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October 5, 2012

By Email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

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

Re: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings (Rel. No. 33-9354; File No. S7-07-12)

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") in response to the Commission's proposed amendments to Rule 506 of Regulation D and Rule 144A under Securities Act of 1933 (the "Securities Act"), in accordance with Title II of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"), to eliminate the prohibition against general solicitation and general advertising in certain Rule 506 offerings and in Rule 144A offerings (the "Proposals"). This letter has been prepared with the participation of, and in conjunction with, the Middle Market and Small Business Committee, the Private Equity and Venture Capital Committee, and the State Regulation of Securities Committee, of the Section, whose contributions we acknowledge and appreciate.

The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

The Committee thanks the Commission for this opportunity to comment on the Proposals.

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We commend the Commission and the Staff for having reviewed thoughtfully the pre-rulemaking comment letters submitted to it prior to the issuance of the Commission's proposing release (the "Release") (including the letter submitted by the Committee), and for addressing in the Proposals many of the concerns raised by commentators. In our view, this process has contributed significantly to the quality of the Proposals and will

help to ensure that the final rule adopted by the Commission comports with the Commission's statutory mandate while also taking into account the practical issues faced by issuers and other affected constituencies in connection with Rule 506 and Rule 144A offerings. We strongly support the Commission's view that the proposed amendments to Rule 506 need to provide sufficient flexibility to accommodate the different types of issuers that would conduct offerings under proposed Rule 506(c) and the different types of accredited investors that may purchase securities in these offerings. The Commission's Proposals will, in our view (if adopted as proposed), facilitate securities transactions pursuant to Rule 506 and Rule 144A that are offered by means that may be deemed to constitute general solicitation or general advertising (which we refer to collectively in this letter as "general solicitation").

We also appreciate the Commission providing its views in the Release with respect to the interplay between the new exemptive safe harbors proposed under Section 201(a) of the JOBS Act and the Regulation S safe harbor, and with respect to the implications of the Proposals to privately offered funds under Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act of 1940. We encourage the Commission, to the extent appropriate, to reiterate its views on both topics in its final release.

#### Specific Comments

1. We strongly support the preservation of existing Rule 506(b) for Rule 506 offerings without the use of general solicitation.

We strongly support the Commission's proposal to retain Rule 506(b) (as proposed to be amended) for Rule 506 offerings that do not use general solicitation. We did not view the statutory directive to permit general solicitation under certain conditions as requiring any change to the Commission's existing requirements for Rule 506 offerings that do not involve general solicitation. As the Commission notes, some issuers may choose not to engage in general solicitation and to rely instead on Rule 506(b) in order to sell privately to accredited investors and to non-accredited investors who meet Rule 506(b)'s sophistication requirements. By retaining the current Rule 506 provisions in proposed Rule 506(b), the Commission will achieve the goal of expanding, rather than contracting, the utility of Rule 506.

2. We strongly support the Commission's view that the reasonable steps required to verify an investor's accredited investor status should be an objective determination, based on the particular facts and circumstances of each transaction.

We strongly support the Commission's view that the reasonable steps to verify an investor's accredited investor status should be an objective determination, based on the particular facts and circumstances of each transaction. The Commission appropriately notes in the Release that a number of factors should be considered when determining the reasonableness of the steps taken to verify that a purchaser is an accredited investor. The Release identifies certain of these factors, such as the nature of the purchaser, the category of accredited investor the purchaser claims to be, the amount and type of information that the issuer has about the purchaser, and the nature of the offering. By acknowledging that the verification process for each particular

offering and each particular investor may differ from the process applicable to other offerings or other investors, the Commission appropriately creates flexibility while discharging its statutory mandate. A prescriptive standard may not only be unduly burdensome but may also be inappropriate to the circumstances. We strongly believe that the approach taken by the Commission will help assure that the verification process reflects the facts and circumstances of the particular issuer, the particular investment, and the particular offering, which will encourage compliance and aid the enforceability of the rule. We commend the Commission for taking this flexible approach, and also appreciate the guidance in this regard set forth in the Release. We recommend that the Commission consolidate this guidance in the adopting release. Finally, we encourage the Division of Corporation Finance to continue its practice of publishing useful, pragmatic guidance under the JOBS Act, in this case Title II and the Commission's implementing rules and interpretations thereunder (*e.g.*, in the form of Compliance and Disclosure Interpretations (C&DI's) regularly published by the Division of Corporation Finance).

3. We concur with the Commission's determination not to provide a non-exclusive list of the specified methods for satisfying the verification requirement.

We fully support the Commission's determination not to provide a non-exclusive list of the specified methods for satisfying the verification requirement. As the Commission correctly notes, a non-exclusive list of specified verification methods could be viewed by market participants as the required verification methods, thus undermining the flexibility the Commission views as appropriate in connection with the verification process.

4. We strongly support the Commission's view that no changes are required to the "reasonable belief" standard in the definition of "accredited investor" in Rule 506(a).

