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Via E-mail: rule-comments@sec.gov

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

Re: Amendments to Regulation D, Form D and Rule 156: File No. S7-06-13

Dear Ms. Murphy:

This letter is submitted to you on behalf of the Committee on Securities Regulation (the "Committee") of the New York City Bar Association in response to the proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act of 1933, as amended (the "Securities Act"), published for comment by the Securities and Exchange Commission (the "Commission") on July 20, 2013.[1] The amendments were proposed in conjunction with the adoption of amendments to Rule 506 of Regulation D and Rule 144A under the Securities Act,[2] which among other things implement Section 201(a)(1) of the Jumpstart Our Business Startups Act (the "JOBS Act") to permit the use of general solicitation or general advertising (collectively referred to in this letter as "general solicitation") in offerings conducted under those Rules.

[1] Amendment to Regulation D, Form D and Rule 156, SEC Rel. No. 33-9416 (the "Proposing Release"), 78 Fed. Reg. 44806 (July 24, 2013).

[2] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 78 Fed. Reg. 44771 (July 24, 2013).

Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms, counsel to corporations, investment banks, investors and government agencies, and academics in the field of law. As such, this letter does not necessarily reflect the individual views of all members of the Committee.

We commend the Commission for its thoughtful consideration of comments previously submitted to it with respect to the implementation of Section 201(a) of the JOBS Act, as reflected in the adopted amendments to Rule 506 and Rule 144A as well as in the Proposing Release. We appreciate the opportunity to comment further on the proposed amendments.

We are mindful of the Commission's aspiration, expressed in the Proposing Release, that the proposed amendments will assist it in evaluating the development of market practices in unregistered offerings involving general solicitation and support future consideration of additional changes related to Rule 506(c). However, the Committee is of the view that in some instances, these goals may be achieved by means other than public filing and disclosure, and urges the Commission to consider whether these goals would be better served by confidential submissions to the Commission of relevant information. In addition, we are concerned that the disclosure and disqualification provisions of the proposed rules will dissuade many issuers from utilizing the Rule 506(c) exemption, and undermine the intent of the JOBS Act provisions and the Commission's proposal. In that regard, we offer the following comments with respect to specific aspects of the proposed amendments and certain of the Commission's requests for comment.

I. Some of the proposed amendments to Rule 503 may have an unnecessary chilling effect on the use of general solicitation in private offerings

1. Advance Form D requirement may prove burdensome and impractical

The proposed amendment of Rule 503 would require the filing of an initial Form D at least 15 calendar days in advance of commencing any general solicitation ("Advance Form D"). An Advance Form D filing would be in addition to the filing of a Form D upon or shortly after the first sale of securities and the filing of a closing Form D upon the termination of an offering. The Committee believes this requirement may prove burdensome and impractical.

An Advance Form D filing requirement will force issuers to determine to conduct a Rule 506(c) offering, and disclose their intention to conduct such an offering, at least 15 days in advance. Consequently, such a requirement may dissuade issuers from conducting private offerings involving general solicitation, either because of reluctance to publicly disclose their capital raising plans before they are fully formulated or because of the artificial delay of the offering that a filing requirement will create. This result is at odds with the intent of the JOBS Act to enhance capital formation, and its negative consequences outweigh any benefits that an Advance Form D may have as a tool for gathering information on Rule 506(c) offerings.

In our experience, decisions as to the structure and timing of transactions depend on market conditions and financing needs that can change within a short time frame, and

in many cases cannot be known 15 days in advance. We submit that the Form D information with respect to actual Rule 506(c) offerings should be provided in a Form D filed upon or shortly after the first sale of securities. If the Commission believes that it would benefit from receiving information regarding abandoned or unsuccessful Rule 506(c) offerings, we believe that it would be more appropriate to gather this information through a confidential submission requirement, rather than through a universal advance notice requirement.[3]

The Proposing Release discusses the possibility of an Advance Form D filing that does not contemplate a particular offering.[4] We do not believe that this would resolve the concern that issuers will shy away from Rule 506(c) offering in order not to announce publicly their plans for capital raising transactions before they are fully formulated. We do not believe that the Commission's rules should require or encourage a practice for potential issuers to always have a general "shelf" Advance Form D on file in order to avoid delays in accessing the capital markets. These generic filings would merely be an administrative burden for everyone involved, would not provide useful information to the Commission or to the public markets and, in fact, would make it more difficult for the Commission and investors to isolate those Advance Form D filings that did actually contain specific and informative details.

