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Via Email to rule-comments@sec.gov

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

Re: File No. S7-06-13
Release Nos. 33-9416, 34-69960, IC-305985
SEC Rule Proposal on Regulation D, Form D and Rule 156

Dear Ms. Murphy:

We represent numerous issuers of securities that rely upon the exemption from securities registration found in Regulation D. Our clients are active in the real estate, energy, intellectual property and manufacturing sectors, among others. We previously commented on the proposed changes to Rule 506 of Regulation D regarding elimination of the prohibition against general solicitation insofar as offers and sales to verifiable accredited investors was concerned, and were pleased that the Commission adopted those changes as required by Jumpstart Our Business Startups Act (the JOBS Act).

We submit these comments regarding the Commission's additional proposed amendments of Regulation D and Form D. In this letter, we refer to public solicitation and general advertising as "public solicitation." We are of the view that most of the proposed changes would simply set traps for the unsophisticated client, and perhaps the unsophisticated lawyer. In addition, a change that would disqualify <u>any</u> issuer from using Rule 506 for a year after <u>any</u> mistake in filing would fundamentally alter the usefulness of Rule 506 for those issuers who do not use public solicitation. Regulation D provides a flexible and practical means for small businesses to raise capital, and the Commission's proposed changes would make complying with Regulation D much more difficult and would increase risk and uncertainty for all businesses raising private capital.

<u>BACKGROUND</u>. The JOBS Act was enacted to increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies and others. The SEC was charged with issuing regulations to implement the JOBS Act, not to propose further restrictions on the existing exemptions for private placements.

The JOBS Act states: "....the Securities and Exchange Commission shall revise its rules issued in section 230.506 of title 17, Code of Federal Regulations, to provide that the prohibition against general solicitation or general advertising contained in section 230.502(c) of such title shall not apply to offers and sales of securities made pursuant to section 230.506, 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." The JOBS Act did not direct the Commission to revise the filing requirements in Rule 503 applicable to offerings that did not use public solicitation nor to impose new sanctions on issuers who do not use public solicitation.

ADVANCE FILING OF FORM D. The proposal to require advance filing of a Form D in any offering where public solicitation is used is not practical in the real world where capital is raised and companies are started or grown. It simply demonstrates the extent to which the Commission, and perhaps other securities regulators, may not understand the dynamics of capital formation, and the way small businesses operate. We provide some possible scenarios drawn from our experiences.

It could be difficult to determine when public solicitation is first used in an offering that might be integrated with a prior offering. For example, an issuer commences an offering without using public solicitation and without making the advance filing. It finds that there has been inadvertent public solicitation, and withdraws the offering and refunds all subscriptions. It then restructures the offering, this time intending to use public solicitation. Under the existing integration rules, the offerings would be integrated. As the offerings are integrated, should the advance notice filing requirement start from the date of the inadvertent public solicitation in the first offering? If Rule 503 were not modified to require an advance filing, the second offering could use public solicitation and the issuer could file within 15 days of the first sale. If Rule 503 is modified as proposed, the issuer may not be able to use public solicitation.

Clients sometimes forget to tell their lawyers that they have started an offering. Assume an issuer receives a draft of a private placement memorandum and begins to show it to prospective investors using public solicitation. The offering has commenced even though the lawyer has not delivered the final version of the private placement memorandum and has not filed a Form D. If Rule 503 were not modified to require an advance filing, this offering could use public solicitation and the issuer could file within 15 days of the first sale. If Rule 503 is modified as proposed, the issuer has not made an advance filing and is now disqualified from using Rule 506 for one year.

Under current Rule 503, questions sometimes arise about when the first sale occurs, but those are relatively simple to resolve. At least a "first sale" is a discrete event largely within the knowledge and control of the issuer. If a filing requirement were tied to the beginning of public solicitation, the door is open to a flood of questions about whether something is public and whether it is solicitation. Coupling this with a disqualification for failure to guess right and file makes proposed Rule 506(c) not very useful. Assume that a person talks to his pastor about an investment fund he has started that will allow the congregation to invest in companies that are compatible with church views. In the pastor's next sermon, he urges his flock to invest in line with their values, and describes the fund as a good place to start. Public solicitation has started whether or not the fund intended to use public solicitation. If Rule 503 were not modified to require an advance filing, the fund's current offering could continue and could use public solicitation, even if it were only to the congregation. The issuer could file within 15 days of the first sale.

In some situations, the inflexibility in the electronic version of the Form D creates opportunities for mistakes. For example, an issuer, such as an oil and gas drilling company, may conduct multiple offerings of interests in different oil wells. It may be difficult to distinguish which Form D relates to which oil well, as there is no place to indicate separate offerings by the same sponsor on the Form D. An amendment intended for one offering might be mistakenly filed for a different offering.

