NATIONAL INVESTMENT BANKING ASSOCIATION

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

Re: Commission File Number S7-06-13

Dear Ms. Murphy:

The National Investment Banking Association ("NIBA")[1] thanks you for the opportunity to provide comments related to the Securities and Exchange Commission's ("Commission") request for comments to its proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act of 1933, as amended (the "Securities Act"), related to the implementation of certain provisions of the Section 201(a) of the Jumpstart Our Business Startups Act (the "Jobs Act").

Our 2013 conferences included panels of experts, including law firms, investment bankers, PCAOB audit firms, and representatives of organizations and entities that worked closely with Congressional staff who drafted the Jobs Act. They presented issues and challenges involved with the implementation of the general solicitation and advertising (collectively, "general solicitation") rules. Lengthy discussions and Q&A periods followed with audiences in excess of 550. As such, we believe that both our Board and interested members are sufficiently up to date on the concerns and support within the investment community who will be utilizing or affected by the proposals as they relate to general solicitation.

We believe there are five (5) Key issues for the Commission to address:

KEY ISSUE #1: WHO SHOULD QUALIFY AS AN ACCREDITED INVESTOR? We view this as a prerequisite to all other Commission considerations relating to the definition of an Accredited

[1] NIBA (www.nibanet.org) is an eleemosynary organization comprised of several hundred FINRA member firms ("member firms"), representing approximately 9,000 registered principals and persons, approximately 95% of which are defined by FINRA or the Commission as Small firms (firms with less than 150 registered representatives or less than $500,000 in net capital), and whose activities are largely focused on capital formation and long term service to over $80 Billion in assets held by their clients. We routinely host regulatory representatives at our four quarterly conferences each year, now in our 5th decade, to provide our Broker Dealer members with the latest updates and compliance information in live sessions and forums, and provide monthly status reports on upcoming legislation and rulemaking processes.

Investor, AS IT ALSO IMPACTS VIRTUALLY ALL OF THE 506 EXEMPTION PROPOSALS. We concur with the Staff that other criteria, and not solely monetary thresholds, should determine eligibility for Accredited Investor status. For example we believe that professionals, including but not limited to attorneys, CPA's and, post-graduate MBA's in business and/or finance should qualify as Accredited Investors without complying with a monetary threshold. The same should apply to FINRA licensed registered principals, RIA's, fund managers and due diligence professionals based upon their relative expertise and experience even if they personally have assets or income below the previously prescribed levels (assuming they would have sufficient liquidity to invest at some prescribed level). There could be myriad reasons why younger, middle aged or older folks who are qualified by occupation or experience might not have annual income of $200K or net worth of $1M but have sufficient income and/or liquid net worth should be afforded some level of investment as an Accredited Investor. NIBA believes the Accredited Investor pool should be expanded to include all those persons who should be deemed Accredited Investors for some level of investment based upon their educational credentials and/or business acumen, as less than 2% of all potential Accredited Investors have ever actually made an investment in a private placement[2]. **We are suggesting in responses to questions # 97, 98 and 99, as set forth below, a number of professions and occupations and levels of experience that would automatically qualify as Accredited Investors, as well as different income and net worth guidelines. These professions and occupations, we believe, should be exempt from the income and net worth requirements as defined in Rule 501 of Regulation D, BUT BE SUBJECT TO SPECIFIC LIMITATIONS UPON THE AMOUNT INVESTED IN ANY ONE PRIVATE PLACEMENT UNDER ANY EXEMPTION, AS WELL AS CUMULATIVE INVESTMENT LIMITATIONS ON PRIVATE PLACEMENTS AT ANY GIVEN TIME. Likewise, new income and net worth guidelines would subject the investor to the same limitations per investment and cumulative investments.**

KEY ISSUE #2: *The Commission wants to: (a) add information to Regulation D Forms, preferably for both the new 506 (c) as well as all other Regulation D exemptions.* **We are generally in favor of these provisions;** *(b) to have issuers file an Advance Form D (a newly created form) which, as proposed, would be filed 15 days before the use of general solicitation only applicable to a Rule 506 (c) offering.* **NIBA opposes this provision on many grounds; and,** *(c) have everyone see the Advance Form D on Edgar or other part of the Commission's website in real time***; with certain limitations as recited below, WHILE WE OPPOSE THE FILING OF AN ADVANCE FROM D, IF REQUIRED, NIBA WOULD FAVOR THE POSTING ON THE COMMISSION'S WEBSITE; and,** *(d) have a closing amendment Form D when an offering is terminated, within 30 days***. We are generally supportive of a Closing Form D, but would suggest a 45 to 60 -day filing requirement**

[2] From Commission's proposal request information related to number of investors vs. total number of AI's.

for smaller or infrequent issuers; and *(e) deny the exemption for the entire offering at issue, including sales that were made while the issuer was in compliance with Rule 503, if the Closing Form D amendment is not filed timely.* **We are opposed to imposing such a draconian penalty for what will be administrative violations; denial of exemption should only be applied to illegal activities, OTHERWISE LOSS OF ABILITY TO ADVERTISE AND OTHER PENALTIES AS RECITED BELOW ARE MORE APPRORIATE;** *(f) after an initial Form D is filed, the Commission wants amendments if material changes occur.* **NIBA is in general support as set forth below;** *and (g) for ongoing offerings over periods greater than a year, the Commission suggests periodic updates on the amount of money raised, number and type of Accredited Investors so far, etc.* **NIBA generally supports this. OUR COMMENTS TO COMMISSION QUESTIONS 1 THRU 36, WHICH FOLLOW, ADDRESS THESE ISSUES.**