2. The rules should provide an explicit cure mechanism for an inadvertent general solicitation

The Commission recognizes in the Proposing Release that the revised Form D rules—and in particular the Advance Form D filing requirement—raise questions in cases of inadvertent general solicitation and asks for comments on the consequences to the issuer in such circumstances. The Committee believes that the rules should provide an explicit cure mechanism for an inadvertent general solicitation, particularly if some form of Advance Form D proposal is adopted. While the Commission refers to Rule 100(a)(2) of Regulation FD (requiring the "prompt" public disclosure of material information upon becoming aware that such information was unintentionally selectively disclosed) as a possible analogous cure provision, we believe a better precedent in the securities offering context is Rule 433(f) under the Securities Act. Under Rule 433(f), a written offer that is deemed a free writing prospectus must be filed within four business days after the issuer or other offering participant becomes aware of it; we see no reason for a more onerous standard in the unregistered context as in the registered context. An explicit safe harbor is particularly important in light of the severe consequences of a failure to file Form D, discussed in part II of this letter, and the potential ambiguity as to what constitutes a general solicitation.

We believe that the use of the cure provision could be expressly conditioned on the issuer bringing the offering into compliance with Rule 506(c), including the

[3] We note that information on abandoned or unsuccessful offerings may, in fact, not be useful information for the Commission to gather, as proposed offerings can fail or be cancelled for a variety of reasons having nothing to do with offering techniques, including mere changes in business plans, market conditions or intended purchasers.

[4] See Proposing Release, 78 Fed. Reg. at 44811.

requirement for verification of accredited investor status. The cure provision should, however, be non-exclusive—that is, an issuer should be able to use the cure provision without being deemed to concede that the communication in question is in fact a general solicitation or an offer, or that the offering is not eligible for exemption under Rule 506(b). We believe that this approach is consistent with Rule 500(c), which states that attempted reliance with any rule in Regulation D does not act as an exclusive election. It is particularly important in the cure context, however, where the categorization of a communication as a possible inadvertent general solicitation will often be a matter of judgment. The cure provision should make clear that if an issuer conservatively identifies a communication as a possible inadvertent general solicitation and brings the offering into compliance with Rule 506(c), that the issuer is not penalized by having that communication automatically be deemed to be, in fact, general solicitation that would make Rule 506(b) unavailable.

II. The disqualification provisions in proposed Rule 507(b) seem overly harsh

We support the Commission's determination not to propose that a Form D filing be a condition of Rule 506. We also recognize that it is the Commission's desire to incentivize issuers to comply with the Form D filing requirements of Rule 503 and create meaningful consequences for a failure to file it, "without requiring action on the part of the Commission or the courts."[5] However, we believe that the disqualification provisions contained in proposed new Rule 07(b), whereby issuers would be disqualified from relying on Rule 506 prospectively for one year if they or their affiliates had failed to comply with the Form D filing requirements, are too severe, especially given the uncertainties with respect to these filing requirements under the proposed amendments. We note, in particular, that failure to comply with the Form D requirements does not fundamentally impact the integrity of the Rule 506 exemptions from a shareholder protection perspective.

As a general matter, we believe that issuers would be sufficiently incentivized to follow the Form D rules through application of the Commission's general enforcement authority, consistent with securities law compliance generally, and accordingly that automatic disqualification is not necessary. We expect, in fact, that issuers engaging in Rule 506(c) offerings will be more likely to comply with the Form D requirements than they are under the current rules, because the actual use of general solicitation will generally make other exemptions unavailable.

In addition, as a practical matter, because the disqualification provision is not contingent on the existence of a court order or SEC action, there can be no sure way for issuers, and others involved in the offering such as placement agents and counsel, to be sure that Rule 506 is available at all for a particular offering. We believe that any automatic disqualification provision introduces unnecessary uncertainty into the offering process, especially given the lack of specificity about what constitutes general solicitation. If, however, the Commission determines to continue to include some form of automatic disqualification, we believe that

[5] Proposing Release, 78 Fed. Reg. at 44818.

changes are necessary in order to avoid unduly harsh consequences and to effect the Congressional purpose.

1. Disqualification trigger should not be a "failure to comply" with the requirements of Rule 503

The proposed Rule 507(b) refers to the issuer having "failed to comply" with the requirements of Rule 503 as the disqualification trigger. "Failure to comply" is a vague trigger pursuant to which even a technical or immaterial non-compliance, or varying views on an interpretive matter, could result in disqualification. In particular, if an Advance Form D filing requirement is adopted, any inadvertent general solicitation in a Rule 506(c) offering would presumably lead to non-compliance with Rule 503 and trigger an automatic disqualification.

