CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

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September 9, 2013

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NW
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Re: Amendments to Regulation D, Form D and Rule 156 under the Securities Act; 17 CFR Parts 230 and 239; Release No. 33-9416; Release No. 34-69960; Release No. IC 30595; File No. S7-06-13; RIN 3235-AL46

Dear Ms. Murphy:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing the interest of more than 3 million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. The CCMC welcomes this opportunity to comment on the Securities and Exchange Commission's ("SEC") proposed amendments to Regulation D, Form D, and Rule 156 to implement the rulemaking on general solicitation and general advertising ("proposed Amendments") which carries out the requirements of Section 201(a) of the Jumpstart Our Business Startups Act ("JOBS Act").

The CCMC believes that the dissemination of material information to investors is critical for efficient capital markets and the foundation of effective investor protection. While the CCMC considers the final rule to be a reasonable approach to meeting these objectives, we are concerned that the proposed amendments could place additional burdens upon businesses that would interfere with legitimate efforts by small companies to raise investment capital, without materially improving the quality of investor protection. In addition to questioning the merits of the proposed amendments we are especially troubled by its timing. We believe strongly that the

SEC should forebear from tinkering with the rule until it has had sufficient time to monitor its implementation and assess its impact.

Discussion

The decision by the SEC to propose amendments to a recently adopted final rule, before it has had sufficient time to assess the impact of that rule reinforces our longstanding concern that the SEC rulemaking process is not sufficiently based on the collection and use of sound empirical data that measures, quantitatively or qualitatively, the costs, benefits and impact of its rules. Simply put, how can the SEC determine that a rule must be amended before it has a factual basis for assessing that rule?

In 2011, the CCMC discussed this recurring problem in its report *U.S. Securities and Exchange Commission: A Roadmap for Transformational Reform*. Recommendation 26 proposed an innovative approach to solving this problem—creation of a "look-back" requirement in which the SEC would mandate that its staff conduct a careful and rigorous examination of major rules at the time when the rule was adopted. We believe that the adopted amendments to Regulation D and Rule 156 present a suitable opportunity to utilize the look-back process on a pilot basis. A careful examination of the impact of the adopted rules could be highly beneficial to the SEC in its consideration of whether there is a need to further amend the rule as proposed.

We believe that two components of the current proposal are especially problematic and should not be adopted without this assessment of the effectiveness of the current rule. These are the proposed changes to the requirements for determining "accredited investor" status and the application of a five year ban on future reliance on the rule by persons who have not complied with the rule in a previous offering. As currently adopted, the rule provides a common sense approach for issuers to follow in determining accredited investor status. Before imposing more rigorous and costly requirements on issuers, the SEC should monitor the application of the current rule. With regard to the proposed imposition of a five-year ban, we are concerned that a mechanical application of this could unfairly injure persons whose conduct represented an inadvertent or a de minimus violation.

Our concerns about the substance and timing of this proposal illustrate our ongoing concern with the inability of the SEC to make fundamental changes in its entire rulemaking program. On January 18, 2011, President Barack Obama issued Executive Order 13563 ("Improving Regulation and Regulatory Review") which reaffirmed, for executive agencies, the importance of adhering to regulatory principles and rulemaking processes that examine the costs and benefits of proposed rules and their alternatives, as well as the carefully considering whether a rule is necessary to achieve statutory goals. In addition, Executive Order 13563 ordered executive agencies to conduct a retrospective review of existing regulations to determine how such regulations can be improved. On July 11, 2011, the President issued Executive Order 13579 ("Regulation and Independent Regulatory Agencies"), which states that independent regulatory agencies, no less than executive agencies, should abide by the heightened regulatory standards of Executive Order 13563.[1] The SEC announced that it would undertake a retrospective review of existing rules. However, to date, the SEC has not publicly disclosed if this review has been completed and, if completed, what actions the SEC will take as a result of the review. By failing to announce what it has done, the SEC has fallen behind other regulatory agencies[2]

