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September 4, 2013

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

Re: File Number S7-06-13

Ladies and Gentlemen:

We are writing to provide our comments and suggestions to the Securities and Exchange Commission (the "Commission") regarding the amendments to Regulation D, Form D and Rule 156 under the Securities Act of 1933, as amended (the "Securities Act"), that the Commission proposed in Release No. 33-9416 (the "Release") issued on July 10, 2013. Our firm represents a number of clients that routinely raise capital for their businesses through private placements of securities and rely on their ability to do this in a cost effective and timely manner. A significant percentage of these clients are sponsors of private investment funds that are organized and operated to provide necessary equity and debt capital to businesses operating in a variety of industry segments such as low-income housing, commercial real estate, agribusiness, technology development and healthcare. These clients, and similar clients of many other law firms in this country, are critical links in the economy of the United States and are engaged in the types of capital raising activities that the Congress specifically sought to encourage by passage of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act").

The securities issued by these clients are almost universally conducted pursuant Section 4(a)(2) of the Securities Act and the safe harbor provisions thereunder described in Rule 506 of Regulation D. As a general rule, securities issued by our clients in private offerings are sold exclusively to accredited investors. The ability of these clients to raise capital on a timely and cost effective basis through offerings that are exempt from federal and state registration requirements will be greatly enhanced by the recently-adopted rules implementing Section 201(a) of the JOBS Act that lifts the ban on general solicitation for offerings of securities made in compliance with new Rule 506(c). Similarly, additional investor protection provided by the recent adoption of rules designed to implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 that disqualifies felons and other "bad actors" from participation in offerings conducted on Rule 506 of Regulation D is also viewed as having a net positive effect on the ability of honest and legitimate issuers to raise capital in the private placement market.

Despite these recent constructive changes to the rules relating to offerings conducted under Rule 506, many of our clients have expressed concerns that certain aspects of the proposed rules described in the Release will have a negative effect on their capital raising efforts. The purpose of this letter is to describe these concerns to the Commission in the hope that they will be considered and addressed in whatever final rules the Commission adopts in this regard.

Please note that the comments contained herein express solely the views of Kutak Rock LLP and may not necessarily represent the views of any or all of our clients.

Our comments are organized to correspond to the section references and request for comment ("RFC") numbers set forth in the Release.

Section II. Proposed Amendments Relating to Form D.

B. Timing of the Filing of Form D

RFC (1) We urge the Commission not to impose a requirement for filing an "Advance Form D" prior to the commencement of general solicitation activities in an offering made in reliance on Rule 506(c). In our opinion, the Commission has not offered any persuasive rationale for imposing an advance filing requirement in the Release[1] and, given the purely informational nature of a Form D filing, we can see no practical benefit for an advance filing to the Commission, state securities regulators or investors. In our opinion, any purported benefits of an Advance Form D filing requirement would be heavily outweighed by the delays and costs imposed on issuers and the attendant damage to the capital formation process that the JOBS Act sought to foster.

As stated in the Release, the proposed amendments to Regulation D are "intended to enhance the Commission's understanding of the Rule 506 market." [2] While we believe it is completely appropriate for the Commission to improve the information it obtains about the Rule 506 market (and acknowledge that improvements in reporting compliance are justified), we do not understand why it is helpful to have the information required in an Advance Form D filing provided to the Commission in advance. Frankly, the filing of an Advance Form D may have a

[1] Although footnote 46 of the Release suggests that a number of commentators had supported an advance filing requirement, it does not provide any clear rationale for such a requirement. The Release also states that not filing an Advance Form D would be "limiting the Commission's ability to determine which issuers are facing challenges raising capital," but never explains what kind of "challenges" the Commission is looking for or how an Advance Form D filing would even be relevant to that inquiry.

[2] See, also, Section XI.A. of the Release which states "[t]he primary reason for, and objective of, the proposed amendments to Form D filings and the proposed amendments to Regulation D is to improve the Form D filing data collection process… and, in particular, to assist our efforts to assess the use of general solicitation in Rule 506(c) offerings."

reverse effect of limiting the Commission's understanding of the market since under the proposed amendments issuers will have an incentive to "get something on file" based on preliminary information that may ultimately change in order to avoid a 15-day delay in their marketing plans. We believe that the Commission is better served by receiving accurate data on a reasonably prompt basis, rather than data from filings made under pressure to meet an arbitrary filing deadline.