KEY ISSUE # 3: *The Commission: (a) wants certain Legends and other disclaimers to appear on all advertisements and general solicitation materials of all types and media***. (SEE # 62, 63, &67 BELOW);** ***(b)*** *defines the type font and size etc., in print or video captioning* **(SEE # 64);** ***(c)*** *addresses oral solicitation of previously unknown Accredited Investors* **(SEE #65);** ***(d)*** *wants to have telephone number or Website address of contact on ads or general solicitation materials* **(SEE # 71); and** ***(e),*** *wants to determine if the FINRA rules that brokers are subject to for advertising will be in conflict with the Commission rules for issuers.*

KEY ISSUE # 4: *The Commission is considering requiring all general solicitation materials to be submitted to the Commission 15 days prior to use--- despite its admission in the proposal that few, if any, submissions will actually be reviewed or responded to. The Commission admits to lacking staff and resources to review all but a few of the submissions they expect to receive.* **(SEE #'S 91 & 94). WE BELIEVE THIS IS IMPRACTICAL AND INEFFECTIVE, AND WILL INTERFERE OR DUPLICATE FINRA PRACTICES WHERE APPLICABLE, CREATING POTENTIALLY IRRECONCILABLE DIFFERENCES, UNNECESSARY DELAYS AND AN UNDUE BURDEN ON ISSUERS AND OFFERING PARTICIPANTS.**

KEY ISSUE # 5: *The Commission requested comment whether non-reporting and delinquent reporting public companies (that have stock otherwise trading), should be allowed to use 506 (c) and use general solicitation even though their shareholders don't have the benefit of seeing current information* **(#101, THEIR LAST QUESTION GROUP). WE BELIEVE THAT BOTH DELINQUENT REPORTING ISSUERS AND NON-REPORTING ISSUERS WHO ARE NOT CURRENT WITH PUBLIC INFORMATION POSTINGS ON THE OTC MARKETS SHOULD NEVER BE ALLOWED TO UTILIZE GENERAL SOLICITATION UNTIL THEY ARE CURRENT IN THEIR REPORTING REQUIREMENTS.**

BELOW ARE THE MORE DETAILED ARGUMENTS IN SUPPORT OF, OR IN OPPOSITION TO THE COMMISSION's PROPOSALS.

KEY ISSUE #1 Accredited Investor Definition:

97. Are the net worth and income tests currently provided in Rule 501(a)(5) and Rule 501(a)(6), respectively, the appropriate tests for determining whether a natural person is an Accredited Investor? **We believe the answer to be no. An investor's sophistication and financial acumen are far better criteria for qualifying as an Accredited Investor. They gauge the investor's ability to understand the risk and evaluate an investment while the dollar limitation thresholds just measure the investors' ability to absorb loss for long periods of illiquidity, with less disruption to their lifestyle. SEE COMMENT IN # 85 BELOW.** *Do such tests indicate whether an investor has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of a prospective investment*? **We believe the answer to be no. Professionals such as attorneys, CPAs, FINRA registered principals, Registered Investment Advisors, due diligence professionals, etc. as well as investors who have regularly invested in private placements (possibly set forth a threshold aggregate amount) and investors who own more than nominal positions in listed securities, derivatives or bonds (possibly set forth a threshold amount) should be able to qualify as Accredited Investors based upon their relative expertise, even if their assets or income are below the currently prescribed levels (assuming they would have sufficient liquidity to invest at some prescribed level).**

Should the $1M net worth or the $200K income level be lower where the person involved: (a) is sophisticated and can prove it (attorneys, CPAs, FINRA registered principals, etc.): and, (b) has sufficient liquid assets so that investing $10,000 to $50,000 only utilizes 10% of their liquidity or net worth? An Accredited Investor at the new lower limits would simply be investing less than Accredited Investors that have greater income or greater assets, in accordance with their reduced level of exposure in investment amount. SEE ALSO THE RESPONSE TO # 85.

THERE IS ALREADY A PRECEDENT FOR SUCH LIMITATIONS, ADOPTED IN THE CROWD FUNDING LAWS OF THE JOBS ACT. THE EXPANSION OF THE BASE OF ACCREDITED INVESTORS ON A RESPONSIBLE LEVEL ADDS MORE TO THE POTENTIAL INCREASE OF AVAILABLE CAPITAL FORMATION THAN ANY OTHER PROPOSALS RELATED TO RULE 506.

Conversely, NIBA believes that the absence of financial sophistication should preclude some investors from Accredited Investor status, despite meeting the minimum financial qualifications, *i.e.,* lottery winners or inheritors of estates lacking financial acumen. These individuals, without a QUALIFIED purchaser representative should be prohibited from such investments.

