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April 30, 2012

U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Attention: Ms. Elizabeth M. Murphy, Secretary

Re: Request for Public Comments on SEC Regulatory Initiatives Under the JOBS Act Title II- Access to Capital for Job Creators

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") with respect to the rules the Securities and Exchange Commission (the "Commission") is required to adopt pursuant to the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"). This letter is submitted in response to the Commission's request for public comments relating to the JOBS Act rulemaking.[1]

The comments expressed in this letter represent the views of the Committee, and have also been reviewed and approved by the Middle Market and Small Business Committee, the Private Equity and Venture Capital Committee, the Corporate Governance Committee and the State Regulation of Securities Committee of the Section. The comments expressed in this letter have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the ABA Section of Business Law.

The Committee thanks the Commission for this opportunity to comment on the rulemaking the Commission is required or authorized to undertake in connection with the JOBS Act. In accordance with the Commission's efforts to organize the submission of comments relating to each major initiative under the JOBS Act, the Committee expects to submit a number of comment letters, each addressing one of the rulemaking categories identified by the Commission. This letter comments on the provisions set forth in Section 201 of the JOBS Act relating to general solicitation and general advertising. Because our comments are being presented prior to formal rulemaking, our comments are intended to highlight matters we believe the Commission should consider in formulating its proposed rules pursuant to Section 201 or providing guidance pursuant thereto.

[1] http://sec.gov/spotlight/jobsactcomments.shtml

We acknowledge that within the scope of the very short time period the Commission has been provided by Congress to propose and adopt final rules, the Commission may not be able to reflect each of the comments below in its proposed or final rules. Should that be the case, we encourage the Commission, either by supplemental rulemaking or through staff guidance, to consider addressing any matters discussed below that are not able to be reflected in the Commission's mandated rulemaking.

Summary of Our Comments

As discussed below, we suggest that the Commission's proposed rules mirror Congress' clear intent to move the existing regulatory framework away from the unnecessary regulation of offers to a focus instead on sales. In implementing the provisions of Section 201, we urge the Commission to fashion reasonable and workable standards that reflect current market practices for determining accredited investor status. Because we believe that the current Rule 506 and Rule 144A markets provide both efficient and cost-effective means for public and private companies to raise capital, we encourage the Commission, in its proposed rules, to recognize the additional benefits that general solicitation and general advertising may provide by expanding the number of accredited investors and qualified institutional buyers ("QIBs") who may learn about, and participate in, such offerings. Such added investor interest may increase the availability of capital to issuers on terms favorable to them. The existing restrictions limiting sales to purchasers reasonably believed to be accredited investors and QIBs would, of course, continue under the Section 201 framework and thus provide a clear investor protection framework for these exempt offerings. We therefore suggest that the Commission's proposed rules implementing Section 201 not impose burdens or liabilities on issuers that could adversely affect their willingness or ability to access the relevant markets.

With these objectives in mind, we offer the following comments for the Commission to consider in connection with its proposed rulemaking:

1. The proposed rules or the accompanying release should reflect the existing definition of "accredited investor" that includes a reasonable belief standard.

2. In setting forth the reasonable steps to be taken to verify that purchasers of the securities offered by means of general solicitation or general advertisement in Rule 506 offerings are accredited investors, the proposed rules should reflect current custom and practice.

3. The proposed rules or the accompanying release should make clear that general solicitation or general advertising employed in a Rule 144A transaction does not impair a Section 4(a)(2) transaction immediately preceding the Rule 144A offering.

4. The Commission should, at some point, clarify certain issues relating to the integration of Rule 506 and Rule 144A offerings that use general solicitation or general advertising with other public or private offerings conducted by the same issuer.

5. The Commission should confirm that the use by an issuer of general solicitation or general advertising in connection with a Rule 506 or Rule 144A offering would not be deemed to constitute "directed selling efforts" by that issuer in connection with a contemporaneous offering pursuant to Regulation S under the Securities Act.

