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September 23, 2013

Submitted electronically

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

RE: Amendments to Regulation D, Form D and Rule 156 under the Securities Act
Release Nos. 33-9416, 34-6990, IC-30595 (File No. S7-06-13)

Dear Ms. Murphy,

As the Commissioner of Securities for the State of Missouri, I appreciate the opportunity to comment on the Commission's proposed amendments to Regulation D, Form D, and Rule 156.[1]

Briefly stated, I support the Commission's proposal that an issuer using Rule 506(c) must file the Advance Form D before any general solicitation. I also support a final rule that includes a meaningful penalty for failing to file the Form D with the Commission. Finally, I support both the proposal to require a closing amendment to the Rule 506 offering as well as some content restrictions on general-solicitation materials.

I. The Commission should adopt the proposed rule requiring that Rule 506(c) issuers file the Advance Form D *before* general soliciting.

One of my duties as the Commissioner is to help facilitate capital formation in the State of Missouri.[2] Accordingly, I recognize how vital small companies are to Missouri's economy and to the nation at large.

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[1] Amendments to Regulation D, Form D and Rule 156 under the Securities Act, 78 Fed. Reg. 44,806 (proposed July 10, 2013) (to be codified at 17 C.F.R. pts. 230 and 239) ("Proposing Release").

[2] *See* § 409.6-608(b)(3), RSMo (Supp. 2012) (stating among other things that, when acting by rule, order, or waiver, the commissioner of securities shall consider policies that "[m]inimiz[e] burdens on the business of capital formation, *without adversely affecting essentials of investor protection*") (emphasis added).

Thus, I agree that start-ups need flexibility and capital-financing options, and the Commission's recent decision to allow general solicitation will greatly expand small businesses' options.[3] But this flexibility cannot come at the expense of the planning and responsibilities that come from receiving other people's money as an investment.

State securities regulators routinely urge investors to call our offices before investing to ensure that their financial advisers are registered or that a security an investor is considering is registered. These calls can root out fraudulent offerings before they occur. With the lifting of the ban on general solicitation, the number of these calls will likely increase and, without some form of an advance Form D, their utility will diminish because issuers could legally be advertising their private fund offerings or shares of their start-up in a newspaper without making any filing.

The required prefiling makes it harder to conduct a fraudulent Rule 506(c) offering outside of regulatory observation while alerting federal and state regulators to the generally-solicited offering in their jurisdiction. Indeed, it would be tremendously useful for an offeree, having been generally solicited, to learn from EDGAR that the promoter had not filed the Advance Form D.[4] And, if the offeree notified state regulators of a generally-solicited offering lacking the prefiling, they could more quickly react to this red flag.

The benefit this notice provides to investors outweighs the burden on issuers. First, the Advance Form D information—e.g., information regarding the issuer itself, its related persons, and the planned exemption—is factual information that should be readily available to the issuer at the time the issuer begins any general solicitation campaign. Moreover, although some commenters have noted that small-business owners frequently prefer to wait until the last minute to finalize details, the information required in the Advance Form D is not the sort that is subject to the deal's closing. And, for those issuers haggling over a debt or equity issuance with a purchaser, the proposing release notes that an issuer need not disclose this if unknown when filing.[5]

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[3] *See* Stuart R. Cohn & Gregory C. Yadley, *Capital Offense: The SEC's Continuing Failure to Address Small Business Financing Concerns*, 4 N.Y.U. J. L. & BUS. 1, 36 (2007) (stating that "[t]here is no greater impediment to the ability of small companies to raise capital under the securities laws than the SEC rules against general solicitation and advertising").

[4] *See* Usha Rodrigues, *In Search of Safe Harbor: Suggestions for the New Rule 506(c)*, 66 VAND. L. REV. EN BANC 29, 40 (2013) (stating that "[r]equiring a presolicitation filing would slow down quick-hitting, too-good-to-be-true offerings; deter some fraud; and make it easier for investors to track down wrongdoers." *See also*, Comment Letter from United States Senator Martin Heinrich et al., June 28, 2013, *available at* http://www.sec.gov/comments/s7-07-12/s70712-160.pdf ("Simply requiring a Form D filing prior to any public solicitation or advertising will ensure that state securities regulators . . . will be able to determine an issuer's intent to rely on general solicitation [and] enable state regulators to respond to questions from investors in their states about publicly advertised offerings . . . "). Also, as noted in a previous comment letter that my office issued, prefiling a Form D with the Commission will act as a signal regarding the issuer's legitimacy, boosting investor confidence. *See* Comment Letter Regarding Proposed Amendment of Rule 506 from the Commissioner of Securities for the State of Missouri, October 11, 2012, *available at* http://www.sec.gov/comments/s7-07-12/s70712-160.pdf.

