September 24, 2013

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: ***Amendments to Regulation D, Form D and Rule 156 under the Securities Act***

Dear Ms. Murphy:

AARP[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "SEC" or "Commission") in response to the proposed rules intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings, and to address concerns that may arise in connection with permitting issuers to engage in general solicitation and advertising under the revised Rule 506. AARP supports these proposed rules as modest but important first steps in ensuring that the Commission and state securities regulators have the enforcement tools necessary, in combination with pre-filing requirements, to identify and shut down potentially fraudulent offerings.

As AARP pointed out in a previous comment letter on this issue,[2] allowing general solicitation in the private offering market represents a profound change in the laws governing the offers and sales of securities. Federal securities regulation relies primarily on registration and disclosure for most offers and sales of securities. General solicitation and advertising activities are generally permitted only if a registration statement has been filed. This acts as a strong practical constraint on the ease with which fraudulent offers can reach their victims, and helps to ensure that investors have adequate information on which to base investment decisions. As Commissioner Aguilar observed, "When general solicitation is used, investors need access to the disclosure and other protections that registration affords. In the absence of registration, and the

[1] AARP is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. AARP advocates for policies that enhance and protect the economic security of individuals.
[2] October 5, 2012 letter from David Certner to Elizabeth Murphy, in reference to proposed rules "Eliminating the Prohibition Against General Solicitation and General Advertising In Rule 506 and Rule 144A Offerings," available at http://www.sec.gov/comments/s7-07-12/s70712-130.pdf.

resulting required disclosure, general solicitation and advertising can all too readily become a tool for deception and misinformation."[3]

AARP recognizes the importance of Regulation D Rule 506 as a capital formation tool. Indeed, Rule 506 is the most heavily used exemption for businesses seeking to raise capital without the protections afforded by the Securities Act. In recent years, the amount of capital raised has continued to grow as a percentage of all securities offerings. The amount raised in Rule 506 private offerings exempt from SEC registration is now roughly equivalent to the amount raised in more closely scrutinized registered offerings, and is expected to continue to grow.[4] And, while it is true that the Rule 506 exemption has been used successfully by many legitimate issuers, as previously mentioned in this letter, it also is an attractive option for those who would defraud unsuspecting investors.[5]

The Commission itself has acknowledged that the rules adopted earlier this year to allow general solicitation and advertising of private offerings "could attract both accredited and non-accredited investors and could result in an increase in fraudulent activity in the Rule 506 market, as well as an increase in unlawful sales of securities to non-accredited investors." Ensuring that investor vulnerability in these offerings is mitigated to the greatest extent possible is of tremendous interest to AARP, as older investors, with a lifetime of savings and investments, are disproportionately represented among the victims of securities fraud. Even before the ban on general solicitation and advertising was lifted, the private placement marketplace was already a source of significant market abuse, according to the North American Securities Administrators Association (NASAA) and other experts. Unregistered securities, such as private placements, have emerged as one of the main vehicles for fraud involving older investors. Indeed, of the enforcement actions taken by state securities regulators in 2010 involving investors age 50 or older, cases involving unregistered securities outnumbered those related to ordinary stocks and bonds by a ratio of five to one, according to NASAA.

AARP, which is represented on the Commission's Investor Advisory Committee (IAC), agrees with the IAC that lifting the solicitation ban can and should be done in a manner that simultaneously promotes investor protection, facilitates efficient capital formation, and provides regulators with the tools they need to police the market effectively.[6] As a

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[3] Statement of Commissioner Luis Aguilar, at the SEC Open Meeting, August 29, 2012, accessed at http://www.sec.gov/news/speech/2012/spch092912laa.htm.

[4] In 2011, Rule 506 offerings accounted for $895 billion, as compared to $984 billion raised in registered offerings.

[5] State securities regulators, for example, in 2011 took more than 200 enforcement actions related specifically to Rule 506 offerings, before the ban on general solicitation and advertising was lifted.

[6] Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Lift the Ban on General Solicitation and Advertising in Rule 506 Offerings: Efficiently Balancing Investor Protection, Capital Formation
and Market Integrity, available at http://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-general-solicitation-advertising-recommendations.pdf

result, we support Commission proposals to require: (1) the filing of a Form D in Rule 506(c) offerings before the issuer engages in general advertising; (2) the filing of a closing amendment to Form D after the termination of a Rule 506 offering; and (3) the submission to the Commission of written general solicitation materials used in connection with Rule 506(c) offerings. AARP also appreciates that the Commission is beginning the process of exploring what updates are necessary to the definition of accredited investor, which will be critically important in this new era of expanded advertising and solicitation of private offerings.

