September 23, 2013

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

Via email to rule-comments@sec.gov

Re: File Number S7–06–13, "Amendments to Regulation D, Form D and Rule 156"

Dear Ms. Murphy:

The National Small Business Association is pleased to provide these comments on the proposed rule regarding "Amendments to Regulation D, Form D and Rule 156."[1]

The National Small Business Association (NSBA) was founded in 1937 to advocate for the interests of small businesses in the U.S. It is the oldest small business organization in the U.S. The NSBA represents more than 65,000 small businesses throughout the country in virtually all industries and of widely varying sizes.

Introduction

While we understand, and are sympathetic with, the concern that there is inadequate information available about the private placement marketplace, we believe that the proposed rule goes much too far and imposes costs that are much too high on small businesses trying to raise capital via Regulation D private placements. We also believe that much of the information collected under the proposed rule will be of little or no practical value to the Commission. The proposed requirements will impose very significant costs on issuers -- costs that will consume a significant percentage of the capital raised and make those funds unavailable for productive purposes. The proposed rule will harm economic growth, job creation and economic efficiency. Moreover, there is little reason to believe in will materially improve investor protection.

We would caution the Commission that many, if not most, of the commentators urging the Commission to go down this path were opposed to Title II of the JOBS Act (relating to general solicitation). They are seeking to undermine the efficacy of Title II of the JOBS Act by urging the Commission to promulgate a series of addition requirements, not contemplated by Congress, so as to make many Rule 506(c) offerings uneconomic. We would hope that the Commission will not choose to frustrate Congressional intent and the sound economic policy underlying the JOBS Act by adopting unnecessary rules that needlessly increase compliance costs while doing little to help investors.

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[1] Release No. 33–9416; Release No. 34– 69960; Release No. IC–30595; File No. S7–06–13; RIN 3235–AL46. See *Federal Register*, Volume 78, Number 142 (Wednesday, July 24, 2013), pages 44806-44855.

We would also note that the proposed rule does nothing to address perhaps the greatest informational gap, to wit, the lack of compiled, accessible information about SEC enforcement actions relating to Regulation D private placements. There is little to no publicly available information relating to what types of offenses engender SEC enforcement action in connection with Regulation D offerings. This information is available to the SEC staff currently and could be compiled and released by the SEC without imposing additional reporting obligations on issuers. This would enable both the Commission and the public to better understand the source of problems in this area and to make more informed judgments about what regulatory changes are appropriate. The SEC could also collect, compile and release information from state regulators. Currently, both the business community and those arguing for a more onerous regulatory regime have little information to go on other than such anecdotal evidence as may become available to them. It would seem appropriate to defer the promulgation of a series of costly economically counterproductive rules until better information is compiled and made available to both the Commissioners and the public about where the true problems with fraud and misrepresentation lie in Regulation D filings.

Form D Filings

The Commission is proposing to amend Rule 503 to require issuers that intend to engage in general solicitation for a Rule 506(c) offering to file an initial Form D in advance of conducting any general solicitation activities with an additional requirement to file an amendment to the Form D that includes the remainder of the information required by Form D (including information regarding the terms of the offering that may not have been known at the time of the filing of the Advance Form D). In addition, the Commission is proposing a closing Form D amendment would be due no later than 30 calendar days after termination of the offering. The proposed rule would not make the filing of a closing amendment to 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. This would be a draconian sanction for a relatively minor administrative oversight.

In summary, the proposed rule would replace one regulatory filing with three. Thus, the costs of complying with Regulation D would increase dramatically. It is entirely unclear what the investing public gains from this substantial increase in regulatory costs. It is doubtful that very many will ever look at any Form D let alone an advance Form D or a final Form D. Most will evaluate the offering memorandum. That is where the information relevant to making an investment decision is, after all. It is very clear that the increased costs will make Rule 506(c) offerings less attractive and further impede the ability of small firms to raise capital.

The proposed rule discussion states that the advance filing will give the SEC and state agencies the opportunity to look for “red flags” of potentially abusive offerings. No actual details are provided about what criteria would be used to evaluate these advance Form Ds or how they might actually be used by regulators. Nor is it likely that meaningful steps will often be taken in the 15 day window between the advance Form D filing and the commencement of the offering. It is also unclear what kind of “red flags” such a Form D could provide unless the SEC intends to substantively review the proposed offering on the merits which would be a massive departure from Commission practice since the inception of Regulation D and is inconsistent with the basic disclosure thrust of our securities laws.

