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# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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LAWRENCE J. BRADY  
STAFF DIRECTOR

August 16, 2012

The Honorable Mary L. Schapiro  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Dear Chairman Schapiro:

I am deeply troubled by the information you conveyed to me on the phone earlier today. During our conversation, you conveyed your decision to propose a rule which would at some future date implement Section 201 of the Jumpstart Our Business Startups Act (JOBS Act).<sup>1</sup> Section 201 requires the Securities and Exchange Commission (Commission) to remove the ban on general solicitation for certain issuers of equity capital.<sup>2</sup> As you know, by issuing a proposed rule, rather than an interim final rule, the Commission is unlikely to finalize the rule until next year. By kicking the can down the road, you are abdicating your responsibility to follow the law, failing to fulfill your sworn commitment to this Subcommittee, and ignoring the will of Congress and the President of the United States.

As you know, the JOBS Act was passed by overwhelming majorities in the House of Representatives and the Senate and signed into law by President Obama on April 5, 2012.<sup>3</sup> The JOBS Act's overwhelming support reflected a bipartisan consensus that the Commission needed to do much more to enable startup companies and other small businesses to raise capital in the United States. The JOBS Act's provisions were informed by numerous congressional hearings, including hearings of this Subcommittee.<sup>4</sup> While you intervened at the 11<sup>th</sup> hour of

<sup>1</sup> Jumpstart Our Business Startups Act, Pub. L. 112-106, 126 Stat. 306 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *Crowdfunding: Connecting Investors and Job Creators: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform, 112th Cong. (2011); America's Innovation Challenge: What Obstacles to Entrepreneurs Face?: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform, 112th Cong. (2011); and How Roadblocks in Public Markets Prevent Job Creation on Main Street: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform, 112th Cong. (2011).*

congressional debate to personally criticize the JOBS Act,<sup>5</sup> after it was passed you testified that “it is the law of the land ... [and] [w]e will implement it faithfully.”<sup>6</sup>

During your testimony before the Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs on June 28, 2012, we had the following exchange:

Chairman McHenry: So to that end there's another provision within the JOBS Act which is the general -- the lifting of the general solicitation ban, will you meet the -- as you outlined in the -- in your statement you believe that the July 4 deadline will not be met. Is that correct?

Ms. Schapiro: That's correct, Mr. Chairman.

Chairman McHenry: When do you foresee this happening?

Ms. Schapiro: I -- I expect that in the next two days we will actually publicly publish the timeline for the Commission consideration of the -- lifting the general solicitation ban and **I expect that it will be done this summer**....<sup>7</sup> [emphasis added]

By issuing a proposed rule, rather than an interim final rule, there is no way that you will fulfill this commitment. While I certainly support transparency and public participation in the rulemaking process, the law provides you with clear direction:

**Sec. 201. Modification of Exemption.**

**Not later than 90 days after the date of enactment of this Act, the Securities and Exchange Commission shall revise its rules** issued in section 230.506 of title 17, Code of Federal Regulations, to provide that the prohibition of against general solicitation 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. Such rules shall require the issuer to take reasonable steps to verify the purchasers of the securities are accredited investors, using such methods as determined by the Commission.<sup>8</sup> [emphasis added]

By merely proposing to revise Commission rules, rather than revising them, you are failing to follow the law. We are now over four months since the JOBS Act was enacted and over one month past your statutory deadline to implement this section removing the ban on general solicitation. You have had ample time to solicit additional public comment. In addition, as you know, issuing an interim final rule would certainly not preclude additional public

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<sup>5</sup> Letter from Mary Schapiro, Chairman, U.S. Securities and Exchange Commission, to the S. Comm. on Banking, Housing, and Urban Affairs, Mar. 13, 2012.

<sup>6</sup> *The JOBS Act in Action, Part II: Overseeing Effective Implementation of the JOBS Act at the SEC: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012).

<sup>7</sup> *Id.*

<sup>8</sup> See note 1, *supra*.

comment nor would it preclude revising the rule at a later date as appropriate.<sup>9</sup> Thus, the fact that you are now proposing a rule after you've had 130 days to seek additional comment can be viewed as nothing other than a delaying tactic. I am unfortunately left with no choice but to conclude that your decision to propose a rule and delay the implementation of this important part of the JOBS Act is a reflection of your ideological opposition to a bipartisan effort by Congress and the President to improve the conditions for capital formation in the United States.

In order to inform the Subcommittee's oversight of the Commission's failure to implement Section 201 of the JOBS Act, I request the following information:

1. All documents and communications between or among SEC Commissioners and staff referring or relating to potential Commission action to implement Section 201 of the JOBS Act.
2. All communications between SEC Commissioners or staff and any outside party referring or relating to potential Commission action to implement Section 201 of the JOBS Act.
3. All documents, including legal memoranda, prepared by staff in the Commission's Office of the General Counsel, referring or relating to potential Commission action to implement Section 201 of the JOBS Act.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

Please provide all such responses as soon as possible, but no later than 5:00 p.m. on August 30, 2012. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers to receive all documents **in electronic format**.

In addition, the Subcommittee requests your testimony at a hearing at 10:00 a.m. on Thursday, September 13, 2012. The hearing will examine the Commission's implementation of the JOBS Act, including your failure to implement Section 201 of the JOBS Act by the Act's statutory deadline and by the deadline you committed to in previous testimony.

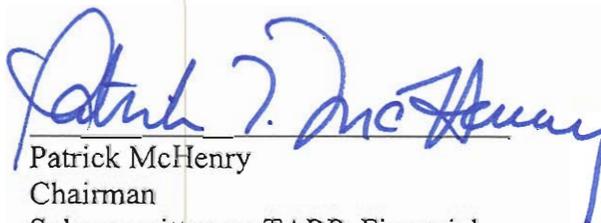
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<sup>9</sup> See Guidance from Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President: "Interim Final Rule - These interim rules are typically issued in conformity with statutory provisions allowing agencies to publish a final rule that becomes effective soon after publication, without going through the proposed rule stage. The "good cause" exception in the Administrative Procedure Act allows agencies to bypass public notice and comment on a rule when it would be impracticable, unnecessary, or contrary to the public interest. This process typically allows for public comment after the rule is published so that the agency still has an opportunity to consider public input and revise the rule accordingly." Available at <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp>.

The Honorable Mary L. Schapiro  
August 16, 2012  
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While I cannot force you to fulfill your commitment to the Subcommittee that you would fulfill your statutory mandate and implement Section 201 of the JOBS Act by the end of "this summer," the Subcommittee can ensure that you publicly explain your failure to do so. Please contact the Subcommittee to confirm your attendance at the hearing as soon as possible.

Sincerely,



Patrick McHenry  
Chairman  
Subcommittee on TARP, Financial  
Services and Bailouts of Public and  
Private Programs

Enclosure

cc: The Honorable Mike Quigley, Ranking Minority Member  
Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs

The Honorable Elisse B. Walter, Commissioner  
U.S. Securities and Exchange Commission

The Honorable Luis A. Aguilar, Commissioner  
U.S. Securities and Exchange Commission

The Honorable Troy A. Paredes, Commissioner  
U.S. Securities and Exchange Commission

The Honorable Daniel M. Gallagher, Commissioner  
U.S. Securities and Exchange Commission

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### Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
  - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,  
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,  
SENTPAGE, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### **Schedule Definitions**

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.