While much of the JOBS Act focuses on a subset of smaller emerging companies that have not yet undertaken a registered equity offering, we continue to urge the SEC to review comprehensively its entire corporate disclosure regulatory system. The *2011 Transformation Report* (Recommendation 12) discussed the importance of such an initiative. As we have previously stated in this letter corporate disclosure is the foundation of both an efficient capital market and effective investor protection. The SEC must confront the harsh reality that after nearly two decades of mandating more disclosure, the result has been the imposition of substantial costs to issuers, and the creation of vastly longer disclosure documents that obfuscate rather than illuminate and in doing so deter and discourage investors from reading the materials. It is essential that the SEC carefully examine all current and proposed disclosure requirements and assess whether the information required to be disclosed provides investors with information useful in making investment decisions, or creates

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[1] *See* attached letter to the SEC Regarding Retrospective Review of Existing Regulations (October 6, 2011). Also available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/SEC-Retrospective-Review-10.6.20111.pdf.

[2] However, as an example of how such a review should work, on May 17, 2013 the Federal Communications Commission announced that they were removing 127 regulatory requirements that were outdated or obsolete.

irrelevant clutter that investors must sift through. Additionally, a careful analysis will help the SEC and market participants to understand if the new rules are benefiting the marketplace, or heaping unneeded costs upon businesses and ultimately their investors.

We raise this analysis in the context of this comment letter since these circumstances present the perfect opportunity for a pilot program. Commitment to perform such a review will allow the SEC and market participants to know by a date certain if the advertising permitted by the final rule are assisting capital formation, if the benefits outweigh the costs and if the investor protections are sufficient.

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Thank you for the opportunity to comment on the proposed amendments and welcome the opportunity to discuss these issues and concerns in greater detail.

Sincerely,

Tom Quaadman

CENTER FOR CAPITAL MARKETS COMPETITIVENESS

DAVID T. HIRSCHMANN
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October 06, 2011

Ms. Elizabeth M. Murphy
Secretary
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Re: Retrospective Review of Existing Regulations 34-65262, 39-2479, IA-3271, IC-29781; File No. S7-36-11

Dear Ms. Murphy:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing more than 3 million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. The CCMC appreciates the decision of the Securities and Exchange Commission ("SEC") to follow Executive Orders 13563 and 13579. However, the SEC should follow these directives in a comprehensive manner to fulfill the intent of the Executive Orders to promote efficiency in market oversight and capital formation to stimulate economic growth and job creation.

The CCMC believes that full compliance with the letter and spirit of Executive Orders 13563 and 13579 requires reforms and process enhancements that include the following:

I. In addition to the retrospective look back, compliance with Executive Order 13579 and 13563 mandates on prospective rule making including enhanced analysis and Office of Information and Regulatory Affairs ("OIRA") review and scrutiny for economically significant rulemakings that will create costs of over $100 million;

II. Adoption of a negotiated approach to rulemaking as part of an enhanced rulemaking process;

III. Prioritization of rules for review, including rules that that are prohibitively expensive with little benefit, or are otherwise an unjustified obstacle to capital formation due to legal uncertainty or lack of clearly articulated or up-to-date policy rationales, along with "living dead" rules that have outlived their purposes;

IV. Include in the scope of the review regulatory activity that results in market uncertainty, such as "rule adoption by speech," or positions that hinder legitimate business activity that were not vetted through appropriate channels;

V. A thorough and transparent review of existing rules conducted at least every five years. The review should include candidates for remediation identified through a public comment process and public hearings and have a commitment to providing timely and detailed responses to comments received from the public, with emphasis on communicating decisions regarding which regulations will be given priority for remediation and the reasons for that determination

VI. Economic analysis of new rules within two years of their adoption; and

VII. Appointment of a lead commissioner to coordinate and spearhead the review effort, to be housed within the Division of Risk, Strategy, and Financial Innovation ("RiskFin").

A more thorough discussion of these points follows.

Discussion

Regulations should be clear, simple, timely, fair, reasonable, and necessary, and they should be clearly communicated to the public so that the agency's expectations of the public are well-known and well-understood. The public should be appropriately involved in the rulemaking process, both as regulations are being considered for adoption and after they come into effect to ensure that they continue

to meet the needs for which they were originally designed. Moreover, the process of reviewing existing rules must be institutionalized as part of the SEC's culture.

