November 4, 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:

I am pleased to provide these comments on the proposed rule regarding "Amendments to Regulation D, Form D and Rule 156."[1] The basic thrust of these comments is that the SEC should tread carefully and not take regulatory steps that have potentially huge adverse economic effects. The Commission should be working with Congress to promote economic growth, innovation, productivity enhancement, job creation and real wage growth. It should not be adopting policies largely designed to thwart Congressional intent that will harm the prosperity and economic well-being of the American people and that will do little to promote investor protection.

Regulation D, although imperfect, works well. In important respects, it has become the most important means of raising capital in the U.S., particularly for the young, dynamic companies that contribute the most to economic growth and job creation. With large bi-partisan majorities, the Congress made the policy judgment that the restrictions in Regulation D should be relaxed to some degree. Yet the proposed rules will sharply reduce the positive economic effects of the constructive changes made by Congress. If combined with substantial increases in the accredited investor thresholds that the SEC is contemplating, and regarding which the SEC has sought comments in this proposed rule, then the SEC will almost certainly negate the positive impact of the JOBS Act.[2]

The changes made by Congress in the JOBS Act, particularly Title II (relating to general solicitation in Regulation D offerings) and Title III (relating to crowdfunding), have the potential to create millions of jobs over time for the American people and to improve the real wages of many millions more. The proposed amendments to Regulation D are not going to affect only affluent accredited investors. The proposed rule and its potential progeny can be expected to have a macroeconomically significant negative impact on the U.S. economy and to adversely affect millions of people.

[1] Release No. 33–9416; Release No. 34– 69960; Release No. IC–30595; File No. S7–06–13; RIN 3235–AL46. See "Amendments to Regulation D, Form D and Rule 156," *Federal Register*, Volume 78, Number 142, July 24, 2013, pages 44806-44855 and Release No. 33-9458; Release No. 34–70538; Release No. IC–30737; File No. S7–06–13; RIN 3235–AL46; "Amendments to Regulation D, Form D and Rule 156; Re-Opening of Comment Period," *Federal Register*, Volume 78, No. 192, October 3, 2013, p. 61222.
[2] The Jumpstart Our Business Startups Act, Public Law 112–106, Apr. 5, 2012.

The simple fact that these unwarranted rules contain within them over 100 issues regarding which the Commission is seeking comments from the public is illustrative of the fact that they are overly complex and will materially increase the burden on small and start-up business. No matter how the Commission resolves these issues, they are issues that counsel for small firms must become familiar with and address in their Regulation D filings and, of course, for which they will bill their clients. If the proposed rules are adopted, using Regulation D (particularly with general solicitation) will become notably more expensive and fewer issuers will be able to raise the capital needed to innovate and create jobs.

The Regulation D Capital Market is Perhaps the Most Important Part of the U.S. Capital Markets

In 2012, total private placements ($1.7 trillion) exceeded public (registered) securities sales ($1.2 trillion) and Regulation D offerings ($903 billion) account for over half of all private offerings.[3] Two thirds of Regulation D offerings were equity.[4] In 2012, more than 234,000 investors participated in Regulation D offerings, of which more than 90,000 participated in offerings by nonfinancial issuers.[5] Although the aggregate amount of capital raised through Regulation D offerings is large, the average offering size is only $30 million and the median offering size is just $1.5 million.[6]

Capital Raised Using Regulation D[7]

Year	Regulation D Filings[8] (number)	Total Amount Sold ($ billions)	Mean Amount Sold ($ millions)	Median Amount Sold ($ millions)
2009	20,841	$595	$36	$1.5
2010	29,445	$1,025	$26	$1.4
2011	30,710	$863	$28	$1.5
2012	31,471	$903	$27	$1.5

Source: SEC

Regulation D is the primary means by which new companies and young growing companies raise equity capital.[9] As two SEC analysts put it, "[c]onsistent with the original intent of

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[3] Vladimir Ivanov and Scott Bauguess, "Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009-2012," Division of Economic and Risk Analysis, U.S. Securities and Exchange Commission, July, 2013, p. 4, 8, http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.
[4] Ibid., p. 10.
[5] Ibid., p. 15.
[6] Ibid., p.5.
[7] Ibid., p. 4.
[8] These figures include amended Regulation D filings. According to the SEC: "There were 49,740 unique issuers of new Regulation D offerings over the four years under consideration. This number increases to 56,968 with the inclusion of ongoing (amended) offerings," ibid., p. 5.

