EXAMINING THE SEC'S FAILURE TO IMPLEMENT TITLE II OF THE JOBS ACT AND ITS IMPACT ON ECONOMIC GROWTH

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

APRIL 17, 2013

Printed for the use of the Committee on Financial Services

Serial No. 113–15

U.S. GOVERNMENT PRINTING OFFICE

80–881 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

HOUSE COMMITTEE ON FINANCIAL SERVICES

JEB HENSARLING, Texas, *Chairman*

GARY G. MILLER, California, *Vice Chairman*
SPENCER BACHUS, Alabama, *Chairman Emeritus*
PETER T. KING, New York
EDWARD R. ROYCE, California
FRANK D. LUCAS, Oklahoma
SHELLEY MOORE CAPITO, West Virginia
SCOTT GARRETT, New Jersey
RANDY NEUGEBAUER, Texas
PATRICK T. McHENRY, North Carolina
JOHN CAMPBELL, California
MICHELE BACHMANN, Minnesota
KEVIN McCARTHY, California
STEVAN PEARCE, New Mexico
BILL POSEY, Florida
MICHAEL G. FITZPATRICK, Pennsylvania
LYNN A. WESTMORELAND, Georgia
BLAINE LUETKEMEYER, Missouri
BILL HUIZENGA, Michigan
SEAN P. DUFFY, Wisconsin
ROBERT HURT, Virginia
MICHAEL G. GRIMM, New York
STEVE STIVERS, Ohio
STEPHEN LEE FINCHER, Tennessee
MARLIN A. STUTZMAN, Indiana
MICK MULVANEY, South Carolina
RANDY HULTGREN, Illinois
DENNIS A. ROSS, Florida
ROBERT PITTENGER, North Carolina
ANN WAGNER, Missouri
ANDY BARR, Kentucky
TOM COTTON, Arkansas
KEITH J. ROTHFUS, Pennsylvania

MAXINE WATERS, California, *Ranking Member*
CAROLYN B. MALONEY, New York
NYDIA M. VELÁZQUEZ, New York
MELVIN L. WATT, North Carolina
BRAD SHERMAN, California
GREGORY W. MEEKS, New York
MICHAEL E. CAPUANO, Massachusetts
RUBÉN HINOJOSA, Texas
WM. LACY CLAY, Missouri
CAROLYN McCARTHY, New York
STEPHEN F. LYNCH, Massachusetts
DAVID SCOTT, Georgia
AL GREEN, Texas
EMANUEL CLEAVER, Missouri
GWEN MOORE, Wisconsin
KEITH ELLISON, Minnesota
ED PERLMUTTER, Colorado
JAMES A. HIMES, Connecticut
GARY C. PETERS, Michigan
JOHN C. CARNEY, JR., Delaware
TERRI A. SEWELL, Alabama
BILL FOSTER, Illinois
DANIEL T. KILDEE, Michigan
PATRICK MURPHY, Florida
JOHN K. DELANEY, Maryland
KYRSTEN SINEMA, Arizona
JOYCE BEATTY, Ohio
DENNY HECK, Washington

SHANNON McGAHN, *Staff Director*
JAMES H. CLINGER, *Chief Counsel*

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

PATRICK T. MCHENRY, North Carolina, *Chairman*

MICHAEL G. FITZPATRICK, Pennsylvania, *Vice Chairman*
PETER T. KING, New York
MICHELE BACHMANN, Minnesota
SEAN P. DUFFY, Wisconsin
MICHAEL G. GRIMM, New York
STEPHEN LEE FINCHER, Tennessee
RANDY HULTGREN, Illinois
DENNIS A. ROSS, Florida
ANN WAGNER, Missouri
ANDY BARR, Kentucky

AL GREEN, Texas, *Ranking Member*
EMANUEL CLEAVER, Missouri
KEITH ELLISON, Minnesota
ED PERLMUTTER, Colorado
CAROLYN B. MALONEY, New York
JOHN K. DELANEY, Maryland
KYRSTEN SINEMA, Arizona
JOYCE BEATTY, Ohio
DENNY HECK, Washington

CONTENTS

EXAMINING THE SEC'S FAILURE TO IMPLEMENT TITLE II OF THE JOBS ACT AND ITS IMPACT ON ECONOMIC GROWTH

Wednesday, April 17, 2013

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:17 p.m., in room 2128, Rayburn House Office Building, Hon. Patrick T. McHenry [chairman of the subcommittee] presiding.

Members present: Representatives McHenry, Fitzpatrick, Duffy, Grimm, Fincher, Hultgren, Ross, Wagner, Barr; Green, Cleaver, Maloney, Sinema, Beatty, and Heck.

Ex officio present: Representatives Hensarling and Waters.

Also present: Representative Rothfus.

Chairman MCHENRY. The subcommittee will come to order.

This is the Subcommittee on Oversight and Investigations of the Financial Services Committee, and our hearing today is entitled, "Examining the SEC's Failure to Implement Title II of the JOBS Act and its Impact on Economic Growth."

Without objection, the Chair is authorized to declare a recess of the subcommittee at any time. The Chair notes that Members have before them a packet of materials labeled the "Chairman's Exhibits," which some Members may wish to refer to when questioning the witness today. The packets containing Chairman's Exhibits 1 through 7 are labeled accordingly. Our witness, Commissioner Walter, has these exhibits in a binder before her. These, in essence, were what we provided the Commission last week.

Without objection, members of the full Financial Services Committee who are not members of the subcommittee may sit on the dais and participate in today's hearing.

We will now turn to the subject matter of today's hearing. We will have 10 minutes of opening statements per side.

Commissioner Walter, I know you are well-versed at testifying before Congress, so I hope you enjoy the show here.

But with that, I will recognize myself for 7 minutes.

In April of last year, with overwhelming bipartisan support from Congress, the JOBS Act was signed into law by President Obama. I was at the Rose Garden that day. Recognizing the difficult economic times, the new law provided hope for an economic recovery. And now, 1 year later, unfortunately very little has been com-

pleted, due to the SEC's delay. In particular, the lifting of the ban on general solicitation under Title II, which would enable private issuers to advertise for investors, continues to linger as a proposed rule.

In August of last year, I sought internal communication from the SEC to understand the delay to Title II of the JOBS Act. Emails provided to the Oversight Subcommittee revealed that the SEC disregarded the law in response to concerns expressed by a single lobbyist. An internal SEC email dated May 9, 2012, reveals that the Office of the General Counsel (OGC) advised the Division of Corporation Finance that due to the implementation deadline for Title II, the SEC should issue an interim final rule without notice and comment. The OGC was dubious that the SEC could enforce the ban on general solicitation against those that comply with Title II of the JOBS Act.

The email indicates that in Rule 506, private issuers advertising for accredited investors, the Commission would likely lose a legal challenge. Specifically, Thomas Kim, Chief Counsel of the Division of Corporation Finance, wrote, "We met with Rich Levine and Aseel Rabie this morning to discuss OGC's comments on the term sheet that we received yesterday. Their biggest comment, which they conveyed more fully at our meeting, is on process. As you know, they have been concerned about what happens on Day 91. Can the SEC enforce the ban on general solicitation in Rule 506 offerings after it fails to meet the deadline Congress has imposed for lifting the ban on general solicitation in Rule 506 offerings? I think they're dubious as to whether we could." That is an important phrase.

Thus, Mr. Kim relayed OGC's concerns to the then-Director of Corporation Finance, Meredith Cross. On May 23rd, Ms. Cross emailed a term sheet which recommended that the SEC proceed with the interim final rules to Commissioners on May 23rd.

On August 7th, an email from a lobbyist with the Consumer Federation of America expressed strong reservations regarding the SEC's plans to adopt an interim final rule without notice and comment. The email stated that the affected groups "are prepared to be quite aggressive in voicing our concerns."

Shortly thereafter, then-Chairman Mary Schapiro emailed Director Cross with the subject line, "Please don't forward." She certainly didn't forward it, but we did get the documents as a matter of public record.

The content said, "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..."

In August, Chairman Schapiro informed the remaining Commissioners of her decision to dispense with an interim final rule and proceed with a proposed rule.

Consequently, on August 8th, Commissioner Gallagher emailed Chairman Schapiro with the subject line, "I am furious." The email stated, "I just got word about the latest change to general solicita-

tion. 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."

It is clear that Chairman Schapiro prioritized special interest groups over the law. This is entirely unacceptable.

Commissioner Walter, Title II of the JOBS Act is clear in its purpose. There is no debate that Congress imposed this law precisely to eliminate the ban on general solicitation for Rule 506 private offerings to accredited investors.

Applying the most basic Chevron analysis, the SEC's current broad ban on general solicitation is not authorized by statute, specifically Title II of the JOBS Act. While the contents of Title II may not please some, that does not provide the SEC authority to deny the law nor deny the reality that the law was passed by a wide bipartisan majority.

As of July 4, 2012, due to the expiration of the implementation deadline, Title II of the JOBS Act has changed the law.

It would appear to me that with this change, the SEC lost the authority to enforce its ban on general solicitation against issuers which abide by Title II. I understand the SEC is under new leadership, and with new leadership comes changes, obviously, and you as a Commissioner are certainly working with the new Chairman to set that agenda and hopefully to work together to come to some accord. And I hope the SEC finalizes the rules under Title II of the JOBS Act as well as a few other provisions that I have talked to Commissioner Walter about over the last year or so.

As promised in that Rose Garden ceremony 1 year ago this month, the JOBS Act can have a major impact and help get this economy moving again, and help small businesses, even large small businesses get access to the capital that they need.

Commissioner Walter, I want to thank you for your service to our government. You have been a faithful public servant. As I said to you, I have high esteem for your intellectual capacity, and even though we at times may disagree on different ideas and different laws and different regulations, I certainly appreciate your willingness to be here today, and I want to thank you for your time.

With that, I will recognize the ranking member of the subcommittee, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman, and I thank you for holding this hearing today. I would also like to thank Commissioner Walter for appearing today. I know that you have a very busy schedule, and there is much you are attending to. In fact, I have made some notes as to some of the things that you are doing.

According to the information that I have, the SEC oversees approximately 35,000 entities, 11,000 investment advisers, 9,700 mutual fund and exchange trade funds, 4,600 broker dealers with more than 160,000 branch offices, approximately 9,500 reporting

companies, approximately 460 transfer agents, 17 national security exchanges, 8 active clearing agencies, 10 nationally recognized statistical rating organizations, and the list goes on, as we say. But I do want you to know that we appreciate the stellar job that the SEC does.

As a matter of fact, we seem to think that the SEC can do a lot more with less. We have not funded the SEC at the levels that have been requested, and my hope is that we will be able to help you get fully funded so that you will have adequate resources to do all of the many things that we inundate you with.

I would also like to take a moment and congratulate the new Chairman. I am told that this is a statutory title, and as such, I want to make sure that I honor what the law requires. But I want to congratulate Chairman White and I look forward to visiting with her. And I assure you that I will keep her in my prayers as well.

I would like to also mention that Chairman McHenry and I have demonstrated some bipartisanship as it relates to the JOBS Act. While it is not in Title II of the JOBS Act, Chairman McHenry and I were able to accomplish something that I thought was significant. He led the effort to create a framework for crowdfunding and a reporting exemption in capital markets. I was honored to offer an amendment that would disqualify individuals convicted of securities fraud from participating in crowdfunding. And I am honored to say, Mr. Chairman, that I think that you and I are still working together well and I am looking forward to producing similar legislation with you in the future.

I want to mention one more thing as I move through rather quickly, and I will probably give back some time to the chairman. We in Congress have demanded much from the SEC over the last 3 years, all while asking you to meet goals with less money than you have asked for. We should not trivialize in any way the responsibility that you have in regulating our capital markets and protecting our investors. Not only do you regulate the markets, but you do have as a mandate protecting investors as well.

More importantly, the SEC should not set aside its rulemaking responsibilities under the Dodd-Frank Act to implement some other legislation. I believe that you are trying to do both as expeditiously as you can, and I appreciate your hard work.

Both of these pieces of legislation, Dodd-Frank and the JOBS Act, are important, and we would hope that as we move forward, we will get them all done as quickly and expeditiously as possible.

Again, welcome to the committee. I look forward to hearing your testimony. I have had a chance to peruse it. I also look forward to presenting some questions about some of the things that I believe to be relevant.

Thank you, Mr. Chairman, for the time, and I will yield back the balance of my time.

Chairman MCHENRY. I thank the gentleman, and I certainly thank him for his willingness to work with me on that provision. And as a former judge, you know a lot of criminal law quite well.

Mr. GREEN. Thank you, Mr. Chairman.

Chairman MCHENRY. At this point, I will recognize the lead sponsor of the JOBS Act, which was signed just over a year ago

today, actually 13 months ago now, the gentleman from Tennessee, Mr. Fincher, for 1½ minutes.

Mr. FINCHER. Thank you very much, Mr. Chairman, for holding this hearing. As a lead sponsor of the JOBS Act, the gentleman from Delaware, Mr. Carney, and I believe that something had to be done to help small business and entrepreneurs create more jobs on Main Street. It is no surprise that Main Street continues to feel the brunt of a lagging economy.

In my home State of Tennessee, the unemployment rate is 7.8 percent, yet when you look at the individual counties in my district, the unemployment rates are a lot higher: A staggering 12.4 percent in Obion County; 11.6 percent in my home County of Crockett; and 9.3 percent in Shelby County, our State's most populous county of nearly 1 million people.

These numbers are reflective of the frustrations I hear from my constituents all the time: "What are you doing to help create an environment where new ideas and companies can succeed, grow, and create more jobs?"

While it has been nearly a year since the JOBS Act was enacted into law, not all sections of the bill have been implemented. Mr. Chairman, a car runs best when every component of the engine is in good working order and works together. In this case, if all sections are not enacted and working together, the full benefit of the JOBS Act to our economy won't be realized.

I look forward to hearing Commissioner Walter's testimony about how she plans to support implementation of the remaining sections of the JOBS Act. And I yield back.

Chairman MCHENRY. I thank the gentleman.

Mrs. Maloney is recognized for 2½ minutes.

Mrs. MALONEY. Thank you, Mr. Chairman, and Mr. Ranking Member, and welcome, Commissioner, and thank you for your very hard work for all of us.

I supported the JOBS Act and worked with the chairman of the subcommittee and others to strengthen the investor protections and the overcrowding title of the bill. And we also worked together on the—and I believe in the on-ramp that we created for small companies so that they can go public with less burden and so that these small companies can create capital, that they are more able to handle the compliance that larger companies to relieve it for the smaller ones.

Part of it was to allow them to focus their growing businesses on raising private capital in the markets and to be able to go to the public markets.

And that is why I believe that fully funding the SEC is so critically important. We put a great deal of burden on the SEC with the enactment of Dodd-Frank, covering whole areas which were not regulated, bringing them into regulation. Now, with the JOBS Act, that needs to be implemented, and they are a very important continuation of focusing on and working on investor protection.

I strongly support the efforts of the ranking member of the full committee and the ranking member of this subcommittee, and he mentioned it in his opening statement, to have full funding for the SEC in the 2014 budget.

I don't see how the SEC can take on these new burdens without the staff to implement it. So at the very least, we should give them full funding.

I also support the work of the ranking member of the full Financial Services Committee and the ranking member of this subcommittee and the minority budget views which also urge full funding. I believe that the public and investors should have the opportunity to comment and present arguments and input on the rules that they will be implementing for the JOBS Act. And I believe the Commissioner was correct in allowing more time—not that you want to delay anything—but it is important to get the rules right, and if the public and others are demanding and wanting comment time, it is appropriate to allow their voices to be heard.

So I look forward to hearing your testimony today, and I thank you again, Mr. Chairman and Mr. Ranking Member, for calling this hearing. Thank you.

Chairman MCHENRY. I thank my colleague, and I thank her for working with me on the crowdfunding provision in the JOBS Act as well.

With that, I will recognize Mrs. Wagner of Missouri for 1½ minutes.

