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November 30, 2012

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

Dear Chairman Schapiro:

The Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs is continuing its oversight of the implementation of Section 201 of the Jumpstart Our Business Startups Act (JOBS Act).¹ Section 201 requires the Securities and Exchange Commission (Commission) to remove the ban on general solicitation for certain issuers.² This reform is critical to capital formation and the growth of small enterprise. Recognizing this urgency, the law required the Commission to implement Section 201 by July 4, 2012.³

On August 29, 2012 – already well past the July 4th deadline – the Commission adopted a *proposal* to implement Section 201.⁴ By choosing to issue a proposed rule in lieu of an interim final rule, which was against the advice of career professional staff, the Commission has added extraordinary delay to the effectuation of this critical reform. The Commission has not given formal notice of any plans to consider a final rule. The delay in implementation of Section 201 is a significant obstacle to capital formation and economic recovery.⁵

¹ Letter from Patrick McHenry, Chairman, Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform to Mary Schapiro, Chairman, U.S. Securities and Exchange Commission, Aug. 16, 2012.

² Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a), 126 Stat. 313 (2012).

³ *Id.*

⁴ Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Release No. 33-9354, File Number S7-07-12 (Aug. 29, 2012).

⁵ See Draft Release prepared by the rulewriting staff at the U.S. Securities and Exchange Commission (advocating for an expedited rulemaking procedure because of the “the anticipated major impact on capital-raising by issuers”) (SEC Document Production of Oct 25, 2012, SEC000950). See also *infra* text accompanying note 7.

Documents that the Commission provided to the Committee are disconcerting as they imply that you personally intervened to delay implementation of the law in an effort to appease special interest groups and out of concern for your legacy as Chairman.

These documents reveal that as early as May 2012, the professional rulewriting staff in the Division of Corporation Finance, with the advice of the Office of General Counsel, had concluded that an interim final rule was the most practical, responsible, and legally appropriate means of implementing Section 201.⁶ The draft release prepared by the Division of Corporation Finance, under the direction of Director Meredith Cross, explained the need for an interim final rule:

The Commission, for good cause, finds that the notice and public comment procedures in advance of effectiveness of the interim final rules are impracticable, unnecessary and contrary to the public interest for the following reasons. First, we believe that the statutory language in Section 201(a) is clear and straightforward as to how to amend Rules 506 and 144A(d)(1), such that prior notice and comment are unnecessary. Second, the Commission finds that it would be impracticable to comply with the notice and comment procedures under the Administrative Procedure Act in light of the 90-day period under Section 201(a) of the JOBS Act to revise these rules. Third, in view of the clear statutory language as well as the anticipated major impact on capital-raising by issuers, we believe that it would be consistent with the public interest to use an expedited rulemaking procedure to adopt these amendments, which would, among other things, allow the Commission to begin monitoring and studying the operation and impact of these amendments.⁷

With your knowledge and under your direction, staff continued to refine the interim final rule over the summer. As of Monday, August 6, 2012, the Division of Corporation Finance was preparing the release for the interim final rule, with plans to place the release on the agenda of the Commission's open meeting on August 22, 2012.⁸

⁶ See E-mail between staff of the Division of Corporation Finance (May 9, 2012 1:20 PM EDT) (SEC Document Production of Oct 25, 2012, SEC000415); E-mail between staff of the Division of Corporation Finance (May 11, 2012 3:18 PM EDT) (SEC Document Production of Oct 25, 2012, SEC000466); E-mail from Meredith Cross, Director of the Division of Corporation Finance, U.S. Securities and Exchange Commission, to Commissioners and Counsel of the U.S. Securities and Exchange Commission (May 23, 2012, 3:07 EDT) (SEC Document Production of Oct 25, 2012, SEC000871). See also Draft Release, *supra* note 5.

⁷ E-mail between staff of the U.S. Securities and Exchange Commission (June 5, 2012 10:45 AM EDT) (SEC Document Production of Oct 25, 2012, SEC000939) (copying and pasting a section of the Draft Release for implementation of Section 201).

⁸ E-mail between staff of the Division of Corporation Finance (Aug. 7, 2012 11:26 AM EDT) (SEC Document Production of Oct 25, 2012, SEC002031).