The filing deadline for Rule 506(c) offerings should be tied to the date of the first sale, with an option to amend at any later time to accommodate issuers who have a change in the plan of distribution after the offering has commenced. If the Commission adopts an advance notice filing requirement, issuers should be permitted to file an advance notice even when no specific offering is contemplated, with such notice covering any offering commenced within a year of filing. As the Commission probably understands, this second suggestion will likely result in many issuers filing an advance notice once a year, greatly reducing the practical utility of the filings. Finally, if an issuer in an offering under Rule 506 that is not intended to use public solicitation inadvertently uses public solicitation, the issuer should be required to file an amended Form D as soon as practical, similar to the current requirement regarding selective disclosure under Regulation FD, with no consequences. If the Commission determines to impose consequences for inadvertent public solicitation under the "wrong" Form D, it will simply encourage issuers not to file an amended Form D, again reducing the practical utility of the filings.

The Commission admits that it is likely to review only a small number of the advance filings. If it reviews a filing and doesn't like the way the form is filled out, then what? Does it contact the issuer and ask for an amendment? Is the issuer in non-compliance? What does this mean? Is the issuer disqualified?

An issuer filing a Form D, whether for a Rule 506(c) offering or another Regulation D offering, can be required to provide only that information known to the issuer at the time the filing is made. It seems to us that the Commission should focus on getting complete and accurate information at some time during the offering rather than incomplete information. Therefore, the suggestion that issuers would have the option of filing all information required by Form D at one time, if known, should increase the usefulness of the Form Ds.

We note a recent letter sent to the Commission by six members of Congress urging that the Commission incorporate an advance filing requirement into the rules, principally relying on the notion that advance filings will provide an opportunity for state securities regulators to ferret out investment proposals made by unscrupulous issuers. Unscrupulous issuers do not make filings, whether or not there is a requirement to do so. No filing requirement, whether or not in advance, will ever prevent individuals or issuers from committing fraud on the investing public, if that is their intention. Even if such issuers were to make filings, it would be virtually impossible for a state regulator to conclude before an offering commences that an issuer's intentions are not honorable. In our view, no advance filings should be required. The filing deadline for all Rule 506 offerings should be tied to the date of the first sale, with an option to amend for later public solicitation.

DISQUALIFICATION FOR FAILURE TO FILE OR COMPLY. Under current Rule 507, an issuer is disqualified from using Regulation D exemptions only if it has been enjoined by a court for failure to comply with the Rule 503 filing requirements. We believe that most issuers who rely on Rule 506 file with the Commission, and most file on time. However, sometimes mistakes are made. Usually they are clerical in nature, where the date to file was not calendared or the person responsible for filing failed to make sure that the Form D was actually transmitted. Sometimes the mistakes result from a failure in communication, such as when the issuer forgets to tell the person responsible for filing that the first sale has been made, or does not send the information in time to file within 15 days. Usually, and appropriately, mistakes like this are remedied upon discovery and do not have drastic consequences, nor should they. The proposed rules would impose drastic consequences for even the most innocent mistake in filing.

The Commission proposes to amend Rule 507 to disqualify any issuer from relying on Rule 506 for one year if the issuer or any affiliate did not comply with all of the Form D filing requirements in a Rule 506 offering. The Commission also proposes disqualification if an issuer or its affiliates failed to file written public solicitation materials on time and were sanctioned for the failure, or failed to use the "right" legends and were sanctioned for the failure. As the Commission should know, and most practitioners know, almost all offerings relying on Regulation D are conducted under Rule 506. Rules 504 and 505 have important, but limited, utility. Contrary to the assertions by commentators cited by the Commission in footnote 85, we believe that compliance with the Form D filing requirement, especially outside the institutional market, is widespread. Most issuers want to ensure that their securities are "covered securities" for purposes of the preemption of certain state requirements under Section 18 of the Securities Act of 1933, and are careful to comply fully with the filing requirements.

An issuer might innocently decide not to file a Form D for a withdrawn offer even though sales have been made and then the proceeds refunded. For example, assume an offering is started in 2014 and is not successful in raising the capital required for the business to purchase the proposed asset. The offering is withdrawn a few days after the issuer accepts the first subscriptions. The issuer refunds the subscription monies, and mistakenly does not file a Form D even though sales have occurred. The issuer therefore has not complied with the filing requirements of Rule 503. The issuer now wants to start a second offering to buy the same asset. If the disqualification provisions are adopted, the issuer is not permitted to use Rule 506 for one year. Is this consequence justified in light of the probably innocent decision by the issuer not to file for sales that are almost immediately rescinded?