The Committee submits that instead of the "failure to comply" trigger, the disqualification provisions in Rule 507(b) should, at most, refer to a "failure to timely file" a required Form D. In line with the "timely filing" standard for reports under the Securities Exchange Act of 1934,[6] only a non-filing of a Form D, or an error related to the filing that would render it "materially deficient," would be deemed a non-timely filing.[7] Alternatively, the Commission could clarify that only *material* non-compliance with the requirements of Rule 503 would trigger disqualification. In this case, we would urge the Commission to consider providing a list of items that would not trigger disqualification, similar to the approach taken in current Rule 503 with respect to required amendments of Form D. In particular, we suggest that disqualification should not be triggered by the use of general solicitation in an offering that was not designated on Form D as a Rule 506(c) offering unless the general solicitation specifically mentions the offering. In addition, the Commission could provide that disqualification is not triggered merely because the issuer checked the wrong box on the Form D as to the subsection of Rule 506 under which the offering is being conducted.

2. Disqualification should be triggered only with respect to failures to file a "first sale" Form D

As discussed in part I above, we believe that the proposed Advance Form D filing requirement should not be adopted. Nevertheless, should the requirement be adopted, we submit that many of the concerns related to the uncertainty of when an Advance Form D or a closing Form D are required (*e.g.*, the harsh consequences of an inadvertent general solicitation with respect to an Advance Form D requirement, or the difficulty to determine when a Rule 506 was abandoned or terminated with respect to a closing Form

[6] Similar to the proposed one-year disqualification under new Rule 507(b), a failure to timely file reports required under the Securities Exchange Act of 1934 triggers a one-year loss of eligibility to use a short-form registration under the Securities Act. See Form S-3, General Instruction I.A.3.

[7] Under SEC staff guidance, "materially deficient" filings are generally limited to those with major omissions, such as failure to include audited financial statements or the management's report on internal control over financial reporting. See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Rules Item 603.03, and Securities Act Forms Question 126.13.

D requirement), would be addressed if disqualification under new Rule 507(b) were triggered only by a failure to file the Form D required under the current rules (*i.e.*, within 15 calendar days of the first sale of securities in the Rule 506 offering).

3. The extension of automatic disqualification triggers to failures of affiliates may have significant adverse consequences for certain issuers

The Commission is soliciting comments on its extension of the automatic disqualification under new Rule 507(b) to failures to comply with Form D requirements by an issuer's affiliates. Under the proposal, an inadvertent failure of one issuer to comply with Form D filing requirements will automatically bar all other issuers that are under common control with that issuer from relying on a Rule 506 exemption. New Rule 507(b) would impose on issuers the impossible task of assuring the compliance of all of their affiliates (including parent companies and sister companies) with all Form D filing requirements in order to be able to rely on a Rule 506 exemption. We believe this approach would have unduly adverse consequences, and would place an impracticable burden on issuers to police and assess compliance by entities—potentially a large number of entities—over which they may have no influence and from which they may have no right or ability to get information. We note that this is inconsistent with the approach taken in the eligibility requirements for the use of Form S-3, which are generally based only on the actions and characteristics of the registrant.

Although we agree that an issuer should not be able to avoid the consequences of the rules simply by conducting future private offerings through an affiliate, we believe that the Commission could address such a scheme to evade disqualification directly, as it does in other contexts.

III. Some of the proposed new Form D content is burdensome and far-reaching, and will discourage issuers from undertaking private offerings using general solicitation, as well as Regulation D more generally

The proposed amendments seek to revise Form D to require additional disclosure items, some of which would apply to all Regulation D offerings and some only to Rule 506(c) offerings. Taken in the aggregate, 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, whether or not intended, of discouraging issuers from undertaking private offerings using general solicitation, as well as Regulation D more generally.

1. Public disclosure of controlling persons (Item 3) is overly burdensome and inconsistent with privacy considerations

The proposed requirement that information about "controlling persons" (for Rule 506(c) offerings only) be made public is inconsistent with privacy considerations for companies that have chosen to remain privately held. Accordingly, this information would be better submitted to the Commission confidentially if the Commission determines to require its submission.

In addition, this proposed disclosure of "controlling persons," which the proposed revised instructions to Form D describe as "each person who directly or indirectly controls the issuer," goes well beyond current disclosure requirements for reporting companies, which require disclosure of certain specified information with respect to "control persons" (similarly defined) in an initial public offering and immediately thereafter (but not disclosure of every "control person"),[8] but otherwise generally require this kind of disclosure using bright line ownership levels.[9] The determination of direct or indirect control is a subjective one that requires, among other things, costly consultations with counsel. Imposing this requirement in the private offering context seems overly burdensome, with limited benefit. Instead, a bright line ownership level could be specified. We suggest that a threshold of 20% might be appropriate in this context, consistent with the approach taken in new Rule 506(d) for disqualification of "bad actors" and the reduced disclosure requirements for less-than-20% holders specified in Rule 13d-1(c).

