Alternative Investment Management Association

File Number S7-06-13

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

Sent by e-mail to: rule-comments@sec.gov

23 September 2013

Dear Ms Murphy,

AIMA's response to the SEC proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act

The Alternative Investment Management Association Limited[1] (AIMA) welcomes the opportunity to submit its comments to the Securities and Exchange Commission (SEC) regarding its proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act of 1933, as amended (the Securities Act) contained in its July 2013 proposing release (the Proposing Release)[2].

AIMA appreciates the SEC's detailed work so far regarding the regulatory implementation of the Jumpstart Our Business Startups Act (the JOBS Act). We are aware that the SEC received a substantial number of suggestions for further rulemaking in connection with the rulemaking done to implement the JOBS Act. While we support appropriate and proportionate regulation for all financial markets participants, there are some aspects of the proposals in the Proposing Release which have us concerned.

Our main issues with the proposals relate to the following matters:

- **No Advance Form D requirement should be imposed** – When it approved the JOBS Act, Congress intended that the SEC would implement that JOBS Act by removing barriers to offers made using general solicitations. We believe that the SEC acted in accordance with that intent in adopting the recent changes to Regulation D, including the recent addition of Rule 506(c) which is appropriately concerned with *sales* of securities to verified accredited investors, rather than whether the issuer is making an improper *offer* using general solicitation. The proposed imposition of an Advance Form D filing requirement adds a level of complexity back into the securities offering process which Congress had sought to remove by enacting the JOBS Act. Furthermore, the reasons in favour of issuers having to file an Advance Form D given in the Proposing Release focus not on whether the issuer is complying with the Rule 506(c) requirements, which concern *sales* of securities to verified accredited investors, but rather on whether the issuer is potentially making an improper *offer*. The SEC has other potential remedies which it can use in connection with offerings it considers improper, including the remedies under the new bad actor requirements and the anti-fraud rules generally, regardless of whether an Advance Form D is required. In addition, any relevant actions under state law will continue to apply, again regardless of whether an Advance Form D is required.

[1] AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector – including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers. Our membership comprises over 1,300 corporate bodies in over 50 countries.
[2] *Amendments to Regulation D, Form D and Rule 156 under the Securities Act*, SEC Rel. No. 33-9416 (July 10, 2013).

- **Pre-emptive Advance Form D filings** - If the SEC does make an Advance Form D mandatory, issuers should be permitted to make pre-emptive Advance Form D filings to insulate themselves from inadvertent general solicitations and from the possibility that actions that they thought were not general solicitations were later deemed to be so;

- **Closing Form D amendment** - A closing Form D amendment, if any, should be made optional rather than mandatory. If it was mandatory, then the failure to file the amendment could lead to the disqualification of a number of other issuers since the disqualification would apply to not only the issuer that failed to make the filing but also to its affiliates. Moreover, with respect to the failure to file a closing amendment, there is a possibility that the failure to file would be inadvertent where a fund ceases operations abruptly between annual update filings. In which case there may be no issuer left to correct the technical fail by making a closing filing during the cure period, meaning that the disqualification of the affiliated entities might be ongoing indefinitely or that a large number of entities might need to seek a waiver;

- **Additional information** – The SEC receives significant additional information from investment advisers about private funds, including about their service providers are, as part of Form ADV. It is not necessary or cost effective to require duplicative reporting in Form D;

- **Requiring disclosure of any controlling persons** – The proposed amendment to Item 3, requiring disclosure of any controlling persons, raises a number of concerns for pooled investment funds. Clarification will be required to help issuers determine the boundaries of who would need to be reported. In addition, there could be a number of circumstances where an issuer may not have access to information regarding indirect controlling persons, especially in the private fund context; and

- **Pre-filing general solicitation materials** – Issuers should not be required to pre-file written general solicitation materials. If the SEC staff is only going to review a small portion of the materials submitted, the costs of compliance will substantially outweigh the regulatory benefit. If the SEC staff wants to have access to these materials, a representation in the Form D that filers will make any such materials available to the SEC staff promptly upon request would be a substantially less costly option and achieve a similar regulatory benefit. In the funds space, such materials will be available from the investment adviser, who will most often be either registered as an investment adviser under the Investment Advisers Act of 1940, as amended, or filing as an exempt reporting adviser.

Further detail regarding these matters and responses to certain of the specific questions raised in the Proposing Release are included in the attached Annex.

We hope you will find our submission helpful and stand ready to be of assistance and to answer any questions you may have in relation to its content.

Yours faithfully,

Jiří Król
Deputy Chief Executive Officer
Head of Government & Regulatory Affairs

ANNEX
Responses to Questions from the Proposing Release[3]

Capitalised terms used in this Annex but not defined have the same meaning as in the Proposing Release.

1. We are proposing that issuers file an Advance Form D no later than 15 calendar days before the commencement of general solicitation in a Rule 506(c) offering. Is such an advance filing useful and appropriate for an effective analysis of the Rule 506(c) market? Should the 15 calendar day period be increased or decreased? Why or why not? Should the filing deadline be tied to the commencement of general solicitation or the commencement of the offering, whether or not general solicitation is used?

The Form D filing requirement should remain within 15 calendar days after the first sale and no Advance Form D requirement should be imposed for the reasons set out below.

a. The Advance Form D is not consistent with the Congressional intent to make capital raising easier

One of the purposes of the JOBS Act was to make it easier for firms to raise capital and as part of this the SEC was required by Congress to amend Regulation D to remove the prohibition on general solicitations. The SEC did this in its recently adopted amendments to Rule 506 under Regulation D, specifically adding new Rule 506(c) to permit offerings using general solicitations provided that sales met the conditions of Rule 501 and Rule 502(a) and (d) and all purchasers of securities sold were accredited investors and the issuer took reasonable steps to verify their status as accredited investors.

