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Elizabeth M. Murphy
Secretary
U.S. Securities & Exchange Commission
101 First Street, NE
Washington, DC 20549

RE: Disqualification of Felons and other "Bad Actors" from Rule 506 Offerings, Release No. 33-9211 File No. S7-21-11

The undersigned appreciates the opportunity to comment on certain of the proposed rules set forth in SEC Release No. 33-9211 (the "Release") concerning implementation of Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") with respect to offerings made under Section 4(2) of the Securities Act of 1933 (the "1933 Act") and Rule 506 of SEC Regulation D adopted thereunder. The comments contained herein are my own and do not reflect the views of any clients of this firm.

<u>SEC Should Delay Implementation of Section 926.</u>

Section 926 of Dodd-Frank was enacted on July 21, 2010 and required the SEC, not later than one year from that date, to issue disqualification rules relating to offerings under Rule 506 ("Disqualification Rules"). However, the Release containing the proposed rules under Section 926 of Dodd Frank was not issued by the SEC until May 25, 2011 even though it originally had indicated that the proposed rulemaking would be issued in October 2010. The Release states that public comments are due on or before July 14, 2011. This is only seven days before the one year anniversary date when the SEC was required under Dodd-Frank to have adopted final rules under Section 926. For the following reasons, the undersigned urges the SEC to delay implementation of Section 926 of Dodd-Frank:

- Due to substantial rulemaking burdens placed on the SEC by Dodd-Frank, the Release containing proposed rulemaking was not issued for public comment until May 25, 2011.

- The Release states that public comments must be received on or before July 14, 2011 which is only seven days before the date required under Section 926 of Dodd-Frank for the SEC to have issued final rules.

- The Release contains a comprehensive set of substantive and interpretive rules and the SEC needs sufficient time to review all public comments and make recommendations to the SEC for adoption of final rules.

- Without a set of effective Disqualification Rules in place by July 21, 2011, affected persons and their counsel will lack appropriate regulatory guidance as to compliance with Section 926 of Dodd-Frank. Since Section 926 of Dodd-Frank requires the SEC to adopt Disqualification Rules by July 21, 2011, does failure by the SEC to adopt final rules mean that potentially affected persons do not have to comply with Section 926 of Dodd-Frank until such time as the SEC issues its final Disqualification Rules?

The SEC Should "Grandfather" Events Prior to Adoption of Final Rules

The undersigned agrees wholeheartedly with the statement made by SEC Commissioner Troy A. Paredes in connection with issuing the Release with respect to retroactivity provisions contained in the proposed rules. Commissioner Parades has stated the issues more eloquently than I with supporting legal citations, particularly the court decision which denied retroactive application of SEC rules in similar circumstances, such as the "penny stock" bar.

My specific situation is a case in point. Until August 2010, I was an associated person of a FINRA member for over ten years and had no prior disciplinary history. In 2008, I partnered with two colleagues who are certified public accountants in a real estate limited liability company which acted as a manager of an entity which raised equity capital to invest in limited partnerships which acquired, owned and operated existing apartment communities within the general geographic area where we resided. The equity capital was raised in reliance on Rule 506 as all investors were Accredited Investors.

I did not think acting as a partner in the manager of the company raising the equity capital constituted a private securities transaction since I did not receive any selling compensation with respect thereto. FINRA, however, initiated an investigation for violating the FINRA rule relating to private securities transactions because I had failed to report this activity to my broker-dealer. After a thorough investigation, FINRA staff concluded that these were legitimate investments in existing properties, all investor funds were applied properly, there were no complaining investors (even from those contacted by FINRA staff), and there was no loss of investor funds.

Nevertheless, FINRA staff said that they would drop the matter if I would agree to settle for a bar from association in any capacity with a FINRA member. FINRA staff insisted on a bar even though I pointed out that FINRA's own monthly disciplinary compilations were replete with only suspensions for associated persons who sold hundreds of thousands of dollars in universal lease, promissory notes or foreign exchange Ponzi schemes where investors lost all their money. Furthermore, the Pennsylvania Securities Commission took regulatory action with respect to the same conduct and FINRA rule violation resulting in payment of a $10,000 monetary penalty and subsequent registration of this firm as a state-registered investment adviser.

Since I did not feel I had the physical and mental stamina as well as the necessary financial resources to litigate *ad infinitum* with FINRA, I felt I had no choice but to accept, without admitting or denying the allegations, a FINRA Waiver, Acceptance and Consent which imposed the bar insisted upon by FINRA staff (the "AWC"). If I had known of what the contents of the Release at that time and how it would affect the ability of any entity with which I may be affiliated to undertake a Rule 506 offering, I very well may have determined not to have entered into a negotiated settlement with FINRA.

In this regard, I do not think it fair to anyone for the SEC to impose a disqualification on the basis of an event or action which, at the time it happened, was not a basis for the disqualification. It is a principle of fundamental fairness. If an activity is criminalized, the police don't go back and find people who have engaged in that activity prior to its criminalization and then arrest them for such conduct. Why should it be any different in the regulatory context than in the criminal? A penalty is a penalty. People should not be penalized for activity that occurred before Congress authorized the rules to be changed.