2. Proposed use of proceeds disclosure (Item 16) is more detailed than required in a public offering, which seems inappropriate in the private offering context

The proposed use of proceeds disclosure in Form D is extremely detailed, even more than the disclosure currently required in connection with registered public offerings pursuant to Item 504 of Regulation S-K. It seems inappropriate and unnecessary in the private offering context to require more information than would be required in a public offering. In addition, this change adds requirements that currently do not exist for Rule 506 offerings not using general solicitation. We believe the requirements should be made consistent with Item 504 of Regulation S-K.

3. Proposed disclosure about verification methods (Item 22) is either overly burdensome or likely to lead to a "check-the-box" approach

In a Rule 506(c) offering, an issuer would be required to list the verification methods used to confirm accredited investor status and, for methods that do not fall within one of the safe harbors, specify the information or documentation used. This specification requirement seems overly burdensome, particularly given the Commission's principles-based approach to the verification requirement, which contemplates a consideration of the specific facts and circumstances of each case. In practice, this item is likely to lead to a more generic, check-the-box approach to verification that would undercut the intent of the rule itself. Therefore, we believe this disclosure should not be a Form D requirement.

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

[9] 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.

4. Disclosure of issuer size (Item 5) should turn on whether the information has previously been made public rather than whether it was included in a general solicitation

The Commission proposes to modify the instructions to Form D to 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: communications to a large number of prospective investors with which the issuer or its agent does not have any "substantive pre-existing relationship" may constitute a general solicitation, even if they are subject to a confidentiality agreement. Accordingly, this instruction should be revised to require disclosure only if this information has truly been made public. This could be accomplished simply by deleting the parenthetical phrase—"(for example, in general solicitation materials for an offering conducted in reliance on Rule 506(c))"—in Item 5 of Form D.

5. Proposed disclosure about accredited investor basis (Item 17) should be required for Rule 506(c) offerings only

The proposed additional disclosure about the basis for the status of accredited investors in the offering should apply only to Rule 506(c) offerings, rather than to all Rule 506 offerings. We believe this is the intent of the requirement, but the reference in Item 17 should be clarified to avoid any potential confusion.

IV. Proposed legend requirement does not address certain forms of social media or inadvertent general solicitation, among other things

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. The proposal also does not address how failures to include legends, including for inadvertent general solicitation, might be remedied. A possible solution for these situations would be 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 the notice permitted by Rule 155 under the Securities Act. Referring to a legend by means of a hyperlink or cross-reference should also be permissible, particularly in the case of social media.

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 presumably is not intended. Accordingly, we urge the Commission to limit the legend requirements only to specified written materials that discuss the details of the offering (*e.g.*, private offering memoranda or circulars) rather than apply them to any communication that may be deemed written general solicitation materials.

V. Rule 510T may be unnecessary and should specify remedies for failure to submit solicitation materials

1. Rule 510T may be unnecessary

The sole purpose of proposed new Rule 510T is to assist the Commission in evaluating developments in Rule 506(c) offerings market practices.[10] Additionally, the Commission does not contemplate that written general solicitation materials submitted under Rule 510T would be subject to a staff review similar to that conducted on Securities Act registration statements.[11] Therefore, instead of imposing a burdensome requirement on all Rule 506(c) issuers to submit materials that may or may not be reviewed, we urge the Commission to consider whether the underlying goal of proposed Rule 510T may be obtained by other means; for example by requiring such issuers to undertake to submit written general solicitation materials upon the Commission's request.

2. Rule 510T should specify remedies for failure to submit solicitation materials

If adopted, we encourage the Commission to clarify that failures to submit written general solicitation materials pursuant to Rule 510T (in particular in the case of an inadvertent general solicitation) could be remedied by submitting such materials when the failure becomes known to the issuer.

VI. The application of Rule 156 to private funds should extend only to sales materials used in Rule 506(c) offerings

We acknowledge that the proposed changes to Rule 156 would not create a right of action that otherwise does not already exist under the Securities Act. However, the application of Rule 156 to all sale materials used by private funds appears overly broad. Given that the adoption of Rule 506(c) is the impetus for proposing amendments to Rule 156 to extend its guidance to private funds, we believe that Rule 156 should be extended to apply only to those private funds that engage in Rule 506(c) offerings and only to sales materials used in such offerings.

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Members of the Committee would be pleased to answer any questions you may have concerning our comments.

Respectfully submitted,

Sandra L. Flow
Chair, Committee on Securities Regulation

[10] Proposing Release, 78 Fed.Reg. at 44828.

[11] *Id*.

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