



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

April 3, 2017

S. Gale Dick
Cohen & Gresser LLP
800 Third Avenue
New York, NY 10022

**Re: SEC v. Rhode Island Commerce Corporation, et al., Civil Action No. 1:16-cv-00107-M-PAS (D.R.I., March 7, 2016)
Waiver of Disqualification under Rule 506(d)(2)(ii) of Regulation D**

Dear Mr. Dick:

This letter responds to your letter dated March 6, 2017 ("Waiver Letter"), written on behalf of Rhode Island Commerce Corporation ("RICC"), and constituting an application for a waiver of disqualification under Rule 506(d)(2)(ii) of Regulation D under the Securities Act of 1933. In the Waiver Letter, you requested relief from any disqualification that will arise as to RICC under Rule 506 of Regulation D under the Securities Act as a result of the entry of the Final Judgment by the United States District Court for the District of Rhode Island on April 3, 2017 ("Final Judgment").

Based on the facts and representations in the Waiver Letter and assuming RICC complies with the Final Judgment, the Division of Corporation Finance, acting for the Commission pursuant to delegated authority, has determined that RICC has made a showing of good cause under Rule 506(d)(2)(ii) of Regulation D that it is not necessary under the circumstances to deny reliance on Rule 506 of Regulation D by reason of the entry of the Final Judgment. Accordingly, the relief requested in the Waiver Letter regarding any disqualification that may arise as to RICC under Rule 506 of Regulation D by reason of the entry of the Final Judgment is granted on the condition that it fully complies with the terms of the Final Judgment. Any different facts from those represented or failure to comply with the Final Judgment would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

Very truly yours,

A handwritten signature in blue ink that reads "Sebastian Gomez Abero".

Sebastian Gomez Abero
Chief, Office of Small Business Policy
Division of Corporation Finance

S. Gale Dick
212 707 7263
sgdick@cohengresser.com

March 6, 2017

VIA E-MAIL AND FEDERAL EXPRESS

Sebastian Gomez Abero, Esq.
Chief, Office of Small Business Policy
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

**Re: Securities and Exchange Commission vs. Rhode Island Commerce Corporation
(f/k/a Rhode Island Economic Development Corporation), et al., Civil Action No.
1:16-cv-00107-M-PAS (D.R.I., March 7, 2016)**

Dear Mr. Gomez Abero:

This letter is submitted on behalf of our client, the Rhode Island Commerce Corporation (formerly known as Rhode Island Economic Development Corporation) (the "Commerce Corporation").¹

The Commerce Corporation hereby requests, pursuant to Rule 506(d)(2)(ii) of Regulation D of the Commission promulgated under the Securities Act of 1933 (the "Securities Act"), waiver of any disqualification from relying on exemptions under Rule 506 of Regulation D that will be applicable as a result of the entry of a Final Judgment in the above-captioned action as to Defendant Commerce Corporation (the "Final Judgment") entered on March 4, which is described below.

BACKGROUND

The staff of the Division of Enforcement has engaged in settlement discussions with the Commerce Corporation in connection with a complaint filed by the Commission in federal court on March 7, 2016 (the "Original Complaint") and an amended complaint filed on October 28, 2016 (the "Amended Complaint" and, with the "Original Complaint," the "Complaint"). As a result of these discussions, the Commerce Corporation has agreed to enter a Consent of Defendant Rhode Island Commerce Corporation f/k/a/ Rhode Island Economic Development Corporation to Entry of Final Judgment (the "Consent").

¹ The Commerce Corporation is a governmental agency and public instrumentality of the State of Rhode Island and has a distinct legal existence from the state.

In the Consent, solely for the purpose of proceedings brought by or on behalf of the Commission or to which the Commission is a party, the Commerce Corporation agreed to consent to the entry of the Final Judgment without admitting or denying the matters set forth therein (other than those relating to the jurisdiction of the district court over it and the subject matter solely for purposes of that action).¹ The Final Judgment resolves the civil action against the Commerce Corporation brought by the Division of Enforcement, which alleged in the Complaint that the Commerce Corporation violated Sections 17(a)(2) and (3) of the Securities Act [15 U.S.C. § 77q(a)(2), (3)]. The Final Judgment enjoins the Commerce Corporation from future violations of Sections 17(a)(2) and (3) of the Securities Act and requires that the Commerce Corporation pay a civil monetary penalty of \$50,000.