Commissioner Parades cited the *Landgraf* court opinion which makes the point that, just because retroactive application of a new statute might vindicate its purpose more fully, it does not mean that it is right thing to do. I agree and the SEC should give proper deference to the U.S. Supreme Court. The Release, however, appears ready to undermine Commissioner Parades' concern. Although it solicits comment on grandfathering, it does so only in the context that such accommodations would be "consistent with the requirements of Section 926." In my mind, the implication is clear, comment all you want but we plan to go forward with no grandfathering.

The fallacy in this statement is that Section 926 of Dodd-Frank, as I read it, just states what must be in the SEC rules on disqualification. It does not address or authorize retroactive application of the mandated rules. Indeed, it states, "Not later than 1 year after the date of enactment of this Act, the Commission shall issue rules for the disqualification of offerings and sales of securities made under 230.506 of title 17, Code of Federal Regulations."

Congress knows how to apply laws retroactively (particularly in tax matters) and it chose not to do so in Dodd-Frank. In the absence of specific language, one can only conclude that Congress intended Section 926 of Dodd-Frank to be forward-looking. Therefore, the Disqualification Rules should be applied prospectively and, to the extent that this would grandfather certain persons from its application, such result is an equitable one. Should the SEC determine otherwise, I am sure there will be some person in future with the standing and sufficient financial resources who will seek a proper judicial determination of the correctness of such a view of Section 926.

<u>SEC Should Not Impede Capital Formation Activities of Current Rule 506 Offerings</u>

Every Rule 506 offering is unique. Some reflect a one-time capital raise while others represent private equity pools that contemplate a continuous offering. Undertaking a private securities offering entails a significant amount of work, due diligence and expense. Disruption of a current or ongoing Rule 506 offering due to application of new Disqualification Rules could have a significant and adverse effect on legitimate capital formation, particularly small business capital formation. Therefore, the SEC should be mindful of the foregoing as it implements the Disqualification Rules.

In this regard, I would urge the SEC to permit any Rule 506 offering for which a Form D has been filed prior to the effective date of the Disqualification Rules to continue to rely on Rule 506 even if a disqualification would otherwise apply for the period measured from the date of filing the initial Form D with the SEC to the date the next annual updating amendment must be filed or the termination or withdrawal of the offering, whichever is earlier.

<u>SEC Should Permit Waivers of Disqualification</u>

I agree that Section 926 permits the SEC to adopt a waiver provision with respect to the Disqualification Rules. Section 926((1) requires the SEC to adopt rules substantially similar to SEC Rule 262. SEC Rule 262 currently contains a waiver provision and therefore, in accordance with the Congressional mandate in Section 926(1) of Dodd-Frank, the SEC, in my view, is legally bound to adopt a waiver provision with respect to its Disqualification Rules.

Legal requirements aside, I think it is just good public policy to afford regulators discretion in applying rules. While rules are adopted with a view toward general application, there always will be special circumstances which do not warrant application of the rules. In the case of the Disqualification Rules, it would be tragic if a person consented to a bar with a state securities agency because he or she could not afford to litigate and then have that bar operate forever to bar the person from being affiliated with an entity which may undertake a Rule 506 offering which, by federal law, is preempted from registration with state securities regulators. Upon a showing of good cause, the SEC should have the authority to waive a disqualification with respect to a federal registration exemption as to which the states have no registration authority.

<u>Harmonization</u>

As noted in the Release, Rule 505 of SEC Regulation D currently contains a disqualification provision. Section 926 directed the SEC to add, by rule, a disqualification provision to Rule 506 of SEC Regulation D. Rule 504 of SEC Regulation D currently does not contain a disqualification provision and Congress did not mandate a change to Rule 504 offerings in Dodd-Frank as it did for Rule 506 offerings.

While uniformity in this area would be welcome, there are several strong reasons mitigating against an undertaking of such magnitude in the context of this Release. First, the SEC is woefully behind schedule in adopting Disqualification Rules within the timeline mandated by Dodd-Frank and undertaking a harmonization of disqualification provisions in context of the Release will serve only to prolong the process and accompanying uncertainty for all concerned.

Second, although Rule 504 is a regulation adopted by the SEC under its discretionary authority in Section 3(b) of the 1933 Act, the SEC consistently has declined to amend that rule to include a disqualification provision. In Dodd-Frank, Congress did not mandate inclusion of a disqualification provision applicable to Rule 504 offerings as it did Rule 506 offerings. Another complication with respect to Rule 504 offerings is the current waiver of the general solicitation and resale restrictions with respect to offerings relying on state Accredited Investor exemptions or where the securities have been registered in a state with a prospectus delivery requirement. Would a disqualification provision apply to that species of Rule 504 offering? Since there has been no debate as to whether a disqualification provision should apply to Rule 504 offerings and, if so, which ones, it would be premature to include such consideration in the context of this Release.

Third, a thorough discussion of the applicability of a uniform disqualification provision across the exempt offering landscape under the 1933 Act should be done in a separate release and only after thoughtful internal discussions by SEC staff. Different exemptions were adopted at different times for different reasons. It is important to understand the circumstances under which each exemption was adopted and the reasons for including or excluding a disqualification provision or adopting differing disqualification provisions. Only then could the SEC solicit meaningful comment about a uniform disqualification provision.

Thank you again for the opportunity to comment on these important rule proposals.

Very truly yours,

Scott W. Coy

Scott W. Coy
President