We think it is interesting to note that the Commission has only proposed the Advanced Form D filing requirement with respect to offerings made under Rule 506(c) without any apparent explanation as to why it requires information about these offerings any earlier than it requires information about other offerings made under Regulation D. We also note that the Commission has proposed that two types of information in Advance Form D that would appear to be important to the Commission's analysis of the Rule 506 market[3] can be provided on a delayed basis under the proposed rule. The Commission also requested comments on whether Advanced Form D filings should be allowed even if no specific offering is contemplated which leads one to wonder what type of meaningful information could be gleaned from such a filing. In our view, these inconsistencies in the Commission's approach are acknowledgements that requiring issuers to file Advance Form D filings will serve no practical purpose consistent with the Commission's stated goal of garnering a better understanding of the Rule 506 market.

The pre-filing requirement seems to us to be nothing more than an unnecessary waiting period of over two weeks imposed on issuers seeking to raise capital through a 506(c) offering during which, based on the stated purpose in the Release, neither the Commission nor any other person would actually take any action or make any decision based on the information contained in the filed Advance Form D. In addition, the Commission has offered no justification for the selecting 15 days prior to the commencement of an offering as the appropriate time for the advance filing of a Form D. Indeed, it appears that the time period was selected either arbitrarily or was determined by simply selecting a matching number of days included in the current Form D filing requirement (*i.e.* 15 days *after* the first sale). In our view, if the Commission has no substantive grounds for selecting 15 days as the length of the pre-filing period, then it should not be seeking to impose this burden on issuers.

Not only is there a distinct lack of any apparent benefit from a pre-filing requirement, the imposition of the 15-day waiting period on issuers can have a substantial adverse effect on capital raising activities for issuers that want to take advantage of general solicitations under Rule 506(c). For many of these issuers, the commencement of general solicitation activities will be tantamount to commencement of the offering. Market conditions and business considerations may require issuers to proceed with an offering immediately and close the transaction quickly,

[3] These are Item 9 pertaining to the types of securities being offered and Item 12 pertaining to persons receiving sales commissions.

and imposing an arbitrary 15-day waiting period before commencement of their marketing efforts may jeopardize their ability to proceed with the offering and may result in lost business opportunities. Indeed, many transactions may simply not get done at all due to changes in market conditions during the proposed time period between filing an Advance Form D and commencement of solicitation activities. Also, many offerings of this type are subject to a variety of last minute changes and revisions in response to market conditions, input from lead investors, and other factors. Requiring the filing of an Advance Form D would result in fewer completed offerings, a considerable loss of flexibility to an issuer to revise transaction terms in response to market changes and the potential for lost business opportunities. Flexibility to approach the capital markets at a time dictated by the issuer and the market rather than by the Commission and the ability to revise and restructure transactions in response to market conditions is often critical to the success of a financing transaction and we believe the Commission should not impose filing requirements that interfere with the ability of issuers to be nimble and responsive without some real and necessary justification.

We would also be highly concerned if state securities administrators began to implement rules of their own requiring advance filings of Form D in every state in which a general solicitation is, or could deemed to be, made, whether or not there were any sales of securities actually made in those states. The time and expense of making advance filings with multiple state securities administrators would be an unconscionable burden on issuers. We would suggest that any attempt by state securities administrators to mirror the Commission's efforts to require Advance Form D filings would be beyond and above the "notice filing requirements that are substantially similar to those required by rule or regulation under section 4(2) that are in effect on September 1, 1996" [4] and should be federally preempted by Section 18 of the Securities Act. However, that conclusion is not necessarily going to be accepted as the law and it is not at all clear that state securities administrators will not attempt to impose their own pre-filing requirements on issuers seeking to take advantage of Rule 506(c).

