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

Re: File No. S7-06-13

Proposed Amendments to Regulation D, Form D and Rule 156 under the Securities Act (the "Proposed Rule")

Ladies and Gentlemen:

Thank you for the opportunity to comment on the above-referenced Proposed Rule, as set forth in Release 33-9416 (the "Release"). My comments below reflect my personal opinions only, and not the views of my law firm or any client.

For the reasons set forth below, I urge the Commission not to adopt any part of the Proposed Rule that pertain to small business issuers, except perhaps for any additional post-sale Form D information. I further suggest that the Commission study, solicit comment on, and implement best practices and regulations that more fairly reflect and effectively implement the intent of Congress and the President in passing the JOBS Act: to remove barriers, and enable new approaches, to capital-raising for business startups.

In particular, the aspects of the Proposed Rule on which I want to comment are (i) the multiple Form D filing requirements, (ii) the proposed "temporary" requirement to submit "written communications" regarding general solicitation and (iii) the mandated inclusion of legends in any written materials constituting general solicitation or advertising.

The Proposed Rule and Rule 506(c)

The Proposed Rule, as I understand it, will mainly affect Rule 506(c) offerings, i.e., the newly-permitted exempt offerings under Reg D that may feature general solicitation, so long as the securities are sold only to accredited investors. My concerns with the Proposed Rule relate to the startups and small business issuers that make up the base of clients which I represent as a transactional lawyer. (I do not address, in this comment letter, the parts of the Proposed Rule that affect certain hedge funds and pooled investment funds.)

As an general observation, it appears to me that the Proposed Rule, while it may be well-intentioned, reflects a rather profound disconnect between Commission rule-making and both the Congressional mandate under the JOBS Act and the risks and realities of early-stage capital raising. There is neither a legislative mandate, nor a proven need, for any part of the Proposed Rule.

Advance and Multiple Forms

Currently, an issuer conducting an offering under Reg D has until 15 days after the first sale to file the Form D, and also may have to file copies of the Form with each state in which it has sold securities. This is a reasonable requirement that does not interfere with capital-raising efforts.

Under the proposed rule, issuers intending to rely on Rule 506(c) would have to submit up to three different Form D filings:

- one, a so-called "Advance Form D," 15 days before commencing a general solicitation (containing complete (if known and if the issuer desires to disclose) or partial information about the issuer and the offering;

- a second Form D or amendment, no later than 15 days after the first sale, providing any information that was not included in the "Advance Form D"; and

- a third Form D amendment 30 days after the completion of the offering.

Issuers failing to comply with this regimen would be barred from using Rule 506 for a one-year period.

I see many problems with this proposed new regulatory scheme. Ironically, the Release's stated reasons for proposing the Advance Form D are the best arguments against it:

- First, the Release states that "requiring issuers to file an Advance Form D would assist the Commission's efforts to evaluate the use of Rule 506(c)" – even though "the Commission does not anticipate that its staff will review each Advance Form D filing as it is being made."

  If the staff is not even going to review these, and they have to be filed within 15 days after the first sale anyway, then how are they going to help, and what is the point of requiring them 15 days in advance? An issuer's failure to file a document that nobody intends to read certainly should not result in loss of future eligibility to use Reg D.

- Second, the Release asserts that the "Advance Form D would be useful . . . as it would enhance the . . . Commission's ability to determine which issuers are facing challenges raising capital under Rule 506(c) and whether further steps by the Commission are needed to facilitate issuers' ability to raise capital under Rule 506(c)."

  Requiring these documents to be filed 15 days before initiating general solicitation for a Reg D offering is not likely to improve the SEC's ability to facilitate capital-raising. Sifting through countless Form D filings, and trying to discern based on that review which ones were successfully completed, which weren't, and why, seems to me to be a uniquely opaque approach to facilitating early-stage fundraising. Furthermore, the SEC already has an excellent tool at its disposal to learn about the challenges facing startups. Each year, the SEC holds a federally-mandated "Government-Business Forum on Small Business Capital Formation." In my experience, this forum draws engaged and experienced members of the small business issuer community, who make many excellent suggestions as to how to improve the capital-raising climate for startups and small issuers. The SEC's rate of enacting any of these suggestions, unfortunately, is extremely low. The annual Forum would seem to be an ideal venue for the Commission to solicit input aimed at helping small business issuers, rather than "facilitating" them by requiring multiple additional filings – which won't be reviewed – for what is supposed to be a simple and straightforward exempt Reg D deal.

- Third, the Release claims that "the Advance Form D 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)." This is a remarkable assertion, especially as it pertains to investors. What information could there possibly be in an Advance Form D that would be useful to an investor, that would <u>not</u> be provided directly to the investor in the offering documents or otherwise during the solicitation or due diligence process? And what rational investor would ever think to look in a Form D, as opposed to the customary aforementioned sources, for relevant information about the issuer material to an investment decision? This hardly seems likely be of any real use to investors.

