ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 22, 2011

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street Northeast
Washington, D.C. 20549

Dear Chairman Schapiro:

The U.S. has for many years been recognized as having the largest, most liquid, and most competitive capital markets in the world. However, in recent years our capital markets have lagged. By one alarming calculation, the market for underwritten initial public offerings (IPOs) in the U.S. is closed to 80 percent of the companies that need it.[1] The number of IPOs in the U.S. has plummeted from an annual average of 530 during the 1990s to about 126 since 2001, with only 38 in 2008 and 61 in 2009.[2] The number of companies listed on the major American exchanges peaked in 1997 at more than 7,000 and has been falling ever since, now having reached a level of about 4,000 companies.[3] Anecdotal evidence suggests that fast-growing companies now try to delay public registration for as long as possible.

Meanwhile, the Securities and Exchange Commission (SEC) discourages private capital formation through the imposition and enforcement of "quiet period" rules,[4] which inhibit communications to investors, and a cap on the number of shareholders of

[1] David Weild and Edward Kim, "Market Structure is Causing IPO Crisis- and More," June 2010, *available at* http://www.gt.com/staticfiles//GTCom/Public%20companies%20and%20capital%20markets/Files/IPO%20crisis%20-%20June%202010%20-%20FINAL.pdf

[2] *Id.*

[3] *See* Felix Salmon, "Wall Street's Dead," *New York Times*, February 13, 2011, *available at* http://www.nytimes.com/2011/02/14/opinion/14Salmon.html.

[4] *See* 17 CFR Parts 200, 228, 229, 230, 239, 240, 243, 249, and 274, *see also* Release Nos.. 33-8591; 34-52056; IC-26993; FR-75 (July 19, 2005). *See also* http://www.sec.gov/answers/quiet.htm for a description of the "quiet period."

unregistered issuers,[5] which restricts and complicates the share issuance process. These rules, and the manner in which they are enforced, reduce private capital formation, resulting in less investment and fewer jobs. Of particular interest to the Committee on Oversight and Government Reform ("Committee") in light of these concerns is a *Wall Street Journal* ("*Journal*") article dated January 5, 2011, which reported that

> [t]he Securities and Exchange Commission has begun examining whether disclosure rules for privately held firms need to be rewritten as a result of recent deals allowing investors to buy shares in Internet companies such as Facebook Inc. and Twitter Inc., according to people familiar with the situation.[6]

On February 23, the *Journal* reported on the continuing investigation:

> SEC officials are concerned that the middleman role could cause conflicts of interest, especially given the challenges of ascribing a fair value to privately traded shares .... SEC officials also believe some of the firms promoting stock-trading in private companies should be registered as broker-dealer operations but aren't, according to people familiar with the matter.[7]

The SEC's examination of the trading of unregistered shares of Facebook and Twitter raises several questions about the SEC's priorities with regard to our capital markets. On February 18, 2011, President Obama said:

> ... [E]ven as we have to live within our means, we can't sacrifice investments in our future. If we want the next technological breakthrough that leads to the next Intel to happen here in the United States -- not in China or not in Germany, but here in the United States -- then we have to invest in America's research and technology; in the work of our scientists and our engineers.[8]

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[5] Securities Exchange Act of 1934 §12(g).

[6] Jean Eaglesham and Aaron Lucchetti, "Facebook Deal Spurs Inquiry," January 5, 2011, *available at* http://online.wsj.com/article/SB10001424052748704723104576062280540485652.html?KEYWORDS=SEC+disclosure+rules+Facebook

[7] Liz Rappaport and Jean Eaglesham, "Private-Share Trades Probed," February 23, 2011.

[8] *See* Transcript of President Barack Obama's speech at Intel in Hillsboro, February 18, 2011, *available at* http://www.oregonlive.com/politics/index.ssf/2011/02/transcript_of_president_barack.html.

Facebook recently issued shares exclusively to non-U.S. investors.[9] That decision reflects poorly on our capital markets. The SEC should take all possible steps to arrest the decline of capital formation – both public and private – and expand opportunities for domestic entities to raise capital within the U.S. It should investigate the causes of the decline in the competitiveness of the public markets. It should likewise consider whether the complex rules and restrictions that govern private capital formation are appropriate.

