CARL LEVIN
MICHIGAN

United States Senate

WASHINGTON, DC 20510

October 5, 2012

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

RE: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings

Dear Secretary Murphy:

I am writing to express my concerns with, and offer suggestions to strengthen, the Commission's Proposed Rule[1] to implement Section 201 of the Jumpstart Our Business Startups Act (the JOBS Act).[2] While Section 201 of the Act removes the long-standing ban on general solicitation and advertising in private offerings to accredited investors, the Commission is still required to issue rules regarding how such marketing and solicitation can be conducted as a way of ensuring investor protection.

The Proposed Rule has two significant flaws:

(1) it fails to adequately outline "reasonable steps" necessary to be taken by the issuer to ensure that all investors are accredited; and

(2) it fails to meaningfully regulate permissible solicitation and advertising so as to protect investors from deceptive advertising, inappropriate or unfair sales tactics, and investment fraud.

I urge the Commission to strengthen the Proposed Rule and, due to the significance of the changes needed, re-propose a new rule to implement Section 201.

BACKGROUND ON THE PROHIBITION AGAINST GENERAL SOLICITATION

The Securities Act of 1933 ("Securities Act") generally requires registration for the offer or sale of any securities.[3] However, it exempts from its registration requirement "transactions by an issuer not involving any public offering."[4] In recent years, private offerings have become

[1] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Rel. No. 33-9354, 77 Fed. Reg. 54,464 (Sept. 5, 2012) (the "Proposed Rule").
[2] Jumpstart our Business Startups Act, Pub. L. 112-106, 126 Stat. 306 (2012).
[3] Securities Act §4(2), 15 U.S.C. §77(d)(2).
[4] Securities Act §4(2), 15 U.S.C. §77(d)(2).

increasingly common, and the total dollars raised by such offerings now exceeds those raised through registered offerings.[5]

Because the contours of the "private offering exemption" are not defined by the Securities Act, they have been developed over the years through Commission interpretations and court cases. One of the critical elements that the Commission and the courts have used to evaluate whether an offering is sufficiently "private" to qualify for the exemption is the manner in which the offering is made. The Commission and the courts have long held that advertising to and soliciting investments from the broader public is inconsistent with being a "private" offering.[6] Over nearly 80 years, this interpretation evolved into what became known as the prohibition against general solicitation. At its core, the prohibition has served as a safety net, helping to ensure that riskier, lightly regulated investments are only available to sophisticated investors with the ability to bear the economic risk of these investments.[7]

In 1992, the Commission conducted what could be viewed as the first major experiment at removing the prohibition against general solicitation for private offerings. Then, as part of its Small Business Initiatives program, the Commission amended Regulation D to allow for general solicitation for a very limited type of private offerings.[8] In 1999, the Commission determined that this experiment failed due to increased fraud, and restored the prohibition of such offerings. In reinstating the protections, the Commission explained that:

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[5] Proposed Rule at 54465 (noting that "[i]n 2011, the estimated amount of capital (including both equity and debt) raised in Rule 506 offerings and Rule 144A offerings was $895 billion and $168 billion, respectively, compared to $984 billion raised in registered offerings.").

