August 28, 2012

FILED ELECTRONICALLY

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F St., N.E.
Washington, DC 20549-1090

Re: JOBS Act Rulemaking: Title II

Dear Ms. Murphy,

We are writing to address concerns that Section 413 of the Dodd-Frank Act may affect the SEC's ability to ensure that amendments to Rule 506 required by the JOBS Act are consistent with the protection of investors and the efficiency of our securities markets. Section 201(a)(1) of the JOBS Act requires that the Commission eliminate the ban on general solicitation and advertising for private offerings under Rule 506 in which only accredited investors are purchasers. We believe that the removal of the general solicitation and advertising ban (GS&A ban) must be accompanied by other changes to Rule 506 that are designed to ensure that investors are adequately protected. As part of this process, the Commission should consider amendments to the accredited standard for individual investors.

We recognize that Section 413(a) requires that, until 2014, the Commission refrain from changing the dollar amount of the $1 million net worth minimum for individual accredited investors in private offerings. In our view, Section 413(a) merely limits the ability of the Commission to alter the dollar amount of the net worth standard for the first four years after the adoption of Dodd-Frank. Section 413 does not limit the SEC's rulemaking discretion in any other way.

I. Dodd-Frank Act Section 413

Section 413 expressly contemplated the kinds of changes to the accredited investor standard that eliminating the GS&A ban necessitated before the JOBS Act was even under consideration. Section 413's primary purpose was to exclude from the net worth calculation the value of an individual's primary residence. The value of an investor's home has little or nothing to do with their financial sophistication or their ability to bear the loss of their investment. With the exception of the dollar amount of the $1 million net worth minimum, Section 413(b)(1) clearly permits the Commission to undertake an immediate review of the definition of accredited investor for natural persons and authorizes the Commission to engage in rulemaking to address any deficiencies that it identifies. Congress made the review mandatory after four years and expressly permitted the Commission to consider revisions of the dollar amount of the net worth standard at that time.[1]

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[1] *See Net Worth Standard for Accredited Investors*, Securities Act Rel. No. 9287, at 5 – 6 (Dec. 21, 2011) ("Section 413(b) specifically authorizes us to undertake a review of the definition of the term 'accredited investor' as it applies to natural persons, and requires us to undertake a review of the definition in its entirety every four years, beginning four years after enactment of the Dodd-Frank Act. We are also authorized to engage in rulemaking to make adjustments to the definition after each such review.") *available at* http://www.sec.gov/rules/final/2011/33-9287.pdf; *Net Worth Standard for Accredited Investors*, Securities Act Rel. No. 9177, at 4 - 5 (Jan. 25, 2011) ("We are not proposing to make revisions

Congress's concern regarding the adequacy of the accredited investor standard for individuals could not have been clearer. It required that the accredited investor standard be strengthened and regularly reviewed, and specifically authorized further rulemaking. Moreover, Congress, in abolishing the ban on GS&A, intended that the accredited investor standard act as the primary mechanism for protecting investors. Reading Dodd-Frank and the JOBS Act in tandem, it would be inconsistent with the will of Congress not to consider the definition of accredited investor contemporaneously with the efforts to end the ban on GS&A.

Moreover, there is nothing in Section 413(a) that affects the SEC's ability to make other, immediate changes to the accredited investor standard under Rule 506. Section 413(a) refers only to the dollar amount of the $1 million net worth standard.[2] The Commission has the authority, for example, to require immediately that investors own securities with a minimum value, which would be a far more accurate reflection of an investor's financial sophistication than ownership of sundry assets that have little or nothing to do with a person's knowledge about investing. This test could exist entirely separate from the net worth standard. An "investment owned" test has been supported by NASAA[3] and proposed by the Commission.[4] The Commission also has the authority to require proof of an investor's financial sophistication, as required for crowdfunding offerings by Section 302 of the JOBS Act.[5] Both of these proposals would help to mitigate the increase in private offering sales abuses that eliminating the GS&A ban is likely to cause.[6]

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to the definitions of 'accredited investor' that are not required by the Dodd-Frank Act at this time, but may consider doing so in future rulemaking.") *available at* http://www.sec.gov/rules/proposed/2011/33-9177.pdf.

[2] Section 413 logically *cannot* refer to anything other than the dollar amount of the minimum in light of paragraph (b)(1)(A). That paragraph expressly authorizes the Commission to "undertake a review of the definition of the term 'accredited investor' to determine whether the requirements of the definition, excluding the requirement relating to the net worth standard described in subsection (a), should be adjusted or modified." Thus, this provision explicitly distinguishes the dollar amount of the net worth requirement addressed in paragraph (a) (that cannot be changed until 2014) from other "requirements of the definition." This necessarily means that Congress not only believed that there were requirements of the definition of accredited investor other than the $1 million dollar amount, but also contemplated that the Commission "undertake a review" of such other requirements "to determine whether [they] . . . should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy." Similarly, Section 413(b)(2) refers to mandatory reviews of the accredited investor definition "in its entirety . . . as such term applies to natural persons." Thus, Congress believed that the accredited definition for natural persons involves more than just the determination of the minimum net worth dollar amount and required that all aspects of the definition, including the dollar amount, be reviewed every four years.