With general solicitation bombarding Accredited Investors who have not recently, or ever, purchased securities in a Regulation D offering (98% of all Accredited Investors based upon

IRS, FRB, GAO, and Commission provided data), we are very concerned that microcap issuers, especially those who are not being advised by experienced securities counsel, do not have recent audited financial statements, and are not utilizing Broker-Dealers or Registered Investment Advisors, will be prone to both shortcutting the Accredited Investor qualification process and/or failing to determine the suitability of their offering for investors. The over 300 comment letters from issuers, angel investors and venture capitalists already received by the Commission make this argument more explicit, as such commenters are openly providing viewpoints that display the lack of understanding, or impatience with, or disregard for, the regulatory needs of the private marketplace. It is very competitive for small and "tiny" issuers to attract interest to their offerings, and the more these issuers need the money as soon as possible, and the longer it takes to raise money, the more pressure they will feel to shortcut the processes. Many commenters openly oppose any protections on, "whom should tell them what they can do with their own money," **as one commenter stated, while they would probably be the first in line to litigate if something went wrong.**

We cannot envision appropriate investor protection without the safeguards proposed herein.

If not, what other criteria should be considered as an appropriate test for investment sophistication? Also, See the response to question # 99.

The occupations of certain professionals and executives or business owners/operators, should qualify them; the investment experience of certain investors should qualify them. See the suggested example list in the response above. Where an investor qualified as accredited only by income, or only by net worth, is making their first lifetime investment in any Regulation D exempt offering, issuers who are not utilizing Registered Investment Advisors or Broker Dealers need to be subject to a suitability standard similar to the Broker Dealer suitability standard, so that appropriate investor protections are observed. If an issuer is not qualified to ascertain whether an investor is suitable for the investment being offered, they can utilize professionals such as Broker Dealers, Registered Investment Advisors, securities attorneys or CPA's who are familiar with suitability rules, to provide them with guidance as to the suitability of the investor, in a manner similar to the qualification certification of the investor as an accredited investor already provided in the July 10, 2013 Rules as promulgated. Suitability considerations should also ascertain whether the investor can effectively assimilate the risks and relative merits of the offering and evaluate the issuer's business prospects.

98. Are the current financial thresholds in the net worth test and the income test still the appropriate thresholds for determining whether a natural person is an accredited investor? **NIBA believes the answer to be no (see our previous comments and in #99 below). We believe those thresholds are outdated and do not reflect sufficient criteria that should be determined in evaluating who should be an**

Accredited Investor. The Commission should adopt a new standard that allows lower thresholds for smaller investment amounts, for financially sophisticated investors, allowing more persons to make limited size investments and the opportunity to invest but precluding obviously unqualified investors irrespective of asset size without a qualified purchaser representative. For investors relying on purchaser representatives, there need to be limits on amounts, that can be invested which are relative to the investor's net worth and/or income. Investors who do not meet the current net worth and income tests should be subject to the same limitations on investment amount. We believe this would be far better than the outdated and incomplete current standard. Professional experience, academic credentials, and investment experience with private placements and frequent listed and OTC securities transactions should all be considered in qualification of accreditation for investors AT SOME LEVEL OF INVESTMENT defined as a percentage of net worth or income. *Should any revised thresholds be indexed for inflation?* **We believe the answer to be No—the Commission should review the thresholds every three years, and revise as and if needed. Miniscule annual threshold modifications provide no benefit to issuers, investors, or professionals that deal with Regulation D offerings, and such annual modifications are overly costly for the Commission. Since we believe that the dollar limitations are not the most important considerations that should determine whether an investor is "accredited," as previously set forth, the Commission's review each third year would include determinations of all the criteria for the qualification of Accredited Investors, not just dollar thresholds. (SEE COMMENTS TO #97).**

99. Currently, the financial thresholds in the income test and net worth test are based on fixed dollar amounts (such as having an individual income in excess of $200,000 for a natural person to qualify as an accredited investor). Should the net worth test and the income test be changed to use thresholds that are not tied to fixed dollar amounts (for example, thresholds based on a certain formula or percentage)? **In keeping with previous comments, we believe the answer to be Yes. The Commission should consider income and net worth tests tied to "limitation" formulas, similar in nature to what Congress approved in the Jobs Act related to crowd funding. The Income definition should be enhanced to include nontaxable income sources such as return of equity, or return of capital, from such events as the repayment of debt due or sales of assets or inheritance or family gifts, where the predominant proceeds are not taxable income. Investors that do not meet the income test *versus* their tax returns may have substantive income to reinvest over shorter periods of time. The $200,000 income level should not be the income determinate alone for the income qualification. Many investors who are making over $120,000 per year in many lower cost of living geographic locations have more disposable income than investors making $200,000 per year in higher cost of living geographic locations. Many investors who have $200,000 plus incomes are spending disproportionate amounts on housing costs and installment debt while**

other investors whose incomes are $120,000 are able to save more over time and liquidate invested funds should they experience a loss of some or all of any investment.

Current IRS statistics[3] clearly indicate that the number of incomes above $100,000 but below $200,000 are just under 14,000,000 in 2010, with total cumulative income of $1.9 Trillion, which is approximately TRIPLE the number of persons with income above $200,000, and about 83% of the total cumulative income of the over $200,000 group. Opening up, with appropriate cross-limitations and restrictions, an additional 14M persons to the opportunities of evaluating whether private investments requiring Accredited Investor qualification are appropriate for each investor is in direct line with the intent of Congress in enacting the new laws for facilitating capital formation. It significantly enhances small business access to capital. Allowing investments for substantially smaller amounts per investment, through the various percentage limitations as described above, would allow more issuers to attract more capital with appropriate dollar risk parameters for the investors whose incomes or assets make them appropriate investors, but not in such larger amounts as have been typically invested in Regulation D offerings in the past. These would obviously be conducted in coordination with the other procedures and stipulations advanced in our other comments, related to disclosure documents, timing, filing information, *etc*. In making determinations, we cannot eliminate the considerations related to "Disposable Income" versus investment capability to absorb risk. An investor relying on the $200K income requirement in Manhattan or San Francisco, after taxes and housing and transportation expenses, has predominantly less total discretionary and otherwise disposable income than does an investor making $130K in Henderson, Nevada, Sebring, Florida, or Waco, Texas and are less able to replace any losses as quickly because losses are replaced out of disposable income and cash flow and not reported income. To be equitable yet protective, the structure will be complex, but the principles involved are clear and the Commission needs to utilize all the parameters that are already part of suitability and fiduciary standards existing in the investment industries.

