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United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Attn.: Ms. Nancy M. Morris, Secretary

Re: File No. S7-18-07

I am writing to provide you with comments on the recent proposed revision of the Limited Offering Exemptions in Regulation D, Rule 502[1]. My comment goes to the proposed reduction of the safe harbor waiting period provision in Rule 502(a) of Regulation D. This waiting period provides a bright-line test in order to avoid integration of multiple offerings. The SEC has proposed reducing the waiting period from six months to 90 days.

BACKGROUND:

Regulation D was adopted in 1982 to clarify and expand the private placement exemption from registration requirements of the Securities Act of 1933, as amended (the "Securities Act"). Rule 506 provides an exemption without regard to the amount offered, so long as it is made without solicitation or general advertising, and sales are made only to "accredited investors" and up to 35 non-accredited investors. The overwhelming majority of private offerings should fall under one or more rule exemptions provided under Reg D, which seeks to prevent an issuer from improperly avoiding registration. In 1982, the SEC adopted the five factors[2] test to consider when making the determination of whether an offering should be integrated or not and established the integration safe harbor in Rule 502(a)[3].

As of today the SEC considers the following five factors in determining whether a private offering should be integrated with a public offering:

A. whether the sale is part of a single plan of financing;

B. whether the sale involves issuance of the same class of securities;

C. whether the sale has been made at or about the same time;

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1 See Release No: 33-8828 : "Revisions of Limited Offering Exemptions in Regulation D" *Other Release No.:* IC-27922 *File No.:* S7-18-07 dated: Aug. 3, 2007 Page 51. Section C.

2 Release No. 33-4552 (November 6, 1982) [27 FR 11316]

3 http://www.law.uc.edu/CCL/33ActRls/rule502.html

D. whether the same type of consideration is received; and

E. whether the sale is made for the same general purpose.

Under the safe harbor, offers and sales that are six months before or after a completion of a Regulation D offering will not be considered part of the same offering. Based on the recommendation made by the Advisory Committee on Smaller Public Companies[4], under the recent proposed revisions to the Limited Offering Exemption in Regulation D, the Commission proposes to reduce the safe harbor time to 90 days from six-months. The presumption is that offerings will be integrated if the above mentioned factors appear evident, or if the private offering is done during an ongoing registered offering process, as the registered offering is deemed a solicitation tool. The rationale is that an issuer can rely on the safe harbor waiting period every fiscal quarter, since the 90-day requirement provides time and transparency for investors and also allows the market to take into account each offering and its results.

COMMENTS:

Many of the small and medium-sized clients I represent rely heavily upon offerings exempt under Rule 506 for their seed or growth capital. I appreciate the fact that the SEC clearly understands that capital raising around the time of a public offering, especially an initial public offering, is crucial for small companies in need of sufficient capital to bridge the transactional costs or provide for operations during the ongoing public offering process. Such an approach endorses important elements of the staff's *Black Box Incorporated* no-action letter[5], which recognizes non-integration for offerings conducted six months or more apart. I support a more market-oriented view of integration consistent with the realities of today's markets. However, I also believe that some important elements have been excluded from the proposed Rule.

My comments are in-line with the recognition that a company's financing needs do not end with the filing of a registration statement, as stated by the SEC *"...the filing of a registration statement does not per se eliminate a company's ability to conduct a private offering, whether it is commenced before or after the filing of the registration statement"*. I believe that a sub-category of smaller reporting companies should be considered, and in some instances exempted from the waiting period requirements altogether under a different test.

The SEC's proposed 90-day waiting period under the safe harbor is based on two principal arguments. The first is "*transparency*", which the SEC believes offers investors a higher level of protection because a similar offering could not be made within the same fiscal quarter and therefore would be fully disclosed in a Form 10-Q or Form 10-QSB. I respectfully disagree with the reasoning behind the transparency argument the Commission raised. In my opinion, a small reporting company would most likely report such an offering on a Form 8-K shortly following closing, and therefore, the transparency goal would be satisfied in less time.

The second argument of "market absorption" occurs immediately in today's fast paced global communication and Internet environment. A 90-day period for market absorption is a throw back to a pre-Internet dissemination era.

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4 Release Nos. 33-8666; 34-53385; File No. 265-23 Advisory Committee on Smaller Public Companies

5 June 26, 1990.

The proposed 90-day waiting period requirements will continue to be an impediment to capital raising by small companies most in need of capital who seek to raise as little as possible when their stock price is low to avoid dilution of existing shareholders. The rulemaking proposed will continue to force companies in need of capital to harm existing holders with greater dilution to satisfy wholly-arbitrary time periods not based upon any intrinsic study or data to support its purpose.

In my view, a waiver of any time period between offerings should be granted to a specific category of small issuers that are more vulnerable to market fluctuations and rapid economic necessity. I suggest that the elements that should be taken into consideration in order to grant such a waiver be the following:

(i) the offers are made to "accredited investors" only, thus the fear of having a series of offerings made to a large number of non-accredited investors is alleviated, which is one of the Commission's major concerns[6];

(ii) small issuers will have to demonstrate an immediate need of capital; and

(iii) the issuer requesting the waiver has no significant public float.

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I appreciate the opportunity to comment to the Commission on this issue and would welcome further discussion. If you or your staff have any questions or seek amplification of my views, please feel free to contact Sunny J. Barkats by phone at (212) 659-4976.

Sincerely,

Sunny J. Barkats

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[6] (also note that generally an offering otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the U.S. under Regulation S, which clearly demonstrates that the principal concern for the Commission is to protect non-accredited domestic shareholders)