To understand the SEC's actions relating to unregistered equity issuances, I request that the SEC produce the following documents, in electronic format, for the time period from January 1, 2009, to the present:

1. All studies authored or co-authored by current or former staff of the SEC's Office of Economic Analysis (OEA), initiated or completed during their tenure with the SEC, referring or relating to registered and unregistered equity capital formation.

Further, I request that you provide responses to each of the following questions and that the SEC produce documents requested below, in electronic format, for the time period from January 1, 2009, to the present, unless otherwise specified:

Decline of the IPO Market

2. In 2004, Google Inc.'s highly-promoted $3.47 billion IPO was delayed as a result of a published interview with company executives in *Playboy* magazine.[10] In 2006, *GoDaddy.com* actually canceled its planned IPO, citing, among other reasons, "suffocating" quiet period rules.[11]

   What is the SEC's understanding of why these firms and other lesser-known entities, many of which generate substantial revenue and garner substantial investment interest, avoided or delayed IPOs?

3. For each episode described in response to Request No. 2 above, and for all other IPOs that the SEC is aware were delayed, redirected or cancelled during

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[9] Rappaport, Lucchetti and Fowler, "Goldman Limits Facebook Offering," January 18, 2011, *available at* http://online.wsj.com/article/SB10001424052748703396604576087941210274036.html

[10] R. Schmidt and J. Mathewson, "U.S. SEC Votes to Eliminate IPO 'Quiet Period'," *Bloomberg*, June 29, 2005, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWDqc3eHuhkU&refer=home.

[11] Bob Parsons, "Go Daddy pulls its IPO filing! Why I decided to pull it." August 8, 2006, *available at* http://www.bobparsons.me/121/godaddy-pulls-ipo-filing-why-decided-pull.html.

the past five years, explain the specific benefits and costs to investors and to the U.S. capital markets that resulted.

4. Despite substantial economic growth over the past twenty years, the total number of U.S. exchange-listed companies has declined by 22% since 1991.[12] The share of value of foreign issuers' international IPOs captured by U.S. exchanges fell from 77.3% in 1996 to 13.8% in 2007 and to 1.9% in 2008.[13] The number of U.S. issuers choosing to list only on foreign exchanges increased from 0.3% in the period between 1996 and 2002 to 8.6% in 2007, then rose to 20% in 2008.[14]

   Has the SEC evaluated the decline in IPOs and its causes and effects? If so, provide all such evaluations and analysis.

5. Explain all significant actions taken by the SEC to reverse the decline referred to in Request No. 4. Produce documents sufficient to describe each action.

6. Does the SEC believe that declines in public equity listings and issuances, as reflected in Request No. 4, were driven by any of the following or any combination of the following?

   a. The substantial expansion and increasing complexity of SEC regulations and FASB rules generally;
   b. The expansion of personal liability, corporate liability, audit requirements, and compliance costs associated with the 2002 Sarbanes-Oxley Act;
   c. The uncertainty generated by the hundreds of pending rulemakings that were mandated by the 2010 Dodd-Frank Act, or the anticipated additional regulatory burden and liability that will arise from the Dodd-Frank Act;
   d. Risk arising out of securities class action lawsuits; or
   e. Other expansions of regulatory, legal or compliance burdens.

   Please explain.

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[12] *See* David Weild and Edward Kim, "A Wake Up Call For America," Grant Thorton LLP, November 2009, *available at* http://www.grantthornton.com/staticfiles/GTCom/Public%20companies%20and%20capital%20markets/gt_wakeup_call_.pdf.

[13] Committee on Capital Markets Regulation, "Continued Erosion in Competitiveness of the U.S. Public Equity Market was among the Few Clear Trends During 2008 Market," March 24, 2009, *available at* http://www.capmktsreg.com/pdfs/09-mar-24_CCMR_Q4_2008_competitiveness_update.pdf.