The Commerce Corporation is a quasi-public entity created by the Rhode Island General Assembly and chaired *ex officio* by the Governor of Rhode Island. The Complaint relates to the 2010 issuance by the Commerce Corporation of \$75,000,000 in taxable revenue bonds to investors in a private placement (the “38 Studios Bonds”) for the stated purpose of financing a loan to a video gaming company, 38 Studios, LLC (“38 Studios”). 38 Studios filed for bankruptcy in 2012. Following its own internal investigation, on November 1, 2012, the Commerce Corporation initiated an action in Rhode Island state court (the “State Court Action”) alleging, among other things, that it had been defrauded in connection with the 38 Studios Bonds by 38 Studios, the Commerce Corporation’s general counsel, bond counsel, financial advisor, two former Commerce Corporation employees, and other parties. To date, more than \$36 million in settlement proceeds recovered in the course of the State Court Action have been paid to the bond trustee. In addition, the state has appropriated more than \$26 million to support bond payments. All payment obligations to bondholders have been made.

The Commission filed the Complaint in March 2016, asserting claims that the Commerce Corporation violated Sections 17(a)(2) and (3) of the Securities Act, as well as claims against Wells Fargo Securities, LLC (“Wells Fargo”), a Wells Fargo employee, and the two former Commerce Corporation employees who are also named in the Commerce Corporation’s complaint in the State Court Action: former Executive Director Keith W. Stokes and former Deputy Director James Michael Saul. The Complaint and Consent allege that the bond placement memorandum provided to investors who were offered the 38 Studios Bonds was materially misleading because it failed to disclose that the loan to 38 Studios from the bond proceeds would be insufficient to fund the video game project contemplated by 38 Studios. The Complaint alleges that Wells Fargo and Peter M. Cannava, its lead banker on the 38 Studios project, as well as Stokes and Saul, knew or should have known of the funding gap but failed to ensure that it was disclosed in the bond placement memorandum. The Complaint further alleges that Wells Fargo (but not the Commerce Corporation), aided and abetted by Cannava, was responsible for other materially leading aspects of the bond placement memorandum and also violated Municipal Securities Rulemaking Board Rules G-17 and G-32 and Section 15B(c)(1) of the Exchange Act.

DISCUSSION

The Commerce Corporation understands that, absent a waiver, the entry of the Final Judgment will disqualify it from relying on the exemption under Rule 506 of Regulation D promulgated under the Securities Act. The Commerce Corporation is concerned that, should it or any of its affiliated entities be deemed to be an issuer, predecessor of the issuer, affiliated issuer, general partner or managing member of the issuer, a promoter, or the underwriter of the securities for the purposes of Securities Act Rule 506(d)(1)(ii), the Commerce Corporation, its issuer affiliates, and other issuers with which it is associated in one of those listed capacities and which rely upon or may rely upon these offering exemptions when issuing securities would be prohibited from doing so.

We further understand that the Commission has the authority to waive the Regulation D exemption disqualification upon a showing of good cause that such disqualification is not necessary under the circumstances. *See* 17 C.F.R. §230.506(d)(2)(ii). The Commerce Corporation respectfully requests that the Commission waive any disqualifying effects that the Final Judgment has and will have under Rule 506 of Regulation D with respect to the Commerce Corporation, its issuer affiliates, or third-party issuers on the following grounds:

1. *The Alleged Misconduct Involved the Offer or Sale of Securities.*

As noted, the conduct alleged in the Complaint relates to disclosures made in connection with the sale of the 38 Studios Bonds.

2. *The Alleged Misconduct Was Non-Scienter Based.*

The Commission did not allege in the Complaint or the Consent that the Commerce Corporation acted with scienter or intent to defraud. Rather, the Complaint and the Consent allege violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, which are civil, non-scienter-based provisions.

