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September 23, 2013

BY ELECTRONIC MAIL

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

Re: File No. S7-06-13

Dear Ms. Murphy:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding the Commission's proposal (the "Proposal")[1] to amend Regulation D ("Regulation D"), Form D ("Form D") and Rule 156 ("Rule 156") under the Securities Act of 1933, as amended (the "Securities Act"). We appreciate the opportunity to comment on the matters discussed in the Proposal.

We understand the Commission's concerns that the elimination of the prohibition on general solicitation and general advertising in Rule 506(c) offerings[2] under Regulation D could facilitate sales of unregistered securities to unqualified investors and fraudulent activity, and we acknowledge that general

[1] SEC Release No. 33-9416 (July 10, 2013) (the "Proposing Release").

[2] On July 10, 2013, the Commission adopted rule changes pursuant to the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") that permit general solicitation and general advertising in private securities offerings made in reliance on new Rule 506(c) under the Securities Act. SEC Release No. 33-9415 (July 10, 2013). We generally refer to general solicitation and general advertising in this memorandum as "general solicitation."

solicitation in private offerings represents a major change in how those offerings can be conducted. Accordingly, we recognize the Commission's need to monitor market practices associated with Rule 506(c) offerings following the elimination of the prohibition on general solicitation. However, we believe that if they are adopted as proposed, there is a substantial risk that the new rules will have a chilling effect on issuers' use of general solicitation in private offerings that runs contrary to the JOBS Act's goal of promoting capital formation. With certain modifications, as discussed below, the proposed rules could achieve what we believe is their purpose with less risk of such a chilling effect.

We believe some elements of the Proposal are too burdensome for issuers. Other elements of the Proposal, particularly with respect to the changes to Form D, could be modified to allow issuers to submit information confidentially to the Commission without disclosing that information publicly. We address these points below and suggest changes that we believe would allow the Commission to achieve its goal of monitoring market practices in Rule 506(c) offerings, and, where necessary, move in a timely way to stop improper conduct without discouraging issuers from using the flexibility afforded by the new rule.

I. Proposed Changes to Rule 503

A. The Advance Form D Filing Requirement Should be Upon First Use of General Solicitation and a Cure Period for Inadvertent "Foot Faults" Should be Provided

We believe the proposed amendment to Rule 503 of Regulation D to require issuers intending to offer securities under Rule 506(c) to file a Form D containing a subset of the Form D-required Items at least 15 calendar days in advance of "any general solicitation activities" (an "Advance Form D") is potentially the most problematic of the proposed rules. In practice, this requirement would impose a regulatory "speed bump," or artificial delay in the process, that could impede use of Rule 506(c) for capital raising.[3] We believe issuers will be unwilling to disclose publicly this far in advance the possibility of an upcoming offering. We also believe this requirement becomes particularly problematic where an issuer starts an offering using the Rule 506(b) exemption but discovers that it inadvertently engaged in general solicitation (discussed further below), and consequently wants to change to the Rule 506(c) exemption.[4] In this case, it could be practically impossible for an issuer to comply with the Advance Form D filing.

An issuer may not wish to file an Advance Form D before it has made a final decision to conduct a Rule 506(c) offering for a number of reasons, including uncertainty regarding the use of general solicitation or unwillingness to disclose prematurely the possibility of capital-raising activity. We acknowledge the Commission's recognition in the Proposal that offering participants may be concerned about publicly available information, and its suggestion that the concern was addressed by the limited scope of information required in the Advance Form D (which is less than what is required by the Form Ds to be subsequently filed). However, the Proposing Release does not address concerns about signaling to

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[3] Other Commission rule proposals in the past have ultimately not been adopted in part because they created unnecessary speed bumps. One example is the 1998 Aircraft Carrier proposal, Release No. 33-7606 (Nov. 3, 1998), as amended by Release No. 33-7606A (Nov. 13, 1998). See, *e.g.*, ABA comment letter on that proposal (Sept. 28, 1999) ("The prospectus and term sheet delivery requirements are structured to interpose "artificial" delays and regulatory "speed bumps" prior to sale, with no discernible benefits to investors that outweigh the costs to issuers and underwriters or the burdens imposed on domestic capital markets.").

[4] This would also require a 15-day suspension in offering activity if an issuer begins an offering under Rule 506(b) but then decides to use general solicitation, which would result in another unfortunate and, we believe, unnecessary speed bump.

the markets and competitors, and thus, notwithstanding the Commission's attempt to accommodate concerns, offering participants may be reluctant to file *any* public advance notice of a potential upcoming offering. That reluctance will have a chilling effect on the use of the Rule 506(c) exemption. Although we recognize the Commission's position that information about offerings that are initiated but are ultimately unsuccessful would be helpful to it in determining "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),"[5] we believe the chilling effect of the Advance Form D requirement as proposed would outweigh any potential benefit that the Commission perceives.

We suggest that these timing concerns could be addressed by instead requiring a Form D to be filed at the time of the first use of general solicitation[6] (but in any event no later than 15 calendar days after the first sale). A first use timing requirement would provide the Commission, state regulators and investors with more timely information about offerings conducted under Rule 506(c) than under the current regime, which imposes the first Form D filing requirement 15 calendar days after the first sale, while alleviating the burden the proposed rule places on offering participants. This alternative timing requirement may also serve to eliminate one of the required filings, as all of the required information might be available at this time, thereby reducing the potentially excessive procedural burden of requiring issuers to file up to three Form Ds.[7]

In addition, inadvertent general solicitation raises another issue associated with Advance Form D, as it would be impossible to comply with the 15-day prior filing requirement upon discovery of an inadvertent general solicitation "foot fault." We believe an explicit cure mechanism for inadvertent general solicitation would be helpful and should be included by the Commission in the adopted rules. We propose the mechanism be modeled on the corresponding provision in Rule 433(f) under the Securities Act for a written offer published or distributed by the media that is deemed to be a free writing prospectus, which must be filed within four business days of the issuer or other offering participant becoming aware of the communication.

B. The Commission Should Consider Requiring Only Two Form Ds for Both Rule 506(c) and Rule 506(b) Offerings

As mentioned above, the Proposal contemplates the filing of three Form Ds in Rule 506(c) offerings (unless an issuer is able to provide all of the information required by the second Form D requirement in the Advance Form D). We suggest that the Commission instead require the filing of only two Form Ds for Rule 506(c) offerings—the Advance Form D at the time of first use of general solicitation as proposed above and a final amendment to Form D required to be filed no more than 30 calendar days after termination or abandonment of any Regulation D offering (a "Closing Form D")[8]—and eliminate the intermediate Form D required to be filed 15 days after the date of first sale. We believe

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[5] Proposing Release, at 22-23.

[6] This timing would be similar to the required filing of a free writing prospectus in a registered offering under Rule 433(d)(1) under the Securities Act.

[7] As proposed, an issuer relying on the Rule 506(c) exemption would generally be required to file Form D at least three times—an Advance Form D 15 days prior to using general solicitation, an amendment no later than 15 days after the first sale and a Closing Form D 30 days after the termination of the offering.

[8] In the case of ongoing offerings, we agree that issuers should continue to comply with the current Rule 503 requirement to file amendments to Form D at least annually.

the excessive procedural burden for issuers in preparing three Form Ds outweighs any incremental advantage to the Commission in terms of being able to monitor Rule 506(c) offerings by receiving the intermediate Form D in addition to the Advance and Closing Form Ds. Requiring issuers to file only two Form Ds would be consistent with the two filings required for Rule 506(b) offerings.