85. *Is investor confusion (or confusion by the general public) a concern with respect to a private fund's general solicitation materials?* **We believe the answer to be No.** *If so, what is the specific nature of that confusion given that ultimately only accredited investors may invest in private funds engaged in a Rule 506(c) offering?* **Confusion is not a concern; what is concerning is the Commission's apparent view that because an investor is accredited they will be more financially sophisticated or informed, and that view is neither borne out by history nor evidenced by the case studies of tens of thousands of actions in courts or arbitration forums throughout the United States. Only a small sector of persons with incomes above $200K, or net assets above $1M, achieved that income or status as a result of, or in conjunction with, the use or acquisition of knowledge**

[3] IRS 2010 Statistics of Income

that would be considered to be financially sophisticated. The $200K and $1M thresholds in the past were more an indicator of an investor's ability to withstand the loss of an investment or illiquidity for lengthy periods. If history has taught us anything, it's that the amount of money someone makes or possesses, in most cases has little to do with the level of their financial sophistication. Of the approximately 4.3M persons[4] who make more than $200K, a very small percentage are in professions or businesses that require financial sophistication and an even smaller percentage of those in non-professional or non-financial related businesses have become financially sophisticated over their lifetime. The Commission should not overly place confidence in the concept that the ability to sustain a loss as an Accredited Investor is remotely equivalent to the ability to judge and analyze the merits and risks of the investment opportunity. It is just as likely or unlikely that a person reporting $130K income and $500K net worth in Gillette, Wyoming, is as sophisticated and able to assess the risks of an investment in any Regulation D offering, and has the ability to withstand the illiquidity for an extended period of time, or loss of, a $25K investment, relative to their income and net worth, and their disposable income cost of living in Gillette, *versus,* an investor in New York City or San Francisco with a $300K joint income or $1M net worth of a $50K investment relative to their income, net worth and the cost of living in Manhattan. The Commission should modify its whole position from the minutia of dollar thresholds or inflation adjustments, to who can afford to make such investments at "some level" of investment risk that can readily be defined at different percentages of liquid net worth and total net worth, or as a percentage of already invested risk capital funds; and, based upon real professional or investment experience that can be verified just as readily as the process for verifying accredited investor qualification already promulgated on July 10, 2013 by the Commission.

KEY ISSUE #2:

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?*" **We support the REISA general comments in its letter to the Commission on this topic (see REISA letter), and do not believe that there is any offsetting usefulness to the Advance Form D. In addition, we are most anxious to read the Commission's response to the House Financial Services Committee letter of July 22, 2013, which includes a challenge to the Commission's Proposal on the grounds that no provision in the Law, as passed, would allow the restriction of any period of time related to advertising and general solicitation.** *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?* **We believe the answer to be No. No Advance Form**

[4] IRS STATISTICAL 2011 REPORT

D should be required, so the time period is a moot question. We believe it to be void of any real value with no apparent benefit.

2. *What should the consequences be for failing to timely file an Advance Form D for a Rule 506(c) offering?* ***We*** **do not support the use of an Advance Form D, but if one were required any consequence should be administrative in severity, and not disruptive to investors, past or current.** *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?* **We believe the answer to be emphatically, No. We could never support the use of penalties for what we believe to be administrative violations. Penalties should be reserved for civil fraud or criminal violations.**

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,53 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? **We do not support the requirement of an Advance Form D, as previously recited (also, see House Financial Services Comm. letter).**

4. Should issuers be permitted to file an Advance Form D even if no specific offering is contemplated? Why or why not? **No—that appears to be a complete waste of resources (both the issuer's and the Commission's).**

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? **Issuers should always be provided with alternative options, but this is one of the reasons that WE CANNOT SUPPORT THE INCLUSION OF AN ADVANCE FORM D REQUIREMENT: no matter what time frame is set there is no consequential benefit to investors or to the information that the Commission seeks, all of which can be gathered in a different manner and at a different time. The Commission will be unable to review more than a handful within a reasonable time, whether the time is a 15 day period, a 21 day period or a 30 day period. Therefore, all of the same information will be available to the Commission anyway in the first Form D filing after the first sale, so there is no benefit to the Commission from an archiving of information for future analysis; and, the cost and time expenditure to the issuers, the Commission, and any Broker Dealers involved is therefore unnecessarily burdensome.** *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? **Should the Commission require the Advance Form D, which we oppose, while we believe that more issuers would choose this option than the other options, we see no obstacles to providing all these options to issuers. We recommend the Commission place checkboxes on the Form D so that upon the initial Advance Filing of the Form D (if it were required and which we oppose), the issuer would check the option they expect to use. (If they change their mind later, they would be required to file an amendment with the new choice.)** *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 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?* **We believe the answer to be Yes. The Commission would not be obtaining the best information about the capital formation process. While it might receive more information on offerings that will be advertised, many may never come to market, thereby making such information less useful in assessing the effectiveness of 506 (c) in facilitating capital formation, which was the intent of Congress.**

