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

September 23, 2013

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

Dear Ms. Murphy:

We are writing in response to the request of the Securities and Exchange Commission (the "**Commission**") for comments pursuant to Release No. 33-9416 (the "**Proposing Release**")[1] regarding the proposed amendments (the "**Proposed Amendments**") to Regulation D, Form D and Rule 156 under the Securities Act of 1933, as amended (the "**Securities Act**"). We appreciate the opportunity to comment on the Proposed Amendments.[2]

On July 10, 2013, the Commission adopted amendments to Regulation D, as mandated by the Jumpstart Our Business Startups Act of 2012 (the "**JOBS Act**"), which, among other things, eliminated the prohibition on general solicitation and general advertising in offerings made in reliance on Rule 506 of Regulation D, so long as all purchasers of the securities are "accredited investors."[3] The rule permitting general solicitation is codified as Rule 506(c) and became effective on September 23, 2013.

We represent investment advisers on the structuring, formation, marketing and operation of private investment funds. Many of the private funds managed by the clients we represent issue the funds' securities in reliance on Rule 506. In addition, certain of the private funds managed by our clients may wish to engage in general solicitation and general advertising in reliance on Rule 506(c) in connection with the offering of the funds' securities. We recognize and strongly support the Commission's important role in protecting investors from potential adverse consequences of permitting general solicitation and general advertising in offerings made in reliance on Rule 506(c). We believe that the Proposed Amendments in many respects would further the Commission's goals. However, we respectfully submit that certain provisions of the

[1] Securities Act Release No. 9416, 78 Fed. Reg. 44806 (July 10, 2013).

[2] The opinions expressed herein represent those of the undersigned and not necessarily those of our clients.

[3] Securities Act Release No. 9415, 78 Fed. Reg. 44771 (July 10, 2013).

Proposed Amendments as drafted are overbroad or vague, while other provisions will significantly burden issuers without contributing substantially to the realization of the Commission's objectives and run contrary to the Congressional intent underlying the JOBS Act. We ask that the Commission consider the following recommendations prior to adopting final rules related to the Proposed Amendments. For ease of reference, the recommendations are presented in the order in which the Commission organized the Proposing Release.

I. Summary of Recommendations

- The Commission's stated purpose for requiring the filing of an Advance Form D 15 calendar days prior to the first use of general solicitation is for the Commission's informational purposes, specifically information as to whether issuers that initiated Rule 506(c) offerings were unsuccessful in selling any securities through such offerings or chose to raise capital by alternative means. As a practical matter, however, this type of information sought by the Commission will be grossly distorted by virtue of the anticipated filing of prophylactic, non-specific Advance Forms D by issuers to afford themselves flexibility in case they later decide to engage in general solicitation. The Commission in fact has acknowledged that issuers may choose to file such non-specific Advance Forms D, which will serve to render unreliable the information sought by the Commission. The Commission also noted that it anticipates being unable to review each Advance Form D filing. Thus, it does not appear that the proposed requirement of filing an Advance Form D will, in practice, serve the stated purposes of the Commission. Therefore, we recommend that the Commission eliminate the proposed requirement to file an Advance Form D. Alternatively, if the Commission adopts a final rule requiring issuers to make Advance Form D filings, we recommend that such rule only require that the Advance Form D be filed no later than two business days prior to the first use of general solicitation. We note that, while reducing the 15-day period for filing an Advance Form D to two business days would be a significant improvement, we believe that only the complete elimination of the Advance Form D requirement is likely to serve the Congressional intent underlying the JOBS Act.

- We concur with the Commission's proposal that a Closing Form D Amendment should only be required when an issuer sells an additional amount of securities in excess of a certain percentage of the amount of securities previously sold and recommend the additional amount of securities sold to require a Closing Form D Amendment should be an increase of at least 25%.

