



June 5, 2012

***filed via e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov)***

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

Re: Section 201 of Title II of the Jumpstart our Business Startups Act of 2012 (the "JOBS Act")

Dear Ms. Murphy:

The Real Estate Investment Securities Association ("REISA")<sup>1</sup> submits this letter in response to the Securities and Exchange Commission's ("SEC") request for comments in advance of its rulemaking in connection with the enactment of the JOBS Act. REISA appreciates the opportunity to comment on the JOBS Act and the rules to be promulgated thereunder, and at the present time, we direct our comments specifically to the elimination of the general solicitation/general advertising prohibitions of Rule 506 of Regulation D, as promulgated under the Securities Act of 1933, as amended. Our comments will focus on the following issues:

1. Definition of "Reasonable Steps to Verify." The JOBS Act requires the SEC to establish "reasonable steps" that issuers must follow in order to verify the accredited investor status of investors who purchase securities in a Rule 506 offering in which the issuer employs general solicitation or general advertising. REISA believes that the rules to be promulgated by the SEC should clearly identify the factors that will determine whether "reasonable steps to verify" have been taken by an issuer. In addition, whatever the SEC determines are "reasonable steps to verify" should not be overly burdensome to issuers.

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<sup>1</sup> REISA is a national trade association that influences over 20,000 real estate professionals who offer and manage alternative investments. These alternative investments typically include, but are not limited to non-traded REITs, real estate partnerships, real estate income and development funds, tenant-in-common interests, oil and gas interests, equipment leasing, business development companies and other securitized real estate investments. REISA has more than 800 active members, which include broker dealers, sponsors/issuers, Registered Investment Advisers, registered representatives and other alternative investment professionals. REISA works to maintain the integrity and reputation of the industry by promoting the highest ethical standards to its members and provide education, legislative and regulatory advocacy, and networking opportunities. REISA connects members directly to key industry experts providing timely trends and education and helping create a diversified portfolio for their clients.



2. Safe Harbor for Issuers. The JOBS Act does not address providing a safe harbor for issuers that follow reasonable steps to verify and inadvertently sell to a non-accredited investor. REISA believes that if issuers are to take advantage of the ability to generally solicit and advertise Rule 506 offerings, the safe harbor for an inadvertent mistake is vital.
3. Delegation of Obligation to Verify to Broker-Dealers. The JOBS Act requirement to take “reasonable steps to verify” solely focuses on the actions of issuers. However, in many Rule 506 offerings, issuers use broker-dealers to sell the securities to investors pursuant to selling agreements. REISA believes that in promulgating the rules required by the JOBS Act, the SEC should also account for an issuer’s use of broker-dealers and provide for the ability of issuers to (1) delegate the obligation to take the “reasonable steps to verify” to broker dealers that sell the issuers’ securities pursuant to a selling agreement and (2) contract away their liability for the actions of the broker-dealers selling their securities in the event the broker-dealer does not take reasonable steps to verify. In addition, REISA further believes that an offering should not lose its exemption from registration as a result of a broker-dealer’s sale of securities to a non-accredited investor, provided that such sale could not have reasonably been prevented by the issuer.
4. Status Quo for Issuers that Continue to Prohibit General Solicitation/General Advertising. Despite the ability of issuers to sell their securities using general solicitation and general advertising in a Rule 506 offering, issuers who choose to continue to prohibit general solicitation and general advertising should not be subject to additional procedural burdens, including the to-be-defined reasonable steps to verify. These issuers should be able to utilize their currently existing procedures in conducting Rule 506 private offerings.

These issues are discussed in more detail below.

REISA supports Congress’ efforts to grow new businesses and jobs, but we are concerned that the rules promulgated pursuant to the JOBS Act could have a significant impact on the usefulness and implementation of these new benefits. In order for Congress’ actions in allowing general solicitation to have a noticeable positive impact on the growth of business, the SEC must consider the burdens of additional procedural requirements for issuers and broker-dealers as well as an issuer’s increased risk of losing a registration exemption and being subject to other regulatory sanctions as a result of the now permitted use of general solicitation and general advertising.

1. Definition of Reasonable Steps to Verify. Section 201 of the JOBS Act requires the SEC to revise its rules to allow for the use of general solicitation and general advertising in the offer and sale of securities made pursuant to a Rule 506 exemption so long as all of the purchasers are accredited investors. In conjunction with such revision, the SEC must also draft a rule that requires issuers to take “reasonable steps to verify” that all of the purchasers of the securities are accredited investors. REISA believes that the rules to be promulgated by the SEC pursuant to the JOBS Act should clearly identify what will be considered reasonable steps to verify or what factors will be considered in determining whether reasonable



steps to verify have been taken by an issuer. The more guidance that can be given with respect to what constitutes “reasonable steps to verify,” the more certainty issuers will have with respect to utilizing these new tools for capital formation and job creation. In addition, a lack of understanding as to what is expected of issuers using general solicitation or general advertising may reduce the interest in using general solicitation and general advertising, which REISA believes, as did Congress, as a tool to help spur growth in the economy through easing capital formation. In keeping with the goals of the JOBS Act, the reasonable steps to verify requirement should not be overly burdensome to issuers. REISA suggests that reasonable steps should include what is currently common practice in the private placement market of requiring an investor questionnaire and the review of such questionnaire to determine accredited investor status. REISA believes that any additional conditions will have a significant impact on the ability of its members to raise capital through the private placement market.