6. What would be the benefits of requiring the Advance Form D for Rule 506(c) offerings? **WE SEE NO BENEFIT-- It's a mine field for the Commission to require an Advance Form D.** *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?* **Whatever the costs and time were, any cost would be unnecessarily redundant and burdensome.** *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?* **Yes, none of which are appealing consequences, which is another reason to abandon the concept of Advance Form D filings.**

7. Would potential investors or other market participants review Advance Form D filings on a real-time basis? **WE ARE NOT SUPPORTIVE OF AN ADVANCE FORM D FILING, but if such were required then the answer would be Yes.** *If so, how would they use the information in the filings?* **Some investors and most Broker Dealers and Registered Investment Advisors could compare the information on Form D's *versus* the advertising and general solicitation content, and eventually, against disclosure document and due diligence information, but it would not be any more useful than a concurrent or subsequent filing.**

. *How would state securities regulators use the Advance Form D filings?* **If an Advance Form D filing is required, we see no reason why it would need to be filed with the states. It would not yield any more benefit than concurrent or subsequent filings.**

8. Are there situations in which an Advance Form D filing should not be required? If so, what are these situations? **We believe in all situations; there should never be a need for an Advance Form D filing.**

11. Should we require a closing Form D amendment for Rule 506 offerings, as proposed? **We believe the answer to be yes but only in situations where general solicitation is undertaken.** *Should the closing amendment requirement apply to all Regulation D offerings, as was the case when Regulation D was originally adopted?* **Yes, in cases of general solicitation. We see no reason to change the existing filing requirements of Regulation D for non-general solicitation offerings.**

Alternatively, should the closing amendment requirement apply only to offerings under new Rule 506(c)? **See immediately preceding answer.** *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?* **We believe it should only be required where general solicitation is implemented.**

12. As proposed, a closing Form D amendment would be required to be filed not later than 30 calendar days after the termination of a Rule 506 offering. Should we use a different time frame for the filing of the closing Form D amendment? If so, why and how long? **The Commission should probably extend this deadline to the 45 day to 60 day range. Investors, Registered Investment Advisors and Broker Dealers are probably best served by maintaining a period of time for issuers filing a Closing Form D amendment that is reasonably proximate to the actual timing of termination of the offering; however, with all the various sources of input from the professionals involved with any offering, including internal issuer accumulation of data for the accurate filing of the closing Form D amendment, we believe 30 days is now too short a period, and would be overly burdensome, especially for larger issuers of larger offerings with hundreds of investor information to accurately report.**

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)? **We believe this to be a totally impractical penalty. Losing an exemption after the fact would create sheer chaos. While we endorse, as our comments herein state, a closing Form D for offerings where general solicitation is implemented, the failure to file a Closing Form D amendment should result in a different less disruptive penalty to the issuer, if any, that will not incur harm, cost or dilution to the offering investors or existing non-affiliated pre-offering shareholders or partners, nor create potential litigation for the issuer. If anything (and we are not advocating for penalties), penalties should only relate to future capital formation events or offerings of the issuer. This could entail suspension of the availability of general solicitation for future offerings for a certain period of time, no more than three (3) months for a first offense.**

15. What would be the costs to issuers of filing a closing Form D amendment? **While it is difficult to pin point an actual cost of filing a Closing Form D, we don't believe the cost to be substantial as**

the information required would be limited with the filing a purely administrative function.

Would a requirement to file a closing Form D amendment deter issuers from conducting Rule 506 offerings? **We believe the answer to be No. However, when Regulation A revisions are completed by the Staff, we believe that more issuers will opt to utilize Regulation A than in the past to access a larger investor base than Regulation D limitations.**

19. As discussed in Section II.D below, we are proposing amendments to Form D to require additional information, primarily with respect to Rule 506 offerings. After an issuer files a Form D that includes this additional information, any change to this information (for example, a change in the number of purchasers who qualified as accredited investors or the methods used to verify accredited investor), would generally require the filing of an amendment to Form D under current Rule 503. Should the Commission amend Rule 503 so that an amendment to Form D would not be required when there is a change to some or any of this information? If so, which information and why? **Amendments to Form D should be required only when the nature of the information to be amended is material to an offering in the same manner that such disclosure would be reviewed by the Commission in commentary to disclosures in registration statements, and the opinion of issuer's and/or placement agent counsel, that disclosure would be necessary to make the representations and terms of the offering not misleading.**

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? **We believe the existing Regulation D filing requirements to be sufficient with the inclusion of a Closing Form D where general solicitation is implemented.**

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? **We do not believe so. This would not protect investors nor provide the Commission with the information it seeks.**

25. Should the presentation of information in a closing Form D amendment be different than in an initial Form D filing or in other Form D amendments? If so, how? **Only for Rule 506(c) offerings and should require information relating to the offering that is now required under Form D with the possible addition of some categories.**

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? **The amendment filed to terminate the offering would serve as the closing amendment. See comments in #25.**

