



Consumer Federation of America

November 15, 2022

The Honorable Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090

Dear Chairman Gensler,

We write to offer strong support for rulemaking that would help restore the health and vitality of our public markets and limit the decades-long, excessive growth of private markets. Toward that end, we appreciate the fact that the Commission’s regulatory agenda includes reforms regarding Regulation D (Reg. D), Form D, the accredited investor definition, and Section 12(g) of the Exchange Act, and we urge the Commission to undertake these rulemakings without delay.

The Decline of Our Public Securities Markets

For too long, Congress and the Commission have promoted policies that expanded private securities markets, at the expense of public markets.¹ This pattern dates as far back as the 1980s with the creation of the “accredited investor” definition and the adoption of Reg. D.²

¹ See, e.g., SEC Commissioner Allison Herren Lee, *Going Dark: Speech by Commissioner Lee on The Growth of Private Markets and the Impact on Investors and the Economy*, Harvard Law School Forum on Corporate Governance (October 13, 2021), <https://bit.ly/3DirdXw>; SEC Commissioner Caroline Crenshaw, *Keynote Address by Commissioner Crenshaw on Minding the Data Gaps*, Harvard Law School Forum on Corporate Governance (May 18, 2021), <https://bit.ly/3DHgWVZ>.

² In October 1980, Congress adopted the Small Business Investment Incentive Act of 1980, laying the foundation for the first major breach of the strict public-private divide established by the Securities Act. Public Law 96-477. This legislation created a new exemption for certain offers and sales of securities by an issuer solely to “accredited investors,” defining the term as “any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under the rules and regulations which the Commission shall prescribe.” This legislation precipitated the adoption of Reg. D, which for the first time abandoned the principle that even sophisticated investors need access to complete and accurate information in order to make sound investment decisions. Subsequently, Rule 506 under Reg.

Other, similar efforts to supplant the public markets with expanded private markets were adopted or enacted in subsequent years, including shortening the Rule 144 holding period for restricted securities,³ and the JOBS Act in 2012.⁴ The most recent expansion of the private markets came with the Commission’s 2020 amendments to the exempt offerings framework.⁵ Unfortunately, the combined effect of this regulatory and legislative history has been the steady erosion of our public markets. In our view, this trend is to the detriment of investors and our economy.

The benefits to investors, market integrity, and capital formation of public securities markets are manifest and indisputable. Public markets require registrants to operate with transparency and accountability, and have critical safeguards. Specifically, in the public markets:

- investors receive the essential facts and material information needed to value their investments and make informed investment decisions;
- investors are guaranteed to receive the best available price when they trade on national exchanges;
- investors can quickly sell their securities when needed; and
- trading is inexpensive and efficient.

By comparison, private markets carry significantly higher risks for investors, and permit issuers to operate with neither transparency nor accountability. Specifically, in private markets:

- investors may not receive complete and reliable information;
- individual investors are not guaranteed the best available price when buying or selling private securities;

D allowed issuers to raise unlimited capital from an unlimited number of “accredited” investors without registering the securities. Release No. 33-6389. Private offerings immediately took off after these developments.

³ In 1972, the Commission adopted Rule 144, creating a non-exclusive safe harbor for the resale of restricted securities by non-affiliates. Release No. 33-5223. The original rule allowed resale after two years if certain conditions were met and unconditional resale after three years. In 1997, the holding periods under Rule 144 were shortened to one year, if certain conditions were met, with unconditional resales after two years. Release No. 33-7390. The holding period was shortened again in 2007 to one year with no conditions, and six months for reporting issuers. Release No. 33-8869. And, in 2015, Congress adopted the FAST Act, which included a provision that created a new safe harbor, Section 4(a)(7) of the Securities Act, allowing immediate resale of restricted securities to accredited investors. Public Law 114-94. These changes made it much easier for investors and employees seeking liquidity to sell their shares, including through online trading platforms that have emerged in the past decade to facilitate such trades.

⁴ Among other changes, a provision in the Jumpstart Our Business Startups Act (JOBS Act) increased from 500 to 2,000 the number of shareholders a company can have without being required to become a reporting company under the ‘34 Act. Moreover, because the threshold is based on shareholders of record rather than beneficial owners and because there are exclusions from even that generous threshold, the actual number of investors may be much higher than the 2,000 limit. This change to Exchange Act reporting requirements has made it possible for even very large companies, with a widely dispersed shareholder base, to remain private virtually indefinitely. In addition, the JOBS Act created the Crowdfunding Exemption and expanded the Regulation A exemption. Public Law 112–106.