  As for "state securities regulators," please remember that there is currently no requirement under any state law for an issuer to file advance notice of a Regulation D offering. The whole point of Rule 506 offerings is that under the National Securities Markets Improvement Act of 1996, or NSMIA, they are <u>exempt</u> from state regulation. It remains to be seen exactly how the Commission anticipates the state securities regulators getting, or using, this information. My understanding is that under NSMIA, the states are not authorized to require any more extensive filings for Reg D offerings than they had in place at NSMIA's 1996 enaction. Do we expect the state securities administrators to review the SEC website to see if any issuers are proposing to make a general solicitation? Even then, how would a state securities regulator know from reviewing an Advance Form D whether any investors in its jurisdiction will be investing, such that advance information would be useful? The Release does not address any of these questions.

  The only way a state securities regulator would be able to make any practical use of information in an Advance Form D would be to review it before the issuer solicits investors within the state. But NSMIA prohibits that. To the extent that the state securities regulators advocating for the Advance Form D expect to have any meaningful ability to use this information before a Rule 506(c) offering takes place, I think they misapprehend the reach and effect of NSMIA.

Finally on the subject of the multiple Form D filings, the Proposed Rule would punish any failure to comply with these complicated new rules under Rule 503 by forbidding the issuer from using Reg D for an entire year. An unexpected inability to use Reg D could put a startup out of business, or expose the company and its advisers to increased risk of litigation. Also, the ban comes with a proposed five-year lookback period. The most likely time for a long-past problem to be discovered is, of course, during due diligence for a later round – the worst moment to encounter an obstacle. An emerging company could, for example, be prevented from closing a critical growth capital round, putting its operations and the livelihoods of its employees at risk, if it emerged in due diligence that, 5 years earlier, the company had commenced a general solicitation for its seed round 10 days, instead of 15, after filing its Advance Form D. This seems unduly harsh, especially where the rules are so potentially complex and the purported benefits so dubious, and where no pattern of failure to comply with Rule 503 has even been established[1].

The proposal to add more Form D filing requirements appears to have no real purpose or effect other than significantly further to burden small business issuers. No practical benefit to anyone else has been established. Therefore, I respectfully suggest that this part of the Proposed Rule be abandoned.

Submission of Written Materials

Issuers will also be required, under a part of the Proposed Rule that is intended to be of temporary duration, to submit to the SEC any "written communication" that constitutes a general solicitation, no later than the date it is first used.

It is not clear, from the text of the Proposed Rule, what information issuers will need to submit to meet this requirement. If, for example, a startup company adds a statement on its home page stating: "We are raising a seed round – accredited investors can contact us to learn more," then it is not clear from the Proposed Rule what materials it would have to submit to the SEC. The entire contents of the website? Only the sentence indicating that an offering is in the works?

Just about every startup that enters a business plan competition, takes up residence in an incubator, sets up a own website, or takes any similar public-facing action, is seeking to raise capital. Every participant in the early-stage entrepreneurial community knows this, whether or not the company explicitly states so. Startup companies seeking funding might use website pages, executive summaries submitted to business plan competitions, LinkedIn profiles of the company's founders, Twitter feeds, and countless other kinds of "written materials" which they use to communicate with the public as well as to attract financial and strategic partners. Indeed, one likely reason for the broad bipartisan Congressional support for lifting the general solicitation ban was the very recognition that the modern-day prevalence of these multiple forms

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[1] As an aside to this topic, I want to comment specifically on the methodology used by the SEC to establish that there might be an existing problem with Form D compliance under Rule 503. In my experience, issuers and their advisors are scrupulous in complying with the Form D filing, both because Reg D requires it and because the states require copies of the Form D under their NSMIA-corresponding statutes. In contrast, the Release contains several statements, all unsubstantiated, from various commenters asserting generally that "some issuers" do not file Form D. Not a single case is cited.

The SEC did attempt to quantify the extent of Form D filing non-compliance by counting the FINRA filings under new Rule 5123 from December 2012 through early February 2013. There were 366. FINRA filings are made under a different rule, by different entities, to a different agency. Not all of the transactions reported are necessarily Reg D transactions. Therefore, there is no reason to expect that there would be 366 matching Forms D on the SEC website, or that these two entirely different things would have any measurable relationship with each other. Nonetheless, the SEC attempted to match the FINRA filings with Forms D that it received during the same period, acknowledging that they might not have found them all. Then, they counted up the FINRA filings for which they could not find a matching Form D and, based solely on that exercise, declared in several places in the Release that there might be a 9% non-compliance rate among Reg D issuers. One wonders how the Commission's own staff accountants might comment on an issuer's use of such math in its public filings.

of mass communication have completely overrun archaic 1930s notions of what does and does not constitute a “general solicitation.”