Specifically, Rule 506(c) provides, in relevant part:

> "(c) Conditions to be met in offerings not subject to limitation on manner of offering -- (1) General conditions. To qualify for exemption under this section, ***sales*** must satisfy all the terms and conditions of §§ 230.501 and 230.502(a) and (d).
>
> (2) Specific conditions -- (i) Nature of purchasers. All purchasers of securities ***sold*** in any offering under paragraph (c) of this section are accredited investors.
>
> (ii) Verification of accredited investor status. The issuer shall take reasonable steps to verify that purchasers of securities ***sold*** in any offering under paragraph (c) of this section are accredited investors...." (Emphasis added)

The proposed imposition of an Advance Form D filing requirement adds a level of complexity back into the securities offering process. An issuer will have to employ a lawyer very early in its development to get advice about what one can and cannot do in connection with an offer before a general solicitation is made. In addition, this approach will introduce the same sorts of complexities that public issuers face in terms of gun jumping communications which are governed by eight different rules. An Advance Form D will introduce complexities about what communications can be made before the Advance Form D is filed and during the 15 days between the filing and the end of the advance notice period. It also creates the awkward result that an issuer will have made a public filing stating that it intends to make an offer using a general solicitation (which statement would itself probably be a general solicitation outside the regulatory requirement) and the issuer is foreclosed for 15 days from saying anything about it that might otherwise be considered a general solicitation.

[3] We have responded to the questions from the Proposing Release in the order they appear in the Proposing Release. However, for efficiency of reading, we have omitted any questions on which we had "no comment" but have left the numbering as it was in the Proposing Release for your convenience.

These types of complexities are contrary to a goal of making capital raising easier.

b. The rationales set forth for the Advance Form D do not relate to compliance with Rule 506(c)

In the Proposing Release, the reasons in favour of an Advance Form D focus not on compliance with the Rule 506(c) requirements, which concern ***sales*** of securities to verified accredited investors**,** but rather on potentially improper ***offers***. For example, some of the reasons stated include:

(1) Enabling "state securities regulators and investors, after seeing an advertisement or notice for an ***offering***, to more easily determine whether an issuer is at least attempting to comply with Rule 506(c)." Since Rule 506(c) focuses on the sale of securities, the pre-filing of a Form D, which by definition pre-dates any sales, provides no information about an issuer's compliance with Rule 506(c), attempted or otherwise.

(2) Ensuring "that the ***offerings*** actually qualify for an exemption under Rule 506...." An Advance Form D will not provide any information about whether an issuer actually qualifies for Rule 506(c) since compliance with Rule 506(c) is dependent on the purchasers of the securities offered all being accredited investors as verified by the issuer.

(3) Looking for "`red flags' that may indicate that an ***offering*** may be fraudulent." Since the SEC states that "[a]n issuer could also file an Advance Form D without contemplating a specific offering, in order to have the flexibility to conduct an offering using general solicitation", it is clear that in at least some circumstances there is not likely to be anything of substance in the Advance Form D about the capital raising plans much less anything to raise "red flags". Even for a fully completed Advance Form D, it is not clear how one would determine that there were "red flags" on the basis of the types of information required to be filed. In addition, the anti-fraud rules, including Rule 206(4)-8 under the Investment Advisers Act of 1940, as amended, will apply, as will any relevant actions under state law, regardless of whether an Advance Form D was filed.

(4) Putting state securities regulators "in a better position to ensure that no bad actors are participating in a Rule 506 offering." Imposing an Advance Form D requirement is unlikely to deter "bad actors"; issuers that are likely to mislead or otherwise provide inaccurate information on a Form D filing will be no less likely to do so on a form that is filed 15 days earlier. To require every issuer to file in advance when there is little guarantee that it will have a deterrent effect seems a relatively high cost for a limited benefit.

(5) "Useful to the Commission and the Commission staff, as it would enhance the information available to the Commission to analyze offerings initiated under Rule 506(c), including issuers that initiated Rule 506(c) offerings but were unsuccessful in selling any securities through these ***offerings*** or chose alternative forms of raising capital." Rule 506(c) requires all *purchasers* of securities to be accredited investors. Requiring an Advance Form D to capture information about issuers who never made a sale to any investor to collect statistics about offerings where no purchases were made places a burden on issuers that is disproportionate to any potential regulatory or investor protection benefits that may result.

(6) "Useful to state securities regulators and to investors in gathering timely information about Rule 506(c) offerings and the use of Rule 506(c)." The requirements of Rule 506(c) concern ***sales*** of securities. Therefore a Form D filing made within 15 days after the first ***sale*** would be sufficiently timely information about persons relying on Rule 506(c).

2. What should the consequences be for failing to timely file an Advance Form D for a Rule 506(c) offering? Should the filing of the Advance Form D be a condition to Rule 506(c) so that failure to file results in the immediate loss of Rule 506(c) as an exemption from Securities Act registration for the offering at issue?

If the consequence of failing to file a timely Advance Form D is the loss of the exemption, issuers will be forced to file pre-emptive Advance Form Ds in case any of their activities are later deemed

to have risen to the level of a general solicitation. The potential penalty is also disproportionate to the stated rationales for having the requirement in the first place. See Question 1 above.

3. **We are proposing to require the filing of an Advance Form D no later than 15 calendar days before the first use of general solicitation in a Rule 506(c) offering. We recognize, however, the possibility that a communication could be inadvertently disseminated beyond the intended audience without the issuer's knowledge or authorization. What should be the consequences for the issuer under such circumstances? Should there be a different filing deadline for the Advance Form D when there is an inadvertent general solicitation? For example, under Rule 100(a)(2) of Regulation FD, the information in a non-intentional selective disclosure must be publicly disclosed "promptly" after the issuer knows (or is reckless in not knowing) that the information selectively disclosed was both material and non-public. Should a similar filing deadline be considered for an inadvertent general solicitation?**

There should not be a presumption that a communication disseminated ***inadvertently*** beyond the intended audience ***without the issuer's knowledge or authorisation*** would automatically mean that the issuer could only rely on Rule 506(c). In such circumstances it is by definition not the issuer making a general solicitation.

If the inadvertent general solicitation is made by an issuer already relying on Rule 506(b) (or by a person acting on the issuer's behalf), then a requirement that a filing to change from reliance on Rule 506(b) to Rule 506(c) be made promptly would be appropriate.

For the reasons stated above, we believe that issuers who intend to rely on Rule 506(c) but have not yet made any sales should not have to make an Advance Form D filing, to address inadvertent general solicitations or otherwise.