C. The Proposed Closing Form D Requirement Raises Confidentiality Concerns

We discuss below all of the proposed changes to Form D items (including those required in the Closing Form D) that we believe should be eliminated, revised or permitted to be submitted confidentially. One consequence of the Proposal that is specific to the Closing Form D and relates to an item currently required by the form is that it would have the effect of requiring issuers to disclose, in Item 13, whether an offering was successful (currently, an issuer is only required to file Form D 15 days after the date of first sale and can include in Item 13 the "Total Remaining to be Sold" without having to later disclose whether it was successful in selling that amount). This raises concerns for offering participants that are similar to the concerns about publicly available information associated with the proposed Advance Form D requirements discussed above. For example, offering participants may be reluctant to file a Closing Form D disclosing an abandoned or otherwise unsuccessful offering due to reputational and competitive concerns. If the Commission believes it would be beneficial to markets and investors for it to gather information about unsuccessful offerings, we recommend that it permit issuers to submit the information required by Item 13 in Closing Form D confidentially.

D. A Safe Harbor Should be Added for Timing of Filing Form D Amendments

With respect to the Commission's request for comment on timing for filing amendments to Form D, while we believe the flexibility of the existing "as soon as practicable" standard is beneficial and should be retained, the proposed consequences of a failure to file any required Form D, including amendments, raise concerns about the lack of certainty afforded by this standard. Therefore, we request that the Commission consider providing a non-exclusive four business day safe harbor for satisfaction of the "as soon as practicable" standard.

E. Rule 503(a)(ii) Should be Revised to Require Form D Amendments Only for "Material" Changes

The Commission has asked commenters to address whether changes to the Form D amendment process are necessary in light of the other changes proposed to be made to Rule 503, Rule 507 and Form D. Rule 503(a)(ii) requires issuers to file an amendment to a previously filed Form D "to reflect a change in the information provided in the previously filed notice of sales on Form D…." We believe requiring issuers to file amendments for immaterial changes to previously submitted information would be too burdensome both for issuers (in terms of monitoring changes to the previously submitted information) and for the Commission (in reviewing the large number of filings that would result from such a requirement). Accordingly, we believe Form D amendments should only be required for material changes to information previously provided, a result that could be achieved by amending Rule 503(a)(3)(ii) to add the word "material." This would be consistent with Rule 503(a)(3)(i) (requiring an amendment to correct a mistake of fact in a previously filed Form D only if such mistake is material). Further, a materiality trigger for amendments is advisable since, if the changes to Rules 503 and 507 are adopted as proposed, a one-year disqualification from the ability to rely on Rule 506 would occur automatically after failure to comply with the filing requirements for any required Form D, as opposed to

(under the current rules) only after imposition of a court order enjoining the issuer for failure to comply with Rule 503.[9]

F. The List of Form D Items for which Changes do Not Trigger a Form D Amendment Should be Expanded

The Commission has also asked for comment on whether it should expand the list of specified items for which a change does not trigger an amendment requirement to include any of the new disclosure items proposed to be added to Form D. We believe all the proposed new Form D items (Items 17-22) should be added to the list of exceptions in Rule 503(a)(3)(ii). First, responses to these items may evolve over the course of an offering, creating an undue burden for an issuer if an amendment were required each time the responses changed. Second, the Closing Form D requirement satisfies the Commission's need for information, making the intermediate amendments unnecessary.

With respect to the proposed changes to existing Form D items, we note that, where information under specified Items is excluded from the amendment requirement under current rules (*i.e.*, Item 3, Item 5 and Item 14), we expect that the relevant exclusion will also apply to any changes to those Items and ask the Commission to confirm its agreement with this view.

II. Proposed Changes to Disclosure Items in Form D

We also wish to comment on the additional disclosure items required under the proposed revised Form D. Some of the information sought by the Commission may be problematic if required to be filed publicly; other items, whether filed publicly or submitted confidentially to the Commission, seem overly burdensome to require of issuers in the private offering context. Taken in the aggregate, we think the additional disclosure requirements, which in some cases are more burdensome and far-reaching than the analogous requirements in the public offering or public reporting context, will have the effect of discouraging issuers from undertaking private offerings using general solicitation, as well as Regulation D more generally. We believe this potential result is not what the Commission intended to achieve in proposing these changes, and accordingly we highlight below the items we believe would have this effect and suggest changes we believe would still allow the Commission to effectively monitor market practices in Regulation D offerings.