Filing Form D before engaging in general solicitation

Currently, issuers selling securities in reliance on Rule 504, 505 or 506 of Regulation D must file a notice of sales on Form D with the Commission for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering. In this rulemaking, the Commission proposes to require issuers that intend to engage in general solicitation for a Rule 506 (c) offering file an initial Form D in advance of conducting any general solicitation activities. AARP supports this proposal.

In our previous comments on this topic, AARP joined state securities regulators and other investor advocates in recommending this advance filing requirement. Simply adding a checkbox to a form that too often goes unfiled, and only after the fact, is inadequate to the task at hand. Instead, AARP supports the proposal to require issuers to file Form D before using any type of general solicitation or advertising.

State securities regulators, in particular, have stressed the importance of this proposal, citing, among other reasons, their educational efforts (which we wholeheartedly endorse) encouraging investors to "investigate before they invest" by calling their state securities agency to determine if the offering is registered or exempt, if there have there been any complaints against the issuer or placement agents, and whether the issuer, control persons or placement agents have any prior securities law violations. Absent a requirement that that notice of reliance on Rule 506(c) be filed in advance of the offering, state securities regulators will not be able to determine whether the issuer is advertising an unregistered, non-exempt offering to the general public, or engaging in a compliant Rule 506 offering.

Further, requiring pre-sale notice will aid in state and federal enforcement actions against fraudulent operators and will assist in efforts to more readily shut down illegitimate offerings before duped investors experience widespread losses of savings. State securities regulators report that they routinely review Form D filings to ensure that the offerings actually qualify for an exemption under Rule 506 and look for "red flags' that may indicate that an offering may be fraudulent. With the advance filing of Form D, state securities regulators will be in a better position to ensure that no "bad actors" are participating in a Rule 506 offering. They will also be better able to answer questions from investors who contact them after seeing an advertised offering or receiving a solicitation.

AARP also supports the proposal to request additional, meaningful information on the Form D. Key among the data points that we believe will assist regulators and investors alike are the website address for the issuer, identification of certain control persons, the types of general solicitation used or to be used, and the method(s) used or to be used to verify accredited investor status.

Further, we agree that the filing of Form D should be made a condition for relying on the Regulation D exemption and that there should be meaningful consequences for failure to comply. We also believe the Commission can develop meaningful consequences that do not impose undue penalties as a result of inadvertent violations. Today, while Form D is required to be filed, its filing is not a condition for relying on the Regulation D exemption. It is generally acknowledged that a significant number of issuers do not currently file Form D, depriving the Commission of important information and inhibiting its ability to provide effective market oversight. Moreover, absent reliable data from Form D, it will be difficult for the Commission to compare the performance of private placements that rely on the new JOBS Act exemptions with the performance of private placements that do not rely on those exemptions. We expect these data will be valuable to the Commission in assessing the performance of these new exemptions.

Filing a closing amendment to Form D

AARP supports the proposal to amend rule 503 to require the filing of a final amendment to Form D within 30 calendar days after the termination of an offering conducted in reliance on Rule 506. We believe this will enhance the flow of information to the Commission, other regulators and investors, and will improve the ability of the Commission and state regulators to track the use of Rule 506. This document will provide important information about what offerings were successful or unsuccessful, and illuminate the types of issuers that have difficulty raising capital in this market.

Submission of general solicitation materials

AARP supports a requirement that all solicitation material prepared or disseminated by or on behalf of the issuer that is being disseminated to the public through a general solicitation or advertising campaign in reliance on the new exemption be furnished to the Commission. We agree with the Investor Advisory Committee[7] that it should be possible to satisfy this requirement at a minimal cost to the issuer if the Commission creates an online electronic "drop box" into which all general solicitation material can be deposited, together with a cover form identifying the issuer using the general solicitation material and the circumstances under which the material is to be used. The drop box should be designed to be able to accept print, audio and video forms of general solicitation. A condition of the exemption should be that the copy of the solicitation materials be furnished either prior to first use or promptly after first use. Finally, we believe that all materials furnished to the Commission should be made publically available on a timely basis.