28. Should we require issuers to provide additional information in Form D filings as we have proposed? **See comments below.** *Should this additional information be required only for Rule 506(c) offerings?* **We believe the answer to be No, with the exception of information currently required as to Broker Dealers and "Finders." Information relating to counsel and auditors does not seem relevant to a form filing.** *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?* **See answer above.** *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)?* **We believe that any additional information should only apply to Rule 506(c) offerings while leaving the present filing requirements for other Rule 506 offerings the same.** *Are there particular items of information that do not provide sufficiently useful information or would be especially burdensome for issuers to provide?* **We believe that only those Broker Dealers who are or have received compensation for the offering should be disclosed.** *Should some of the additional information that we propose to require in Form D not be required for offerings under Rule 506(b)?* **We believe that there is no reason to provide additional information other than for Rule 506(c) offerings.**

29. What are the costs or burdens on issuers in providing the additional information in Form D, as proposed? Are there ways to reduce any costs or burdens on issuers? Would the requirement to provide this additional information result in issuers choosing not to rely on Rule 506 to raise capital? **The additional information is readily available to any issuer contemplating, or initiating, an offering, so it is not burdensome, and would not generally affect an issuer's decision to use or not use Regulation D 506 (c). Many other more significant factors go into that decision than the additional information requirement.**

30. Should some of the additional information that we propose to require in Form D be required only in the closing amendment to Form D? **Yes, as stated in the comments to # 25 above.**

31. Should the Commission define what it means for an issuer to make information publicly available for purposes of Item 5, or to take reasonable efforts to maintain such information as confidential? For instance, would confidential information about an issuer that is publicly disseminated by a third party in violation of a duty to keep such information confidential be deemed to be publicly available? **In most cases, Yes. Once it's out, it's out, irrespective of whether it should have been disseminated, or how it became publicly available.**

32. Should the Commission amend Item 5 to require an issuer that conducts a Rule 506(c) offering to provide information on its revenue range or aggregate net asset value range, as applicable, regardless of whether the issuer has otherwise made this information publicly available (for example, by including this information in general solicitation materials)? **As Rule 506(c) offerings can only be sold to Accredited Investors, issuers should not be required to disseminate additional information on Form D.**

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? **Yes,** *Should there be other changes to Form D to indicate that an issuer is filing an Advance Form D or a closing amendment?* **No.**

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)? **As "bad actors" can no longer avail themselves of Regulation D, it still might be relevant to have the information disclosed as to those acts where a time period has elapsed enabling these individuals to then avail themselves of the Rule 506 exemption.**

35. Should pooled investment funds be required to provide additional or different information in connection with Rule 506(c) offerings? **Yes, the identity and web site or address of the manager, and if it is an affiliated entity, external, or inside management; names, registration numbers, if applicable, type of fund, and assets classes focus. FINRA has recently issued NTM 13-26, which raises some due diligence type questions which would be appropriate to adopt for fund issuers in their Form D disclosures. Consistency should be an objective of the Commission staff, especially since approximately 88% on average from year to year of all funds capitalizing Rule 506 offerings are generated through Broker Dealer channels.** *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?* **Yes, this is a nominal addition that has no cost or downside.** *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?* **Both the promoter and the adviser should be disclosed, and whether affiliated parties will engage in wholesaling or direct sales activity.** *Does the proposed amendment to Item 3, requiring disclosure of any controlling persons, raise any particular concerns for pooled investment funds?* **Yes, but it needs to be disclosed.**

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? **Issuers know what means they are contemplating using before they use them so they should be willing to disclose what they are using at the time they file the Advance Form D, and amend Form D if they add an activity.** *Do certain methods of general solicitation raise particular concerns from an investor protection standpoint?* **If the general solicitation is not formatted with content and disclaimer according to the guidelines to be adopted and anti-fraud laws, then all methods are equally susceptible to investor misunderstanding, and are all equally concerning, despite their compliance with the applicable Law.** *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?* **All methods are going to reach non-accredited investors, so issuers will be responsible for qualifying Accredited Investors. It is possible that high pressure oral solicitation of Accredited Investors poses a larger risk of fraud than all other forms of prepared video, audio, or written advertisements, which would have specific legends, disclaimers and controlled content.** *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? **Issuers should be required to provide specific information on what forms of solicitation they are going to use, and file amendments when they add an activity.**

KEY ISSUE # 3

62. Do the proposed legends and required disclosures appropriately inform potential investors as to whether they are qualified to participate in Rule 506(c) offerings, the type of offerings being conducted and the potential risks that may be associated with such offerings? If not, how could they be revised to do so? **The intention of a "legend" is to provide an investor with an unmistakable "warning alert" that the subject of the legend needs to be further considered; further consideration in this case means the information that will be found in the complete disclosure documents of the offering, as well as the investor's ability to ask management of the issuer any questions they may have, and receive appropriate information that such answers have a reasonable basis of reliability. Legends and the related disclosure statements proposed by the Commission should adequately provide interested investors with the incentive to seek further information for consideration of an investment. The actual definitive disclosures should be set forth in the disclosure materials and not in the Legends.**

Should additional legends or disclosures be required and, if so, what should these additional legends or disclosures be? **We believe that any additional legends and disclosures should be left to the discretion of the issuers, their Broker Dealers and their respective counsel.**

If anything, we believe the Commission should require a short version of legends and disclosure statements.