We strongly support the Commission's interpretation Title II of the JOBS Act as calling for the continued inclusion of the "reasonable belief" standard in the definition of "accredited investor" in Rule 501(a). The "reasonable belief" provision in the accredited investor definition in Rule 501(a) has been an integral and important element of that definition. If all investors in a transaction were, in fact, accredited investors within the scope of one of the eight enumerated categories, no issues would arise as to the status of the offering exemption. However, if an investor who did not fall within one of the enumerated categories were to claim incorrectly to be an accredited investor (either intentionally or inadvertently), and the issuer were, on the basis of its diligence, to reasonably believe that the investor was within one of the enumerated categories, by reason of the definition's reasonable belief prong the offering's exempt status would not be jeopardized. We strongly support the continued inclusion of the reasonable belief standard in the accredited investor definition, whether the offering is conducted under Rule 506(b) without general solicitation, or under Rule 506(c) with general solicitation.

5. We support the Form D Check Box for Rule 506(c) offerings.

We concur with the proposed amendment of Form D to add a separate field or box for issuers to indicate whether they are claiming an exemption under Rule 506(c). We note that an issuer's checking of a box on Form D to indicate reliance on Rule 506(c) (or its not checking the box on a Form D) does not constitute an election with respect to its use of Rule 506(c). An issuer retains the ability to determine to conduct the offering pursuant to any other available Securities Act exemption. It is possible, for example, that an issuer that has sold securities in an offering only to accredited investors may check the Rule 506(b) box in an initial Form D filing, but may determine later to utilize general solicitation and to conduct the offering in accordance with Rule 506(c). In our view, the issuer is not precluded from later claiming the Rule 506(c) exemption and reflecting this change in an amended Form D.<sup>1</sup>

In addition, we would not support requiring a Form D filing in order to claim the Rule 506(c) exemption. As we understand it, the principal purpose of the Form D filing requirement is to enable the Commission to better understand and analyze how Regulation D is being used in the marketplace. Under current provisions of Regulation D, the failure to file Form D does not constitute a basis for the loss of the Securities Act registration exemption. We do not believe that it would be appropriate to impose a risk of loss of the offering exemption should an issuer in a Rule 506(c) transaction fail to effect the Form D filing. We note that, in these instances, the Commission would retain the right to bring an administrative proceeding against the issuer.

6. The final rule or rule release should make clear that general solicitation or general advertising employed in connection with a Rule 144A transaction does not impair the related Section 4(a)(2) transaction immediately preceding the Rule 144A offering.

Unlike a Rule 506 transaction, which is an issuer transaction, a Rule 144A transaction is a resale transaction. Often in a Rule 144A transaction an initial purchaser acquires securities from an issuer in a Section 4(a)(2) transaction,<sup>2</sup> and resells the securities pursuant to Rule 144A. It is clear under paragraph (e) of Rule 144A and Preliminary Note 7 to the Rule that the availability of Section 4(a)(2) for the issuer is unaffected by the subsequent Rule 144A transactions, and we believe that will still be true after Rule 144A is amended pursuant to the JOBS Act to eliminate the focus on the QIB status of offerees. Any other conclusion would undermine the Congressional intent of Section 201 to permit general solicitation and general advertising in connection with a Rule 144A transaction. To assist practitioners, we suggest that the Commission confirm in the release accompanying the final rule that general solicitation in

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<sup>1</sup> We assume for this purpose that an issuer that has initially conducted an offering pursuant to Rule 506(b) and later changes to Rule 506(c) will have complied with all the requirements of Rule 506(c) relating to the offering. We note that following the Commission's adoption of final rules pursuant to Section 3(b)(2) of the Securities Act an issuer that had filed a Form D indicating an intention to conduct a Rule 506(c) offering may determine to conduct its offering pursuant to the Section 3(b)(2) exemption rather than pursuant to Rule 506(c).

<sup>2</sup> The JOBS Act changed the designation of previous Section 4(2) to Section 4(a)(2).

connection with a Rule 144A resale will not impair the Section 4(a)(2) exemption for the initial sale by the issuer to an initial purchaser.<sup>3</sup>

7. The Commission should provide transitional guidance in the final rule or release.

At the time the final rule becomes effective, a number of issuers may be in the process of offering securities pursuant to existing Rule 506, but may thereafter determine to use general solicitation for the remaining portion. In some situations, initial closings may have occurred, which possibly could have included non-accredited investors (pursuant to offering procedures that would not have included general solicitation). It would be extremely helpful to issuers engaged in offerings that straddle the effectiveness date of the final rule for the Commission to indicate, either in the final rule or by way of interpretive guidance, that an issuer would be entitled to conduct the portion of the offering following effectiveness of the final rule in accordance with Rule 506(c) (with the post-effectiveness portion being subject to all the requirements of Rule 506(c)), without the post-effectiveness portion affecting the completed portions of the offering.

The Committee appreciates the opportunity to comment on the Proposals. We would be pleased to meet with the Commission and its staff to discuss these matters in greater detail and to respond to any questions.

Very truly yours,

/s/ Catherine T. Dixon

Catherine T. Dixon,

Chair, Federal Regulation of Securities Committee

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<sup>3</sup> The Release provides (on page 7) that “The term ‘Rule 144A offering’ in this release refers to a primary offering of securities by an issuer to one or more financial intermediaries – commonly known as the “initial purchasers” – in a transaction that is exempt from registration pursuant to Section 4(a)(2) or Regulation S, followed by the immediate resale of those securities by the initial purchasers to QIBs in reliance on Rule 144A.” [footnote omitted] We suggest that in its final rule release the Commission make clear that Rule 144A does not require that the offering follow immediately after a Section 4(a)(2) or Regulation S transaction. We understand that in some Rule 144A offerings, the initial purchaser may retain some securities for some period of time, and this should not affect the availability of the exemption.

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