INVESTMENT COMPANY INSTITUTE

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August 17, 2012

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

Re: Additional Comments on SEC Regulatory Initiatives Under Title II of the JOBS Act

Dear Ms. Murphy:

Earlier this year, Congress enacted the Jumpstart Our Business Startups Act (the "JOBS Act"). Among other things, the JOBS Act repeals the ban on general solicitation and general advertising in offerings under Rule 506 of Regulation D, provided that all sales are only to accredited investors, and directs the Securities and Exchange Commission ("Commission") to amend its rules accordingly.[1] The Commission has scheduled an open meeting for August 22nd to consider this rulemaking.

Recent press reports have suggested that the Commission plans to adopt an interim final rule at the August meeting.[2] Proceeding in this manner is, in our judgment, neither justified under the circumstances nor advisable. The Commission should resort to interim final rulemaking only under exceptional circumstances, *i.e.*, when the Commission "for good cause finds…that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[3] There is no conceivable basis on which the Commission could make any such finding in this instance. The absence of a final rule does not create an emergency, threaten to force any firm out of compliance with any

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[1] *See* Section 201(a)(1) of the JOBS Act. The Investment Company Institute has filed advance comments relating to this rulemaking. *See* Letter from Paul Schott Stevens, President and CEO of the Investment Company Institute, dated May 21, 2012, available at http://www.sec.gov/comments/jobs-title-ii/jobstitleii-13.pdf.

The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13,1 trillion and serve over 90 million shareholders.

[2] *See*, *e.g.*, Sarah N. Lynch, "Investor advocates to meet with Treasury on JOBS Act concerns," available at http://www.reuters.com/article/2012/07/31/jobs-act-treasury-idUSL2E8IVBGX20120731.

[3] *See* Administrative Procedures Act, Section 553(b)(3)(B).

provision of the securities laws, or otherwise jeopardize the Commission's pursuit of its mission.[4] Quite simply, there is no compelling reason for the Commission to bypass the normal APA notice and comment process in this instance.

To the contrary, the Commission's investor protection mandate provides compelling reasons for the Commission to adhere to a full notice and comment proceeding here. As demonstrated by the advance comments received by the Commission, this rulemaking raises issues that are complex and controversial and that involve substantial investor protection concerns. Further considerations are likely to surface during a comment period. It is the Commission's duty to deal with all these issues fully and fairly through the public process contemplated by the APA. Indeed, we believe the complexity of the issues to be addressed in this rulemaking call for a comment period longer than the 30-day minimum.[5]

Moreover, there is very real danger in rushing to "check the box" with this rulemaking. The practical reality is that interim final rules are often much more final than interim. For example, the Commission's "interim final temporary rule" 206(3)–3T under the Investment Advisers Act of 1940, adopted in 2007, remains on the books today.[6] The rule requiring mutual funds to have anti-money laundering programs remains an "interim final" rule *more than ten years* after its adoption in April, 2002.[7] It can be difficult for any agency to revisit a rulemaking that has taken effect as regulatory priorities change and other pressing issues arise. Undoubtedly, it will prove extremely difficult for the Commission to do so with this rulemaking, as it grapples with implementation of other parts of the

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[4] *See Riverbend Farms, Inc v. Madigan*, 958 F.2d 1479, 1484 and 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."). *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).

[5] Section 553(b)(3)(B) of the APA requires a comment period of "*not less*" than 30 days. In our earlier comment letter, for example, we recommended that the Commission consider imposing content restrictions on private fund advertising at least as extensive as those currently applicable to mutual funds, prohibit performance advertising by private funds until it can craft a rule similar to Rule 482 under the Securities Act of 1933 specifically dealing with performance advertising by private funds, and direct FINRA to require filing and review to the same extent as mutual fund advertisements. We also urged the Commission to increase the accredited investor thresholds, which were adopted in 1982 and have eroded continually due to inflation and growth in wealth and income.

[6] Rule 206(3)-3T was adopted in the wake of a judicial decision that vacated Rule 202(a)(11)–1 under the Advisers Act. *See Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007). It includes a sunset provision that has twice been extended by the Commission. *See* http://www.sec.gov/rules/final/2010/ia-3128.pdf and http://www.sec.gov/rules/final/2009/ia-2965.pdf.

[7] *See* Financial Crimes Enforcement Network, *Anti-Money Laundering Programs for Mutual Funds*, 67 Fed. Reg. 21117 (Apr. 29, 2002), available at http://www.fincen.gov/statutes_regs/frn/pdf/352mufunds.pdf.

JOBS Act, the many unfinished rules mandated by the Dodd-Frank Act, and other important discretionary rulemakings on its agenda.

We do recognize the pressures today that the Commission faces to produce a final rule. But the Commission's enduring fundamental mandate to protect investors should not, indeed must not, be sacrificed to these transitory pressures.

It is our sincere hope that the press reports are erroneous, and that the Commission does not intend to adopt an interim final rule at its August meeting. We believe that doing so would leave the public without a meaningful opportunity for comment on the Commission's chosen regulatory approach. But if those press reports are accurate, we respectfully urge you to reconsider and to follow the public notice and comment requirements of the APA to ensure a result that is in investors' best interests.

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Thank you for considering these advance comments on the Commission's JOBS Act rulemaking. If you have any questions about our comments or would like additional information, please contact me at 202/326-5901 or Karrie McMillan, ICI's General Counsel, at 202/326-5815.

Sincerely,

/s/ Paul Schott Stevens

Paul Schott Stevens
President and CEO

cc: The Honorable Mary L. Schapiro
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes
The Honorable Daniel M. Gallagher

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