63. Should we have specific requirements for the legends and disclosures, such as for type size, type style, location and proximity? If so, what should they be? **Unfortunately yes, because there are so many small and "tiny" Regulation D filing companies (according to the Commission's analysis, they represent the predominant majority of filers) that do not use advisers such as attorneys, Broker Dealers or Registered Investment Advisors, the Commission needs to set standards. The standards should require the type size and font for print ads in any format or medium (whether that print is in a digital or paper media) to be no smaller than the type size and font used by the advertiser to state the Offering amount, the name of the offering and type of securities being offered. If the ads are in video format, then the Commission's proposed Legends and Disclosure statements should be flashed at the bottom of the screen during the entire length of the ad, in font size, type and color that is visible from the distance appropriate for that medium, *i.e.,* television ads would likely have a different type, size and color font than video intended to appear on a computer monitor, and again different for a smartphone application. Viewers are used to seeing such flashing messages in other types of video advertisements. Again, if the ad were a minimal disclosure ad, then a "short form" of the Commission's**

Legends and short Disclosure Statements would apply to the ad, but if the ad were more than a minimal ad, a longer version would apply, as defined in the previous comments.

Radio or telephonic audio only ads present a different challenge, as listeners may not hear an entire ad; therefore the legends and disclosure statements should be stated both before and after the content of the ad.

Oral general solicitation poses the most obvious challenge in that the investor, even one who is interested and gives his permission to have further conversation, or who takes a number to call or a WEB site to visit, may hang up before the issuer's caller finishes reciting the legends, let alone the disclosure statements even in short form. In general, issuers' personnel are not licensed Brokers or RIA's, nor generally were they such in their past experience, so they are not going to be as generally experienced in soliciting Accredited Investors. We believe that it is impractical for the Commission to expect that any manner of enforcement could be potentially effective to ensure that phone or in person contact by personnel of an issuer to investors would be within the Commission's requirements. We therefore believe that direct phone or in person solicitation of previously unknown Accredited Investors by issuers be excluded from permissible forms of general solicitation.

Only licensed Broker Dealers or state or Commission licensed Registered Investment Advisors should be allowed to generally solicit previously unknown Accredited Investors by phone or in person, as they are bound to numerous standards as a condition of their licensing and in the case of Broker Dealers and dually licensed Investment Advisors and Registered Investment Advisors (which represent 88% of all Registered Investment Advisors and Investment Advisors according to Commission releases) are further overseen by FINRA. As such, the investing public is more protected, and the Commission has predictable enforcement standards, for general solicitation by phone or in person if such oral solicitation is limited to licensed professionals.

Alternatively, should we require the legends and disclosures to be presented in any manner reasonably calculated to draw investor attention to them? **Should the Commission adopt the standards suggested above, we believe that the attention is sufficiently drawn.**

64. Should we define the types of communications that constitute written general solicitation materials for purposes of the proposed requirements of Rule 509? **The Commission can utilize existing rules for definitions of written general solicitation materials, such as those that cover written communications related to mutual funds, Broker Dealers, Registered Investment Advisors and pooled investment funds. There is no need to reinvent the wheel. Use the same rules so there is consistency in the standards. The last thing issuers and Broker Dealers and RIA's need**

is a different definition than what exists in other areas of regulation. *Should we specify that the term includes any electronic communications?* **Yes.**

65. Should comparable disclosure be required to be provided in oral communications used in a Rule 506(c) offering that constitute general solicitations? Why or why not? **Our response depends on who is making the oral communication? If it is an issuer representative, then we have stated our prior comment that there can be no practical enforcement by the Commission of such conversations or an ability to determine who said what in an after the fact analysis. SEE COMMENT 63 ABOVE.**

Comparable disclosure, even for Registered Investment Advisors or Broker Dealers, will be difficult to administer on an initial phone call or meeting, since such call or meeting would be devoid of presentation of the disclosure documents, as the presumed context of the initial contact would be to determine if the investor had any interest in learning more about the offering and whether the investor were accredited. Comparable disclosure may not be possible even for the most experienced licensed persons in oral or in person settings, and even if it were, the Broker's version of the communication and the investor's version of the communication, in the aftermath, are likely to be considerably different should a future dispute arise. The Commission has to rely on the licensed FINRA member or Registered Investment Advisor's enforcement when it comes to oral solicitation in general solicitation of previously unknown accredited investors. It's too deep a hole to dig for issuers' personnel. Please avoid this abyss.

Should the legends and required disclosures be required to be included in all offering materials or just the materials used in connection with general solicitation activities? How would issuers provide such disclosure? **With the approval of advertising and general solicitation in Rule 506 (c) offerings, the advertising and general solicitation materials have now become an integrated part of the offering materials and disclosure of the offering, *de facto*, and therefore all such materials become part of the disclosure documents provided to investors. There is no low ground or middle ground here; once an advertisement is in the public domain, and once general distribution materials have been utilized, inclusive of all the legends and short disclosure statements affixed thereto, an investor needs to have all of those materials as part of the digital or hard copy disclosure documents and amendments that the issuer is providing prior to the investor's execution of subscription agreements. The Commission can't allow some investors to be aware of ads or solicitation materials, while other investors may not have seen or heard them. Every investor should be provided with the same disclosures. Selective disclosure or accidental disclosure is not an option. (Audio and video materials can be provided in written script form, or as digital files in their original video or audio content).**

The Commission also needs to be sensitive to Broker Dealer or Registered Investment Advisor assisted offerings; its decisions as to issuer guidelines will result in added liability to Broker

Dealers and Registered Investment Advisors, not just monetarily, but in potential litigations that are instituted as a result of the rules and procedures now being established. Without the suggested modifications and comments as recited herein, the Commission would be acting against the Broker Dealers and Registered Investment Advisors interests that it governs.

