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October 28, 2013

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

Re: File No. S7-06-13

Dear Secretary Murphy:

I appreciate the opportunity to comment on the proposals by the Securities and Exchange Commission concerning Rule 506 and Regulation D that are contained in Securities Act Release No. 9416 (July 10, 2013) ("Release" or "Proposal").[1]

I. Overview

The Release proposes a number of changes to Regulation D. These include: a requirement to file a Form D prior to the use of a general solicitation under Rule 506(c) and a closing amendment for any offering relying on Rule 506; the imposition of a penalty for the failure to file the Form D in the form of a one year time out for offerings under the Rule; the inclusion of legends and other disclosure in solicitation materials; and, on a temporary basis, the obligation to file solicitation materials with the Commission. The Release also proposes a number of changes to the content of Form D and describes a "work plan" that will be undertaken by the staff to determine the "effectiveness of Rule 506(c)".

II. Advanced Filing of Form D

The core of the Proposal is the requirement that issuers file a Form D 15 days prior to an offering under Rule 506(c). The advanced filing of the Form has at least two critical benefits. First, the Form can facilitate investor due diligence by providing useful information about some of the risks associated with of an offering under the provision. Second, the filing can facilitate the identification of, and intervention in, fraudulent offerings by the Commission and state regulators before sales actually occur.

[1] The comment period was extended until November 4, 2013. *See* Securities Act Release No. 9458 (Sept. 27, 2013).

Investments under Rule 506 often entail a high degree of risk. Most offerings relying on Rule 506 appear to involve very small[2] non-reporting[3] operating companies[4] that raise only a modest amount of capital.[5] Shares in these companies will either not be traded in the secondary market or traded in markets with thin volume and prone to manipulation.[6] Likewise, these companies are typified by a dearth of public information.[7]

General solicitations will exacerbate the concerns in this area. The analysis provided by the Division of Economic and Risk Analysis (DERA) shows that most operating companies using Regulation D sell to a small number of investors.[8] Because issuers do not typically rely on intermediaries,[9] these statistics suggest that investors often have a pre-existing relationship with the issuer.[10] The relationship provides a potential source of information about the company.

The use of general solicitations will change the nature of these relationships. Issuers will be able more easily to attract a class of investors that do not have a pre-existing relationship. As a result, these investors will have access to less information about the company. The Form D will often represent the only available source of public disclosure.[11] Among other things, the Form may indicate the size of the issuer and identify insiders and controlling shareholders.

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[2] Based upon the number of issuers reporting revenue, the Study concluded that "most" had revenues below $1 million (including 17.3% of companies filing a Form D reporting no revenue). A majority of companies did not, however, provide revenue data. Vladimir Ivanov and Scott Bauguess, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption*, 2009-2012, at 14 (July 2013) ("Study"), *available at*: http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.

[3] Only approximately 13% of the offerings examined by non-fund companies involved reporting companies. Study, *supra* note 2, at 14.

[4] *See* Study, *supra* note 2, at 11 ("Although non-financial issuers raised substantially less than fund issuers in aggregate, they account for the majority (60%) of all new offerings and Form D filings").

[5] In 2012, the median offering for a non-financial issuer was $1.6 million. Study, *supra* note 2, at 11.

[6] The Commission has expressed "increase[ed] concern" with the prevalence of fraud among microcap companies." *SEC v. Lee*, Litigation Release No. 22177 (D. Mass. Dec. 2, 2011) ("Fraud in the microcap stock markets is of increasing concern to regulators as such markets have proven to be fertile grounds for fraud and abuse. This is, in part, because accurate information about microcap stocks may be difficult for the average investor to find, since many microcap companies do not file financial reports with the Commission.").