3. *The Alleged Misconduct Was Principally Attributable to Former Commerce Corporation Employees and Outside Parties.*

The violations alleged in the Complaint involved two former Commerce Corporation employees who, according to the Complaint, misled the Commerce Corporation's Board of Directors. Neither employee has worked for the Commerce Corporation in more than four years. In addition, the Complaint attributes much of the misconduct to Wells Fargo, the placement agent for the deal, which drafted the bond placement memorandum at issue, and to Cannava, the lead Wells Fargo banker on the 38 Studios transaction. For the past four years, the Commerce Corporation has been prosecuting a civil lawsuit in Rhode Island state court against Wells Fargo, the former Commerce Corporation employees (Saul and Stokes), its former bond counsel, its former general counsel, its former financial advisor, and former executives of 38 Studios (along with their liability insurer), all of whom provided false, misleading, or inadequate information to the Commerce Corporation in connection with the 38 Studios issuance.

This is not a case in which the Commerce Corporation's Board of Directors condoned misconduct. Recognizing the complexity and risks of the proposed transaction – the issuance of bonds to fund a loan to a pre-revenue video gaming company – the Commerce Corporation retained a collection of outside advisors to foresee, confront, and minimize those risks. This included a financial advisor with expertise in municipal issuances, outside bond counsel, general counsel, two due diligence experts, and two placement agents. Several of those advisors either failed to perform their duties or were actively complicit in the misrepresentations and omissions that caused the bond placement memorandum to be misleading.

4. *The Alleged Misconduct Was of Limited Duration.*

The conduct alleged in the Complaint lasted less than one year and related to disclosures concerning a single transaction, a conduit bond issuance to fund a loan to a single company, 38 Studios. The issuance was offered six years ago in reliance upon Regulation D. As described below, in the years since the 38 Studios transaction, the Commerce Corporation has been restructured, the Commerce Corporation employees involved in the alleged misconduct have long since left the Commerce Corporation, and the organization has implemented – and routinely evaluates and updates – thorough and ongoing reforms to its diligence and disclosure procedures to ensure compliance with all legal requirements, including those under the federal securities laws and regulations.

5. *The Commerce Corporation Undertook, and Continues to Undertake, Substantial Remedial Measures.*

Since the 38 Studios transaction, the Commerce Corporation has undergone substantial structural changes and has taken broad-reaching steps to ensure that future issuances are accompanied by accurate and complete disclosure and otherwise comply with the federal securities laws. The Commerce Corporation has also engaged in an intensive and ongoing effort to redress its rights against Wells Fargo and other parties that defrauded the Commerce Corporation in connection with the 38 Studios Bonds. The Commerce Corporation has achieved gross settlements to date of approximately \$45 million, and the pending State Court Action is scheduled to go to trial against the Commerce Corporation's former financial advisor First Southwest in January 2017.

a. *Structural Reforms*

The current Rhode Island Commerce Corporation is a different institution with more robust oversight and controls than those in place at the time of the 38 Studios transaction. The General Assembly has passed legislative reforms restructuring oversight of the Commerce Corporation and responsibility for economic policy at the State level. As part of this reform, the enabling act of the Commerce Corporation was amended to ensure transparency and accountability. Among other things:

- The legislature created a new department within the State known as the Executive Office of Commerce to act as the lead agency for economic development throughout Rhode Island. The Executive Office of Commerce is headed by the Secretary of Commerce, a cabinet-level appointment.
- The Commerce Corporation now serves under the jurisdiction of the Executive Office of Commerce and as the operating agency of the State to carry out the policies and procedures established by the Secretary of Commerce, the Governor and the Board of Directors. R.I. Gen. Laws § 42-64-5.
- The Secretary of Commerce serves as chief executive officer of the Commerce Corporation. See R.I. Gen. Laws § 42-64-8(d).
- Under R.I. Gen. Laws § 42-64-8(d), the legislature required the creation of a subcommittee of the Board of the Commerce Corporation to review all loans and loan guarantees (which would include transactions such as the 38 Studios Bonds) and make recommendations to the Board with regard to such transactions. This subcommittee is comprised of Board members and requires outside members who are neither Board members nor employees of the Corporation. No employee of the Commerce Corporation is permitted to sit on this subcommittee.