66. Are there alternative methods for encouraging important explanatory information regarding performance to be given sufficient prominence in written general solicitation materials? **The Commission will undoubtedly receive many comments related to alternative methods. In the end, there is no substitute for the "investor's perspective" in interpreting any ad or general solicitation--- that could replace the basic "WHO, WHAT, WHERE, WHEN, WHY, HOW AND HOW MUCH".** *Would mandated legends be helpful in mitigating concerns regarding fraudulent statements in written general solicitation materials?* **As previously recited.**

67. The proposed amendments do not specify the precise wording of any required legends. Is that appropriate? Or should we require specific wording? If so, what would that be? **The wording of the required legends should be similar, if not the same, as the language provided as examples in the request for comments, as presented by the Staff. However, LEGENDS ARE NOT GOING TO PROVIDE QUALITY IN CONTENT OF ADS AND WILL ONLY MAKE PRINT OR VIDEO MORE EXPENSIVE, AND NOT MORE EFFECTIVE. The Commission needs to proactively suggest the <u>nature of the content</u> of ads. Keep it simple, again, "WHO, WHAT, WHERE, WHY, WHEN, HOW AND HOW MUCH."**

71. As proposed, private funds would be required to include a telephone number or a website where an investor may obtain current performance data. Is this requirement appropriate? **Yes.** *Should private funds be required to provide performance information on a website?* **Yes.** *Should private funds be allowed to restrict access to such website through the use of passwords or other measures?* **Yes. Access to information that would otherwise only be available to investors in the fund should be protected by username and password encrypted technology.**

84. Is there a concern that, without content restrictions, materials used as part of general solicitations may vary depending upon who is selling the product (e.g., a broker-dealer's material subject to FINRA rules may differ from an issuer's materials)? **There cannot be differences in content. That is totally inconsistent with investor protection. IF SUBMISSIONS WERE TO BE REQUIRED, WHICH WE OPPOSE, THEY SHOULD ALL GO TO FINRA. The Commission has already sent certain non-broker dealer functions to FINRA (RULE 6490), so there is already a precedent for such action on the part of the Commission, and FINRA is in charge of all submissions for Broker Dealer originated or edited selling materials. (We do not believe FINRA has the near term ability to monitor such filings either, but if required to do so, will have to devise methods of handling the new responsibilities just like they are endeavoring to handle Rule 6490 requirements—albeit not generally consistently or sufficiently yet). There is also the cost of such submissions to consider, and smaller issuers are going to be especially resistant to any costs related to such filings.**

KEY ISSUE # 4

91. Should written general solicitation materials be required to be submitted as an exhibit to Form D? Why or why not? **No, the written solicitation materials need to be provided to each investor prior to the investor's executing a subscription agreement, because it is in each investor's interest to be provided full disclosure. It is not the concern of the general public or non-Accredited Investors, and therefore any posting of such materials on any portion of the Commission's website, is inappropriate.** *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?* **No. The opportunity of increased criminal activity and fraud would far outweigh any benefit from the Commission's website. Foreign perpetrators and internet fraud are simply uncontrollable risks, especially for private issuers, which should not be fostered. In addition, the materials should be required on the issuer's website as previously recited, so the Commission's website presence would be redundant and an additional cost to the Commission for which there is neither offset nor benefit. In order to go to Edgar to view an issuer's filing, users would need to already know the name of the issuer, so they could just as readily go directly to the issuer's website.**

If the Commission decided to require submissions, it would seem that it would be necessary to create a new section of its website that would list and contain the digital files of all past and present advertisements and general solicitation for each offering and issuer submitting them and archive them indefinitely. We question whether the Commission has the current resources and near term financial support of Congress for such a project. <u>Without such a listing and content provision, submissions are a moot subject.</u>

94. As proposed, only the issuer relying on Rule 506(c) would have an obligation under Rule 510T to submit written general solicitation materials to the Commission, even if the materials were prepared and disseminated by an offering participant on behalf of the issuer. Should this requirement extend to the submission of all written general solicitation materials used by other offering participants in the same offering? Would this requirement further the Commission's assessment of the market practices used by issuers in Rule 506(c) offerings? **No prior submissions should be required at ALL.**

KEY ISSUE # 5

101. Should an issuer subject to the reporting requirements of Sections 13 or 15(d) of the Exchange Act be permitted to use Rule 506(c) if it is not current in its reporting obligations? **We believe the answer to be No—506(c) should not be available to delinquent issuers; non-current issuers cannot be afforded any privilege prior to their returning to current reporting status. Non-current issuers would have to use other exemptions within Regulation D if they chose to seek capital through**

non-registered offerings. UNDER NO CIRCUMSTANCE SHOULD THE COMMISSION PERMIT ADVERTISING AND GENERAL SOLICITATION FOR NON-CURRENT ISSUERS.

We appreciate the opportunity to respond to the questions posed by the Commission and respectfully submit our responses.

Please refer any questions to Gerald A. Adler, Esq., or Michael Scillia, both Directors of NIBA and drafting Committee Co-Chairmen, or Mary O'Hara, Esq., NIBA Co-Chair of Legislative Committee, at the emails below.

[redacted] **or** [redacted] **or** [redacted]

Respectfully submitted,

The NIBA Board of Directors