[7] Most companies relying on Rule 506 are not public and, as a result, do not file periodic reports. *See* Securities Act Release No. 9416 (July 10, 2013) ("Reporting companies account for 2% of the total amount sold through Regulation D, on average, although this varies significantly by year."). Moreover, reporting companies often lack adequate available information. This is particularly true with respect to microcap companies. Microcap Stock: A Guide for Investors, *available* at http://www.sec.gov/investor/pubs/microcapstock.htm ("information about microcap companies can be extremely difficult to find, making them more vulnerable to investment fraud schemes and making it less likely that quoted prices in the market will be based on full and complete information about the company.").

[8] Study, *supra* note 2, at 15 (mean for non-financial issuers for offerings under Regulation D in 2012 was 8; median was 4). *See also* Exchange Act Release No. 69959 (July 10, 2013) ("More than two-thirds of these offerings have ten or fewer investors, while less than 5% of these offerings have more than 30 investors.").

[9] Of the offerings studied between 2009 and 2012, only 13% used an intermediary "such as a finder or broker-dealer." Study, *supra* note 2, at 16.

[10] As the Commission has noted, "the vast majority of Regulation D offerings are conducted without the use of an intermediary, suggesting that many of the investors in Regulation D offerings likely have a pre-existing relationship with the issuer or its management because these offerings would not have been conducted using general solicitation." Securities Act Release No. 9416 (July 10, 2013).

[11] Exchange Act Release No. 57280 (Feb. 6, 2008) ("Form D filings also have become a source of information for investors.").

Investors can use the information to assess the risk of the offering, determine the quality of management, and, in some cases, uncover the presence of bad actors.

The advance filing of the Form D also promotes enforcement. NASAA has targeted Internet fraud.[12] The Commission intends to "develop risk characteristics regarding the types of issuers and market participants that conduct or participate in Rule 506(c) offerings. . ." In both instances, an advance filing of the Form D will facilitate intervention in illegal offerings before sales have actually occurred and investors have been defrauded.[13]

III. Form D Noncompliance

a. The Problem of Noncompliance

The Proposal also seeks to address the serious problem of noncompliance with respect to the filing of Form D. Rule 503 currently requires issuers relying on Regulation D to file a Form D. 17 CFR 230.503. The use of Regulation D, however, is not conditioned upon the filing of the Form. As a result, issuers have little incentive to file the document and, in fact, noncompliance appears to be rampant.

The DERA analysis provided some insight into the rate of noncompliance. DERA focused on offerings involving a registered broker or adviser. DERA concluded that approximately 9% of the offerings disclosed in FINRA filings by brokers "did not have a corresponding Form D" while "as many as 11% of the private funds advised by registered investment advisers did not file a Form D when relying on the Regulation D exemption."[14]

The degree of noncompliance is, however, likely to be substantially higher than the 9% to 11% range. First, the DERA analysis is, by definition, limited to the offerings where brokers and advisers complied with independent filing obligations concerning private offerings. The analysis would not include, therefore, data about offerings where issuers failed to file the Form D and advisers or brokers failed to meet their independent filing obligation.

Second, most offerings by operating companies under Regulation D do not involve the use of a broker or adviser.[15] Brokers and advisers are presumably more likely to know the legal requirements associated with private placements. Issuers that do not employ such professionals

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[12] NASAA has formed a task force designed to focus on Internet fraud. *See* http://www.nasaa.org/12835/nasaa-warns-of-potential-dangers-of-crowdfunding-investment-opportunities/ (announcing formation of Internet Fraud Investigations Project Group).
[13] For example, share prices may be manipulated in advance of the general solicitation, thereby increasing the sale price for the shares in a subsequent private placement. *See SEC v. Rubin*, Litigation Release No. 22102 (Sept. 23, 2011) ("Scott, in an email to Rubin and another scheme participant, explained that he engaged in manipulation to keep an issuer's stock price at a certain range - a range that he believed was needed to facilitate Westcap's concurrent private placement involving that issuer.").
[14] Securities Act Release No. 9416 (July 10, 2013). DERA noted that the number "could overstate the actual number of private funds that did not file a Form D due to typographical errors in the name of the private fund or filing number" and because they were not required to report offerings for funds "closed to new investments. . . " Id.
[15] *See supra* note 9.

can, therefore, be expected to be less informed about these legal obligations and have a higher rate of noncompliance with the filing of a Form D.

The level of noncompliance raises substantial concerns. The failure to file deprives investors of important information about an offering. Likewise, noncompliance makes intervention in an ongoing offering by the Commission and state securities regulators more difficult.[16]

Noncompliance also, however, raises significant concerns about the empirical analysis employed by the Commission in determining the appropriate regulatory framework with respect to Regulation D. The degree of noncompliance affects the conclusions that can be drawn from the data. Moreover, companies committing fraud or engaging in regulatory noncompliance have a particular incentive not to file a Form D. The dearth of these companies from the data set, therefore, makes efforts to develop "risk characteristics" particularly difficult.

b. Ensuring Compliance

The Release acknowledges the problem of noncompliance and proposes a penalty for the failure to file a Form D in the form of a time out from the use of Rule 506 for one year. The penalty, however, is unlikely to significantly improve compliance with the filing requirement.

First, the effectiveness of the penalty is impaired by the problems of detection. The unavailability of Rule 506 depends upon the existence of an earlier offering and noncompliance with the Form D filing requirements. The Proposal does not explain how investors and the Commission will become aware of the earlier offering, particularly given the failure to file the Form D. Thus, as a practical matter, issuers ineligible to use Rule 506 will nonetheless continue to rely on the exemption, with investors and the Commission unaware of its inapplicability.

Second, the "time out" applies to subsequent offerings. As a result, the penalty does not prevent the current offering from going forward. For issuers unconcerned about the next offering (particularly those engaging in fraudulent practices such as pump and dumps), the prospective nature of the penalty will provide little incentive to file the Form D. Moreover, it only applies if the "next offering" is within five years. Issuers often will have no expectation of using the exemption within that period.[17]

Third, the time out only applies to Rule 506. Section 4(a)(2) would, for example, continue to be available, as would Regulation A, Rules 505 and 504, and intrastate exemption under Rule 147.[18] As a result, issuers confronting the penalty have numerous other avenues available for selling shares in an exempt offering.

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[16] *See* Exchange Act Release No. 57280 (Feb. 6, 2008) (noting that one purpose of Form D was "enforcement of the federal securities laws, including enforcement of the exemptions in Regulation D.").

[17] Thus, for example, the number of "unique" issuers over a four year period in one Study was placed at 49,740. Study, *supra* note 2, at 5. At the same time, there were 67,706 filings. The data, therefore, suggests that most unique issuers used the exemption only once during the four year period.

[18] Almost 70% of the offerings reported under Regulation D would have been eligible either for Rules 504 or 505. Study, *supra* note 2, at 7 ("Almost 50% of all Rule 506 offerings by non-funds since 2009 were $1 million or less

Finally, the approach presupposes that issuers are sufficiently motivated to file the Form D by the prospect of a one year delay. In a proposal that is otherwise filled with empirical observations, this assertion is curiously unsupported. Issuers will only be sufficiently motivated if they reasonably expect to conduct another offering within the five year period of the penalty. The data from DERA suggests that this is often not the case.

c. Alternatives

The SEC's proposal is an improvement over the existing regulatory framework. Currently there is no consequence to the failure to file a Form D. Nonetheless, the Commission needs to adopt an approach that is more likely to induce significantly greater compliance.

The most effective solution would be to reinstate the requirement that conditioned the exemption upon the filing of the Form. In eliminating the requirement in 1989,[19] the Commission nonetheless recognized the continued need to provide an "incentive for filing the Form D in a timely manner".[20] As a result, the Commission added Rule 507 to allow an issuer "subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with Rule 503" to be barred the use of Regulation D.[21]

With more than two decades of experience, the use of Rule 507 as an "incentive" to ensure compliance with the requirement to file a Form D must be viewed as a failure. There is significant noncompliance with the filing requirement. Moreover, no issuer has ever been barred from using Regulation D under the Rule.

As a result, the Commission should simply eliminate Rule 507 and again require the filing of the Form D as a condition of the exemption. In declining to propose this reform, the Release cited concerns with "disproportionate" consequences.[22] Specifically, the Release noted that the approach could result in uncertainty about the applicability of the exemption "until after the offering was terminated and all filings required under Rule 503 were made."

The analysis, however, focused on the uncertainty that arose from a loss of the exemption arising from the failure to file a timely amendment to the Form D. To the extent that the

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and therefore may have qualified for the Rule 504 exemption . . . An additional 20% of offerings were between $1 million and $5 million and therefore could have claimed a Rule 505 exemption based on offering size.").

[19] *See* Securities Act Release No. 6825 (March 14, 1989) ("The Rule 503 requirement to file a Form D within 15 days of the first sale of securities remains, but will no longer be a condition to the establishment of any exemption under Regulation D.").

[20] Securities Act Release No. 6759 (March 3, 1988).

[21] 17 CFR 230.507.

[22] Securities Act Release No. 9416 (July 10, 2013) ("in the case of a continuous or long-lived offering, this could mean that an issuer's failure to file an annual amendment or closing amendment would trigger loss of the Securities Act exemption, which would give purchasers rescission rights and result in loss of blue sky pre-emption for offers and sales that occurred, in certain cases, years before the failure to file a Form D triggered the loss of an exemption.").

exemption was conditioned only upon the timely filing of the initial Form D, there would be no uncertainty. For other requirements in Rule 503, such as the need for amendments, the Commission could apply a less severe penalty such as the proposed one year time out.[23] Finally, to mitigate any concerns over the possible hardship resulting from the loss of an exemption due to the failure to file a Form D, the Commission could provide for waiver under the appropriate circumstances.

In addition, the Commission should require that, in addition to any other legends or required disclosure, the issuer include a link to the Form D on all materials used in a general solicitation. The absence of the link could suggest noncompliance, serving as a warning to investors, and provide the Commission with the immediate ability to intervene in the offering if circumstances warranted. The requirement could be both a condition of the exemption in Rule 506(c) and a requirement imposed under the antifraud provisions.[24]

IV. Form D and Disclosure

The proposal also seeks to modify the information collected in a Form D. The proposed changes to the content of Form D are appropriate and will assist the Commission in collecting much needed data. Additional changes in the proposed format would, however, increase the value of the data collected and permit the Form to serve a stronger investor protection purpose.

Method of General Solicitation. Proposed Item 21 seeks information on the type of general solicitation used by the issuer.

The proposed Item contains a list of categories. Categories include "email" and "social media." With respect to social media, this can mask wide variations, including passive posting (Facebook) (sometimes called "pull technology) or affirmative distribution of notifications (sometimes called "push" technology). The Item should at least provide a clarification field to provide space to specify the type of social media employed in the offering.

In addition, the Item provides that, with respect to the types of general solicitation used, issuers can check "all that apply." Issuers will, therefore, be able to check a multitude of categories on the Form D, with some likely to be selected in every general solicitation. Email, the Internet, and the telephone will, for example, be common categories. The effect will be to obscure the primary method used in the offering. Because the method (e.g., spam emails, robo calls), may be important in analyzing the use of Regulation D and developing appropriate risk factors, the Item should request that issuers identify the "primary" methods used for the general solicitation and allow issuers to check no more than two categories.

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[23] Once the Form has been filed, the Commission and the public will be aware of the offering. The ability to detect other violations of Rule 503 will be significantly greater.

[24] For example, a rule adopted under the antifraud provisions makes it a violation to fail to send a confirmation at or before completion of a securities transaction. *See* Rule 10b-10, 17 CFR 240.10b-10. Requiring a link to the Form D under the antifraud provisions would essentially elevate the seriousness of any failure to make the requisite disclosure.

The list of categories also should be more specific. For example, while the list includes telephone solicitations, something that presumably encompasses robo calls, it does not specifically reference texting. Nor does the list clarify where instant messaging would be included. There is no category that specifically calls for videos posted on YouTube or similar Internet sites, although perhaps they fall under "other oral communications."[25] Similarly, no category specifically mentions solicitations undertaken by facsimile.

Finally, issuers relying on social media, emails, texting and other methods that facilitate mass distributions to accredited and non-accredited investors will often need to acquire lists from third parties. The number of investors on the list and their common attributes, if any, could provide important information about the nature of the general solicitation and the risks associated with the offering. The Item (or a separate item) should, therefore, require that issuers identify whether they have purchased lists of potential purchasers from third parties, the approximate number of persons on the list, the third party providing the list, and whether the persons on the list are represented to have common characteristics such as accredited investors or retirees.

Verification of Accredited Investor Status. Proposed Item 22 seeks information on the methods used to verify accredited investor status.

With respect the accredited investor standard for individuals, the determination of "net worth" imposes the most "practical difficulties" in connection with verification.[26] Particularly in anticipation of reforms of the accredited investor standard, the Item should be expanded to require the reporting of information that will assist in understanding the types of assets used in this calculation.

For those checking the net worth category, additional queries should be included. They should include a discover field that asks for the approximate percentage of purchasers qualifying under the net worth standard or a range of percentages that can be checked.[27] In addition, they should ask issuers to disclose the type of assets used in calculating net worth from a pre-existing list that includes retirement plans, illiquid assets such as real estate, personal items, which would include automobiles and household items, and a discovery field for any other asset in which there was no liquid market.

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[25] These methods are in fact used in securities offerings. *See SEC v. Banc De Binary LTD*, Litigation Release No. 22767 (Aug. 1, 2013) ("The company has broadly solicited U.S customers by advertising through YouTube videos, spam e-mails, and other Internet based advertising; and . . . representatives have communicated with investors directly by phone, e-mail, and instant messenger chats.").

[26] *See* Securities Act Release No. 9415 (Jul. 10, 2013) ("the verification of natural persons as accredited investors may pose greater practical difficulties as compared to other categories of accredited investors, particularly for natural persons claiming to be accredited investors based on the net worth test.").

[27] The use of ranges rather than a discovery field will make it easier to analyze the data. Rather than individually examine each item in the discovery field, answers using a preexisting range can be converted into structured data and analyzed more quickly with software. This is particularly important given the volume of filings under Regulation D. *See* Study, *supra* note 2 (analyzing more than 110,000 Form Ds over four year period).

Issuer size. As discussed, the size of the company can be an important factor in determine the risk associated with an offering under Regulation D. Nonetheless, the information is often unavailable.

Item 5 of Form D currently requests information on revenue or net asset value. The Item does not ask for a specific number but allows issuers to select an appropriate range. Issuers, however, also have the option of selecting "decline to disclose" or "not applicable." Most companies submitting the Form select one of these options and do not provide the requested information.[28] As a result, it is difficult to draw any firm conclusions about the average (or median) size of the companies engaging in offerings under Regulation D.

The Proposal seeks to address the high rate of non-response by eliminating the "decline to disclose" option and replacing it with "Not Available to Public". The change is apparently designed to limit the circumstances where issuers could withhold the information. They could not do so, for example, where the information was already available to the public or the issuer had not made a "reasonable effort to keep such information confidential . . ."

The proposed change, while an improvement, is not likely to result in a significant increase in the response rate. Most companies using Regulation D are non-reporting companies. They will invariably be able to assert that the information is not available to the public. This is true even if the information is routinely calculated and provided to lenders or key investors. Moreover, issuers may incorrectly decline to provide the required information with little risk of detection or enforcement.