[5] Proposing Release, 78 Fed.Reg. 44,811 n.43.

Second, and on a related note, some commenters have complained that the Advanced Form D is too complex for small businesses. However, the Advanced Form D filing is no more complicated than the Form D filing that has been required to this point, and small businesses have been, in the main, successfully navigating Regulation D's filing requirements for several years.[6]

Third, Federal and state securities laws require that those selling securities fully disclose the intended use of the capital and the risks associated with the investment. Irrespective of security registration requirements, failure to present a fair, balanced, and fulsome picture of the investment is securities fraud. While some have argued that this prefiling requirement is such a burden that it will deter issuers, this prefiling burden is minimal. Any issuer planning to subject itself to these considerable disclosure duties under the securities laws should reconsider marketing securities until it has prepared the relatively minimal information required by the Advance Form D. Thus, not only will properly prepared offerings reduce the risk of noncompliance with Rule 506(c), but start-ups' ability to respond to a funding need will be well served by the option to file the Advance Form D, even if a particular offering is not yet certain.[7]

In short, the Advance Form D information is either information that any issuer should have at the ready or need not disclose if it is unavailable. And the expected marginal costs associated with the amendments to Form D filings do not appear to price out those companies already contemplating a Rule 506 offering.[8] Given that Congress has decreed that Rule 506 allow for general solicitations, filing an Advance Form D in cases of general solicitation strikes a balance between small-business flexibility and investor protection.

However, my office would not oppose a shorter timeframe in which to file the Advance Form D. As long as the Commission can assure that the Advance Form D would be immediately accessible to the public (and, by extension, state securities regulators), then it is only important to my office that the filing occur before any general solicitation.

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[6] *See generally*, Vladimir Ivanov and Scott Bauguess, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption*, 2009–2012 (July 12, 2013), *available at* http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.

[7] Proposing Release, 78 Fed.Reg. at 44,811. I do not agree with others' comments that having an Advance Form D filed, even when the issuer does not have a specific offering in mind, serves no informational purpose. The Advance Form D's utility goes beyond the Commission's data-gathering needs (although it is important for administrative agencies to have facts as to how rules are used so as to better shape those rules to their actual use). Having the Advance Form D on file does double duty: first, it gives an issuer the agility to respond to a sudden market opportunity; second, without any further action by the issuer, the prefiling alerts state securities regulators to the offering.

[8] Proposing Release, 78 Fed.Reg. 44,831.

II. The Commission should adopt the proposed rule sanctioning Rule 506 issuers for failing to file the Form D.

I support the Commission's suggested amendment to Rule 507, i.e., that an issuer may not use Rule 506 for a year if the issuer, or its predecessors or affiliates, has failed to comply within the past five years with Rule 503's Form D filing requirements in connection with a Rule 506 offering.

This rule is important in that it establishes, for the first time, a consequence for failing to abide by the law. Still, some have claimed that the proposed consequence for failing to file the Form D is disproportionate and could be a trap for unsophisticated issuers.

Neither stands to reason. First, the proposed consequence for failing to file the form seems reasonable. Like others, I would not support a penalty that deprived an issuer for the failure to file the Form D. Especially for those issuers who have used a rolling Rule 506 offering to bring on numerous investors, losing the exemption as to all those investors would be truly disastrous for the business. However, a year-long prohibition will motivate issuers to comply with the requirement. The unfortunate result will be that some issuers will be unable to access the Rule 506 market for a time.[9] But the incentive to avoid this result coupled with an opportunity to cure the deficiency appear to lessen the deterrence that some have claimed will occur.

Second, if the failure to file is a mere oversight, the Commission has created an avenue to cure the deficiency. Moreover, if an issuer, even one without securities counsel, is deliberately using Rule 506, then it is difficult to conclude that the issuer will not also know to file the Form D. In fact, it is easier to conclude that the issuer who has chosen Rule 506 *ought* to know to file the Form D.

