September 23, 2013

Via E-mail (rule-comments@sec.gov)

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

Re: SEC File No. S-7-06-13
Comments on Proposed Amendments to Regulation D, Form D
and Rule 156 Under the Securities Act Offerings

Dear Ms. Murphy:

The Small Business Investor Alliance ("***SBIA***") is submitting this comment letter in response to the request for comments made by the Securities and Exchange Commission with respect to the proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act of 1933 (the "***Proposals***").

SBIA is the national trade association that develops, advocates and supports policies that benefit investment funds that finance small businesses and the investors that provide capital to these funds. These funds and investors are SBIA's voting members. Fund members are comprised of funds that have been licensed or are seeking to be licensed by the U.S. Small Business Association ("***SBA***") as small business investment companies ("***SBICs***"), funds that are registered as business development companies ("***BDC***s") under the Investment Company Act of 1940, and other private funds that invest in small businesses. Each member fund must be organized under the laws of a U.S. state or the District of Columbia and must have a primary purpose of investing in small businesses primarily located in the U.S. Our member funds, other than BDCs, generally have between $100 million and $225 million under management (which

amounts include, in the case of SBICs, leverage that the SBICs obtain from SBA and invest). The investor members are all institutional investors, including banks and family offices, that invest in such funds. SBIA started in 1958.

Our private fund members in making their offerings and sales of interests overwhelmingly rely on Rule 506 for the exemption from registration under the Securities Act of 1933 and on either Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940 for the exemption from registration as an investment company. Most of these funds currently restrict their sales to natural persons and entities that qualify as "accredited investors" as defined in Rule 501 ("***Accredited Investors***"). SBICs overwhelmingly restrict their offerings to natural persons and entities that qualify as both Accredited Investors and "institutional investors" as that term is defined in the SBIC regulations promulgated by the U.S. Small Business Administration ("***Institutional Investors***").[1]

Compliance with additional regulations requiring the gathering and reporting of information is more burdensome and costly for smaller funds. To comply, a smaller fund may need to hire additional staff or ask existing staff to increase responsibilities, in addition to the potential need to request assistance of outside counsel. New obligations add to the cost of doing business for a smaller fund, which in turn could negatively impact their ability to invest in small businesses. It was the clear Congressional intent of the JOBS Act to reduce regulatory barriers to capital formation for small businesses, but this proposal, as currently drafted, runs counter to the law and its intent. Instead of creating reasonable regulatory relief, the new rules would add new burdens, create new regulatory risks, and appear to be designed to ensure that informed small business investors will not avail themselves of the relief Congress intended.

To this end, and as set forth in our more specific comments below on the Proposals, we request that the SEC only adopt changes to Regulation D, Form D and Rule 156 that will not create new burdens and costs on private funds investing in small businesses, particularly those funds that will continue to rely on Rule 506(b) for their offerings.

<u>Accredited Investors</u>

[1] See 13 CFR §107.50. Institutional Investors can be most forms of business entities with a net worth of at least $10 million, or banks or savings and loan associations or their holding companies, insurance companies, pension plans for private or public sector employees, and tax-exempt foundations or trusts, in each case with a net worth of at least $1 million. Institutional Investors also include natural persons with a net worth of at least $10 million (exclusive of the equity of their most valuable residence) or a net worth of $2 million if the amount committed to be invested does not exceed 10% of their net worth (in measuring a natural person's net worth the value of any equity in the person's most valuable residence is excluded).

Accredited Investors are supposed to be investors that are capable of making decisions for themselves and are qualified to evaluate the risks and merits of an investment. It is for these reasons that an issuer selling securities under Rule 505 or Rule 506 is required to provide to investors that do not qualify as Accredited Investors the information set forth in Rule 502(b). Newly adopted Rule 506(c) permitting the use of general advertising and general solicitation requires that a condition to its use is for an issuer to take reasonable steps to verify that purchasers of the offered securities are Accredited Investors. We understand and accept the reasons for this; however, this new amendment to Rule 506 should not make the burdens on other issuers that are not relying on Rule 506(c) any more burdensome that existed prior to the adoption of that amendment. In taking this position, we understand that Rule 506(d) has been amended to eliminate use of Regulation D by felons and so-called bad actors, which is required to implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("***Dodd-Frank***"). Accordingly, we understand the reason for the proposed amendment to the signature block to Form D to include a certification that issuers claiming a Rule 506 exemption for its offering confirm that the issuer is not disqualified from relying on Rule 506.