The mandatory disqualification, even for minor infractions, is not cured by the 30-day grace period because many companies probably will not discover an error within that time, nor is it cured by the possibility that the disqualification would be waived by the Director of the Division of Corporation Finance. The delegation of authority does not impose timelines for granting or denying a waiver, although we are uncertain whether other internal guidelines setting time limits exist and are followed. A small company that has made a mistake, especially if the mistake shuts it out of the capital markets for a year, is likely to make the decision not to spend time and money seeking a waiver. It may not even have the money to afford counsel to let it know that it could seek a waiver, much less pay for help to file a request. The company is likely to simply curtail its plans for growth. Or, as in the example above, the company may not even be aware that it has failed to make a required filing and that it is disqualified from raising capital under Rule 506. If it proceeds with a Rule 506 offering under these circumstances, what are the consequences? Has it violated Section 5 of the Securities Act and numerous state acts and given all investors a right to demand rescission?

We find it curious that the Commission would propose that disqualification for failure to comply with proposed Rule 509 would take effect only after action by the Commission or the courts. In our view, this reflects perhaps a better understanding of the private fund industry, which is well represented by counsel, than of the remainder of the mostly operating companies who use Regulation D to raise capital. We suggest that the Commission adopt the same standard for all failures to comply with the filing requirements of Rule 503. The potential for disproportionate consequences for inadvertent errors or omissions should not be greater for Main Street issuers than Wall Street issuers.

MANDATORY SUBMISSION OF WRITTEN PUBLIC SOLICITATION MATERIALS. The Commission proposes to require issuers to submit any written public solicitation materials used in their Rule 506(c) offerings to the Commission no later than the date of the first use. Again, clients often forget to talk to a lawyer before they began talking to others about a potential offering. Is a diagram on a cocktail napkin provided to a person known only by their first name in the course of a barroom conversation a written public solicitation? Has an offering started? What about some jottings on a white board, about an existing offering, after a nighttime accounting class where the students discuss business ideas? A broad range of writings might be considered public solicitation.

Another problem with the filing requirement is the insidious worry about making a filing that may or may not be reviewed at some point in the future, where there is no deadline for review and no way to gauge who might review it and who might object and on what grounds. Although somewhat the same uncertainty exists under the current filing requirements for advertising materials imposed by FINRA, there are not such serious consequences attached to a filing that a regulator does not like. While the Commission might find the materials interesting, the staff probably could find most of the materials that are likely to reach unsophisticated investors by trolling the internet, as they and the states have done for years.

PRESCRIBED LEGENDS. The Commission proposes to add Rule 509 to prescribe legends in any written public solicitation, and additional legends and performance data in offerings by private funds. All this does is set another trap for the unsophisticated or those who receive bad legal advice. Any person who reads new Rule 506(c) is highly likely to include a legend that the offering will be sold only to accredited investors, and that investors will be required to provide information about their accredited status. This alone is likely to weed out any but the most determined non-accredited investor. Does the Commission really believe that the approximately 2% to 3% of investors who are accredited on the basis of income need the protection of additional mandated legends?

We do recognize that there may be some benefit to requiring private funds to disclose that they are not registered as investment companies and to include appropriate legends regarding performance data. Unlike operating companies that are seeking to raise capital for their businesses, private funds are by their nature in the business of investing in securities, and can be expected to have a more sophisticated understand of legal requirements, and, one would hope, have access to competent counsel. The Commission should be cautious, however, of adopting a one-size-fits-all approach. A private fund that invests in publicly traded securities does not face the same performance and valuation questions as one that invests in various technology or energy start-ups. The anti-fraud provisions found in the federal and state securities laws are sufficient to deal with unfounded claims. This proposal goes far beyond the information gathering focus of Form D and the monitoring of Regulation D offerings by the Commission and the states.

CLOSING FILING REQUIREMENT. We support the proposal to require issuers to file a closing amendment to Form D upon the closing of any Rule 506 offering. We believe this requirement would provide important information to the Commission and the industry about the amount of capital actually raised in Rule 506 offerings, in comparison to the amount of capital sought to be raised. It could also serve as a substitute for periodic amendments and therefore reduce compliance burdens for issuers and broker/dealers. We think this proposal would have the added benefit of reminding issuers to withdraw offering materials for closed offerings. The failure to file a closing amendment should not, however, result in disqualification or the loss of the exemption. A loss of the exemption for the entire offering after the offering has closed, and probably after the money has been invested by the issuer, would be draconian. The purpose of the closing amendment is to provide better information to the Commission, the states and the industry. If the exemption would be lost because a mistake was made and the closing amendment not filed, the issuer likely would have no practical way to remedy the problem and would live under a cloud for the next few years.