Notwithstanding the deliberations that produced the interim final rule, it appears that one late communication from a well-placed lobbyist effectively stalled the implementation of Section 201. On Tuesday, August 7, 2012, Barbara Roper, a registered lobbyist with the Consumer Federation of America (CFA), emailed your Chief of Staff, Didem Nisanci.⁹ Ms. Roper communicated “strong objections” to the draft rule and demanded a drawn-out proposal and comment process.¹⁰ Ms. Roper further promised that, if you did not accede to her demands, CFA and aligned groups would be “quite aggressive in voicing our concerns.”¹¹ Upon receipt of the e-mail, you immediately informed your top advisors that the email had left you “very worried.”¹² You also informed Commissioner Walter – and apparently no other Commissioner – of your concern.¹³ Less than an hour later, you wrote to Director Cross an email with the subject line “Please don’t forward”:

... I have 2 worries – one is that if these guys (CFA, et al) feel this strongly, it seems like we should give them a comment period. Its not really asking for much... The other is that **I don’t want to be tagged with an Anti-Investor legacy**. In light of all that’s been accomplished, that wouldn’t be fair but it is what will be said given how high emotions run on anything related to the JOBS Act. Doesn’t seem worth it for an extra 45 days of process.¹⁴ [emphasis added]

Over the next week, you informed your fellow Commissioners of your decision to proceed via a proposed rule in lieu of an interim final rule. This sudden turnabout is troubling as it reflects a decision to override both the long-held conclusions of the professional staff in the Division of Corporation Finance and Office of the General Counsel.¹⁵ Furthermore, in delaying implementation of Section 201 by means of an open-ended proposal period, it appears that third-party evaluations of your legacy and the “strong feelings” of a special-interest group were prioritized over the faithful implementation of the law. The possibility that Section 201 will not even be implemented this year – well beyond the “extra 45 days” you predicted in August – would compound the potential impropriety of your decision.

⁹ E-mail from Barbara Roper, Director of Investor Protection, Consumer Federation of America, to Didem Nisanci, Chief of Staff, U.S. Securities and Exchange Commission (Aug. 7, 2012, 3:23 PM EDT) (SEC Document Production of Oct 25, 2012, SEC002659).

¹⁰ *Id.*

¹¹ *Id.*

¹² E-mail from Mary Schapiro, Chairman, U.S. Securities and Exchange Commission, to Didem Nisanci et al., Staff of the U.S. Securities and Exchange Commission (Aug. 7, 2012, 4:32 PM EDT) (SEC Document Production of Oct 25, 2012, SEC002660).

¹³ *Id.*

¹⁴ E-mail from Mary Schapiro, Chairman, U.S. Securities and Exchange Commission, to Meredith Cross, Director of the Division of Corporation Finance, U.S. Securities and Exchange Commission (Aug. 7, 2012, 5:05 PM EDT) (SEC Document Production of Oct 25, 2012, SEC002678).

¹⁵ See *supra* text accompanying notes 6 and 7.

Furthermore, documents make clear that both your fellow Commissioners and career rulewriting staff believed a proposal period would be of limited substantive value. Director Cross went as far as to acknowledge to you that “[o]n the benefit of the comment period, as you noted, much of the benefit comes from the *perception* of our process.”¹⁶ [emphasis added] Such a conclusion accords with Ms. Cross’ representations to Commissioner Daniel Gallagher, to whom she made “crystal clear ... that there is no need for a [proposal period] because we know what the comments will be.”¹⁷ Even Commissioner Walter, while ultimately advocating for a proposal instead of an interim final rule, acknowledged that the “[c]omment period could be very short I think if we emphasize how much we’ve already heard.”¹⁸

Documents further reveal that the decision to override the recommendations of the professional staff significantly disrupted the ability of the Commission to function collegially and cooperatively. In an August 8, 2012, email to you with the subject line of “I am furious,” Commissioner Daniel Gallagher expressed dismay and frustration at the “shifting sands” your actions created in the rulemaking process:

I just got word about the latest change to general solicitation. It is not acceptable. I have been operating in good faith, reviewing the multiple proposals sent to me for consideration this month, and I continue to find shifting sands. A "proposal" on general solicitation could have been done months ago, and indeed should have been done years ago. Meredith and Lona made it crystal clear to me on Monday that there is no need for a proposal because we know what the comments will be. And so, I spent hours working on how to accommodate your desire for a study within an interim final rule, and we did so -- just to find out now that you have changed your mind again.