[3] *See* Letter from David S. Massey NASAA President and Deputy Securities Commissioner, North Carolina Department of the Secretary of State to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (March 11, 2011) (supporting the adoption of an "investment owned" test for accredited investors) *available at* http://www.sec.gov/comments/s7-04-11/s70411-36.pdf.

[4] *See* Securities Act Release No. 8828 (August 3, 2007) (proposing two part standard for accredited investors to invest in certain private pooled investment vehicles that included ownership of a specified amount of "investments").

[5] This provision requires, among other things, that a crowdfunding intermediary "positively affirms that investors that the investor understands that the investor is risking the loss of the entire investment, and that the investor could bear such a loss; and (C) answers questions demonstrating—(i) an understanding of the level of risk generally applicable to investments in startups, emerging businesses, and small issuers; (ii) an

II. Rule 506 Amendments

The elimination of the GS&A ban necessitates other amendments to Rule 506 to ensure that private offerings are consistent with the protection of investors and the efficient operations of our securities markets. For example, the JOBS Act expressly requires amendments that require issuers take "reasonable steps" ensure that only accredited investors are purchasers in private offerings. We believe that the removal of the GS&A ban must be accompanied by other changes to Rule 506 that are designed to ensure that investors are adequately protected, which would include amendments to the accredited standard for individual investors.

There is nothing in the language of Section 413 or the legislative history that affects the SEC's ability to make immediate changes to the accredited investor standard under Rule 506 other than to the $1 million net worth standard.[7] Indeed, provisions in the JOBS Act suggest the need for immediate consideration of the definition of accredited investor, such as the provision relating to proof of an investor's financial sophistication noted above, and the grant of authority to the Commission to adopt safe harbors under Section 503 for determining accredited investor status.[8]

There are myriad means by which the Commission can amend Rule 506 to counter the adverse effects on investor protection and efficient markets that eliminating the GS&A bank is likely to cause. These include strengthening the accredited investor standard for individuals to ensure that it

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understanding of the risk of illiquidity; and (iii) an understanding of such other matters as the Commission determines appropriate, by rule."

[6] The legislative history clearly establishes that Congress was focused specifically on the dollar amount, and only the dollar amount, of the income and net worth minimums. *See* Statement by Senator Bond, *available at* http://thomas.loc.gov/cgi-bin/query/C?r111:./temp/~r111ZpGVEH; http://thomas.loc.gov/cgi-bin/query/C?r111:./temp/~r111lLleET. The final text reflected a bipartisan compromise and was sponsored by Senators Kit Bond (R-MO) and Senate Banking Committee Chairman Christopher Dodd (D-CT) and co-sponsored by Senators Mark Warner (D-VA), Scott Brown (R-MA), Maria Cantwell (D-WA) and Mark Begich (D-AK).

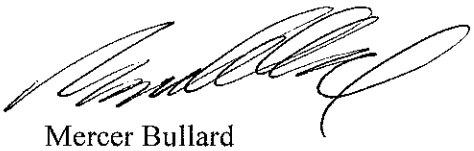
[7] Section 413 logically *cannot* refer to anything other than the dollar amount of the minimum in light of paragraph (b)(1)(A). That paragraph expressly authorizes the Commission to "undertake a review of the definition of the term 'accredited investor' to determine whether the requirements of the definition, excluding the requirement relating to the net worth standard described in subsection (a), should be adjusted or modified." Thus, this provision explicitly distinguishes the dollar amount of the net worth requirement addressed in paragraph (a) (that cannot be changed until 2014) from other "requirements of the definition." This necessarily means that Congress not only believed that there were requirements of the definition of accredited investor other than the $1 million dollar amount, but also contemplated that the Commission "undertake a review" of such other requirements "to determine whether [they] . . . should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy." Similarly, Section 413(b)(2) refers to mandatory reviews of the accredited investor definition "in its entirety . . . as such term applies to natural persons." Thus, Congress believed that the accredited definition for natural persons involves more than just the determination of the minimum net worth dollar amount and required that all aspects of the definition, including the dollar amount, be reviewed every four years.

[8] *See* Section 503 ("The Commission shall also adopt safe harbor provisions that issuers can follow when determining whether holders of their securities are accredited investors or that holders of their securities received the securities pursuant to an employee compensation plan in transactions that were exempt from the registration requirements of section 5 of the Securities Act of 1933.").

fairly reflects the financial sophistication an investor needs to evaluate unregistered securities offerings. We believe that Section 413 presents no material restriction on the SEC's rulemaking in this respect. If the SEC staff believes that Section 413 affects the agency's ability to ensure that eliminating the GS&A ban is accompanied by other appropriate amendments under Rule 506, it is incumbent on the Commission to provide notice and request comment thereon.

Thank you for your consideration of our comments.

Respectfully submitted,



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