A. Item 3 – Disclosure of Controlling Persons is Too Onerous, and Ownership Information Proposed in Lieu Should be Submitted Confidentially

As proposed, for Rule 506(c) offerings an issuer would be required to disclose "controlling persons" under Item 3, which the revised instructions to the Form describe as "each person who directly or indirectly controls the issuer." This requirement goes well beyond current disclosure requirements for reporting companies, which only require disclosure of certain specified information with respect to

[9] In the absence of a materiality qualification, an issuer may be left in a position of asking the Commission to confirm on a case-by-case basis that it does not believe the issuer has breached the filing requirements, and as such is eligible to conduct offerings under Rule 506. This is too burdensome, and creates too much uncertainty concerning whether issuers are Rule 506-eligible, especially considering the ramifications of an incorrect determination regarding Rule 506 status (*i.e.*, potential violation of Section 5 of the Securities Act). Faced with such uncertainty, issuers may refrain from engaging in Regulation D offerings, which is at odds with the objectives of the JOBS Act.

"control persons" (similarly defined, but *not* disclosure of every "control person"),[10] in an initial public offering and immediately thereafter. Otherwise, existing rules generally require reporting companies to make this kind of disclosure using bright-line ownership level tests.[11] The determination of direct or indirect control in the Proposal is subjective and would require, among other things, costly consultations with counsel. This is overly burdensome in the private offering context, with limited benefit, and, if the Commission believes the additional information is necessary to monitor Rule 506(c) offerings (which we believe is debatable), a bright-line ownership test should be specified instead. Given the private offering context, we believe a threshold of 20% ownership of an issuer's voting securities to trigger disclosure is appropriate, consistent with the approach taken in new Rule 506(d) for disqualification of "bad actors."[12] However, requiring this information to be made public is inconsistent with privacy considerations for companies that have chosen to remain privately held. Accordingly, the Commission should permit issuers to submit this information confidentially (but if the Commission is not able to prevent disclosure of the information pursuant a Freedom of Information Act request, it should not require submission of the information at all).

B. Item 5 – Issuer Size Should Only be Disclosed If Truly Made Public

The proposed modification to the instructions for Item 5 would require disclosure of an issuer's revenues (or aggregate net asset value in the case of a fund) if that information has been made public in any way, including in general solicitation materials. However, not all general solicitation materials will necessarily be public information—in the context of a Rule 506(c) offering, communications to a large number of prospective investors with which the issuer or its agent does not have any "substantive pre-existing relationship" may be general solicitation, even if subject to a confidentiality agreement. In this scenario and others, the issuer will not have communicated that information to the public at large. Accordingly, this instruction should be revised to require disclosure only if this information has been disseminated via publicly available media.

C. Item 14 – The New Information Regarding Investors Should be Submitted Confidentially

The proposed revisions to the information about investors in Item 14 would include disclosure of the number of natural persons included in each category of accredited investors and, in the case of Rule 506(b) offerings, non-accredited investors, as well as the amount raised from each category. This level of detail seems excessive as public disclosure and adds requirements that currently do not exist for Rule 506 offerings not using general solicitation. It is also not apparent why this information is useful.[13] The Commission should eliminate this requirement or, if the Commission continues to conclude, following the

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[10] See Item 401(g) of Regulation S-K, which requires the disclosure of certain legal proceedings with respect to control persons.

[11] For example, Item 403 of Regulation S-K requires disclosure of all beneficial owners of more than five percent of any class of voting securities known to the issuer. Item 404(a) of Regulation S-K, which requires disclosure of transactions with certain "related parties," uses the same threshold for shareholders as Item 403.

[12] Under new Rule 506(d), one category of persons that will disqualify an issuer from using the Rule 506 exemptions if they have been convicted of or sanctioned for securities fraud or other specified legal violations is "any beneficial owner of 20% or more of the issuer's outstanding voting securities, calculated on the basis of voting power." See Release No. 33-9414 (July 10, 2013).