On January 18, 2011, President Barack Obama issued Executive Order 13563 ("Improving Regulation and Regulatory Review") which reaffirmed, for executive agencies, regulatory principles and rulemaking processes that include an enhanced process for examining the costs and benefits of proposed rules and their alternatives, as well as the necessity of a rule to achieve regulatory goals. In addition, Executive Order 13563 ordered executive agencies to conduct a retrospective review of existing regulations to determine how such regulations can be improved.

On February 1, 2011, U. S. Chamber President and CEO Tom Donohue wrote a letter to all independent agencies and Chairman Mary Schapiro requesting that the agencies voluntarily conduct a review of its existing regulations consistent with Executive Order 13563. Following that letter, on July 11, 2011, the President issued Executive Order 13579 ("Regulation and Independent Regulatory Agencies"), which states that independent regulatory agencies, no less than executive agencies, should abide by the heightened regulatory standards of Executive Order 13563.

As one example of the need for the enhanced regulatory scrutiny called for in these Executive Orders, for new rules as well as old, the CCMC has filed two comment letters on the proposed conflict minerals rule. The letters request that the SEC follow the executive orders in writing this rule, as well as putting the proposal through more rigorous OIRA review. The reasons for the requests include:

- the difficulties in establishing the origins of minerals;
- the great disparity in the SEC's estimate of compliance costs of $71 million versus some industry estimates of costs of $9 billion; and
- the failure of the SEC to take into account the compliance and economic costs that could be imposed on vendors that sell manufactured goods, costs that could affect tens of thousands of businesses.

Additionally, concurrent action by the State Department to map conflict areas and a proposed process for audits under the rule by the Comptroller General have either not been completed, or not started.

This is but one example of the challenges faced by businesses because of an inadequate rulemaking process that focuses too little on the economic impact of rules and gives insufficient consideration to less burdensome alternatives that may meet regulatory goals.

I. Compliance with Executive Orders and Plan for Rigorous Economic Analysis and OIRA Review

Despite the fact that Executive Order 13579 does not explicitly require the SEC to conduct a retrospective review, the SEC is voluntarily adopting this process to improve upon the way that reviews of existing regulations are conducted. The CCMC applauds the SEC's decision, which can yield significant positive benefits for the business community and the broader economy.

However, the Chamber is concerned that the most important aspect of Executive Order 13563 has not yet been adopted. In addition to calling for a retrospective review of existing regulations, Executive Order 13563 reaffirms agencies' obligation to identify regulatory actions that are expected to have an annual effect on the economy of greater than $100 million ("significant regulatory actions") and submit these proposed rules for OIRA review. The Order further requires that significant regulatory actions be accompanied by:

- an in-depth analysis of the rule's anticipated costs and benefits, quantified to the extent feasible;
- an assessment, including the underlying analysis, of the costs and benefits of potentially effective and reasonably feasible alternatives, and;
- an explanation why the planned regulatory action is preferable to the identified potential alternatives.

The CCMC requests that the SEC devise, implement, and communicate to the public a plan to meet this more rigorous process for review of proposed rules. Adherence to this process will help ensure that each rule adopted by the Commission contributes to an efficient, modern regulatory structure that enhances American competitiveness and helps grow the economy and create jobs.

II. Consider Adopting the Negotiated Approach to Rulemaking

To further ensure that rules are necessary, narrowly tailored to meet their regulatory objectives, and are supported by a realistic analysis of costs and benefits, the SEC should consider adopting the negotiated approach to rulemaking where appropriate.

In a negotiated rulemaking proceeding, a well-balanced group representing the regulated public, community, and public interest groups join with representatives of the federal agency in a federally chartered advisory committee to negotiate the text, outline, or concept of a rule before it is published as a proposed rule in the Federal Register. If the committee reaches consensus on the rule, the agency can use this consensus as a basis for its proposed rule, which is still subject to public notice and opportunity for comment. If consensus is not reached, the agency continues with its usual rulemaking procedure.

The regulatory negotiation process allows the interested, affected parties to have more direct input into the drafting of the regulation, thus ensuring that the rule is more sensitive to the needs and limitations of both the parties and the agency. Rules drafted by negotiation are frequently more pragmatic and more easily implemented at an earlier date, thus providing the public with the benefits of the rule while minimizing the negative impact of poorly conceived or poorly drafted regulations.

