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September 23, 2013

Ms. 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 under the Securities Act, File No. S7-06-13

Dear Ms. Murphy:

We appreciate the opportunity to provide comments to the Securities and Exchange Commission (the "Commission") on its proposed amendments to Regulation D under the Securities Act of 1933, as amended (the "Securities Act"). We set out below our principal comments.

I. Proposed Changes to Form D and Form D Filing Requirements

We understand the Commission's desire to collect more information about the private offering market, and to seek to understand the ways in which market participants are benefiting from the ability to communicate more freely in the context of certain Rule 506 offerings. However, we believe that the Commission's proposed changes to the Form D filing requirements are burdensome and may create traps for the unwary, especially for private funds engaged in continuous financings.

Proposed Rule 503 would require an issuer intending to engage in general solicitation for a Rule 506(c) offering to make at least three Form D filings. This seems excessive if the objective is information gathering.

Form D Filing Requirements

The proposal contemplates that an issuer would be required to file an initial Form D at least 15 calendar days in advance of commencing any general solicitation. It is not clear why the Commission seeks to set a 15-day waiting period in offerings that will use general solicitation. Assuming that the objective is to promote transparency in the Rule 506(c) offering market, the same result could be accomplished by requiring that the Form D filing be made concurrently with the first sale (as opposed to after the first sale) if the Commission believes that there is utility in having the Form D on file earlier in the process.

For many issuers, there will be some ambiguity in determining when general solicitation has commenced, given, as we discuss below, that "general solicitation" has been interpreted quite broadly by the Commission. As a result, the advance filing requirement will lead many issuers, out of an excess of caution, to make Form D filings, even if it is unclear that their offerings will proceed. This is likely to lead to an information overload, and not to increased transparency. For issuers, like private funds, which are engaged in continuous offerings, it may be difficult to identify when a particular financing commences and is completed. The same is likely true of start-up companies. So, one could easily conclude that the 15-day advance filing requirement introduces an artificial and unnecessary speed bump to the capital-raising process.

The proposal also contemplates the filing of a "termination" Form D. In the context of the termination Form D, the Commission notes that it will consider an offering ongoing if an issuer has failed to make this filing. In other contexts, the Commission has concluded that an offering is "terminated" or considered completed when definitive purchase commitments are received and the conditions to closing are outside of the control of the investors. Would the private offering be deemed "ongoing" for all purposes, including, for example, in the context of undertaking an integration analysis? This would seem an unusual result.

In order to remain faithful to the intent to facilitate capital formation, we recommend that the Commission consider requiring that a Form D be filed at the commencement of a financing and either at termination or abandonment of the financing, or instead make the filing an annual requirement. This will provide the Commission and the public with the necessary data, without unduly burdening issuers.

Content Changes to Form D

The Commission has proposed to make significant content changes to Form D, and to request additional information from issuers. Presumably, the additional information will help the Commission better understand the private offering market; however, in certain instances, it would appear that the Form D is being viewed as a disclosure document.

The Commission should provide guidance as to certain of the items. For example, Item 3 requests information on related persons, including "each person who directly or indirectly controls the issuer." It is not clear why this information is being requested only for Rule 506(c) offerings. Many issuers will have difficulty identifying the entities that may be considered "control persons" in the absence of more specific guidance. Item 16 requires a detailed description of use of proceeds. For many issuers, this information will be viewed as confidential. Also, for many issuers, especially emerging companies, the uses of proceeds may change over time as their business plans evolve. It is not clear how the Commission intends to use the information that will be provided in response to this item.

Item 14 and Item 17 request information on the number and type of investor that is participating in the offering. It is not clear whether this information can be furnished confidentially, or whether this information will be made available publicly. Many issuers would view this information as sensitive.

Item 19 appears to require that the issuer inquire of its broker-dealer whether the broker-dealer has complied with FINRA Rule 5123 and/or with the FINRA communications rules. It is not clear why the issuer should be deputized and made responsible for ascertaining whether a broker-dealer has complied with its obligations.

Many issuers may not be sufficiently familiar with the types of communications that may be considered to constitute a "general solicitation" and may, therefore, omit to include information that may be relevant in responding to Item 21. If, over time, the issuer uses different approaches to solicit indications of interest in an offering, it is unclear whether it would have to amend the Form D in order to supplement or correct the information in Item 21. Many issuers will likely include more information in response to this item simply out of an excess of caution.

Finally, the Commission should clarify the liability that would attach in connection with an incomplete Form D, and make clear that third parties cannot rely on the disclosures contained in a Form D filing in bringing a cause of action.

II. Loss of Offering Exemption for Failure to Comply with Form D Filing Requirements

Currently, the exemptions provided by Rules 504, 505 and 506 are not conditioned on compliance with the Form D filing requirements. We understand the Commission's concern that, without some consequences for failures to comply, market participants have not been sufficiently diligent with respect to Form D filings. The Commission's proposal to amend Rule 507 in order to provide that an issuer would be disqualified automatically from using Rule 506 in any new offering for one year if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the past five years, with the Form D filing requirements in a Rule 506 offering, seems to be an excessive response to the perceived problem.