6. The proposed rules should provide that the use of general solicitation or general advertising in connection with a Rule 506 or Rule 144A offering will not adversely affect the availability of any exemptions or exceptions under the Investment Company Act.

Background

Section 201 of the JOBS Act requires the Commission, not later than July 4, 2012 (90 days after enactment of the JOBS Act), to revise Regulation D under the Securities Act of 1933 (the "Securities Act") to "provide that prohibitions against general solicitation or general advertising contained in [Rule 502(c) of Regulation D] shall not apply to offers and sales of securities made pursuant to [Rule 506] provided that all purchasers of the securities are accredited investors. Such rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission." In addition, the Commission is required, also by July 4, 2012, to revise Rule 144A(d)(1) under the Securities Act to provide that "securities sold under such revised exemption may be offered to persons other than qualified institutional buyers, including by means of general solicitation or general advertising, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer."

Discussion

In proposing rules to implement Section 201 of the JOBS Act, we encourage the Commission to reflect the Congressional intent to expand permissible practices in connection with private offerings while not imposing burdens that may inhibit private offering capital formation or increase the potential liabilities of issuers in connection with such offerings. Among other things, we believe it is important that the proposed rules provide that if an issuer has taken reasonable steps to verify that purchasers of securities in Rule 506 offerings which use general solicitation or general advertising are accredited investors, the offering exemption will not be compromised, and the issuer will not be subject to liability were it to be subsequently determined that a purchaser was not, in fact, an accredited investor.

The comments set forth below are intended to provide the Commission with suggestions to assist the Commission in proposing rules that will provide important clarifications to issuers while at the same time preserving the Commission's historic investor protection mandate.

We have organized our comments below based on specific topic areas we believe the Commission should address in its proposed rulemaking or in the accompanying release.

1. **The proposed rules or the accompanying release should reflect the existing definition of "accredited investor" that includes a reasonable belief standard.**

   Under existing Rule 501 under the Securities Act, the term "accredited investor" is defined as any person who comes within specific categories "or who the issuer reasonably believes comes within" any of those categories "at the time of the sale."

   Section 201(a)(1) of the JOBS Act provides that the general solicitation and general offering restrictions do not apply "provided that all purchasers of the securities are accredited investors." We read this provision as referring to accredited investors as defined in Rule 501; that is, a person who is within one of the specific categories or who the issuer reasonably believes is within one of the categories. The "reasonable belief" prong would be consistent with Section 201(a)(2) of the JOBS Act, with respect to Rule 144A, which applies if the securities are sold only to persons "that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer." We recommend that the proposed rules confirm this point.

2. **In setting forth the reasonable steps to be taken to verify that purchasers of the securities offered by means of general solicitation or general advertisement in Rule 506 offerings are accredited investors, the proposed rules should reflect current custom and practice.**

   Section 201 provides that the Commission shall revise its rules to require issuers to take reasonable steps to verify that purchasers of securities offered by means of general solicitation or general advertising are accredited investors, using such methods as determined by the Commission. Because what might constitute reasonable steps may depend upon particular facts and circumstances and the applicable accredited investor category, we believe the Commission's rules should reflect current custom and practice which take these considerations into account. Especially because the purpose of the JOBS Act is to encourage and support capital formation, any requirement that imposes additional burdens on issuers or on purchasers would contravene the fundamental impetus for the JOBS Act. In this regard, we believe that the Commission should be sensitive to the legitimate privacy concerns of purchasers.