Adoption of the negotiated rulemaking approach would give the SEC the benefit of the regulated community's expertise and perspective before a rule is proposed. While this more collaborative process certainly takes more time at the outset, it would give the SEC the benefit of the regulated community's expertise and perspective, and potentially deter even more costly and time-consuming litigation. The negotiated rulemaking process has been voluntarily adopted numerous times by

executive agencies, including the Department of Education, Department of Labor, Department of Transportation, and Environmental Protection Agency.

III. Prioritization of Review of All Existing Regulations

Executive Order 13563, as extended to independent agencies including the SEC through Executive Order 13579, establishes five "General Principles of Regulation" that the agencies should follow when promulgating rules. These principles provide a starting point for a process to identify rules that do not provide significant net benefits to the markets, to prioritize those rules for more in-depth review, and to ultimately determine whether such rules should be modified, streamlined, expanded, or repealed.

- Do the benefits of a regulation justify its costs (recognizing that some benefits and costs are difficult to quantify)?

- Is the regulation tailored to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations?

- Is there another alternative regulatory approach that maximizes net benefits?

- Does the regulation, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt?

- Are alternatives to direct regulation available, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public?

In addition, we urge the SEC to abide by the core principle that its rules and regulations must contribute to ensuring that the United States remains the destination of choice for legitimate and productive capital formation. Maintaining this status requires maintaining market integrity and enforcing clear rules, in addition to greater

efforts to ensure consistency and predictability of rule adoption and interpretation, and the elimination of redundancies.

Accordingly, the Chamber believes that the SEC should prioritize its review of rules into the following categories:

a. **Prohibitively expensive or difficult to comply with regulations.** These are regulations for which it has become apparent that the expected benefits of the regulation have not come to fruition, or that the costs of implementation—in terms of compliance costs, burdens on capital formation, and effect on firms' competitiveness—were not fully recognized at the time of adoption and whose actual expense outweighs their actual benefit. As these rules have the largest economic impact, it is important that they take the highest priority.

b. **Inconsistent or duplicative regulations**. Many regulations have become a significant burden over time because they are inconsistent with or duplicative of other regulations of the SEC or other regulatory agencies. In these cases, it is critical that the SEC, where applicable, coordinate its review and remediation efforts with other agencies with overlapping regulations. Such duplicative regulations impose high compliance burdens on industry and also high costs on the regulatory agencies seeking to enforce such rules.

c. **Regulations whose purpose has diminished (the "Living Dead")** These are regulations that have become out-of-date since they were adopted as a result of a significant shift in the marketplace, technological changes, or other events occurring since enactment of such regulations, yet still impose costs on the marketplace. These regulations must be updated or repealed, as they represent a significant burden without a corresponding benefit, and may be counterproductive in light of their original purpose.

The Chamber believes that this review should begin promptly so that rules can be modified, streamlined, expanded, or repealed, as appropriate and in an expeditious manner.

IV. Review Regulatory Policy Made Outside of the Formal Rulemaking Process

Commission staff, without vetting by the Commissioners or public input, often make decisions and policies that have the force of a regulation. This may lead to contradictory positions, as well as uncertainty for companies, and should be subject to the same review process as formal regulatory policies.

As one example of many, over the course of a three-year period, the Financial Accounting Standards Board ("FASB") attempted to revise the FAS 5 standard on loss contingency disclosures. This proposal generated hundreds of comment letters in opposition, many centered upon the concern that the proposed standard would violate attorney client privilege and hamper the ability of businesses to use their constitutional rights to defend themselves from litigation. In the face of this opposition, FASB first suspended the proposal and, last fall, dropped it all together.

Shortly thereafter the Division of Corporation Finance, through speeches and letters, began to require selected companies to implement in their current SEC filings many of the controversial disclosure requirements that had been rejected by FASB. These actions were not reviewed by the SEC, but clearly are designed to, and are having the effect of, setting new corporate disclosure policy. Unfortunately, this was done without a discussion or examination of the very significant policy issues that led FASB to put its rulemaking on hold: the significant costs to shareholders in terms of the burden of complying with new disclosure requirements; the harm from disclosure of information that could significantly disadvantage the company in ongoing litigation (and expose it to new litigation); and the lack of any benefit from the disclosures, given the inherent unreliability of the predictions that are being required.

