August 15, 2012

The Honorable Mary Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F St., N.E.
Washington, DC 20549-1090

Dear Chairman Schapiro:

Recent press reports have suggested that the Commission plans to adopt an interim final or temporary rule at its August 22 meeting lifting the ban on general solicitation and advertising (GS&A) in private offerings. We are writing to express our strong opposition to any such circumvention of the public comment process for this or any other rulemaking under the Jumpstart Our Business Startups Act of 2012 ("JOBS Act"). We urge you in the strongest possible terms to abandon this rushed approach, which puts vulnerable investors at risk, and to adopt instead a fully transparent rulemaking process based on careful consideration of the significant potential harm to investors that is likely to result from eliminating the GS&A ban and the best ways to eliminate or minimize those risks.

In the past year, the Commission has appeared to be all but paralyzed by the obligation to perform cost-benefit analysis in support of rulemakings required under the Dodd-Frank Act to restore order, integrity and stability to our financial markets. As a result, the agency has fallen far behind schedule in fulfilling its financial reform rulemaking responsibilities, with many rulemakings now more than a year past their statutory deadline.[1] In light of this fact, it is unseemly for the Commission to rush ahead with JOBS Act rulemaking, to the point of circumventing the requirements of the Administrative Procedures Act (APA), while its responsibilities under Dodd-Frank remain unfulfilled.

Moreover, the Commission staff recently outlined its interpretation of the agency's responsibility to consider the full range of cost and benefits in rulemaking, even when that rulemaking is subject to a congressional mandate.[2] While we do not agree with the scope of the

---

[1] These include a Dodd-Frank mandated rulemaking that requires, like the JOBS Act, amendments under Rule 506, but the deadline for this rulemaking passed more than one year ago. *See* Dodd-Frank Act Section 926; *Disqualification of Felons and Other "Bad Actors" From Rule 506 Offerings*, Securities Act Rel. No. 9211 (May 25, 2011). The Commission made a similar proposal in 2007, on which it also has not taken final action. As of July 18, the Commission, deadlines for 52.6% (50 out of 95) of Dodd-Frank rulemakings had passed without final action. *See Dodd-Frank Progress Report*, Davis Polk at 9 (2012) *available at* http://www.davispolk.com/files/Publication/15a76992-d82a-4d15-a2db-fcde9effc3d0/Presentation/PublicationAttachment/b82f9d23-0edc-49eb-af02-ff97ff34bd56/071812_Dodd.Frank.Progress.Report.pdf.

[2] *Current Guidance on Economic Analysis in SEC Rulemakings*, Memorandum from RSFI and OGC to the Staff of the Rulewriting Divisions and Offices (Mar. 16, 2012) *available at* http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

obligations implied by the staff's recent memorandum, and are particularly concerned that it over-weights quantifiable costs to industry (*e.g.*, compliance costs) in comparison with benefits to investors and the securities markets,[3] we do strongly believe that any policy the Commission adopts with regard to cost benefit analysis must at a minimum be applied equitably. The Commission cannot apply a less rigorous approach when analyzing the potential harm to investors and the markets from weakening investor protections, as this regulation would do, than it applies when considering the cost of regulations to strengthen investor and market protections, such as those required under the Dodd-Frank Act. On the contrary, protecting investors and promoting market integrity remain the primary responsibilities of the agency. Moreover, a careful analysis is particularly important in the current circumstance, as Section 201(a)(1) requires a profound change in the regulation of nonpublic offerings. Such a profound change necessitates a careful, thorough analysis by the Commission of the significant costs to investor protection and the integrity of our securities markets that abolishing the GS&A ban may cause.[4]

Adopting an interim rule in the current circumstances would violate the spirit and letter of the Administrative Procedures Act. As the Commission is well aware, proposed rules must be published for at least thirty days to allow for public notice and comment. The Commission may adopt an interim rule[5] without prior notice only if it "for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[6] There is no conceivable basis on which the Commission could show good cause to disregard notice and comment requirements. The ban on GS&A in Rule 506 offerings has been in place for decades; one cannot reasonably maintain that some emergency or special circumstances require that the ban be suspended during the 30-day (or longer) pendency of the comment period.[7] If Congress had wanted to obviate

---

[3] *See The SEC's Aversion to Cost-Benefit Analysis*, Hearing before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, Committee on Oversight and Government Reform, U.S. House of Representatives (Apr. 17, 2012) (testimony of Mercer Bullard) (discussing the problem of adopting "investor protection rules based on a reasonable belief that the unquantifiable benefits of preventing and deterring fraud and misleading sales practices exceed the often quantifiable costs of compliance with the rules") *available at* http://oversight.house.gov/wp-content/uploads/2012/04/4-17-12-Bullard-Testimony.pdf.

[4] Some of us have provided and may further provide comments on these substantive issues, but our focus in this letter on reports that the Commission is considering the adoption of an interim or temporary rule under Section 201(a)(1) on August 22 without providing interested parties with notice of its proposed regulatory approach or an opportunity to comment on that proposal.

[5] We use this term to describe an interim rule, temporary rule, interim final rule, interim final temporary rule, and any other rulemaking that has the legal effect, even if not permanent, of amending Regulation D. *See, e.g., Extension of Interim Final Temporary Rule on Retail Foreign Exchange Transactions*, Exchange Act Rel. No. 67405 (July 2012) *available at* http://www.sec.gov/rules/interim/2012/34-67405.pdf.

[6] Administrative Procedures Act Section 553(b)(3)(B). *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (C.A.D.C. 2012) (vacating interim rule adopted to relieve company of regulatory burdens on ground that EPA did not show good cause). *See also Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 810 - 11 (1980) (pressing statutory deadlines are not sufficient to constitute good cause).

