SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000
FACSIMILE: 1-212-558-3588
WWW.SULLCROM.COM

125 Broad Street
New York, NY 10004-2498

LOS ANGELES • PALO ALTO • WASHINGTON, D.C.
FRANKFURT • LONDON • PARIS
BEIJING • HONG KONG • TOKYO
MELBOURNE • SYDNEY

September 23, 2013

Via e-mail: rule-comments@sec.gov

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

Re: Proposed Amendments to Regulation D, Form D and Rule 156
File No. S7-06-13

Dear Ms. Murphy:

We appreciate the opportunity to provide these comments to the Securities and Exchange Commission on the proposed amendments to Regulation D, Form D and Rule 156 of the Securities Act of 1933. The amendments are proposed in conjunction with the recent adoption of amendments to Rule 506 of Regulation D and Rule 144A under the Securities Act eliminating the ban on general solicitation in offerings conducted under those rules.[1]

We acknowledge the Commission's hope that these proposed amendments will permit the Commission to gather information that will enhance its ability to evaluate market practices in Rule 506 offerings and the impact of general solicitation on capital-raising efforts. We also appreciate the Commission's desire to address non-compliance with Regulation D's filing requirement. We are concerned, however, that the proposed amendments will have the unintended effect of frustrating some of the goals of the JOBS

[1] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings (July 10, 2013), 78 Fed. Reg. 44771.

Act, which was enacted in part to facilitate capital formation by permitting the use of general solicitation in private offerings. The proposed advance-filing and expanded content requirements for Form D, in particular, will make it significantly harder for issuers to gain access to the private capital markets pursuant to Rule 506. In addition, the proposed penalty for non-compliance with the Form D filing requirement (automatic disqualification) is, we believe, unnecessarily harsh. The proposed amendments also fail to provide a mechanism to cure inadvertent solicitations, which we believe is necessary, especially in light of the proposed automatic disqualification penalty. Finally, we believe that the proposed changes to Form D's content should be revised in several respects. We offer the following comments with respect to the specific aspects of the amendments that concern us.

An Advance Form D Requirement Will Unnecessarily Limit Access to General Solicitation in Private Offerings

The Commission proposes to amend Rule 503 to require issuers that intend to engage in general solicitation to file a Form D 15 calendar days prior to commencing general solicitation (the "Advance Form D"). As proposed, the Advance Form D filing would be in addition to the filing of a Form D upon or shortly after the first sale of securities and the filing of a closing Form D upon the termination of the offering. We are concerned that this requirement runs counter to the JOBS Act's intent of easing access to private capital markets and will have the unintended effect of limiting the ability of issuers to engage in general solicitation in Rule 506(c) offerings.

An Advance Form D filing requirement will impose a 15-day waiting period for issuers that want to avail themselves of the benefits of the JOBS Act – that is, to be able to engage in general solicitation in the offering. This proposal would create an unnecessary hurdle for issuers seeking access to the private capital markets by means of general solicitation and will limit their flexibility in planning and conducting private offerings. As an initial matter, the proposed 15-day delay fails to take into account the rapidly changing nature of today's capital markets. Pricing and success of securities offerings are dependent on conditions in the capital markets that vary significantly in real-time, often on a daily or hourly basis. This waiting period could be particularly problematic for issuers seeking to raise capital quickly, in circumstances where it is most needed. The benefits of the JOBS Act should not be limited to those issuers that can afford to engage in a leisurely, protracted offering process. We also note that an Advance Form D filing may result in premature signaling to the markets and the issuer's competitors, which may in turn affect the success of the offering.

If we consider the Form D as a tool to help the Commission gather information about market practices (as the Commission does), then requiring Form D to be filed in advance of a general solicitation will not further the Commission's information-gathering efforts any more than the current practice of filing the Form D within days after the first sale. If Form D, as proposed to be modified by the Commission, were filed within 15 days after the date of first sale, in accordance with the long-standing requirements of Regulation D, the Commission would have access to the same market information. We see no need to change the filing deadline in order to ensure access to market information.