CHANGES TO FORM D. We support requiring issuers to identify their website if they have one, and to check whether they intend to use public solicitation, on the Form D. However, an issuer should be able to amend the information regarding its intent to use public solicitation without penalty at any time during the offering. We believe that the additional information required regarding the types of investors and the general description of the methods used to verify accredited status should be required only on the closing filing, as the information may be unknown at the start of the offering or subject to change as market conditions warrant. In those offerings where the Rule 506(c) box is checked, the Commission might want to consider requiring information about whether the issuer intends to use third parties who are not registered to solicit investors [or has used them in the closing filing]. We believe that a cottage industry of persons who will publicly solicit on behalf of issuers for compensation is already forming, and has the potential to spawn misleading solicitations. We think information on third party solicitors would be more likely to turn up instances where the Commission or the states might want to make further inquiries than the other information the Commission is considering requiring.

We think that the rest of the information the Commission seeks to require under Form D imposes significant additional compliance costs and is detrimental to the Congressional intent to make Regulation D more accessible, not less. It is far afield of the Congressional directive to permit public solicitation. While the Commission might consider information about the use of proceeds useful, it imposes a significant additional burden on issuers, especially on small issuers who are raising working capital and whose plans and options change. Business is dynamic, and a business that is not prepared to change its plans may not survive. A small issuer must be nimble and plans such as acquisitions may not come to fruition during the course of an offering. Obviously, any material change in the use of proceeds would have to be communicated to prior and prospective investors, and may require a rescission or other actions, all of which are outside the Commission's information gathering focus.

In addition, requiring public disclosure of intended use of proceeds could harm the competitive position of filers. Although most small companies do not monitor the SEC website, their counsel often do, and alert companies when a competitor files. If a small company is required to state publicly that it intends to use the proceeds of an offering to make an acquisition, a competitor could possibly deduce the target based on the size of the offering, and decide to make a competing offer for the target.

Other information the Commission would like to gather, such as information about net asset value range, may be a subjective number in a small company. What is the value of a patent where the use has not been monetized? Is the value of an oil well the value of the proved producing reserves at PV10, as required under SEC guidelines, or some other number? Will the company have to hire experts to value it when it is just getting started? What is the penalty for guessing wrong?

Expanding the additional information requirements to issuers under other exemptions in addition to Rule 506 would impose additional uncertainty and burdens on those least able to comply. For example, if an issue makes information about its size publicly available, or "does not take reasonable efforts to maintain such information as confidential", it must provide that information in the Form D, under the proposal. If a company posts information on its website about how many apartment buildings it owns in an attempt to attract business, is this making information about its size publicly available? What regulatory curiosity justifies imposing this kind of uncertainty on small issuers? As with other information required, the information on the use of proceeds may change, and if it is required then any amendment should be permitted at any time without penalty.

Title IV of proposed legislation passed by the House of Representatives [2013 CONG US HR 2767, 113th CONGRESS, 1st Session], called "Removing Barriers to New Investment", contains a section 405 that cautions the Commission that it should not condition the availability of the exemptions afforded by Rule 144, Rule 144A and Rule 506 upon an issuer's undertaking to provide to investors the same types of information as would be required in a registered offering. We suspect that Congress would not appreciate the Commission reducing the usefulness of Rule 506 offerings under the guise of implementing the ability to use public solicitation.

In conclusion, we respectfully suggest that:

1. No advance filing of Form D be required.

2. Amendments to Form D, including an amendment to indicate the issuer will use public solicitation, should be permitted at any time without penalty.

3. The penalties for failure to comply with the filing requirements of Rule 503 remain the same.

4. Issuers not be required to submit written solicitation materials.

5. Form D be amended to require issuers to identify their website, and to check whether they have used or intend to use public solicitation.

6. Form D be amended to require issuers to indicate whether they intend to use third party solicitors.

7. Issuers be required to file a closing amendment upon the closing of a Rule 506 offering.

Sincerely,

Joan C. Waller

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*The co-author of this comment previously served within the Enforcement Division of the Texas Securities Board and as regulatory counsel to the Federal Reserve Bank in Dallas. She is a member of the Securities Law Committee within the Business Law Section of the State Bar of Texas and is an active commenter on regulatory proposals. Her practice focuses on the representation of small business issuers and emerging growth companies which use Regulation D to raise capital.

**This co-author of this comment previously served within the Enforcement Division of the Securities and Exchange Commission and the Enforcement Division of the Texas Securities Board. In addition, he previously served as a member of the Texas Securities Board as appointed by Governors Ann Richards and George W. Bush. He also serves as the Chairman of the Securities Law Committee of the American Association of Attorney-Certified Public Accountants and Chairs the North Texas Chapter of the Association. He is a frequent commenter and lecturer on matters relating to the enforcement initiatives of the Commission and state securities regulators.

***We appreciate the assistance of Carolyn Myers, and her insights about Form D.