

September 12, 2013

**VIA ELECTRONIC SUBMISSION**

U.S. Securities and Exchange Commission  
Attn: Elizabeth M. Murphy, Secretary  
100 F Street, NE  
Washington, DC 20549  
Electronic Address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Re: Amendments to Regulation D, Form D and Rule 156, File Number S7-06-13

Dear Ms. Murphy:

The Office of Advocacy (Advocacy) offers the following comment to the Securities and Exchange Commission (SEC) in response to the above-referenced proposed rule issued on July 24, 2013.<sup>1</sup> The SEC issued the proposed rule with the intent of enhancing its ability to evaluate and enforce market practices associated with general solicitation and general advertising. Small business owners, entrepreneurs who have participated in small business startups, and investors in small business have all been in contact with Advocacy to discuss the proposed rule. Based upon this input from small business representatives, Advocacy is concerned that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule lacks essential information required under the Regulatory Flexibility Act (RFA)<sup>2</sup>. For this reason, Advocacy recommends that the SEC republish for public comment a Supplemental IRFA before proceeding with this rulemaking.

**Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The RFA requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the

<sup>1</sup> <http://www.sec.gov/rules/proposed/2013/33-9416.pdf>.

<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).



Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>4</sup>

## **Background**

On July 10, the SEC issued a final rule implementing section 201(a) of Jumpstart Our Business Startups (JOBS) Act<sup>5</sup>, which lifts the ban on general solicitation and general advertising.<sup>6</sup> The SEC final rule permits businesses to openly advertise to raise money in private offerings provided that the issuer of securities takes "reasonable steps" to verify that the purchasers of the securities are accredited investors.

On July 24, the SEC issued a proposed rule intended to enhance the agency's ability to evaluate and enforce market practices associated with general solicitation and general advertising. The proposed rule would amend Regulation D, Form D and Rule 156. Specifically, the proposed rule would require the following: (1) the filing of a Form D in Rule 506(c) offerings before the issuer engages in general solicitation; (2) the filing of a closing amendment to Form D after the termination of any Rule 506 offering; (3) the written general solicitation materials used in Rule 506(c) offerings; (4) the submission of written general solicitation materials used in Rule 506(c) offerings to the SEC; and (5) the disqualification of an issuer from relying on Rule 506 for one year for two future offerings if the issuer did not comply within the last five years with Form D filing requirements in a Rule 506 offering.

## **The Proposed Rule's IRFA is Deficient**

Advocacy believes that the IRFA contained in the proposed rule is deficient, and for this reason, the SEC should republish a Supplemental IRFA for additional public comment before proceeding with this rulemaking. Under the RFA, an IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities; (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.<sup>7</sup> Advocacy is concerned that because the proposed rule's IRFA is deficient, the public has not been adequately informed about the possible impact of the proposed rule on small entities and whether there are significant alternatives to the proposed rule that would meet the SEC's objectives in a less costly manner.

The IRFA does not adequately describe and estimate the number of small entities to which the proposed rule would apply. The IRFA provides that the SEC relied on Form D filings to estimate the number of small entities that would be subject to the proposed rule.<sup>8</sup> However, the SEC concedes that the proposed rule likely underestimates the number of small entities to which the proposed rule would apply because over 50 percent of issuers declined to report their size on the Form D. Because the IRFA does not adequately describe and estimate the number of small entities that would be subject to the proposed rule, impacted small entities have not been properly notified that they would be affected by the proposal. Therefore, Advocacy recommends that the SEC revise its IRFA to better identify and more accurately estimate all regulated small entities.

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<sup>4</sup> 5 U.S.C. § 601 et seq.

<sup>5</sup> Pub. L. No. 112-106, 126 Stat. 306.

<sup>6</sup> <http://www.sec.gov/rules/final/2013/33-9415.pdf>.

<sup>7</sup> 5 USC § 603.

<sup>8</sup> All issuers that sell securities in reliance on SEC Rule 506 are required to file a Form D to report the transaction.



Additionally, the IRFA does not contain a description of significant alternatives to the proposed rule which accomplish the stated SEC objectives and which minimize any significant economic impact of the proposed rule on small entities. The IRFA only lists alternatives related to partially or completely exempting small business from the proposed requirements. The SEC rejects the alternatives listed in the IRFA by stating that "a partial or complete exemption from the proposed requirements...would be inappropriate because these approaches would detract from the completeness and uniformity of the Form D dataset and, as a result, reduce the expected benefits of more consistent submission of Rule 506 information and improved collection of data for Commission enforcement and rulemaking efforts." Thus, the SEC appears to reject the alternatives because the alternatives do not accomplish the objectives of the rulemaking (the enhancement of the SEC's ability to evaluate and enforce market practices associated with general solicitation and general advertising).

Because the SEC rejects the IRFA's alternatives for conflicting with the purpose of the rulemaking, the IRFA does not comply with the RFA which requires that an IRFA provide significant alternatives that accomplish an agency's objectives. Advocacy recommends that the SEC revise its IRFA to include alternatives which actually accomplish its objectives for the rulemaking.

Moreover, the IRFA does not discuss how the alternatives may reduce the disproportionate economic impact on small entities. Advocacy encourages the SEC to revise its IRFA to provide a more detailed discussion of the reduction in economic burden that potential alternatives would cause.

## **Conclusion**

Advocacy is concerned that the SEC's proposed rule and IRFA lack essential information needed to properly inform the agency's decision making, particularly with respect to how many small entities would be impacted and whether the alternatives described in the analysis meet the requirements of the RFA. Accordingly, Advocacy recommends that the SEC republish for public comment a Supplemental IRFA before proceeding with this rulemaking.

By republishing a Supplemental IRFA, small businesses will have more adequate data to assess the potential impact of the proposed rule. Further, the SEC will gain valuable insight into the effects of the proposed rule on small business.

Advocacy is committed to helping the SEC comply with the RFA in the development of the proposed rule. Therefore, Advocacy stands ready to assist the SEC in the completion of a Supplemental IRFA.

Advocacy looks forward to working with the SEC. If you have any questions or require additional information please contact me or Assistant Chief Counsel Dillon Taylor at [REDACTED] or by email at [REDACTED]

Sincerely,

A handwritten signature in cursive script, appearing to read "Winslow Sargeant".

Winslow Sargeant, Ph.D.  
Chief Counsel for Advocacy

A handwritten signature in cursive script, appearing to read "Dillon Taylor".

Dillon Taylor  
Assistant Chief Counsel Advocacy

Copy to: The Honorable Howard Shelanski, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget