svb Silicon Valley Bank

September 23, 2013

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Submitted via email: rule-comments@sec.gov

**Re: Amendments to Regulation D, Form D and Rule 156
File No. S7-06-13**

Ladies and Gentlemen:

SVB Financial Group ("SVB") appreciates this opportunity to comment on the Commission's proposed rules to implement Title II of the JOBS Act.

The new rules governing private offerings under Rule 506, which go into effect today, will create a more open, flexible, and workable process for private offerings. This, in turn, will promote capital formation, job creation and economic growth while appropriately protecting investors.

Yet in the proposed rules, the Commission risks undoing this important step forward. We believe the Commission should refrain from adopting additional requirements, unless and until it sees a specific problem in Rule 506 offerings that needs to be addressed. At a minimum, we urge the Commission to streamline its proposed new rules in a material way. Otherwise, the Commission will usher in, at best, a very modest improvement, far from what Congress envisioned. At worst, it will stifle capital formation by funds and companies that rely on private offerings.

BACKGROUND

In reviewing and commenting on the proposed rules, we focused primarily on the impact they would have on venture capital and growth equity funds.[1] These funds are important from a policy perspective because they invest in the high-performing, high-growth companies that drive job creation, global competitiveness, and economic growth. We have discussed in depth the role venture-backed companies play in our economy in other filings with the Commission and federal regulatory bodies, and we incorporate those discussions by reference rather than repeating them here.[2] Although we have focused these comments on specific issues facing funds under the proposed rules, we urge the Commission also to carefully consider how any new rules will affect capital formation by individual companies.

There are a few facts worth noting about venture capital and growth equity funds, which will help place our comments in context.

- ***Most venture capital and growth equity firms are small.*** The average venture capital firm in 2012 had seven principals.[3] As a result, it is important to structure compliance requirements in a way that is workable for very small firms.

- ***Venture capital and growth equity funds are targeted.*** Venture and growth equity funds do not – and we believe will not – raise capital through broad-based advertising or by soliciting large numbers of individual accredited investors. These funds are well suited to qualified institutional buyers and very large accredited investors, due to their long duration, large minimum investment levels, and small

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1 SVB and its principal subsidiary, Silicon Valley Bank, provide a diverse array of banking and other financial services to the innovation economy. We bank more than 600 venture capital firms and approximately half of all venture capital-backed technology and life science companies in the United States. We believe our clients constitute a disproportionate share of the United States' high performing companies: for example, we bank 80% of the Wall Street Journal's "Top 50 VC-Backed Companies – The Next Big Thing 2012." Our focus on this segment of the economy gives us a deep understanding of the forces driving investors and entrepreneurs and the impact regulatory policies have on the overall health of the innovation sector. In addition, as a long-term participant in this market (with 30 years of experience working with investors and entrepreneurs), we share the Commission's desire to ensure that offerors treat investors fairly, transparently and honestly.

2 *See* Letter from SVB Financial Group to the Federal Reserve, FDIC, SEC and OCC, *Restrictions on Proprietary Trading and Certain Interests in and Relationships with Hedge Funds and Private Equity Funds* (Feb. 13, 2012); Letter from SVB Financial Group to the Financial Stability Oversight Council, *Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds*, File No. FR Doc. 2010-25320 (Nov. 5, 2010).

3 National Venture Capital Association, *Yearbook 2013*, at page 9 (Mar. 2013).

number of limited partners per fund. As a result, they do not present the same risk of drawing in "small" accredited investors as broader-based offerors.

- ***There are a limited (and shrinking) number of active venture capital funds.*** The number of independent and corporate venture capital groups that invested $5 million or more in a given year shrunk by half between 2000 and 2012.[4] In any given year, only a portion of these funds is engaged in fundraising.[5] This implies two things. One, it is important to avoid steps that would exacerbate this decline, which would have a negative impact on capital formation for high growth companies. Two, given their small number, these firms as a group do not have a broad or deep reach into the overall U.S. market or "touch" large numbers of investors, further reducing their risk profile.

COMMENTS

I. THE COMMISSION SHOULD REFINE THE DEFINITIONS OF "ADVERTISING" AND "SOLICITATION" USING AN ONGOING, ITERATIVE PROCESS.

In a world defined by blogs, tweets and other forms of social media, information is more fluid, more dynamic, and less centrally controlled than it was when the Commission wrote its private offering rules. Fund general partners, CEOs and others blog about their businesses and their future plans. They speak at conferences, where their comments may be tweeted or posted on websites with or without their knowledge.

That's a good thing. The more entrepreneurs understand investors' views, the better able they are to find the right investors and successfully raise capital. The more policymakers and the public understand the health (or not) of the sectors driving our economy, the better able they are to develop forward-looking approaches to social issues.

But it also means that, no matter how clearly the Commission drafts its rules, questions are bound to come up, and the line between Rule 506(b) and Rule 506(c) offerings is bound to blur. For example: if a venture capital general partner blogs that the fund is seeing a lot of promising startups and will likely need to begin raising its next fund in the coming year, has the fund begun "fundraising" and is the blog a "solicitation" or "advertisement" for that fund? Is the answer consistent across all funds and partners, or does it vary depending on past practice? Can a fund file

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4 *Yearbook 2013* at pages 17, 20.

5 *Yearbook 2013* at page 24.

comments in an SEC rulemaking that discuss the impact regulations are having on its fundraising process without fear of violating the restrictions on general advertising?[6]

Legitimate market players share an interest in making sure that all market participants understand the rules and interpret them consistently. Offerors, their counsel, their accountants and others all need to get comfortable with the offeror's approach to fundraising. This is going to become more difficult – and potentially much more expensive and time consuming – as offerors are able to communicate more flexibly and as communications technologies continue to evolve.

To promote compliance, consistency, and efficient capital markets, we urge the Commission to take the following three steps.

One, we urge the Commission to create space for "normal" communications that do not rise to the level of "solicitation" (and, as a result, are permissible under the existing Rule 506(b) rules). In doing so, it should adopt rules that are as simple as they can be without putting investors at unreasonable risk. For example, the Commission should:

- Allow a broader range of general, non-specific communications by companies, funds, firms, and their principals, which mention fundraising but are not solicitations or advertising in the common-sense meaning of those terms.

- Determine what types of fundraising pose less risk, based on factors such as the number or type of investors that will be admitted to the fund or minimum investment levels, and give firms engaged in lower-risk fundraising greater flexibility than firms that are engaged in true, broad-based general advertising and solicitation.

- Clarify that the legends and other disclosures in the proposed rules (if adopted) must appear in formal written communications to prospective investors, but are not required in informal written communications, such as blogs, tweets, conference presentations, and the like.

Two, no matter how perfectly the Commission writes its rules in this proceeding, there are bound to be surprises and the world is bound to keep changing. The Commission should therefore create an informal guidance process it can use to refine and

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6 This is not a hypothetical issue. We are aware of one firm that filed comments with the SEC discussing the impact regulations were having on its efforts to raise its most recent fund. The firm had to withdraw its comments, due to concerns that discussing fundraising in a public document violated the restrictions on general advertising and solicitation.

communicate how it interprets its rules. The Commission should make the output easily accessible (such as through FAQs on the Commission's website) and continue the process on an ongoing basis.

II. The Commission Should Gather Data Using the Least Intrusive, Most Efficient Approaches Available.

In the Notice, the Commission proposes to require offerors relying on Rule 506(c) to make a series of new filings before, during, and at the close of an offering. This presents two serious problems.

One, the added complexity would raise compliance costs. This would impose a particular burden on small funds, including many of the investors who provide capital to early stage startups.

Two, the new filing rules would force offerors to disclose more information and make those disclosures earlier in the process – potentially before they even begin talking with investors. Interestingly, in another Title of the JOBS Act, Congress recognized that offerors legitimately may want to "test the waters" before they publicly announce their offering or disclose confidential information. Yet under Rule 506(c), the Commission is proposing to move in exactly the opposite direction.

As a result of these effects, the Commission's proposed approach will significantly reduce or even destroy the attractiveness of the new 506(c) offering process.

The Commission can solve this problem without losing the benefits it sought to create by taking three related steps.

One, any reporting process should be streamlined and have minimal (if any) "prior notice" requirements. Any pre-offering filings should include only the core information state and federal regulators need to determine whether an offeror is relying on Reg D (such as fund name, address, website, contact and a "check box" indicating the fund is relying on Reg D), and should be structured in a way that makes it possible for an offeror to have a blanket "standing" filing, indicating that any fundraising it does while the filing is effective is being done under Reg D without disclosing the specific timing for the offering or fundraising goals.

Two, if the Commission decides it needs to augment its data-collection efforts, it should do so using a single annual filing, rather than a series of filings tied to specific offerings. In addition, offerors should be allowed to make this filing together with other required filings, such as Registered Investment Advisor and Exempt Reporting

Advisor filings. These steps will retain the Commission's access to data on fundraising without adding meaningfully to funds' compliance burdens.

Finally, if any data is needed for investor protection purposes (as opposed to data collection purposes), the Commission should either require offerors to include the data in investor materials (if the information is needed by investors) or allow offerors to submit the data on a confidential basis (if the information is needed by the Commission or state regulators). As above, the number of filings should be kept to a minimum, and filings should be required only during or after an offering, rather than prospectively.

CONCLUSION

SVB appreciates this opportunity to comment on the proposed rules. If you have any question on these comments, please do not hesitate to contact us.

Sincerely,

Mary Dent

Mary Dent *on behalf of*
SVB Financial Group

30 *Years of Innovation*