Regulation D to target the capital formation needs of small business, there have been more than 40,000 issuances by non-financial issuers since 2009 with a median offer size of less than $2 million.[10]

Economic research has increasingly demonstrated that most of the job creation in the economy comes from young, dynamic companies. These companies need equity investment to launch and to grow. Some call these companies Gazelles. A recent survey of the economics literature on the subject reached the conclusion that Gazelles "create all or a large share of net new jobs."[11]

Adopting policies that impede these dynamic firms' access to capital will exacerbate unemployment and hold down real wage improvements. They will harm millions of Americans who will not be able to secure good, well-paying jobs because the firms that create those jobs will not exist. Given the size of the Regulation D capital market and the critical role of Gazelles in job creation and economic growth, these effects will be macroeconomically important.

Securities Regulation Administrative Costs are High and Significant and Should Not be Increased without Good Reason

The regulatory framework created by the Commission makes it expensive to raise capital and dramatically impedes capital formation, job creation, innovation, productivity improvement and economic growth. Regulatory costs have a particularly pronounced impact on the ability of small and start-up firms to access the capital markets and these costs should not be increased without very good reason. The proposed rule exacerbates these costs and, for that matter, so does the proposed crowdfunding rule.[12] That Commission regulatory impediments are a major problem is, I submit, so widely understood that the JOBS Act secured strong bi-partisan support at a time when such bi-partisan cooperation is rare. The Commission should acknowledge this problem by, at the very least, not making it worse.

One of the goals of Regulation D was "a substantial reduction in costs and paperwork to reduce the burdens of raising investment capital (particularly by small business)."[13] It is imperfect, but compared to previous regulations governing private placements or small offerings, Regulation D has achieved that goal, particularly since NSMIA was enacted.[14] The proposed rule is diametrically opposed to this objective.

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[9] Many of the smallest firms rely on the private offering exemption without using the Regulation D safe harbor. These firms raise the bulk of their funds from family and friends, with whom they have a "substantial pre-existing relationship."

[10] Ivanov and Bauguess, *supra*, p. 3.

[11] Magnus Henrekson and Dan Johansson, "Gazelles as Job Creators: A Survey and Interpretation of the Evidence," *Small Business Economics*, Vol. 35, pp. 227-244 (2010).

[12] See "Crowdfunding," Release Nos. 33-9470; 34-70741; RIN 3235-AL37, File Number S7-09-13, Proposed Rule, October 23, 2013. I will file separate comments on the Crowdfunding proposed rule on a later date.

[13] "Revision of Certain Exemptions From the Registration Provisions of the Securities Act of 1993 for Transactions Involving Limited Offers of Sales" (Release No. 33-6339), Background, 46 *Federal Register* 41791, August 18, 1981.

[14] The National Securities Markets Improvement Act (NSMIA) of 1996 amended section 18 of the Securities Act (15 USC 77r(a)) such that Rule 506 generally preempted state blue sky laws.

A cautionary tale is the way that Commission overregulation rendered Regulation A and the statutory small issue exemption effectively a dead letter.[15] It is used sometimes as little as once annually by the small issuer community.[16] Its contribution to capital formation in the U.S. is, therefore, genuinely trivial. The increase in the Regulation A offering limit to $50 million from $5 million contained in the JOBS Act may rekindle interest in Regulation A for mid-sized companies. But the regulatory burden remains too high for it to be of any material value to its intended beneficiaries – small firms.

It is much too costly to go public[17] and going public is beyond the means of virtually all small and start-up companies. Congressional and Commission overregulation of public companies has made the cost of remaining public so high that more and more firms – particularly small firms – are going private.[18]

It is beyond the scope of these comments to conduct an exhaustive analysis of the regulatory costs imposed by the U.S. securities regulation regime and, as discussed below, there is surprisingly little hard data on these and other issues in the field in any event. The key point is that our regulatory costs are too high – higher than most other OECD countries – and have a substantial adverse impact on the U.S. economy. Therefore, the Commission should be highly cautious when considering whether to take actions that will make the situation worse.

Purpose of Securities Laws is to Prevent Fraud and Provide Information not to Substitute Federal Judgments for those of Investors.

The purpose of federal securities laws is to prevent fraud and to require that issuers disclose information so that investors may make informed judgments based on possession of the material facts about the issuer. The purpose of federal securities regulation is emphatically not to substitute the Commission's judgment for those of private investors.