Mrs. WAGNER. Thank you very much, Mr. Chairman. Ever since the JOBS Act was passed a little over a year ago, the mood amongst entrepreneurs and investors in the St. Louis area, an area which I am proud to represent, has gone from excitement and anticipation to one of frustration and bewilderment at the SEC's inability to implement vital portions of the bill, in particular Title II.

Adding insult to injury, it appears that the SEC's inaction on Title II certainly is not due to the complexity of the issue itself. Indeed, it is both ironic and unfortunate that a bipartisan success such as the JOBS Act has been held up at the SEC for what appear to be political reasons.

The JOBS Act was a success not just because of the policy it put in place, but because of the bill's implicit recognition that it is entrepreneurs and risk takers and fresh ideas which power the American economy.

The idea that one Federal agency would put all of this on hold for no valid reason is, quite frankly, part of the reason why so many people have lost faith in Washington.

With this in mind, Mr. Chairman, I look forward to hearing today about when exactly we can expect the JOBS Act to be fully implemented.

Thank you. I yield back.

Chairman MCHENRY. I thank my colleague. I now recognize Mrs. Beatty for 2½ minutes.

Mrs. BEATTY. Thank you, Mr. Chairman, and Mr. Ranking Member, for holding this hearing. And certainly, Ms. Walters, I thank you for being here today, and of equal importance, I thank you for your service to the American people.

We are eager to hear your comments about the SEC's role in the implementation of Title II of the JOBS Act. So let me start with telling you what I hope to hear today.

I hope that this hearing sheds light on three important concerns of mine: one, making sure that the SEC has the necessary funds to achieve its mission in regulating markets; two, getting new rules right rather than simply getting them done; and three, ensuring that the investors are protected.

We know that since the Great Recession, the SEC has been under intense pressure to increase its regulatory oversight of financial firms in an effort to combat both core risk management within financial markets and also to detect and prosecute investor fraud. And frankly, as we have heard from several of my colleagues, in this environment, the Commission has also been charged with implementing a number of additional rules and regulations under the comprehensive Dodd-Frank Wall Street Reform and Consumer Protection Act. And now, with the enactment of the JOBS Act last year, the SEC has been instructed to conduct further studies, rulemaking and oversight functions.

So I would like to make it clear that there does seem to be some inconsistencies as to the expectation of the Commission with respect to its rulemaking authority. Specifically, given that there are a number of final rules yet to be issued under Dodd-Frank, which in large part is designed to increase investor protection, while the JOBS Act wasn't signed into law until nearly 2 years later and is designed to relax security. So hopefully, we will be able to address some of these issues, and I just simply want to say thank you, and I yield back.

Chairman MCHENRY. I thank the gentlelady.

We will now recognize our distinguished witness. Ms. Elisse Walter is a Commissioner with the U.S. Securities and Exchange Commission. She served as the Acting Chairman of the SEC from December 2012 to April 2013, actually until last Friday.

Before the SEC, the Commissioner held several positions, including with the CFTC and with FINRA. Commissioner Walter received a B.A. from Yale and her J.D. from Harvard Law School, a few small institutions which have more than a regional name.

So thank you for your willingness to testify today. You will be recognized for 5 minutes to summarize your opening statement. And without objection, your written statement will be made a part of the record. With that, we will now recognize Commissioner Walter

STATEMENT OF THE HONORABLE ELISSE B. WALTER, COMMISSIONER, U.S. SECURITIES AND EXCHANGE COMMISSION

Ms. WALTER. Chairman McHenry, Ranking Member Green, and members of the subcommittee, thank you for the opportunity to testify today regarding our implementation of Title II of the Jumpstart Our Business Startups Act (JOBS Act). Implementing Title II and the other provisions of the JOBS Act is a top priority for the Commission.

As you know, Title II requires the Commission to revise Rule 506 of our Regulation D to allow general solicitation or general advertising for certain offers and sales of securities provided that all purchasers are accredited investors. The rules the Commission adopts must require issuers to take reasonable steps to verify that pur-

chasers of the securities are accredited investors using such methods as determined by the Commission.

The Title II rulemaking was required to be completed within 90 days of enactment of the JOBS Act, and I am committed to finalizing these rules and working closely with my colleagues to do so expeditiously.

Prior to enactment, a rule-writing team was formed consisting of staff from across the Commission, including economists from the Division of Risk Strategy and Financial Innovation. And in August, the Commission issued for public comment proposed rules to implement Title II.

Under the proposed rules, companies issuing securities in an offering conducted under Rule 506 of Regulation D would be permitted to use general solicitation or general advertising so long as the issuer takes reasonable steps to verify that the purchasers of the securities are accredited investors.

The proposal explains that in determining such reasonableness, issuers should consider the facts and circumstances of the transaction. Meanwhile, the proposed rules would preserve the existing portions of Rule 506 as a separate exemption so that companies conducting Rule 506 offerings without the use of general solicitation or general advertising would not be subject to the new verification requirement.

To aid the rulemaking process and to increase the opportunity for public comment, the Commission permitted interested parties to submit comments regarding this provision even prior to issuing its proposal. These pre-proposal commenters expressed a variety of views, including how the verification process should work. Some focused on the capital formation benefits they believed the rulemaking could provide, while others raised serious investor protection concerns that would arise if general solicitation was permitted without additional safeguards.

The comment period for the proposal, which ended in October, resulted in more than 220 letters. Those letters have generated meaningful discussion regarding the issues and have been very useful in our consideration of how to implement Title II.

As with the pre-proposal stage, commenters on a proposal were sharply divided in their views. On the one hand, a number of commenters expressed general support for the proposals, with many stating that eliminating the ban on general solicitation and general advertising would facilitate capital formation.

In addition, several supporters recommended that the proposed framework for verifying accredited investor status be supplemented by including a nonexclusive list of specific verification methods that could be relied upon by issuers.

On the other hand, a number of commenters expressed general opposition to the Commission's proposal, with some stating that the proposed rules, if adopted, would result in an increase in fraudulent offerings.

A number also recommended that the Commission consider additional safeguards such as those recommended in certain pre-proposing release comment letters.

Currently, staff in the Divisions of Corporation Finance and Risk Strategy and Financial Innovation are developing recommendations

for the Commission's consideration as to how best to move forward with the implementation of Title II.

Although the Commission and the staff continue to work on implementing Title II, I fully recognize the need to move forward on this rule quickly, and I can assure you that I am committed to doing that.

Implementing the JOBS Act is a top priority for the Commission, and getting this particular rulemaking done is a matter on which I believe we need to be acutely focused.

Thank you again for inviting me to appear before you today. I would be pleased to answer any questions you may have.

[The prepared statement of Commissioner Walter can be found on page 42 of the appendix.]

Chairman MCHENRY. I thank the Commissioner, and I thank you for your service to your government.

I will now recognize myself for 5 minutes. If you look at the first exhibit in the exhibit book, the last two sentences of the first paragraph, "Can the SEC enforce the ban on general solicitation in Rule 506 offerings after it fails to meet the deadline Congress has imposed for lifting the ban on general solicitation in Rule 506 offerings? I think they're dubious as to whether we could."

So the sentence before those two, though, says that legal counsel "have been concerned about what happens on Day 91." What were the SEC lawyers concerned about on Day 91?

Ms. WALTER. As the JOBS Act was written, the ban on general solicitation was not automatically lifted. There was a determination by Congress to mandate that the SEC conduct rulemaking to lift it. So on Day 91, the ban on general solicitation would remain in effect. However, there was an expression of congressional policy that on a going-forward basis, the Commission should lift the ban.

So as I understand it, what they were concerned about is if we were to find a situation where general solicitation was being conducted and bring a case against that person for violating the law, in the absence of another exemption from registration, there was concern that a court or other tribunal might not be willing to impose relief because of the congressional policy determination.

Chairman MCHENRY. So, the enforceability of said ban is questionable?

Ms. WALTER. The question of enforceability in the sense of whether we would be able to obtain relief in that instance.

Chairman MCHENRY. Okay. So you agree with the SEC lawyers' approach here?

Ms. WALTER. I agree that there was an issue. I personally was not that troubled by this issue.

Chairman MCHENRY. Okay. The next exhibit is an email which states that, "Meredith supported going straight to a final rule..." In this context, and we provided these emails to you last week, is "Meredith" in reference here to Meredith Cross?

Ms. WALTER. Yes.

Chairman MCHENRY. Okay. Do you concur with her assessment?

Ms. WALTER. My preference was always to have notice and comment. The Division of Corporation Finance determined to recommend at one point that we go without notice and comment for the rule.

As I understood it, their primary reasoning was that they didn't believe we would obtain very much information in the comments that were made given what we had heard already. I believe that the over 200 comment letters, which were quite substantive and interesting to me and my colleagues that we did receive, showed that in fact was not the case.

Chairman MCHENRY. So if you look at Exhibit 3—we are just going to walk through this process—dated May 23, 2012, the implementation deadline was July 4th for this provision of the JOBS Act. That would have given you 90 days. So Exhibit 3 is dated before the implementation deadline.

This is an email you are included on as a Commissioner, and it comes from Meredith Cross stating that, "As you will see, we are recommending that the Commission proceed with an interim final rule." There are a number of other pieces of information there, obviously.

So almost a year ago, you had a draft in good enough condition to circulate among all Commissioners, isn't that right?

Ms. WALTER. This was a draft term sheet, and let me explain a little bit about our term sheet process, which has been quite valuable for us. It is one of the earlier steps in rulemaking in that it outlines what the rule would do. It is not a draft of the actual text of the rule accompanied by the release which would be issued if a rule was proposed or adopted.

Chairman MCHENRY. Okay. But you did have this term sheet?

Ms. WALTER. We did.

Chairman MCHENRY. Okay. How long does it normally take from that point to actually have a rule?

Ms. WALTER. There really is no—

Chairman MCHENRY. Apparently pretty long.

Ms. WALTER. There really is no standard length of time. What the term sheet is meant to start is the discussion process and to get an initial feeling from each of the individual Commissioners of where they stand on the major issues in a rulemaking process.

Chairman MCHENRY. Okay, not to interrupt, but I only have 20 seconds left.

But at that point, the Commission had intended to meet its statutory deadline?

Ms. WALTER. Certainly, we always intended to try to meet the statutory deadline.

Chairman MCHENRY. Apparently not very consistently, since we are now approaching almost 11 months after this email with the term sheet.

So the question here is that the staff recommended a final rule, and yet there was a pullback. Did you think a pullback at that point was appropriate?

Ms. WALTER. I would point out, too, before this, the staff had recommended a proposal. So this was a very fluid process. Staff first recommended a proposal, then recommended a final rule, and then it was changed back to a proposal. As I said, throughout that process my preference was to go with a proposed rule.

Chairman MCHENRY. I now recognize Ranking Member Waters of the full Financial Services Committee for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman. I have a question about SEC resources and the agency's ability to ferret out fraud given the expanded ability of securities issuers to use general advertising and solicitation under Title II of the JOBS Act.

Will the SEC need to expand the number of enforcement staff looking for fraud under Rule 506 offerings, given the expansion of rule Rule 506 under the Act?

Ms. WALTER. Thank you, Ranking Member Waters. It is imperative, and I have believed all along and worked with the staff very closely, that when this rule is enacted, as with many rules, but this rule in particular because we have received serious comments that this rule may increase the opportunity for fraud, that there be an intensive review program to determine what impact the rule has. Does it lead to offerings being sold to the wrong people? Does it lead to increased fraud, of course, compared to the situation with respect to other private placements? And I do believe that we will need to expend both examination and enforcement resources that we would not otherwise have to expend.

Ms. WATERS. The JOBS Act removes certain investor protections for all offerings made under Rule 506 by eliminating the ban on general solicitation and advertising so long as only accredited investors are purchasers. Given the updates made under the JOBS Act, is it appropriate for the Commission to perhaps reexamine the definition of accredited investor?

Ms. WALTER. Yes, I believe it is. I have often said in this process that I agree with both sides of this debate. I believe we should lift the ban on general solicitation and focus on those who purchase in private offerings, not those to whom the offer is made. But I also believe that we have to be careful about who those people are. It is my view that the accredited investor definition is outdated, at least the numerical standards need to be looked at, but in fact my preference would be to change the criteria entirely as to how we attempt to measure sophistication and access to information. And I think that would be a significant investor protection effort well worth undertaking.

Ms. WATERS. Is the Commission applying the same standards to the rulemakings under the JOBS Act as what they have applied to rulemakings under the Wall Street Reform Act? For instance, under the general solicitation rulemaking, did the Commission consider the losses that might be sustained by allowing investors to purchase investments that are marketable under the newly expanded Rule 506 but would never have been so successful in a registered offering that required full disclosure?

Ms. WALTER. As we were required to do, we did conduct an economic analysis which is contained in the proposal release. Of course, we have not yet issued an adopting release, and part of our responsibility in reviewing the comments is to determine what we have heard about the impact of the rule and to explain the economic impact of the decisions that we make when we adopt.

Ms. WATERS. Thank you very much.

I yield back the balance of my time.

Chairman MCHENRY. We will now recognize the vice chair of the subcommittee, Mr. Fitzpatrick of Pennsylvania.

Mr. FITZPATRICK. Thank you, Mr. Chairman. Commissioner, thank you for your testimony and your time before the committee today.

The JOBS Act passed the Congress over a year ago, passed the House of Representatives on March 8, 2012. The vote was 390–23, a pretty significant bipartisan effort. Two weeks later, it sailed through the Senate. The vote was 73–26, and it was signed, of course, by the President on April 5th. So the rules were supposed to be promulgated within 90 days, or by July 4th.

I would ask you to refer to exhibits 2 and 3 if they could go up on the screen. Exhibit 2 is an email from Thomas Kim. In the first paragraph he said, "Meredith supported going straight to a final rule, as we could then have a pilot period where we could assess how issuers are verifying accredited investors and whether or not these investors are, in fact, accredited, after which point we could decide whether to adopt final final rules or amend the rule to address any concerns. She was more comfortable doing this as an interim final temporary rule, which means it would sunset at some future date."

Exhibit 3 is Meredith Cross' email of May 23rd: "Attached for your review is a draft term sheet for the rulemaking to remove the ban on general solicitation..."

It appears from the emails, Commissioner, contained in exhibits 2 and 3 that Meredith Cross, the Director of the Division of Corporation Finance at the SEC, agreed that the best course of action was to go to a final rule.

Do you recall her support for an interim final rule prior to implementing Section 201?

Ms. WALTER. I am sorry, I couldn't hear the last part of your question, her support for the rule.

Mr. FITZPATRICK. Do you recall her support for an interim final rule to implement Section 201?

Ms. WALTER. Yes, I do.

Mr. FITZPATRICK. Was she the most knowledgeable person within the organization?

Ms. WALTER. She was the head of the division in charge of implementing the rule as a matter of substance, and a very knowledgeable person.

Mr. FITZPATRICK. Was her support based on concerns over the enforceability of the ban on general solicitation?

Ms. WALTER. As I understand from talking to her at the time, her support was more based on the fact that she felt that there wasn't a great deal of benefit to be gained from the comment process. And as I said earlier, I believe the comments that have come in have shown that there was a great deal of benefit to be gained. And my colleagues in the Division of Corporation Finance agree with that.

Mr. FITZPATRICK. Commissioner, to what extent were you an active participant in the discussions and negotiations pertaining to the implementation of Title II of the JOBS Act?

Ms. WALTER. I was an active participant in the sense that I was to vote as well as the other four Commissioners.

Mr. FITZPATRICK. Do you agree that Title II of the JOBS Act is a relatively straightforward and simple set of provisions that pro-

vide only limited discretion to the SEC with regard to implementation?

Ms. WALTER. I agree that the statute itself is straightforward, but it also raises serious investor protection concerns that do not impact necessarily whether one moves ahead. We have a congressional directive to move ahead with lifting the ban. I agree with lifting the ban. I also believe that as the Federal agency which is charged with protecting the markets, facilitating capital formation, and protecting investors, it is important that we look at those investor protection concerns as well.

I also believe that although it is sometimes posed as a balance between investor protection and capital formation, the two go hand in hand, and they are really dependent on each other. If we don't take care of investors they will have no confidence in the markets, they will not invest, entrepreneurs will not be able to build businesses, and we won't be able to have sufficient capital formation.

