September 23, 2013

U.S Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attn: Elizabeth M. Murphy
Secretary

Re: Release No. 33-9416 (the "***Release***")
File No. S7-06-13

Dear Ms. Murphy:

The Investment Program Association ("***IPA***")[1] respectfully submits this letter in response to the request for public comment by the Securities and Exchange Commission ("**Commission**") on the Release (Proposed Amendments to Regulation D, Form D, and Rule 156 under the Securities Act). We understand that the proposed rules are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506(c) offerings.

Background

Contemporaneously with the Release, the Commission amended Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933, as amended (the "Securities Act") in order to implement Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act"). Title II, Section 201(a) of the JOBS Act directed the Commission to amend its rules for offerings conducted pursuant to Section 230.506 of Title 17 Code of Federal Regulations ("**Rule 506**"), to permit general solicitation and general advertising provided that all purchasers of the securities are accredited investors. Further, the JOBS Act mandated that an issuer conducting a Rule 506 offering with public solicitation take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission.

Summary of IPA's Position

The IPA welcomes the opportunity to provide the Commission with comments on the proposed rules as well as its views on the need to revise the definition of accredited investor under Regulation D. It is hoped that these comments, along with others that may be submitted, will give the Commission a better understanding of the challenges to the markets that may be presented if the rule changes are implemented as proposed or if there is a dramatic change to the current definition of accredited investor.

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[1] Formed in 1985, the IPA provides the direct investment industry with effective national leadership, and today is the leading advocate for the inclusion of direct investments in a diversified investment portfolio. IPA members include direct investment product sponsors, FINRA member broker-dealer firms, and direct investment service providers.

While we understand the need to balance investor protection concerns with the need for maintaining the free flow of capital, as mandated by the JOBS Act, there are four specific areas covered in the Release for which we offer our comments from the perspective of market participants who are regularly involved in offerings for which the provisions of Regulation D are an integral part. These areas include:

(i) Changes to the definition of accredited investor;
(ii) Mandatory submission of written materials used in generally solicited private offerings;
(iii) Content of general solicitation and advertising materials ("Solicitation Materials"); and,
(iv) Impact of inadvertent filing deficiencies.

I. Proposed Change to the Definition of "Accredited Investor"

The IPA understands that the Commission is not proposing any amendments to the accredited investor definition in the Release. Further, the IPA is aware that the Commission has recently received a study conducted by the Government Accountability Office ("GAO") pursuant to the requirements of Section 415 of the Dodd-Frank Act ("DFA") regarding the appropriate criteria for determining the financial thresholds or other criteria for qualification as an accredited investor. Further, the IPA understands that, pursuant to DFA Section 413(a), the net worth standard for individual accredited investors shall remain \$1 million, excluding the value of a person's primary residence until July 2014. Finally, we further understand that this review is also being conducted because of the effectiveness of Rule 506(c).

Nevertheless, the IPA respectfully suggests that the addition of general advertising and general solicitation in Rule 506(c) offerings should not be the occasion for any changes in the definition of "accredited investor" other than those that may be required by the DFA, for the following reasons:

- The new requirements for enhanced verification of accredited investor status already provides the necessary mechanism for ensuring that only those individuals able to bear and appreciate the financial risk of an investment made pursuant to Rule 506(c) are able to participate in a private offering under Rule 506(c);

- The fact that under the DFA, any modification to the definition of accredited investor should only be made i) after a thorough review by the GAO and then, ii) only during successive four year periods, beginning four years after DFA enactment, points to the intent of Congress to make changes to securities regulation on an incremental basis; and,

- Any change to the definition of "accredited investor" needs to take into account the effect that the new definition would have on securities offerings generally. For instance, with enhanced accredited investor verification requirements, the methodology for determining accreditation may shift from purely income and/or asset determinations to a methodology which more accurately reflects the types of offerings being conducted pursuant to Rule 506(c).

- As indicated in the GAO study referenced above, even a small increase in the income or asset test within the definition of accredited investor could result in a decrease, by as much as 50% in the number of potential investors qualifying to participate in Rule 506 offerings, thus decreasing capital formation opportunities for small business in America – in contravention of the clear and stated intent of the JOBS Act.

- We respectfully suggest that the current state of the economy must be considered in making any changes to the accredited investor definition. Congress passed the JOBS Act in 2012 to encourage capital formation in order to stimulate employment opportunities. The JOBS Act would not have been enacted if the economy had improved sufficiently since the economic downturn of 2008; therefore, we submit that the economy is not yet at a point where the accredited investor definition can be modified to limit further categories of persons who currently are considered eligible to invest in private placements conducted under Rule 506 without causing serious harm to the capital markets and, by extension, the still struggling economic recovery.

- The definition of accredited investor has already been significantly changed to reflect the current economic reality. A CPI Index adjustment to the net worth test would ignore the recent change in the definition of accredited investor that excludes the value of an investor's primary residence from the net worth calculation, which by itself significantly raised the accredited investor net worth threshold.