b. *Disclosure Policies and Procedures*

The Commerce Corporation has adopted a substantially strengthened Disclosure Policy, which is applicable to all of the Commerce Corporation's future issuances, including all issuances that rely Rule 506 of Regulation D. The stated goal of the Disclosure Policy is to "establish a framework for compliance by the [Commerce Corporation] with its disclosure and contractual obligations with respect to the securities it issues or that are issued on its behalf, pursuant to the requirements of the Securities Exchange Act of 1934 and the Securities Act of 1933, including, in particular, Rule 15c2-12 promulgated under the 1934 Act and other applicable rules, regulations, and orders."

In furtherance of these goals, the Disclosure Policy creates several relevant policies and procedures tailored to the various types of issuances by or on behalf of the Commerce Corporation.² The Disclosure Policy establishes a Disclosure Working Group, overseen by a Disclosure Officer, for preparing, checking the accuracy of, or issuing disclosure documents relating to the various issuances by or on behalf of the Commerce Corporation, including issuances that rely upon Rule 506 and/or that are subject to Rule 15c2-12.

- The composition of the Working Group varies by the type of issuance. For example, for state bond issuances, the Working Group must include representatives of the state

² The Commerce Corporation engages in a variety of conduit issuances, including state, quasi-public corporation, profit, not-for-profit, and moral obligation conduit issuances.

budget office and the state component unit familiar with the project (such as the Rhode Island Department of Transportation for highway projects), and for moral obligation conduit issuances, the Working Group consists of the Chief Financial Officer of the obligated entity, one or more representatives familiar with project and financial aspects of the borrowing, and legal counsel familiar with disclosure obligations under the federal securities laws.

- At the outset of the disclosure process for any issuance, the Working Group is charged with determining the scope of information to be disclosed (which is broadly defined) and establishing a specific process for gathering and reviewing the specified information.
- The Working Group must review drafts of official disclosure statements to ensure that the material facts in the statement are accurate and that no material facts are omitted.
- For conduit issuances involving a for-profit or non-profit entity (including moral obligations), the Commerce Corporation retains an independent third-party expert to perform financial analysis to be made available to potential investors.³

The Disclosure Officer has several additional oversight responsibilities, including:

- Ensuring that the Commerce Corporation provides accurate and timely notice to the MSRB of reportable events.
- Coordinating the detailed procedures for ensuring the accuracy of continuing disclosure in cases where the Commerce Corporation becomes obligated under a disclosure agreement. (The Commerce Corporation acts primarily as a conduit issuer and generally does not enter into disclosure agreements.)
- Together with legal counsel, reviewing the Disclosure Policy on an annual basis and recommending updates and changes to the Commerce Corporation's Chief Operating Officer.

The Disclosure Policy requires regular training for the Disclosure Officer, the Commerce Corporation's legal counsel, and others to address any changes in law and ensure compliance with Rule 15c-12 and the Disclosure Policy itself.

c. *Accountability and Investor Protection*

As noted, immediately after 38 Studios entered bankruptcy in June of 2012, the Commerce Corporation began an investigation of the facts surrounding the bond offering and

³ This procedure does not apply to private placements with financial institutions that do their own underwriting.

loan. Based on the results of that investigation, the Commerce Corporation initiated the State Court Action on November 1, 2012. (The Commerce Corporation also shared the results of its investigation with the Division of Enforcement.) Over the past four years, the goal and effect of the State Court Action has been to hold accountable third-party participants in the issuance process and to protect the interests of bondholders. As of the date of this letter, \$36,461,247.70 in settlement proceeds obtained by the Commerce Corporation have been paid to the bond trustee for the benefit of investors. In addition, the state has appropriated another \$26,157,373.44 to support bond payments.⁴ Statements made by the Governor, Speaker of the House, and Senate President have all been steadfast in their support of appropriations to satisfy the state's moral obligation under the 38 Studios bonds.