Mr. FITZPATRICK. So what was the problem in getting the rule implemented within 90 days as the law required?

Ms. WALTER. First, I will say the rulemaking process—I don't know that I have ever seen a rule proposed and adopted in 90 days. If I have, they are rare, few, and far between. The rulemaking process generally takes longer than that. There are of course exceptions where it takes less time than that. The answer here is that responsible people, and I will particularly cite which influenced me in the comment process, that our Investor Advisory Committee which if you look at the constituency of it is rather broad, wide and deep, people from all walks of life, from institutional investors, representing retail investors, from businesses as well, came unanimously to us with recommendations saying you should not move ahead with this without addressing the following investor protection problems.

Our mandate is to lift the ban. Our mandate is also to consider investor protection. That made it more complicated than it seems on its face.

Chairman MCHENRY. Mr. Cleaver is recognized for 5 minutes.

Mr. CLEAVER. Thank you, Mr. Chairman.

Madam Chairwoman, my concern is that the things that were principally intended or the ones that are not being implemented and the things that we probably didn't think would happen are the ones getting the most attention. Would you agree that the one part of the JOBS Act which is being used more than anything else is the one which allows companies to avoid the executive pay rule?

Ms. WALTER. The part of the JOBS Act that is now in effect is Title I, which basically is the IPO on-ramp, and it does create a category of smaller companies which among other things, do not have to comply with the executive pay rule.

Mr. CLEAVER. So you are saying "yes?"

Ms. WALTER. Yes.

Mr. CLEAVER. Thank you. The SEC was created after the Great Depression in part as a reaction to all of the fraudulent practices that had gone on that probably contributed to the Great Depression. So if we begin to relax any of the regulations in the JOBS Act, do you think that it would lead to any additional jump in fraudulent activity?

Ms. WALTER. I don't know the answer to that. And that is why from the beginning of consideration of Title II, I asked the staff to develop a review program so that we could monitor that. That doesn't necessarily have to be the case. It doesn't have to be true that lifting the ban would lead to greater fraud. If I had thought that was inevitable, I would not have been in favor of it. I still would have done it because Congress told me to.

So I think the important thing to do here is to analyze the investor protection issues that are present, see if some of them can be addressed and they really do revolve mostly around who the investors are rather than how they are solicited, and then put in place a review program so that we can make sure that these offerings are not being sold to the wrong people and that there isn't an increase in fraud. And if there is a notable increase in fraud, we should come back and tell you because this was a congressional determination.

Mr. CLEAVER. Is there any kind of way in which you can detect the increase early on so that it would be brought back to Congress for us to hopefully make some immediate alterations?

Ms. WALTER. We will be able to monitor certain of the offerings fairly easily. There is a form that gets filed and that form, if it goes through as proposed, would have a box that would check whether people were using general solicitation. But although people are required to file the form, it is not a condition of the exemption, so not everyone does. So if those people don't file, we are going to have to rely on other efforts such as surfing the Internet and the like to try to identify what offerings are going on.

That is why one of the suggestions that was made in the course of the comment process was to make the form a condition. There are pros and cons to that which I would be happy to address if you like.

Mr. CLEAVER. Thank you. Let me move over to another area. The whole IPOs, I think, giving ordinary citizens the opportunity to become investors, sounds good except that for the most part when we are talking about investors, we are talking about some very sophisticated people, people who understand, they are venture capitalists and so they understand it.

Is there anything that the SEC can do or is there anything that we need to do to make sure that the start-up community understands and appreciates the risk involved?

Ms. WALTER. I believe that some of that happens in the course of the process of doing a standard IPO, because they generally involve investment professionals who provide advice and counsel about that. It also involves filing a public document with the Commission, going through the Commission review process, responding to the Commission's comments. There is less education about that, I believe, in the private offering market. People don't really understand that. Certainly, there are educational efforts that could be launched. There are some that we are doing, and there are some that are done by the private sector as well, which would be quite helpful to businesses as well as to investors.

Chairman MCHENRY. The gentleman's time has expired.

We will now recognize Mr. Ross for 5 minutes.

Mr. ROSS. Thank you, Mr. Chairman.

Commissioner, thank you for being here. I appreciate your acknowledging in your opening statement the significance of the JOBS Act, specifically with regard to Title II in that you agree that it was intended to lift the ban on general solicitations for Regulation D, Rule 506 that seek only investment from accredited investors. That was pretty clear wasn't it? That is fairly direct, straightforward, and unambiguous?

Ms. WALTER. Absolutely.

Mr. ROSS. And it was relatively clear and unambiguous also in the JOBS Act that this was to be done within 90 days, correct?

Ms. WALTER. Yes. That is correct.

Mr. ROSS. So my question is, in your opinion, what would cause a regulator to deviate from clear and unambiguous language mandated by Congress in the promulgation of a particular rule?

Ms. WALTER. There are other statutes that we are compelled to comply with, including the Administrative Procedure Act.

Mr. ROSS. I agree. The leading case of *Chevron* v. *Natural Resources,* the Supreme Court case in 1984, really set forth the only criteria in this two-step process by which there may be great deference given to a regulator in trying to interpret or otherwise implement a statutory requirement.

And if I could just have Exhibit 4 up there for just a second, in Exhibit 4, which, I guess this was the interim rule that was being proposed, the interim final rule, and it says there that, and this was prepared by the lawyers, "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."

It appears as though, and this is the theme I keep coming back to, it was clear and unambiguous what the requirement was for the SEC to do with regard to implementation of Title II. Do you disagree with that?

Ms. WALTER. I believe I disagree with your interpretation of what the governing statutes are in terms of process. Yes, what Congress wanted us to do was clear. Congress' determination that there be a 90-day deadline was clear. But in order to dispense with notice and comment, we had to have good cause, that is intended to be a narrow exemption—

Mr. ROSS. And wouldn't the good cause have been the final interim rule? In fact, in the exhibits here before us, it indicates on advice of counsel that if the SEC implemented the interim final rule, it would allow for this process to engage for a couple of years, so that you could then reevaluate and issue a final rule.

Now, that was suggested in June of 2012, 29 days before the deadline of 90 days.

What happened in the interim? Did it have to do with Ms. Roper?

Ms. WALTER. What happened is that there were concerns—actually, I can't speak for exactly what happened.

Mr. ROSS. But something happened.

Ms. WALTER. For what happened in my own mind, there were concerns expressed by others outside the agency about the process that was being followed. First I should make clear, we never got

legal advice from our lawyers that this was the way we had to go. We were told—

Mr. ROSS. Who prepared the interim rule?

Ms. WALTER. The Division of Corporation Finance.

Mr. ROSS. Your Office of General Counsel had nothing to do with that?

Ms. WALTER. They were consulted. They did not prepare it.

Mr. ROSS. Okay, and you have no evidence or otherwise have any reason to believe that they objected to that?

Ms. WALTER. They advised us that it would be possible to do an interim final rule, not that it would be without risk, but that it was one possible avenue.

Our rulemaking division first recommended that it be done by proposal, then it recommended that it be done by interim final, and then a determination was made that it be done by proposal. We were never told that we had to do an interim final, and it is very difficult to conceive of an instance in which that would be true.

Mr. ROSS. But you knew you had to do it within 90 days, and then in the interim Ms. Roper does an email to Ms. Schapiro and suddenly things change, the 90 days is expired. Do you not believe that even based on the recommendations or advice of your Office of General Counsel that this will lead to litigation unnecessary and totally unavoidable had it been promulgated within the 90 days?

Ms. WALTER. I believed that it could have led to litigation if it had been promulgated within the 90 days. It may also lead—

Mr. ROSS. Because it had ambiguities, because it wasn't specific?

Ms. WALTER. Because it didn't—

Mr. ROSS. The elimination of general solicitations.

Ms. WALTER. Because an argument was likely to be made that we didn't thoroughly analyze and consider alternatives to the rule, which is what we do in our economic analysis, and the implications of the rule.

Mr. ROSS. And in light of the 90 days being expired, now there might not even be authority for the SEC to implement this particular requirement.

Ms. WALTER. Oh, no. That authority does not cease simply because the deadline passes. We still have authority to implement the requirements. We believe it is our job to do so, and we are going to.

Mr. ROSS. Even contrary to what your attorneys have advised you?

Ms. WALTER. Our attorneys did not advise us that our authority expired after 90 days. They have never suggested that.

Mr. ROSS. I yield back.

Chairman MCHENRY. We will now recognize Ms. Beatty for 5 minutes.

Mrs. BEATTY. Thank you very much, Mr. Chairman, and thank you, Mr. Ranking Member.

Again Commissioner, thank you for being here and taking your time to address our many questions. We have spent a lot of time in the last few minutes asking you about the processes that relate to rulemaking from the proposal to your last response to the question.

In that same light, but shifting it a little bit, can you please speak to how SEC's funding and resource level impacts its ability to properly complete its rulemaking authority?

Ms. WALTER. Of course, there are two questions. One was the fact that I think even before the Dodd-Frank Act was passed in 2010, the SEC was underresourced. And I mean that both in terms of personnel, and in particular in terms of technology. There was a substantial gap in our capacity compared to the private sector that we regulated.

When the Dodd-Frank Act was passed and followed by the JOBS Act, I will conflate them, we had serious additional responsibilities that were given to us, first, to promulgate a large number of rules, close to 100 new rules, to do a number of studies. That is work which is continuing. We have not finished our work under the Dodd-Frank Act, and we have not finished our work under the JOBS Act.

Even more significant than that, however, when all of these rules are done and all of them go into effect, those rules will be meaningless unless they are administered and enforced, and we need the resources and again both on the people level and the technology to do that right, and that is why we have continued to ask for additional resources.

Mrs. BEATTY. Mr. Chairman, Mr. Ranking Member, let me ask you another question. Does the SEC believe that the criteria for qualifications as an accredited investor, are they significantly restrictive as to protect unsophisticated investors with moderately high salaries from unregistered security or should there be a revision of the qualifying standards?

Ms. WALTER. Of course, I cannot speak for all of my colleagues, but I believe very strongly that there should be a revision of the qualifying standards. I believe that the definition of "accredited investor" as it stands today does a poor job of screening out people who are unsophisticated and people who do not have the wherewithal to demand access to information, and includes many unsophisticated investors.

Mrs. BEATTY. Thank you very much. I yield back.

Chairman MCHENRY. We will now recognize Ms. Wagner for 5 minutes.

Mrs. WAGNER. Thank you, Mr. Chairman, and thank you, Commissioner Walter.

I am as dismayed as anyone that the SEC has put what I consider a lid on innovation and investment in their inaction surrounding Title II. So I want to highlight some of the entrepreneurs, real life examples, you get out of the process weeds here perhaps, in the St. Louis region that are doing just great things and stand to help our economy even more if only the SEC would do what Congress has directed them to do regarding Title II. And these are just a couple of the companies, just a couple, looking for growth capital. Global Velocity, this company provides the world's first data loss prevention solutions that have been built for the Cloud. They are the cutting edge of providing cybersecurity solutions which is absolutely critical in our economy today. And in 2011, the company was named a finalist for Forbes Magazine list of America's most promising companies.

Next, would be Big Event Mobile. Big Event has developed a mobile app that allows trade show producers to build and better capitalize events that they have put on.

Commissioner Walter, the bottom line here is that there are endless, I think, examples of companies such as this around the country that are innovating and looking to expand, looking to hire, and really it just seems unacceptable to me that the SEC continues to drag its feet here. There is, I think, a direct link between SEC inaction regarding Title II and decreased economic activity around the country. And I think it needs to be one of the key takeaways today.

So Commissioner, I would ask that the SEC Title II rule proposal pointed out that the market for Reg D offerings, and this is of course pre-JOBS Act in 2010 and 2011, was larger than all other private offerings, public debt and public equity offerings combined.

The same SEC analysis clearly has high expectations that lifting the solicitation ban could further increase such capital formation.

Do you agree with the SEC's analysis?

Ms. WALTER. I believe that is likely.

Mrs. WAGNER. Likely or—the analysis was very specific here in terms of post a trillion dollars, this is even pre that could be there.

Ms. WALTER. Clearly, there is a large amount of money that is raised in the private offering market. And I am saying it is quite likely that when the general solicitation ban is lifted, that amount will go up significantly.

Mrs. WAGNER. So then if the Reg D market pre-JOBS Act was nearly a trillion dollars, wouldn't you agree that if the SEC finally implemented Title II to allow for solicitation, the economic benefits could just be enormous?

Ms. WALTER. I don't know what the impact will be. And the overall net economic benefits will depend in part, again, on how we implement it. For example, in the course of the comment process, even from supporters of the proposal, they did not like the way we decided to treat reasonable steps to verify. They wanted us to do something different. They wanted further comfort. So if in fact we had gone forward with an adoption, many of the supporters of this rule, many of the people who wanted to use it would not have been happy about how we had implemented one of the key provisions.

Mrs. WAGNER. And why was that?

Ms. WALTER. Because they felt they wanted more specific guidance. We put out a proposal that was extremely flexible about what reasonable steps to verify would be, and in fact we were surprised the supporters of the rule wanted a safe harbor in terms of specific things that they would be able to do. And we heard that. The impact of the rule will also vary depending on what happens, as we track it, to see whether in fact it ends up being used, perhaps not by the honorable and upright companies that you are citing, but other companies to use it as a vehicle for fraud.

Mrs. WAGNER. Let me ask about that in terms of risk and risk-taking. These are all accredited investors that would be involved in these kinds of offerings. Is that correct?

Ms. WALTER. They are accredited investors. I, frankly, believe that the definition of accredited investor is too broad. In any event—

Mrs. WAGNER. And why is that?

Ms. WALTER. Because it covers any number of people who neither have the wherewithal to lose the money that they could lose, the sophistication to evaluate the investment opportunities—

Mrs. WAGNER. These are investors who can afford advice and who can, I think, better afford the kind of risk taking that is out there. And certainly—

Ms. WALTER. Not necessarily, particularly not if an offering is done by general solicitation over the Internet. All it has to be is someone who has the right financial numbers who answers an Internet solicitation. And you don't have to have an adviser at all. So there are risks there. That does not mean to me that we should not go forward with this. We should. But we have an obligation to look at the investor protection concerns as well.

Mrs. WAGNER. I yield back.

Chairman MCHENRY. I will now recognize Mr. Heck.

Mr. HECK. Thank you, Mr. Chairman.

Commissioner Walter, thank you very much for your presence and your testimony today. I want to follow up, as we keep butting up against this issue of the definition of an accredited investor. Am I correct that Dodd-Frank permitted the SEC to review that definition? And if so, is there one under way?

Ms. WALTER. Dodd-Frank did several things in this area. It mandated that in determining net worth, you not consider your primary residence. And it said that the SEC could move forward in reviewing the definition, but was not permitted to change the net worth standard until the middle of 2014.

Mr. HECK. Has a review been initiated?

Ms. WALTER. We have started to look at those issues.

Mr. HECK. And you have said several times that you don't think that the definition is adequate. As I recall, and I could be mistaken, the principal pillars of the definition are a net worth threshold and an annual income level. So, obviously, you have a strength of conviction here, having heard you respond in that fashion 3 times now. How would you change it? Or what kinds of things would you add to get at this objective of ensuring that an accredited investor was sufficiently capable of evaluating an investment opportunity above and beyond income and/or net worth?

Ms. WALTER. Some of the things that we could consider, and I wouldn't rule out others, would be of course raising the numbers that are in the definition. Alternatively, we could use a different criterion. I tend to think that if we were to look at the amount an individual had invested—and we are really talking about natural person accredited investors here, we are not talking about entities—but if we were to look at a standard of a person having so much already invested, that prior experience wouldn't be perfect, but would be nonetheless an objective indicator that perhaps would be better.

We could also look to criteria that are not specifically with respect to the definition. Borrowing from Title III of the JOBS Act, if you look at the crowdfunding provision, there is a provision in there that someone who is going to invest through a crowdfunding site has to go through a process of demonstrating that they understand basic concepts, essentially an online—it would end up being

probably an online learning module where you would have to keep going through until you got the answers right. So it would demonstrate a certain degree of knowledge. And we could perhaps consider something like that as well.