Moreover, the process will likely create much greater likelihood of unintentional noncompliance by the issuer. Consider this fact pattern: The issuer plans to go to the accredited market in six months, but in advance, it participates in a business plan competition to take advantage of the free advice and mentoring offered through the business plan competition. After initiating the process for the competition, the company is contacted by the organizers of the competition and encouraged to present the business plan orally at an angel and venture capital trade association gathering to obtain feedback on the business idea from those experts. The presentation is successful and the issuer obtains good feedback. Two months later one of the audience members contacts the owner to ask how the business is going, asks if he is raising capital as the plan contemplated, and offers to invest. Ultimately this new contact, an accredited investor, buys 1/2 of the equity interests offered by the issuer. Although the issuer had originally intended to pursue a Rule 506(c) offering, the issuer thought it had found the capital privately and pursued a Rule 506(b) exemption (filing Form D). However, two years later, a venture capital company proposing to make a substantial additional investment and also cash out a portion of the founder's equity position tells the issuer that it will need to delay the investment because, in its opinion, the sale to the investor was as a result of general solicitation at the venture capital trade show, especially since the investor was unknown to the issuer. Under the proposed rule, the issuer has no ability to cure the defect.

If a final or closing form is required, the form should ask only for the amount raised in the offering and the number of investors (segregated into accredited and non-accredited categories). Nothing more. This information would be useful to the Commission and its economists in assessing the Regulation D marketplace. Other information has relatively little utility and whatever utility it has is outweighed by the costs of collecting and filing it.

We would ask the Commission to withdraw this rule, as least until information is compiled and publically released regarding the nature and causes of SEC enforcement actions with respect to Regulation D offerings. Only then can any logical nexus be drawn between the increased reporting requirements and improved anti-fraud enforcement.

The present proposed rule is a shot in the dark, the primary effect of which will be to make Regulation D general solicitation offerings less attractive. This may be the aim of JOBS Act opponents but it is not the aim of Congress and should not be the aim of the SEC. There is no particular reason to believe that investors will gain a thing. In fact, both investors and issuers will lose from the increased costs. It is, however, clear that lawyers will benefit from the increased fees.

If the Commission goes down this path, we would strongly recommend that small issuers be exempt from filing three different Form Ds. One should be sufficient for small issuers.

Proposed Mandatory Legends

The Commission is proposing to add new Rule 509 to require all issuers to include certain legends in any written general solicitation materials used in a Rule 506(c) offering.

Requiring a legend to the effect that the offering is available only to accredited investors is not extremely burdensome and will probably be done by issuers most of the time even in the absence of a rule requiring it. Issuers are not going to want to have to field a large number of inquiries from non-accredited investors that cannot invest in their offering. It t is the

verification requirement that will be effective in reducing the incidence of non-accredited investors participating in Rule 506(c) offerings, not a legend.

Other legends, other than those already required, are unnecessary in our judgment.

The proposed amendments do not specify the precise wording of any required legends. If the Commission adopts a legend requirement, it would be our recommendation that it set forth specific language that it believes would satisfy the requirement. This eliminates uncertainty and regulatory risk and would impose no additional costs.

Proposed Temporary Rule for Mandatory Submission of Written General Solicitation Materials

The Commission is proposing new Rule 510T to require that an issuer conducting an offering in reliance on Rule 506(c) submit to the Commission any written general solicitation materials prepared by the issuer and used in connection with the Rule 506(c) offering. Under the proposed rule, the written general solicitation materials must be submitted no later than the date of first use of such materials in the offering. This temporary rule would expire two years after its effective date.

This would constitute a significant administrative burden on issuers. As materials are developed and used, many filings may be required even if the materials differ only slightly. But more importantly, it is entirely unclear what the Commission will do with many thousands of documents (advertisements, web pages, flyers, letters, etc.) it will receive under this proposed rule. It will not provide information susceptible to much, if any, meaningful and useful summary or quantification. It is not clear how the information would lead to a better understanding of what enforcement or regulatory changes should be undertaken. Investors will be not be helped in the slightest in that they are going to receive these materials directly from issuers. Filing the materials with the SEC provides no additional information to investors. It is, however, clear that once again it will increase costs and make general solicitation offerings less attractive.