The Commission also notes that the Advance Form D will allow it to analyze those offerings initiated under Rule 506(c), but in which the issuer was unsuccessful in selling any securities or where the issuer chose another way to raise capital, and determine if further steps are needed to facilitate issuers' ability to raise capital. We note, however, that offerings are abandoned or unsuccessful for a variety of reasons, many having nothing to do with the offering techniques used. As a result, we believe that the information in the Advance Form D would not provide meaningful assistance to the Commission in this regard.

If the Commission does determine that there should be some advance notice, we submit that 15 days is far too long. It would impede, and in some cases prevent, timely access to the private capital markets. Issuers need the ability to go to market quickly, sometimes within a few days; requiring that they wait for over two weeks before completing an offering does not take account of the realities of today's securities markets.

The Proposed Amendments Do Not Provide a Mechanism by Which to Cure Inadvertent General Solicitation

We believe the proposed amendments should provide a cure mechanism for issuers that intend to engage in a Rule 506(b) offering but must proceed instead under Rule 506(c) because the offering becomes the subject of an inadvertent general solicitation. Inadvertent general solicitation has been a frequent and recurring problem for issuers conducting private placement transactions. Because the Securities Act concept of "offer" is extremely broad, many forms of company publicity, including those intended for non-investor audiences, can raise a general solicitation concern. We think that the adoption of Rule 506(c) presents an opportunity to address this problem in a new way that both promotes efficient capital raising and addresses investor protection concerns. Specifically, we would suggest that the Commission add a new subsection to Rule 506, providing a cure mechanism to issuers conducting a private placement that, following a potential inadvertent general solicitation, subject themselves to the conditions of Rule 506(c) in respect of any future sales in that particular offering. Under this new provision, an issuer electing to use the cure could make future sales only to accredited investors, and would be subject to the verification requirement of Rule 506(c) in respect of those future sales.

Rule 433(f) of the Securities Act, addressing a form of inadvertent free writing prospectus, provides a useful template for the provision we are proposing, particularly in the way that it balances relief for the issuer (from a possible Section 5 violation) with an element of investor protection (in that case, required filing of the press piece or related issuer information). However, the new Rule 506 provision would need to be tailored to the private offering context in a number of ways. First, because many private offerings involve sales made over a period of time, the cure provision should provide that the Rule 506(c) conditions would apply only to sales made *after* the issuer became aware of the inadvertent communication. To afford a real cure, the provision has to work this way, since the issuer cannot change how prior sales were effected or to whom they were made. But structuring the provision this way does not compromise investor protection objectives, because any prior sales would not be subject to the possible influence of the inadvertent communication.

Second, the cure provision (like Rule 433(f)) should afford the issuer some reasonable period of time to analyze and assess a communication after becoming aware of it, before having to elect to use the cure. Inadvertent general solicitation questions are often close calls, requiring judgment and fact gathering, so it is only reasonable to allow the issuer some number of business days before having to decide whether curative action is warranted.

Third, the cure provision should explicitly provide that it is non-exclusive, so that the electing issuer retains the ability to take the position that the communication in question was not in fact a general solicitation in respect of the offered securities. We think this is only fair to issuers (who may wish to claim, in the alternative, compliance with Rule 506(b) or Section 4(a)(2)) and promotes the policy objective underlying Section 102(b) of the JOBS Act, pursuant to which Rule 506(c) was adopted. At the same time, non-exclusivity would encourage use of the cure provision, which (because the Rule 506(c) conditions would then apply) should be seen as promoting investor protection.

Finally, we think that a cure provision could reasonably require the submission, to the Commission on a confidential basis, of the inadvertent communication or the issuer information provided to a third party that made that communication (again, in the manner of Rule 433(f)), if the communication is made (or information is provided) by the issuer in writing. This might give the Commission staff insights into market practices, and perhaps a greater ability to police the market. But we do not think such materials should be required to be filed publicly, and would be concerned that such a public filing requirement would potentially undercut the non-exclusive nature of the cure provision.[2]

We believe that a cure provision of this sort would benefit issuers conducting private offerings, and would also promote investor protection objectives. We do not see any potential downside, from a compliance perspective, from providing such a provision, because issuers would be subject to the same requirements of Rule 506(c) as if they had engaged in general solicitation intentionally, and would be entitled to rely on the cure provision only if the general solicitation were inadvertent.