[13] We see nothing in the Proposing Release that explains what the Commission intends to accomplish or achieve by obtaining the information.

comment process, that it should obtain this information, the Commission should provide for it to be submitted confidentially. This approach would allow the Commission to collect the information without imposing unnecessary public disclosure requirements on offering participants.

D. Item 16 – The Proposed Use of Proceeds Information is Too Detailed

The use of proceeds disclosure required by Item 16 for Rule 506 offerings under the Proposal is far more detailed than that currently required in connection with registered public offerings pursuant to Item 504 of Regulation S-K. It seems fundamentally inconsistent to require an issuer, in the private offering context, to disclose more information than would be required in a public offering. In addition, this proposed change adds requirements that currently do not exist for Rule 506 offerings not using general solicitation. Given the burdens this disclosure requirement would create, we request the Commission not adopt any changes to Item 16. Alternatively, if the Commission still believes additional use of proceeds disclosure is needed, we suggest that it limit the disclosure requirement to be consistent with the information required by Item 504 of Regulation S-K and permit issuers to submit the information confidentially.

E. New Item 17 – Disclosure Under this Item Should Apply to Rule 506(c) Offerings Only

We do not believe the Commission was seeking to impose an accredited investor verification requirement on Rule 506(b) offerings through the proposal that there be Item 17 disclosure of the number of accredited investors who qualified under each of the reasonable steps to verify tests. We therefore request that the Commission clarify that Item 17 is only applicable to Rule 506(c) offerings.

F. New Item 22 – Issuers Should Not be Required to List Verification Methods for Accredited Investor Status

We believe the requirement under new Item 22 for an issuer conducting a Rule 506(c) offering to list the verification methods used to confirm accredited investor status and, for methods that do not fall within one of the safe harbors, to specify the information or documentation used, is overly burdensome. This seems particularly true given the Commission's principles-based approach to the verification requirement, which contemplates consideration of the specific facts and circumstances of each case, and we believe a verification requirement this specific is inconsistent with that facts-and-circumstances approach. We also believe the requested disclosure is too burdensome for issuers to complete. We therefore suggest that proposed Item 22 be removed from the adopted rules. Although we believe a more simple check-the-box approach would also be inconsistent with the facts-and-circumstances approach to the verification requirement, if the Commission strongly believes additional disclosure is required, we suggest the Commission adopt a check-the-box approach to identify generally the method of verification used (*e.g.*, information provided by the prospective purchaser, information provided by a third party, verification by a third party or use of a questionnaire) that includes an option for "other" verification methods (without requiring further elaboration).

III. Rule 507

A. We Agree with the Commission that Filing Form D Should Not be a Condition for Use of Rule 506

The Proposal seeks comment on whether compliance with Rule 503's Form D filing requirements should be a condition to the use of Rule 506, or at least to the use of Rule 506(c). We believe the Commission properly recognized the draconian result of making such a change, acknowledging that

doing so could result in a violation of Section 5 of the Securities Act (and the availability of a strict liability "put" or rescission right for the purchasers under Section 12(a)(1) of the Securities Act) and applicable state securities laws for the entire offering, a result we agree with the Commission would be disproportionate to the failure to file. We expect the potential for losing the registration exemption for the offering (or even uncertainty over whether such potential might exist) would cause some issuers to be reluctant to engage in Rule 506 offerings, and thus such a rule would be contrary to the JOBS Act mandate. We strongly recommend that the Commission not change the proposed rules to condition Rule 506 availability on compliance with Rule 503.

B. Rule 507(b) Should Reference Timely Filing as the Disqualification Trigger, Not Compliance with Requirements of Rule 503

As noted above, we appreciate the Commission's acknowledging the draconian result of making Form D filings a condition to the use of Rule 506; however, we also believe the change the Commission has proposed to Rule 507—adding a new subsection (b) disqualifying an issuer and its affiliates from using Rule 506 prospectively if the issuer has "failed to comply" with the Rule 503 Form D filing requirements,[14]—presents similar draconian consequences and would have a chilling effect on issuers' use of Rule 506. The discussion in the Proposal about the cure period suggests that even an immaterial, inadvertent or technical error, if not cured within the 30-day period, would result in disqualification. This is also overly harsh. It would, for example, go well beyond the standard for filing of Exchange Act reports (10-Ks, 10-Qs and 8-Ks for domestic issuers)—which is based on timeliness of filing, not on compliance with reporting requirements—that triggers one-year loss of eligibility for use of short-form registration under the Securities Act.[15]