[7] *Ibid.*

Definition of accredited investor

The current definition of accredited investor – someone with an income of $200,000 and net worth of $1 million – is unlikely to be effective in deterring the fraudulent activity that may arise in connection with general solicitation and advertising for private placements. The income and net worth levels that apply to individuals for the purpose of satisfying the definition of accredited investor were adopted in 1982 as quantitative standards to identify investors who presumably could "fend for themselves" without the protections afforded by registration when investing in private offerings. While those standards may have been appropriate more than a quarter of a century ago, they are wholly inadequate today. This standard now reaches deep into a population that has smaller real incomes. In testimony before Congress, Professor Robert Thompson of Georgetown University Law Center noted that as a percentage of the pool of individual taxpayers, the number of individuals whose income is above $200,000 now is 20 times larger than at the time of enactment of Regulation D.[8]

It is instructive for this rulemaking that in 2007 the Commission went on record as viewing a higher accredited investor standard be a condition of relaxing the Rule 506 general solicitation and advertising ban.[9] In that rulemaking, the Commission proposed to permit limited advertising of offerings that were sold only to "large accredited investors," who were defined as natural persons with at least $2.5 million in investments or $400,000 in annual income. If the Commission believed that such an increase in thresholds for accredited investors would be necessary for a **limited relaxation** of the general solicitation and advertising ban, then it would be logical to assume that – at a minimum -- an increase on that scale would be necessary for a **complete elimination** of the general solicitation and advertising ban that this rulemaking contemplates. Although the Commission does not seek to change the accredited investor standard in this rulemaking, AARP appreciates that the Commission is beginning the process of reviewing the definition of accredited investor and is seeking comment on what changes might be appropriate.

While AARP has not completed its own review, we believe there are several proposals that might help tighten the accredited investor standard that are worthy of further exploration. The Commission could, for example, consider requiring that investors own

[8] Joint Hearing with the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs of the Committee on Oversight and Government Reform and the House Subcommittee on Capital Markets and Government Sponsored Enterprises of the Committee on Financial Services entitled "The JOBS Act: Importance of Prompt Implementation for Entrepreneurs, Capital Formation, and Job Creation," September 13, 2012. http://financialservices.house.gov/uploadedfiles/hhrg-112-ba16-wstate-rthompson-20120913.pdf

[9] Securities and Exchange Commission, 17 CFR Parts 230 and 275, Release No. 33-8766; IA-2576; File No. S7-25-06, "Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles," December 27, 2006 (noting that 1982 accredited investor standards have made investors eligible today who not have previously been eligibleand the increasing complexity of investments), available at http://www.sec.gov/rules/proposed/2006/33-8766.pdf.

securities with a minimum value to be considered accredited investors. Such an "investment owned" test was proposed by the Commission in 2007 and supported by NASAA. The Commission could require proof of an investor's financial sophistication, as required for crowdfunding offerings by Section 302 of the JOBS Act. The Commission could consider whether there should be a limit on how much even an accredited investor can invest in a Regulation D 506 offering. This suggestion is derived from the JOBS Act itself, which in the context of the crowdfunding exemption, would permit an investor with $1 million in investments to invest only 10 percent ($100,000) of such investments in all crowdfunding offerings combined. Under the new Regulation D rules, an investor is free to invest 100 percent of his or her net worth in a single private offering. It makes little sense to impose more stringent limits on crowdfunding offerings where general solicitation and advertising is not permitted than is imposed on private offerings where general solicitation and advertising are permitted. No doubt there will be other suggestions put forward that will help inform thinking on this critical issue.

Updating and strengthening the accredited investor standard to ensure that it fairly reflects the financial sophistication of an investor is a key way in which the Commission can counter the adverse effect on investor protection and efficient markets that eliminating the general solicitation and advertising ban may cause. AARP looks forward to being an active participant in the debate over updating the accredited investor definition.

Conclusion

Allowing widespread marketing of investments under an exemption designed for private offerings is a significant change in the securities regulatory framework and has the potential to greatly increase the risk of investor fraud and abuse. Given the current "accredited investor" standard, many retirees and those nearing retirement with a lifetime of savings and investments are likely to be the targets of unscrupulous operators who may take advantage of the relaxed standards under which these offerings may be marketed. Now that the Commission has acted to lift the ban on general solicitation and advertising of private offerings, AARP encourages the Commission to be as decisive and swift in adopting rules to strengthen the investor protections in this market.

Please contact Mary Wallace of our Government Affairs staff at (202) 434-3954 or mwallace@aarp.org if you have questions or need additional information.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director