[6] In 1935, the Commission's General Counsel declared "the purpose of the exemption of non-public offerings is largely limited to those cases wherein the issuer desires to consummate a few transactions with particular persons. Consequently, I feel that transactions which are effected by direct negotiation by the issuer are much more likely to be non-public than those effected through the use of the machinery of public distribution." Letter of General Counsel discussing the factors to be considered in determining the availability of the exemption from registration provided by the second clause of Section 4(1), Securities Act Rel. No. 33-285 (1935), 1935 WL 27785. In 1953, when the Supreme Court redefined the contours of the private offering exemption, it left the prohibition against general solicitation intact. *Sec. and Exch. Comm'n v. Ralston Purina Co.*, 346 U.S. 125 (1953). In 1962, the Commission issued additional guidance on the registration exemption for private offerings, which noted that "[n]egotiations or conversations with or general solicitations of an unrestricted and unrelated group of prospective purchasers for the purpose of ascertaining who would be willing to accept an offer of securities is inconsistent with a claim that the transaction does not involve a public offering even though ultimately there may only be a few knowledgeable purchasers … *Public advertising of the offerings would, of course, be incompatible with a claim of a private offering.")* Non-Public Offering Exemption, Securities Act Release No. 33-4552 (1962), 1962 WL 69540, *1-2 (emphasis added). In 1974, while promulgating Rule 146, the Commission barred "the issuer or any person acting on its behalf from offering or selling the securities through any form of general advertising or general solicitation including, but not limited to, advertisements or other communications in newspapers, magazines, or other media; broadcasts on radio or television; seminars or promotional meetings or any letter, circular, or other written communications." Transactions By an Issuer Deemed Not To Involve Any Public Offering, 4 S.E.C. Docket 154 (1974), 1974 WL 161966, *7. In 1982, the Commission revised and clarified the exemption criteria yet again when it rescinded three exemptions and four forms, and promulgated Regulation D, which loosened many exemption criteria, but continued the prohibition against general solicitation. Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Securities Act Rel. No. 33-6389, 47 Fed. Reg. 11,251 (Mar. 8, 1982), 1982 WL 35662, *3.

[7] See Transactions By an Issuer Deemed Not To Involve Any Public Offering, 4 S.E.C. Docket 154 (1974), 1974 WL 161966, *3 (1974).

[8] Small Business Initiatives, SEC Release Nos. 33-6949; 34-30968; 39-2287 (1992), 1992 WL 188930.

> Recent market innovations and technological changes, most notably, the Internet, have created the possibility of nation-wide [] offerings for securities of non-reporting companies that were once thought to be sold locally.
>
> In some cases, [these private offerings have] been used in fraudulent schemes .... As a part of this arrangement, these securities are then placed with broker-dealers who use cold-calling techniques to sell the securities at ever-increasing prices to unknowing investors. When their inventory of shares is exhausted, these firms permit the artificial market demand created to collapse, and investors lose much, if not all, of their investment. This scheme is sometimes colloquially referred to as 'pump and dump.'[9]

In 2007, the Commission again considered modifying the general solicitation ban[10] after its Advisory Committee on Smaller Public Companies recommended that it do so.[11] Amid strong pushback from consumer groups, investors, and others,[12] the Commission decided to keep the prohibition against general solicitation in place.

More recently, in January 2012, the newly-created Advisory Committee on Small and Emerging Companies recommended that the Commission relax or modify its restrictions to permit general solicitation and general advertising in private offerings made in reliance on Rule 506, provided that all the purchasers are "accredited investors."[13] In March, Congress passed the JOBS Act.

Congress intended Section 201 to make it easier for small businesses to raise capital by removing the prohibition against general solicitation for their private offerings.[14] Section 201

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[9] Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption, Securities Act Rel. No. 33-7644, 64 Fed. Reg. 11,090 (Feb. 25, 1999).

[10] Revisions of Limited Offering Exemptions in Regulation D, Securities Act Release No. 33-8828 (2007), 72 Fed. Reg. 45,116 (Aug. 10, 2007).

[11] ADVISORY CMTE ON SMALLER PUBLIC COMPANIES, FINAL REPORT OF THE ADVISORY CMTE ON SMALLER PUBLIC COMPANIES TO THE U.S. SEC. AND EXCH. COMM'N), at 8 (2006), *available at http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf.*

[12] *See, e.g.*, Letter from Paul Schott Stevens, President and CEO, Inv. Co. Inst. letter to Nancy M. Norris, Secretary, Sec. and Exch. Comm'n, (Oct. 9, 2007), *available at http://www.sec.gov/comments/s7-18-07/s71807-37.pdf.*

[13] Letter from Stephen M. Graham and M. Christine Jacobs, Co-chairs of Advisory Cmte on Small and Emerging Companies, to Mary L. Schapiro, Chairman, Sec. and Exch. Comm'n (Jan. 6, 2012) *available at http://www.sec.gov/info/smallbus/acsec/acsec-recommendation-010612.pdf.*