The bulk of the proposed rule does little or nothing to promote the first two objectives. For example, requiring all issuers to provide the commission with a copy of each advertisement seeking accredited investors will not provide any new material information that will improve the ability of investors to analyze a prospective investment. It will clearly increase the administration burden on issuers using general solicitation. Similarly, that requirement does nothing to change the applicable fraud provisions. In the vast majority of cases, the

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[15] See, e.g., Rutheford B Campbell, Jr., "Regulation A: Small Businesses' Search For "A Moderate Capital," 31 Del. J. Corp. L. 77, 2006.
[16] Prior to the enactment of the JOBS Act, Regulation A offerings could not exceed $5 million. In 2011, only one Regulation A offering was completed. See "Factors That May Affect Trends in Regulation A Offerings," United States Government Accountability Office (GAO-12-839), July 2012, a study mandated by the JOBS Act.
[17] U.S. costs of going public are notably higher than European costs. See, e.g., Michele Meoli, Katrin Migliorati, Stefano Paleari and Silvio Vismara, "The Cost of Going Public: A European Perspective," Volume 2, Issue 2 May 2012 compared to, e.g., Jay R. Ritter, "The Costs of Going Public," Journal of Financial Economics (1987).
[18] See, e.g., Ehud Kamar Pinar Karaca-Mandic and Eric Talley, "Going-Private Decisions and the Sarbanes-Oxley Act of 2002: A Cross-Country Analysis," Kauffman–RAND Institute for Entrepreneurship Public Policy, February 2008; Ellen Engel, Rachel M. Hayes, and Xue Wang, "The Sarbanes-Oxley Act and Firms' Going-Private Decisions" May, 2004; Robert P. Bartlett III, "Going Private but Staying Public: Reexamining the Effect of Sarbanes-Oxley on Firms' Going-private Decisions ," University of Chicago Law Review, Vol. 76, Issue 1, Winter 2009.

advertisements are not where material misrepresentations will occur. Those misrepresentations will be in the offering memorandum provided to investors (either via fraudulent representations or omissions).

The true goal of the proposed rule appears to be two-fold: to collect information and to increase the regulatory burden on general solicitation offerings. The first goal is legitimate but must be balanced with the burdens it imposes on issuers. Moreover, as discussed below, the information collected needs to be reasonably calculated to further legitimate and important regulatory purposes. Opponents of the JOBS Act argue that it "increases the risk of fraud and misleading practices in the vast and increasingly important Regulation D market."[19] They seek to so heavily regulate JOBS Act general solicitation offerings that they are unattractive and to accomplish via the Commission what they were unable to accomplish in Congress. This second goal is inappropriate both because it is economically counterproductive and inconsistent with Congressional intent.

The Accredited Investor Thresholds Should Not be Increased

Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act[20] ("Dodd-Frank") required the SEC to modify the accredited investor net worth qualification to exclude the equity in a person's residence when calculating their net worth. In addition, section 413(b) invites the Commission to analyze whether the $1 million net worth standard "should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy." This review may be undertaken by the SEC as early as July 21, 2014 and must be undertaken by 2018. Continued quadrennial reviews are required.

Section 415 of Dodd-Frank required the Government Accountability Office (GAO) to conduct a study of the accredited investor thresholds. This GAO study, "Alternative Criteria for Qualifying as an Accredited Investor Should Be Considered," was released in July, 2013.[21]

Tucked in the discussion of the proposed rule is a request for comments regarding the definition of an accredited investor.[22]

The Commission is specifically seeking comment on the following points.

1. Are the net worth test and the income test currently provided in Regulation D the appropriate tests for determining whether a natural person is an accredited investor? Do such tests indicate whether an investor has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of a prospective investment? If not, what other criteria should be considered as an appropriate test for investment sophistication?

[19] See, e.g., Consumer Federation of America Letter to the SEC dated September 26, 2013 available at http://www.sec.gov/comments/s7-06-13/s70613-434.pdf .
[20] The "Dodd-Frank Wall Street Reform and Consumer Protection Act," Pub. L. No. 111–203, July 21, 2010.
[21] "Alternative Criteria for Qualifying As An Accredited Investor Should Be Considered," Government Accountability Office, July, 2013, ("GAO Study").
[22] See "Amendments to Regulation D, Form D and Rule 156," *Federal Register,* Volume 78, Number 142, July 24, 2013, Section V, "Request for Comment on the Definition of Accredited Investor," p. 44829-44830.