Smaller issuers should be exempted from this requirement.

Request for Comment on the Definition of ''Accredited Investor''

The Commission is seeking input on whether the current accredited investor financial thresholds in the net worth test and the income test are appropriate.

Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] ("Dodd-Frank") required the SEC to make the accredited investor net worth qualification to be residence exclusive. Section 413(b) invites the Commission to analyze whether the net worth standard "should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy" and mandates that:

[2] P.L. 111–203, July 21, 2010.

> Not earlier than 4 years after the date of enactment of this Act, and not less frequently than once every 4 years thereafter, the Commission shall undertake a review of the definition, in its entirety, of the term ‘‘accredited investor’’

This review, therefore, may be undertaken by the SEC as early as July 21, 2014 and must be undertaken by 2018.

Section 415 of Dodd-Frank required the Government Accountability Office (GAO) to conduct a study of the accredited investor thresholds. This study was released in July, 2013.

There is no doubt that inflation has reduced the accredited investor thresholds in real, inflation-adjusted terms. See table below.

Accredited Investor Thresholds Adjusted for Inflation[3]

Accredited Investor Threshold	Existing (1982 –present)	If Adjusted for Inflation (1982 to 2012)
Net Worth	$1,000,000	$2,400,000
Income (Single)	$200,000	$475,000
Income (Joint)	$300,000	$715,000

Source: Undersigned’s calculations using BLS data.

The GAO estimates that increasing the accredited investor net worth thresholds to this degree would reduce the number of potential small business investors from 8.5 million to 3.4 million, a reduction of 60 percent. Adjusting the income thresholds would reduce the pool of small business investors from 6.1 million to 1.7 million, or 72 percent. See table below.

GAO Estimates of Number of Households Eligible for Accredited Investor Status at Various Thresholds for Net Worth and Income (2010) [4]

Income threshold		Net worth threshold	
Existing and hypothetical thresholds	Number of households	Existing and hypothetical thresholds	Number of households
$100,000	21,600,000	$250,000	23,200,000
$200,000 (existing for individuals)	6,100,000	$1,000,000 (existing)	8,500,000
$300,000 (existing for couples)	3,300,000	$1,750,000	4,600,000
$400,000	2,400,000	$2,500,000	3,400,000
$500,000	1,700,000	$3,250,000	2,700,000

Source: GAO

[3] Bureau of Labor Statistics data shows that the CPI-U index (1982-84=100) for 1982 was 96.5 and for 2012 229.6. The ratio, therefore, is 2.38 representing inflation over the period of 138 percent.
[4] GAO Study at p. 18.

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Per the GAO: "According to SEC, when the standard was first created, 1.87 percent of households qualified as accredited investors. SEC staff estimate that 9.04 percent of households would have qualified as accredited investors under the net worth standard in 2007; we estimate that removing the primary residence from households' net worth, as required in the Dodd-Frank Act, dropped the percentage to 7.2 percent (based on 2010 data)."[5]

The wealthiest seven percent of the public are not poor, uneducated people incapable of paying to secure needed investment advice or of making informed decisions themselves. Nor are they incapable of bearing financial risk. But those arguing to increase the thresholds to, for example the 1982 levels in inflation-adjusted terms, would reduce the pool to about the top two percent of households.

Obviously, this would have a substantial adverse impact on the ability of small firms seeking access to the capital they need to grow their businesses, create jobs, enhance productivity and bring new products to market. But is it fair, in the name of paternalism, to limit investment opportunities to those who are already rich with a net worth exceeding 98 percent of their fellow citizens. Certainly such a policy can be counted on to thwart upward mobility. Making it more difficult for small businesses to raise capital and reducing the ability of investors to invest in companies with tremendous potential is not a worthy policy goal.

The bottom line is this. It is clear that increasing the accredited investor thresholds would have a dramatically adverse impact on small, dynamic, innovative firms seeking capital.

Conclusion

We would urge the Commission to withdraw the proposed rule until better information is developed about where the true problems lie in connection with Regulation D and then craft solutions directed specifically at those identified problems. We would urge the Commission to keep the accredited investor thresholds at their current levels.

Sincerely,

David R. Burton
General Counsel

(direct dial)

[5] "Alternative Criteria for Qualifying As An Accredited Investor Should Be Considered," GAO, July, 2013, at pp. 9-10 ("GAO Study").