The Commission acknowledged in the Proposal the "possible disruptions in the Rule 506 market if market participants could not be certain of the availability of Rule 506 for an offering until after the offering was terminated and all filings required under Rule 503 were made."[16] Given the potential for inadvertent general solicitation and various other uncertainties with respect to the filing requirements, there is still a genuine possibility that filing failures with respect to past offerings, whether completed or abandoned, might only be identified later and potentially after a new Rule 506 offering has begun.

As a result, we believe the disqualification provision as proposed is overly harsh. Therefore, we suggest an alternative approach that would strike a better balance between issuers' need for certainty and the Commission's desire to incorporate an effective incentive for issuers to comply with the Form D filing requirement, acknowledging the Commission's view that this requires "meaningful consequences for failing to file the form without requiring action on the part of the Commission or the courts."[17] We

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[14] In connection with any Rule 506 offering within the past five years and including any of the successive amendments required under the proposed rules.

[15] See, *e.g.*, Form S-3, General Instruction I.A.3. An error in an Exchange Act report only results in that report being considered not to have been timely filed, and therefore affects the issuer's eligibility to use Form S-3 or F-3, if it renders the report "materially deficient"—a result generally reserved only for major omissions. See, *e.g.*, Commission Division of Corporation Finance Compliance and Disclosure Interpretations, Question 115.02 (Jul. 3, 2008) (omission of management's report on internal control over financial reporting renders Form 10-K "materially deficient"), available at http://www.sec.gov/divisions/corpfin/guidance/safinterp.htm.

[16] Proposing Release, at 51.

[17] Id., at 50.

propose that the disqualification be triggered only by the failure to file a Form D and that the language of Rule 507(b) be changed accordingly to reference the "timely filing" of required Form Ds, rather than "compliance with the requirements of Rule 503," as currently proposed.[18] As noted above, this approach would be more consistent with the standard for reporting issuers retaining elibility to use short-form registration statements.

C. Rule 507(b) Should Not Contain an Affiliate Disqualification Trigger

Although Rule 507 currently disqualifies affiliates upon disqualification of an issuer, the proposed introduction of an *automatic* disqualification for compliance failures makes the affiliate consequence much more burdensome, and thus we recommend the Commission reconsider it. A company would need to obtain assurances from all affiliates (upstream or downstream) that they had made all required Form D filings within the past five years before it could itself be comfortable relying on any Rule 506 exemption, which for many issuers would be too burdensome a process. Further, in the analogous Exchange Act framework for reporting issuers discussed above, an issuer's failure to file Exchange Act reports does not result in the disqualification of affiliates for Form S-3/F-3 eligibility. We suggest that Rule 507(a)—the existing provision—retain the reference to affiliates, but Rule 507(b) be revised to refer only to the issuer. Finally, we note that if the Commission is concerned that a company would make use of an affiliate to evade disqualification, it could address schemes to evade directly as it does in many other contexts.[19]

D. A Technical Clarification on the Timing for Disqualification is Needed

Finally, as a technical point, we suggest that the Commission clarify that Rule 506 disqualification would end at the earlier of one year after correcting all missed filings and five years after a missed filing. Otherwise, correcting a missed filing during the fifth year following that missed filing could result in a longer disqualification period than waiting for the fifth anniversary of the missed filing to pass, which could create a disincentive for issuers to make corrective filings in the fifth year. We do not believe this was the Commission's intent, and therefore ask that it clarify the point in the adopted rules.

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[18] This is a similar approach to that taken with respect to Form 8-K, where failure to comply with certain items that require management to make rapid materiality and similar judgments within a compressed timeframe does not result in the loss of eligibility to use short-form registration statements. See Form S-3, General Instruction I.A.3(b); Release Nos. 33-8400, 34-49424 (Mar. 16, 2004), at 29.