3. **The proposed rules or an accompanying release should make clear that general solicitation or general advertising employed in a Rule 144A transaction does not impair a Section 4(a)(2) transaction immediately preceding the Rule 144A offering.**

   Unlike a Rule 506 transaction, which is an issuer transaction, a Rule 144A transaction is a resale transaction. Often in a Rule 144A transaction, an initial purchaser acquires securities from an issuer in a Section 4(a)(2) transaction,[2] and resells the securities pursuant to Rule 144A. It would undermine the Congressional intent of Section 201 to permit general solicitation and general advertising in connection with a Rule 144A

[2] The JOBS Act changed the designation of previous Section 4(2) to Section 4(a)(2).

transaction if that same solicitation or advertising would deny an issuer the ability to rely upon Section 4(a)(2) in connection with its sale to the initial purchaser. We therefore recommend that the Commission make clear, either in its rules or in an accompanying release, that general solicitation or general advertising in connection with a Rule 144A offering will not impair the Section 4(a)(2) exempt transaction related to the Rule 144A transaction.

4. **The Commission should, at some point, clarify certain issues relating to the integration of Rule 506 and Rule 144A offerings that use general solicitation or general advertising with other public or private offerings conducted by the same issuer.**

   The ability to engage in general solicitation and general advertising in connection with Rule 506 and Rule 144A offerings under the JOBS Act raises issues regarding the integration of these offerings with other public and private offerings. The provisions of Section 5(d) of the Securities Act, added by Section 105 of the JOBS Act, permitting test-the-waters communications with QIBs and institutional investors raise similar issues. We believe it would be helpful and appropriate for the Commission to address these issues at some point. In addressing them, the Commission should have in mind the Congressional intent to facilitate capital formation while maintaining investor protection.

5. **The Commission should confirm that the use by an issuer of general solicitation or general advertising in connection with a Rule 506 or Rule 144A offering would not be deemed to constitute "directed selling efforts" by that issuer in connection with a contemporaneous offering pursuant to Regulation S under the Securities Act.**

   In the past, most side-by-side offerings involving reliance upon Rule 506 or Rule 144A in the United States, and Regulation S outside the United States, did not pose concerns regarding directed selling efforts.[3] Issuers have therefore been confident in proceeding with contemporaneous offerings in which the offshore component was conducted in accordance with Regulation S.[4] Release No. 33-6863 (April 24, 1990), adopting

[3] "Directed selling efforts" is defined in paragraph (c) of Rule 902 under the Securities Act to mean "any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S (Rule 901 through Rule 905, and Preliminary Notes). Such activity includes placing an advertisement in a publication "with a general circulation in the United States" that refers to the offering of securities being made in reliance upon this Regulation S." The definition goes on to describe a publication "with a general circulation in the United States," and also specifies certain disclosures that would not constitute directed selling efforts.

[4] The Commission has clearly stated the appropriateness of concurrent offerings in Rule 500(g)(previously the preliminary notes to Regulation D): "Securities offered and sold outside the United States in accordance with Regulation S … need not be registered under the Act. See Release No. 33-6863. Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this paragraph (g), however, do

Regulation S, provides that permissible activities in connection with registered or exempt offerings in the United States do not constitute directed selling efforts in a contemporaneous Regulation S offering. We recommend that in its proposing release or elsewhere the Commission should clearly indicate that this guiding principle remains controlling and therefore that permissible activities in an exempt Rule 506 or 144A offering, including general solicitation and general advertising after the adoption of the new rules, do not constitute directed selling efforts in a contemporaneous Regulation S offering.

6. **The proposed rules should provide that the use of general solicitation or general advertising in connection with a Rule 506 or Rule 144A offering will not adversely affect the availability of any exemptions or exceptions under the Investment Company Act.**

We also recommend that the proposed rules confirm that an offering of fund shares pursuant to Rule 506 or Rule 144A will not be a "public offering" for the purposes of Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 (the "Investment Company Act"). Although Section 201(b) of the JOBS Act provides that offerings complying with amended Rule 506 "shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation," there is no comparable reference to a Rule 144A offering. For this reason, we suggest that the Commission's rules clearly provide that an offering of fund shares pursuant to Rule 506 or Rule 144A utilizing general solicitation or general advertising will not be a "public offering" for the purposes of Section 3(c)(1) or 3(c)(7) of the Investment Company Act.

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not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States."

Conclusion

The Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin
Chair, Federal Regulation of Securities Committee

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