The Commission should, as proposed, delete the option of "decline to disclose" but should not, as proposed, replace it with "Not Available to Public". The "decline to adopt" option was problematic when adopted in 2008. Of the few comments,[29] one in fact warned that "many companies will opt out, reducing the integrity of the information collected," an observation that proved prescient. The rationalization given by the Commission for inclusion was that "some companies may regard this type of information as confidential." To the extent some residual concern exists over the confidentiality of the information, the matter is better addressed through broader ranges for revenue and NAV rather than through the option of a non-response.

The Commission should also delete the "not applicable" option, another category that obscures issuer size.[30] The option was also added in 2008 and was apparently designed to provide an option for businesses that "were not intended to produce revenue, such as a fund that seeks asset appreciation".[31] Notwithstanding the concern, information on the size of these

[28] Securities Act Release No. 9416 (July 10, 2013) ("At present, a majority of Form D filings do not provide information on the size of the issuer's revenue (if the issuer is an operating company) or net asset value (if the issuer is a hedge fund or other investment fund). A total of 55.4% of companies from 2009 to 2012 declined to disclose."). 14. The non-compliance is even higher with respect to investment funds. Study, *supra* note 2, at 12, n. 21 ("Since 2009, more than three-quarters of issuers have declined to disclose NAV").
[29] Exchange Act Release No. 57280 (Feb. 6, 2008) (noting that one commentator "suggested that we eliminate the revenue range requirement entirely."). The comments are here: http://www.sec.gov/comments/s7-18-07/s71807.shtml
[30] Of the issuers submitting a Form D, 3.7% selected "not applicable." Study, *supra* note 2, at 14 (figure 8).
[31] Exchange Act Release No. 57280 (Feb. 6, 2008).

issuers would still be useful. Moreover, the meaning of the provision is not self-evident and may sometimes be incorrectly applied. At a minimum, the category should be changed to provide more specific information either by designating the category as "Funds that Primarily Seek Asset Appreciation" or through the inclusion of a "clarification field."

Number of Investors. Item 14 asks for the number of accredited and non-accredited investors, broken down by natural persons and legal entities.

In general, this comports with the approach under Rule 501(a). Nonetheless, the Rule also provides that the definition of accredited investors includes "[a]ny entity in which all of the equity owners are accredited investors." In some cases, therefore, an entity may qualify because it is owned entirely by an individual accredited investor (or group of accredited individuals). Under the Form as proposed, these investors would be listed in the category of "legal entities." Because the applicable test for the entities would be the accredited status of the individual owners, rather than the accredited status of the entity, they should be included in the category of natural persons. An instruction to that effect should be included in the Form..

Disclosure of Corporate Insiders. Item 3 seeks disclosure of a number of persons associated with the issuer, including promoters and any person who "directly or indirectly controls the issuer . . ."

The provision, however, should be drafted in a manner that brings it into greater alignment with the bad actor provision in Rule 506(d). At a minimum, this would require the addition of officers participating in the offering and any beneficial owner of 20% or more of the outstanding voting equity securities. Consideration should also be given to the mandatory disclosure of any broker or other person receiving remuneration in return for soliciting purchasers.

V. The Work Plan

The Proposing Release commits the Commission to a work plan designed to analyze the effectiveness of Rule 506(c). This is an important step. Among the various topics that will be examined, the staff intends to "evaluate whether the absence of the prohibition against general solicitation has been accompanied by an increase in sales to non-accredited investors . . ." This is a critical issue that can drive the direction of future regulatory reforms.

At one level, the "absence of the prohibition against general solicitation" will likely result in a reduction of the number of non-accredited investors. While Rule 506(b) permits sales to some non-accredited investors, Rule 506(c) does not. To the extent issuers rely more frequently on Rule 506(c), the already small percentage of offerings that include non-accredited investors will decline.[32]

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[32] Study, *supra* note 2, at 15 (noting that 10% of offerings by non-financial issuers and 7% of those by hedge funds report at least one non-accredited investor).