[19] Most recently, for example, the Commission staff indicated that it may question an issuer's status as an emerging growth company "if it appears that the issuer or its parent is engaging in a transaction for the purpose of converting a non-emerging growth company into an emerging growth company, or for the purpose of obtaining the benefits of emerging growth company status indirectly when it is not entitled to do so directly." JOBS Act Frequently Asked Questions, Generally Applicable Questions on Title I of the JOBS Act, Question 53 (Sep. 28, 2012), available at http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm.

IV. New Rules 509 and 510T

A. Issuers Should be Permitted to Comply with the Rule 509 Legend Requirement by Providing a Notice to Investors Instead

With respect to the new proposed legending requirement for general solicitation materials under Rule 509, we note there are a few situations not discussed in the Proposal where it would be difficult, if not impossible, to include a legend. For example, the Proposal does not address the use of legends in communications where they might not be readily practicable, such as in certain forms of social media. It also does not address how failures to include legends, including for inadvertent general solicitation, might be remedied. Registration statements filed prior to or concurrently with a Rule 506(c) offering could also constitute general solicitation and thus technically require the inclusion of the proposed legend, which we presume the Commission did not intend. As a solution for all hypothetical situations where legending is difficult, we suggest Rule 509 be revised to permit an issuer to comply with the legending requirement by sending potential investors in the Rule 506(c) offering a separate notice containing the Rule 509 legends, similar to that permitted by Rule 155.[20]

B. Rule 510 Should be Revised to Provide Alternative Timing Requirements For Filing Inadvertent General Solicitation Materials and to Eliminate the Need for Multiple Filings of the Same Materials

Proposed Rule 510T, requiring the temporary submission of written general solicitation materials to the Commission no later than the date of first use, does not address how failures to submit materials could be remedied. This is particularly concerning in the context of inadvertent general solicitation. We recommend the Commission clarify that in such a case materials can be submitted when the failure becomes known to the issuer. As in our discussion in Section I.C above, we suggest the Commission provide that such materials must be submitted within four business days of the issuer or other offering participant becoming aware of the general solicitation, by analogy to the treatment of written offers deemed to be a free writing prospectus in Rule 433(f) under the Securities Act.

Additionally, as proposed, Rule 510T could be interpreted to require an issuer to submit general solicitation materials each time they are used, even if substantially similar materials were previously submitted. We urge the Commission to clarify that materials need not be resubmitted if they do not contain substantive changes from or additions to the previously filed materials. This approach is analogous to the exception to the free writing prospectus filing requirement in Rule 433(d)(3), under the Securities Act. It would also reduce the burden on issuers of complying with Rule 510T and the burden on the Commission of creating a large volume of materials to review.

C. We Support the Commission's Treatment of Rule 509 and Rule 510T in Connection with Rule 507

Finally, we support the Commission's proposal that an issuer's non-compliance with Rule 509 or 510T should not trigger automatic disqualification from the use of Rule 506, but rather should only trigger disqualification if the issuer has been enjoined by a court for failure to comply with Rule 509 or

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[20] Rule 155(c) under the Securities Act provides that an abandoned registered offering (deemed to involve general solicitation) will not be integrated with a subsequent private offering if, among other things, the issuer notifies each offeree in the private offering that (i) the offering is not registered, (ii) the securities will be restricted securities, (iii) purchasers in the offering will not have Securities Act Section 11 protection and (iv) a registration statement was filed and withdrawn, with the effective date of the withdrawal. See Rule 155(c)(4).

Rule 510T, as applicable. In these contexts, as the Commission notes, an automatic disqualification provision could result in disproportionate consequences for inadvertent errors or omissions, especially in light of the potential volume of general solicitation materials that may be used in an offering.