For the foregoing reasons, we believe the requirement of an Advance Form D filing should be excluded from the Commission's final rule altogether. We can see no reason that the current filing timeline of 15 days after the first sale of securities does not adequately meet the information gathering purposes of Form D filings. Indeed, a Form D filed during this reasonably prompt period of time after commencement of a private offering that contains more definitive information with respect to the offering will not only reduce the filing burdens on issuers, but should also improve the quality of information submitted to the Commission in these filings. This timing also has the advantages of maintaining a single rule for Form D filings for any type of offering made under Regulation D which avoids unnecessary confusion. This timing would also eliminate the need to devise additional procedures for dealing with "inadvertent

[4] Section 18(b)(4)(D) of the Securities Act.

solicitations" described in RFC 3 under Section II. B and special sanctions for failing to file a timely Advance Form D.

RFC (2) We discuss our thoughts regarding the proper sanctions for failure to file Form D filings generally in more detail below. However, we do not believe that failure to file a Form D (including an Advance Form D for a Rule 506(c) offering or a closing Form D filing discussed in Part C below) should result in the loss of an exemption under Regulation D (including new Rule 506(c)) because the loss of the exemption would be a disproportionate penalty that would leave issuers open to investor lawsuits and actions by state regulators, increase uncertainty and unnecessarily harm capital formation.

RFC (4) As we suggested above with respect to RFC (1), there does not appear to be any valid reason given for issuers to have to go through a pre-filing exercise when the same information can be obtained when an offering has begun. However, if the Advance Form D requirement is retained, we believe that issuers should be permitted to file even if no specific offering is contemplated. In this regard, an issuer may not have decided whether or not to make an offering under Rule 506(c) or exactly when such an offering would be made. The filing would thus satisfy the Form D filing requirement while giving the issuer the flexibility to make a last minute decision, because of market conditions or otherwise, to begin an offering without having to wait a 15 day period. This option would result in numerous filings providing no meaningful information to the Commission or state regulators to gather.

We do not believe that Item 16 (Use of Proceeds) of Form D should be expanded as proposed. See response to RFC (28) below.

RFC (5) Again, as discussed above in response to RFC (1), there does not appear to be any reason to require an Advance Form D in the first place and this option appears unnecessary. However, if the Advance Form D requirement is retained, allowing issuers to have the option of providing all of the required information required by Form D later than the date of an Advance Form D should be allowed because in all likelihood issuers will not be able to provide all of the information required 15 calendar days before the commencement of a general solicitation. The terms of offerings are generally not settled upon until the last minute because of marketing considerations; thus there is usually little likelihood that all required information would be available (and the information that is available is likely to change).

RFC (9) For the same reasons discussed above in response to RFC (1), we do not believe Advance Form D filings should be required with respect to any offerings under Rule 506 or Regulation D. However, if the Advance Form D filing requirement is retained, it should be limited to offerings under Rule 506(c). The process for Regulation D offerings that do not utilize general solicitation is well established and does not merit the added burden of an Advance Form D filing. The amendments to Regulation D adopted simultaneous with the Release to implement

Section 201(a) of the JOBS Act did not modify the Rule 506 offering process for offerings not utilizing general solicitation, and we believe there is no compelling reason to add additional Form D requirements for those offerings. We also believe this would hinder capital formation and that the extra time, cost and burden are not necessary for investor protection and are not necessary to carry out the stated purposes of the Release or the purposes of Form D. See also the response to RFC (1) above.

C. Form D Closing Amendment for Rule 506 Offerings

RFC (11) To minimize the number of Form D filings made that will not include any meaningful information for the Commission or others, we believe that Form D and the instructions should be revised to clarify that issuers are permitted to check the closing amendment box on any Form D filing (even before the closing of the offering), and that no further filing would be required to the extent that there were no material changes to the information disclosed on a previously filed Form D (see the response to RFC (16) regarding limiting Form D filing requirements with respect to certain amendments to an offering). We further believe that with respect to any Rule 506 offering that does not result in the actual issuance of securities, either no closing Form D filing should be required, or the information required to be included in such Form D should be limited to include only (1) the identification of the issuer and the offering (perhaps referencing the prior Form D filing), and (2) checking a box that the offering was terminated without the issuance of securities.

