September 23, 2013

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

Dear Ms. Murphy:

I am submitting these comments to the proposed Amendments to Regulation D, Form D, and Rule 156 under the Securities Act.

I am a lawyer in Seattle, Washington. I work with many startups and early stage companies. In my practice I have become intimately familiar with the difficulties startups and early stage companies experience in trying to raise capital, both from a business and legal compliance point of view.

One of the goals of the JOBS Act was to make it easier for companies to raise money. The proposed rules are contrary to that spirit. The proposed rules will actually make it much, much more difficult for startups and emerging companies to raise money because (i) they impose myriad new requirements, such as the "Advance Form D" (which is required to be filed 15 days before generally soliciting), and (ii) the proposed automatic disqualification for failing to timely file a Form D.

The proposed rules create many traps for the unwary. If the proposed rules are adopted as proposed, many startups and early stage companies will inadvertently violate them and then be precluded from fundraising for a year. This is a result directly contrary to the spirit of the JOBS Act. This would truly be unfortunate because these companies are a source of great economic growth and job creation in the U.S. The one year fundraising prohibition in the proposed rules is an onerous penalty for startup and emerging companies.

The impact of the rules is also complicated by the lack of really clear answers on what constitutes general solicitation and general advertising.

For example, a student at a university might receive encouragement from a faculty member to participate in a business plan competition. The student will not have legal counsel. Indeed, the student will not have even formed a company. Yet the student might pitch at the business plan competition. The competition's judges might be local venture capitalists and prominent angel investors. Without better guidance as to what constitutes general solicitation and general advertising, it might be difficult to determine whether that student's pitch constitutes general solicitation under the proposed rules.

Startups are also going to find it very difficult to file all of their written general solicitation materials before their first use. The reason? Startups are constantly evolving their written solicitation materials. For example, it is not uncommon for a startup to go to a pitch, receive feedback, and go straight to another pitch and alter their presentation on the way. As another example, a startup might be pitching at a demo day. It might be revising its pitch materials until

right before it goes on stage. Under your proposed rules, startups will have to have to find time to first upload to the SEC website their pitch content before they pitch.

Congress carefully delineated the "catch" for companies generally soliciting. The "catch" was that companies would have to take additional steps to verify the accredited investor status of their investors. That was the only limitation Congress placed on companies generally soliciting in all accredited investor offerings. There was a specific colloquy in the legislative history in which this "catch" was debated and discussed. I have included it for you on Exhibit A. Your statement in the proposed rules that commenters thought that unaccredited investors might be more at risk, and that this somehow justifies your proposed rules doesn't seem consistent with Congressional intent or the Congressional action taken. Congress intended to allow startups to generally solicit and didn't specify any additional requirements other than taking reasonable steps to verify.

The One Year Penalty Box

The one year penalty is a very onerous penalty for early stage companies. It is essentially a death penalty.

The SEC should not put in place rules that will punish founders and startups that are unaware of filing deadlines because they haven't yet talked to a lawyer. This is contrary to the spirit of the JOBS Act.

The 15 Day Advance Filing Requirement

The advance filing requirement is contrary to the Congressional intent behind the JOBS Act. Requiring advance filings will trip up many small companies and their founders. Congress didn't ask the SEC to impose advance filings on issuers. In fact, the requirement is arguably in opposition to the plain language of Section 201 of the JOBS Act itself.

The Form D filing should not be in advance. Fifteen days after taking funds is the soonest the form should be due.

A post-sale requirement is also more sensible for startups because many startups don't know if they will ever be able to raise money when they start trying to raise money. Many don't know if they have a fundable idea until they receive commitments from investors. Requiring all startups to file Advance Forms D, and spend thousands of dollars on legal fees doing so, doesn't make sense when many won't succeed in actually raising money.

15 Days is Too Short a Time

The SEC should consider lengthening the period of time companies have to file Forms D. 15 days is a very short period of time, especially now that there will be draconian penalties enforced for missing the deadline. Many companies, especially small companies without a lot of resources to devote to legal fees, will miss these deadlines. Sixty or even ninety days would be more appropriate. Even the IRS allows founders 30 days to file Section 83(b) elections.

The Lack of a Good, Specific, Reliable Definition of "General Solicitation"

The rules should provide clear examples of what constitutes general solicitation and what doesn't. It would be extremely helpful if the final rule had multiple examples of different types of events and circumstances that constitute general solicitation so that founders and companies would not be left wondering whether their behavior constitutes general solicitation or not. The IRS, when it issues rules, frequently includes examples. It would be very helpful to the startup and early stage company ecosystem if the SEC did the same.

It would also be very helpful if the SEC clearly gave examples of what does not constitute general solicitation (e.g., specific carevouts). For example, a founder deserves to know whether an event at which the founder pitches business ideas but does not include in the pitch an express request for funding is or is not a general solicitation.

The Length of the Form D

The Form D should be shorter, not longer. The Form D is already too long and costs companies more in legal fees than they want to spend. I encourage the SEC to consider not requiring the form to be filed at all for small rounds (e.g., less than $5M).

Submission of Written Offering Materials Prior to Use

Many startups will find this requirement difficult to comply with as a practical matter. Submission prior to use will be quite challenging because a startup's documents often need to be refined and modified after initial feedback from prospective accredited investors.

The Definition of Accredited Investor

I would encourage the SEC not to increase the financial thresholds for determining an accredited investor.

The SEC should also change the definition of accredited investor so that same sex couples are treated the same as heterosexual couples for purposes of the definition of spouse.

Conclusion

I hope you reconsider your proposed rules in light of the Congressional intent behind the JOBS Act, and the practical difficulties many startup companies will face when trying to comply with your proposed rules. I would also reiterate the recommendation of your Advisory Committee on small and emerging companies that you provide an additional period of time for interested persons to analyze and comment on these proposed rules.

Joe Wallin

EXHIBIT A

In the committee mark-up session, the following argument was made for adding the verification language:

> This amendment would clarify that the SEC shall write rules to require that the issuer of a security, using the exemption provided for under this bill shall take reasonable steps to verify their purchases of the securities are accredited investors using such methods as determined by the commission.
>
> Mr. Chairman, I understand that lifting the ban on general solicitation and general advertising on private offerings may make sense that those offerings are only sold to accredited investors. We know that because of their wealth or their level of sophistication, accredited investors are not in need of as many investor protections as the average retail investor.
>
> And we know that with the current prohibition on solicitation and advertising it can be tough for a company to connect with accredited investors who may be interested in investing in their company.
>
> But I am concerned about the process in which accredited investors verify that they are in fact accredited. As I understand it, it is currently a self-certification process. This obviously leaves room for fraud.
>
> In testimony from the North American Securities Administration Association the state securities commissioner from Arkansas notes it is going to be impossible to limit the sale to only accredited investors when issuers advertise to everyone. Indeed, there will be no reason to believe that any investor seduced by public advertising will hesitate to be dishonest with completing the investor suitability questionnaire.
>
> That is why I have offered this amendment. My amendment would require the SEC when issuing a rule to provide for the exemption under Representative McCarthy's bill to include a provision mandating that issuers take reasonable steps to verify investor status as an accredited investor.
>
> If we are rolling back protections for our targeted audience of sophisticated individuals, we must take steps to ensure that those folks are in fact sophisticated.

There is no publicly available link to the above transcript. But you can find a link to the video of the hearing in which this occurred at: http://financialservices.house.gov.calendar/eventsingle.aspx?EventID=2622490.