Contemporaneous with the release of the proposed rules, the Commission released a study that provided information on the use of Rule 506. Given the significance of Rule 506, loss of the offering exemption would be a severe penalty. An issuer would have extremely limited financing alternatives—it would be relegated to reliance on the Section 4(a)(2) private placement exemption and be required to comply with state blue sky requirements. The Commission is also proposing to add multiple Form D filing requirements, which are likely to confuse market participants.

At the same time that the Commission proposes to impose a harsh penalty for a failure to comply with Form D filing requirements, the Commission also is proposing to add additional Form D filings. Adding additional Form D filing requirements, as we note above, will impose significant burdens on issuers, without providing an accompanying benefit. This is especially concerning if the Commission intends to impose the same penalties for failure to comply with any of the Form D filing obligations. In this regard, we suggest that, if the Commission proceeds with multiple required Form D filings, the penalty for failure to file be associated only with the closing Form D filing. Technical failures to file, or failures to file amendments, should not result in a disqualification. This would avoid creating unintended traps and consequences for the unwary, and addresses the Commission's concern with obtaining accurate information regarding the private offering market.

We suggest that the Commission consider adopting a shorter look-back period. Five years is quite a long period. Significant diligence would be required in order to investigate the activities of predecessors or affiliates over a five-year period. We suggest that the Commission consider providing a longer cure period in which to make the required Form D filings. Instead of imposing a one-year disqualification period, we suggest that the Commission permit the issuer to continue to rely on Rule 506 once all delinquent filings have been made or brought current. The Commission might implement a change to Form D whereby an issuer would have to indicate if the issuer (or predecessors or affiliates) had been delinquent in making prior timely required Form D filings. The Commission might also consider modifying existing Securities Act and Exchange Act forms to require that any issuer that is an SEC-reporting company disclose whether in connection with unregistered sales of securities it had been delinquent in making timely Form D filings. Requiring such disclosures will serve as further reminders to issuers and their advisers regarding the need to comply with Form D filing requirements. For issuers that have repeatedly been delinquent, the Commission might then consider an appropriate sanction that would be more commensurate with the harm, such as a six-month disqualification period.

The Commission should provide additional specificity with respect to the entities that will be considered "affiliates" and "predecessors" in the context of amended Rule 507. For venture or private equity funds, it may be difficult to ascertain compliance by all portfolio companies, and affiliation through common control of portfolio companies may result in overly broad application of the disqualification provisions. Similarly, for private funds, it may be difficult to ascertain which entities would be included.

Finally, the proposing release notes that the Commission may waive disqualification. As discussed above, the proposed one-year disqualification is a draconian remedy and the possibility of obtaining a waiver does little to mitigate the harm that will result from being foreclosed from raising capital. As noted in the Commission's study on the use of Rule 506, the majority of issuers that rely on the exemption are small, emerging companies, and likely will not be able to spend the time and incur the expense associated with the waiver process. In any event, the Commission should provide additional guidance concerning the factors that will be considered relevant for a waiver.

III. General Solicitation Materials

Legend Requirement

The Commission proposes a new Rule 509 that would require an issuer to include certain legends in all written general solicitation materials, and private funds would also be required to include certain performance-related legends. The objective of this proposed requirement is unclear. If the intent is to educate prospective purchasers with the risks associated with an investment in "restricted securities" or to caution investors that written solicitation materials have not been subject to any regulatory review, there are more effective ways to promote investor education. "Boilerplate" disclosure is, if truth be told, generally ignored by investors. Issuers and their advisers should be left to craft disclosures that are tailored and specific to the circumstances, and, as a result, more likely to be read. If the legend requirement will be enforced, then perhaps the Commission might clarify the types of written materials to which these requirements will apply, and confirm that, in the context of communications made using social media, a hyperlink to the required legend would satisfy the requirement, if applicable.

If the Commission intends to advance certain content standards, it may be more effective to consider the existing requirements applicable to registered investment advisers, broker-dealers that are FINRA member firms, and commodity pools and commodity trading advisers registered with the NFA. Each of these categories of registered persons already is subject to rules and regulations that govern advertising or solicitation materials and that address performance related disclosures. Market participants would benefit from a harmonized approach that aligns various existing requirements relating to advertisements.

We strongly believe that an existing framework already is in place for regulating the content of information that may be used to solicit prospective investors under Rule 506(c). In this regard, we believe that existing anti-fraud provisions of the federal securities laws provide a significant deterrent to the use of misleading or deceptive materials in the course of any offering, including the types of offerings contemplated by Rule 506(c). It is difficult to understand how the mere inclusion of a legend would minimize the chance that a non-accredited investor might participate in a Rule 506(c) offering, or serve to reinforce the need for materials to be fair and balanced.