[14] *Id.*

The Quiet Period

7. In 2011, Goldman Sachs "slammed the door on U.S. clients hoping to invest in a private offering of shares in Facebook Inc., because it said the intense media spotlight left the deal in danger of violating U.S. securities laws."[15]

   What is the SEC's understanding of why Goldman Sachs and Facebook decided to withhold this investment opportunity from U.S. investors? Do you believe that this decision benefited investors or facilitated capital formation?

8. The SEC imposed quiet period restrictions on communications by issuers of unregistered securities at a time that predated the computer, the Internet and smartphones.[16] Communications have changed dramatically since passage of the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act). The SEC has adjusted the quiet period rules slightly but their underlying operation has not changed.[17] Identify the costs and benefits of the quiet period rules in the context of today's marketplace and communications technology. Explain why the SEC continues to apply these outdated and broad limitations to communications.

9. Does the SEC recognize that quiet period rules conflict with the promotion of disclosure and transparency? How does the SEC reconcile the quiet period rules with the promotion of disclosure and transparency?

10. In *Lorillard Tobacco Co. v. Reilly* (*Lorillard*), the Supreme Court recognized the First Amendment rights of cigarette advertisers to advertise their product to adult consumers, even though children were also exposed to the advertisements.[18] Similarly, restrictions on communications to accredited investors during the quiet period appear to violate issuers' First Amendment rights.[19] Has the SEC considered the constitutionality of limiting communications during the quiet period as it applies to an issuer's communications to accredited investors regarding private offerings? Has the SEC considered the application of *Lorillard* to the quiet period rules? Please explain.

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[15] *See* note 9, *supra*.

[16] *See* note 4, *supra*.
[17] *See* note 4, *supra*.

[18] *Lorillard Tobacco Co. et. al. v. Reilly, Attorney General of Massachusetts, et. al.*, 533 U.S. 525, 564 (2001).

[19] *See id.* at 561.

11. Justice Sandra Day O'Connor delivered the view of the Supreme Court in *Lorillard*. Her opinion concludes that the Attorney General failed to conduct a cost-benefit analysis of the restrictions on advertisers' speech that were imposed by its regulations:

> Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, we conclude that the regulations do not satisfy the fourth step of the Central Hudson analysis. The final step of the Central Hudson analysis, the "critical inquiry in this case," requires a reasonable fit between the means and ends of the regulatory scheme. The Attorney General's regulations do not meet this standard. The broad sweep of the regulations indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed" by the regulations.[20]

Please provide a cost-benefit analysis that evaluates the impact of the quiet period rules on securities markets and investors. In your analysis, please consider the burden on speech imposed by the quiet period rules. This analysis should be applied to situations involving private entities that have no current intention to go public, and, separately, to all other applications of the quiet period rules.

12. Identify and explain all potential harm that may realistically result to an unaccredited investor by the receipt of an advertisement by an issuer of unregistered securities that is targeted at accredited investors or Qualified Institutional Buyers (QIBs).[21] Assume, for purposes of this question, that the issuing entity and its underwriters are carefully evaluating all potential investors to ensure their accreditation or that they are QIBs.

The 499-Shareholder Cap under Section 12(g) of the Exchange Act

13. A fundamental roadblock to private equity capital formation results from a limitation to the total number of shareholders that can own shares of a private issuer. Specifically, the Exchange Act limits the total number of shareholders of an unregistered or private issuer to 499 (the "499-shareholder cap").[22] This

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[20] *Id.*

[21] *See* SEC Rule 144A(7)a-1, 55 FR 17945, Apr. 30, 1990, as amended at 57 FR 48722, Oct. 28, 1992 *available at* http://taft.law.uc.edu/CCL/33ActRls/rule144A.html.