Mr. HECK. In addition to requiring an accredited investor to meet some threshold of invested funds, would you personally favor increasing either or both the annual income level or the net worth level?

Ms. WALTER. I would probably, sitting here today—and I don't have a fixed judgment; I would like to go through the process—prefer to do away with the income and net worth levels and go to an amount invested, unless we can find a different objective criteria that will work. I do think it is important that this be relatively simple and objective so it is administerable.

Mr. HECK. And what range of invested amount would you think—I am asking for a range, and I am obviously not asking for some kind of an enduring commitment here—but I am just trying to get a sense of at what level do you think people are demonstrating some level of sophistication sufficient to warrant this?

Ms. WALTER. To me, it would have to be relatively high. We could either use one of our existing standards or we could do something like $500,000. I fear for hard-working people who haven't made very much in their lives, who have accumulated money in a retirement account and are nearing retirement, so that they are at the high point of their asset accumulation level and are just rife targets for fraud, and that money is going to have to last them for the rest of their lives. So I would think it would have to be relatively high, but I don't know the right number right now.

Mr. HECK. Lastly, do you have the authority to in any way limit the manner in which the general solicitation and advertising is done, or does by definition, general solicitation preclude you from prohibiting certain kinds of venues or channels for appeal?

Ms. WALTER. That has been a matter of some controversy. Some have said we do, and some have said we don't. I believe that we do. We, of course, would have to propose that.

Mr. HECK. Very good.

Mr. Chairman, thank you. I yield back the balance of my time.

Chairman MCHENRY. I certainly appreciate that. Very interesting line of questions and interesting comments as well.

We will now go to Mr. Hultgren of Illinois for 5 minutes.

Mr. HULTGREN. Thank you, Mr. Chairman.

Thank you, Commissioner Walter. I appreciate you being here. I do apologize. There are several things going on at once. I have had to step out a little bit. So I know you have maybe brushed on some of these things, but I do want to—I have some questions I wanted to ask. The proposed rule to implement Title II, which proposes a solution to accredited investor verification, passed the Commission on August 29, 2012, and the comment period, as you know, ended on October 5, 2012. It is now April 17, 2013. I wondered if you could explain why during your tenure as Chairman, you haven't voted on a final rule to implement Title II?

Ms. WALTER. I believed that my job as Chairman was to try to chart a way forward that took into account the comments on both sides and tried to come out with a way to go forward in what I con-

sidered to be a responsible fashion, and significantly a way to go forward that would garner three votes among the four Commissioners we had at that point in time.

We didn't reach that point. I didn't reach an answer that I felt met that standard. I regret that it has taken longer than we had expected. We now have a new Chairman. We are at full strength as a Commission, so I am hopeful that we can move forward expeditiously. And I certainly am fully committed to doing that. It is one among many projects that have been pending that led me to decide to stay on as a Commissioner.

Mr. HULTGREN. So there were discussions, but there wasn't agreement on it. There was never a full vote on a proposal? Is that correct?

Ms. WALTER. I never had the staff put a formal proposal back to the Commission. My fellow Commissioners came at this from very different points of view. And I was in the process of trying to figure out how to walk the line to come up with a proposal—I don't mean a proposed rule—I mean a proposed solution to this problem that would satisfy my concerns and garner at least two additional votes.

Mr. HULTGREN. We are just past the 1-year anniversary of the passage of the JOBS Act, and are approaching the 1-year anniversary of the 90-day implementation deadline for Title II. Looking back during this time, I see that the SEC deployed resources to consider political contribution regulation, an area of law that the SEC has little expertise over and questionable jurisdiction. The SEC also found time to work on money market fund regulation despite no legislative mandate to do so. At the same time, the SEC failed to implement Title II of the JOBS Act, a two-page part of a highly bipartisan law with limited discretion.

Based on the time the Commission found to pursue money market reform and political contribution regulation, is it reasonable to believe that the Commission could not manage to implement Title II, a two-page section of the JOBS Act, with limited discretion?

Ms. WALTER. First, I should say very little time was spent on political contributions. And the question of whether or not there should be corporate disclosure of political contributions, I do think is in the Commission's mandate.

Second, with respect to money market reform, although there was no statute, there was quite a hue and cry from all aspects of the public and all around government for us to address that. And that is done by entirely different staff than the staff who are working on this.

Mr. HULTGREN. It appears that there should have been plenty of time to get this done.

Ms. WALTER. It is not a question of time. We did not come out with the resolution, and we were sitting with a four-member Commission. We now have a five-member Commission, and we will move forward on this as expeditiously as possible. We had Commissioners with decidedly different views on this. And a Chairman does not get to decide what the answer is. The Chairman is one vote.

Mr. HULTGREN. I also believe a Chairman is given direction and needs to follow that direction. There clearly was congressional direction here. I wonder if you are aware of other cases where a regu-

lator ignored a direct command of Congress through obvious delay tactics. At least, that is how it appears to us.

Ms. WALTER. There were no delay tactics involved here. I can assure you of that. I have never in 1 second during this period of time engaged in any delay tactics. There certainly have been other instances in which congressional deadlines for rulemaking were not met. The rulemaking process is not as easy a one as it appears to be. Until you sit down and engage in it, it has a lot of complexities, and it takes time. But there were no delaying tactics here.

Mr. HULTGREN. The appearance to us, again, and even you said in the previous question, that other things didn't take that much time. This isn't a matter of time. So you could take forever to get this done. And yet this is a clear command, basically a direction by Congress, a law that was passed, a bipartisan law, again, through the House and the Senate, agreed to by the President, signed by the President, and yet we have seen, from our perspective, no action on this.

Again, I just see that as unacceptable. Even if there is action and not agreement, at least there is activity. And from our perspective, there is no activity. That is the frustration I think that many of us are feeling, and many of our constituents are feeling as well.

With that, I see my time has expired. I yield back.

Chairman MCHENRY. Thank you.

I will now recognize the ranking member of the subcommittee for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. And I thank the witness again for appearing today.

I do want to give you an opportunity to restate your position with reference to moving expeditiously. You have been very clear that you are not refusing to do this, but I think that you should have the opportunity to make the record as clear as possible on this issue.

Ms. WALTER. Thank you. I appreciate that. My position is twofold. One, I believe that Congress has given us a mandate. We need to fulfill it. I am committed to moving forward with it as expeditiously as we can. And two, I will say on the substance, since the 1980s I have been in favor of lifting this ban. So this is not something that I personally oppose. I do think that there are other considerations that need to be taken into account, and we are looking at those.

Mr. GREEN. There seems to be a good deal of consternation with reference to the comment period. Is it the norm to have a comment period or is it the exception to have a comment period?

Ms. WALTER. It is absolutely the norm. The lack of a comment period is quite rare. And it is generally done either in exigent market circumstances or where some external event causes an obligation to kick in unexpectedly that people aren't prepared for. And in our case, even in the midst of the market crisis, it happened on average 2 or 3 times a year.

Mr. GREEN. And have you received comments on this piece of legislation?

Ms. WALTER. Yes. We received over 220 comments, which were mixed. A little less than half of them were in support of the pro-

posal. A little more than half opposed the proposal as it was put out for comment.

Mr. GREEN. Let's talk for just a moment about your budget, because it has been mentioned—I mentioned it earlier, and I have heard other Members mention it as well. While I have your 2012 numbers, I will focus on 2013. My evidence indicates that you requested $1.56 billion. The House passed $1.371 billion. And the actual budget was $1.321 billion, decidedly less than what you were asking for. Did you ask for that $1.56 billion because you actually needed the $1.56 billion to perform efficaciously?

Ms. WALTER. Absolutely. As I mentioned before, even prior to the passage of these two major pieces of legislation, we had certain very pressing needs. In particular, I would highlight the fact that we don't have sufficient resources to do a good enough job examining the investment adviser population. We examine 8 percent of the investment adviser population a year and that simply isn't sufficient. So one of the things that we intend to do is to try to beef up that program.

In addition to that, we are way behind the outside world we regulate in terms of the technological tools we use, both to examine the entities that we regulate, and in even as simple a case as when we litigate cases in court. And that is another area where we really need the funds to catch up.

Mr. GREEN. You have 35,000 entities that you oversee, which is a huge number.

Ms. WALTER. Yes, it is.

Mr. GREEN. And 11,000 investment advisers. Can you in any way put these things aside to make sure that you get other things done, or do you have to try to do everything?

Ms. WALTER. You have to try to do everything. And what you do is try to develop techniques to get to be as efficient as possible. For example, in our examination program we have taken many steps over the last few years to try to enhance our risk assessment and the analytics we use in determining which entities we examine. But in the end, when you have to do everything and you don't have enough, you don't do anything quite as well as you should.

Mr. GREEN. Quickly, on the question of the money market fund, did FSOC have anything to do with the reason you endeavored to deal with the money market fund?

Ms. WALTER. I think that answer might differ depending on who at the Commission you spoke with. If you may recall, before the FSOC got involved we had made some changes in money market fund regulation, in 2010, I believe, and we said at the time that there was going to be a second step where we were going to analyze whether further changes were needed.

Our Chairman was working on that. There was opposition from other Commission members. And she decided not to present it to the Commission. At that point, the FSOC stepped in and made a request of us that we look at these issues. So they definitely have been playing a role.

Mr. GREEN. Thank you, Mr. Chairman, for the extra time. I yield back.

Chairman MCHENRY. We will now recognize Mr. Grimm for 5 minutes.

Mr. GRIMM. Thank you, Mr. Chairman.

And thank you, Commissioner. I appreciate you being here today. I want to just go back, the ranking member of the full committee and the ranking member of this subcommittee had mentioned the budgets and funding. You were asked basically if you had the resources to deal with an expansion in fraud that lifting this ban could lead to. But I want to ask a different question. Regardless of any potential increase in fraud, implementing this part of the JOBS Act, do you have the resources to do that?

Ms. WALTER. Yes, we do. We obviously have to set priorities. And one of the things that happened with the passage of Dodd-Frank and the JOBS Act is those priorities took the place of other, more discretionary, voluntary initiatives that we would like to pursue. We do not have the resources to do everything we would like to do, but we obviously prioritize congressional mandates.

Mr. GRIMM. Okay. Taking a step back, the ranking member just asked about those priorities, and you did I think just testify that you do try to do everything. And I understand that is hard, especially with 35,000 entities out there that you are regulating.

Ms. WALTER. That is correct. There are certain things; certain types of rulemaking are discretionary. Most of our job is not discretionary. We have an examination program. When we review public company filings, we are under a mandate to do a third of the public companies every year. So it really depends on the particular aspect of the job, the manner in which it is discretionary or mandatory, but we have many things that we must do.

Mr. GRIMM. How about enforcement of the existing rules prior to even Dodd-Frank changes? Would you say that you are capable of doing that?

Ms. WALTER. We are. But again, we choose our cases. You probably could not give us enough resources so that we could bring every case that is out there. And that is appropriate. When you run an enforcement program you have to decide what to prioritize, what types of cases to look for, how to use your resources. And that, of course, is done.

Mr. GRIMM. It is a little off the topic of today, but since I went down this road I would like to ask you, where would you say the priority of illegal shorting, the ban against naked shorting? I see that as a huge issue. Is that a priority?

Ms. WALTER. I believe it is. We have set up over the last few years a tips and complaint system, a TCR system. And what we do is we gather in all of the complaints that we get from the outside world and we perform triage on them. We are able to determine who is complaining about what to try to decide what to pursue.

Mr. GRIMM. Have you ever looked at the fall of Lehman Brothers?

Ms. WALTER. Yes, our agency did do that. And I will say personally, I was recused from Lehman matters, so I can't speak to it personally.

Mr. GRIMM. The shorts were 17 times the actual float. There is only one way that could happen, and that is if they were illegally trading. It happened with Lehman Brothers; it happened with Bear Stearns; and Overstock.com always has this issue. It just seems

from what I have seen, the SEC turns a blind eye to naked shorting.

Ms. WALTER. I believe that we do enforce the rules we have on the books.

Mr. GRIMM. Lehman Brothers would disagree. Well, they can't disagree any more.

Okay. With that, I will yield back.

Chairman MCHENRY. Will the gentleman yield to the—

Mr. GRIMM. I will yield to the chairman.

Chairman MCHENRY. Thank you.

Commissioner Walter, you stated that you wanted to open up the proposal to comments. Is that correct? On lifting the ban on general solicitation?

Ms. WALTER. Yes. That is correct. I have found—

Chairman MCHENRY. Okay. And as a matter of policy and procedure at the SEC, when you go to an interim final rule, is that a rule that is final, or can it then be adjusted after it is up and running?

Ms. WALTER. Both interim final rules and normal final rules can be adjusted.

Chairman MCHENRY. So, people can comment on interim final rules as a matter of process?

Ms. WALTER. However—

Chairman MCHENRY. Is that correct?

Ms. WALTER. Yes, that is correct.

Chairman MCHENRY. Yes, okay. Now, you wanted to answer. Go right ahead.

Ms. WALTER. Thank you. I appreciate that. One thing I have learned in many years of doing rulemaking is, first of all, comments are more robust—our post-proposal comments were more helpful than the pre-proposal comments because there was a specific proposal out there.

Second, it is often difficult to go ahead and adopt a rule, have people set up systems, for example systems for verification in this particular case, and then accept comment and then modify them. It can subject people to undue costs. It is better, if you can, to have a system set up the way you want it to be in the first instance.

Chairman MCHENRY. Yes, counter to the law existent, though. That is the reason why we are having this hearing.

So with that, we will now recognize Mr. Duffy for 5 minutes.

Mr. DUFFY. Thank you, Mr. Chairman.

I missed a little bit of this hearing, so I hope I am not repetitive. But again, I want to bring up my concern about the chain of emails that has been reviewed today and the fact that the SEC had come out with an agreement, an internal agreement that you were going to introduce an interim final rule. And when the Chairman got an email notice from an outside lobby group expressing a concern, she was willing to change course from an interim final rule to go to a proposed rule.

And to think that this institution which has had, frankly, a pretty rough couple of years, and that you were able to get Democrats and Republicans, House Members and Senators, to agree to the JOBS Act, and to get the President to sign that bill, and then to see these emails from an outside lobby group which was able to

prevent the implementation, or a portion of the implementation of the JOBS Act is outrageous. I guess I would like to hear your comment on why an outside lobby group can impact the SEC more than this institution.

Ms. WALTER. I don't believe that is the case. And I will say that—

Mr. DUFFY. Did you read the emails, by chance?

Ms. WALTER. Yes, I have read the emails.

Mr. DUFFY. And you come to a different conclusion from these emails?

Ms. WALTER. Yes, I do.

Mr. DUFFY. And what is that?

Ms. WALTER. First of all, there was no agreement reached that it was the proper way to proceed. The staff who were working on the rulemaking switched from recommending a proposed rule at one point to recommending an interim final rule at another point. One thing that is true in rulemaking is that nothing is final until the vote is taken, and the vote had not been taken. Throughout this process, we heard from investor groups, we heard from industry groups, and we meet with everyone who comes in.

Mr. DUFFY. And you heard from an outside lobby group. And it was after that email that the Chairman expressed her concern about the pressure that was going to be put on the agency. And it was after that that you then went to a proposed rule from an interim rule. How could the conclusion be any different?

Ms. WALTER. We always talk to all sides of the issue, and we listen to their views. And frequently, very frequently in the course of a rulemaking project, we change our minds about basic issues, peripheral issues, the approach which we are going to take. This was—

Mr. DUFFY. Reclaiming my time, we don't always have email chains from the Chairman expressing concern about comments made by an outside lobby group. We have that. And it was after that concern was expressed, that the course changed within the SEC to go from an interim rule to a proposed rule. And that doesn't concern you?

Ms. WALTER. It doesn't concern me because I believe—I cannot speak for Chairman Schapiro, but quite frankly, as I have said several times during the course of this hearing, I always thought the better course of action was to propose a rule from the beginning. And I thought that was the better way to go. We also are always concerned when we are told by outside groups, in essence, that if you go a different way, we will sue you. We don't want to adopt rules—

Mr. DUFFY. I want to reclaim my time.

