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October 12, 2012

VIA E-MAIL: rule-comments@sec.gov

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

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

Dear Ms. Murphy:

Thank you for the opportunity to comment on the above-referenced release.

We commend the Commission and staff on the Proposing Release to implement Section 201(a) of the Jumpstart Our Business Startups Act (the "**JOBS Act**"), which mandates that the Commission adopt rules that allow for general solicitation and general advertising in offerings under Rule 506 and Rule 144A of the Securities Act of 1933, as amended (the "**Securities Act**"), provided that all purchasers of the securities are accredited investors ("**AIs**") or qualified institutional buyers ("**QIBs**"), respectively. We agree with the Commission's decision not to impose an overly prescriptive method for verifying an accredited investor's status in Rule 506 offerings involving general solicitation and urge the Commission to adopt and implement the proposed rules expeditiously in light of the July 4, 2012 rulemaking deadline contained in the JOBS Act.

We recommend, however, that the Commission adopt additional changes to the federal securities laws to permit issuers to fully utilize the ability to locate sophisticated investors through general solicitation or advertising, in furtherance of the policy underlying the JOBS Act. First, we request that the Commission permit issuers to generally solicit or advertise in connection with transactions pursuant to Section 4(a)(1) and 4(a)(2) of the Securities Act, provided that the purchasers of the securities are AIs or QIBs. Second, we ask the Commission to amend Section 18 of the Securities Act to preempt the blue sky laws with respect to transactions conducted pursuant to Rule 144A.

We discuss these points in more detail below.

***The Commission should adopt its proposal to permit general solicitation expeditiously***

We support the Commission's proposal to permit general solicitation and advertising in transactions conducted under Rule 506 and Rule 144A, provided the purchasers are AIs and QIBs, respectively. We currently believe that the Commission's principles based approach to verification of accredited investor status in Rule 506 offerings involving general solicitation is preferable to a more prescriptive approach. We agree that the Commission's proposal is more likely to allow issuers and market participants "the flexibility to adopt different approaches to verification depending on the circumstances, to adapt to changing market practices, and to implement innovative approaches to meeting the verification requirement." (See Proposing Release at 25). We also concur with the Commission that some of the practices currently used to determine an investor's status as an AI will assist issuers in verifying an investor's status as an AI as required by new Rule 506(c). (See Proposing Release at 25 and 34). We are confident that market participants will use these existing conventions, coupled with the principles set forth in the proposing release, to develop reasonable methods of verifying investor status based on the particular facts and circumstances of each transaction. We have witnessed similar practices develop in other areas and expect that verification practices will evolve over time in this instance as well.

To further the proposing release's purpose of implementing the statutory mandate in Section 201(a) of the JOBS Act, we urge the Commission to adopt the proposal as soon as possible after the expiration of the comment period. As the Commission is aware, the JOBS Act imposes a July 4, 2012 deadline for the Commission's rulemaking to permit the use of general solicitation in connection with transactions under Rule 506 and Rule 144A, provided sales of securities are made only to AIs and QIBs, respectively. Since this statutory deadline has passed, we support efforts to implement the Commission's proposal without delay.

***The Commission should conduct additional rulemaking to (1) permit general solicitation in transactions pursuant to Section 4(a)(1) and 4(a)(2) of the Securities Act, provided the purchasers of the securities are QIBs or AIs and (2) preempt the blue sky laws with respect to Rule 144A transactions***

In introducing the amendment that later became Section 201(a) of the JOBS Act, Congressman McCarthy of California asserted that the goal of the amendment was to "ensure that more small businesses have the opportunity to find the investors they need while preserving investor protections." (See 158 Cong. Rec. H1234, 1260). This implies that by allowing general solicitation in transactions conducted under Rule 506 and Rule 144A, Congress was focused on assisting *issuers* in finding investors, provided all purchasers in the transaction were AIs and QIBs, respectively.

In order to fully execute this goal, we suggest that the Commission adopt additional amendments to (1) permit general solicitation in transactions conducted pursuant to Section 4(a)(1) or 4(a)(2) of the Securities Act, provided the purchasers in the transaction are AIs or QIBs, and (2) preempt the blue sky laws with respect to Rule 144A transactions generally.

*Transactions pursuant to Section 4(a)(1) and 4(a)(2) of the Securities Act*

In the Proposing Release the Commission states that the Section 201(a) mandate does not affect transactions under Section 4(a)(2) of the Securities Act and notes that bills which would have amended Section 4(a)(2) in a similar manner were introduced but not enacted. (See Proposing Release at page 11, footnote 35). We acknowledge that Section 201(a) does not explicitly refer to Section 4(a)(1) or 4(a)(2). We believe, however, that the Commission is justified in acting on its own accord to permit general solicitation in transactions pursuant to Sections 4(a)(1) and 4(a)(2) which have the same characteristics as Rule 506 or Rule 144A transactions (where Congress did explicitly permit general solicitation). Rulemaking of this nature would further the policy of the JOBS Act and, in our opinion, failure to do so would produce an odd result.

