



October 5, 2012

Via E-mail (Rule-Comments@sec.gov)

Elizabeth M. Murphy, Secretary
Securities & Exchange Commission
100 F. Street Northeast
Washington, DC 20549-1090

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

Dear Ms. Murphy:

The Small Business Investor Alliance (“SBIA”) is submitting this comment letter in response to the request for comments made by the Securities and Exchange Commission with respect to the Proposed Amendments to Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933 which will implement Section 201(a) of the Jumpstart Our Business Startups Act (“JOBS Act”).

SBIA is the national trade association that develops, advocates and supports policies that benefit investment funds that finance small businesses and the investors that provide capital to these funds. These funds and investors are SBIA’s voting members. Fund members are comprised of funds that have been licensed or are seeking to be licensed by the U.S. Small Business Association (“SBA”) as small business investment companies (“SBICs”), funds that are registered as business development companies (“BDCs”) under the Investment Company Act of 1940, and other private funds that invest in small businesses. Each member fund must be organized under the laws of a U.S. state or the District of Columbia and must have a primary purpose of investing in small businesses primarily located in the U.S. The average SBIC fund has between \$100 million and \$225 million assets under management, and the average for all funds is less than \$300 million under management. In the case of SBICs, the assets under management include leverage that the SBICs obtain from SBA and invest. The investor members are all institutional investors, including banks and family offices that invest in such funds. SBIA started in 1958.



Our private fund members in making their offerings and sales of interests overwhelmingly rely on Rule 506 for the exemption from registration under the Securities Act of 1933 and on Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act of 1940 for the exemption from registration as an investment company. Most of these funds currently restrict their sales to accredited investors and institutional investors. Because our member funds target U.S. small businesses for their investments, we strongly believe that the availability of the general solicitation and public advertising to them would go far to fulfill the primary purpose of the JOBS Act.

As the SEC develops its final rule, it is important to recognize that any new administrative burden would be particularly costly for smaller funds. It is more difficult for a smaller fund to take on new federal compliance mandates than a larger fund because they are less likely to have the staff to process new administrative burdens. Every new burden from the SEC adds to the cost of doing business for a smaller fund and this could negatively impact their ability to invest in small businesses. We request that when drafting the final rule the SEC keep costs negligible for smaller funds.

To this end, we request that the SEC adopt certain safe harbors for private investment funds, which if met would result in the verification requirement of the proposed rule being met. In making these safe harbor recommendations, we are not suggesting that a private investment fund that has credible information that indicates that the investor does not qualify as an accredited investor should, absent other factors or information, be permitted to rely on the safe harbor outlined below.

RECOMMENDED VERIFICATION SAFE HARBORS

Size of Investment – An investor that (a) represents in a signed writing that it is an accredited investor and (b) has a firm commitment to invest \$200,000 or more in a private investment fund, provided such amount has not been financed by the fund or any party affiliated with the fund or its management. \$200,000 is a significant investment by an investor and demonstrates substantial net worth. We also believe that the SEC should consider a reduced commitment amount of \$100,000 provided the fund has certain characteristics, including by way of example: (i) the fund does not permit withdrawals or reductions in commitments except as a result of changes in law or regulatory schemes applicable to the investor; (ii) the minimum term of the fund is five years, and (iii) the fund’s investments have a term of at least one year, except for short term bridge financings. The experience of our member funds indicates that commitments of this size have not been made by persons who are not accredited investors. An investor making such an investment commitment should be considered an accredited investor.

Size of Investments – An investor in a private fund that (a) represents in a signed writing that it is an accredited investor and (b) the total amount of its commitment



to the fund and affiliated funds plus the amounts it has entrusted the managers of the fund to invest in other than funds aggregate \$500,000 or more. The same rationale applicable under the size of the investment safe harbor discussed above is applicable.

Reliance on Third Parties -- An investor that has been certified to be an accredited investor by any one of the following: a placement agent who is a registered broker/dealer, a registered representative of a registered broker/dealer in good standing, a certified public accountant, an accounting firm with certified public accountants, an investment adviser registered under the Investment Advisers Act of 1940 or with a state securities commission, an exempt reporting adviser under the Investment Advisers Act of 1940, or a professional tax preparer that prepared the investor's most recent tax return.