This is but one staff driven policy that may harm the bottom line of businesses and investors without being subjected to rulemaking process required by the Administrative Procedures Act. Therefore, consistent with the letter and spirit of the Executive Orders, decisions and policies made outside of the formal rulemaking process should be subject to the same review process as formal regulatory policies.

V. Retrospective Review Process and Public Involvement

Transparency and coordination with the public will be critical to maximizing the benefits of the review process. Therefore, following its adoption of a process and standards, the SEC should set forth both the process and the standards publicly, so the public will understand how the review process is going to proceed. The SEC should then, through a 120-day period for public comment and a series of public hearings throughout the country, solicit nominations from the public of specific regulations that should be reviewed with an eye towards modification, streamlining, expansion, or repeal.

After the close of the public comment period, the SEC should commit to providing timely and detailed responses to comments received from the public, with a particular emphasis on communicating the SEC's decisions regarding which regulations will be given priority and the reasons for that determination. This response should inform the public as to which regulations will be given priority for review, and should set out a timeline for agency action on such regulations. To the extent that action on any existing rules may require a legislative change, that fact should be clearly outlined in the response to public comments.

It is critically important that the process for retroactive review set in motion by Executive Order 13579 be institutionalized in the SEC's regulatory mission, and not become a one-time exercise. We recommend, in addition, that the SEC revisit its entire inventory of rules—through the process described above—at least every five years to ensure that its rules remain clear, simple, timely, fair, reasonable, and necessary. This process, once fully institutionalized, will provide benefits to the markets by both ensuring that existing rules are brought up to date and by reinforcing to rulemaking staff that diligence in conducting cost benefit analysis and reviewing reasonably available alternatives will result in more effective regulations.

VI. Economic Analysis of New Rules within Two Years of their Adoption

While deficiencies in economic analysis have been well documented and debated, economic analysis during rulemaking remains an estimate of potential costs and benefits *before* a rule has been promulgated. By also mandating an economic cost analysis two years after a rule has been promulgated, the SEC will have a true measure of the costs and benefits and may quickly take action to correct any potential adverse consequences in a rule, as well as to get a measure of the rules effectiveness.

Additionally, over the course of time, this dual system of economic analysis will help to instill discipline and rigor in the additional analysis made during initial rulemaking.

This concept, while novel, is not a new one. In 2008, the SEC's own Advisory Committee on Improvements to Financial Reporting made similar recommendations for a post implementation review of accounting and auditing standards.

VII. Appointment of a Lead Commissioner and RiskFin to Guide the Retrospective Review Effort

Recognizing the Chairman's already significant and expanding responsibilities, we recommend that the Chairman delegate ultimate responsibility for the regulatory review process to another Commissioner, who will lead the review effort. Further, the review effort should be housed within the Division of Risk, Strategy, and Financial Innovation.

By assigning ultimate responsibility for this important function at the highest level of the agency, the SEC will both demonstrate to the public that this important function is a priority of the Commission and is receiving the attention that it requires. Additionally, with a Commissioner at the helm, the SEC's retrospective review will be less susceptible to cross-divisional biases and siloing that might otherwise interfere with its success.

Likewise, RiskFin is well-suited to provide the discipline that will be required to institutionalize the review process. RiskFin's multidisciplinary staff possesses the skills needed to adequately assess rules' intended and unintended consequences. Additionally, RiskFin staff are more likely to be able to review rules' effectiveness objectively, and are less likely than staff in the Divisions of Enforcement, Trading and Markets, Office of Compliance Inspections and Examinations, and Corporation Finance to have a vested interest in the outcome of a review. RiskFin's periodic written analyses of the costs and benefits of each rule should become part of the public record.

Conclusion

The CCMC once again would like to thank the SEC for the opportunity to comment on the Retrospective Review of Existing Regulations. We believe this

process is critical to modernizing our regulatory structure in a way that will enhance American competitiveness and help grow the economy and create jobs. We continue to look forward to working with the SEC throughout this process.

Sincerely,

David Hirschmann