[14] *See, e.g.*, 157 Cong. Rec. H7292 (daily ed. Nov. 3, 2011) (statement of Rep. Robert Dold) ("this bill removes the ban on small companies from soliciting equity financing from accredited investors."); 157 Cong. Rec. H7293 (daily ed. Nov. 3, 2011) (statement of Rep. Don Manzullo) ("I hear complaints from our small business constituents back home about the difficulty in raising capital. Today, we have an opportunity to fix one aspect of this problem so that our Nation's small businesses can obtain the funds that they need to hire workers."); 157 Cong. Rec. H7293 (daily ed. Nov. 3, 2011) (statement of Rep. Mike Kelly) ("[This legislation] is as basic as blood is to the body, the access to capital for small businesses, the ability to raise capital in hard times."); 157 Cong. Rec. E1991 (daily ed. Nov. 3, 2011) (statement of Rep. Phil Gingrey) ("I rise today as a proud supporter of H.R.2940, the Access to Capital for Job Creators Act ... which seek[s] to help entrepreneurs and small business owners access the capital they need to start or expand their business."); 157 Cong. Rec. E2003 (daily ed. Nov. 3, 2011) (statement of Rep. Chris Van Hollen) ("[T]he Access to Capital for Job Creators Act will allow small companies to raise capital more easily by removing restrictions against general solicitation and advertising to potential investors.").

directs the Commission to amend Rule 506 to permit general solicitation or general advertising provided that all purchasers of the securities are "accredited investors."[15] It also says that "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."[16] This means that Congress intended for the Commission to establish meaningful protections to ensure that such advertisements and marketing efforts resulted in sales of such risky securities only to "accredited investors."

PROPOSED RULE

The Proposed Rule would add a new and separate exemption, Rule 506(c), which would be available to an issuer that wishes to use general solicitation and general advertising to offer securities, provided that:

- the issuer takes "reasonable steps" to verify that the purchasers of the securities are accredited investors;
- all purchasers of securities are accredited investors, either because they come within one of the enumerated categories of persons that qualify as accredited investors or the issuer "reasonably believes" that they do, at the time of the sale of the securities; and
- all terms and conditions of Rule 501 and Rules 502(a) and 502(d) are satisfied.[17]

The proposed cramped interpretation of the law not only fails to carry out the agency's statutory obligation, it ignores the Commission's past experience with general solicitation and advertising as well as its duties to protect investors and ensure fair and open markets.

Failure to Adequately Outline "Reasonable Steps"

As noted above, the statute requires the Commission to identify the "methods" issuers must use in order to qualify as taking "reasonable steps" to verify the accredited status of all investors in the offering. The Proposed Rule's definition of what constitutes "reasonable steps" ignores this Congressional mandate and is insufficient to fulfill the Commission's mission of protecting investors.

Section 201 of the JOBS Act does not remove the Commission's authority to regulate the manner or substance of permissible general solicitation and advertising.[18] Nor does any other provision of the JOBS Act remove or restrict the Commission's authority in this area. At no point in the Congressional debate of Section 201 or in its predecessor legislation, was the intention relayed that the Commission would lose its authority to regulate the manner or substance of the general solicitation and advertising that would be permitted regarding private offerings.

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[15] Jumpstart our Business Startups Act, Pub. L. 112-106, 126 Stat. 306 (2012).
[16] Jumpstart our Business Startups Act, Pub. L. 112-106, 126 Stat. 306 (2012).
[17] Proposed Rule at 54,467.
[18] *See* JOBS Act, §201.