4. **Should issuers be permitted to file an Advance Form D even if no specific offering is contemplated? Why or why not? How would this impact the usefulness of the Advance Form D data? We have identified certain information that we believe should be included in the Advance Form D. Is the information proposed for the Advance Form D the appropriate information to be provided at that point of the offering? Is there other information that issuers should provide in the Advance Form D? Would it be more difficult for issuers to provide certain information in an Advance Form D? If so, which information?**

If the SEC does make an Advance Form D mandatory, issuers should be permitted to make pre-emptive Advance Form D filings to insulate themselves from inadvertent general solicitations and from the possibility that actions that they thought were not general solicitations were later deemed to be so. In such filings certain information will not be available, such as Items 13 (Offering and Sales Amounts) and 14 (Investors) of Form D, and where such information is not available the issuer should be permitted to leave blanks and/or fill in zeros. Issuers are currently permitted to file a pre-sale Form D for offerings made under what is now Rule 506(b).[4] The treatment under Rule 506(c) should not be different.

5. **We are proposing that an issuer have the option of either filing an Advance Form D for Rule 506(c) offerings to provide certain information required by Form D, with the complete Form D information provided in a subsequent amendment to Form D filed no later than 15 calendar days after the first sale of securities, or providing all of the required Form D information in the Advance Form D, if known at that point in the offering. Should issuers be provided this option? Or should issuers be limited to providing certain specified information in the Advance Form D and required to file a subsequent amendment, after the first sale of securities, to provide the remainder of the information required by Form D? Would allowing issuers to have the option of providing all of the information required by Form D no later than 15 calendar days before they commence general solicitation (as**

[4] Item 1 of Form D provides an option to tick that the issuer is "yet to be formed" and Item 7 of Form D provides an option for issuers to check a box stating that the "first sale is yet to occur".

compared to the current requirement of no later than 15 calendar days after the first sale of securities) affect the quality or usefulness of the Form D information for purposes of the Commission's efforts to analyze the Rule 506 market? For example, what is the likelihood that issuers will be in a position to provide all of the information required by Form D no later than 15 calendar days before the commencement of general solicitation?

As an issuer has historically been able to file a Form D prior to the first sale and then not been required to file an amendment for the express purpose of filling in information unknown at the time of the initial filing (like Items 13 and 14 as discussed above) after the first sale, we believe that such a requirement should not be imposed in respect of the Advance Form D requirement.

6. **What would be the benefits of requiring the Advance Form D for Rule 506(c) offerings? What would be the costs to issuers, market participants and other parties? Would the requirement to file an Advance Form D deter issuers from conducting Rule 506(c) offerings? Would the requirement to file an Advance Form D have differing or unique effects on certain types of issuers, such as Exchange Act reporting companies, non-reporting companies, foreign companies or private funds?**

See above.

In addition, for foreign issuers that may not be EDGAR filers, the imposition of an Advance Form D filing requirement for securities that may never be sold to U.S. investors, imposes unnecessary costs and burdens on such issuers by requiring them to invest the time and incur the expenses associated with obtaining EDGAR Form IDs. To the extent issuers seek legal counsel to assist them with this process (which is common), these costs are generally passed on to investors in the funds.

8. **Are there situations in which an Advance Form D filing should not be required? If so, what are these situations?**

We do not believe the Advance Form D filing should be required at all for the reasons stated above.

9. **Should an Advance Form D filing be required before or at the commencement of all offerings under Rule 506, or all offerings under Regulation D? If not, why?**

For offerings under Rule 506(b), or Rules 504 or 505, there is a requirement not to engage in a general solicitation. Accordingly, many of the rationales expressed for requiring an Advance Form D in Rule 506(c) offerings would not be relevant here. As a result, the uncertainty and additional costs created would substantially outweigh the benefits.

10. **Are any other rule amendments necessary if the Commission were to require the advance filing of Form D for Rule 506(c) offerings, as proposed?**

See Question 1 above.

11. **Should we require a closing Form D amendment for Rule 506 offerings, as proposed? Why or why not? Should the closing amendment requirement apply to all Regulation D offerings, as was the case when Regulation D was originally adopted? Alternatively, should the closing amendment requirement apply only to offerings under new Rule 506(c)? Are there situations where a closing amendment to Form D should not be required? If so, what are these situations? For example, should no closing amendment be required if no sales of securities have been made?**

A closing Form D amendment, if any, should be made optional rather than mandatory. If it was mandatory, then the failure to file the amendment could lead to the disqualification of a number of other issuers since the disqualification would apply to not only the issuer that failed to make the filing but also to its affiliates. Moreover, with respect to the failure to file a closing amendment, there is a possibility that the failure to file would be inadvertent where a fund ceases operations abruptly between annual update filings. In which case there may be no issuer left to correct the

technical fail by making a closing filing during the cure period, meaning that the disqualification of the affiliated entities might be ongoing indefinitely or that a large number of entities might need to seek a waiver (see our response to Question 38 in this regard).

13. We have not proposed that the filing of a closing amendment be a condition of Rule 506. If the closing amendment were a condition of Rule 506 and an issuer failed to make the required filing, the issuer would lose the exemption for the entire offering at issue, including sales that were made while the issuer was in compliance with Rule 503. Should the filing of a closing Form D amendment be a condition to Rule 506(b) or Rule 506(c)?

No.

14. As proposed, the closing amendment must be filed within 30 calendar days after the issuer terminates the offering. Should we provide a more detailed explanation of what constitutes the termination of an offering?

No.

16. What are the alternatives to requiring a closing amendment to Form D? For example, rather than requiring a closing amendment to Form D for all Rule 506 offerings, should the Commission only require an amendment when an issuer sells an amount of securities in excess of a certain percentage (for example, 10%) above the amount reported as sold in the last Form D or Form D amendment previously filed for the offering?

A closing amendment could be made optional. For issuers who would like to close out the offering and to stop making annual update filings, an option to file a closing amendment would be attractive.

20. Should issuers conducting ongoing offerings pursuant to Rule 506(c) be required to amend their Form D filings more frequently than on an annual basis to provide, to the extent that such information has not already been provided in a previous Form D filing, updated information regarding the dollar amount of any securities sold during such period pursuant to such offering, and any other securities of the same class (or any securities convertible into or exercisable or exchangeable for securities of the same class) sold during such period pursuant to an exemption from the registration requirements of the Securities Act? If yes, how frequently? For example, on a semi-annual basis or a quarterly basis?