Form D

SBIA believes that its fund members are unlikely to avail themselves of Rule 506(c), because it is not clear that any general solicitation or advertising will assist them in reaching the type of investors they are seeking, generally those with substantial net worth that are prepared to invest substantial amounts of money in the fund. SBIA member funds usually set a minimum target investment of $1 million per investor, and these member funds rarely accept less than $100,000 from any investor. As a consequence, our comments focus on offerings by funds that rely on Rule 506(b).

Request for Comment 9. You ask whether you should require an Advance Form D filing for all Rule 506 offerings. SBIA strongly opposes any filing requirement of Form D before the commencement of an offering under Rule 506(b). To require such a pre-filing would require the issuer to make a publicly available disclosure prior to its determining whether there is any sufficient investor interest in the fund. It would discourage new funds from testing the market because of the stigma and embarrassment that is likely to attach to not being successful. This would be a very undesirable change. SBIA strongly supports the current requirement for Rule 506(b) offerings that is an initial Form D filing no later than 15 calendar days after the first sale of securities.

Request for Comment 11. You ask whether you should require a closing From D amendment for all Rule 506 offerings. While SBIA understands that the SEC has an interest in compiling certain statistical information, SBIA does not believe that an issuer availing itself of Rule 506(b) should be required to file a final amendment within

thirty calendar days after termination of the offering. Such a closing amendment puts in public hands information about the fund that many funds wish to keep private. This requirement adds burdens onto the existing exemption that are not called for by Dodd-Frank. While perhaps such a termination notice may be justified in connection with Rule 506(c) offerings because of their public solicitation and public advertising aspects, SBIA does not believe that any of the same logic is or should be applicable to private funds relying on Rule 506(b). Rule 503(a) requires that amendments to a Form D be made under the circumstances specified. In particular, the issuer must file to correct a material mistake of fact or error in the previously filed notice. In addition, an annual filing is required if the offering continues beyond one year. Moreover, that annual filing requires an update of all information. We suggest that this is sufficient and obviates the need for any final filing. SBIA strongly believes that the information in a closing Form D amendment provides to competitor funds information to which they are no entitled and which could be used to the disadvantage of the issuer. By way of example, it would require disclosure of the amount of securities sold (hence the size of the fund – item 13) and categorization in detail about the types of investors (item 14). This is for most funds sensitive information. In a similar vein, SBIA believes that non-public portfolio companies of funds relying on Rule 506(b) should not be required to disclose publicly information about the amount of securities sold and details about their investors, as this information could be used to hurt the issuer with respect to both competitors and customers. As discussed below, if the information in a closing Form D amendment were kept confidential, the issue would be reduced to the extra burden on a small fund in gathering the required information and making the filing.

Request for Comment 13. For the reasons discussed above, SBIA believes that a closing amendment should not be a condition to Rule 506(b), as a failure to file would vitiate the exemption to satisfy what some might view as "desirable" information, but a private fund and a non-public portfolio company view as prejudicial and burdensome.

Request for Comment 16. You ask for alternatives to filing a closing amendment on Form D. While SBIA continues to believe that filing any such amendment for a Rule 506(b) offering is burdensome and competitively disadvantageous for the issuer, particularly smaller funds and for private companies competitively disadvantageous, if the SEC nevertheless believes that the value of receiving the information outweighs these negative impacts on the issuers, SBIA urges disclosure to the SEC that is not publicly available. That is, submissions should be confidential and not subject to disclosure under FOIA. At very least, an issuer should be able to elect what information it wishes to have protected.

Request for Comment 17. You ask whether a closing amendment should serve as a substitute for amendment filings required under Rule 503(a)(3)(iii) for

informational changes. As noted above, SBIA agrees that a single amendment after termination of the offering reduces the burdens and obligations for smaller funds and issuers and consequently would be desirable; however, as set forth in the Request for Comment 17, SBIA and its members would find this change acceptable only if the disclosures in the final amendment, at least for Rule 506(b) offerings, could be filed confidentially so as to protect sensitive information.