II. Proposed Temporary Rule For the Mandatory Submission of Written General Solicitation Materials

The Commission is proposing Rule 510(T) of Regulation D, which would require an issuer conducting an offering pursuant to Rule 506(c) to submit to the Commission any written general Solicitation Materials prepared by or on behalf of the issuer and used in connection with the Rule 506(c) offering. Further, Rule 510(T) would require general Solicitation Materials to be filed no later than the date of the first use of such materials.

While we appreciate the desire to determine what effect Rule 506(c) will have on offering materials, we believe that there may be several unintended consequences in the proposed temporary rule including the following:

- We believe that for those Rule 506(c) offerings made through FINRA member broker-dealers the proposed filing requirement will result in duplicative filings with the Commission and FINRA. FINRA Rules 5122 and 5123 require the filing of offering materials in which either the offering will raise funds for a FINRA member and/or its affiliate(s) or for any offering conducted through a FINRA member. Further, FINRA advertising rules require that its member's compliance departments review, and in most cases, file materials. Such filings are already available to the Commission;

- Pursuant to Section 18 of the Securities Act, the states may require an issuer to file with the states those documents filed with the Commission in connection with a Rule 506 offering. This requirement, when coupled with the fact that the filing of such material pursuant to proposed Rule 510(T) would be required at the time of first use and not within the 15-day post-sale period for filing Form D, would have the unintended consequence of allowing the states to demand the filing of offering materials before any sale has occurred in the state. This would significantly increasing the filing costs, because the materials could be required to be filed in all 50 states and 4 territories[2] whether or not sales are ultimately made in all such jurisdictions;

- If the states are allowed to require that the Solicitation Materials required to be filed with the Commission by Rule 510(T) be filed with them, the result would be tantamount to reinstating merit review for offerings of covered securities, where each state could review the materials under its own view of appropriateness, and effectively return issuers to the state of affairs before Section 18 state preemption was adopted as part of the National Securities Markets Improvement Act of 1996. This has the real potential to create delays in capital formation as well as additional costs; more often than not, in states where no sales will ever take place. Furthermore, this will be yet another bar to entry for many issuers in violation of Congressional intent to encourage job creation through capital formation; and,

- If the Commission feels that it needs to access the types of materials being distributed in Rule 506(c) offerings, it should do so by reviewing filings made with FINRA, and perhaps by requesting materials from a statistically significant number of issuers filing Form D, either based upon the type of issuer making the filing, or based upon a random selection approach. This would eliminate a number of problems described above that might result from requiring all issuers to file Solicitation Materials.

III. Proposed Rule and Rule Amendments Relating to General Solicitation Materials

The Commission is proposing to add Rule 509 to require all issuers to include legends in any written Solicitation Materials used in a Rule 506(c) offering and additional disclosure for private funds if such materials include performance data.

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[2] State securities, or Blue Sky, practitioners generally make filings for issuers in the District of Columbia, Guam, Puerto Rico, and the U.S Virgin Islands, in addition to the 50 states.

Our primary concerns with the requirements of this proposed rule are as follows:

- FINRA already has access to, and comments upon, various disclosures in Solicitation Materials subject to FINRA's advertising rules and comments upon them on a regular basis. The Commission has direct access to all such materials;

- To the extent the states may have the opportunity to review any Solicitation Materials (see above), they may have their own interpretation of the style and content of any legends and/or require additional disclosures; and,

- The result of multiple reviews of legends and disclosures may further act as a bar to entry for small issuers who can afford neither the time nor the funds to hire counsel to engage in the often long and detailed discussions with multiple regulators regarding such content.

- As an alternative, we suggest that the Commission default to FINRA's "fair and balanced" standard as more in line with "reasonable" verification steps which offer the flexibility to change depending on the facts and circumstances of each offering rather than the one size fits all approach of specific legends.

IV. Effects of Inadvertent Filing Deficiencies.

We are concerned that the inadvertent failure to file or a late filing of a Form D due to administrative oversight could result in a bar from using Rule 506. We believe that in the absence of scienter, this is an instance in which the punishment far outweighs the harm of the infraction. We are also concerned that the inadvertent failure to file or a late filing, as opposed to a failure to file, could serve as a disqualification from reliance upon the Rule 506 safe harbor, thus creating tremendous implications under the various state securities laws. Since an issuer proposing to conduct an offering under Rule 506(c) would not be able to rely on the various state private placement exemptions, which generally require that no general solicitation or advertising be employed, this would result in issuers being virtually shut out of the capital markets.

Often times a small issuer has neither the resources to hire competent counsel, nor the independent experience to know what needs to be filed with whom and when such filing is required.

If the intent of the JOBS Act is to be adhered to, the inadvertent failure to file Form D should not preclude an issuer from relying on Rule 506 in the future. Furthermore, and perhaps most importantly, the proposed bar for inadvertent failure to file or late filing will have the opposite effect of that which we all seek, which is compliance with Rule 506.

