

August 2, 2013

**VIA ELECTRONIC MAIL**

The Honorable Mary Jo White  
Chair  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

Re: Proposed Advance Filing Requirement for Form D (File No. S7-06-13)

Dear Chair White:

I am writing this letter to respectfully ask the U.S. Securities and Exchange Commission (the "Commission") not to pursue the proposed amendment (the "Proposed Amendment") to Rule 503 promulgated under the Securities Act of 1933, as amended (the "Securities Act"), to require issuers to file Advance Form D (as defined in the Proposed Amendment) at least fifteen (15) calendar days before commencing general solicitation of a securities offering to "accredited investors" pursuant to Rule 506(c) promulgated under the Securities Act.<sup>1</sup> As described in more detail below, the Proposed Amendment is (i) inefficient because the costs to issuers of this delay greatly outweigh the minimal benefits to the Commission, state regulatory authorities and investors, and (ii) contrary to the intention of the Jumpstart Our Business Startups Act (the "JOBS Act").<sup>2</sup>

Inefficiency of the Proposed Amendment

*1. The substantial costs to issuers of the Proposed Amendment.*

The principal costs to issuers of the fifteen (15) day delay in the Proposed Amendment relate to the uncertainty in market conditions and the availability of capital after this time period. As the Commission is well aware, the pricing and success of securities offerings are dependent upon the condition of capital markets that varies on a daily basis, and many issuers decide to cancel registered securities offerings during the Commission review and comment period due to adverse changes in market conditions. The mandatory delay in the commencement of general solicitations under the Proposed Amendment will inevitably (and unnecessarily) stymie potential securities offerings to accredited investors due to adverse changes in market conditions during this time period.

The Proposed Amendment also precludes the use of general solicitations in expedited securities offerings to accredited investors. Issuers are often required to raise capital in a very

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<sup>1</sup> *Amendments to Regulation D, Form D and Rule 156*, Release Nos. 33-9416, 34-69960, and IC-30595 (July 24, 2013), 78 Fed. Reg. 44806, 44810-44812 (the "Proposed Amendment Release").

<sup>2</sup> Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012).

short time period for liquidity, acquisitions, regulatory and other purposes. The fifteen (15) day time period set forth in the Proposed Amendment will prevent the use of general solicitations by issuers to obtain capital from accredited investors on such an expedited basis without justification.

*2. The minimal benefits to the Commission, state securities regulatory authorities and investors of the Proposed Amendment.*

The substantial costs to issuers of the mandatory delay in general solicitations of securities offerings to accredited investors substantially outweigh the minimal benefits to the Commission, state regulatory authorities and investors. The Commission acknowledges that will not review Advance Form D filings before Rule 506(c) securities offerings, and that such Advance Form D filings will primarily be used by the Commission for information purposes (to analyze the success of securities offerings under Rule 506(c)).<sup>3</sup> The Commission also states that Advance Form D filings “would be useful to state securities regulators and to investors in gathering timely information about Rule 506(c) offerings and the use of Rule 506(c).”<sup>4</sup>

The negligible informational benefits to the Commission of Advance Form D filings do not justify the significant costs to issuers of delayed general solicitation of securities offerings to accredited investors. The Commission can obtain such information through independent research, industry conferences and other means that do not require the delay imposed upon issuers by the Proposed Amendment.

The minimal benefits to state securities regulators and investors of Advance Form D filings also do not outweigh the considerable costs to issuers of the fifteen (15) day delay contemplated by the Proposed Amendment. Almost all of the information required to be furnished by issuers in the Advance Form D would be required to be set forth in the general solicitation materials and/or purchase agreement associated with the securities offering, which remain subject to the antifraud provisions of the federal securities laws (including Rule 10b-5).<sup>5</sup>

Furthermore, the rationale underlying the entire existence of the exemptions from registration in Regulation D promulgated under the Securities Act are that accredited investors can “fend for themselves” and therefore do not need prior federal or state regulatory review of information provided in connection with securities offerings.<sup>6</sup> If the Commission believes that accredited investors require the benefit of Commission and state securities regulatory review of securities offering documents, then the exemptions from registration in Regulation D should be eliminated.