Moreover, it is unclear what purpose is to be served by requiring submission of these “written communications.” The Release states that, as with the Advance Form D, they will not be reviewed by the SEC staff – but failure to file them can lead to the issuer’s ineligibility to use Reg D. Such a harsh punishment seem unreasonable. Also, from the Release it appears that state securities regulators were the main voices, along with the Commissions’ Investor Advisory Committee, calling for the submission of these written materials. Again, one wonders to what use state regulators intend to put these materials, or how they expect to figure out, pre-offering, which materials have any relevance to their state. Do state securities regulators intend to demand advance copies of these materials, and will issuers have to pre-file in every state 15 days before beginning an offering featuring general solicitation, just in case an investor from that state winds up participating in the offering? This would appear to violate NSMIA’s pre-emption. And if the state securities regulators are not getting these written materials in advance, it is unclear what good they are. If the Commission simply wants to learn more about how issuers are using general solicitation, then it could add a section to the post-sale Form D asking the issuer to identify the primary means it used to advertise the offering. It doesn’t make sense to burden startup issuers in this manner, when the intent of Section 201 of the JOBS Act was to permit the free use of general solicitation in the context of an exempt offering.

<u>Legends</u>

The Proposed Rule requires any “written communication constituting a general solicitation or general advertisement” in a Rule 506(c) to include a few legends of disclaimers and risk factors (including, e.g., that the investor might lose the entire investment).

These proposed mandated disclosures amount to little more than the “Risk Factors 101” that tend to appear in rote fashion in private placement memoranda and offering documents. These kinds of disclosures are not usually considered, by experienced practitioners, to have much effect on any well-informed investor’s decision to invest in an early-stage company. Indeed, if a reporting company tried to use boilerplate statements like these in its 1993 Act or 1934 Act filings, it might well be asked by the Corporation Finance staff to replace them with disclosures that provide more specific and useful information to investors.

Worse, this is just the kind of broadly-worded requirement – “include in any written communication” – that in turn leads to over-lawyering, and to startups being inundated with “client alerts” and expensive advice about the kinds of “written communications” in which the legends might have to be included, and in turn to overcompliance that will water down the usefulness that the legends might have had, e.g., if they were prominently included in the actual subscription materials. All of this, in the absence of any evidence that issuers in Rule 506 offerings are generally failing to make adequate disclosure. Congress has not mandated this requirement and no case has been made for it.

Additional Required Information in Form D

For the most part, the additional information requirements proposed for From D are unobjectionable, to the extent that they would be added to the single, post-sale Form D. If they will truly help the Commission understand and facilitate early-stage capital-raising then they should be added to the Form D. However, one proposed requirement stands out as particularly undesirable. Form D once required the identification of 10% owners of the issuer. This may not have been a well-loved provision, but at least it was easy to understand and comply with. In 2008, this requirement was deleted, as the Release notes. But now, the Proposed Rule would require the identification, not of 10% owners, but instead of anyone "who directly or indirectly controls the issuer." The idea of what constitutes "control" under securities laws has been the subject of reams of analysis and differing interpretations for over 70 years. It is especially susceptible of uncertainty in the early-stage company space, with shareholder and investor rights agreements, veto rights, different classes and series of stock, class vote requirements and several other indicia of "control." I foresee countless hours of pointless legal analysis that startups cannot afford, aimed at trying to determine who the "control persons" are before and after the offering, for the sole purpose of filling out a Form D. If this information is truly necessary, and again, no case has been made that it is, then we should at least go back to an objective standard.

Conclusion

The Proposed Rule reflects a significant effort on the part of the Commission, and an objective to protect investors from fraudulent activity, both of which should be commended. However, it is well to remember that the acronym "JOBS" stands for "Jumpstart Our Business Startups." Unfortunately, much of the Proposed Rule would likely have the opposite effect, impeding the ability of early-stage companies to communicate with the community of accredited investors who want to invest in them.

The funding gap for startups is real, and significant. In contrast, the SEC, by its own admission in the Release, has no evidence that fraud is an issue in this market to any greater or lesser extent than in any other kind of economic activity. I respectfully suggest that to place significant additional burdens on desirable economic activity, based solely on the unquantified, if incontrovertible and, in any case, ultimately meaningless, statement that "fraud exists in this market," is not an appropriate use of the Commission's rulemaking authority and conflicts with the clear Congressional mandate of the JOBS Act.

As a final observation, part of the job of being "the investor's advocate," is providing information to assist investors in evaluating opportunities to participate in the market. The Commission does this in part through its companion website, investor.gov. One can visit investor.gov and find information about various types of fraud, information about retirement plans, and tips on how to spot scams. However, what cannot be found on investor.gov is a single word about the basics of investing in startups. Congress has delivered a clear mandate in the JOBS Act to open up early-stage investing to the public. I respectfully suggest that the SEC place at least some emphasis on investor education, instead of proceeding from the apparent assumption that the main, indeed the only, problem with startup financing is issuer fraud. If the SEC intends to play a serious and authoritative role in overseeing this growing and vital area of our economy, then I hope it will continue to engage with the entrepreneurial community in the spirit of enabling, and not impeding, legitimate capital-raising efforts.

Thank you again for this opportunity to comment on the Proposed Rule.

Very Truly Yours,

Gerard P. O'Connor