[22] *See* Exchange Act §12(g) *available at* http://taft.law.uc.edu/CCL/34Act/sec12.html.

limitation requires an issuer to file a registration statement within 120 days after its first fiscal year that ends with more than 499 shareholders.[23]

Under the originally-planned Facebook equity issuance, as reported in the *Journal*, the 499-shareholder limitation would have been overcome by grouping multiple shareholders into entities that qualified as single shareholders.[24] SEC's Rule 12g5-1(a) makes this increase to total shareholders possible by counting each partnership, trust and corporation as a single shareholder.[25] This approach enables issuers to effectively exceed the 499-shareholder cap; however, if the method is primarily intended to circumvent the 499-shareholder cap, then Rule 12g5-1(b)3 enables the SEC to look through the partnership, trust or corporation (special purpose entity or "SPE") and individually count each beneficial owner within the SPE.[26]

Does the SEC believe that the use of SPEs that treat multiple shareholders as single shareholder:

a. results in disjointed or illiquid markets since, after resale restrictions lapse, investors within each SPE cannot freely trade shares with accredited investors that are outside of the SPE?
b. prevents price discovery by enabling the SPE manager to dictate the terms, fees and pricing associated with purchase or sale of the unregistered shares within the SPE?

14. Given your response to Request No. 13, does the SEC agree that accredited investors' willingness to participate in SPEs administered by Goldman Sachs & Co., J.P. Turner & Co., Felix Investments, SecondMarket Inc., and SharesPost Inc., despite the associated fees, illiquidity and pricing concerns, is evidence that the Exchange Act's Section 12(g) 499-shareholder cap is restricting a robust additional source of equity capital? Please explain.

15. Does the SEC agree that Rule 12g5-1(b)3 creates regulatory uncertainty? Is the SEC willing to consider elimination of Rule 12g5-1(b)3? Does the SEC agree that the uncertainty imposes additional risks to private capital formation in the U.S., as in the case of Facebook? Please explain.

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[23] *Id.*

[24] *See* note 6, *supra.*

[25] *See* SEC Rule 12g5-1, 30 FR 484, Jan. 14, 1965 *available at* http://taft.law.uc.edu/CCL/34ActRls/rule12g5-1.html.

[26] *Id.*

16. Section 105 of the National Securities Markets Improvement Act of 1996 (NSMIA) provides the SEC broad exemptive authority with regard to the Exchange Act.[27] Does the SEC agree that Section 105 authorizes the SEC to create additional exemptions to the 499-shareholder cap? In your explanation, please consider SEC's Rule 12g3-2(b), which provides foreign issuers with an exemption to the 499-shareholder cap.[28]

17. The economy and the population have grown enormously since the Securities Act and the Exchange Act passed. The statutory 499-shareholder cap found in Section 12(g) of the Exchange Act relates to a very different time with a far smaller number of investors, dollars and regulations. Given the growth in the sophistication of shareholders and growth in regulatory burdens since its implementation, the cap is all the more constraining. Why hasn't the SEC used its broad exemptive authority to modernize or eliminate the 499-shareholder cap? For example, would the SEC consider exempting entities from the 499-shareholder cap to the extent the issuers submit to disclosure of financial statements and implement specific protections to prevent agency problems?

18. The SEC's Rule 144A[29] provides a safe harbor from the registration requirements of the Securities Act for certain private resales of restricted securities to QIBs, which essentially are large institutional investors that own at least $100 million in assets.[30] When a broker or dealer relies on Rule 144A, it is subject to the condition that it may only make offers to persons that it reasonably believes to be QIBs.[31]

    Due to Rule 144A, institutions can now trade formerly restricted securities amongst themselves.[32] These 144A QIB markets have progressed and are

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[27] National Securities Markets Improvement Act of 1996, Public Law 104-290 §105 (Oct. 11, 1996) (to provide general exemptive authority, the NSMIA amended Section 28 of the Securities Act of 1933 and Section 36 of the Securities Exchange Act of 1934).

[28] *See* Exemptions for American Depositary Receipts and Certain Foreign Securities, 48 FR 46739, Oct. 14, 1983, as amended at 49 FR 12689, Mar. 30, 1984; 56 FR 30068, July 1, 1991; 65 FR 37672, 37676, June 15, 2000; 72 FR 16934, 16955, Apr. 5, 2007; 73 FR 52752, 52768, Sept. 10, 2008, *available at* http://taft.law.uc.edu/CCL/34ActRls/rule12g3-2.html.