Request for Comment 19. You ask whether, because of the additional disclosures required on Form D, changes to that additional information should require amendment. SBIA views the need to update this additional information unreasonably burdensome. It is clear that a fund that is continuing its offering will, after each additional closing (and many funds use rolling closings after the initial closing), have periodic changes in the sales amounts (item 13) and information about its investors (item 14). SBIA strongly opposes any need to update on a continuing basis this type of information. The information is sensitive non-public information, disclosure of which could hurt an issuer's ongoing fund raising and could be used by competitors against the issuer. If updates are nevertheless required by the SEC, these should be confidential.

Request for Comment 20. You ask whether annual amendments to Form D should suffice. SBIA is under the impression that investors, at least in Rule 506(b) offerings do not rely on the information contained in Form D filings. In fact, SBIA believes that these investors rely on the private placement memorandum of the issuers and questions they ask of the issuer. SBIA believes that the information on Form D, therefore, is not used by investors in making investment decisions. Accredited Investors who have an interest in particular information can request it from issuers and, if a Rule 506(b) offering is being extended to non-accredited investors, the information required in Rule 502(b) must be supplied. As a consequence, SBIA believes that continuing updates serve little purpose, other than as an unnecessary burden on the issuer. SBIA would support a single update upon the termination of an offering, at least for Rule 506(b) offerings, subject to the need for confidentiality noted above. If an offering extends beyond two years, perhaps an additional exception might be appropriate.

Request for Comment 23. As SBIA believes that no investors rely on the Form D filing, it is perplexed as to what the phrase "material mistake of fact or error" means and how it should be interpreted. Moreover, if investors do not rely on this information, SBIA believes that Rule 503(b)(3)(i) should be eliminated. It serves no meaningful purpose other than as a trap for issuers. If the SEC, nevertheless, chooses to retain503(b)(3(i) (SBIA believes it and the rest of Rule 503(b)(3) should be eliminated in favor a confidential amendment filing upon the termination of an offering), SBIA believes a better understanding of the meaning of "material mistake of fact or error" would be useful. In particular, it would be very useful for an issuer to know the kinds and magnitude of information that is material. For example, in item 3 is the addition or

elimination of one related person material? What about two persons? In item 12, what additional number of states is material? What changes in new items 14, 16, 19, 20, 21 and 22 are material? Is anything material that is not specifically excepted in Rule 503(b)(3)(ii)?

Request for Comment 24. You ask whether an amendment to Form D should require the updating of all information on the Form. As previously indicated, SBIA believes that providing information into a publicly available data base can be competitively harmful to an issuer such as a small fund. Consequently, to the extent that any update is required, SBIA believes it should be limited to the item in question. If the information will be treated confidentially, then the SEC should consider the burden of updating all information on a smaller issuer.

Request for Comment 28. You ask whether the additional information being requested on Form D should apply to all filings or be limited to Rule 506(c) offerings. SBIA believes that the additional information should be limited to Rule 506(c) offerings. Issuers in Rule 506(b) offerings are not seeking to use general solicitation or general advertising and should be entitled to confidentiality. SBIA members compete for private dollars, and any information about the issuer and its relative success in its offering that is made generally available can be a competitive disadvantage. For example, competitors can seek to use the information against the fund required to furnish the additional information, particularly any such information that provides information about the amount raised and investors in the fund. In particular, SBIA believes that the additional information being requested in items 14 and 17 of Form D should not be required in Rule 506(b) offerings. In addition, SBIA believes that for Rule 506(b) offerings the SEC should not require issuers to provide more information about the methods used to verify accredited investor status. This information directly relates to how a fund conducts its operations and should not be accessible to competitors.

Request for Comment 31. The Commission should take reasonable steps to maintain such information is confidential and we agree this could be achieved by allowing issuers the option to check a "Not Available to Public" box.