As the Commission is aware, Section 4(a)(2) of the Securities Act exempts from registration transactions by an issuer not involving a public offering. Rule 506 of Regulation D is a non exclusive

safe harbor that provides that sales made in accordance with its conditions will not constitute a "public offering" for purposes of Section 4(a)(2). In other words, an issuance of securities that satisfies the conditions set out in Rule 506 should qualify for the exemption from registration under Section 4(a)(2) of the Securities Act.

Likewise, Section 4(a)(1) of the Securities Act exempts transactions by any person other than an issuer, underwriter or dealer. Rule 144A is a non exclusive safe harbor that provides that any person, other than an issuer, underwriter or dealer, who sells securities in accordance with the conditions in Rule 144A shall not be engaged in a distribution of the securities and therefore will not be an underwriter for purposes of Sections 2(11) and 4(a)(1) of the Securities Act. Accordingly, the resale of securities in accordance with the conditions set out in Rule 144A should qualify for an exemption from registration under Section 4(a)(1).

In light of this framework, it seems strange to us that, once Section 201(a) is implemented, general solicitation will be permitted in connection with transactions under Rule 506 or Rule 144A, provided sales are made only to AIs and QIBs, respectively, yet general solicitation may not be permitted in similar transactions conducted directly under Sections 4(a)(2) or 4(a)(1). If Rule 506 and Rule 144A are indeed safe harbors that provide a means to obtaining the registration exemption in Section 4(a)(2) or 4(a)(1), how can conduct that is permitted in a transaction under Rule 506 or Rule 144A be prohibited in a transaction under Section 4(a)(2) and 4(a)(1)?

This result is even more peculiar because, as noted above, Congress intended for Section 201(a) to assist *small businesses* in finding investors while preserving investor protections. As the Commission acknowledges in the proposing release, "by its terms, Rule 144A is available solely for resale transactions; however, since its adoption by the Commission in 1990, market participants have used Rule 144A to facilitate capital-raising by *issuers*. [emphasis added] The term 'Rule 144A offering' . . . 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." (See Proposing Release at 7).

The SEC's proposal would amend Rule 144A to permit general solicitation in a Rule 144A resale by an initial purchaser without also amending Section 4(a)(2), the exemption often relied upon to complete the first of the nearly concurrent companion transactions—the primary offering of securities by an *issuer* to one or more initial purchasers. In our view, this is an incomplete approach that undermines the JOBS Act's goal of providing issuers more flexibility to use general solicitation or advertising to locate investors. Further, issuers seeking to locate investors through general solicitation or advertising in a Rule 144A transaction will be required to first hire a financial intermediary to serve as an initial purchaser. On the other hand, allowing issuers an opportunity to advertise in certain transactions pursuant to Section 4(a)(2) would provide small businesses an opportunity to find investors on their own without the added expense of a financial intermediary. This strikes us as more consistent with the JOBS Act's goal of assisting small businesses in finding investors.

In order to correct these inconsistencies and aid small businesses in finding investors, as intended by the JOBS Act, the Commission should also permit general solicitation in transactions under Sections 4(a)(1) and 4(a)(2), provided the purchasers of the securities are AIs or QIBs.

*The Commission should preempt the blue sky laws for Rule 144A transactions*

The Commission should also use its authority under Section 18 of the Securities Act to preempt the blue sky laws in offerings pursuant to Rule 144A generally. Without such an exemption, existing blue sky laws that prohibit general solicitation may prevent some offering participants from utilizing advertising to find investors in connection with certain Rule 144A transactions. This is contrary to the JOBS Act mandate in Section 201(a)(2).

Section 18 of the Securities Act preempts the securities registration provisions of the blue sky laws for offerings of "covered securities," but currently not all securities sold in Rule 144A transactions meet this definition. Although certain Rule 144A transactions, such as those involving securities listed on a national securities exchange or securities issued by a reporting company, fall within the definition of "covered securities" entitled to preemption under Section 18, others do not. Therefore, the blue sky laws that ban advertising in connection with securities transactions will apply to certain Rule 144A transactions and prevent offering participants from seeking investors through general solicitation in these instances. In order to avert this divergent result, which would clearly undermine the intent of Section 201(a)(2) of the JOBS Act, we request that the Commission conduct additional rulemaking to preempt the blue sky laws for Rule 144A offerings generally. One way to do so would be to create a definition of "qualified purchaser" under Section 18 to include QIBs who purchase the securities in Rule 144A transactions.

As the Commission is aware, some, but not all, of the blue sky laws contain an exemption for Rule 144A transactions. Securities issued pursuant to Rule 506 constitute "covered securities" for purposes of Section 18 because they are issued in a transaction exempt from registration due to rules or regulations issued under Section 4(a)(2) of the Securities Act. Rule 144A, however, is a safe harbor created under Section 4(a)(1) of the Securities Act, therefore, securities resold pursuant to Rule 144A do not meet this prong of the covered securities definition.

* * *

We would be pleased to discuss the above comments or any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to Joseph A. Hall, Michael Kaplan, Richard J. Sandler, Richard D. Truesdell, Jr. or Janice Brunner at 212-450-4000.

Very truly yours,

DAVIS POLK & WARDWELL LLP