- We do not understand why information disclosing who directly or indirectly controls an issuer, which has not been required previously for issuers relying on Rule 506(b), would become relevant information to the Commission merely because an issuer decides to engage in general solicitation. Determinations relating to who directly or indirectly controls an issuer can be complicated and involve an intense "facts and circumstances" analysis which can be time- and cost-consuming. Due to the breadth and lack of clarity relating to the definition of "control person" and privacy concerns in an issuer being required to disclose any person who directly or indirectly controls such issuer, we believe that the

proposed revisions to Item 3 would be significantly adverse to the intent underlying the JOBS Act to foster capital formation. We therefore recommend that the Commission not include the requirement to disclose information on an issuer's "control persons" when the Commission adopts its final changes to Form D.

- We recommend that the additional information that would be required by the proposed change to Item 14 be required only when an issuer files its last Form D or a Closing Form D Amendment for an offering and the information is final. We believe that this recommendation would enable the Commission to achieve its stated purpose of the proposed change to Item 14 of determining the composition of investors who invest in Rule 506 offerings, the respective amounts they have invested and the types of offerings and issuers in which each category of investors invests, without imposing a substantial burden on issuers.

- We believe that the requirement to provide information on the basis of investors' accredited investor status is most relevant to a Rule 506(c) offering. Therefore, we recommend that the requirement to provide the information in proposed Item 17 apply only to offerings made in reliance on Rule 506(c) rather than to all Rule 506 offerings, and only when an issuer files its last Form D or a Closing Form D Amendment when such information is final. In addition, we request clarification that the information requested by this new Item 17 pertains solely to "natural persons."

- We believe that indicating each type of general solicitation and general advertising used or to be used in the offering, as would be required under new proposed Item 21, would be overly burdensome to issuers, in particular because it would require an issuer to put in place policies and procedures to monitor the type of general solicitation methods used by its placement agents that may be soliciting investors for the issuer's securities. We believe that issuers would be inclined to indicate that all types of general solicitation may be used in order to avoid such monitoring requirements and, as a result, the information received by the Commission in response to proposed Item 21 would not provide the Commission with useful data on the manner in which issuers are generally soliciting. If the Commission retains proposed Item 21, we believe that the information provided would be more accurate and meaningful if required to be included solely when an issuer files its last Form D or a Closing Form Amendment after the offering has terminated.

- We seek confirmation that an issuer would be subject to disqualification under proposed Rule 507(b) only if the issuer fails to make a "timely filing" as required under Rule 503, but would not be subject to disqualification as a result of an immaterial, inadvertent or technical error in a Form D filing. We also request that proposed Rule 507(b) be revised to refer to a "failure to timely file" a required Form D.

- Proposed Rule 507(b) would disqualify an issuer from relying on Rule 506 for a period of time if a predecessor or affiliate fails to comply with the requirements of

Rule 503. We note that the definition of "affiliate" under the Securities Act is broad and would include an issuer that "directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with" another issuer. This would preclude portfolio companies controlled by a private fund that is disqualified under proposed Rule 507(b) from being able to rely on Rule 506 and vice versa. Moreover, because the Securities Act definition of "affiliate" includes issuers that are under common control, proposed Rule 507(b) could also result in a portfolio company that is disqualified from relying on Rule 506 to cause the automatic disqualification of other portfolio companies that are commonly controlled by the same private fund, even if such other portfolio companies did not fail to comply with the requirements of Rule 503. The extension of the disqualification provisions to affiliates of an issuer could have a significant impact on the private placement market that would seem to run contrary to the intent underlying the JOBS Act to foster capital formation because a large number of issuers would be automatically disqualified from relying on Rule 506 merely because they were an affiliate of a disqualified issuer. Further, proposed rule 507(b) would also impose a significant ongoing due diligence burden on issuers who would need to monitor the Form D filings of their affiliates to determine with certainty whether such issuers could rely on Rule 506 as an available exemption. We therefore recommend that proposed Rule 507(b) not include affiliates or predecessors, and instead refer only to the issuer.

- We recommend that the failure to file an Advance Form D or Closing Form D Amendment not trigger a disqualification under proposed Rule 507(b). Under the Proposed Amendments, an issuer would still be required to file a Form D within 15 calendar days after the date of first sale of securities in the offering, which, even without the filing of an Advance Form D and a Closing Form D Amendment, would provide the Commission with almost all of the information that it would obtain even if all three Forms D were filed. Furthermore, we believe that proposed Rule 507(b) could be as effective in establishing "meaningful consequences" for failing to make Form D filings if the look-back period was decreased from the five years to one year, the cure period was increased from 30 days to at least 45 days and the disqualification period was reduced from one year to 90 days.