2. Are the current financial thresholds in the net worth test and the income test still the appropriate thresholds for determining whether a natural person is an accredited investor? Should any revised thresholds be indexed for inflation?

3. Currently, the financial thresholds in the income test and net worth test are based on fixed dollar amounts (such as having an individual income in excess of $200,000 for a natural person to qualify as an accredited investor). Should the net worth test and the income test be changed to use thresholds that are not tied to fixed dollar amounts (for example, thresholds based on a certain formula or percentage)?[23]

A wide variety of pro-regulation organizations have taken this opportunity to indicate to the SEC their support increasing the accredited investor thresholds and support for a variety of other provisions that would make Regulation D more complex.

For example, the North American Securities Administrators Association, which represents state and provincial securities regulators, supports more than doubling the net worth threshold to a residence exclusive net worth of $2.4 million and increasing the income thresholds from $200,000 to nearly $500,000 to account for inflation since Regulation D was adopted in 1982.[24] Americans for Financial Reform, a coalition of 250 pro-regulation groups, believes that updating the definition for inflation since 1982 "is the single most important step the Commission can take to ensure that unregistered securities sold under Rule 506 are sold only to those investors who are financially sophisticated enough to understand the risks and wealthy enough to absorb potential losses."[25] AARP supports dramatic increases, seemingly to at least $2.5 million in investments and $400,000 in income.[26] The Consumer Federation of America (CFA) supports not only increasing the thresholds dramatically but additional changes to substantially narrow the definition of accredited investor.[27] The CFA's Director of Investor Protection, Barbara Roper, opines that "the burden of proof should be on those groups resisting change to demonstrate that the existing threshold satisfies the Supreme Court test of identifying a group of investors with the financial sophistication to understand the risks of investing in private offerings and the financial wherewithal to withstand potential losses. We have little doubt that, to the degree that it ever did, the current definition has long ceased to identify a population of investors who are capable of "fending for themselves" without the added protections afforded in the public markets."

The primary argument for raising the thresholds is simply that they have not been raised since they were adopted in1982 and that inflation has effectively reduced the original thresholds in

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[23] Ibid.

[24] Letter of A. Heath Abshure to the SEC dated September 27, 2013, available at http://www.sec.gov/comments/s7-06-13/s70613-430.pdf. See also, letter of Karen Tyler to the SEC dated October 26, 2007 available at http://www.nasaa.org/wp-content/uploads/2011/07/34-NASAACommentLetter_Revisions_of_Limited_Offering_Exemptions_in_Regulation_D.pdf.

[25] Letter to the SEC dated September 26, 2013available at http://www.sec.gov/comments/s7-06-13/s70613-434.pdf.

[26] Letter of David Certner to the SEC dated September 24, 2013available at http://www.sec.gov/comments/s7-06-13/s70613-429.pdf .

[27] Letter of Barbara Roper to the SEC dated September 23, 2013available http://www.sec.gov/comments/s7-06-13/s70613-393.pdf .

real, inflation-adjusted terms. The table below shows what the accredited investor thresholds would be if they had been indexed for inflation during the previous three decades.

Accredited Investor Thresholds Adjusted for Inflation[28]

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: Author's calculations using Bureau of Labor Statistics Consumer Price Index data.

Logically, the inflation adjustment argument rests on the idea that the number picked by the Commission in 1982 was correct. A review of the discussion in the proposed and final rules shows that the figure chosen was not based on any sophisticated economic analysis or detailed empirical data.[29] It was, in effect, the best guess of people involved with the markets at the time. In the proposed rule, the SEC chose a net worth test of $750,000 and an income test of individual adjusted gross income of $100,000 or more in the most recent year. Based on comments to the Commission, these were increased in the final rule to $1,000,000 in net worth for the investor and his or her spouse[30] and $200,000 of income in the past two years combined with a reasonable expectation of this level of income in the current year. The use of the tax concept of adjusted gross income was dropped.

The proper way to examine the question of whether the accredited investor definition should be changed to account for inflation is not blind adherence to a largely arbitrary threshold chosen in 1982. The correct question is whether there is evidence that the current thresholds are problematic and the answer to that is no. Proponents of increasing the threshold offer no evidence illustrating the alleged problem.