V. Rule 156

A. Additional Rulemaking on Manner and Content Restrictions Is Not Necessary

The Commission solicits comments on whether additional manner and content restrictions on advertising by private funds should be addressed in Rule 156. We do not believe Rule 156 should be expanded in this way because addressing manner and content of advertising by private funds in Rule 156 would overlap (and potentially be inconsistent) with regulations of the Financial Industry Regulatory Authority, the Investment Company Act of 1940 and the Investment Advisers Act of 1940, all of which are more appropriate places for this type of regulation.

VI. Other Requests for Comment

A. Offering Documents Should Not be Required for Rule 506(c) Offerings

The Commission requested comment on whether an offering document containing specified information should be required to be provided for Rule 506(c) sales, where only accredited investors are eligible to purchase. Under the current version of Rule 506 (and under Rule 506(b) when effective), issuers do not need to provide offering documents to accredited investors that participate in an offering. Accredited investors are sophisticated, able to ask questions as needed, be discerning about investment opportunities and fend for themselves.[21] Providing accredited investors with general solicitation materials should not overcome those factors. Therefore, issuers should not be required to provide offering documents for Rule 506(c) offerings.

B. Reporting Companies Should Not be Disqualified From Using Rule 506(c)if Not Current in Their Exchange Act Filings

Lastly, the Commissions asks in the Proposal whether issuers subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act should be disqualified from using Rule 506(c) if they are not current in their reporting obligations. We believe they should not be disqualified. First, there will typically be more information available to the market about a public company that is not current in its reporting obligations than about a private company. Those public companies should not be penalized by having less access to capital raising opportunities than private companies. Second, as is generally the case with private placements, accredited investors should be permitted to make their own decisions about what information they will require from an issuer as a condition to making an investment. Accordingly, we urge the Commission not to disqualify reporting companies that are not current in their Exchange Act filings from using Rule 506(c).

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[21] The Commission has acknowledged this, for example, in stating that "We are considering the same alternative approaches to disclosure in offerings limited to sophisticated investors and in offerings to investors with a pre-established relationship with the issuer. Historically, we have given issuers more flexibility in these types of offerings on the theory that these purchasers are able to fend for themselves." Release No. 33-7606A, at 92 (Nov. 13, 1998).

VII. Revised Rule 144A

A. The Commission Should Designate All Rule 144A Securities as "Covered Securities" under Section 18 of the Exchange Act

Finally, although not directly related to the Proposal, we request that the Commission consider one aspect of the adopted amendments to Rule 144A. We agree with the adopted amendments to Rule 144A and believe they accord with the JOBS Act's clear statutory directive, and acknowledge that the Commission has not requested further comment on the Adopted Rules. However, as we have previously noted to the Commission, state blue sky law registration requirements under Section 18 of the Securities Act ("Section 18") are not currently preempted for all Rule 144A offerings. That is an anomaly, as state blue sky registration requirements under Section 18 are preempted with respect to all securities offered and sold pursuant to Rule 506. We see no reason for different treatment of the two, especially since purchasers in Rule 144A offerings are limited to the largest and most sophisticated institutional accredited investors, and thus are less in need of the protection of the state blue sky registration requirements even than accredited investors generally, any of which can purchase securities offered and sold in a Rule 506 offering. This anomaly becomes more glaring in light of the policy objectives of the JOBS Act and its emphasis on improving capital formation, and accordingly we urge the Commission to align Rule 144A offerings with the existing preemption for Rule 506 offerings by using its authority under Section 18 to designate all securities offered or sold pursuant to Rule 144A as Covered Securities..

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We very much appreciate this opportunity to provide you with our thoughts on the Proposing Release. Please do not hesitate to contact Leslie N. Silverman, Alan L. Beller or John Palenberg (212-225-2000) if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

cc: The Honorable Mary Jo White, Chairman, Securities and Exchange Commission
The Honorable Luis A. Aguilar, Commissioner, Securities and Exchange Commission
The Honorable Daniel M. Gallagher, Commissioner, Securities and Exchange Commission
The Honorable Kara M. Stein, Commissioner, Securities and Exchange Commission
The Honorable Michael S. Piwowar, Commissioner, Securities and Exchange Commission