The Proposed Automatic Disqualification is Unduly Harsh

We appreciate the Commission's desire to create meaningful consequences for a failure to file Form D. We will address our views on the proposed consequences below, but would note at the outset that we believe it is quite likely that the Commission will see greater compliance with the Form D filing requirements in the context of Rule 506(c) offerings. This is because an issuer that uses general solicitation

---

2 We note that proposed Rule 510T, which would temporarily require that written general solicitation materials used in a Rule 506(c) offering be submitted to the Commission, would apply only to written communications prepared by or on behalf of the issuer, and that no materials so submitted would be treated as "filed" or "furnished" for purposes of the Securities Act and the Securities Exchange Act of 1934.

to conduct an offering under Rule 506(c) will no longer have the ability to rely as a fall-back on the statutory exemption provided by Section 4(a)(2), and thus may place much greater importance on making a clear record as to perfection of the Rule 506(c) exemption, which a Form D filing, with the Rule 506(c) box checked, would do. We think this would likely be the case even without the possibility of automatic disqualification.

We believe an automatic one-year disqualification from relying on Rule 506 for future offerings, as proposed, is a disproportional penalty for an issuer that misses the deadline for filing a Form D or amendment (or makes other mistakes in the filing) and could expose issuers to significant legal risk even if the mistakes were inadvertent or immaterial. In addition, as proposed, disqualification could result from a failure by an issuer's affiliate to comply with the Form D filing requirement within the preceding five years. We do not understand why it is necessary to impose such a harsh penalty for failing to file what is essentially an information-gathering tool. We believe this proposal could have a significant negative impact on the private capital markets.

Disqualification, if retained, should not be triggered by a "failure to comply" with Rule 503

Proposed Rule 507(b) would automatically disqualify an issuer from future reliance on Rule 506 if the issuer, or any of its predecessors or affiliates, has "failed to comply" with "the requirements" of Rule 503 within the specified look-back period. "Failure to comply" is a vague trigger under which even a technical or immaterial non-compliance could result in automatic disqualification. This problem is compounded by the fact that the trigger could be interpreted to apply upon non-compliance with *any requirement* of Rule 503, including any of the significantly expanded content requirements and the expanded requirements for advance and termination filings as proposed. We think this proposed approach would create a disqualification trigger that is far too broad and the scope of which is uncertain.

Rule 503's requirements are likely to be uncertain in any particular situation because of the relevant facts and circumstances and because issuers will necessarily take different interpretive views of those requirements in good faith.

We urge the Commission, if it retains the disqualification provision, to modify the disqualification trigger so as to apply only upon a "failure to timely file a Form D notice under Rule 503"[3] and to state that non-compliance with the content or other requirements in Rule 503 do not trigger disqualification unless the non-compliance is so significant that the required filings actually made, when taken together, are "materially deficient." This is analogous to the standard applied by the Commission Staff in determining whether the filing requirements of other Securities Act forms have been met.[4]

Automatic disqualification due to non-compliance by affiliates is excessive

Proposed Rule 507(b) would extend the disqualification trigger so as to apply to an issuer if any of its *affiliates* have failed to comply with Rule 503 when conducting a Rule 506 offering during the look-back period. We believe this approach will have unduly adverse consequences, particularly when the issuer is under common control with a large number of entities. Under the proposal, even an inadvertent failure of one issuer to comply with Form D filing requirements during the relevant period would automatically bar all issuers that are under common control with that entity from

---

3 A failure to timely file reports required under the Exchange Act, for example, triggers a one-year loss of eligibility to use a short-form registration under the Securities Act. *See* Form S-3, General Instruction I.A.3.