Regulation D works and has become an integral part of the U.S. capital market. There is, of course, some fraud in the Regulation D market, just as there is fraud in the public market or any other market. Such fraud is, of course, unlawful and vigorous enforcement of the laws against securities fraud is entirely warranted. But there is no evidence that fraud is more commonplace in Regulation D offerings than in other offerings.[31] Moreover, there is little reason to believe

[28] Bureau of Labor Statistics data shows that the CPI-U index (1982-84=100) for 1982 was 96.5 and for 2012 was 229.6. The ratio, therefore, is 2.38 representing inflation over the period of 138 percent.
[29] "Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers of Sales" (Release No. 33-6389), 47 *Federal Register* 11251, March 16, 1982. For the proposed rule, see "Revision of Certain Exemptions From the Registration Provisions of the Securities Act of 1993 for Transactions Involving Limited Offers of Sales" (Release No. 33-6339), 46 *Federal Register* 41791, August 18, 1981.
[30] This was done primarily because of problems that arose for those in community property states or those who held assets jointly with their spouse.
[31] It would be helpful were the Commission to release statistics on what kind of offerings involve the most fraud (both in terms of instances and amounts) and what kind of fraud was the most common. This would enable state and federal policy-makers in the executive and legislative branches to adopt more nuanced policies.

that increasing the accredited investor thresholds would materially affect the level of fraud in any event.

The argument that the general solicitation provisions of the JOBS Act require increased accredited investor thresholds are simply mistaken. First, over the objection of the CFA, AARP, state regulators and many others, the Congress, with huge bi-partisan majorities, decided that general solicitation in Rule 506 offerings should be permitted. The SEC should not effectively thwart Congressional purposes by increasing the regulatory burden on Rule 506 offerings to such an extent that they are no more attractive (or potentially less so) than there were before the JOBS Act was passed and signed into law by President Obama.

Second, the JOBS Act contains provisions ensuring that only accredited investors may invest in Rule 506 offerings involving general solicitation. The SEC recently adopted rules, a year after the Congressional imposed deadline, governing general solicitation in Rule 506 offerings. [32] These rules impose strict requirements on Rule 506 issuers engaging in general solicitation. They must use tax returns or other information to verify that investors have income or net worth sufficient to qualify as accredited investors.

Raising the accredited investor thresholds would have a devastating impact on the ability of entrepreneurs to launch new enterprises and impede the capacity of small firms to grow, to innovate and to create jobs. This dramatic negative economic affect substantially outweighs the highly speculative improvement in investor protection that proponents of higher thresholds are claiming.

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 the table below.

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)."[33]

[32] "Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings," Final Rule, *Federal Register*, Vol. 78, No. 142, July 24, 2013, p. 44771.
[33] GAO Study at pp. 9-10.

GAO Estimates of Number of Households Eligible for Accredited Investor Status at Various Thresholds for Net Worth and Income (2010) [34]

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

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. Increasing the thresholds to the 1982 levels in inflation-adjusted terms would reduce the pool to about the top two percent of households.

Most proponents of increasing the accredited investor thresholds believe that they are protecting investors from themselves – from making unwarranted investments. They do not believe that the wealthiest seven percent of the population have the "sophistication" or the financial wherewithal to make investments beyond the public marketplace. They believe that they are too "unsophisticated" to seek and pay for sophisticated advice. But is it fair, in the name of paternalism, to limit some of the best 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. It is inappropriate and unfair as well as economically destructive to prevent all but the very richest Americans from investing in the most promising companies in America.

General Solicitation Should Not Trigger Major New and Burdensome Regulation Because General Solicitation Investors Must Be Verified as Accredited.

Taking advantage of the general solicitation provisions of the JOBS Act should not trigger a major regulatory burden. The JOBS Act requires that the investors in such offerings still be accredited and the Commission has issued detailed rules governing the obligations of issuers to verify investors' status as accredited. This is particularly the case until some significant, identifiable problem arises. The JOBS Act should be given a chance to work.

[34] GAO Study at p. 18.

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

No issuer intent on committing fraud is going to place fraudulent information in widely disseminated materials, particularly if they are provided to the Commission. Fraud (whether by affirmative misrepresentation or omission) will occur elsewhere, probably in the offering memorandum. Thus, it is entirely unclear what is to be gained by this requirement and it is quite clear that it will materially raise issuer costs.

The requirement 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 and by far the most material information will be in the offering memorandum.

