

# United States Senate

WASHINGTON, DC 20510

December 3, 2013

The Honorable Mary Jo White  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Dear Chairman White,

As the Commission considers additional rulemaking pertaining to Title II, Section 201 of the JOBS Act to allow for general solicitation and advertising of exempt offerings under Rule 506 of Regulation D, we write to reaffirm our belief that, in instances where public solicitation and advertising are used, the issuer should be required to first submit a Form D filing. Where general solicitation or advertising is not used, then the current 15 day post-first sale filing deadline would still apply. We were pleased that the Commission proposed rules in July that would, among other things, effectuate such a pre-filing requirement, and we urge that this important requirement be retained as a part of any final rule that the Commission adopts.<sup>1</sup>

As you know, Rule 506 provides the most heavily used exemption for businesses seeking to raise capital without the regulations and protections of the Securities Act. In recent years, the amount of capital raised through Rule 506 offerings has continued to grow as a percentage of all offerings of securities, and the amount raised in private offerings exempt from SEC registration now rivals the amount raised in more closely scrutinized registered offerings. Following implementation of Title II of the JOBS Act, this trend will undoubtedly continue. Although the Rule 506 exemption is used successfully by many legitimate issuers, the exemption has also become an attractive option for individuals who would otherwise be prohibited from engaging in the securities business, and in some cases, operates as a haven for fraud.<sup>2</sup>

State securities regulators are the primary regulator of offerings conducted under Rule 506 pursuant to their antifraud authority. This front-line regulatory protection is critical, particularly given that the SEC does not actively monitor Rule 506 offerings and is not likely to

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<sup>1</sup> Release Nos. 33-9416, 34-69960, IC- 30595 (File No. S7-06-13), "Amendments to Regulation D, Form D and Rule 156 under the Securities Act" (July 10, 2013).

<sup>2</sup> In 2011, for instance, state regulators took more than 200 enforcement actions related specifically to Rule 506 offerings. Moreover, in 2011 the states pursued more than 400 investigations of Rule 506 offerings likely leading to more enforcement actions reported for 2012. (Source: North American Securities Administrators Association)

scrutinize the tide of general solicitations or advertisements that will stem from implementation of Title II of the JOBS Act.<sup>3</sup>

Prior to removal of the long-standing ban on general solicitation and advertising, state securities investigators could be assured that any securities offering relying on general solicitation was registered with the SEC if it was publicly advertised on the internet or elsewhere. State securities regulators commonly encourage investors in their states to “investigate before they invest.” Typically this results in communications by state regulators with investors—notably, many local “mom and pop” investors—who are seeking information about issuers and potential investments. With the removal of the general solicitation and advertising prohibition, a state investigator will not be able to determine whether the issuer is advertising an unregistered, and non-exempt, offering to the general public or engaging in a compliant Rule 506 offering.

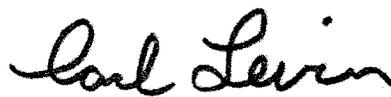
This one correction to the Form D filing requirements will address the practical realities that will now be faced by state enforcement personnel. Simply requiring a Form D filing prior to any public solicitation or advertising will ensure that state securities regulators, and the SEC, will be able to determine an issuer’s intent to rely on general solicitation and advertising, it will enable state regulators to respond to questions from investors in their states about publicly advertised offerings, and it will further enable local investors, who can also access Form D filings, to get basic background information about “legitimate” offerings before they invest.

Adopting this prefiling requirement will ultimately enhance investor confidence and further the JOBS Act’s goal of helping businesses in their capital raising efforts. Therefore, we respectfully ask that the Commission implement this change to the Form D filings requirements for Rule 506 offerings. Thank you for your consideration of this matter and please contact us if we can be of any further assistance.

Sincerely,



MARTIN HEINRICH  
United States Senator



CARL LEVIN  
United States Senator

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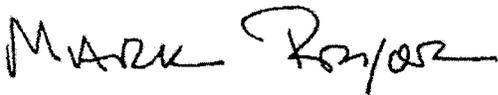
<sup>3</sup> The SEC’s Inspector General found in 2009 that “[the SEC Division of Corporate Finance] does not generally take action when [its] staff learn that issuers have not complied with the requirements of the Regulation D exemptions. Further, [SEC] does not substantively review the more than 20,000 Form D filings that it receives annually, which in 2008, identified total estimated offerings of \$609 billion dollars.” U.S. SEC. AND EXCH. COMM’N OFFICE OF INSPECTOR GENERAL, REGULATION D EXEMPTION PROCESS, Rep. No. 459 (2009).



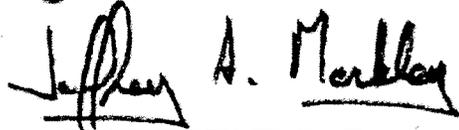
TOM HARKIN  
United States Senator



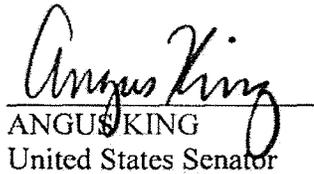
JACK REED  
United States Senator



MARK PRYOR  
United States Senator



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United States Senator



ANGUS KING  
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