The fabric of the federal and state securities laws and state licensing is such that reliance on such persons, especially when that verifier has a regulatory-imposed burden to assess suitability or is otherwise licensed by a government regulatory body, is appropriate. To require managers or investment adviser/general partners of a pooled investment vehicle to make a subsequent determination of accredited investor status when that status has already been determined by such a person would be duplicative. This safe harbor would also be reflective of customary businesses interactions.

Small Business Investment Companies— An investor in an SBIC or in a fund that has been authorized to apply to be an SBIC by SBA (defined below) that has represented in writing that it is an accredited investor and an Institutional Investor (see discussion below) and has made a commitment to invest \$100,000 or more. SBA grants licenses under the Small Business Investment Act of 1958, as amended, as SBICs to private funds that meet SBA's stringent qualification standards. Prior to granting a fund and its managers the right to file an SBIC license application, the managers file a management assessment questionnaire setting forth in detail, among other things, the qualifications of the management team and each of its members (including track record) and, the business plan for the fund. Permission to file a license is not granted until there has been an in person interview of fund managers by members of the SBA's SBIC investment committee.

In addition, SBICs are required to operate in accordance with regulations promulgated by the SBA and to file detailed reports with SBA and are subject to an annual SBA inspection. Importantly, SBICs are required to file on an ongoing basis a Capital Certificate in which the fund certifies under penalty of prosecution for false statements whether or not an investor is an "Institutional Investor." The standard for an "Institutional Investor" is set forth at 13 CFR §107.50 and is higher than that for an accredited investor.



SBA also requires an SBIC to incorporate into the fund's organization documents a number of provisions with respect to the commitments of the investors in the fund. Among these requirements are that (a) the commitment of the investor cannot be forgiven, withdrawn or reduced without prior SBA written approval; and (b) stringent restrictions on any right to withdraw. In addition, for SBICs that draw funds from the SBA that are not repaid, SBA has the right to enforce the commitment of an investor that remains unfunded.

SBICs are required by SBA to have a minimum life of 10 years. An SBIC can only make profit distributions to its investors if the SBIC has "Retained Earnings Available for Distribution", that is cumulative net realized earnings less any unrealized depreciation on investments. Generally, the capital of investors can only be returned if the SBIC has filed a wind up plan with SBA that SBA has approved. Consequently, only investors willing to invest for the long term invest in SBICs. Not only because of the regulatory scheme under which SBICs operate as outlined above but also because SBICs can only invest in U.S. small businesses and the underlying purpose of the JOBS Act is to encourage such investing, we believe that SBICs should be given their own safe harbor.

Verification Agencies – A written statement of third party verification agencies made to private investment funds, which statements attest that the investor is an accredited investor. We anticipate that verification agencies will be established in response to the promulgation of these rules. We expect these agencies to be an adjunct service of either transfer agency or administration type firms. For example, such firms have assumed, by way of example, anti-money laundering and know-your-customer duties. Such firms could add to their verifications that for accredited investor status for purposes of Rule 506(c). Where such a service provider has completed its review and, made a verification certification to the fund, the fund should be entitled to rely on such certification without further verification.

SENSITIVE FINANCIAL INFORMATION

If safe harbors are not adopted or not applicable, a number of our members have indicated that requesting sensitive financial information from potential investors is likely to discourage investors from investing, absent privacy protections. Moreover, some of these fund members have indicated a reluctance to hold sensitive investor financial information.

We would, therefore, suggest that if a private investment fund is required to obtain financial information in order to verify that the investor is an accredited investor, the fund should be permitted to return the supplied information, if the person reviewing the information sets forth in a memorandum on behalf of the fund to be placed in the fund's files a description of the document(s) examined and the general reason for a



conclusion that the investor qualifies as “accredited.” Such a procedure should help reassure the investor that the investor’s sensitive financial information is not being kept or preserved by the fund, avoid the fund needing to put in place elaborate protective safeguards and adequately meet verification requirements.

If you have any questions or wish further information, please do not hesitate to contact the undersigned.

Sincerely,

Brett Palmer, President