- We recommend that the Commission clarify in new proposed Rule 509 what constitutes "written general solicitation materials" and provide guidance on how to comply with the legend and disclosure requirements of proposed Rule 509 given the constraints of social media, such as Twitter. In determining what constitutes written general solicitation materials for purposes of proposed Rule 509, we suggest that the Commission provide guidance that tracks the requirements of Financial Industry Regulatory Authority ("**FINRA**") Rule 5123, which requires private placement memoranda, term sheets and other documents that set forth the terms of the offering, including any materially amended versions thereof, used in connection with the sale of securities in a private placement to be filed with FINRA. We also seek confirmation on whether an issuer may cure any written general solicitation materials that did not contain the proposed Rule 509 legends and disclosures following an inadvertent general solicitation.

- We propose that the Commission only require submission of "written general solicitation materials" upon the request of the Commission, rather than obligating issuers to file all written general solicitation materials because the Commission has suggested that it would be unable to review a high percentage of the written general solicitation materials submitted to it under proposed Rule 510T. Alternatively, if the Commission determines that proposed Rule 510T should be adopted as proposed, we recommend that the Commission limit the written general solicitation materials required to be submitted pursuant to proposed Rule 510T to those documents required to be filed under FINRA Rule 5123 (*e.g.*, private placement memoranda, term sheets and other documents that set forth the terms of the offering, including any materially amended versions thereof), which we believe would significantly lessen the compliance burden on issuers. In addition, we seek confirmation that, for purposes of proposed Rule 510T, the "date of first use" means the date the written communication that constitutes a general solicitation or general advertising is first provided to an outside investor.

II. Form D Filing Requirements

A. Requirement to File an Advance Form D Under Proposed Rule 503

The Proposed Amendments would amend Rule 503 to require issuers using general solicitation in an offering made in reliance on Rule 506(c) to have previously filed an initial Form D no later than 15 calendar days "prior to the first use of general solicitation or general advertising for such offering" ("**Advance Form D**"). Currently, under Rule 503, an issuer making an offering in reliance on Regulation D is only required to file a Form D no later than 15 calendar days *after* the date of first sale of securities in the offering.

According to the Proposing Release, the Commission believes that requiring issuers to file an Advance Form D "would enhance the information available to the Commission to analyze offerings initiated under Rule 506(c)."[4] We believe that, as proposed, the benefits to the Commission of requiring an Advance Form D to be filed 15 days in advance of engaging in general solicitation would not be realized as a practical matter. We submit that the Congressional intent and purposes underlying the JOBS Act as well as the Commission's regulatory interests would be better served by eliminating the requirement to file an Advance Form D or, alternatively, substantially reducing the 15-calendar day requirement to two business days before commencing any general solicitation.

The Commission acknowledges that it "does not anticipate that its staff will review each Advance Form D filing as it is being made"[5] yet states that "the Advance Form D would be useful to the Commission and the Commission staff, as "it would enhance the information available to the Commission to analyze offerings initiated under Rule 506(c), including issuers that initiated Rule 506(c) offerings but were unsuccessful in selling any securities through these offerings or chose alternative forms of raising capital."[6] We respectfully submit that the information that the Commission may obtain from comparing filings of Advance Forms D with actual sales, as

[4] Proposing Release at 22.

[5] Proposing Release at 22.

[6] Proposing Release at 22.

reflected in Forms D currently required to be filed after the date of first sale, would, as a practical matter, be misleading at best and inaccurate at worst, for the reasons set forth below.