No, annual amendments are frequent enough.

21. Rule 503 requires an amendment to a previously filed Form D to correct a material mistake of fact or error "as soon as practicable after discovery of the mistake or error" and an amendment to a Form D to reflect a change in the information previously provided, except in certain situations, "as soon as practicable after the change." Would such non-specific filing deadlines make it difficult for market participants to determine whether an issuer is disqualified from reliance on Rule 506 for failure to comply with Form D filing obligations, including the determination of when a cure period expires? Should the Commission consider amending Rule 503 to set forth more specific time frames for filing these amendments to Form D?

Changing the requirements to something like "within 30 days after discovery of the mistake or error" or "within 30 days after the change" might make the timings more specific for the issuer itself but it would not make it any easier for affiliates of the issuer (especially unrelated issuers under common control) to know when they are automatically disqualified. This question highlights the general problem that extending the automatic disqualification to affiliates brings. See our response to Question 38 in this regard.)

22. Should the Commission amend Rule 503 so that an annual amendment for an ongoing offering is required to be filed on a specified date, such as the one-year anniversary of the initial filing of a Form D or Advance Form D?

No. The current requirement allows an issuer to change the anniversary for its annual filings to a date that suits its business. Where investment adviser compliance personnel are responsible for preparing these annual update filings for multiple funds advised by the investment adviser (which may all have had disparate initial filing dates), the ability to file amendments to align the anniversaries and future annual update deadlines to the same date is important as it eases the compliance burden. Establishing the filing deadline based on the initial filing date will take away that flexibility and increase compliance costs unnecessarily. If a change is made, it should to require all filers to file updates within a specific window, such as within 45 days following the calendar year end.

26. If an issuer filed an Advance Form D but subsequently terminated the offering without selling any securities, what information should the issuer be required to provide regarding the offering in its closing amendment?

Issuers should not be required to file an Advance Form D, in which case a closing amendment in these circumstances would not be required. If, however, an Advance Form D is ultimately required, the closing amendment in these circumstances should not be required to provide any different information than would otherwise be the case, allowing for zeros and blanks where relevant. If the Advance Form D is required, it is likely that issuers will consider filing pre-emptive Advance Form D filings in case their activities in initial discussion phases accidentally trip over the line into general solicitation. When such pre-emptive filers do not end up selling any interests, the chances of a closing Form D not being made are increased. As the consequence of this is to disqualify all issuers who are affiliates (including affiliates who happen to be under common control but are otherwise unrelated), the negative impact of the failure to make the filing may outweigh the benefits of receiving a closing filing reporting only that nothing was sold.

28. Should we require issuers to provide additional information in Form D filings as we have proposed? Should this additional information be required only for Rule 506(c) offerings? If so, why and what should that information be? For example, should the Commission require issuers to provide information in Form D about counsel representing the issuer (if any) or the issuer's accountants or auditors (if any), as some have suggested? If the additional information were required only for Rule 506(c) offerings, what impact would this requirement have on the use of Rule 506(c) as compared to the use of Rule 506(b)? Are there particular items of information that do not provide sufficiently useful information or would be especially burdensome for issuers to provide? Should some of the additional information that we propose to require in Form D not be required for offerings under Rule 506(b)? If so, which requirements and why? Would the additional information that we propose to request in Form D provide useful information to state securities regulators in responding to inquiries from constituents about offerings conducted under Rule 506 and in enforcement efforts?

No. The SEC receives significant additional information from investment advisers about private funds, including about their service providers are, as part of Form ADV. It is not necessary or cost effective to require duplicative reporting.

33. Should the Commission amend Form D to include a check box for issuers to indicate whether they are filing an Advance Form D or a closing amendment to Form D, as proposed? Should there be other changes to Form D to indicate that an issuer is filing an Advance Form D or a closing amendment?

Yes there should be a check box to indicate an Advance Form D filing or a closing filing (if either such requirement is adopted) should be included on the Form D.

34. Should the Commission amend Form D to provide a checkbox to indicate that the issuer is required to provide disclosure of prior "bad actor" events under Rule 506(b)(2)(iii)?

Yes.

35. Should pooled investment funds be required to provide additional or different information in connection with Rule 506(c) offerings? Should the Commission require a pooled investment fund to disclose its investment adviser's CRD number rather than (or in addition to) its adviser's SEC registration number? Item 3 of Form D asks for the identity of the issuer's promoter. Should information on a pooled investment fund's investment adviser be added to Item 3, rather than the proposed Item 20? Does the proposed amendment to Item 3, requiring disclosure of any controlling persons, raise any particular concerns for pooled investment funds?

Due to the potentially expansive definition of affiliate, there could be a number of circumstances where an issuer may not have access to information regarding indirect controlling persons, especially in the private fund context. See the response to Question 38 for a further discussion of the difficulties arising as a result of definition of affiliate.

36. Should the Commission require issuers to provide more or less specific information in Form D about the methods of general solicitation used in Rule 506(c) offerings? Do certain methods of general solicitation raise particular concerns from an investor protection standpoint? For example, are some methods of general solicitation more likely to result in an increased risk of fraud or manipulation or more likely to reach non-accredited investors? Should we require additional information in Form D with respect to these methods of general solicitation? If so, what information should we require issuers to provide regarding these solicitation methods?

As discussed below, we believe that issuers should not be required to file their general solicitation materials. An alternative would be to require an issuer to indicate from a list of common methods of general solicitation which methods of general solicitation the issuer might use. This could be accompanied by a representation that the issuer will supply any general solicitation materials used to the SEC promptly upon request.

37. Should the Commission require issuers to provide more or less specific information on Form D about the methods used to verify accredited investor status? If so, what information should the Commission require issuers to provide regarding verification practices? For example, should we require issuers to identify any registered broker-dealers, registered investment advisers, attorneys, certified public accountants or other third parties that assisted the issuer with the verification process?

No.

38. Is disqualifying issuers and their affiliates and successors from reliance on Rule 506 for future offerings an appropriate sanction to incentivize compliance with Form D filing requirements? Why or why not? How would these amendments affect the Rule 506 market?