[29] SEC Rule 144A, 55 FR 17945, Apr. 30, 1990, as amended at 57 FR 48722, Oct. 28, 1992, *available at* http://taft.law.uc.edu/CCL/33ActRls/rule144A.html.

[30] *See* note 21, *supra*.

[31] *Id.*

[32] *Id.*

now electronic.[33] Rule 144A has become the principal safe harbor on which non-U.S. companies rely when accessing the U.S. capital markets.[34] When the SEC created the Rule 144A exemption, it did not provide for an exemption for U.S. issuers from the 499-shareholder cap.[35] The result has been the formation of a 144A QIB-based private placement market that is primarily suitable for debt-based capital formation. Note, however, that under the SEC's Rule 12g3-2(b), foreign issuers can qualify for an exemption to the 499-shareholder cap, and hence equity private placements by foreign issuers are common.[36] The SEC seems comfortable with allowing these sophisticated QIBs to trade unregistered privately placed bonds, and is also comfortable with QIBs equity investments in foreign unregistered issuances, and yet the SEC continues to cap the total number of shareholders to an equity issuance by a U.S. issuer.

Why does the SEC prevent QIBs from trading privately placed equities of U.S. issuers? Does the SEC generally believe private equity issuances by foreign issuers within the U.S. are safer than private equity issuances by U.S. issuers? What prevents the SEC from creating an exemption from the 499-shareholder cap for U.S. issuers in the QIB market? Also comment on whether, from a jurisdictional standpoint, the SEC is concerned with the potential loss of listings by entities that choose to go private via the QIB market.

19. The *Journal* reported that "SEC officials are concerned that the middleman role could cause conflicts of interest, especially given the challenges of ascribing a fair market value to privately traded shares...."[37]

Does the SEC agree that the 499-shareholder cap is the primary inhibitor to development of liquid markets for privately traded shares? If not, what is the primary inhibitor? Does the SEC agree that improved liquidity would largely reduce or eliminate the market power of potentially conflicted middlemen?

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[33] *See* "The PORTAL Market - SEC Approves Trade Reporting For PORTAL Securities; Effective June 16, 2001 For PORTAL Equity Securities," NASD Notice to Members 01-19. See also, Steve Bolden and Eric Blue, "New Portal Alliance to Increase Transparency and Liquidity of 144A Market," *available at* http://blog.nbacls.com/2010/01/22/new-portal-alliance-intends-to-increase-transparency-and-liquidity-of-144a-market.aspx.

[34] *See* "COMMITTEE ON CAPITAL MARKETS REGULATION COMPLETES SURVEY REGARDING THE USE BY FOREIGN ISSUERS OF THE PRIVATE RULE 144A EQUITY MARKET," p. 1., *available at* http://www.capmktsreg.org/pdfs/09-Feb-13_Summary_of_Rule_144A_survey.pdf.

[35] *See* note 21, *supra*.

[36] *See* note 28, *supra*.

[37] *See* note 7, *supra*.

Which investors does the SEC seek to protect from these potentially conflicted middlemen? Please evaluate the costs and benefits of protecting the specified investors from middleman conflicts of interest and the impact of such protection on the markets and capital formation.

Early-Stage Capital Formation

20. Equity capital is crucial for young, innovative companies that are rich with ideas but short on cash. The obvious advantage of equity over debt is that companies have the ability to avoid allocating cash flow to investors until they can afford to do so. In this time of extraordinarily high employment, no potential source of capital should be closed off to young, innovative companies. It is particularly troubling that the SEC continually fails to open the market for equity private placements to accredited investors, or at least QIBs, which could spur innovation without compromising the safety of unaccredited investors.

    Does the SEC agree that, particularly for early-stage ventures, equity capital provides for lower credit risk when compared to debt financing, primarily due to the mandatory interest payments generally associated with debt financing? Explain why the SEC has failed to open up private placements of equity capital to accredited investors or to QIBs, particularly given this period of extended and extraordinary unemployment.

21. Does the SEC agree that early-stage or speculative growth entities seeking an IPO via the equity markets typically face cash flow constraints, particularly when compared to mature, income-generating registered entities? Please explain.

