

## MEMORANDUM

To: Members of the Committee on Financial Services  
From: Committee Majority Staff  
Date: April 12, 2013  
Subject: April 17, 2013, Oversight and Investigations Subcommittee Hearing Entitled “Examining the SEC’s Failure to Implement the JOBS Act and its Impact on Economic Growth”

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On Wednesday, April 17, 2013, at 2:00 p.m. in Room 2128 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing titled “Examining the SEC’s Failure to Implement the JOBS Act and its Impact on Economic Growth.” This hearing will examine the failure of the U.S. Securities and Exchange Commission (SEC) to meet the statutorily required deadline for implementing Title II of the Jumpstart Our Business Startups Act (JOBS Act). This hearing will also examine the SEC’s implementation of other provisions of the JOBS Act.

The sole witness for this hearing will be SEC Commissioner Elisse Walter.

### **Title II of the JOBS Act**

With overwhelming bipartisan support, the JOBS Act passed the House by a 390-23 vote on March 8, 2012. Two weeks later, the Senate passed the bill by a vote of 73-26, and President Obama signed the JOBS Act into law on April 5, 2012. Title II of the JOBS Act—Access to Capital for Job Creators—promotes job creation and economic growth by allowing private issuers to market their securities through general solicitations and advertising under exemptions to the registration requirements of the Securities Act of 1933. The JOBS Act required the SEC to revise its rules to remove the prohibition against general solicitations and advertising in these exemptions within 90 days of its enactment.

The Securities Act of 1933 requires that offers to sell securities must either be registered with the SEC or be exempted from the Securities Act’s registration requirements. One such exemption is Regulation D Rule 506, which allows non-registered securities to be offered for sale to “accredited investors,”<sup>1</sup> so long as the securities are not marketed through general solicitations or advertising. Another such exemption is Rule 144A(d)(1), which allows non-registered securities to be offered for sale to “qualified institutional buyers.”<sup>2</sup> Although Rule 144A does not expressly prohibit non-

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<sup>1</sup> “Accredited investors” include natural persons with an individual net worth, or joint net worth, that exceeds \$1 million at the time of the purchase, excluding the value of the primary residence of such person; natural persons with incomes exceeding \$200,000 in each of the two most recent years or joint incomes with spouses exceeding \$300,000 for those years; or businesses in which all the equity owners are accredited investors.

<sup>2</sup> “Qualified institutional buyers” are financial firms—such as a registered investment companies, investment advisors, or employee benefit plans—that own and invest on a discretionary basis at least \$100 million in the securities of issuers not affiliated with the firms.

registered securities to be offered for sale through general solicitations or advertising, the prohibition effectively applies because secondary offerings under Rule 144A may relate back to an original issuance.

The deadline for the SEC to revise Rules 506 and 144A was July 4, 2012.

### **The SEC's Delay Implementing Title II of the JOBS Act**

On June 28, 2012, SEC Chairman Mary Schapiro testified at a hearing before the Committee on Oversight and Government Reform's Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, chaired by Mr. McHenry. Chairman Schapiro testified that the SEC would miss the July 4, 2012 deadline for implementing Title II, but that the SEC's Commissioners would vote on a draft rule during the summer of 2012. Within the SEC, an interim final rule was distributed that would have implemented Title II and permitted companies to use its provisions to raise capital. Rather than holding a vote on the interim final rule, Chairman Schapiro instead recommended that the Commissioners vote on a proposed rule, which was adopted by a vote of four to one on August 29, 2012.

During the SEC's open meeting at which the rule proposal was approved, SEC Commissioners Daniel Gallagher and Troy Paredes expressed frustration with the SEC's rulemaking process. Commissioner Gallagher noted that the JOBS Act is "at the heart of what the SEC is supposed to do, and . . . should feature prominently in the work of this agency." He then expressed his support for the substance of the rule proposal before noting that:

I am not happy to be sitting here today, almost two months after the JOBS Act deadline for a final rule, voting on a proposal. For months, the Commission had been told that the Staff was recommending that we vote on an interim final rule. . . . An interim final rule would have ensured that we had a final rule in place reasonably soon after the Congressional deadline.

Commissioner Gallagher then concluded that "let me be very clear. I am voting 'yes' on the proposal, which is a matter of substance. But if I could, I would certainly vote 'no' on the process that led up to this meeting, as well as the choice of proposal versus interim final rule." Commissioner Paredes expressed similar sentiments, stating that "a proposal such as this could have been made much earlier so that we would be in a position to adopt a final rule on a much more timely basis."

Although the comment period for the proposed rule ended on October 5, 2012, because the SEC adopted a proposed rule rather than an interim final rule, it will not be able to finalize the regulations that implement Title II until 2013.