RFC (12) While we understand that there would need to be some timeframe established for filing a closing Form D amendment, we believe that the rule will need to allow issuers to make a reasonable and good faith determination of when an offering is actually terminated. These offerings are often conducted on a best efforts basis over a period of months. Terms of the offerings typically require that subscriptions for a minimum dollar amount of securities be raised by a date certain in order to close, but once that contingency is met the issuer often continues to market unsold securities for an additional period of time which may or may not have a fixed end point. Issuers will need the flexibility to make a good faith determination that an offering is, in fact, terminated and be allowed to use this date as the measuring point for the closing Form D filing. It would be unfair, for example, to have the 30 day filing period revert back to the last closing date on which securities were actually sold in the offering.

RFC (13) As noted above in our response to RFC (9), we do not believe it is wise to make the filing of any Form D (including closing amendment to Form D) a condition to the availability of an exemption under Rule 506. In addition to the reasons noted earlier, there would be practical problems making a post-closing filing a condition to the exemption. For example, it is customary for issuers to make representations and warranties and for counsel to give legal opinions on the date of issuance that the offering is exempt from the registration requirements of the Securities Act. These representations and opinions would now have to be

qualified or assume that a future Form D filing was, in fact, made on a timely basis. This type of qualification may be unacceptable to transaction participants, and may deter issuers from conducting offerings under Rule 506.

RFC (16) In addition to the limits on both the circumstances in which a closing Form D filing is required and the amount of information that is required to be included in any such filing as described in response to RFC (11), we believe that the filing of a closing Form D should only be required if there are material changes to the information previously disclosed on Form D filing (such as a material increase to the size of the offering or the inclusion of non-accredited investors when the offering was previously contemplated only for accredited investors). We believe the list of circumstances under Rule 503(a)(ii) in which an amendment to a Form D filing is not required is illustrative. Any added informational value to the Commission or others for closing Form D filings in any other circumstances is extremely limited, does not justify the additional time and expense required to make such filings and the potential loss of the exemption for failing to make a filing disclosing a non-material change seems draconian. We believe that the foregoing limitations on closing Form D filings would strike an appropriate balance between the Commission's desire to increase its information about Regulation D offerings and the added time and expense required to make such filings.

RFC (17), RFC (19), RFC (20) There is substantial overlap between the circumstances in which a proposed closing Form D filing would be required and when a Form D amendment filing is already required under Rule 503(a)(3)(ii), and with the information required to be provided by an issuer in each of these filings. Given the limited informational value of duplicative filings when weighed against the severe sanction of the potential loss of the Regulation D exemption by the issuer for future offerings and the burden of multiple filings, we believe that these duplicative filing requirements should either be eliminated or Form D filings should be amended to permit issuers to check multiple boxes (that a filing constitutes both an amendment filing and a Form D closing filing). We do not think it will be particularly useful to require annual or other periodic updates of Form D filings relating to ongoing offerings as long as the latest filing remains correct.

With respect to the information required to be included in any Form D amendment filing, we believe that Rule 503(a)(4) should be amended to permit issuers to limit the required disclosure to basic identifying information about the issuer and the offering (as we proposed in response to RFC (11)) and disclosure with respect to items in which there are actual changes from the last Form D filing. We also would like to see the Commission improve on the current mechanism for making an amended Form D filing that requires re-inputting on the electronic form all of the Form D filing information for each filing, especially where there are no changes to certain information from the prior filing. We think the burden of fully repopulating the entire Form D for amendments outweighs any benefits to the Commission.

RFC (21) The requirement to amend a previously filed Form D to correct a material mistake of fact or error or a change in information previously provided, in each case as soon as practicable, would make it difficult to determine eligibility for Rule 506 in future offerings, although specifying a single time period for all circumstances in which such amendments must be filed would be problematic, as the reasonable time period may vary based on the specific facts and circumstances of the offering. There could also be certain situations in which such a mistake or change occurs at a time when a new filing cannot be made (such as if the issuer no longer exists), and some alternative should be considered to avoid the disqualification of all of the issuer's affiliates from future reliance on Regulation D.

D. Proposed Amendments to the Contents of Form D

RFC (28) We believe the requirement for the new table in Item 14 should be required only in the closing Form D. Any obligation to constantly update this information throughout the offering term will be an unnecessary burden on issuers.