The impact of the disqualification, especially as it relates to affiliates, is disproportionate to the perceived gains from requiring the form to be filed, as discussed above.

Because the definition of affiliate is "a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified", the number of entities affected by the automatic disqualification is potentially quite large. This is especially the case given that "control" for this purpose is generally interpreted in line with the definition of control in Rule 405:

> "The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to

direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

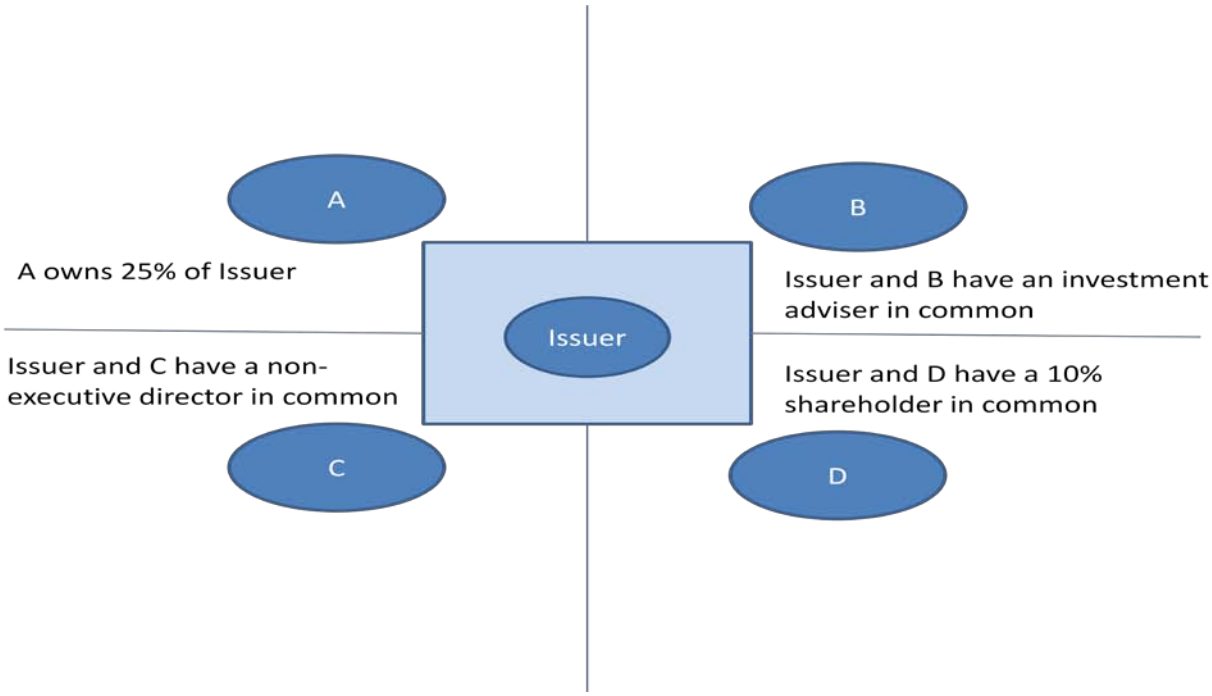
Moreover, the application of this definition of control will generally capture directors, officers, and 10% or more shareholders as affiliates of the issuer. In the funds context, this could also include a fund's investment adviser/promoter.

The existing disqualification as relates to affiliates requires "order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with Rule 503." This means there is a process involved and presumably a publicly available record of the order, judgment or decree. As the Proposing Release notes, there have been relatively few such actions instituted to date and thus relatively few affiliates have been affected.

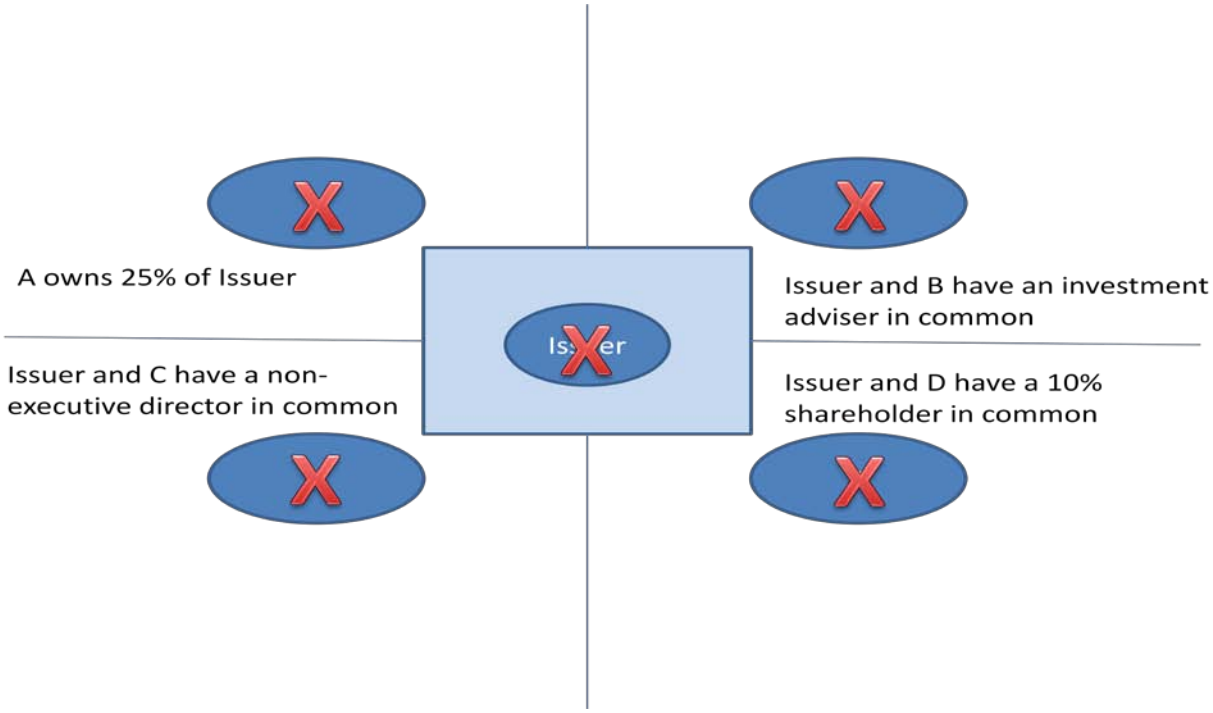
If filing of the Form D is made a condition of reliance on Regulation D, and the disqualification is automatic and applies to affiliates, a substantial number of other issuers could be negatively impacted.