REISA does not believe issuers should be subject to significant procedural burdens in order to meet the reasonable steps to verify requirement. The cost of implementing significant additional procedures and oversight to ensure that reasonable steps to verify are taken should not outweigh the benefits of increased access to capital. Thus, REISA does not believe issuers should be held responsible for such tasks as independently verifying an investor’s income or net worth to determine accreditation or the accuracy of representations made in its subscription documents. In addition, REISA members typically use registered broker-dealers to distribute their securities and such broker-dealers are in the best position to verify the representations of investors regarding accreditation status.

2. **Safe Harbor for Issuers.** The JOBS Act does not address providing a safe harbor for issuers that inadvertently sell to a non-accredited investor despite following reasonable steps to verify such investor’s accreditation. REISA believes that the SEC should provide a safe harbor for issuers and their offerings if they adhere to the reasonable steps to verify requirement, but are still found to have sold exempt securities to a non-accredited investor. Without a safe harbor, many issuers may avoid using general solicitation for fear of losing their exemption from registration and being subject to other regulatory sanctions as a result of unintentionally selling securities to a non-accredited investor. Thus, the amendment contained in Section 201 of the JOBS Act could have the unintended consequence of actually diminishing growth in business by stifling issuer interest and broker-dealer involvement in exempt offerings. REISA believes it is imperative that safe harbor provisions be included in the rules to be promulgated that prevent the loss of the registration exemption and any other regulatory sanctions as the result of an inadvertent sale by the issuer or a member of a selling group. If the rules do not provide a safe harbor, the attempt to spur capital formation activities will fail for fear of the attendant liability and the loss of the registration exemption.
3. **Delegation of Obligation to Verify to Broker-Dealers.** Issuers often engage the assistance of registered broker-dealers to solicit investors for the issuers’ securities. If engaged by issuers, broker-dealers are the parties that have the interaction and relationship with the investors and are thus in the best position to verify the



accreditation status of such investors. REISA believes that the SEC should include provisions in the rules to be promulgated that provide issuers the ability to delegate the obligation to take reasonable steps to verify accreditation status to the broker-dealers acting as their agents in the sale of securities through an exempt offering. Without the ability to delegate its obligations, an issuer could choose (a) not to engage a broker-dealer to assist in the sale of its securities in an exempt offering (b) not to use the ability to generally solicit or advertise due to the inability to rely on the broker-dealers or (c) to sell their securities directly. Any of these actions would eliminate the intended benefits of Section 201 of the JOBS Act. If issuers cannot take advantage of general solicitation or general advertising by delegating such obligation to broker-dealers, then issuers may begin selling their securities either directly without the protection afforded by licensed broker-dealers or through non-licensed persons.

In addition to being able to delegate the obligation to take reasonable steps to verify, the broker-dealers that have such obligation should not be subject to further procedural burdens as a result. Broker-dealers already have an obligation to determine the suitability of investments for investors and must make that determination based upon various factors, including an investor's financial situation, net worth and income. Broker-dealers should be permitted to rely on the representations of investors without having additional burdens, including concerns regarding privacy rights of investors, to contend with in making those determinations if additional steps will be required. More and more broker-dealers are exiting the business due to unreasonable and burdensome regulations. Adding additional regulatory burdens in a rulemaking that is intended to ease capital formation would likely cause additional exits from the business, further limiting issuers ability to raise necessary capital and create jobs.

Just as REISA believes there should be a safe harbor for issuers, we believe there should also be a safe harbor for broker-dealers who inadvertently sell exempt securities to a non-accredited investor in an offering that utilizes general solicitation or general advertising. An issuer should not lose its exemption from registration by delegating the obligation to a broker-dealer who inadvertently sells to a non-accredited investor if the issuer would not have lost the exemption from registration if it had not delegated such obligation.

4. **Impact on Issuers that Prohibit General Solicitation or General Advertising.**

Despite the ability of issuers to distribute their securities using general solicitation or general advertising, some issuers may choose to prohibit general solicitation and general advertising for various reasons. REISA believes that issuers that choose to prohibit the distribution of their securities through general solicitation or general advertising should be permitted to use currently existing procedures and not be subject to additional procedural or regulatory burdens. Those issuers should also continue to be permitted to sell exempt securities to up to 35 non-accredited investors as currently provided under Rule 506 of Regulation D. Therefore, REISA believes that the currently existing Rule 506 should remain in place with all of its current limitations and issuers can determine which private offering exemption they wish to use – the current Rule 506 that prohibits general solicitation and general advertising and allows up to 35 non-accredited investors or the “enhanced” Rule



506 that allows general solicitation and general advertising but permits only accredited investors to purchase the securities. If the SEC removes the traditional Rule 506 offering, some issuers may seek other, less burdensome forms of capital raising, which negatively impacts the independent broker-dealers that receive compensation for actively assisting in the distribution of exempt securities and provides less protection to investors in general.

### Conclusion

REISA believes in the importance of improving access to capital and spurring economic growth. However, it also recognizes some potential unintended consequences that may result if the SEC does not include certain provisions in its future rule.

Consequently, REISA strongly believes that the rules to implement the intention of Section 201 of the JOBS Act should:

- (1) clearly specify what procedural measures will be considered “reasonable steps to verify,” and that such steps should not be overly burdensome;
- (2) provide a safe harbor that allows issuers to avoid the loss of their registration exemptions;
- (3) allow issuers to delegate the obligation to take “reasonable steps to verify” to broker-dealers who may sell their securities; and
- (4) leave the existing Rule 506 exemptions in place for those issuers who choose not to engage in general solicitation and general advertising.

REISA appreciates the opportunity to provide its perspective and comments on the amendment to Section 201 of the JOBS Act. REISA looks forward to a continued dialogue with the SEC on these and other important issues for the protection of investors and the capital markets.

Respectfully submitted,

Daniel Oschin  
President  
Real Estate Investment Securities Association