As the Commission recognizes in its Proposing Release, "[a]n issuer could . . . file an Advance Form D without contemplating a specific offering, in order to have the flexibility to conduct an offering using general solicitation."[7] As a practical matter, it is anticipated that many if not most issuers would file Advance Forms D (if the requirement is retained by the Commission) prophylactically, to preserve flexibility to engage in general solicitation *if* they choose to do so at a later point in time and to avoid any potential delay to engage in general solicitation when the opportunity might arise. To maximize flexibility, issuers may file non-specific Advance Forms D as many as 30, 60, or 90 or more days in advance. Non-specific Advance Forms D are, by their very nature, unreliable indicators of whether an issuer was "unsuccessful in selling any securities through these offerings or chose alternative forms of raising capital,"[8] especially if an Advance Form D was prophylactically filed 30 days or more in advance of a general solicitation.

Thus, the filing of non-specific "cautionary" Advance Forms D is likely to become prevalent if not universal, thereby grossly distorting any otherwise meaningful information to be derived by the Commission as to whether an issuer was "unsuccessful in selling any securities through these offerings or chose alternative forms of raising capital."[9]

This analysis may suggest to the Commission that it should reduce to two business days the time prior to engaging in general solicitation that an issuer must file an Advance Form D. That would likely lessen the business need to file a prophylactic Advance Form D. It would not, however, eliminate other reasons to file non-specific Advance Forms D as many as 30, 60, or more days in advance, for there are a multitude of unpredictable business situations that would suggest to a prudent issuer that it should simply always have an Advance Form D on file.

Many issuers may be undecided whether to engage in a general solicitation, only deciding to do so when an unanticipated marketing opportunity arises. Under the Proposed Amendments, the issuer would not be able to utilize such an opportunity unless it already had on file an Advance Form D. For example, on short notice, a private fund manager who manages a fund that issues securities in reliance on Rule 506 may have an opportunity to be interviewed in a forum for which there is a public audience. During such an interview, the manager may desire to discuss a private fund that it manages which is currently in the fundraising process. However, if the fund issuer has yet to file an Advance Form D, the manager would be prevented from discussing the fund. To prevent such a circumstance, a prudent fund manager would most likely ensure that the fund has already filed an Advance Form D to avoid a violation of the 15-day Advance Form D requirement. These and other examples of unexpected situations strongly suggest that the Commission would be inundated with Advance Forms D from issuers that may never ultimately engage in general solicitation. This may lead the Commission to conclude that the Rule 506(c) market is far larger than it actually may be.

Where the expressed benefit to the Commission is so unlikely to be realized, the next inquiry is whether *any* advance notice rule would serve the purposes and the Congressional

[7] Proposing Release at 23.

[8] Proposing Release at 22.

[9] Proposing Release at 22.

intent underlying the JOBS Act and/or place well-intentioned issuers in the position of inadvertently violating the Commission's proposed 15-day Advance Form D rule. In the example above, if a private fund manager is speaking to a public audience, he or she may inadvertently make statements that could arguably be regarded by the Commission as general solicitation. If the Commission determines that the manager engaged in general solicitation without having an Advance Form D on file, the consequences would be very harsh given the disqualification consequences of proposed Rule 507(b). To avoid this and other types of inadvertent general solicitations, most issuers would likely be well-advised to protect themselves by the filing of a prophylactic, non-specific Advance Form D – even if the requirement for filing the form was reduced to two business days. Indeed, it would be hard to imagine any issuer not keeping on file with the Commission a non-specific Advance Form D regardless of its plans. If it failed to do so, future private placement opportunities to rely on Rule 506 could be eliminated by the disqualification penalties for failure to file an Advance Form D – and that would run counter to one of the purposes of the JOBS Act to permit general solicitations and general advertising of private offerings.

Thus, while reducing the 15-day period for filing an Advance Form D to two business days would be a significant improvement, we believe that only the complete elimination of the Advance Form D requirement is likely to serve the Congressional intent underlying the JOBS Act. Such an elimination will also serve the salutary purpose of avoiding "traps for the unwary," such as when managers may have to make split-second decisions as to whether a question being posed in a public setting or any statement made that can be broadcast to the general public constitutes general solicitation.

For the reasons discussed in this Section II.A, we therefore recommend that any final rule adopted by the Commission not include the requirement to file an Advance Form D. Alternatively, if the Commission requires that the Advance Form D be filed prior to the first use of general solicitation, we recommend that the time period be reduced from 15 calendar days to two business days prior to the use of general solicitation.