Request for Comment 36. The Commission asks if more or less information should be required on Form D about the methods used in general solicitation used in Rule 506(c) offerings. Private funds that participate in investment industry conferences, seminars or meetings should be exempt from any new reporting requirements. Participants attend investment industry conferences for education and networking purposes to build relationships with other professionals. For example, the SBIA's annual conference called the *National Summit for Middle Market Funds*, brings together over four hundred industry professionals over a three day period. The meeting is attended by fund managers, institutional investors, and a select group of lawyers and

accountants specialized in private equity investing. The vast majority of the participants are members of the same association, in this case they are members of the SBIA, and therefore they are directly linked by their trade association membership. Even the non-member attendees are industry professionals. Private funds that are either in the fundraising or will be in the fundraising process often attend these association events. Fund managers should be explicitly permitted, without new regulatory burdens or risks, to discuss their fundraising efforts and their views of market conditions with other conference participants. Candid discussions or presentations to other industry professionals should not be interpreted to mean the fund managers are "publicly" advertising or soliciting for capital. In other words, the association conferences self-limiting (who else would spend thousands of dollars to attend a private equity conference) and therefore any talk of fundraising should explicitly not be considered a public or general solicitation of other participants. The Commission should make it clear that these types of discussions and presentations at events and conferences for industry professionals will not require participants to submit to reporting requirements, particularly Form D which otherwise requires fifteen days prior to them attending the conference. It is worth noting that it is impossible to predict what questions will be asked from the audience at a conference and a statement of "I am not allowed to answer that because I did not file paperwork 15 days ago" is equally telling and overburdening.

Rule 507

Request for Comment 38. Rule 507 would prevent an issuer from making a Rule 506 offering if the issuer or any predecessor or affiliate of the issuer failed to comply within the last 5 years with the requirements of Rule 503, subject to certain limited exceptions. This rule elevates even minor non-compliance with a substantial penalty. SBIA strongly opposes the future availability of Rule 506 on any failure to provide information under Rule 503 or failure to timely provide information. As previously stated, Form D and the information required under Rule 503 appear not to be used by investors. Thus, both the content and the timeliness of any filing are not particularly relevant from an investor perspective. Rule 507 is, therefore, elevating its informational needs into a severe penalty. If Rule 507 is nevertheless adopted, SBIA recommends that the SEC distinguish in Rule 507 between Rule 506(b) offerings and Rule 506(c) offerings, failures to provide updated information from failing to file any Form D and eliminate penalties on subsequent offerings for late filings. For example, a failure timely to make an Advance Notice filing for a Rule 506(c) offering or a failure to disclose bad actor events perhaps should be the basis for a disqualification for one year. On the other hand, a failure to amend a Form D by reason of a decrease of more than 10% in the minimum investment amount or an increase of more than 10% in the total offering amount appears to SBIA to be punitive and entirely disproportionate to the failure to update the information. Such failures should not be penalized.

Request for Comment 47. SBIA strongly recommends that certain affiliates of an issuer not be considered in determining a disqualification of an issuer under Rule 507. Many SBIA member funds have portfolio company affiliates. These portfolio companies may be affiliates by reason of the amount of securities owned by the fund or the representation of the fund on the portfolio company's board of directors. These portfolio companies generally have their own independent officers who are responsible for day to day operations and their own independent counsels. Such officers and counsel of a portfolio company would be expected to be responsible for securities law compliance, including the use of Regulation D and Form D filings. A private fund should not be denied use of Regulation D for any actions of its portfolio company affiliates with respect to Regulation D compliance. Moreover, a fund should not be in the business of and should not have any responsibilities for reviewing a portfolio company affiliate's compliance with Rule 503 in a Rule 506 offering by that company. To broaden the penalty to an owner fund is punitive and unreasonable. Moreover, it would require a fund to hire attorneys to review in depth the contents and adequacies of the disclosures made in the filings (or failures to file) and the timeliness of the filings made by the portfolio company over the previous five years for its Rule 506 offerings. This is an over-the-top burden that cannot be justified and should absolutely not be required.

If you have any questions or wish further information, please do not hesitate to contact the undersigned.

Sincerely,

Brett Palmer, President
Small Business Investor Alliance