Ms. WALTER. —and then have them invalidated or stayed.

Mr. DUFFY. If I could direct your attention to the screen, it is an email from Chairman Schapiro. And it says, "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." So that means she is saying they have asked for a comment period, which means they have asked for a proposed rule instead of the interim final rule. And she says they have asked for it, so we should give it to them. Isn't that what she is saying?

Ms. WALTER. Yes. And you have to keep in mind that a comment period is the norm. It is the way rulemaking is traditionally and overwhelmingly done. The question here was—

Mr. DUFFY. Then how did you ever get to the point where you were going to go with an interim final rule?

Ms. WALTER. The suggestion was made that in this case, there was an adequate basis to do an interim final rule. The suggestion was never made that giving a comment period, which is a more informed way to do rulemaking—

Mr. DUFFY. I want to reclaim my time. This lobby group, the Consumer Federation of America, who sent this email which persuaded the Chairman to change direction, how many of those lobbyists are Members of Congress or Senators? How many?

Ms. WALTER. I would assume none.

Mr. DUFFY. Not one. That is right. But it was their influence that changed the course and will of this institution.

I yield back.

Chairman MCHENRY. We will now go to Mr. Barr of Kentucky.

Mr. BARR. Thank you, Mr. Chairman.

Commissioner, thank you for your testimony today. Is it your position that Section 201(a) is in conflict with the notice and comment requirement of the Administrative Procedure Act?

Ms. WALTER. No, it is not.

Mr. BARR. Okay. What is your position with respect to the interface between notice and comment requirements under the APA and the JOBS Act 90-day provision?

Ms. WALTER. You have to look—we were required, if at all possible, to comply with both. We did not make the deadline. But in order to dispense with the notice and comment provision, we would have to have a justification and just cause. Our General Counsel's Office suggested that might be possible here and was one way of dealing with the risk of our perhaps not being able to obtain relief in the general solicitation case. But the fact that there is a congressional deadline does not in and of itself change the obligations under the APA.

Mr. BARR. And you said in addition to that, agencies never meet congressional deadlines, or rarely meet the 90-day deadline.

Ms. WALTER. No—

Mr. BARR. Was that your testimony?

Ms. WALTER. No. I said that 90 days is a very short deadline for rulemaking.

Mr. BARR. Is it your opinion—

Ms. WALTER. What I said, if I may, is that rarely, if ever, have I seen a rule, mandated or not, go through the process in that short a period of time.

Mr. BARR. I understand that. And I understand your testimony with Mr. Duffy that notice and comment on a longer period of time is traditionally done. The question here, though, is the 90-day directive from the Congress under the JOBS Act. And my follow-on question would be, is it your opinion that it is impossible for administrative agencies to meet a 90-day deadline on rulemaking such as was dictated in this case?

Ms. WALTER. It would have been extraordinarily difficult.

Mr. BARR. Okay. Does the Administrative Procedure Act (APA) permit rulemaking within a 90-day window?

Ms. WALTER. Yes, it does.

Mr. BARR. Okay. Do you agree that an interim final rulemaking would enable compliance with a 90-day deadline?

Ms. WALTER. Assuming that the standard was met, and I wasn't convinced that the standard was met, I think that is a litigable question.

Mr. BARR. Okay. So why was a proposed rule decided upon in lieu of an interim rule, an interim final rule, in light of the fact that only an interim final rule would have been consistent with the 90-day statutory deadline?

Ms. WALTER. I can only speak for why I favored a proposed rule and preferred one. It was the only proposal that was put before the Commission for a vote. And I favored a proposed rule because I wanted to hear what people said both about how the ban should be implemented in terms of verification and—

Mr. BARR. To reclaim my time, I understand your preference from your previous testimony. But my question to you really is, did Congress speak directly to the precise question, which is the 90-day deadline?

Ms. WALTER. Congress spoke directly to the 90-day deadline. It did not speak to the Administrative Procedure Act.

Mr. BARR. Is the JOBS Act Section 201(a) more specific in its directive to Congress than the more general notice and comment of rulemaking direction under the Administrative Procedure Act?

Ms. WALTER. I believe that they are both specific directives, and that if we don't meet the standards of the APA, we have an invalid rule.

Mr. BARR. Is the intent of Congress on 90 days clear to you?

Ms. WALTER. Yes, it is.

Mr. BARR. Is the expressed intent of Congress on the 90-day deadline in any way ambiguous to you?

Ms. WALTER. No, it is not.

Mr. BARR. Okay. Then under Chevron, and you comply with the Administrative Procedure Act regularly, you understand the requirements of the Supreme Court's interpretation of the law under Chevron, and under step one of Chevron, it is pretty clear what an administrative agency's obligations are. Always when Congress has spoken directly to the precise question at issue, if the intent of Congress is clear, that is the end of the matter for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress. You just testified that you agreed that the unambiguous expressed intent of Congress was 90 days. Why did you not comply with that directive under the Chevron mandate?

Chairman MCHENRY. The gentleman's time has expired, but the witness may answer.

Ms. WALTER. Thank you. Because I do not believe it overrides the Administrative Procedure Act, nor do I believe it overrides our job. We also have an obligation to consider the economic analysis, and we have an obligation to consider how it impacts the protection of investors and our mission. And I think we are supposed to do all of those things. We did not meet the 90-day deadline, as I have said. We regret that. I am committed to moving forward with the

rule. And I do believe that what we are talking about in terms of the unambiguity really relates to the substance of the statute, not the timing.

Mr. FITZPATRICK [presiding]. The Chair will recognize himself for 5 minutes.

Commissioner, I just want to go back over those lines of questions we had about Meredith Cross. She was proposing a scenario where you were going to be able to comply with the 90-day requirement. She wanted to go to interim rule or interim final rule. And you indicated that she was the staff person with the most knowledge with respect to the rule, correct?

Ms. WALTER. That is correct.

Mr. FITZPATRICK. And there were other staff members at SEC who were concerned that there might be a number of comments that she was unaware of, and so they decided to overrule her? Is that what happened?

Ms. WALTER. No, she didn't have the decision-making authority. Understand that the divisions work on recommendations to the Commission. Those recommendations are presented to the Commission. And it is the five voting Commissioners who have the decision-making authority.

Mr. FITZPATRICK. But she, the person with the most knowledge within the agency, had actually provided a mechanism or a path where the Commission could both comply with the law, the 90-day requirement, and consider comments or suggestions or revisions going forward. I just refer to Exhibit 2, if we could put that up on the screen. That is the email from Thomas Kim. It says, "Meredith supported going straight to a final rule, as we could then have a pilot period where we could assess how issuers are verifying..." He goes on to say, "She was more comfortable doing this as an interim final temporary rule, which means it would sunset at some future date. Two years was tossed around as a possible sunset date."

So didn't she provide a mechanism where you could both comply with the 90-day time period, comply with the law as passed by Congress, the House and the Senate, and signed by the President, be able to comply with the law, and consider suggestions going forward?

Ms. WALTER. She provided a possible way to go forward. She never said she was opposed to doing a proposal.

Mr. FITZPATRICK. But it was possible to comply with the law. Correct?

Ms. WALTER. It was possible to meet the deadline.

Mr. FITZPATRICK. I want to refer to Chairman's Exhibit 6, which is the email from Chairman Schapiro, the third sentence, which states, "Its not really asking for much. The other is that I don't want to be tagged with an Anti-Investor legacy." Do you agree that asking for a comment period was not asking for much?

Ms. WALTER. Yes, I do, because I think the law generally provides for it. It is a right. It is the essence of rulemaking. And you have to have an exceedingly good reason to dispense with it. So, yes, I do agree with that statement.

Mr. FITZPATRICK. Is breaking the law not asking for much? The law did require that this occur within 90 days, correct?

Ms. WALTER. Congress set that deadline. We tried to meet it. We did not meet it. There have been other instances in which we have not met deadlines. There are deadlines that we meet. We always try to meet them. We don't always meet them. I don't think, and I will repeat, I never felt comfortable with dispensing with the comment period, because you look at the 220 comment letters we have gotten and tell me that they are not valuable in determining how to go forward with this rule.

We have an obligation to do this and to do it right. This is a rule you told us to do. You told us to go and do the rulemaking. We have to do it in accordance with our responsibilities. I wish that we had been able to do it while meeting the 90-day comment period, but we did not.

Mr. FITZPATRICK. But there was a way to do it within the 90 days and consider the comments. Correct?

Ms. WALTER. There was a way to adopt a rule. Would it have been the right rule? Would it have been a responsible rule? I am not so certain of that.

Mr. FITZPATRICK. I recognize Mr. Cleaver for 5 minutes.

Mr. CLEAVER. Thank you, Mr. Chairman.

Ms. Walter, I served as the mayor of Kansas City for 8 years, and as I was leaving office, I was asked to support various members of the city council and even people running to succeed me. One of the things I said to them was that I have been able to recreate two projects: one, Union Station; and two, the 18th and Vine Jazz District. And I said, that is my legacy. My concern is that you support my legacy.

Now, everybody wants to be remembered. But the other part of it is we had invested about $250 million. So I wanted that legacy protected. And I am not sure that there was anything sinister in asking that my legacy be protected because it also had something to do with the city and the investment of the city. So if somebody wants their legacy to protect investors protected, what is wrong with that?

Ms. WALTER. There certainly is nothing wrong with it. I hope that in my short term as Chairman, I will be remembered as someone who protected investors.

Mr. CLEAVER. I yield back my time to the ranking member.

Mr. GREEN. Thank you, Mr. Cleaver.

I am assuming the remainder of Mr. Cleaver's time. Okay, thank you.

First, let me compliment you for being such a person with great dignity and composure. Much has been said about the 90-day window. You have never refused to come to Congress to give testimony when required or requested, have you?

Ms. WALTER. Of course not.

Mr. GREEN. And did you receive any request from Congress as to your appearing and giving testimony as to whether or not 90 days was the appropriate amount of time to perform this task?

Ms. WALTER. I was asked to come up to speak about Title II and how the process ran and why it wasn't done.

Mr. GREEN. And has Congress ever made an inquiry of you as to whether or not 90 days was a sufficient amount of time prior to today?

Ms. WALTER. Not that I am aware of.

Mr. GREEN. And are you aware that other persons do come and testify, I am sure, but do you have any knowledge of Congress performing any due diligence to come to a conclusion that surely 90 days is the amount of time that is needed to get this done?

Ms. WALTER. No, I don't know of any such due diligence being performed.

Mr. GREEN. The 90-day window, did Congress mandate that you do it in 90 days, and that in doing it, you avoid the comment period?

Ms. WALTER. No.

Mr. GREEN. So the comment period is something that is codified in the law?

Ms. WALTER. That is correct.

Mr. GREEN. And the comment period is what is generally done so that you will do things that are reasonable, that are prudent, and that will protect investors in the process.

Ms. WALTER. Absolutely.

Mr. GREEN. Have comment periods been beneficial in the past?

Ms. WALTER. In my experience, I always learn things through the comment period.

Mr. GREEN. So we have a circumstance now where Congress gave you 90 days, did not indicate that you should avoid the comment period, and what you have done thus far is what would typically be done under normal circumstances, and we did not indicate that these circumstances were so exigent that you should avoid the comment period. Correct?

Ms. WALTER. Correct.

Mr. GREEN. With the use of the comment period, you indicated that you received more than 200 comments. I don't remember the exact number. What was that number again?

Ms. WALTER. Two hundred and twenty, I believe.

Mr. GREEN. Two hundred and twenty. And within what period of time, if you recall, did you receive the 220 comments?

Ms. WALTER. My recollection is, and I may need to be corrected, that the comment period expired in October. Generally speaking, comments come in through the comment period, a little bit after the comment period. I think in this particular case, given the amount of interest in it and the decidedly different views, we have continued to receive information from time to time. We always try to consider what comes in even if it is after the deadline.

Mr. GREEN. And were these comments beneficial in this process?

Ms. WALTER. Yes, they have been very beneficial.

Mr. GREEN. Have you acquired intelligence by way of the comment period that you would not have acquired but for the comment period?

Ms. WALTER. Yes. I believe we have.

Mr. GREEN. Finally, this: Do you know of any rule or law that mandates that you have a certain amount of time to act on a given mandate from Congress with reference to developing a rule?

Ms. WALTER. No, I am not aware of any.

Mr. GREEN. So Congress could have selected 60 days?

Ms. WALTER. Yes, I believe that is correct.

Mr. GREEN. We could have selected 30 days. And we chose 90 days. I won't say that is arbitrary and capricious, but I don't see a record that indicates that 90 days was the prudent thing to do.

I yield back, Mr. Chairman.

Mr. FITZPATRICK. Ms. Wagner is recognized for 5 minutes.

Mrs. WAGNER. Thank you. Mr. Chairman, I am also reminded that we are well beyond the 90-day enactment period.

Commissioner Walter, the SEC has recently lost a series of high-profile cases in which it was determined that the SEC had acted beyond its authority. I am reminded of the Business Roundtable proxy access, I am reminded of Gabelli. You have acknowledged, Commissioner, that the enforcement concerns associated with the ban, you have acknowledged the clarity of Title II and its clear purpose. We have also heard repeatedly about the SEC's scarce resources. Additionally, the Commission has had a poor track record, I think obviously, as I stated, in court as of late. And given all of this, would the SEC use its scarce resources to enforce the ban against those that abide by Title II?

Ms. WALTER. I don't know that it would. That would have to be made in an individual case, and we would have to look at the facts surrounding it and seeing what the other circumstances were. For example, many times when there is a registration violation, there is also a fraud violation. They sometimes go hand in glove.

Mrs. WAGNER. Let me go back, if I can. I am a little troubled, going back to the accredited investors discussion here and your wanting to somehow change the way that it is determined. Explain that in a little broader sense, if you could. How is it that you would like to change the way that it is determined?

Ms. WALTER. The theory behind the private placement exemption, and these are all forms of private placement exemptions that we are talking about, is that there are categories of investors who don't need the protections that the law ordinarily brings in a registered offering. It is my concern that as accredited investors are defined today, and that same definition has been on our books, and it is a rule, not a statute, that hasn't been changed in decades, that it includes people who do need the protections of the securities laws.

Mrs. WAGNER. I am looking at this, and the rule, $200,000 minimum income, $1 million in assets. Are you suggesting that only the wealthier and the wealthier should have access to these kinds of investments and capital markets?

Ms. WALTER. The theory of having a registration system is that there are protections given to investors by having information be made publicly available and subject to review by a government agency.

Mrs. WAGNER. But what specifically is the determination of an accredited investor? I think I just laid out what that is.

Ms. WALTER. That is what we decided it was in the early 1980s. It is now 2013. And it is—

Mrs. WAGNER. You don't think hard-working families and middle-class families, my goodness, a $200,000 minimum income, a million dollars in assets, excluding their home. Why should only the wealthier and wealthier have access to this?

Ms. WALTER. The determination in the Federal securities laws enacted by Congress was the presumption that when you make an offering of securities to the public, it should be registered, and it should be subject to these protections. The private offering exemptions, the safe harbor included in Rule 506, are for those people who don't need the protections the law applies. Congress could decide it doesn't like the registration system. That is not the determination Congress made. It said there would be a registration system, offerings would be made with these protections. And they are particularly concerned about protections against fraud.

And we go through a comment process when we get a public offering, and we have a back-and-forth with an issuer to try to make sure that their disclosures are robust and full. That process is missing in the private offering process. So the theory is that there are certain people—and it is not really so much wealth, it is sophistication. What we are looking for is sophistication and the ability, the wherewithal to look at the issuer and say, I want to know more about your financial condition, tell me, there is not enough on this piece of paper. We now have these offerings being made to people who don't have the ability to demand that information and don't have the sophistication to make those decisions—

Mrs. WAGNER. And why is that? Why do they not have that ability?

Ms. WALTER. Because financial literacy in this country, even among people who are quite well-educated and who have a fair amount of money, is not what it should be. But there are lots of unsophisticated people.