Neither the Commission nor, to our knowledge, any other party has alleged that any investor has suffered any financial harm relating to the 38 Studios Bonds.

The Commerce Corporation has worked cooperatively with the bond insurer, Assured Guaranty Ltd., and the bond trustee to safeguard the interests of bondholders in the event of default. For example, the Commerce Corporation conferred with Assured Guaranty prior to initiating the State Court Action and secured the bond insurer's agreement to various settlements on its own behalf and on behalf of the bondholders). The bond trustee has satisfied all obligations owed to the bondholders out of a capital reserve account.

6. *Denial of the Waiver Would Negatively Impact the Ability of the Commerce Corporation to Raise Capital for Private Sector Projects Important to Rhode Island's Economy.*

The disqualification of the Applicant would have a significant adverse impact on the Commerce Corporation and on the economy and citizens of the state of Rhode Island. In brief, disqualification from using the Regulation D exemption would seriously constrict the Commerce Corporation's ability to carry out its statutory purpose under Rhode Island law, which is to "induce, encourage, and attract new industries" to address the state's "substantial and persistent unemployment and underemployment." R.I. Gen. Laws § 42-64-2.

Among the Commerce Corporation's principal activities is to provide bond financing for new manufacturing and commercial enterprises and infrastructure projects. Like other state and local governments throughout the country, Rhode Island and its municipalities are exploring a myriad of public-private partnerships, some of which involve funding for private, for-profit enterprises aimed at stimulating economic growth. Regulation D issuances provide an effective means to fund such projects, and the Board of Directors of the Commerce Corporation has discussed the strong likelihood that the Commerce Corporation will increasingly rely upon Regulation D going forward. In light of the fiscal constraints that Rhode Island continues to face, the Commerce Corporation foresees the potential for an increase in the use of Regulation D for such public-private partnerships in the near future. By way of example, in 2015 the Rhode

⁴ This figure includes funds appropriated for the current fiscal year that may not yet have been applied to debt service payments.

Island General Assembly enacted legislation known as the Tax Increment Financing Act, which permits the Commerce Corporation to exempt certain state taxes (e.g. sales, hotel, insurance, income taxes, etc.) for the purpose of creating a revenue stream to support private economic development. The legislation was structured to allow the Commerce Corporation to act as a conduit issuer on behalf of private entities, as it is anticipated that large and complex projects utilizing this statute would have the need for financing through a conduit issuance under Regulation D in order to attract investors to support these endeavors. Disqualification under Rule 506 would likely preclude financing for such projects, and for other public-private projects outside the tax increment financing context, to the detriment of the State's economy. In short, disqualification would severely limit the Commerce Corporation's ability to participate in the private placement markets on behalf of Rhode Island businesses, and thus limit the access of state businesses to municipal bond financing opportunities.

7. *Disclosure in the Event a Waiver Is Granted*

In the event that the Commission grants the waiver requested by this letter, the Commerce Corporation, for a period of five years from the date of the Order, will furnish (or will cause to be furnished) to each purchaser in a Regulation D offering that would otherwise be subject to the disqualification under Rule 506(d) as a result of the Consent a description in writing of the Order a reasonable time period prior to such sale.

REQUEST FOR WAIVER

In light of the grounds for relief discussed above, we believe that disqualification is not necessary under the circumstances, and that the Commerce Corporation has shown good cause that relief should be granted. Accordingly, we respectfully urge the Commission, pursuant to Rules 506(d)(2)(ii), to waive the disqualification provisions in Rules 506 under the Securities Act to the extent it may be applicable to the Commerce Corporation as a result of the entry of the Consent.⁵

If you have any questions regarding any of the foregoing, please do not hesitate to contact us at the telephone numbers or email addresses below.

⁵ The Commerce Corporation is not requesting waivers of the disqualifications from relying on Regulation A at this time because it does not now use or participate in transactions under such offering exemptions. The Commerce Corporation understands that it may request such waivers in a separate request if circumstances change.

Sebastian Gomez Abero, Esq.
March 6, 2017
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Sincerely,



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