NEW YORK
CITY BAR

COMMITTEE ON SECURITIES REGULATION

ROBERT E. BUCKHOLZ
CHAIR
125 BROAD STREET
NEW YORK, NY 10004
Phone: (212) 558-3876
Fax: (212) 291-9018
buckholzr@sullcrom.com

TREVOR OGLE
SECRETARY
125 BROAD STREET
NEW YORK, NY 10004
Phone: (212) 558-7938
Fax: (212) 291-9429
oglet@sullcrom.com

May 4, 2012

Via E-mail: rule-comments@sec.gov

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

Re: *Request for Public Comments on SEC Regulatory Initiatives under the JOBS Act – Title II: Access to Capital for Job Creators*

Dear Ms. Murphy:

This letter is submitted on behalf of the Committee on Securities Regulation (the "Committee") of the New York City Bar Association in response to the request for comments by the Securities and Exchange Commission (the "Commission") in advance of rulemaking required to be undertaken pursuant to the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"). In this letter, we address the rule changes mandated by Section 201 of the JOBS Act.

Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms and counsel to corporations, investment banks, investors and government agencies. As such, this letter does not necessarily reflect the individual views of all members of the Committee.

We expect to provide detailed comments when the Commission publishes proposed rules to implement Section 201 of the JOBS Act. At this early stage, we would offer the following three high-level suggestions.

1. The new purchaser conditions to Rule 144A and Rule 506, in offerings involving general solicitation, should incorporate a "reasonable belief" standard.

Section 201(a)(2) of the JOBS Act clearly states that the new purchaser condition to Rule 144A shall be based on a "reasonable belief" standard – under the amended Rule, the exemption will remain available, notwithstanding a general solicitation, "provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer." The amendment to Rule 144A should implement this clear directive.

Section 201(a)(1) uses different language in respect of the required amendment to Rule 506 – "provided that all purchasers are accredited investors" – but we do not think that this difference in language precludes use of a reasonable belief standard in the new Rule 506 purchaser condition. For one thing, the definition of "accredited investor" in Rule 501(a) already incorporates a "reasonable belief" standard, applicable to any determination that an investor is "accredited." The existence of the "reasonable steps" provision in Section 201(a)(2) also supports application of a "reasonable belief" standard for the new purchaser condition, since "reasonable steps" to determine an investor's status would provide the basis for a reasonable belief (not absolute certainty) as to that status (we see this point as analytically separate and independent from the question of how the Commission actually defines "reasonable steps"). In addition, most other Rule 506 conditions – for example, as to the number and the nature of purchasers, and as to a purchaser representative's qualifications – are also subject to a "reasonable belief" standard. This approach reflects a practical judgment that the usefulness of

Rule 506 would be substantially undermined if the exemption could be lost based on second-guessing of reasonable but erroneous determinations made by offering participants. A similar logic applies to the provisions mandated by Section 201(a)(1): issuers' willingness to engage in new offering practices and techniques that could involve general solicitation – encouragement of which is clearly the policy goal underlying Section 201(a) – would be significantly inhibited if the new purchaser condition is an absolute, rather than a "reasonable belief", standard. We therefore recommend that the Commission make clear that the "reasonable belief" approach extends to the new Rule 506 provision.

2. The provision to be added to Rule 506, requiring "reasonable steps" to determine "accredited investor" status, should not be overly prescriptive.

Under Section 201(a)(1) of the JOBS Act, the rule changes relating to Rule 506 offerings must include a requirement that the issuer take reasonable steps to determine "accredited investor" status, "using such methods as determined by the Commission." We would urge the Commission to implement this directive by adopting a flexible and principles-based non-exclusive safe harbor rule.

Rule 506 offerings are an enormously important means of capital raising, and are used in a wide variety of circumstances. Unduly detailed or prescriptive rules for determining investors' status would therefore have the potential to result in significant economic harm. There is also a substantial body of market practice that has built up over the many years that Regulation D has been in effect. The new provisions for determining investor status should recognize and build on this body of market practice, rather than seeking to replace it.

We therefore believe that these new provisions should be principles-based, and framed by reference to the desired outcome, rather than laying out detailed procedural requirements. The new provisions should be flexible enough to accommodate web-based offering techniques, as they – and other technology-driven offering practices and techniques – may evolve over time. They should also, to the extent possible, build on other existing requirements and practices – for example, they might usefully address whether a broker-dealer's suitability and other account-opening procedures would typically satisfy the new Rule 506

standard. We would also urge that these provisions be set up as a non-exclusive safe harbor (in the manner of current Rule 144A(d)), rather than as one or more exclusively prescribed methods.