Section 201 had its origins in the Access to Capital for Job Creators Act, which was introduced by Representative McCarthy on September 15, 2011.[19] That bill directed the Commission to:

> revise its rules … to provide that the prohibition against general solicitation or general advertising contained in section 230.502(c) of such title shall not apply to offers and sales of securities made pursuant to section 230.506, provided that all purchasers of the securities are accredited investors.[20]

But this initial language raised some very serious concerns. For example, the President of the North American Securities Administrators Association testified that "[t]he removal of the "general solicitation" prohibition contemplated by [the bill] would represent a radical change that would dismantle important rules that govern the offering process for securities."[21] Professor John C. Coffee, a securities law expert from Columbia Law School warned that "upper-middle-class Americans who qualify as accredited investors will soon begin receiving streams of unsolicited offers from brokers they do not know for unregistered offerings. … From a consumer protection standpoint, this combination of little sophistication and even less disclosure seems troubling."[22]

These and other experts warned Congress that something needed to be done to ensure that those who participate in these private offerings are sufficiently sophisticated. In response to these and other concerns, the bill was modified before it passed the House.[23] Congresswoman Waters offered an amendment adding that "[s]uch 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."[24] Congresswoman Waters explained that she offered this new "reasonable steps" language to address concerns that "it would be difficult to limit the sale of these securities to only accredited investors when issuers advertise to everyone, particularly since accredited investors were able to self-certify their status."[25]

This addition was deemed essential because history has shown that individuals faced with what they believe to be a valuable financial opportunity may often misstate their financial resources in order to participate. It is not hard to imagine a retired teacher watching television and responding to an advertisement that touts returns of 20% or more for each of the past 10 years. When she's told that she needs to be an accredited investor in order to participate, and is then asked whether she meets the criteria, she very well may say "yes," even if she does not meet the criteria. That's why the author of the "reasonable steps" provision stated that investor self-

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[19] We presume that the date of introduction was only coincidentally the three year anniversary of the Lehman Brothers' bankruptcy filing.

[20] Access to Capital for Job Creators Act, H.R. 2940, 112th Cong. (2011).

[21] *Spurring Job Growth Through Capital Formation While Protecting Investors: Hearing on S.1965, S.1933, H.R.3606, S.1824, S.1544, and S.1970 Before the Senate Comm. on Banking, Housing, and Urban Development*, 112th Cong. 9 (2011) (statement of Jack E. Herstein, President, North American Sec. Administrators Assoc., Inc.).

[22] Paul Sullivan, *Deciding Who's Rich (or Smart) Enough for High-Risk Investments*, N.Y. Times, Jan. 13, 2012, at B5 (statement of John. C. Coffee, Jr., Adolph A. Berle Professor of Law, Columbia Law School).

[23] *Access to Capital for Job Creators Act, Markup on H.R. 2940 Before the House Subcommittee on Capital Markets and Government Sponsored Enterprises, House Financial Services Committee*, 112th Cong. (2011) (statement of Rep. Waters) ("We must take steps to ensure that those folks are indeed sophisticated").

[24] See JOBS Act, § 201.

[25] 157 CONG. REC. H7290 (daily ed. Nov. 3, 2011) (statement of Rep. Waters).

certification is insufficient.[26] In fact, of the dozens of legislators who spoke about this provision, not one indicated self-certification would be acceptable.

The "reasonable steps" mandated by Section 201 are intended to ensure that only accredited investors, in fact, participate in private offerings and to provide that layer of protection for investors in a way that is subject to a readily verifiable check by regulators. At a minimum, issuers should be required to provide documentation identifying and confirming the "reasonable steps" they took to ensure a buyer was accredited, prior to selling securities to a buyer identified through a general solicitation or advertising.

Instead of documenting the steps taken by the issuer to ensure the investor is accredited, the Proposed Rule effectively would allow the investors themselves to "self-certify" that they meet the criteria for accredited investors. This approach is sorely lacking for at least two reasons. First, past experience indicates that investors – perhaps made eager by misleading advertisements or hard sell tactics – may misidentify themselves as meeting the criteria. Second, the Commission does not have the resources to monitor the tens of thousands of instances of general solicitations or advertisements to identify pools of misidentified investors or even to spot troubling trends involving issuers that rely on self-certifications despite indications that the investors are neither sophisticated nor financially secure enough to take on higher risk investments.