An example will help illustrate this point:

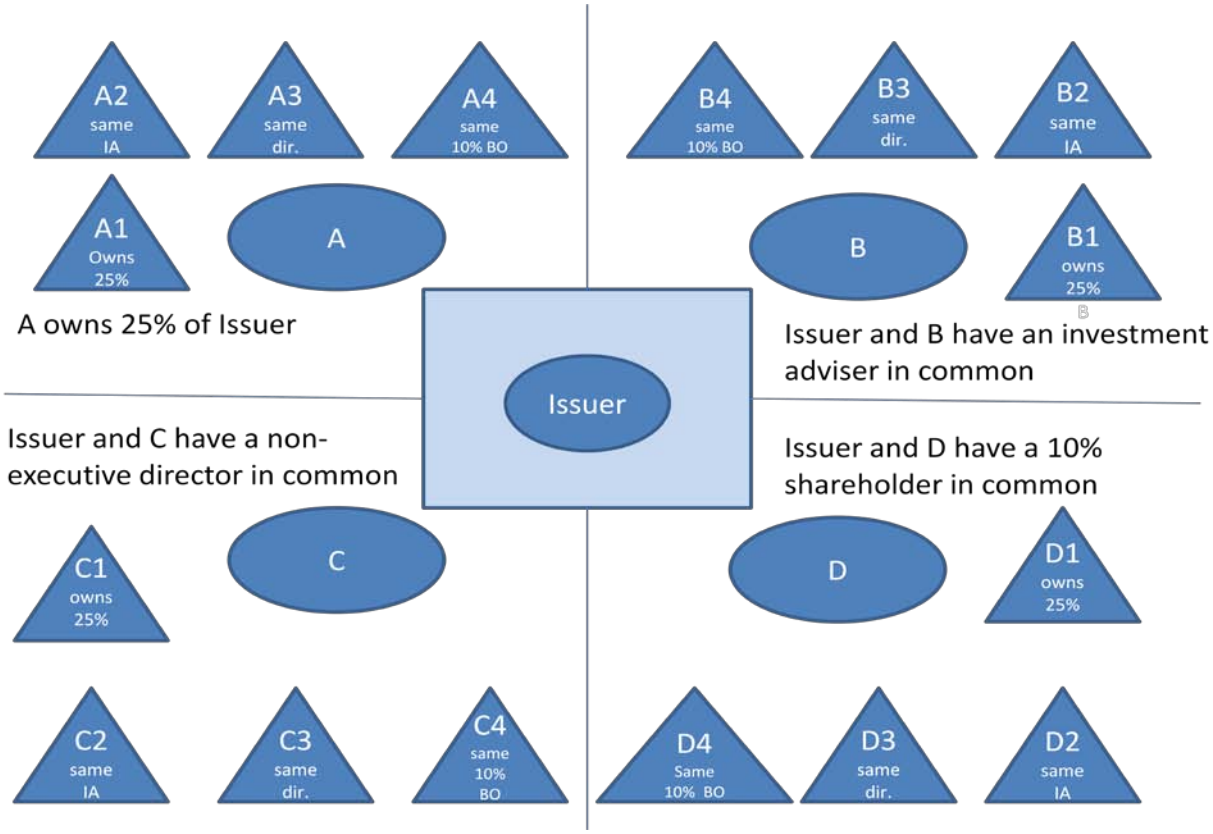
First assume there are five potential issuers, four of which have an affiliate relationship with the issuer that fails to make the filing (the 'Issuer'). The relationships between the Issuer and each of those four other issuers (A, B, C and D) are shown in the diagram below.



Now assume that the Issuer fails to make a filing. The disqualification (represented by an 'X' in the diagram below) will apply to the Issuer because it failed to make the filing, and to A which controls Issuer as well as B, C and D which are under common control with the issuer. Under the current proposal, all five entities would be disqualified simply because one filing, which is not even related to the operative provisions of Rules 504, 505 or 506, was not made.