We do not believe Item 16 should be expanded in the manner the Commission has proposed. Providing this type of precise detail is not often possible for issuers and usually just results in estimates that are of limited utility since they are subject to change. In addition, it is not clear how this information would be useful to the Commission. We do not believe investors routinely rely on Form D fillings for this type of information.

E. Proposed Amendments to Rule 507

RFC (38), RFC (41) and RFC (42) Disqualifying issuers and their affiliates and successors from reliance on Rule 506 for future offerings for the time periods currently proposed in the Release is a disproportionate sanction to incentivize compliance with Form D filing requirements unless the failure to file is evidenced by an event occurring as specified in Rule 507(a). The proposed penalties are more drastic than the consequences of the late filing of a periodic report by an issuer required to file reports under the Securities Exchange Act of 1934, as amended, that wants to file a registration statement (which registration statement could be filed immediately after all delinquent reports were filed). Although the Release also proposes terms whereby the Commission may waive disqualification, the waiver process would be expected to be both time consuming and expensive and would not itself be adequate to mitigate the potential severe sanction that is proposed. We believe that the disqualification to rely on Regulation D should terminate at the time that all prior delinquent Form D filings have been made. We believe that this penalty would adequately incentivize issuers to make the required Form D filings. We also believe that for ongoing offerings, multiple 30-day cure periods should be permitted (a reasonable time period between cure periods would be six months to coincide with the time period set forth in Rule 502(a) for the integration of offerings: after availing itself of a cure

period for a continuous offering, an issuer could not utilize a cure period for six months from the time it last utilized a cure period).

RFC (45) See the response to RFC (38). In addition, we believe that neither technical failures to file an amendment, nor failures to file where there were no material changes to the offering, should trigger disqualification from future reliance on Regulation D.

RFC (46) Disqualification of an issuer for the actions of an affiliate or a predecessor for the time periods currently proposed in the Release is a disproportionate sanction to incentivize compliance with Form D filing requirements unless the failure to file is evidenced by an event occurring as specified in Rule 507(a). Furthermore, in some cases, Form D filings for the prior five-year period may not be able to be made (such as with the dissolution of an affiliated issuer). We suggest that Form D and the related instructions be amended to permit an affiliate or successor of an issuer no longer in existence who failed to make required filings to be able to make the filings on behalf of the delinquent, non-existent filer, and that the disqualification to rely on Regulation D would terminate at the time that all such filings have been made.

RFC (50), RFC (52) See the response to RFC (38) suggesting alternate cure provisions.

RFC (58) No, for the reasons described in response to RFC (13).

Section V. Request for Comment on the Definition of "Accredited Investor".

RFC (97) We express no comment on whether net worth and income tests should be amended. However, if there are amendments to the definition of an accredited investor, we believe that the material interpretations that have been issued by the Commission and its staff since the adoption of Rule 501(a) should be codified in the amended rule.

Section VI. Additional Requests for Comment.

RFC (100) We do not believe that the delivery of an offering document containing specified information should be a condition for an offering relying on Rule 506(c). The disclosure requirements under Regulation D currently focus on the actual sale of securities rather than the method in which they are offered, as Rule 502(b)(1) requires specific disclosure in offerings made in reliance on Rule 505 or 506 only if securities are actually sold to purchasers that are not accredited investors. The fact that Rule 506(c) is available only if all of the purchasers are accredited investors and the heightened requirements imposed on issuers to verify that purchasers are in fact accredited investors should provide adequate investor protection. Adoption of any such information requirements on Rule 506(c) offerings would not increase investor protection, would strongly discourage issuers from utilizing Rule 506(c) by greatly increasing the time and cost of conducting such an offering, and would not facilitate the capital formation process that the JOBS Act sought to foster.

Section VII. General Request for Comment.

We suggest that the Commission make clear that any general solicitation materials or sales literature used in the offerings of securities by private funds or pooled investment funds under Regulation S where there also is a concurrent domestic offering under Rule 506 which does not utilize such materials, would not subject such materials to the requirements of Rule 156 or Rule 510T of Regulation D. See Section IV of Release 33-9415.

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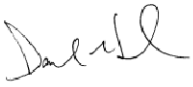
We would be glad to discuss any of our comments with the staff of the Commission.

Sincerely yours,

Robert J. Ahrenholz

Steven P. Amen



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