22. Does the SEC agree that unregistered early stage or speculative growth entities:

    a. suffer a disproportionate impact from the substantial costs arising from the regulatory, legal, compliance and accounting burdens of SEC registration, when compared to mature registered companies?
    b. would gain increased access to equity capital from increases to, or the complete elimination of, the 499-shareholder cap required under Section 12(g) of the Securities Exchange Act of 1934 (Exchange Act)?
    c. would gain increased access to equity capital if "quiet period" or "waiting period" restrictions were eliminated for unregistered entities that have no present intention to go public?

    Please explain.

23. Did the SEC, or any of its officers or employees, intend to influence Facebook or Twitter to issue IPOs sooner than they otherwise would?

Organizational Barriers to Progress in Regulatory Reform

24. If the SEC were to reduce limitations on the number of shareholders that could invest in equity private placements and eliminate the quiet period, the increased ability of companies to raise funds would likely shift many issuers from the public markets to the private markets. However, the SEC's jurisdiction would also diminish as companies choose to exit the public markets. Does this risk of diminished regulatory reach pose a conflict of interest that prevents the SEC from acting in the best interest of markets and investors? Is the SEC conflicted regarding decisions that would expand private markets for accredited investors?

25. It is a concern when agencies rely on unqualified staff to evaluate the economic costs and benefits of proposed regulations. Identify staff position/title and division/office (e.g., Financial Economist, Office of Economic Analysis) for each person who was primarily responsible for cost-benefit analysis of each rule or regulation under the Securities Act or the Exchange Act proposed between January 1, 2005, and the present.

26. Has OEA revised any cost-benefit analysis at the direction or influence of SEC management during the past five years? If so, which proposed regulations had their related cost-benefit analyses changed? Has SEC management disputed the results of any cost-benefit analysis with the OEA during the past five years? Has the SEC or its management exercised influence to change an OEA opinion relating to any cost-benefit analysis within the past five years? Who is currently responsible for cost-benefit analyses of regulations?

Exemptions for Unaccredited but Sophisticated Investors

27. Has the SEC considered creating exemptions that would enable unaccredited but sophisticated investors in the U.S. to invest, with reasonable limitations, in unregistered securities issued by small start-ups under what is being called "crowdfunding" via entities similar to Crowdcube.com?[38] Produce documents sufficient to describe each action.

28. Does the SEC agree that the United Kingdom and other jurisdictions may gain a competitive advantage over the U.S. and improve their economic growth

[38] *See* http://www.crowdcube.com/pg-how-it-works-l for an example of how the United Kingdom is enabling start-ups with limitations.

through advancements in their regulatory structure that enable crowdfunding and similar investment vehicles? Please explain.

29. Does the SEC agree that certain start-ups may not have the size necessary to attract investment from QIBs or larger accredited investors? Does the SEC agree that QIBs may be economically prohibited from investing in smaller startups based on the price impact that would result from the typical transaction sizes of QIBs?

30. Does the SEC agree that small startups, e.g., those seeking $1 million or less, are generally not capable of considering SEC registration given the large share of cash flow that would be directed to compliance with requirements to publicly registered companies? Consider your response to Request No. 23a.

31. Does the SEC agree that a natural diversification of risk results from the crowdfunding of small entities? Compare the decision of a single equity investor's investment of $1 million in a business to that of 1,000 investors investing $1000 each. Does the SEC expect different levels of risk aversion to apply across these two scenarios? Explain whether the SEC agrees that the latter possibility may have dramatic effects for capital formation and describe the costs and the benefits.

32. Given the growth of unaccredited investor sophistication, would the SEC consider an exemption targeted to funding small startups by unaccredited investors that prove sophistication through examinations of investment knowledge while limiting the size of their investments relative to their income? Please explain.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on April 5, 2011. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Peter Haller or Hudson Hollister of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

Darrell Issa
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

ONE HUNDRED TWELFTH CONGRESS

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House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

Majority (202) 225–5074
Minority (202) 225–5051

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.

8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157of the Rayburn House Office Building and the Minority Staff in Room 2471of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.