But I think your analysis really, if I may, stands the law on its head. The private placement is the exception. Your question suggests that the private placement should be the rule and one should have to justify needing the protections of the registration system. That is not the way the law is written. And that is the predicate on which the securities laws have been built since the 1930s.

Mr. FITZPATRICK. The gentlelady's time has expired. Mr. Heck is recognized for 5 minutes.

Mr. HECK. Thank you, Mr. Chairman. With your permission, I would like to yield my time to the ranking member of the subcommittee.

Mr. FITZPATRICK. Without objection, it is so ordered.

Mr. GREEN. Thank you very much, Mr. Chairman.

Madam Commissioner, let's talk for a moment about the Volcker Rule. You are familiar with the Volcker Rule?

Ms. WALTER. I am.

Mr. GREEN. Is it true that this rule was to be perfected by July 2012 or thereabouts?

Ms. WALTER. Yes, that is correct.

Mr. GREEN. And I think it is safe to say that we have exceeded July 2012.

Ms. WALTER. I believe that is true.

Mr. GREEN. We are approaching July 2013. The Volcker Rule was to be implemented around the same time as the JOBS Act. Is that a fair statement?

Ms. WALTER. I believe that is true.

Mr. GREEN. Do you have any indication as to why the Volcker Rule has not been implemented? Have you been quizzed as to why you haven't implemented the Volcker Rule? Have we had a hearing comparable to this to ascertain why you haven't implemented the Volcker Rule?

Ms. WALTER. We have not. We have had correspondence, both from people who wanted to see it implemented faster and people on the Hill who don't want to see it implemented for quite a long time.

Mr. GREEN. I am going to take just a moment to read a paragraph from a letter. This letter is addressed to the Honorable Ben Bernanke, Chairman, Board of Governors, Federal Reserve, and a host of other persons, including the Honorable Mary Schapiro, Chairman, U.S. Securities and Exchange Commission. It is a rather lengthy letter.

So as to not exceed the time, permit me to read the next to the last paragraph. It reads, "Given the time that it will take for you to agree on one version of the Volcker Rule as well as the tremendous uncertainty that market participants face in trying to anticipate what the final rule will look like, we respectfully suggest that the Federal Reserve Board delay the Volcker Rule"—some things bear repeating—"we respectfully suggest that the Federal Reserve Board delay the Volcker Rule's effective date until two years after the date on which the final rule is promulgated."

Now, I don't think that the persons who made this request are asking you to break the law. Listening to some of the comments today, I might conclude that some people think that what you have done has been a breach of the law because you have exceeded the 90-day window that Congress accorded you. But I, quite frankly, don't think that this is a breach of the law, and I certainly don't think that the persons who codified this letter and sent this letter to the Honorable Mary Schapiro and the Honorable Ben Bernanke, among others, I don't think that these persons broke the law, and I am going to stand up for them today. Because I have great respect for both of these persons who asked that you delay what was mandated by Congress. That is the way I read this letter, that you delay what was mandated by Congress. And I find that this letter has been signed by two people that I highly respect, and they are both friends of mine.

I only introduce it because I want to make the point—I think it has to be made—that you are doing the best that you can under the circumstances existing, and that you are not doing this with malice aforethought, and that this is not the first time that we have exceeded a timeline that has been accorded you, that, in fact, Congress will ask that you take your time and make sure you get it right, which is not an unreasonable thing for Congress to ask.

So, Mr. Chairman, I ask unanimous consent that I be allowed to place in the record this letter from my very good friend, the Honorable Spencer Bachus, and my very good friend, the Honorable Jeb Hensarling: Mr. Bachus as chairman; and Mr. Hensarling as vice chairman.

Chairman MCHENRY. Without objection, it will be entered into the record.

I ask unanimous consent that it also be noted in the record that the Volcker Rule did not have an implementation deadline of 90 days, as did Section 2 of the JOBS Act. Without objection, it is so ordered.

With that, we will now recognize Mr. Grimm for 5—I am sorry, Mr. Duffy. I guess the two handsome men at the end of the dais get confused here. Sorry. Mr. Duffy is recognized for 5 minutes.

Mr. DUFFY. Thank you, Mr. Chairman.

Ms. Walter, I would like to direct your attention to an email that was sent from Chairman Schapiro on August 7th. It is an email that you were CC'd on. And in that email, the first line from Chairman Schapiro says, "I know we spent an hour discussing this yesterday but they are making me very worried." And when she is saying "they," there is an attached email from the lobby group we discussed in the last 5 minutes I had with you.

I am a bit concerned that Chairman Schapiro or the SEC is worried about a lobby group and their opinion; they are not worried about the law set forth by this institution. But that is not my question. You were CC'd on that email. Obviously, it is clear that Ms. Schapiro was expressing her worries about the position of a lobby group, so much so that she changed—or the SEC changed their position from going from an interim final rule to a proposed rule. What did you do to push back on Ms. Schapiro and others in the analysis that was being used in changing course and using the input from a lobby group and not the internal conversation of the SEC? Did you push back on that? Did you send emails out pushing back on this email from Ms. Schapiro?

Ms. WALTER. First, I will say I think it is entirely appropriate for public servants to consider views that are expressed both externally and internally within the agency in making their decisions.

Second, I will say I have always said that I was not comfortable with dispensing with the comment period. And so, when she started to express more concern about dispensing with the comment period, that was closer to my views than vice versa.

Mr. DUFFY. And how about if the lobby group is expressing a position that is contrary to the will of the American people as spoken through Congress? Then do you have a concern?

Ms. WALTER. I do not believe that was the case. As I have said, I think there are a number of statutes that we need to comply with. And we need to do our rulemaking responsibly. Frankly, it would not save a rule—

Chairman MCHENRY. If our witness would pull the microphone closer. It is hard to hear.

Ms. WALTER. I am sorry. I am height-challenged.

Chairman MCHENRY. I can relate.

Ms. WALTER. It would not save our rule from scrutiny and perhaps being overturned by a court.

Mr. DUFFY. So you did nothing to push back on the comments made by Ms. Schapiro to say that she was worried about the comments made by this lobby group on the course of the—

Ms. WALTER. I, too, was worried about dispensing with notice and comment. So, no, I did not push back.

Mr. DUFFY. Okay. Changing course a little bit, would you agree that the purpose of the JOBS Act and the purpose of Title II was

to actually expand and grow the economy, create more jobs within our communities? That was the purpose of this Act, right, including Title II, yes?

Ms. WALTER. Yes, that is correct.

Mr. DUFFY. Why didn't you have then the rule completed within 90 days?

Ms. WALTER. As I have said, we determined that we would put a rule out for comment and see what the commenters had to say, because we were given an obligation to lift the ban, we thought we also needed to explore how that was going to be done, the alternatives to different ways to do it, and whether there were additional issues that needed to be considered.

Mr. DUFFY. Okay. I am going to reclaim my time. You admit that this is a law that will create jobs within our society.

Ms. WALTER. No, I said I believe that is the intent. I hope when this law is implemented, either this law or other laws will create jobs. It is not my job to analyze whether it will carry out its purpose or not.

Mr. DUFFY. That is right. But it is your job to follow the will and intent of Congress, which is to get a rule out within 90 days. And so you have come in and testified and said, listen, 90 days wasn't enough time for us. I will accept that. I think that is a good point. I am willing to accept that. I am concerned about these emails. I have expressed that to you.

But we are well beyond 90 days. We are over a year and we are not done. Are you telling this institution that a year is not enough time for you to have this issue resolved and to have a rule out?

Ms. WALTER. The only thing I can say to you, Congressman, is that I regret we did not meet the deadline. I regret—

Mr. DUFFY. Is a year not enough time?

Ms. WALTER. It has turned out that we have not gotten it done. Could we have gotten it done?

Mr. DUFFY. Did you need more time than a year?

Ms. WALTER. We had rules that take far longer than a year to do. I am committed to trying to get this one done—

Mr. DUFFY. Is this one of them?

Ms. WALTER. —as expeditiously as possible. Yes, this was highly controversial, and we heard a lot of heavy comment from a lot of different people on both sides.

Mr. DUFFY. Can I ask one question? You took a little of my time with your height comment. Can I ask just one quick question? It is not on this, but on—

Chairman MCHENRY. I ask unanimous consent that the gentleman has an additional minute.

Mr. DUFFY. Thank you. I am going to change topics on you quickly. There has been some conversation about a pilot program to increase tick sizes. It was discussed in the JOBS Act. There are quite a few people who support it. Ms. White has expressed some interest, I think. I don't know if in a pilot program. She has indicated that she agrees that a one-size strategy doesn't fit all. Is that something that you would agree with, exploring some modification to tick sizes for small companies?

Ms. WALTER. I don't yet have a formed position on that, but I do agree that it is a serious issue, and we should explore it.

Mr. DUFFY. Thank you. I yield back.

Chairman MCHENRY. And with that, I will now recognize the ranking member of the subcommittee for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

My assumption is that you don't get letters from industry. We have talked about a letter today. You don't get letters from industry, do you?

Ms. WALTER. We certainly do.

Mr. GREEN. Is it unusual to get letters from industry?

Ms. WALTER. Not at all. We get letters and visits from industry all the time on a very wide range of subjects. And I believe that as public servants it is my duty and my pleasure to meet with these people, read the letters no matter who is sending them, no matter who is coming in to meet with me.

Mr. GREEN. Do you assume that because you get a letter from industry that somehow industry is doing something that is inappropriate and somehow exerting undue influence?

Ms. WALTER. No, I do not.

Mr. GREEN. Do you find that it is helpful to have industry's point of view when you are promulgating rules?

Ms. WALTER. Yes, I do.

Mr. GREEN. Have you, in fact, because you have received requests from industry, specific requests, have you honored some of those requests in the orderly rulemaking fashion?

Ms. WALTER. Yes.

Mr. GREEN. Is it unusual to take seriously what industry ask of you?

Ms. WALTER. Not at all.

Mr. GREEN. Do you find it unusual that persons who represent investors will ask that you give consideration to certain aspects of your rulemaking parameters?

Ms. WALTER. It is not unusual, but it happens with less frequency than it does with industry.

Mr. GREEN. Some things bear repeating. Are you saying that you get more input by way of request from industry, which is not bad, but more from industry than you do from consumer entities?

Ms. WALTER. Yes. That is correct.

Mr. GREEN. Are you offended by this?

Ms. WALTER. I am not offended by it, but I do wish that we had better means of communicating with the investing public, whom I consider to be our primary constituency, and we have been working on improving that.

Mr. GREEN. Let's go back to the Volcker Rule for just a moment. You have now gone beyond the timeline to implement it, which was July of 2012, I believe, and we are beyond July 2012.

Ms. WALTER. Yes.

Mr. GREEN. Probably about the same amount of time as before the JOBS Act.

And it is true, for clarity purposes, that you have not been called before Congress to explain why you have gone beyond the timeline for the Volcker Rule; is this true?

Ms. WALTER. I have not.

Mr. GREEN. And the Volcker Rule is designed to protect investors, is it not?

Ms. WALTER. Yes, it is.

Mr. GREEN. Under the Volcker Rule, my suspicion is that you have received some letters from investors or people representing investors as well as from industry; is this a fair statement?

Ms. WALTER. I believe it is.

Mr. GREEN. And would you give those your considered thought before you implement your new rule?

Ms. WALTER. Absolutely.

Mr. GREEN. So with the Volcker Rule, as with the JOBS Act, we find ourselves being reasonable, prudent, and judicious as we move forward. I say "we" because quite frankly, we have a lot of input into what you do. But is that a fair statement?

Ms. WALTER. Yes, it is.

Mr. GREEN. And you are not giving one less attention than the other?

Ms. WALTER. No.

Mr. GREEN. You believe them both to be important?

Ms. WALTER. Yes.

Mr. GREEN. Now, let's do something else. Let's talk about sequestration for just a moment. We talked about your budget earlier and we have talked about how you have been underfunded. Sequestration is going to have an impact on a good many agencies. Is your agency one of the agencies that will be impacted by sequestration?

Ms. WALTER. Yes, it is.

Mr. GREEN. Do you have any sense of how this impact will have an effect on what you will be doing?

Ms. WALTER. For one thing, it is going to curtail our hiring. And we are going to have to parcel out those people who get to refill positions when people leave. It is also going to affect how much we are able to spend on technology and how much we are going to be able to progress on our second technological plans. Those are the two main issues but those are—our budget is largely a people budget given the nature of what we do, not surprisingly, so it will have an impact in both of those areas.

Mr. GREEN. And you are expected to be the cop on the beat to make sure that the streets are safe for investors, is that correct?

Ms. WALTER. Yes, that is correct.

Mr. GREEN. And it appears to me that you are also expected to do a lot more with a lot less.

I yield back.

Chairman MCHENRY. The gentleman yields back, and I will recognize myself for the final round, for the final question, I should say. This will be the last question of the day.

I will put up Exhibit 6 on the board just to reiterate my opening statement.

It is an email from Mary Schapiro, then the Chairman of the SEC, to Meredith Cross. The subject line is, "Please don't forward." And the email states, "I look forward to talking tomorrow. 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," blah, blah, blah.

So, not asking for much, anti-investor legacy.

It is this email that should raise concern for you and for your agency, and it seems like this should be in some way upsetting and in some way a concern, right?

And I don't see any outrage, any concern in your testimony, your comments today.

Now, there was concern expressed and we will go to Exhibit 7 on this, and Mary Schapiro forwarded an email to Meredith Cross and two others entitled, in the forward, "I am furious." It comes from Dan Gallagher, a fellow Commissioner of yours. And he says, "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."

Now, Mary Schapiro forwards this on to others and says, "This did not go well." That was her only comment.

So that is a concern, and that is why we have hearings, when we see an agency which has that type of disorder.

I am hopeful that with a new Chairman, we can actually right this ship. And I certainly believe, as I said in the beginning, in your capacity, in your intellectual capacity and your understanding of securities laws to take this on.

If you wish to respond, go right ahead.

Ms. WALTER. I would say that I don't see in these emails an agency that is in disarray. I see in these emails—I can't speak for what Mary Schapiro was seeing at the time—a concern that there is a constituency interested in our rulemaking, and as the ranking member points out, in this case it is an investor group, someone speaking for investors, it could have been industry saying we want a comment period so that we have a chance to see a specific proposal and to make comments on it, which is the essence of the rulemaking process, and I see a Chairman being concerned about that. I do not think that is a cause for outrage.

Chairman MCHENRY. Yes. But the comment I am concerned about is "an Anti-Investor legacy" as she is leaving the agency. That is a concern I see.

And so, why I bring this up is I am hopeful that we can take this on, that your agency can take on the JOBS Act implementation, and I would hope, I think the takeaways from this hearing is that the agency put those concerns over actually letting capital flow. And that is the reason why the JOBS Act even occurs as we see the SEC stifling the flow of capital and at the same time not protecting investors as well as they should.

And so my concern is that you have prioritized that inaction over the will of Congress and the law.

We have a two-page bill, the discretion is very limited, within 3 weeks you had a proposed rule at the staff level, we don't want any

further excuses, and I am very hopeful that in the future, we will have some movement on this.

I certainly appreciate your willingness to testify before Congress. The origin of this hearing was a request for a member of the staff, and you offered yourself when you were Acting Chairman. That was very kind of you, and I certainly appreciate your willingness to engage in the discussion today.

The Chair notes that some Members may have additional questions for this witness, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to this witness and to place her responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

And without objection, this hearing is adjourned.

[Whereupon, at 4:25 p.m., the hearing was adjourned.]

A P P E N D I X

April 17, 2013

Testimony on the Implementation of Title II of the JOBS Act
by
Commissioner Elisse B. Walter

U.S. Securities and Exchange Commission

before the
Subcommittee on Oversight and Investigations
Committee on Financial Services
U.S. House of Representatives

April 17, 2013

Chairman McHenry, Ranking Member Green, and Members of the Subcommittee:

I appreciate the opportunity to testify today regarding the implementation of Title II of the Jumpstart Our Business Startups Act (JOBS Act or the Act) by the Commission and its staff.[1] Implementing the JOBS Act, including Title II, is one of the Commission's top priorities.