Against the backdrop of a potential open meeting on money market funds that may be just an exercise of you "getting us on the record" as you told me two weeks ago and as was reported in the WSJ today, I can only assume that you have no desire to proceed in [good] faith as we consider critically

¹⁶ E-mail from Meredith Cross, Director of the Division of Corporation Finance, U.S. Securities and Exchange Commission, to Mary Schapiro, Chairman, U.S. Securities and Exchange Commission (Aug. 8, 2012, 8:10 PM EDT) (SEC Document Production of Oct 25, 2012, SEC002701).

¹⁷ E-mail from Daniel Gallagher, Commissioner, U.S. Securities and Exchange Commission, to Mary Schapiro, Chairman, U.S. Securities and Exchange Commission (Aug. 8, 2012, 7:19 PM EDT) (SEC Document Production of Oct 25, 2012, SEC002694).

¹⁸ E-mail from Elisse Walter, Commissioner, U.S. Securities and Exchange Commission, to Mary Schapiro, Chairman, U.S. Securities and Exchange Commission (Aug. 8, 2012, 8:01 PM EDT) (SEC Document Production of Oct 25, 2012, SEC002698).

important rules in an unreasonable schedule you have set for this month. I will proceed accordingly.¹⁹

The unavoidable conclusion is that the draft release being circulated in the beginning of August was the product of the informed, professional, and meritorious work of the career rulewriting staff in the Division of Corporation Finance, and warranted immediate implementation as an interim final rule. The decision to proceed with a proposed rule appears to have prioritized a well-connected special-interest group's preference and concern over how your legacy would be perceived over faithful compliance with the law. Concern for one's legacy has no place in what should have been a routine implementation of a law passed with bipartisan support in Congress and signed by President Obama.

The Commission adopted the proposed rule on August 29, 2012.²⁰ The comment period for the proposed rule closed on October 5, 2012, and Commission staff have had almost two months to consider and respond to submitted comments.²¹ The Subcommittee sincerely hopes that now, having provided exhaustive opportunity for pre-finalization notice and comment, the Commission will comply with the JOBS Act's directive and implement this vital reform. The Subcommittee remains extremely wary of the potential to further delay or unsettle the straightforward implementation of Section 201. Recent comments by Commissioner Walter give rise to particular concern:

We must be vigilant about the potential consequences [of Section 201], particularly unintended consequences, of a significant change like this and consider ways to mitigate potential harms to the investor while preserving the rule's intended benefits.²²

Investor protection is a goal we all share, but continued second-guessing, and the accompanying delays in the process, is simply unacceptable.

You recently announced that you will step down from the Commission on December 14, 2012.²³ The Subcommittee respects your wishes, and appreciates your service to your government, but nonetheless urges you to first complete implementation of Section 201 of the JOBS Act. Such completion is necessary to satisfy the explicit

¹⁹ E-mail from Daniel Gallagher, Commissioner, U.S. Securities and Exchange Commission, to Mary Schapiro, Chairman, U.S. Securities and Exchange Commission (Aug. 8, 2012, 7:19 PM EDT) (SEC Document Production of Oct 25, 2012, SEC002694).

²⁰ See Securities Act Release No. 33-9354, *supra* note 4.

²¹ *Id.* at 77 Fed. Reg. 54,464 (Sept. 5, 2012) (to be codified at 17 C.F.R. pts. 230 and 239).

²² Elisse Walter, Commissioner, U.S. Securities and Exchange Commission, Remarks at the 2012 SEC Government-Business Forum on Small Business Capital Formation (Nov. 15, 2012), *available at* <http://www.sec.gov/news/speech/2012/spch111512ebw.htm>.

²³ Press Release, U.S. Securities and Exchange Commission, SEC Chairman Mary Schapiro to Step Down Next Month (Nov. 26, 2012), *available at* <http://www.sec.gov/news/press/2012/2012-240.htm>.

The Honorable Mary L. Schapiro
November 30, 2012
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Congressional mandate of the JOBS Act,²⁴ your personal commitments to the Committee,²⁵ and perhaps most importantly, your oath to well and faithfully discharge the duties of the office on which you entered.²⁶

Sincerely,



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

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

²⁴ Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a), 126 Stat. 313 (2012).

²⁵ *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. 23, 28 (2012) (Mary Schapiro, Chairman, U.S. Securities and Exchange Commission, testifying “[The JOBS Act] is the law of the land; and we will implement faithfully . . . I expect that [by June 30, 2012] we will actually publish the timeline for the Commission consideration of lifting the general solicitation ban, and I expect that it will be done this summer.”)

²⁶ Oath of Office, 5 U.S.C. § 3331.