

TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP

900 THIRD AVENUE

NEW YORK, NEW YORK 10022-4775

(212) 508-6700

FACSIMILE: (212) 371-1084

October 5, 2012

**VIA ELECTRONIC MAIL**

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

Re: File No. S7-07-12: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings

Dear Ms. Murphy:

We are submitting this comment letter in response to the request for comments made by the Securities and Exchange Commission (the "Commission") with respect to the proposed amendments to Rule 506 of Regulation D and Rule 144A under the Securities Act of 1944, as amended (the "Securities Act").<sup>1</sup> (We refer to such Commission's proposals as the "Proposed Rules" and the proposing release relating thereto, the "Release"). We appreciate the opportunity to comment on the issues discussed in the Release.

While we agree with most of the Release, there are a few aspects to the Proposed Rules on which we respectfully request that the Commission provide clarification.

**I. Verification of Accredited Investors**

**A. Uniform Verification Standards**

The Commission has requested comment on its implementation of the verification mandate of Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act") and asked whether the Commission should provide specific verification methods to be

<sup>1</sup> Securities and Exchange Commission; *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*; proposed rule. Release No. 33-9354; File No. S7-07-12.

used by issuers to verify a potential purchaser's accredited investor status. In the Release, the Commission noted that its Proposed Rules do not require issuers to use specified methods of verification, noting that requiring issuers to follow a verification template "would be impractical and potentially ineffective in light of the numerous ways in which a purchaser can qualify as an accredited investor, as well as the potentially wide range of verification issues that may arise, depending on the nature of the purchaser and the facts and circumstances of a particular Rule 506(c) offering."<sup>2</sup> We agree that the use of specified methods of accredited investor verification would be unduly burdensome in light of the fact that some verification methods may not be applicable to each purchaser's accredited investor analysis.

Many issuers would benefit from the increased flexibility provided by the Commission's proposed approach because of the varying circumstances surrounding the analysis of each purchaser and the different ways that an issuer can obtain information about a purchaser. An issuer can rely on information from a pre-existing relationship, public knowledge, third parties (as discussed in Section I.B below), existing verification methods and other methods in order to verify whether a purchaser qualified as an accredited investor. A uniform verification requirement would also be ineffective because the nature of an issuer's verification process should correlate to the extent of the issuer's general solicitation activities. As proposed, an issuer's verification burden will be higher if there is more widespread general solicitation and vice versa. We believe that any limited benefits of a uniform verification requirement do not outweigh the flexibility provided by the Commission's proposed approach.

#### B. Reliance on Third Parties

The Commission noted in the Release that, in order to satisfy the verification mandate, an issuer could review and/or rely upon certain third-party information that "provides reasonably reliable evidence that a person falls within one of the enumerated categories in the accredited investor definition," so long as the issuer "has a reasonable basis to rely on such third-party verification."<sup>3</sup> We believe that the reliance on

---

<sup>2</sup> See Release, Section II.B, p. 25-26.

<sup>3</sup> See Release, Section II.B, p. 18-19.

information provided by a third party who has verified a purchaser's status can be a crucial resource for issuers in the accredited investor analysis under the new Rule 506(c) exemption.

In certain circumstances it is difficult or sometimes even impractical for an issuer to obtain information about a prospective purchaser without information from a third party. These issuers should not be limited in the types of third party entities which can be used for such verification purposes so long as the issuers have formed a reasonable basis to rely on such third party information, especially because that third-party verification systems are likely to become an important tool for issuers in the future. The use of a "reasonably reliable" third party to provide this information could also alleviate the privacy concerns of prospective purchasers. A purchaser could refer issuers to a third party which has collected data from such purchaser and which could then certify to issuers that such purchaser qualifies as an accredited investor without the purchaser having to disclose its confidential information to multiple issuers, thereby limiting the number of parties to which it has to provide detailed financial information. The ability to rely on third party verification information is consistent with the objectives of (and addresses certain privacy concerns associated with) the JOBS Act and proposed Rule 506(c).

### C. Proof of Reasonable Steps

The Proposed Rules allow an issuer to rely on the Rule 506(c) exemption if (i) the issuer takes reasonable steps to verify that the purchasers of securities are accredited investors, and (ii) all purchasers of securities either (x) are accredited investors under existing Rule 501 or (y) the issuer reasonably believes that the purchasers are accredited investors at the time of the sale of the securities. The Release also notes that the burden of proof with regard to such verification remains with the issuer claiming the exemption.<sup>4</sup> Rule 508 of Regulation D states that the current exemptions in Rule 506 will not be lost due to an "insignificant" deviation from a term, condition or requirement of Regulation D. Rule 508 should be amended to include any additional provisions specifically related to proposed Rule 506(c). We believe that if an issuer cannot prove that it took

---

<sup>4</sup> See Release, Section II.B, p. 21.

“reasonable steps” to verify a prospective purchaser’s status as an accredited investor to the Commission staff’s satisfaction, that should be considered an “insignificant” deviation from the general solicitation exemption to the extent the purchaser actually is an accredited investor; such issuer should not be disqualified from relying on the Rule 506(c) exemption.

## **II. Mechanics of Proposed Exemption 506(c)**

### **A. Switching Rule 506 Exemptions**

It is possible that an issuer who previously relied on an existing Rule 506 exemption and at a later date decides to engage in general solicitations under Rule 506(c) may have non-accredited investors at the time it engages in such conduct. We believe that there should be a “grandfathering” carve-out provision for existing investors of an issuer. With regard to existing investors who are non-accredited investors, we ask that the Commission confirm that an issuer should not have to remove these investors once it engages in any general solicitations under proposed Rule 506(c). These existing investors should also be able to make additional investments in the issuer without having to qualify as accredited investors given their pre-existing relationship with the issuer. If such investor decides to make an additional investment in an issuer once such issuer has engaged in any general solicitations in reliance on Rule 506(c), presumably such investor is not investing as a result of the general solicitation efforts. Rather, it is likely that such investor has decided to participate in the offering as a result of its pre-existing relationship with and access to the issuer. Similarly, any investor who previously represented to an issuer that it was an accredited investor (which representation was relied on by the issuer in good faith) should not be subject to any additional verification to either maintain its investment in the issuer or to make additional investments in the issuer as a result of the issuer engaging in any general solicitations. As the goal of the Proposed Rules is to provide verification of the accredited investor status of prospective purchasers *as a result* of an issuer’s general solicitation activities, we believe that a “grandfathering” carve-out for existing investors of an issuer is consistent with the objectives of the JOBS Act.

B. Form D

The Commission proposed to include a check box for issuers to indicate that they are claiming an exemption under Rule 506(c). We agree that this check box should be added to Form D in order to distinguish between those issuers relying on previous Rule 506 exemptions and those relying on the new Rule 506(c) exemption. However, we ask that the Commission clarify that Form D should be completed with regard to the current intentions of the issuer and not the issuer's potential plans to engage in any general solicitations at a later date. Please also confirm that if an issuer later decides to engage in general solicitations, it would submit an amended Form D reflecting its selection of the Rule 506(c) exemption at such later time (rather than "protectively" checking multiple exemption boxes on Form D with regard to its potential plans to engage in any general solicitations).

\* \* \* \*

We would be happy to meet with the Commission staff to discuss this further if requested to do so.

Respectfully submitted,

Tannenbaum Helpert  
Syracuse & Hirschtritt LLP

cc: Michael G. Tannenbaum  
Ricardo W. Davidovich  
Richard E. Strohmenger