In fact, the Commission's own Inspector General's March 2009 report found that "[the SEC Division of Corporate Finance] does not generally take action when [its] staff learn that issuers have not complied with the requirements of the Regulation D exemptions. Further, [SEC] does not substantively review the more than 20,000 Form D filings that it receives annually, which in 2008, identified total estimated offerings of $609 billion dollars."[27]

Section 201 does not itself spell out the "reasonable steps" that issuers must take to verify that investors are accredited.[28] Instead, Section 201 requires the Commission to take on that task. But the Proposed Rule ignores that statutory mandate and declines to specify, either generally or specifically, any verification procedures at all. This failure is so blatant that it borders on arbitrary and capricious.

The Proposed Rule should be revised to provide clarity to investors and issuers about the steps that need to be taken. At a minimum, it should outline the documentation necessary to establish that an investor is, in fact, accredited. In nearly every basic financial transaction, investors, borrowers, and other parties are routinely asked to provide documentation sufficient to establish why they should be allowed to participate in the transaction. Banks ask for income statements, tax returns, and other financial documents before making loans. Utility companies ask for documented proof of residence and creditworthiness before establishing service. Businesses often ask for financial documents from their counterparties as part of their due diligence process.

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[26] 157 CONG. REC. H7290 (daily ed. Nov. 3, 2011) (statement of Rep. Waters).
[27] U.S. SEC. AND EXCH. COMM'N OFFICE OF INSPECTOR GENERAL, REGULATION D EXEMPTION PROCESS, Rep. No. 459 (2009).
[28] See JOBS Act, §201.

Providing basic documentation is essential to well-functioning markets, not only to ensure parties have an understanding of with whom they are conducting business, but also to safeguarde against fraud and other wrongdoing. The failure to provide appropriate documentation is often a warning sign that a counterparty may not be able to fulfill its obligations or that a transaction may not be what it seems. In many instances, this basic financial information is required not just by careful market participants, but also by regulators.

The Proposed Rule inexplicably ignores such common-sense practices, and fails to require even minimal documentation either from the issuer or the investor. In order to meet its mandate to protect investors and the markets, and to provide bright-line certainty for issuers and investors, the Commission should set forth exactly what documents and other evidence can be used to demonstrate that a purchaser can participate in a private offering.

The Proposed Rule also creates, with no statutory basis, an alternative to the "reasonable steps" requirement in the statute by stating that issuers may engage in a general solicitation or advertising so long as they "reasonably believe" that the investors to be addressed will be accredited. This "reasonable belief" alternative is contrary to the plain language of the statute, unnecessarily complicates the accredited investor analysis (which itself involves a "reasonable belief" standard),[29] and should be removed.

Failure to Meaningfully Regulate Permissible Solicitation and Advertising

In addition to its failure to specify the reasonable steps that must be taken to ensure solicited investors meet accreditation standards, the Proposed Rule inexplicably fails to specify any restrictions of any nature on the solicitation and advertising now permitted.

The Commission appears to misconstrue Section 201's directive to remove the prohibition against general solicitation or advertising in private offerings as a mandate to bar any regulation of those activities. That is not what the statute states nor what Congress intended, and the Commission's failure to comply with the statute's plain language again borders on the arbitrary and capricious.

Both the statute and legislative history reflect the intention to remove the prohibition on general solicitation only.[30] Congress could have removed from the Commission any authority to

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[29] See 17 C.F.R. §230.501(a) (2012) ("*Accredited investor* shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person…").