Submission of General Solicitation Materials

The Commission also proposes to adopt new Rule 510T, which would require an issuer conducting a Rule 506(c) offering to submit to the Commission any written general solicitation materials prepared by or on behalf of the issuer and used in connection with the offering no later than the date of first use. Many market participants will have difficulty assessing the types of communications that would actually be considered to be "written materials" by the Commission.

It is also not clear how "general solicitation" should be interpreted in this context. It is not clear whether the Commission intends that all "uses" of a communication should each be subject to a filing requirement—that is, for example, if the issuer prepares summary investment highlights and uses these in various communications, without material modification, should each such communication be filed with the Commission? Will a script used for investor presentations, but not actually shared with investors, be subject to the filing requirement? Will any question/answer session be subject to filing?

There are many details that would have to be clarified if this requirement were adopted in order to promote consistency and certainty. However, it is not clear that the Commission has considered the costs associated with imposing a submission requirement. There are already filing requirements for certain types of communications. For example, "retail communications" are required to be filed by a broker-dealer with FINRA. FINRA Rule 5123 requires the filing of certain information relating to private placements. The National Futures Authority requires the filing of certain disclosure materials used by commodity pools and their operators or advisers. These self-regulatory organizations also impose certain recordkeeping requirements as to these materials.

Having to submit materials to the Commission may well have a chilling effect on the use of general solicitation and may cause issuers to refrain from using general solicitation or simply refrain from using written materials. If the objective of the submission requirement is to obtain information about the types of materials that are being used, perhaps a more efficient approach would be to coordinate with FINRA and with the NFA.

If the Commission were to proceed with the submission requirement, we recommend that the Commission consider the appropriate penalty for failure to file. The proposal suggests that the failure to submit materials would result in disqualification from reliance on Rule 506(c).

IV. Proposed Changes to Rule 156

The Commission proposes to extend Rule 156 to all sales materials used by private funds regardless of whether offerings involve general solicitation. It is not clear why this measure is needed or warranted. The antifraud provisions already apply to securities offerings of private funds. Extending Rule 156 without the benefit of any cost benefit analysis, and without coordinating or harmonizing the communications requirements to which private funds already are subject, seems ill-considered. If additional restrictions along these lines were to be applied, there should be an additional comment period as to this portion of the proposed rule changes.

V. General Solicitation

There is significant ambiguity concerning the types of communications that would constitute a "general solicitation."

For decades prior to the JOBS Act, lawyers and other market participants noted that the private offering process was inefficient and stymied by the lack of certainty regarding the types of communications that might be deemed a "general solicitation" by the Commission. Generally, lawyers advised clients that "general solicitation" may be interpreted broadly by regulators. This has had a chilling effect on communications.

In this new environment, we would anticipate that issuers and their counsel will be quite cautious and take the view that "general solicitation" will be interpreted broadly by the Commission, and will want to tread carefully for fear of inadvertently engaging in a communication prior to the proposed initial Form D filing. Following the enactment of the JOBS Act, the Staff of the Commission actively provided guidance in the form of Frequently Asked Questions relating to reliance on the provisions of Title I of the JOBS Act, the so-called "IPO on-ramp." This information was very helpful to market participants as they were grappling with significant changes to the offering process.

The relaxation of the ban on general solicitation will have a broader impact on many more issuers at varying stages of development. It would be beneficial if the Staff would provide guidance regarding the types of communications that should be understood to constitute a "general solicitation" and the types of communications, such as those of a bilateral nature made to existing investors or others with whom the issuer or its financial intermediary has a pre-existing substantive relationship, which would not constitute a "general solicitation."

Similarly, it would help to reinforce that the principles regarding pre-existing substantive relationships remain relevant. The Staff also should consider confirming in this regard that the views expressed in no-action letters like those issued to IPONet and Lamp Technologies also continue to represent the views of the Staff.

Given that the rubric of "private" offerings has changed, and Rule 506(c) offerings are exempt, not private, offerings, it would be helpful to re-examine the rules relating to communications. Communications safe-harbors, similar to those contained in Rules 134, 135, 168 and 169, have helped to provide greater certainty for issuers and their advisers.

In order to promote greater transparency as it relates to privately held companies, including those for which a private secondary trading market exists, the Commission should consider extending the Rule 169 safe harbor to clarify that information that is factual business related information and is regularly released would not be considered a "general solicitation." There also should be a safe harbor for "inadvertent" general solicitations, such as communications made by third parties, not affiliated by the issuer, in which the issuer did not participate.

VI. The Accredited Investor Standard

Finally, we would urge the Commission to consider modifying the "accredited investor" definition to include: (1) non-accredited investors advised by an investment professional; and (2) knowledgeable employees of a private fund.

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We appreciate this opportunity to comment on the proposed amendments. We would be pleased to respond to any inquiries you may have regarding this letter or our views on the release more generally. Please contact David Lynn at (202) 887-1563 or Anna Pinedo at (212) 468-8179.

Very truly yours,

Morrison & Foerster LLP

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