The more difficult issue, however, is whether and to what degree general solicitations result in the sale of shares to non-accredited investors who represent that they are in fact accredited. This can arise from investor error in computing income or net worth. It may also occur where investors lack a complete understanding of the necessary methodology in calculating these amounts (for example by including the principle residence in the determination of net worth) or from incorrect advice by a participant in the offering. It can also occur as a result of a deliberate decision by an investor to misreport income and net worth. The reasonable steps requirement in Rule 506(c) is intended to address all of these concerns.

The data produced in the Form D is not likely to provide significant insight into the degree to which investors incorrectly categorized as accredited in fact participated in offerings under Rule 506(c). To obtain this information, the Commission will need to ensure that the inspection process for brokers and advisers includes a thorough examination of records used to verify accredited investor status, particularly for individuals. The inspections will need to take into account both the information contained in the documents and their credibility.

Inspections of brokers and advisers will not, however, be enough. Most offerings by operating companies do not rely on these market professionals. To understand the participation rate by non-accredited investors in offerings under Rule 506(c), therefore, the Commission will need to examine the verification practices implemented by issuers. This will require a committed and dedicated effort by the Division of Enforcement.

VI. Request for Comment on the Definition of Accredited Investor

The Release also invited comments on the definition of accredited investor. The definition will likely be a topic addressed in future rulemaking endeavors. As the matter moves forward, however, the Commission should give serious consideration to reforming the calculation of net worth by eliminating from the determination the assets contained in retirement plans.

Investors who are retired or close to retirement may qualify as accredited primarily or solely because of these assets. Given the increased risk and accompanying illiquidity of offerings under Regulation D, restricted securities sold pursuant to these exemptions will generally not be an appropriate investment for many such individuals. Moreover, to the extent cash poor, retirees seeking to invest may be encouraged to liquidate retirement assets, potentially replacing low risk investments with high risk securities.

The accredited investor test is designed to use income and net worth as an objective substitute for sophistication. Investors who meet the test primarily because of retirement assets do not have sufficient indicia of sophistication. As a result, the asset should be removed from the calculation. In addition, consideration should be given to the exclusions of funds recently withdrawn from retirement plans, much the way Rule 501 addresses equity from the primary residence.

V. Conclusion

The Proposal contains a number of reasonable reforms. The inconveniences of these modest requirements are outweighed by the need to protect investors. Modifications may be possible but only after the Commission has obtained sufficient experience with the general solicitation requirement and an empirical understanding of actual practices.

The Proposal also demonstrates the importance of interactive data in the determination of the appropriate regulatory framework. Many of the suggested reforms were supported by extensive empirical analysis undertaken by the DERA. The data mostly entailed an examination of the four year period from 2009 to 2012 when issuers were required to file the Form D in an interactive format. As a result, DERA was able to pull data from approximately 110,000 forms filed during the period.[33]

The Form D is currently one of the small number of filings that must be submitted to the Commission using an interactive format.[34] The SEC's Investor Advisory Committee has recommended that the Commission make fare more extensive use of interactive data.[35] The IAC has specifically recommended that the Commission require the inclusion of machine readable tags in filings that disclose executive compensation and voting practices by mutual funds. The analysis and insight provide by DERA demonstrates the benefits associated with this approach.

If you have any questions or would like to discuss this matter further, please feel free to contact me.

Yours truly,

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Chauncey Wilson Memorial Research Professor of Law
Director, Corporate & Commercial Law Program
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[33] The analysis of data on offerings under Regulation D was based upon the Form D's filed electronically. The data did not include paper filings, something that continued until March 2009. Study, *supra* note 2, at 4 (noting that "paper filings in 2009 are not captured in the analysis.").

[34] The electronic form is here: http://www.sec.gov/about/forms/formd.pdf

[35] Recommendations of the Investor Advisory Committee Regarding the SEC and the Need for the Cost Effective Retrieval of Information by Investors
(Adopted July 25, 2013), *available* at http://www.sec.gov/spotlight/investor-advisory-committee-2012/data-tagging-resolution-72513.pdf