Only two things are clear. This will increase the burden placed on issuers. And the Commission will receive a great many copies of advertisements or web pages.

Additional 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 substantially. 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. In reality, it is highly unlikely that meaningful steps will 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.

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.

<u>Proposed Mandatory Legends</u>

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 stating that the offering is available only to accredited investors is not particularly 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 is, however, 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. The proposed amendments do not specify the precise wording of any required legends. If the Commission adopts a legend requirement, it should set forth specific language that it believes would satisfy the requirement. This would eliminate uncertainty and regulatory risk.

<u>Ability to Cure and Sanctions</u>

The Commission s should structure its rules so that significant sanctions apply when the actor has engaged in culpable conduct such as fraud or misrepresentation or intentionally failing to disclose material facts. In contrast, the sanctions associated with relatively minor violations should be relatively light and the actor should be afforded the opportunity to cure the violation.

For example, if an issuer forgets to file a copy of an advertisement with the Commission, the issuer should be afforded an opportunity to do so and the sanctions should be minimal. If an issuer files a Form D (or, under the proposed rule, an advance or closing Form D) but files it one day late, then the sanctions should be minimal.

The regulatory structure should be established such that the sanctions are proportionate to the offense and opportunities to cure are afforded in the case of minor violations that involved no intent to harm investors. Such a system both is in the interest of justice and will promote compliance.

Improved Data Collection is Warranted

The concern of the Commission that there is inadequate information available about the private placement marketplace has merit. But there needs to be a balance on the needs of the Commission for information and the burden placed on issuers. There is little indication that the Commission appreciates the impact that these complex rules will have on small businesses trying to raise capital via Regulation D private placements. 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.

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. This information is entirely within the control of the Commission staff yet no significant attempt appears to have been made to compile this information and make it available to the Commission, other policy-makers or the public.

There is little to no publicly available information relating to what types of offenses engender SEC enforcement action in connection with Regulation D offerings. There is little to no information available about whether fraud or other violations are more frequent in public or private offerings and what differences exist between different types of offerings. Having this information would enable both the Commission and the public to better understand the source of problems 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.

Contrasting the data made available by other agencies in other fields to that made available by the SEC is instructive. The IRS publishes the IRS Data Book (primarily about the IRS itself) and the Statistics of Income (primarily about tax return data). The Bureau of Labor Statistics published copious data about labor markets. The Bureau of Economic Analysis at the

Commerce Department publishes vast amounts of information about the economy and businesses. The Census Bureau, the Federal Reserve, the Federal Deposit Insurance Corporation and other agencies publish a great deal of economic information. Other independent agencies, such as the National Labor Relations Board and the Equal Employment Opportunity Commission, publish information about their enforcement activities.

The SEC makes very little statistical information available about itself or the securities market other than making available information provided to it by issuers. It publishes virtually nothing compiling information about its enforcement actions or the private securities market. Only recently has it published some information about the Regulation D marketplace and only because of a Congressionally-mandated GAO study do we have data about the Regulation A marketplace. This makes it difficult for the Commission to accurately assess these markets and to appropriately regulate them. Furthermore, it reduces the quality of the public debate about these matters.

The SEC Economic Analysis is Flawed

The Commission's economic analysis makes no attempt to quantify the costs imposed by the proposed rule and simple assumes that whatever gains (also unquantified) to be had from promulgating this rule would exceed the costs. There is a strong need for the Commission to make a serious attempt to quantify the costs that its rules impose on small issuers.

That these costs have a major impact is clear. Compliance costs are the primary reason that Regulation A is so rarely used. Blue Sky compliance costs are the primary reason that Rule 506 is used rather than Rule 505 or Rule 504 since the latter two rules have lower federal compliance costs but Rule 506 offerings have dramatically lower overall costs. In short, compliance costs are key to understanding the shape of the private securities marketplace yet the Commission has done little to gain an understanding of these costs. At the very least, a serious survey of various types of issuers regarding costs should be undertaken by the Commission.

Small Business Regulatory Enforcement Fairness Act

There is little doubt that the proposed rule is a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act. Regulation D offerings total about $900 billion annually. If the higher compliance burden reduces those offerings by a mere 0.011 percent, then it would be a major rule (i.e. have an economic impact of at least $100 million). For the reasons discussed above, the rule will undoubtedly have "significant adverse effects on competition, investment or innovation."

Sincerely,

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