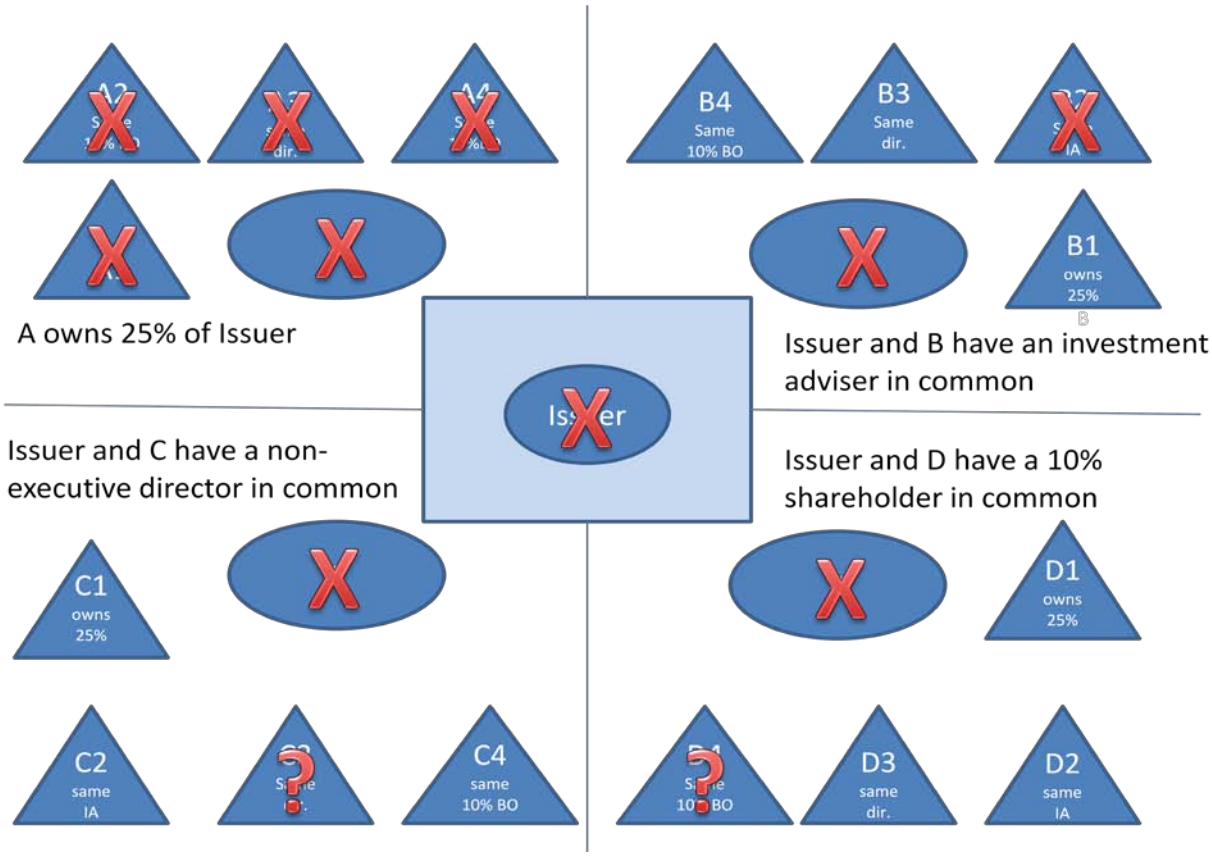


While this example may appear complicated, in today's market, this structure is comparatively simple. In another case, assume that each of A, B, C and D has relationships with other entities that replicate the relationships that A, B, C and D have with the Issuer (this is an oversimplification but it is illustrative). Those further entities are indicated with the numbers 1 through 4.



Now if the Issuer fails to make a filing, the numbers of affected issuers expands as indicated in the diagram below. Where there is an 'X' the entity will be disqualified because either it indirectly

controls or is under common control with the Issuer. The '?' is used for entities that might be disqualified depending on the circumstances. For example, if the director C3 has in common with C is the same director C has in common with the Issuer, then C3 would be disqualified for being under common control. This is especially problematic in a fund context where many of the non-executive fund directors serve as directors for funds with different promoters. So if one promoter's fund fails to make a filing, then all of the other funds on whose board the director sits will be affected.



Finally, with an automatic disqualification, it is not clear that a director resigning or a 10% shareholder redeeming out of a fund, in either case to break an affiliation, will 'cure' the disqualification for previously affiliated entities.

39. Proposed Rule 507(b) would not impose any consequences with respect to the offering for which an issuer failed to file or amend a Form D as required, or for other offerings that were ongoing at the time of the failure to file. Would disqualification from reliance on Rule 506 for future offerings be a sufficient incentive for issuers to comply with Form D filing requirements? Why or why not? Should an issuer engaged in an ongoing offering be permitted to continue relying on Rule 506 if it or an affiliate failed to comply with the filing requirements of Rule 503?

Yes the issuer should be able to continue to rely on the exemption because the consequences of losing the exemption are disproportionate to the regulatory benefits of having the Form filed.

41. As proposed, outside of the cure period, disqualification under Rule 507(b) would not be lifted until one year after all required Form D filings are made or, in the case of offerings that had been terminated, a closing amendment is made. Is this an appropriate requirement? If not, what are the alternatives?

No, this is not an appropriate requirement. See responses above.

44. The look-back period would not extend to the period prior to the effective date of proposed Rule 507(b). Is it appropriate not to consider these filings before the effective date of the rule? Why or why not?

Yes, because the failure to file a Form D was not previously a disqualification from reliance on Regulation D. In addition, there is a higher likelihood that issuers who failed in the past to file a Form D will be unable to make a curing filing to keep the disqualification from becoming indefinite because the issuer is no longer in existence. Moreover, if the disqualification will also extend to affiliates, the consequences of the inability to cure are magnified and could affect a multitude of unrelated entities.

46. As proposed, issuers would be disqualified from using Rule 506 based on noncompliance with Rule 503 within the past five years in connection with a Rule 506 offering by their predecessors and affiliates. Is it appropriate to disqualify issuers for non-compliance by their predecessors and affiliates? If not, would it be too easy to avoid disqualification by using an affiliate or successor entity to conduct a Rule 506 offering? How should the Commission address this concern?

No, an issuer should not be disqualified for non-compliance by their affiliates. See our response to question 38, above.

47. Would portfolio companies that are affiliates of a private fund be unduly affected by any disqualification triggered by noncompliance of the private fund, its predecessors and its affiliates with Rule 503? If so, should the Commission treat portfolio companies of private funds differently for disqualification purposes? If yes, how?

Yes portfolio companies that are affiliates of private funds would be unduly affected (but then so are funds -- see Question 38).

48. Is it appropriate to prohibit a private fund or its successors or affiliates from engaging in a subsequent offering under Rule 506 if the private fund failed to comply with Rule 503? For instance, if a private fund issuer fails to file its Form D or the appropriate amendments in accordance with the filing requirements of Rule 503, is it a disproportionate response to prohibit any private funds affiliated with the private fund from relying on Rule 506? Should proposed Rule 507(b) contain an express provision that excludes affiliated private funds from such consequences?

See responses above.

56. Is it appropriate to amend Rule 507's existing waiver provision so it applies to proposed Rule 507(b)? Should we provide guidance regarding factors that the Commission may take into account when considering whether to grant a waiver?

If there is an automatic disqualification provision, then there needs to be a way to request a waiver.

59. Should we require all issuers to include the proposed legends in written general solicitation materials? Why or why not? Are accredited investors already aware of the information included in the proposed legends? Would the proposed legends be effective in reducing the incidence of non-accredited investors participating in Rule 506(c) offerings?

A legend on a piece of general solicitation could help an issuer screen enquiries from non-accredited (and therefore unqualified) potential investors. However, in some cases, such as tweets, it is not possible or practical to have a legend. An issuer should be required to provide an offering document prior to the sale of the interests and that offering document should include the legend, but using the legend on other materials should be optional.