[31] *See, e.g.*, 157 Cong. Rec. H7292 (daily ed. Nov. 3, 2011) (statement of Rep. Robert Dold) ("this bill removes the ban on small companies from soliciting equity financing from accredited investors."); 157 Cong. Rec. H7293 (daily ed. Nov. 3, 2011) (statement of Rep. Don Manzullo) ("I hear complaints from our small business constituents back home about the difficulty in raising capital. Today, we have an opportunity to fix one aspect of this problem so that our Nation's small businesses can obtain the funds that they need to hire workers."); 157 Cong. Rec. H7293 (daily ed. Nov. 3, 2011) (statement of Rep. Mike Kelly) ("[This legislation] is as basic as blood is to the body, the access to capital for small businesses, the ability to raise capital in hard times."); 157 Cong. Rec. E1991 (daily ed. Nov. 3, 2011) (statement of Rep. Phil Gingrey) ("I rise today as a proud supporter of H.R.2940, the Access to Capital for Job Creators Act … which seek[s] to help entrepreneurs and small business owners access the capital they need to start or expand their business."); 157 Cong. Rec. E2003 (daily ed. Nov. 3, 2011) (statement of Rep. Chris Van

condition, limit, or otherwise regulate the manner or substance of general solicitation. It did not do that. Instead, Congress clearly elected to allow the Commission to keep its authority to regulate general solicitation and advertising for offerings exempt from registration pursuant to Rule 506 or Rule 144A.

The plain intention of Congress when passing Section 201 was simply to *make it easier for small businesses* to raise capital by removing the historic prohibition against general solicitation for their private offerings.[31] It was not to surrender the Commission's overall obligation to protect investors and markets from fraud, unfair practices, or other wrongdoing.

The author of the bill that ultimately became Section 201, Representative McCarthy, described the need for his legislation by detailing his personal experience as an owner of a small deli in search of capital.[32] He explained that the bill would "allow the small business to unshackle the capital which it needs. It will allow the individual to talk to those who are accredited and it has protections to do that."[33]

Chairman Spencer Bachus of the House Committee on Financial Services stated that the bill would "give entrepreneurs the ability to raise capital, and that capital translates into jobs."[34]

Senator Thune, who introduced the same legislation in the Senate, explained: "[t]his amendment would make it easier for small business to better access capital in order to expand and create jobs."[35]

Section 201 of the JOBS Act does not remove the Commission's authority to regulate the manner and substance of permissible general solicitation and advertising.[36] Nor does any other provision of the JOBS Act. At no point in the Congressional debate of JOBS Act, or its predecessor legislation, was the intention relayed that Congress wanted the Commission to lose its authority to regulate the manner or substance of the general solicitation and advertising that would be permitted for private offerings.

Hollen) ("[T]he Access to Capital for Job Creators Act will allow small companies to raise capital more easily by removing restrictions against general solicitation and advertising to potential investors.").

[31] *See, e.g.*, 157 Cong. Rec. H7292 (daily ed. Nov. 3, 2011) (statement of Rep. Robert Dold) ("this bill removes the ban on small companies from soliciting equity financing from accredited investors."); 157 Cong. Rec. H7293 (daily ed. Nov. 3, 2011) (statement of Rep. Don Manzullo) ("I hear complaints from our small business constituents back home about the difficulty in raising capital. Today, we have an opportunity to fix one aspect of this problem so that our Nation's small businesses can obtain the funds that they need to hire workers."); 157 Cong. Rec. H7293 (daily ed. Nov. 3, 2011) (statement of Rep. Mike Kelly) ("[This legislation] is as basic as blood is to the body, the access to capital for small businesses, the ability to raise capital in hard times."); 157 Cong. Rec. E1991 (daily ed. Nov. 3, 2011) (statement of Rep. Phil Gingrey) ("I rise today as a proud supporter of H.R.2940, the Access to Capital for Job Creators Act … which seek[s] to help entrepreneurs and small business owners access the capital they need to start or expand their business."); 157 Cong. Rec. E2003 (daily ed. Nov. 3, 2011) (statement of Rep. Chris Van Hollen) ("[T]he Access to Capital for Job Creators Act will allow small companies to raise capital more easily by removing restrictions against general solicitation and advertising to potential investors.").

[32] 157 CONG. REC. H7290 (daily ed. Nov. 3, 2011) (statement of Rep. McCarthy).

[33] 157 CONG. REC. H7290 (daily ed. Nov. 3, 2011) (statement of Rep. McCarthy).