Furthermore, under the Proposed Amendments, an issuer that intends to offer securities in reliance on Rule 506(b), but that subsequently finds the need to rely on Rule 506(c) because of a "foot fault," or an inadvertent general solicitation, may not be able to rely on Rule 506(c) because it would not have timely filed an Advance Form D. If the Commission adopts a final rule requiring an Advance Form D, we recommend that the Commission provide guidance on the procedures that an issuer intending to rely on Rule 506(b) can follow in the event of an inadvertent general solicitation. We believe guidance by the Commission would be especially important given the harsh consequences associated with the failure to file Advance Form D under proposed Rule 507(b) and the lack of definition and clarity as to what constitutes "general solicitation."

In the Proposing Release, the Commission indicated that one solution may be for such an issuer to provide the information that would otherwise be required on Advance Form D "promptly" after an inadvertent general solicitation, which is a concept that the Commission derived from Rule 100(a)(2) of Regulation FD.[10] We believe that such a standard could be difficult to adhere to because it could be unclear under the circumstances what is meant by and

[10] See Proposing Release at 24.

required as a result of the word "promptly." Instead, we recommend that the Commission require the information an issuer would otherwise be required to provide on an Advance Form D "as soon as practicable," which aligns with the standard currently used for amendments to Form D for material mistakes of fact or error or changes in the information provided in a previously filed Form D.[11]

B. Requirement to File a Closing Form D Amendment Under Proposed Rule 503

The Proposed Amendments would require issuers making an offering of securities in reliance on Rule 506 to file a final amendment to Form D no later than 30 calendar days after "termination of the offering" conducted in reliance on Rule 506 (the "**Closing Form D Amendment**"). According to the Proposing Release, the Closing Form D Amendment would provide the Commission with a "more complete analysis and comparison of the use of long-standing Rule 506(b) and new Rule 506(c)"[12] and "with substantially complete information about the Regulation D market . . . ."[13]

We concur with the Commission's proposal that a Closing Form D Amendment should only be required when an issuer sells an additional amount of securities in excess of a certain percentage of the amount of securities previously sold.[14] We believe that the 10% figure used as an example by the Commission[15] should be at least 25% inasmuch as an increase of only 10% is typically so insignificant that it does not justify the burden placed on issuers to file a Closing Form D Amendment and would not provide the Commission with the meaningful information it seeks to obtain.

Although the need to prepare and file an additional Form D is an administrative burden and would result in increased costs for issuers, our principal concern is not with the incremental burden associated with this new form. Rather, we are far more concerned that the disqualification consequence under proposed Rule 507(b) for failing to file this additional Form D, which the Commission acknowledges is predominantly for informational purposes, is not only extremely harsh but also disproportionate to the limited purposes for which the Commission is seeking the data derived from the Closing Form D Amendment. Our concern about the overly harsh consequences of disqualification under Proposed Rule 507(b) is addressed in more depth in Section IV. below.

III. Disclosure Items in Form D

A. Content Requirements Generally

The Proposed Amendments would amend Items 2, 3, 4, 5, 9 and 14 of Form D and add new Items 17 through 22. Some of the changes to Form D would be applicable to all offerings made in reliance on Rule 506, while other changes would apply only to offerings made in reliance on Rule 506(c). In the Proposing Release, the Commission estimates the burden on

[11] See General Instructions to Form D.

[12] Proposing Release at 28.

[13] Proposing Release at 28.

[14] See Proposing Release at 31.

[15] See Proposing Release at 31.

issuers would be minimal.[16] We believe that the Commission underestimates the time necessary to gather information and prepare a Form D, especially in light of the proposed changes to the disclosure items. Moreover, for each Form D amendment, the issuer would be required to update Form D to provide current information in response to all items, which, depending upon the updates that may be necessary, can require significant amounts of time. We further believe that the Commission's estimate of time spent by outside professionals to prepare a Form D underestimates the amount of time that outside professionals actually spend on preparing, revising, reviewing and submitting Form D filings. In addition, the Commission's estimate that the costs of outside counsel average $400 per hour is apparently based on the assumption that paralegals and junior lawyers are often principally relied upon in the preparation of Form D filings. If the Commission retains the disqualification penalty for non-compliance with Form D filings, this severe consequence is likely to result in considerably more professional time being incurred by more senior and costly professionals. Thus, the imposition of these amendments and other new filing requirements is likely to result in considerably more professional time and expense to the issuer than what the Commission has estimated.

