Verrill Dana LLP
Attorneys at Law

GREGORY S. FRYER
[redacted]

ONE PORTLAND SQUARE
PORTLAND, MAINE 04112-0586
207-774-4000 • FAX 207-774-7499

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Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Comments on Title II of the JOBS Act

Dear Ms. Murphy:

I appreciate the opportunity to offer comments about changes to Rule 506 that the Commission will be considering pursuant to Section 201 of the Jumpstart Our Business Startups Act ("JOBS Act"). Specifically, I am writing to express views on certain recommendations recently made by the North American Securities Administrators Association, Inc., and also to comment on integration issues relating to Section 201. I do so from the standpoint of a practitioner with many years of experience representing issuers and investors on securities law matters.

Important Principles Behind Section 201

One important rationale behind both Section 4(e)[1] of the Securities Act of 1933 and the newly enacted Section 201 of the JOBS Act is that investors with financial means have significant capacity, as a practical matter, to fend for themselves.[2] Even if the prospective investor is not himself particularly sophisticated, he presumably has the ability (should he choose to do so) to hire advisors to help investigate the potential investment. Moreover, federal and state antifraud rules provide remedies to disappointed purchasers who believe that they were misled into making their investment, including remedies that reach controlling persons of the issuer.

The availability of simplified exemptions for private placement-type offerings also reflects a practical reality that, from an administrative standpoint, regulators have limited capacity to conduct detailed pre-sale monitoring and that formulaic attempts to screen out questionable transactions can easily cause more harm than good by discouraging capital formation for small businesses. Better to focus pre-sale reviews on broader scale offerings, through the securities registration process, as is currently the case.

[1] Formerly Section 4(6).

[2] *Cf.* SEC Rule 502(b)(1) (issuer need not furnish paragraph (b)(2) information to accredited investors).

In JOBS Act Section 201, Congress set a 90-day deadline for amending Rule 506 to allow advertising in accredited-only offerings. The short deadline suggests that Congress did not intend for the SEC to engage in extensive or complex rulemaking in this regard. Keeping the amendment simple and of limited reach is consistent, too, with the concepts that this class of wealthier investors needs fewer protections, and that the antifraud rules already provide inducements for issuers and their principals to make disclosures that are both accurate and appropriate in scope.

It is understandable if State securities regulators fear the worst from changes to allow advertising of accredited-only offerings. However, Congress' judgment was that existing regulations are too restrictive and impose too great a level of expense on offerings aimed solely at wealthier investors. The Commission should respect that policy judgment. If naysayers' fears come true and Rule 506 becomes a vehicle for fleecing the general public, the SEC has ample authority to step back in and adopt prophylactic measures tailored to the ills that do in fact arise.

Comments on Selected NASAA Recommendations

With those principles in mind, I offer the following comments on certain of NASAA's proposals.

1. I agree with NASAA's recommendation that the SEC adopt some nonexclusive safe harbors for verifying accredited investor status. NASAA recommends that the safe harbors should require production of documentary evidence of income or net worth, either to the issuer or to a registered broker-dealer involved in the offering. This strikes me as sensible, so long as the resulting safe harbors are truly nonexclusive and are not phrased in ways that can be read as prescriptive.

The concept of "reasonable belief" is already embedded in the SEC's rules defining accredited investors, and JOBS Act Section 201 contains no suggestion that Congress intended to hold issuers to a higher threshold of certainty. There are many ways for an issuer to form a reasonable belief about an individual's financial status. Documentary evidence of the type described by NASAA is one way, but I would urge the Commission to make clear in its Rule amendment that other evidence of wealth (reputation, third-party verification, investment size, personal attestations, and so forth, or some combination of these) might suffice, too, without requiring each investor to disclose detailed personal information. Section 201 contemplates adoption of more specific rules to discourage issuers and investors from circumventing the accredited investor definition, but the statute should not be read to favor imposing strict liability on the issuer[3] in cases where an investor (without complicity of the issuer) successfully misrepresents his qualifications.