Additional Comments and Suggested Modifications to the Proposed Rules:

We understand, acknowledge, and appreciate the intent behind the rule proposals contained in the Release; however, we are concerned that other rule changes in the Release, as proposed, will have a chilling effect on capital formation and job creation. Therefore, we respectfully suggest the following modifications to the proposed rules:

- As is the case with requiring the pre-sale filing of Solicitation Materials (see above), requiring an issuer file a Form D before sales have occurred would be a significant departure from long-standing practice under Regulation D and will inevitably result in issuers deciding to file in all 50 states, whether or not a sale ever occurs in those states, in order to preserve federal preemption of state registration requirements afforded by Section 18 of the Securities Act for any anticipated sales, whether any such sales ever occur. We therefore believe that the Form D filing requirement should remain at 15 days after the first sale in the offering, as has always been the case. Leaving the filing requirement at 15 days after the first sale in the offering, as is currently required, would greatly reduce the number of jurisdictions in which filings must be made, because an issuer will know where it is required to make notice filings only after a sale has occurred, and, as a result, the costs of compliance, without compromising investor protection. Unnecessary filings should be avoided, since the cost of filing with multiple jurisdictions ultimately reduces the amount of capital raised which would otherwise be available for the business purposes of the issuer. Further, dramatically expanding the number and cost of making state filings will divert valuable resources of all issuers, but particularly of smaller issuers, by potentially creating a cash flow problem for small issuers before the first sale is made, and might create a bar to entry for start-up companies in contravention of the intent of Congress to encourage job creation through capital formation.

- We do not believe that extensive modifications should be made to Form D beyond those which are strictly required by the statutory and regulatory modifications already adopted. For instance, we do not believe that issuers should be required to represent the basis on which various investors were determined to be accredited investors. The enhanced verification requirement already in place makes that information readily available to the Commission. The Form D filing process is already as complex and time consuming as it needs to be. Adding to that regulatory burden is unwarranted, especially in view of Congress' intent to ease access to the capital markets.

- Provide an exemption from the requirement of Regulation D to file that which is filed with the Commission with the states as it relates to Solicitation Materials. This will help make the use of Rule 506 a cost effective method of conducting private placements.

- The filing of Form D has never been a prerequisite for claiming the Rule 506 safe harbor, and we do not believe that it should be made a prerequisite now. If it is, then a failure to file would mean that preemption of state securities registration requirements under Section 18 would become unavailable, and massive liability would result for issuers that the JOBS Act was designed to benefit. Moreover, we do not believe that the requirement that a termination filing be made at the completion of a Rule 506 offering serves any investor protection purpose. We note that such termination filings were required when Regulation D was initially adopted, but were later eliminated as unnecessary. We believe that a termination filing requirement is problematic since it is often difficult for an issuer to determine exactly when an offering has terminated, and the failure to file might have such dire consequences. Since a Form D filing must be reviewed annually or it lapses, we see no reason to require an additional filing.

- In connection with the "Bad Actor" disqualification rules, under Rule 506(d)(1), an issuer cannot rely on the Rule 506 exemption if the issuer or any other person covered by the Rule, including any general partner of the issuer, is subject to a disqualifying event that occurred on or after September 23, 2013. If the disqualifying event occurred before September 23, 2013, however, instead of disqualification of the Regulation D exemption, Rule 506(e) requires written disclosure of the matter that would otherwise have triggered disqualification under Rule 506(d)(1). Oil and gas drilling programs are unique, however, because the Internal Revenue Code allows general partners to claim a non-passive loss from the intangible drilling costs as long as the investor has general liability for partnership liabilities and obligations under the applicable state law. In these tax advantaged oil and gas drilling programs, investors usually may elect to buy either limited partner or general partner interests in the partnership.

Therefore, the "general partner of the issuer" disqualification and disclosure provisions of Rule 506(d) arguably would not apply to persons who:

- purchase general partner interests in an oil and gas drilling limited partnership, but are passive investors because under the terms of the partnership agreement they have no management or control power over the partnership solely by reason of their status as general partners;

- individually, do not purchase 20% or more of the partnership's voting equity securities;

- are not otherwise related to or affiliated with the partnership or the sponsor of the offering; and

- do not participate in the offering of the partnership's securities except as purchasers of the securities.

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As of the date of this letter, the SEC has not published guidance on the matter. In light of the foregoing, IPA member Atlas Energy (“***Atlas***”) has filed a written Interpretative Advice Request with the Commission for such general partners. The IPA has been informed that in response to Atlas’ request, the Commission has verbally provided interpretative advice. At this time, the parties await receipt of the written advice addressing the foregoing unintended consequences of the new Rule 506.

In conclusion, the IPA appreciates the opportunity to comment upon the proposing release, and we thank the Commission staff for its hard work, dedication, and stewardship of investor protection while simultaneously advancing Congressional intent in the areas of access to private capital and job growth in America. As always, we stand ready to discuss any of the above at any time in order to work with the Commission towards creating an environment which protects investors while encouraging capital formation and job growth.

Respectfully submitted,

Frank McCarthy

Frank McCarthy
Chairman, Investment Program Association

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