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<sup>3</sup> Proposed Amendment Release at 78 Fed. Reg. 44811.

<sup>4</sup> *Id.*

<sup>5</sup> 17 C.F.R. 240.10b-5.

<sup>6</sup> *Proposed Revision of Certain Exemptions From the Securities Act of 1933 for Transactions Involving Limited Offers and Sales*, Release No. 33-6339, 46 Fed. Reg. 41,791 (Aug. 18, 1981).

Finally, contrary to the assertions by several commenters,<sup>7</sup> the advance filing of Form D would not enable state securities regulators and investors to determine whether an issuer is attempting to comply with Rule 506(c), provide “red flags” regarding potentially fraudulent securities offerings, or ensure that no felons or other bad actors are participating in any such offering. The Advance Form D does not contain information regarding the steps to be taken by issuers to determine that participants in a Rule 506(c) securities offering are accredited investors, nor do the minimal information disclosures in Advance Form D contain any information that would alert state securities regulators regarding “red flags” regarding potentially fraudulent securities offerings. Also, felons and other bad actors would almost certainly not file Advance Form D notifying the Commission of their illegal participation in a Rule 506(c) offering.

#### Intention of the JOBS Act

The express purpose of the JOBS Act was “[t]o increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.”<sup>8</sup> The Proposed Amendment is contrary to the purpose of the JOBS Act because it makes it more difficult for issuers (including emerging growth companies) to access capital markets, and therefore serves as an impediment to job creation and economic growth.

Furthermore, Section 201 of the JOBS Act expressly states that the Commission “shall revise [Rule 506] to provide that the prohibition against general solicitation or general advertising contained in [Rule 502(c)] shall not apply to offers and sales of securities made pursuant to [Rule 506], provided that all purchasers of the securities are accredited investors. Such rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission.”<sup>9</sup>

The fifteen (15) day delay imposed by the Proposed Amendment is not specified in (or contemplated by) Section 201 of the JOBS Act. The June 28, 2013 letter to the Commission from five (5) Democratic members of the United States Senate requesting the Proposed Amendment (the “Democratic Senators’ Letter”) therefore appears to be a partisan effort to modify the directive given to the Commission by the President, the United States Senate and the United States Congress in Section 201 of the JOBS Act.<sup>10</sup>

Given the purpose of the JOBS Act and the provisions in Section 201 thereof, the Commission should not adopt the Proposed Amendment as requested by the Democratic Senators’ Letter.

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<sup>7</sup> Proposed Amendment Release at 78 Fed. Reg. 44811.

<sup>8</sup> See *supra* note 2 at Preamble.

<sup>9</sup> *Id.* at Section 201.

<sup>10</sup> Letter to Hon. Mary Jo White, dated as of June 28, 2013, from United States Senators Martin Heinrich (D-NM), Carl Levin (D-MI), Tom Harkin (D-IA), Mark Pryor (D-AR), Jeff Merkley (D-OR), and Angus King (I-ME), available at <http://www.sec.gov/comments/s7-06-13/s70613-1.pdf>.

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Conclusion

As a result of (i) the substantial costs to issuers of the fifteen (15) day advance filing requirement for Advance Form D prior to commencement of general solicitation for a Rule 506 securities offering, and the minimal benefits to the Commission, state securities regulators and investors from such a delay, and (ii) the intention of the JOBS Act, I respectfully ask the Commission not to pursue the Proposed Amendment.

Please do not hesitate to contact me via email ([vsekhon@ktbslaw.com](mailto:vsekhon@ktbslaw.com)) or telephone (310-407-4075) if you have any questions regarding the foregoing. Please be advised that the views expressed herein are mine and do not necessarily reflect the views of Klee, Tuchin, Bogdanoff & Stern LLP or my colleagues at Klee, Tuchin, Bogdanoff & Stern LLP.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Vijay S. Sekhon".

Vijay S. Sekhon