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January 29, 2014

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1040

Re: File No. S7-06-13
Release No. 33-9416

Dear Ms. Murphy:

The Commission's proposals in Release No. 33-9416 (July 10, 2013) (the "Release") relating to Rule 506 and Form D (the "Current Proposals") were issued on the same day as the Commission purported to implement Section 201(a) of the JOBS Act by adopting final rules that amended Rule 506 and Form D to permit the use of general solicitation. Release No. 33-9415 (July 20, 2013) (the "Adopted Rules"). Nearly all of the Current Proposals relate to the Adopted Rules, in particular new paragraph (c) to Rule 506, and nearly all of the Current Proposals are explained by the Commission as responding to its and commenters' concerns about the Adopted Rules' potential effect on investors.

In addition, the Current Proposals are obviously not based on any experience under the Adopted Rules but rather upon the Commission's and commenters' speculations about outcomes under the Adopted Rules.

The close relationship between the Adopted Rules and the Current Proposals suggests that the Current Proposals should be viewed as part of the same rulemaking as the Adopted Rules and judged, not on the basis of the Commission's normal rulemaking powers, but on the basis of how fairly they respond to the Congressional mandate in Section 201(a) of the JOBS Act. That mandate was to make Rule 506 private placements more efficient by eliminating the prohibition on general solicitation and general advertising ("general advertising").

For the reasons set forth in my letter of October 5, 2012 commenting on the proposals that became the Adopted Rules, the Adopted Rules did not fulfill the Section 201(a) mandate. For the reasons set forth in this letter, the Current Proposals represent a further disregard of that mandate.

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1. Section 201(a) of the JOBS Act does not authorize the Commission, as it proposes to do, to require the filing of a Form D prior to the first use of general solicitation in a Rule 506(c) offering or the inclusion of legends on, and the filing with the Commission of, written general solicitation materials.

Section 201(a) of the JOBS Act directed the Commission to revise Rule 506 to eliminate the prohibition against general solicitation or general advertising ("general solicitation") contained in Rule 506(c). The only condition that Section 201(a) attached to the use of general solicitation was that all purchasers be accredited investors.

Section 201(a) also directed the Commission to revise Rule 506 to require an issuer taking advantage of the new freedom to take reasonable steps to verify that purchasers of the securities are accredited investors. The Commission chose – incorrectly, in my view, as stated in my letter of October 5, 2012 – to implement this mandate as a second condition to the use of general solicitation.

But even if one accepts the Commission's characterization of the "reasonable steps" element as a mandated condition to the use of general solicitation, Section 201(a) on its face does not authorize the Commission to attach new and additional conditions to the use of Rule 506(c). As the Commission itself stated in a different context but one that also involved a rule mandated by Congress, "[i]f ... [Congress] had intended that ... [a mandate] be limited further, ... we think Congress would have done so explicitly." Release No. 34-67716 (August 22, 2012). Also, as the Commission stated in a court proceeding involving the same rule, "[i]t was not for the Commission ... to find that Congress overreached and to bring the statutory requirements back into line." *National Association of Mfrs. v. SEC*, 2013 U.S. Dist. LEXIS 102616 (D.D.C. July 23, 2013). Similarly, it is not for the Commission to rely on its general rulemaking authority to bring Congress and the President "back into line" by adding conditions that it believes may enhance investor protection.

The Commission would not have power, in my view, to add conditions to Rule 506(c) other than as specified in Section 201(a) even if the conditions were benign. On the contrary, however, as explained in other letters commenting on the Current Proposals, the proposed requirement to file a Form D at least 15 days before the first use of general solicitation – a requirement that has aptly been characterized as an unauthorized "waiting period" for general solicitation – is likely to discourage reliance on Rule 506(c) because issuers will be reluctant to publish their financing plans prior to being able to launch their marketing efforts. Also, as discussed below, both issuers and placement agents will be reluctant to risk losing the exemption in a current offering because of an overlooked failure to comply with the Form D filing requirements in a prior offering. To place such burdens on the use of Rule 506(c) is to disregard the Congressional purpose in enacting Section 201(a) of the JOBS Act.

2. Issuers and placement agents should have a safe harbor that protects them against rescission claims and the loss of "covered securities" status if the issuer loses a Rule 506 exemption as the result of an overlooked past failure to comply with a Form D filing requirement.

The Current Proposals contemplate that the issuer (and its predecessors and affiliates) will lose the ability to rely on Rule 506 in the event of any failure within the past five years to comply with a Form D filing requirement "in connection with an offering conducted in reliance on ... [Rule] 506."

As explained above, the Form D filing requirement, to the extent it arises as the result of a Rule 506(c) transaction, is not authorized by Section 201(a) of the JOBS Act. If the Commission were to adopt the requirement, however, it should provide issuers and placement agents with a safe harbor that will protect them against rescission claims and the loss of "covered securities" status if the issuer loses a Rule 506 exemption as the result of an overlooked past failure to comply with the requirement.

Issuers may over the course of five years engage in many private placements, and in many of these – especially in the case of smaller companies – little or no thought may be given to whether the exemption being relied upon is Rule 506. It may be impossible for an issuer to identify all such transactions that took place during the past five years or to establish that it met the Form D filing requirement for all such transactions. An issuer should not face rescission claims or the loss of "covered securities" status in the event of a good faith mistake.

In addition to identifying Rule 506 transactions, an issuer would have to identify whether any such transactions involved the use of general solicitation. Again, this may not be self-evident. An issuer might have assumed, for example, that publicity associated with a given transaction did not rise to the level of a general solicitation because all the investors for a transaction had already been identified (*see* Release No. 33-8828 (August 3, 2007)).

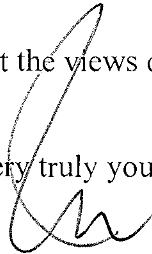
A placement agent will necessarily have to rely on the issuer's conclusions as to whether there were any missed filings during the past five years. For a placement agent to conduct its own review of every private placement completed by the issuer during this period would be cost prohibitive. The result would be to risk leaving issuers – especially smaller companies – without the services of a placement agent. Even more than for an issuer, therefore, the Commission should provide a safe harbor for a placement agent that receives a written representation from an issuer as to its compliance with the filing requirements.

A final point: rescission – even for violations of Section 12(a)(1) – is an equitable remedy. The Commission recognizes as much when it states in the Release that it that it did not propose conditioning the Rule 506 exemption for a transaction on the issuer's compliance with Rule 503 *in the same transaction* because the consequences would be excessively "severe ... for

failure to file a form that is intended primarily to provide information to the Commission." The consequences would be equally severe, however, if the exemption were to be lost in a given transaction for the issuer's failure to identify a violation of the filing requirement *in a prior unrelated transaction*, particularly in view of the attenuated value to the Commission of the information that would have been provided in the omitted filing. The Commission should therefore provide a safe harbor for both issuers and placement agents for overlooked past failures to comply with Rule 503.[1]

This letter does not necessarily represent the views of my firm or any of its partners or clients.

Very truly yours,



Joseph McLaughlin

[1] Courts may well find in any event that investors should not be entitled to rescission claims where the issuer's filing failure was in good faith and related solely to the collection of information by the Commission and not to the protection of investors.