2. NASAA argues in favor of changing the Rule 506 notice filing requirements. It recommends that "if an issuer wants to take advantage of general solicitation, it should be

[3] As would be the case if the issuer later is held to have lost its Rule 506 exemption and cannot prove the availability of an alternative exemption from securities registration requirements.

required to file a Form D before the public solicitation begins." It further recommends that "the Form D should be improved to require more fulsome notice to regulators." In my view, these recommendations can be examined at some later time, once more experience is gained with use of advertising for accredited-only offerings.

Personally, I have found the post-sale filing deadline to be useful and efficient from the standpoint of issuers and investors alike, and I am highly skeptical that a pre-offering deadline (even coupled with "more fulsome" disclosures) will result in effective pre-sale screening by State regulators. A pre-offering deadline could increase the number of States to which filing fees are paid, or could decrease the number of States into which the offering is extended. Neither outcome is central to the policies intended to be advanced by JOBS Act Section 201.

3. NASAA recommends that the SEC adopt new standards to prevent deceptive advertising of Rule 506 offerings. It points to *CF Disclosure Guidance: Topic No. 3* as a possible model for generalized standards. The SEC's Industry Guides were developed for *public* offerings by issuers in *particular* industries. JOBS Act Section 201, by contrast, relates to *private* offerings by issuers in *any* field of business endeavor. Section 201 does allow advertising, but only for offerings limited to a class of investors which neither needs nor wants preclearance by securities regulators. I see no evidence that Congress intended Section 201 to impose detailed disclosure regulations on capital transactions by accredited investors. To the contrary, I think it is evident that Congress was attempting to reduce the costs of those transactions, so long as the offerings are limited to the specified class of investors.

A Comment on Integration

JOBS Act Section 201 is silent on how long an issuer must wait between (i) completing an accredited-only offering that employed general advertising and (ii) starting an offering for which general advertising is prohibited. Existing SEC rules under Regulation D contain a six-month safe harbor, but some commentators have argued for a longer "cooling off" period if the issuer's advertising would have been seen by non-accredited investors also.

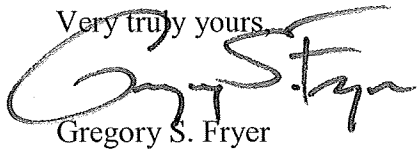
This is an interesting and complicated issue. I would urge the SEC not to make any changes in the six-month safe harbor until greater experience has been obtained with advertised offerings of this type. The reality is that it is common for established businesses to maintain websites that provide generalized information about the company. Even start-up companies often maintain websites or describe themselves through social media, and entrepreneurs with a sufficiently intriguing business plan often are the subject of news coverage. If the goal is to promote capital formation for nonpublic companies, my opinion is that regulators should be tolerant of the availability of generalized information, even where that information comes from some advertisement that continues to reverberate around the Internet long after its original date of publication.

The case against pre-offering advertising is strongest in the context of registered public offerings, but regulators are well-positioned to discover the advertising and make case-by-case judgments on whether the registration should be delayed.

Prior advertisements under Rule 506 might also affect subsequent limited offerings that are not pre-cleared with regulators and that do extend to nonaccredited investors. However, the federal disclosure requirements associated with those offerings are much more specific if the issuer is relying on Rule 505 or 506 to reach nonaccredited investors, and if prior advertising has grown stale or misleading, one would expect the issuer to provide corrective disclosure.

In short, I predict that the problems from lingering effects of prior advertising will prove to be more theoretical than real, but here again time will tell. If, contrary to my expectations, the Commission later finds widespread use of bogus accredited-only offerings as a ruse to season the nonaccredited marketplace for later offerings, then the SEC has ample authority to address this on the basis of experienced gained.

Very truly yours,



Gregory S. Fryer

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