4 "Materially deficient" filings generally are limited to those with major omissions, such as failure to include audited financial statements or the management's report on internal control over financial reporting. *See* SEC Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Rules Item 603.03, and Securities Act Forms Question 126.13.

relying on Rule 506 exemptions. This would be the case even where the affiliated issuer may have no actual control over, and no access to information about, the prior conduct of the non-compliant entity. This proposed requirement mistakenly assumes that all affiliated issuers are operated in a coordinated, centralized manner, which is simply not the case in many instances. New Rule 507(b) will impose on issuers the task of assuring the compliance of all of their affiliates (including parent companies and sister companies) will all Form D filing requirements in order to be able to rely on a Rule 506 exemption. This task is likely to be very burdensome, if not impossible, in a wide range of situations. Moreover, the interpretive uncertainty about the meaning of "control" as defined under the Securities Act, and the fact that it can be found to exist in situations where an entity may have far less than actual or outright control, greatly compound this problem. We agree that an issuer should not be able to avoid the consequences of the rules simply by conducting future private offerings through an affiliate. However, we believe that the Commission should address such a scheme to evade disqualification directly, just as it does in other contexts. We are concerned that the proposed extension of the disqualification trigger to include affiliate non-compliance in all cases would greatly reduce the availability of Rule 506.

Some of the Proposed Changes to Form D's Content Should Be Revised

We think that some of the proposed revisions to Form D will be burdensome, are inconsistent with privacy considerations and may, as a result, discourage issuers from engaging in private offerings that use general solicitation or from relying on Regulation D generally. We also think that some of these changes are inconsistent with the purpose of Form D.

Public disclosure of controlling persons is burdensome and raises privacy considerations

We believe the proposed disclosure of "controlling persons" (for Rule 506(c) offerings only) is particularly problematic. This disclosure, which the proposed revised instructions to Form D describe as "each person who directly or indirectly controls the issuer," goes well beyond current disclosure requirements for reporting companies, which require disclosure of certain specified information with respect to "control persons" in an initial public offering and immediately thereafter (but do not require disclosure of every "control person"). Imposing this requirement in the private offering context seems overly burdensome, with limited benefit. We would suggest that a threshold ownership of 20% might be appropriate in this context and would be consistent with the approach taken in new Rule 506(d) for disqualification of "bad actors" and the reduced disclosure requirements for less-than-20% holders specified in Rule 13d-1(c).

In addition, we note that requiring even this information to be made public does not comport with privacy considerations for companies that have chosen to remain privately held. Accordingly, we believe that this information would be better submitted to the Commission on a confidential basis if the Commission decides to require its submission.

Proposed use of proceeds disclosure is more detailed than required in a public offering

The proposed use of proceeds disclosure in Form D is very detailed, even more so than the disclosure currently required in connection with registered public offerings pursuant to Item 504 of Regulation S-K. We believe it is inappropriate and unnecessary in the private offering context to require more information than would be required in a public offering. In addition, this change adds requirements that currently do not exist for Rule 506 offerings not using general solicitation. We believe the requirements should be made consistent with Item 504 of Regulation S-K. We also question whether this change is consistent with the purpose of Form D described below (i.e., as a tool for information-gathering by the Commission and not as a disclosure document for investors).

Form D Should Not Be Viewed as an "Investor Tool"

Finally, we want to express one general concern. Throughout the proposing release the Commission refers to Form D as a "tool for investors," as well as a method by which it gathers information about private offerings. That the Commission could view Form D as a disclosure document for investors raises significant questions about issuer liability with respect to the content of Form D filings as well as the failure to submit such filings altogether. We think such a view would mark a very significant change in existing Regulation D practice, effectively subjecting all Rule 506 offerings to mandatory disclosure requirements.[5] We are not sure that the Commission intends such a significant change nor, if it does, do we believe that issuers and other market participants fully appreciate the significance of the change or have considered its implications in responding to the Commission's request for comment. We urge the Commission to clarify that Form D is intended to provide the Commission with information about market practices in Regulation D offerings and is not intended to be a disclosure document on which investors should rely in making investment decisions.

* * *

5 While Regulation D imposes information requirements, they have never applied to Rule 506 offerings except solely with regard to purchasers that are not accredited investors. To impose a new disclosure requirement at this time, when the principal recent change to Rule 506 has been to permit general solicitation under new paragraph (c) only if the offering is sold *exclusively* to accredited investors, is incongruous.

As we hope has been made clear by the foregoing, there are a number of substantial questions raised by the proposed amendments. We appreciate the opportunity to submit these comments. If you have any questions about them, please contact Robert Buckholz at 212-558-3876 or David Harms at 212-558-3882.

Very truly yours,

Sullivan & Cromwell LLP

Sullivan & Cromwell LLP