More generally, many comments that complain about the burdens of compliance do not reflect the fundamental nature of these transactions: one person with asymmetrical information convincing another person—who may be a virtual stranger or vulnerable to manipulation or overreach—to give him or her that person's money, sometimes that person's life savings. Surely, many Rule 506 transactions are arm's length and properly negotiated, but any rule must attempt to capture all variations on the continuum. Hence, it seems fair to ask that, if you are going to use a legal exemption to take other peoples' money, then you must comply with legal requirements designed to oversee and monitor those transactions, especially given the opportunities for abuse. The Commission's proposed amendment to Rule 507 merely requires that issuers comply fully with the exemption they themselves have chosen to use.

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[9] On this point, I note that Rule 506 is not the only securities registration exemption: state securities laws include limited offering exemptions that, if needed, would still allow an issuer access to capital, albeit on a probably intrastate level.

III. The Commission should adopt the proposed rule requiring a closing amendment to Rule 506 offerings.

I support the Commission's proposed amendment to Rule 503, which requires a closing amendment to Rule 506 offerings. State securities regulators need to know when notice-filed securities transactions begin and end in their states. This will only become more important as the public will have more questions regarding publicly-advertised Rule 506 offerings. In order to properly police those offerings and to be responsive to their citizens' inquiries, issuers should be required to file a closing amendment to their Rule 506 offerings.

Others rightly recognize that this will be another filing burden for Rule 506 users and, from this, conclude that the costs of compliance with the amendment outweigh its data-gathering benefit. Although I agree that this requirement implies more compliance cost, comments that consider only filing burdens ignore that securities regulators' oversight needs are significantly deepened by the ability to generally solicit. As noted before, securities regulators' duty to protect vulnerable investors necessarily requires that they have access to information regarding the publicly-made offerings in their jurisdiction. Shifting the cost of this information production to the issuers seems appropriate in the public interest and for the protection of investors.

Similarly, others have critiqued the rule, suggesting that the complexity of the closing-amendment filing will be a trap for unsophisticated issuers. Here too this sounds exaggerated: if an uncounseled small-business owner is able to file the initial Form D, then that same owner is presumably able to file a closing amendment.

To that end, I support this proposed amendment. I would also support a penalty to provide issuers an incentive to file the closing amendment. I do not support the idea of losing the exemption for failing to file a closing amendment. Instead, I concur with suggestions made by the North American Securities Administrators Association, that is, a late-filing fee and, as necessary, a one-year ban from using Rule 506 for repeated failures.[10]

IV. The Commission should adopt the proposed rules regarding required legends on written communications in Rule 506(c) offerings.

I support the Commission's proposed Rule 509. Written materials should clearly note that the offering can only be sold to, as the Commission suggests, "investors who meet certain minimum annual income or net worth thresholds."[11] Found at proposed Rule 509(a)(1), this legend seems especially important because it would put offerees on immediate notice as to whether they qualified for such an offering—and, therefore, whether the seller's offer to them complied with the securities laws. I support this plain English legend, or one substantially similar to it, being

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[10] Letter from the North American Securities Administrators Association to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Sept. 23, 2013).

[11] Proposing Release, 78 Fed.Reg. 44821.

required prominently in the issuer's Rule 506(c) written materials as well as, when used to generally solicit investors, on the issuer's website or digital media.

The other proposed legends also provide investors with worthwhile disclosures. However, in order to balance a need for meaningful disclosure with the reality of what potential investors will read, I would support a version of the rule that allowed the disclosures at proposed Rule 509(a)(2) through (5) to be provided in an abridged form on any website or digital media used in the issuer's Rule 506(c) public advertising. However, the legends at proposed Rule 509(a)(2) through (5) would still need to be fully provided in the issuer's written communications.

In closing, I recognize that the JOBS Act has significantly shifted the capital financing landscape, and the Commission's recently-enacted and proposed rules are reasonable attempts to adapt to this landscape. As described above, I support the Commission's proposed amendments to Rule 506 and Form D. I urge you to consider the above comments as well as those of my fellow state securities regulators. Thank you for your consideration.

Sincerely,

Andrew M. Hartnett

Andrew M. Hartnett
Commissioner of Securities