68. Should we specifically require disclosure of the date as of which any performance data included in the written general solicitation materials was calculated? Should we require all

such performance data to be current as of the most recent practicable date? To give issuers certainty, should we provide more specific guidance as to what constitutes the most recent practicable date? Should we require performance data to be provided for a specific period (e.g., for the last one, five, and ten year periods)? Should we require such performance data to be updated at specified intervals? If so, what interval or intervals would be appropriate? Should we require a private fund to provide narrative disclosure regarding the methodology used to calculate performance data? Will such required disclosure become standardized or unwieldy and, therefore, less useful to investors?

Standardised performance calculations or presentation requirements should not be imposed.

69. If all purchasers in an offering receive a private placement memorandum that includes all of the required legends, is it necessary that other materials also include these legends?

No.

78. Are there additional amendments to Rule 156 that would help to clarify the obligations of private funds under the antifraud provisions?

Rule 156 has previously been interpreted in the context of registered investment companies. If this proposal is adopted, the SEC should specify that interpretations of Rule 156 with respect to registered investment companies will not automatically apply to private funds now subject to the rule.

82. How do the different types of private funds (e.g., hedge funds, private equity funds, venture capital funds, and securitized asset funds) calculate and present performance? Should private funds be subject to standardized performance reporting? If so, what reporting standard(s) should apply? Is there any standard that is widely used by private funds and should we consider requiring the use of such standard? Would one standardized performance reporting methodology be appropriate for different types of private funds?

Standardised reporting requirements should not be imposed. The reporting should have to meet the anti-fraud standards, but how it is reported and how it is calculated should not be subject to prescriptive requirements.

86. Should the Commission draw a distinction between general solicitation activity engaged in by a private fund relying on Section 3(c)(1) of the Investment Company Act compared to a fund relying on Section 3(c)(7) of the Investment Company Act? If so, how and why? General solicitation can be conducted through a broad array of media, including, but not limited to, print advertisements, billboards, television, the Internet and radio. Which ones will be most likely used in private fund offerings? Are there certain types of media that present heightened investor protection concerns?

No, there should not be a distinction.

87. Should we require the submission of written general solicitation materials used in Rule 506(c) offerings, as proposed? Should oral communications that constitute general solicitation be required to be submitted in some form? If so, how should a requirement to submit general solicitation materials be applied to telephone solicitations, solicitations through broadcast media or oral communications?

No, written general solicitation materials should not be required to be filed.

From a technological point of view the SEC does not currently seem equipped to handle the uploading of the multitudes of electronic file types that such written materials might come in. If audio or broadcast files are added to the required filings, then the number of file types and size of the files that will have to be uploaded will increase substantially.

88. What are the appropriate ramifications for an issuer that fails to submit written general solicitation materials? Should failure to submit general solicitation materials disqualify an issuer from using Rule 506 for future offerings without court action? Should a cure period be provided? Should submission of written general solicitation materials be a condition to the Rule 506(c) exemption?

It should not be a condition to reliance on Rule 506(c).

If it is a condition, a cure period should be provided.

If anyone is disqualified for the failure, it should just be the issuer.

89. What are the benefits and costs of requiring the submission of written general solicitation materials in Rule 506(c) offerings? If the staff were able to conduct only limited review of a small portion of the materials submitted, how does that impact an assessment of costs and benefits?

If the SEC staff is only going to review a small portion of the materials submitted, the costs of compliance will substantially outweigh the regulatory benefit. If the SEC staff wants to have access to these materials, a representation in the Form D that filers will make any such materials available to the SEC staff promptly upon request would be a substantially less costly option and achieve a similar regulatory benefit. In the funds space, such materials will be available from the investment adviser, who will most often be either registered as an investment adviser under the Investment Advisers Act of 1940, as amended, or filing as an exempt reporting adviser.

90. Should the submitted written general solicitation materials be made publicly available on the Commission's website? Would the availability of such materials on the Commission's website give undue credibility to the materials and create the impression that submitted materials have been reviewed and/or approved by the Commission?

No, in addition to the possible misimpression about the SEC's review and approval, having these materials on the publicly available website will potentially draw interest from non-accredited investors or others to whom the solicitation was not directed, potentially increasing the costs for investors in having to deal with such unsolicited interest.

91. Should written general solicitation materials be required to be submitted as an exhibit to Form D? Why or why not? Could submission of these materials publicly, through EDGAR or another means, have the effect of encouraging broadened investor interest in these offerings, beyond what the offerors would achieve by engaging in their own general solicitation efforts? Would this be in the interests of investors?

Written general solicitation materials should not be submitted as exhibits to filings. Doing so would prove duplicative, administratively burdensome and costly (particularly if all the data on the Form D has to be updated each time as well).

92. Should the written general solicitation materials be submitted at a time other than the date of first use of such materials? For example, currently, free writing prospectuses in the form of media publications or broadcasts that include information about the issuer, its securities, or the offering provided, authorized, or approved by or on behalf of the issuer or an offering participant and that are published or disseminated by unaffiliated media must be filed within four business days after the issuer or offering participant becomes aware of its publication or first broadcast. Should a similar deadline be considered for the submission of written general solicitation materials that are in the form of media publications or broadcasts and that include information provided or authorized by the issuer or an offering participant?

Yes, a similar deadline should apply in this context as applies in the free writing prospectuses context.

95. How would a requirement that written general solicitation materials be submitted to the Commission affect the amount or quality of information in such materials? How would it affect the use of Rule 506(c)?

This requirement is likely to reduce the numbers of issuers who seek to use Rule 506(c) and the amount of written general solicitation material produced.

100. Should it be a condition of Rule 506(c) that, prior to any sale of a security in reliance on the Rule, the purchaser shall have received an offering document containing specified information? If so, should such information requirements be the same as, or more or less inclusive than, the information requirements set forth in Rule 502(b) of Regulation D (which apply only when an issuer sells securities under Rule 505 or Rule 506 to a purchaser that is not an accredited investor)?

Having to provide an offering document is sensible, but provided it contains all the information material to an investor's decision to invest, there should not be specific requirements as to the content of the offering document. Since sales under Rule 506(c) are limited to accredited investors, there is no reason to impose a requirement that an issuer provide a level of information that is necessary when a non-accredited investor is going to invest.