Title II requires the Commission to revise the Rule 506 safe harbor of Regulation D[2] from registration to allow general solicitation or general advertising for offers and sales of securities made under Rule 506, provided that all purchasers of securities are accredited investors.[3] The rules the Commission adopts pursuant to Title II must require issuers to take

---

[1] This testimony is my own and does not necessarily reflect the views of the U.S. Securities and Exchange Commission, my fellow Commissioners, or the Commission staff.

[2] 17 CFR 230.506. Rule 506 of Regulation D under the Securities Act is a non-exclusive safe harbor under Section 4(a)(2) (formerly Section 4(2)) of the Securities Act, which exempts transactions by an issuer "not involving any public offering" from the registration requirements of Section 5 of the Securities Act. Under Rule 506, an issuer may offer and sell securities, without any limitation on the offering amount, to an unlimited number of "accredited investors," as defined in Rule 501(a) of Regulation D, and to no more than 35 non-accredited investors who meet certain "sophistication" requirements. The availability of the existing safe harbor is subject to a number of requirements and is conditioned on the issuer, or any person acting on its behalf, not offering or selling securities through any form of "general solicitation or general advertising."

[3] Title II also amends Section 4 of the Securities Act to provide a narrow exemption from the requirement to register with the Commission as a broker-dealer in connection with certain limited activities related to Regulation D offerings. In February 2013, the Commission's Division of Trading and Markets posted on the Commission's website answers to frequently asked questions about these provisions, including confirmation that the exemption does not require the Commission to issue or adopt any rules. *See* http://www.sec.gov/divisions/marketreg/exemption-broker-dealer-registration-jobs-act-faq.htm.

"reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission." The Commission also is required to revise Securities Act Rule 144A[4] to provide that securities sold under this rule may be offered to persons other than qualified institutional buyers, including by means of general solicitation or general advertising, provided that the securities are sold only to persons reasonably believed to be qualified institutional buyers.

The Title II rulemaking was required to be completed within 90 days of enactment of the JOBS Act. Prior to enactment, a rulewriting team was formed consisting of staff from across the Commission, including economists from the Division of Risk, Strategy, and Financial Innovation. In August 2012, the Commission issued for public comment proposed rules to implement Title II.[5] Under the proposed rules, companies issuing securities in an offering conducted under Rule 506 of Regulation D would be permitted to use general solicitation or general advertising to offer securities, provided that the issuer takes reasonable steps to verify that the purchasers of the securities are accredited investors. The Proposing Release explains that, in determining the reasonableness of the steps that an issuer has taken to verify that a purchaser is an accredited investor, issuers should consider the facts and circumstances of the transaction, such as the type of purchaser and the type of accredited investor that the purchaser

---

[4] 17 CFR 230.144A. Rule 144A is a non-exclusive safe harbor exemption from the registration requirements of the Securities Act for resales of certain "restricted securities" to qualified institutional buyers. Although Rule 144A does not include an express prohibition against general solicitation or general advertising, offers of securities under Rule 144A currently must be limited to qualified institutional buyers, which has the same practical effect. A qualified institutional buyer is defined in Rule 144A and includes specified institutions that, in the aggregate, own and invest on a discretionary basis at least $100 million in securities of issuers that are not affiliated with such institutions. Banks and other specified financial institutions also must have a net worth of at least $25 million. A registered broker-dealer is a qualified institutional buyer if it, in the aggregate, owns and invests on a discretionary basis at least $10 million in securities of issuers that are not affiliated with the broker-dealer.

[5] Securities Act Release No. 33-9354 (Proposing Release), 77 Fed. Reg. 54464 (August 29, 2012), *available at* http://www.sec.gov/rules/proposed/2012/33-9354.pdf.

claims to be, the amount and type of information that the issuer has about the purchaser, and the nature of the offering. The proposed rules would preserve the existing portions of Rule 506 as a separate exemption so that companies conducting Rule 506 offerings without the use of general solicitation or general advertising would not be subject to the new verification requirement.

The Commission also proposed that securities sold pursuant to Rule 144A could be offered to persons other than qualified institutional buyers, including by means of general solicitation or general advertising, provided that the securities are sold only to persons whom the seller and any person acting on behalf of the seller reasonably believe are qualified institutional buyers.

Prior to issuing the Proposing Release, to aid the rulemaking process and to increase the opportunity for public comment, the Commission permitted interested parties to submit comments regarding this provision of the JOBS Act.[6] These pre-proposing release commenters expressed a variety of views on how the Commission should implement Title II, in particular, how the rules relating to the requirement to verify accredited investor status should be implemented. Some focused on the capital formation benefits they believed the rulemaking could provide, highlighting the enhanced ability of accredited investors and qualified institutional buyers to learn about, and participate in, offerings made under the revised rules.[7]

Others asserted that permitting general solicitation without additional safeguards would create serious investor protection concerns, with some commenting on other areas that they believed should be considered as part of this rulemaking. For example, several recommended

---

[6] *See* http://www.sec.gov/spotlight/jobsactcomments.shtml. The Commission received more than 65 comment letters regarding Title II prior to issuing its rule proposal. *See* http://www.sec.gov/comments/jobs-title-ii/jobs-title-ii.shtml.

[7] *See, e.g.*, letter from Federal Regulation of Securities Committee, Business Law Section of the American Bar Association (April 30, 2012).

that the Commission amend the definition of "accredited investor" as it relates to natural persons. Others recommended that the Commission amend the Form D filing requirement, including conditioning the availability of the revised Rule 506 on the filing of a Form D, requiring the Form D to be filed in advance of any general solicitation, or adding to the information requirements of Form D. In addition, some commenters suggested that the Commission propose rules governing the content and manner of advertising and solicitations used in offerings conducted under the revised rule.[8]

In the Proposing Release, the Commission proposed only those rule and form amendments that a majority of the Commission members believed were necessary to implement the mandate in Title II. The Proposing Release did not propose other amendments to Regulation D, Form D, or the definition of "accredited investor," such as those suggested in pre-proposing release comment letters. The Commission requested that commenters address the Commission's specific proposed approach to implementing Title II. The Proposing Release did not request comment on other potential rule changes, nor did it address any such recommendations as potential reasonable alternatives to the approach in the proposed rule.[9]

Prior to the issuance of the rule proposal, a number of commenters expressed concerns about the possibility that the Commission might proceed to a final rule without allowing the

---

[8] *See, e.g.*, letters from Investment Company Institute (May 21, 2012); AFL-CIO, Americans for Financial Reform, Consumer Federation of America, Consumer Action, and Fund Democracy (May 24, 2012); Massachusetts Securities Division (July 2, 2012); North American Securities Administrators Association (July 3, 2012); Ohio Division of Securities (July 3, 2012).

[9] Commissioner Luis Aguilar dissented from the Commission's action, stating his view that the Proposing Release presented a framework that was not balanced and did not consider the alternatives suggested by pre-proposing release commenters. *See* Commissioner Luis A. Aguilar, Statement at SEC Open Meeting, August 29, 2012, *available at* https://www.sec.gov/news/speech/2012/spch082912laa.htm.

public an opportunity to comment on a specific Commission proposal.[10] The Administrative Procedure Act, which governs all Commission rulemakings, requires such a notice and comment process, with certain narrow exceptions.[11]

The comment period for the proposal ended in October 2012. Following the proposal, commenters have submitted more than 220 letters.[12] Those letters have generated meaningful discussion regarding the issues and been very useful in our consideration of how to implement Title II.

Commenters on the proposal were sharply divided in their views. Sixty-one commenters, including the majority of professional and trade associations/organizations, law firms and legal associations that submitted letters, expressed general support for the proposal, with many stating generally that the elimination of the prohibition on general solicitation or general advertising would facilitate capital formation.[13] In addition, several supporters recommended that the proposed framework for verifying accredited investor status be supplemented in the final rule by including a non-exclusive list of specific verification methods that could be relied upon by issuers seeking greater certainty that they are satisfying the verification requirement.[14] Eighty-

---

[10] *See, e.g.*, letters from the Investment Company Institute (August 17, 2012); Fund Democracy, Consumer Federation of America, Americans for Financial Reform and Lynn E. Turner (August 16, 2012); Council of Institutional Investors (August 16, 2012); and North American Securities Administrators Association (August 15, 2012).

[11] *See* 5 U.S.C. 553.

[12] *See* http://www.sec.gov/comments/s7-07-12/s70712.shtml. Commissioners and the staff also have participated in numerous meetings with a wide variety of interested individuals and groups regarding the rulemaking. The comment file relating to Title II provides information about the meetings in which the Commissioners and the staff participated. *See* http://www.sec.gov/comments/jobs-title-ii/jobs-title-ii.shtml.

[13] *See, e.g.*, letters from the Federal Regulation of Securities Committee, Business Law Section of the American Bar Association (October 5, 2012); Angel Capital Association (September 27, 2012); Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce (October 5, 2012); and Securities Industry and Financial Markets Association (October 5, 2012).

[14] *See, e.g.*, letters from Angel Capital Association (September 27, 2012); Biotechnology Industry Organization (October 5, 2012); and Managed Funds Association (September 28, 2012).

one commenters expressed general opposition to the Commission's proposal, including the Investor Advisory Committee formed by the Commission as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act,[15] all of the investor organizations, and all but one of the federal and state officials who submitted letters. Some of these commenters stated that the proposed rules, if adopted, would result in an increase in fraudulent securities offerings, with a number recommending that the Commission consider additional safeguards, such as those recommended in certain pre-proposing release comment letters.[16] Currently, staff in the Divisions of Corporation Finance and Risk, Strategy, and Financial Innovation are developing recommendations for the Commission's consideration as to how best to move forward with implementation of Title II.

In conclusion, the Commission and the staff continue to work on implementing Title II of the JOBS Act. Although our work on this important provision is still ongoing, the Commission needs to complete this rulemaking promptly and it is a priority for the agency.

Thank you again for inviting me to appear before you today. I would be pleased to answer any questions you may have.

---

[15] The Investor Advisory Committee was established in April 2012 pursuant to Section 911 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to advise the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, and on initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. Members of the Investor Advisory Committee were nominated by all five of the sitting Commissioners at the time of its formation and represent a wide variety of interests, including senior citizens and other individual investors, mutual funds, pension funds and state securities regulators. The Dodd-Frank Act authorizes the Investor Advisory Committee to submit findings and recommendations for review and consideration by the Commission. *See* Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Lift the Ban on General Solicitation and Advertising in Rule 506 Offerings: Efficiently Balancing Investor Protection, *available at* http://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-general-solicitation-advertising-recommendations.pdf.

[16] *See, e.g.*, letters from AARP (October 5, 2012); Council of Institutional Investors (September 27, 2012); Consumer Federation of America (October 3, 2012); Investment Company Institute (October 5, 2012); Massachusetts Securities Division (September 20, 2012); and North American Securities Administrators Association (October 3, 2012).

CHAIRMAN'S EXHIBITS

4/17/13

OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

HEARING ON "EXAMINING THE SEC'S FAILURE TO IMPLEMENT TITLE II OF THE JOBS ACT AND ITS IMPACT ON ECONOMIC GROWTH"

From: Kim, Thomas
Sent: Wednesday, May 09, 2012 1:20 PM GMT -04:00
To: Cross, Meredith; Nallengara, Lona
CC: Ingram, Jonathan; Yu, Ted; Kwon, Charles
Subject: FW: Revised Draft Rule 506 Rule 144A Term Sheet

Hi:

We met w/ Rich Levine and Aseel Rabie this morning to discuss OGC's comments on the term sheet that we received yesterday. (See below, which includes a summary of what we discussed w/r/t each point.) Their biggest comment, which they conveyed more fully at our meeting, is on process. As you may know, they have been concerned about what happens on Day 91. Can the SEC enforce the ban on general solicitation in Rule 506 offerings after it fails to meet the deadline Congress has imposed for lifting the ban on general solicitation in Rule 506 offerings? I think they're dubious as to whether we could.

OGC's idea is that, instead of following the typical proposing release/adopting release process, we consider going straight to an interim final rule within the 90 days. This interim final rule would contain language that largely tracks the statute. In the release text, we would explain our interpretation of what "verify" means and what "reasonable steps" means, and provide examples of what "methods" could be used. What would suffice would be based on a facts-and-circumstances/reasonableness standard. We could even have an instruction that says, self-certification, in and of itself, would be not be sufficient.

The interim final rule would sunset at some point in the future, such as one year or, better yet, two years later. Between now and then, we would invite comment on the interim final rule. We anticipate that these comments would be better and more useful than they would be if we didn't have an interim final rule in place because, presumably, the comments would be informed by real-life experience with the new rule. Similarly, our final final rule would also presumably be better for the same reason, as it would be informed by the comments and by the Staff's own experience with interpreting and administering and enforcing (and bringing enforcement actions with respect to) the interim final rule.

We told them that if this is the way they think we should go, we would probably all need to meet one more time, and also involve IM as well.

Thoughts?

Thx, Tom

From: Fredrickson, David R.
Sent: Monday, May 07, 2012 2:57 PM
To: Kim, Thomas; Zepralka, Jennifer; Brown, Lillian; Brightwell, Tamara
Cc: Levine, Richard A.; Rabie, Aseel
Subject: RE: Revised Draft Rule 506 Rule 144A Term Sheet

Tom, et al.,
Thanks for the revised Rule 506/144A term sheet. We'd still like to discuss some of the issues we raised on the prior draft, and to understand whether the term sheet or the proposing release will address these issues. We also have questions about some of the newly added language.
Our comments are as follows:

1. The term sheet suggests in a couple of places (pp. 6 and 13-14 of the redline) that the

From: Kim, Thomas
Sent: Friday, May 11, 2012 3:18 PM GMT -04:00
To: Nallengara, Lona
Subject: Rule 506 update

Hi Lona:

Yesterday, the working group met w/ Meredith in the afternoon (I sent you the meeting invite) to discuss whether the Rule 506 amendments should be implemented w/o notice and comment, either as an interim final rule or as an interim final temporary rule. Meredith supported going straight to a final rule, as we could then have a pilot period where we could assess how issuers are verifying accredited investors and whether or not these investors are, in fact, accredited, after which point we could decide whether to adopt final final rules or amend the rule to address any concerns. She was more comfortable doing this as an interim final temporary rule, which means that it would sunset at some future date. Two years was tossed around as a possible sunset date.

We are revising the term sheet accordingly, and focusing on making the rule principles-based, with the emphasis being on "reasonable" steps in light of facts and circumstances. Basically, GC's comments on the old term sheet. Correspondingly, we're going to de-emphasize the word "verify" and so we're going to delete the discussion about the legislative history and the other federal rules that use that term and require 3d party documentation.

Just wanted to give you this update so you know what the status is.

(Bts, I did the mid-Atlantic ENF conference yesterday morning. It was actually enjoyable. About 40 regulators from the mid-Atlantic area, including our Philadelphia regional office. No members from the public. State securities regulators, the IRS, various US Atty offices.)

Have a great weekend!

Tom

From: Cross, Meredith
Sent: Wednesday, May 23, 2012 3:07 PM GMT -04:00
To: Schapiro, Mary L.; Walter, Elisse; Aguilar, Luis A. (Commissioner); Paredes, Troy A.; Gallagher, Daniel; Nisanci, Didem A.; Williams, Erica Y.; Sheppard, Lesli; Leaf, Marc A.; Kimpel, Scott H.; Devine, Stephen W.
CC: Cross, Meredith; Nallengara, Lona; Kim, Thomas; Yu, Ted; Cahn, Mark D.; Levine, Richard A.; Fredrickson, David R.; Lewis, Craig; Hanley, Kathleen; [redacted]
Subject: JOBS Act rulemaking -- Draft Term Sheet for Rule 506/Rule 144A rulemaknig
Attachments: Draft Rule 506 Rule 144A Term Sheet, Final.docx

Dear Commissioners and Counsels,

Attached for your review is a draft term sheet for the rulemaking to remove the ban on general solicitation in Reg D Rule 506 offerings and to allow offers to non-QIBs in Rule 144A offerings. It also requires issuers to take reasonable steps to verify accredited investor status in generally solicited Reg D Rule 506 offerings. This rulemaking is required by Title II of the JOBS Act. As you will see, we are recommending that the Commission proceed with an interim final rule.