[34] 157 CONG. REC. H7289 (daily ed. Nov. 3, 2011) (statement of Rep. Bachus).

[35] 158 Cong. Rec S183 (daily ed. Jan. 31, 2012) (statement of Sen. Thune).

[36] *See* JOBS Act, §201.

Nevertheless, the Proposed Rule inexplicably fails to include any meaningful regulation on the appropriate exercise of general solicitation and advertising. It is as if the Department of Motor Vehicles (DMV) were directed to issue licenses, but elected to issue licenses without requiring any driver tests. This failure to bring the regulator's expertise to bear on appropriate use of this new tool will likely lead to results somewhat similar to the DMV issuing licenses without driver tests: crashes, injuries, and a significant loss to public safety.

The Proposed Rule should be significantly revised to provide clear, objective, and meaningful regulation of the manner and substance of general solicitation and advertising that may be allowed in private offerings.

When engaged in this exercise, the Commission should first take into account its obligation to protect investors and our securities markets from deceptive, fraudulent, and unfair practices. Second, the Commission should take into account the nature of the securities being offered as well as the characteristics of the issuer. It should consider establishing a regulatory framework that distinguishes between issuers that, for example, engage in operational businesses and those that are investment vehicles.

Congress did not contemplate removing the general solicitation ban—without retaining any limitations on forms of solicitation—for private investment vehicles. Not once in the lengthy debate of the bill did the author or any other member of Congress argue that the objective was to ease the capital aggregation process for private investment vehicles. Not once were the words "hedge fund," "private fund," or "investment vehicle" used either during the committee mark-up process or on the floor debate in the House of Representatives. Nor did the Senate contemplate removing these restrictions completely from private investment vehicles. Instead, the focus was solely on small businesses seeking to raise capital for their operations.

The Commission should exercise its authority to regulate general solicitation and advertising in private offerings seeking to rely on an exemption from the registration requirement of the Securities Act by requiring additional safeguards, disclosures, and attestations from auditors to guard against fraud, unfair practices, and other wrongdoing. The need to exercise this authority is heightened by the potential risks posed by publicly advertised, so-called "private" investment vehicles. Already, the Commission has determined that the manner and substance of solicitation and advertising for investments in registered investment companies deserves significant regulatory oversight. Many of those same concerns apply to investments in private investment vehicles. Accordingly, the Commission should impose analogous protections for investments in private funds.

Disclosure of General Solicitation Activities as a Risk Factor

We agree with the Commission's determination that Section 201(a) of the JOBS Act should not eliminate the current Rule 506 process for otherwise qualifying offerings that are made without the use of general solicitation or advertising.[37] Preserving this option and requiring an accompanying disclosure would allow investors to differentiate between offerings that intend to rely on general solicitation and advertising activities and those that do not. Some investors may,

[37] *See, e.g.*, Proposed Rule, at 54,467.

in practice, view general solicitation and advertising activities as a risk factor in the offering, and may avoid or require other concessions in return for taking on additional risk. This investor reaction may function similarly to how investors are currently viewing issuers seeking to take advantage of the new "emerging growth company"[38] category, wherein issuers who take advantage of "emerging growth company" status are identifying their election as a risk factor for investors.[39]

CONCLUSION

The Proposed Rule is seriously flawed. The Commission should improve the Proposed Rule and, because of the significance of the changes, re-propose a new regulatory framework for implementation of Section 201 of the JOBS Act.

Thank you for the opportunity to comment on the Proposed Rule.

Sincerely,

Carl Levin

[38] Under Title I of the JOBS Act, Congress created a new class of company subject to lower accounting and disclosure obligations, called an "emerging growth company." *See, e.g.*, JOBS Act §§ 102-105.

[39] *See, e.g.*, Fender Musical Instruments Corp., Amendment No. 6 to Registration Statement, Form S-1/A, Jul. 10, 2012, *available at http://www.sec.gov/Archives/edgar/data/767959/000119312512298421/d293340ds1a.htm* (later withdrawn).