⁵ Final Rule, Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release Nos. 33-10884; 34-90300; IC-34082; File No. S7-05-20 (November 2, 2020); *see also* SEC Commissioner Allison Herren Lee, *Statement on Amendments to the Exempt Offering Framework* (November 2, 2020), <https://bit.ly/3TtzHBe>; SEC Commissioner Caroline Crenshaw, *Statement on Harmonization of Securities Offering Exemptions* (November 2, 2020), <https://bit.ly/3NNpGgW>.

- favored investors can get access to inside information that other investors don't receive; and
- private securities are generally illiquid and trading can be expensive and inefficient.

In light of these critical differences and the significant risks to investors that private markets give rise to, restoring a healthier balance between the lit and dark markets requires strong intervention by the Commission.

The Need for Enhanced Regulatory Safeguards

Given the unbridled expansion of private markets, we encourage you to prioritize the public/private-related reforms on the Commission's regulatory agenda. In addition, the Commission should pursue other opportunities that would help restore the health and vitality of our public markets and limit the excessive growth of private markets.

Specifically, the Commission should update the accredited investor definition, as this would have profound benefits for public and private market integrity and retail investor protection. Changes to the accredited investor definition should, among other things:

- consider the impact that inflation has had and continues to have on a definition that relies on financial thresholds that are not indexed to inflation;
- consider potential harms to Americans' retirement security resulting from the growing encroachment of private securities into retirement accounts, thereby increasing risk exposure for investors who qualify as accredited investors based on savings they must rely on for income throughout several decades of retirement;⁶ and
- aim to ensure that the definition effectively identifies a pool of investors who are able to fend for themselves by virtue of their ability to gain access to information that is essential to value the investment, their financial sophistication, or their ability to withstand risks associated with private offerings.⁷

In addition, the Commission should constrain the unlimited capital raising capacity of Reg. D. Specifically, Rule 506(b) under Reg. D is the main driver of the growth of private markets. This exemption allows issuers to raise unlimited amounts of capital from an unlimited number of investors. Allowing the unlimited and perpetual use of Reg. D ensures that companies can effectively stay private forever, to the detriment of public markets.⁸ Therefore, we urge the Commission to meaningfully constrain the use of this exemption by, for example, limiting the size of an offering during a 12-month period, limiting the number of investors that can

⁶ This includes consideration of whether retirement assets should be included in the calculation at all.

⁷ See *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119 (1953).

⁸ Additionally, Rule 506(c) under Reg. D allows issuers to raise unlimited amounts of capital from an unlimited number of accredited investors.

participate in an offering (both accredited or non-accredited), capping the size of a company permitted to engage in such an offering, or by other means.

Also, we urge the Commission to enhance Form D filing requirements. In 2013, the Commission adopted a proposal to update Form D,⁹ but never issued a final rule – that unfinished effort should form the starting point of a new proposal. At minimum, this effort should aim to fill information gaps about the Reg. D market, including information about the amount of capital that is raised in Reg. D markets, who invests in Reg. D offerings, what the characteristics of Reg. D issuers are, how issuers use proceeds of Reg. D offerings, and how investors fare with these investments.

Finally, the Commission should narrow the ability of companies to evade the Exchange Act's Section 12(g) registration requirements. The current application of Section 12(g) allows very large companies, with widely dispersed shareholder bases and large economic footprints, to remain private virtually indefinitely.¹⁰ While Congress has certainly played a role in expanding companies' ability to rely on Section 12(g), allowing large companies to remain private indefinitely is plainly inconsistent with congressional intent. It is therefore critical that the Commission act to close loopholes that have effectively rendered Section 12(g) ineffective.

Conclusion

Without regulatory changes, the excessive growth of private markets is unlikely to slow anytime soon. This unchecked growth will exacerbate the decline of public markets, erode investor protections, and diminish the integrity of our capital markets.

For these reasons, and because the Commission has an opportunity to restore a healthier and more appropriate public/private balance, we strongly support the Commission undertaking action on these critical issues.

Respectfully,



Dylan Bruce
Financial Services Counsel

⁹ Proposed Rules, Amendments to Regulation D, Form D and Rule 156, Release Nos. 33-9416; 34-69960; IC-30595; File No. S7-06-13 (July 10, 2013), <https://bit.ly/3hxcX5H>.

¹⁰ See Commissioner Allison Herren Lee, *Going Dark: Speech by Commissioner Lee on The Growth of Private Markets and the Impact on Investors and the Economy*.