The JOBS Act calls for these rule amendments to be finalized by 90 days after enactment of the JOBS Act (July 4, 2012). In the interest of time, we are drafting a release based the draft term sheet. We look forward to discussing your questions and comments.

Thanks, Meredith

Draft Rule 506 Rule 144A Term Sheet, Final.docx (55 kB)

From: Kwon, Charles
Sent: Tuesday, June 05, 2012 10:45 AM GMT -04:00
To: Rabie, Aseel
CC: Yu, Ted; Kim, Thomas; Ingram, Jonathan; Fredrickson, David R.
Subject: 506 release - "good cause" exception under the APA

Aseel,
As I mentioned over the phone, the following is a draft discussion of the "good cause" exception under the APA for the 506 release.

Please let me know if you have any questions. Your feedback would be much appreciated.

Thanks,
Charles

OTHER MATTERS

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.[1] This requirement does not apply, however, if the agency "for good cause finds … that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."[2] 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.[3]

The Commission is requesting comments on the interim final rules and will consider any

comments that we receive in determining whether we should revise, or take any other actions with respect to, the interim final rules. The interim final rules will remain in effect until the compliance date for final rules that we may adopt further establishing the methods that issuers may use in taking "reasonable steps" to verify that purchasers of securities in a Rule 506 offering are accredited investors.

[1] See 5 U.S.C. 553(b).

[2] Id.

[3] Adopting the amendments to Rules 506 and 144A as interim final rules would also permit the Commission to coordinate its final rulemaking efforts in implementing Section 201(a) with any Commission rulemaking efforts to amend the definition of "accredited investor" following the GAO's study and report on the appropriate criteria needed to qualify for accredited investor status, as required by Section 415 of the Dodd-Frank Act.

[1] See 5 U.S.C. 553(b).

[2] Id.

From: Schapiro, Mary L.
Sent: Tuesday, August 07, 2012 4:32 PM GMT -04:00
To: Nisanci, Didem A.; Williams, Erica Y.; McHugh, Jennifer B.; Cross, Meredith; Marlin, Myron L.
CC: Walter, Elisse
Subject: Re: general solicitation ban rulemaking

I know we spent an hour discussing this yesterday but they are making me very worried. Is there really a problem with a short comment period? I know, i know we went through all of that....

From: Nisanci, Didem A.
Sent: Tuesday, August 07, 2012 04:10 PM
To: Schapiro, Mary L.; Williams, Erica Y.; McHugh, Jennifer B.; Cross, Meredith; Marlin, Myron L.
Subject: Fw: general solicitation ban rulemaking

From: Barbara Roper [redacted]
Sent: Tuesday, August 07, 2012 03:23 PM
To: Nisanci, Didem A.
Subject: general solicitation ban rulemaking

Didem,

By now I imagine you have heard from SEC staff who attended last week's JOBS Act Implementation roundtable at the Treasury Department about how strongly investor representatives at that meeting opposed the reported plan to adopt the rule eliminating the general solicitation ban in private offerings as an interim final or temporary rule. We have strong objections to this approach based on both substance and process, which we will detail in a forthcoming letter to the Commission. (A letter is currently being drafted and is likely to be finalized by early next week at the latest.) It will call on the Commission to subject this and all future JOBS Act rulemakings to the full public proposal-and-comment process required under the Administrative Procedures Act. I wanted to give you a heads up that this is coming, that it is a very important issue for a number of investor groups including CFA, and that groups who were present at last week's meeting are prepared to be quite aggressive in voicing our concerns.

Barb

Barbara Roper
Director of Investor Protection
Consumer Federation of America
[redacted]

From: Schapiro, Mary L.
Sent: Tuesday, August 07, 2012 5:05 PM GMT -04:00
To: Cross, Meredith
Subject: Please don't forward

I look forward to talking tomorrow. 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....

From: Schapiro, Mary L.
Sent: Wednesday, August 08, 2012 7:40 PM GMT -04:00
To: Cross, Meredith; Williams, Erica Y.; Cahn, Mark D.
Subject: Fw: I am furious

This did not go well.

----- Original Message -----
From: Gallagher, Daniel
Sent: Wednesday, August 08, 2012 07:19 PM
To: Schapiro, Mary L.
Subject: I am furious

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 food faith as we consider critically important rules in an unreasonable schedule you have set for this month. I will proceed accordingly.

and State and local governments, and as a source of liquidity for the financial system; and

(G) the nature, scope, and mix of the activities of the supervised securities holding company.

Effective date.

(4) NOTICE.—A capital requirement imposed under this subsection may not take effect earlier than 180 days after the date on which a supervised securities holding company is provided notice of the capital requirement.

(e) OTHER PROVISIONS OF LAW APPLICABLE TO SUPERVISED SECURITIES HOLDING COMPANIES.—

(1) FEDERAL DEPOSIT INSURANCE ACT.—Subsections (b), (c) through (s), and (u) of section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) shall apply to any supervised securities holding company, and to any subsidiary (other than a bank or an institution described in subparagraph (D), (F), or (H) of section 2(c)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2))) of a supervised securities holding company, in the same manner as such subsections apply to a bank holding company for which the Board of Governors is the appropriate Federal banking agency. For purposes of applying such subsections to a supervised securities holding company or a subsidiary (other than a bank or an institution described in subparagraph (D), (F), or (H) of section 2(c)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2))) of a supervised securities holding company, the Board of Governors shall be deemed the appropriate Federal banking agency for the supervised securities holding company or subsidiary.

(2) BANK HOLDING COMPANY ACT OF 1956.—Except as the Board of Governors may otherwise provide by regulation or order, a supervised securities holding company shall be subject to the provisions of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) in the same manner and to the same extent a bank holding company is subject to such provisions, except that a supervised securities holding company may not, by reason of this paragraph, be deemed to be a bank holding company for purposes of section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843).

SEC. 619. PROHIBITIONS ON PROPRIETARY TRADING AND CERTAIN RELATIONSHIPS WITH HEDGE FUNDS AND PRIVATE EQUITY FUNDS.

The Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) is amended by adding at the end the following:

12 USC 1851.

"SEC. 13. PROHIBITIONS ON PROPRIETARY TRADING AND CERTAIN RELATIONSHIPS WITH HEDGE FUNDS AND PRIVATE EQUITY FUNDS.

"(a) IN GENERAL.—

"(1) PROHIBITION.—Unless otherwise provided in this section, a banking entity shall not—

"(A) engage in proprietary trading; or

"(B) acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund.

"(2) NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD.—Any nonbank financial company supervised by the Board that engages in proprietary trading or takes or retains

any equity, partnership, or other ownership interest in or sponsors a hedge fund or a private equity fund shall be subject, by rule, as provided in subsection (b)(2), to additional capital requirements for and additional quantitative limits with regards to such proprietary trading and taking or retaining any equity, partnership, or other ownership interest in or sponsorship of a hedge fund or a private equity fund, except that permitted activities as described in subsection (d) shall not be subject to the additional capital and additional quantitative limits except as provided in subsection (d)(3), as if the nonbank financial company supervised by the Board were a banking entity.

"(b) STUDY AND RULEMAKING.—

"(1) STUDY.—Not later than 6 months after the date of enactment of this section, the Financial Stability Oversight Council shall study and make recommendations on implementing the provisions of this section so as to— Deadline. Recommendations.

"(A) promote and enhance the safety and soundness of banking entities;

"(B) protect taxpayers and consumers and enhance financial stability by minimizing the risk that insured depository institutions and the affiliates of insured depository institutions will engage in unsafe and unsound activities;

"(C) limit the inappropriate transfer of Federal subsidies from institutions that benefit from deposit insurance and liquidity facilities of the Federal Government to unregulated entities;

"(D) reduce conflicts of interest between the self-interest of banking entities and nonbank financial companies supervised by the Board, and the interests of the customers of such entities and companies;

"(E) limit activities that have caused undue risk or loss in banking entities and nonbank financial companies supervised by the Board, or that might reasonably be expected to create undue risk or loss in such banking entities and nonbank financial companies supervised by the Board;

"(F) appropriately accommodate the business of insurance within an insurance company, subject to regulation in accordance with the relevant insurance company investment laws, while protecting the safety and soundness of any banking entity with which such insurance company is affiliated and of the United States financial system; and

"(G) appropriately time the divestiture of illiquid assets that are affected by the implementation of the prohibitions under subsection (a).

"(2) RULEMAKING.—

"(A) IN GENERAL.—Unless otherwise provided in this section, not later than 9 months after the completion of the study under paragraph (1), the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, shall consider the findings of the study under paragraph (1) and adopt rules to carry out this section, as provided in subparagraph (B). Deadline.

"(B) COORDINATED RULEMAKING.—

"(i) REGULATORY AUTHORITY.—The regulations issued under this paragraph shall be issued by—

"(I) the appropriate Federal banking agencies, jointly, with respect to insured depository institutions;

"(II) the Board, with respect to any company that controls an insured depository institution, or that is treated as a bank holding company for purposes of section 8 of the International Banking Act, any nonbank financial company supervised by the Board, and any subsidiary of any of the foregoing (other than a subsidiary for which an agency described in subclause (I), (III), or (IV) is the primary financial regulatory agency);

"(III) the Commodity Futures Trading Commission, with respect to any entity for which the Commodity Futures Trading Commission is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

"(IV) the Securities and Exchange Commission, with respect to any entity for which the Securities and Exchange Commission is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Consultation.

"(ii) COORDINATION, CONSISTENCY, AND COMPARABILITY.—In developing and issuing regulations pursuant to this section, the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission shall consult and coordinate with each other, as appropriate, for the purposes of assuring, to the extent possible, that such regulations are comparable and provide for consistent application and implementation of the applicable provisions of this section to avoid providing advantages or imposing disadvantages to the companies affected by this subsection and to protect the safety and soundness of banking entities and nonbank financial companies supervised by the Board.

"(iii) COUNCIL ROLE.—The Chairperson of the Financial Stability Oversight Council shall be responsible for coordination of the regulations issued under this section.

"(c) EFFECTIVE DATE.—

"(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), this section shall take effect on the earlier of—

"(A) 12 months after the date of the issuance of final rules under subsection (b); or

"(B) 2 years after the date of enactment of this section.

Deadline.

"(2) CONFORMANCE PERIOD FOR DIVESTITURE.—A banking entity or nonbank financial company supervised by the Board shall bring its activities and investments into compliance with the requirements of this section not later than 2 years after the date on which the requirements become effective pursuant

Board of Governors of the Federal Reserve System

Joint Press Release

Board of Governors of the Federal Reserve System
Commodity Futures Trading Commission
Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency
Securities and Exchange Commission

For immediate release **April 19, 2012**

Volcker Rule Conformance Period Clarified

The Federal Reserve Board on Thursday announced its approval of a statement clarifying that an entity covered by section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, or the so-called Volcker Rule, has the full two-year period provided by the statute to fully conform its activities and investments, unless the Board extends the conformance period. Section 619 generally requires banking entities to conform their activities and investments to the prohibitions and restrictions included in the statute on proprietary trading activities and on hedge fund and private equity fund activities and investments.

Section 619 required the Board to adopt rules governing the conformance periods for activities and investments restricted by that section, which the Board did on February 9, 2011. Subsequently, the Board received a number of requests for clarification of the manner in which this conformance period would apply and how the prohibitions will be enforced. The Board is issuing this statement to address this question.

The Board's conformance rule provides entities covered by section 619 of the Dodd-Frank Act a period of two years after the statutory effective date, which would be until July 21, 2014, to fully conform their activities and investments to the requirements of section 619 of the Dodd-Frank Act and any implementing rules adopted in final under that section, unless that period is extended by the Board.

The Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the Commodity Futures Trading Commission (the agencies) plan to administer their oversight of banking entities under their respective jurisdictions in accordance with the Board's conformance rule and the attached statement. The agencies have invited public comment on a proposal to implement the Volcker rule, but have not adopted a final rule.

The statement is included in the attached *Federal Register* notice, publication of which is expected shortly.

Federal Register notice: TEXT | PDF

Board Voting Record

Media Contacts:

Federal Reserve Board	Barbara Hagenbaugh	202-452-2955
CFTC	David Gary	202-418-5085

FDIC	David Barr	202-898-6992
OCC	Bryan Hubbard	202-874-5770
SEC	John Nester	202-551-4120

SPENCER BACHUS, AL, CHAIRMAN

United States House of Representatives
Committee on Financial Services
Washington, D.C. 20515

BARNEY FRANK, MA, RANKING MEMBER

November 29, 2012

The Honorable Ben Bernanke
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

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

The Honorable Martin Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

The Honorable Thomas Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, DC 20219

The Honorable Gary Gensler
Chairman
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Dear Sirs and Madam:

As you know, Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), popularly known as the "Volcker Rule," prohibits banks from engaging in proprietary trading. Hearings in the Committee on the Financial Services have demonstrated that the Volcker Rule will have significant effects on capital formation and liquidity in the financial system as well as the availability of credit to businesses and consumers and the ability of individuals to save for their retirements and their children's education. Moreover, because no other country has imposed a similar prohibition on proprietary trading, the Volcker Rule may well put U.S. financial institutions at a competitive disadvantage against their foreign counterparts.

Given that the costs that the Volcker Rule will impose on the U.S. financial system will more than likely outweigh any benefits the rule has to offer, it is absolutely essential that you carefully consider how you will implement it and that your agencies be transparent about the process by which you issue the final rule. Unfortunately, you have been less than transparent about how you intend to implement the Volcker Rule, and the resulting confusion has only made it that much more likely that whatever final rule you issue will compound the regulatory uncertainty that continues to plague our economy.

In October 2011 and in January 2012, your agencies released proposed rules pursuant to Section 619, and solicited comments on more than one thousand separate questions. Five months later, in April 2012, amid considerable confusion about how financial institutions would comply with rules that have yet to be finalized and a looming July 2012 deadline, the Federal Reserve

Board directed banking entities to engage in good-faith efforts to try to conform their activities to a yet-to-be-defined rule, with full compliance mandated by July 2014.

The media now report that your agencies may be preparing to issue as many as three different versions of the Volcker Rule. Even if proprietary trading played a role in bringing about the financial crisis and even if banning proprietary trading would make the financial system safer—propositions that are simply not supported by the evidence—the prospect that regulators have been unable to agree on one version of the Volcker Rule is extremely troubling. As we are sure you can appreciate, competing versions of the Volcker Rule will make it all the more difficult for market participants to know what their obligations are and how to comply with them, particularly if they find themselves subject to competing obligations enforced by different regulators. While the Volcker Rule promises little if any benefit, what little benefit it does promise will not be realized if regulators further fragment financial markets and ratchet up the costs of compliance for market participants by issuing multiple versions of the Volcker Rule. Section 619 charged the five regulatory agencies with jointly promulgating one Volcker Rule; it did not grant each one the discretion to issue its own version of the same rule. To comply with the mandate set forth in the Dodd-Frank Act, you must speak with one voice and jointly issue one rule.

As part of your efforts to jointly issue one Volcker Rule rather than several, the agencies should conduct a robust cost-benefit analysis of the Volcker Rule and its effects on investors, borrowers, capital markets, the financial system, and the U.S. economy. Market participants deserve to know whether the Volcker Rule will in fact make the financial system safer and they deserve to know at what cost. Perhaps more important, Congress should have the benefit of that analysis in considering whether Section 619 should be amended or repealed.

Given the time that it will take for you to agree on one version of the Volcker Rule as well as the tremendous uncertainty that market participants face in trying to anticipate what the final rule will look like, we respectfully suggest that the Federal Reserve Board delay the Volcker Rule's effective date until two years after the date on which the final rule is promulgated. Doing so would replicate the two-year conformance period mandated by Section 619, and it would grant institutions the time Congress intended to give them to begin their efforts to comply with this far-reaching, complex rule.

We look forward to your response and your description of how you plan to proceed with this crucial rule that will profoundly affect U.S. financial markets and all those who rely upon them.

Sincerely,

SPENCER BACHUS
Chairman

JEB HENSARLING
Vice Chairman