

United States Senate

September 20, 2013

The Honorable Mary Jo White
Chairman
U.S. Securities and Exchange Commission
100 F Street, Northeast
Washington, DC 20549

Dear Chairman White:

We appreciate the Commission's recent efforts to publish rules eliminating the ban on general solicitation under Rule 506 of Regulation D as required by Section 201(a) of the Jumpstart Our Business Startups (JOBS) Act. As you are well aware, we have been encouraging the SEC to move forward on these rules and those for crowdfunding so that American small businesses and startups can access more capital to grow their businesses and hire additional employees.

As the Commission implements the final rules and considers the proposed rules, we encourage the Commission to keep in mind the bipartisan intent of Congress to enhance capital access for entrepreneurs. We are hearing from angel investors and startups that certain aspects of these rules may actually *reduce* funding for job-creating small businesses and increase red tape for all involved. In order to make sure we have a strong generally solicited capital market and to increase jobs in the United States, we encourage the Commission to do the following to ensure straightforward approaches for raising capital under Rule 506:

- ***Release 33-9415, Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings***

We believe that investors and the public would benefit by the addition of more methods as "reasonable steps to verify" accredited investor status in the Commission's principle-based approach to verification methodology. The four non-mandatory "safe harbors" included in the final rule present challenges for both startups and the early-stage investors who support them. Providing documentation of income or wealth to issuers and even to third-party certifiers is difficult. According to the Angel Capital Association, the world's largest organization of accredited angel investors, a number of its member angel groups are considering halting their activities if members must furnish private financial information to an entrepreneur or to a verifying agent. These angels invested \$22.9 billion in 67,000 companies last year. We are concerned that this requirement will lead to a drop in this very important type of investment, causing substantial harm to American startups and our economy.

It appears to us that there may be less burdensome solutions such as allowing angel investors to self-attest that they are accredited investors under a construct which penalizes perjury. In addition, the startup financing community is beginning to recommend verification processes such as membership in an angel group, providing a reference from another angel investor, or listing of previous investments on an investor platform. We urge the Commission to consider providing written clarification that these or other actions taken by stakeholders in the community fit the rule.

- ***Proposed Release 33-9416, Amendments to Regulation D, Form D and Rule 156 Under the Securities Act***

We are also concerned about the proposed rules regarding Regulation D, Form D and Rule 156, which threaten to slow down or stop the usage of general solicitation offerings by startup entrepreneurs – conflicting with the intentions of the JOBS Act. The rule has several requirements and penalties that make using new Rule 506(c) to advertise offerings concerning:

1. Issuers must file a Form D fifteen days before they begin advertising their offering, delaying their fundraising and adding costs and heavy regulatory burdens, particularly for smaller and newer businesses. Instead, the Commission could tie the Form D requirement to the term sheet for the offering or another appropriate milestone.
2. Entrepreneurs must also submit their advertising materials to the SEC on the same day they are used, an enormous requirement for small young companies with few resources for compliance. Advertisements must also include a long set of standard disclosures, which may increase the costs of advertising space for startups and which is difficult to accommodate when utilizing new technologies, such as Twitter. The Commission could create an abbreviated set of disclosures or a process that recognizes the challenges posed by character limit requirements, for instance. Alternatively, the Commission could require issuers to include standard disclosures on term sheets instead of on the advertisements.
3. While the proposed rules allow an issuer a one-time 30-day period to correct a missed deadline in filing reports or submitting materials, the penalty for the issuer if they miss another deadline is quite severe – they are automatically prohibited from using Rule 506 for an offering for one year. We encourage the Commission to consider alternatives that are proportional to the severity of the infraction.

These requirements and penalties seem burdensome to issuers, investors, and startups. A better approach may be to follow the suggestion of one of the comment letters in the record, “The Commission has several advisory bodies and working groups in the small business and investor protection area, and it would be easy to ask these bodies to form a working group or committee whose purpose is the monitoring of form and content of Regulation D [Generally Solicited Generally Advertised] materials, and which reports back to the Commission and Staff on a regular basis, with anonymized examples.” Such a process may better enable the Commission to address challenges such as the collection of solicitation materials given the

iterative nature of advertising and offerings, including the use of social media and discussion forums that are updated frequently.

We urge the Commission to adopt straightforward rules to verify accredited investor status and to streamline reporting requirements for issuers and investors in order to achieve the purpose of the JOBS Act. Thank you for your consideration. We look forward to your response to this letter at your earliest convenience.

Sincerely,


JERRY MORAN
United States Senator


MARK WARNER
United States Senator