3. The Commission should give careful consideration to the interplay of the amended Rules 144A and 506 with Regulation S.

We believe that one of the more challenging issues introduced by Section 201 of the JOBS Act is how the amended Rule 144A and amended Rule 506 should relate to Regulation S. Rule 500(g) of Regulation D (regarding coincident Regulation S offerings) – and more broadly, the non-integration position set forth in Release No. 33-6863 (April 27, 1990) – were of course fashioned at a time when an exempt offering in the United States could not include general solicitation or general advertising. But we think it is critically important that issuers retain the ability to effect simultaneous U.S. exempt and Regulation S offerings. We also think that the policy determination reflected in Section 201 of the JOBS Act suggests that the Commission should be strive to reconcile the new general solicitation freedom with Regulation S requirements.

At the very least, the Commission should preserve existing market flexibility by confirming that the non-integration position will continue to apply in situations where a Rule 144A or Rule 506 offering does not involve a general solicitation or general advertising. Beyond that – and perhaps beyond the scope of the statutorily-required 90-day rulemaking – we think it is incumbent on the Commission to re-examine the "directed selling efforts" concept, in the light of evolving technology and offering techniques, and also in the light of the terms and policy objectives of Section 201.

The current definition of "directed selling efforts", and related Regulation S provisions, do not prohibit all activities that would constitute "offers" under the Securities Act. Rather, in crafting Regulation S (and similar rules, such as Rules 135c and 135e), the Commission has traditionally applied a balancing approach, weighing market needs and policy objectives against the risk of inappropriate conditioning of the U.S. market. Indeed, the whole focus of the "directed selling efforts" definition is on whether given activity has the purpose or effect of "conditioning" the market in the United States. In addressing the consequences of the

mandated Rule 144A and Rule 506 amendments, the Commission should apply that same approach once again, focusing on expected U.S. market impact, based on its assessment of current market conditions and in light of the JOBS Act.

Applying such an approach, we think that there will be ample scope to liberalize the "directed selling efforts" concept, particularly where the communications in question are inadvertent, or at least not intended to induce purchases of securities, or where the communications are limited in scope—for example, in the manner permitted by Rule 134, or perhaps Rule 135. We also think that approach can be calibrated by reference to the existing Regulation S categories, with Category 1 issuers being the least in need of restriction. At the same time, in fashioning any adjustments, the Commission should take into account the structure of Regulation S — for example, the 40-day distribution compliance period applicable to Category 2 issuers, and the even more stringent compliance requirements imposed on Category 3 issuers, which may limit the "conditioning" impact of various communications. While we think that reconciling the various competing considerations may prove to be challenging, we also think it is very important that the Commission promptly attempt to do so.

* * * * *

Members of the Committee would be pleased to answer any questions you may have concerning our comments.

Respectfully submitted,

Robert E. Buckholz
Chair
Committee on Securities Regulation

Drafting Subcommittee:
Margaret A. Bancroft
Bruce C. Bennett
Robert E. Buckholz
Stephen P. Farrell
Sandra L. Flow
Richard M. Kosnik

Securities Regulation Committee

Margaret A. Bancroft
Bruce C. Bennett
Bernd Bohr
Robert E. Buckholz
Steven G. Canner
John Crowley
Sharon M. Davison
Francis Facciolo
Stephen P. Farrell
Stuart Fleischmann
Sandra L. Flow
William Fogg
Leslie K. Gardner
Arunas E. Gudaitis
Jeffrey M. Haber
Lois F. Herzeca
Paul Immerman
Valerie Ford Jacob
Marc D. Jaffe
Ronald Janis
Chad Johnson
Stacy J. Kanter
Jeffrey T. Kern
Katia Kirova
Michael T. Kohler
Richard M. Kosnik
Simon M. Lorne
Kenneth L. MacRitchie
Mark McElreath
Trevor Ogle
Luis R. Penalver
Christoph A. Pereira
Vincent J. Pisano
Roxane Reardon
Marc M. Rossell
Raphael M. Russo
Cara Schembri
David Sewell
Alexander M. Sheers
Roslyn Tom
Priya Velamoor
Jonathan Walcoff
Anthony Zaccaria