B. Item 3

In addition to the information currently required for "related persons," Item 3 would be amended to require in Rule 506(c) offerings the name and address of "control persons," which, under the Proposed Amendments, would include "any person who directly or indirectly controls the issuer." We note that such a requirement exceeds the disclosure requirements in respect of a "control person" for issuers required to report under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). Although Rule 506(c) permits general solicitation, it is still considered a private offering and, therefore, such expanded disclosure requirements in a public filing would seem inconsistent with making a private placement. Furthermore, issuers would be required to consult counsel to determine whether certain persons "directly or indirectly control" the issuer for purposes of the proposed change to Item 3 because such determinations can be complicated and involve an intense "facts and circumstance" analysis which can be time- and cost-consuming.

In addition, many investors in private funds specifically request that their name and commitment amount remain confidential, yet the proposed change to Item 3 could require investors making sizeable financial commitments to private funds to be disclosed as "control persons." This could discourage such investors from participating in offerings made in reliance on Rule 506(c), which would be contrary to the intent underlying the JOBS Act. The Commission's stated purpose in obtaining information relating to the disclosure of an issuer's control persons is that it would be "helpful in obtaining a more complete picture of the issuers and other market participants that are involved in Rule 506(c) offerings."[17] We do not understand why this information, which has not been required previously for issuers that rely on 506(b), would become relevant to the Commission merely because an issuer decides to engage in general solicitation.

Due to the breadth and lack of clarity relating to the definition of "control persons" and the aforementioned privacy concerns, as well as the Commission's limited stated purpose for

[16] See Proposing Release at 100-102.

[17] Proposing Release at 38.

requiring this information, we believe that the proposed revisions to Item 3 could be significantly adverse to the Congressional intent underlying the JOBS Act to foster capital formation. We therefore recommend that the Commission not include the requirement to disclose information on an issuer's "control persons" when the Commission adopts its final changes to Form D.

C. Item 14

As proposed, Item 14 would be amended to add a table requiring, with respect to Rule 506 offerings, information on the number of accredited investors and non-accredited investors that have purchased in the offering, whether they are natural persons or legal entities and the amount raised from each category of investors. In the Proposing Release, the Commission states that the additional information required by the proposed change to Item 14 would help determine the "composition of investors who invest in Rule 506 offerings, the respective amounts they have invested, and the types of offerings and issuers in which each category of investors invests."[18] We believe that the Commission could achieve its stated objective in a manner that is less burdensome to issuers. Therefore, we recommend that the additional information that would be required by the proposed change to Item 14 be required only after such information is final and therefore should be required solely when an issuer files its last Form D or a Closing Form D Amendment, if the requirement is retained, for an offering.

D. Item 17

Under the Proposed Amendments, new proposed Item 17 would require an issuer offering securities in reliance on Rule 506 to provide the number of purchasers who qualified as accredited investors on the basis of (1) income, (2) net worth, (3) being a director, executive officer or general partner of the issuer or its general partner or (4) another basis. The Proposing Release implies that the information provided in response to proposed Item 17 would only be required for "natural persons"[19] but the revised Form D included in the Proposing Release does not include this limitation. We request clarification from the Commission that the information requested pertains solely to natural persons. Similar to our objection with respect to the proposed change to Item 14, we believe that the Commission could achieve such an objective in a manner that is less burdensome to issuers by requiring such information only when an issuer files its last Form D or a Closing Form D Amendment, if the requirement is retained, for an offering when the information is final. In addition, because the requirement to provide information on the basis of investors' accredited investor status is most relevant to a Rule 506(c) offering, we recommend that the requirement to provide the information in proposed Item 17 be confined to offerings made in reliance on Rule 506(c) and not to all Rule 506 offerings.