[7] *See Riverbend Farms, Inc v Madigan*, 958 F.2d 1479, 1484 & n.2 (9th Cir 1992) ("Congress intended to let agencies depart from normal APA procedures where compliance would jeopardize their assigned missions. . . . Emergencies, though not the only situations constituting good cause, are the most common."). We believe the complexity of the issues to be addressed in this rulemaking argue for a comment period longer than the 30-day minimum. *See* Administrative Procedures Act Section 553(b)(3)(B) (requiring comment period of "not less" than 30 days).

compliance with the APA, it would have done so through legislation. Instead, it chose to submit the GS&A provision to the rulemaking process, which members of Congress undoubtedly expect to be conducted consistent with applicable law. Nor do we believe that one could reasonably argue that Section 201(a)(1) constitutes adequate "notice" under the APA. Abandoning the GS&A ban raises a myriad of issues that belie any reasonable claim that affected parties are on constructive notice as to what the resulting rule will entail. Finally, the SEC's recent record in APA challenges where affected parties *had* the benefit of notice and comment certainly counsels against adopting rules *without providing any notice period at all*.

Relying on an interim rule suggests that the Commission plans to come back and adjust the rule at a later date after it has had the benefit of public comment. This is a risky practice under the best of circumstances,[8] and these are far from the best of circumstances. The political pressure that has been placed on the Commission to rush to adopt this and other JOBS Act rules would make it difficult, if not impossible, for the Commission to: (1) backpedal on any interim forms of GS&A that, after considering public comments from all affected parties, it decides should not be permitted (but that issuers may have begun to engage in), or (2) impose any additional restrictions under Rule 506 that further analysis indicates eliminating the ban on GS&A demands.

Finally, it would simply not be possible for the Commission to adequately consider by August 22 the potential adverse effects of eliminating the ban on GS&A. Among these, for example, is the very real risk of an upsurge in abusive private equity and hedge fund advertising and marketing practices based on misleading performance claims. Similarly, the effect of other regulatory changes made pursuant to the JOBS Act, such as the broker-dealer exemption for private offering platforms, must be thoroughly considered in relation to the operation of Rule 506 before amending the rule. The Commission has, for decades, included the ban in Rule 506 offerings for good reason. General solicitation and advertising present special risks for investors and the integrity of the securities markets, especially in light of the inadequacy of the current accredited investor standard. All of these issues must be reexamined in light of the heightened risks that result from eliminating that ban.

The JOBS Act was drafted and adopted with little or no consideration of the significant harm it could inflict on investors, on their confidence in the integrity of our capital markets, and, by extension, on capital formation. For much of the Act, there is unfortunately relatively little the Commission can do through rulemaking to minimize that harm. This particular rulemaking is an exception, where the rulemaking approach adopted by the Commission can either afford investors substantial and much needed protections or leave them vulnerable to devastating harm. For the Commission to conduct rulemaking in this area through an interim final or temporary rule, without adequate consideration of the potential impact on investor protection and market integrity and without a meaningful opportunity for public comment on its proposed regulatory approach, would be a further slap in the face for investors whose concerns were ignored during the legislative process.

We urge you to show the same leadership you demonstrated when you spoke out against the JOBS Act's rollback of vital investor protections during Senate consideration of this legislation, to stand up against pressure to move forward with rulemaking in a hasty and reckless fashion, and to

[8] For example, the "no action" position that was adopted while the fee-based brokerage account rule was under consideration was intended to be temporary, but it lasted for years, only to be vacated after its final adoption. *See Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007) (vacating exemptive rule for fee-based brokerage accounts). *See also Temporary Rule Regarding Principal Trades with Certain Advisory Clients*, Investment Advisers Act Rel. No. 3128 (Dec. 28, 2010) (extending period of "temporary" rule to *more than five years* from its initial effective date) *available at* http://www.sec.gov/rules/final/2007/ia-2653fr.pdf.

demand a full opportunity for public comment and full consideration of the potential impact on investors before proceeding with rulemaking in this area.

Thank you for your consideration of our comments.

Respectfully submitted,

<u>Organizations</u>

Fund Democracy, Inc.
Consumer Federation of America
Americans for Financial Reform
AFSCME
AFL-CIO
International Brotherhood of Teamsters
U.S. PIRG
Public Citizen
Consumer Action
SAFER *(The Economists' Committee for Stable, Accountable, Fair and Efficient Financial Reform)*
Consumer Assistance Council, Inc.
Florida Consumer Action Network
Consumer Federation of the Southeast
Dēmos
Chicago Consumer Coalition
Consumers for Auto Reliability and Safety
CA REINVESTment Coalition
Center for California Homeowner Association Law
Cumberland Countians for Peace & Justice and Network for Environmental & Economic Responsibility
Virginia Citizens Consumer Council

<u>Individuals</u>

Lynn E. Turner
Former SEC Chief Accountant

James D. Cox
Brainerd Currie Professor of Law
Duke Law School

Joseph V. Carcello
Ernst & Young Professor
Director of Research - Corporate Governance Center (www.corpgovcenter.org)
University of Tennessee

J. Robert Brown, Jr.
Chauncey Wilson Memorial Research Professor of Law
Director, Corporate & Commercial Law Program
University of Denver Sturm College of Law

Jane B. Adams
Former SEC Acting Chief Accountant

Gaylen Hansen
Audit Partner
EKS&H

Bevis Longstreth
Former SEC Commissioner

cc: Honorable Elisse Walter, Commissioner
Honorable Luis Aguilar, Commissioner
Honorable Troy Paredes, Commissioner
Honorable Daniel M. Gallagher, Commissioner
Meredith Cross, Director, Division of Corporation Finance
Norm Champ, Director, Division of Investment Management
Mark Cahn, General Counsel, Office of General Counsel
Elizabeth M. Murphy, Secretary