E. Item 21

Under the Proposed Amendments, new proposed Item 21 would require an issuer making an offering in reliance on Rule 506(c) to indicate each type of general solicitation and general advertising used or to be used in the offering. We believe that such a requirement would be overly burdensome to an issuer because it would require an issuer to put into place policies and procedures to monitor the types of general solicitation methods used not only by the issuer

[18] Proposing Release at 41.

[19] Proposing Release at 42.

but also by its placement agents that may be soliciting investors for the issuer's securities and to update such information for each filing. We believe that this type of coordinating and monitoring may need to be an ongoing process for issuers because a placement agent may implement additional types of general solicitation as part of its solicitation activities, which may not have been reflected in an issuer's prior Form D filing. As a result, we believe that an issuer that is offering securities in reliance on Rule 506(c) would avoid such coordination, monitoring and updating obligations and otherwise maintain offering flexibility by simply indicating that it will use all of the various types of general solicitation methods even if the issuer or its agents do not actually intend to use all such types. Furthermore, we believe that the proposed Item 21 would not provide valuable information to the Commission because the types of general solicitation used by an issuer would seem to have no correlation with the type of accredited investor that purchases the issuer's securities. Moreover, because issuers are likely to indicate that all types of general solicitation may be used for the reasons stated above, the information received by the Commission in response to proposed Item 21 would not provide the Commission with accurate or useful data on the manner in which issuers are generally soliciting.

If the Commission decides to retain new proposed Item 21, we believe that the information the Commission hopes to elicit from this Item could be more accurate and therefore more meaningful if required to be provided solely when an issuer files its last Form D or a Closing Form D Amendment after the offering has terminated. This would also serve to lessen the administrative burden on issuers.

IV. Disqualification Under Proposed Rule 507(b)

The Proposed Amendments would amend Rule 507 to add Rule 507(b), which would disqualify an issuer from relying on Rule 506 if the "issuer, or any of its predecessors or affiliates, has, within the five preceding years, *failed to comply with the requirements of*" Rule 503. (emphasis added). Notably, Rule 503 contains the rules pertaining to not only the timely filing of a Form D but also to the technical information required to be included in a Form D. This would suggest that even an immaterial, inadvertent or technical error could result in disqualification under Rule 507(b).

Notably, the Proposed Amendments provide for a cure period if an issuer that did not otherwise timely file a Form D has made all relevant Form D filings related to the offering within 30 days of the missed filing. Under the cure provision of the Proposed Amendments, "issuers would generally be regarded as having complied with the Rule 503 *filing deadlines* for a Form D or Form D amendment if they filed the relevant filing within a cure period after the filing is due under Rule 503."[20] (emphasis added). This language suggests that the intent of the Commission under proposed Rule 507(b) would be for an issuer to be subject to disqualification only if the issuer (or, under the Proposed Amendments, its predecessors and affiliates) fails to make a "timely filing" as required under Rule 503, but not as a result of an immaterial, inadvertent or technical error. We therefore request clarification by the Commission that immaterial, inadvertent or technical errors (such as, for example a mistake in the number of certain types of investors required to be disclosed under proposed Items 14 or 17 or failing to identify a type of a general solicitation used in response to proposed Item 21) would not result in triggering an automatic

[20] Proposing Release at 54.

disqualification under proposed Rule 507(b), if adopted, and that the disqualification provision in proposed Rule 507(b) be revised to refer to a "failure to timely file" a required Form D.

In addition, the Proposed Amendments would disqualify an issuer from relying on Rule 506 if a predecessor or affiliate fails to comply with the requirements of Rule 503. The definition of "affiliate" under the Securities Act is broad and would include issuers that "directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with" another issuer. Including affiliates in proposed Rule 507(b) so as to disqualify issuers would lead to the disqualification of issuers as a result of failures to timely file Forms D by far-flung affiliates of such issuers. For example, the failure of a private fund issuer to timely file a Form D could cause portfolio companies controlled by such private fund to be disqualified from relying on Rule 506 and vice versa. Similarly, because the Securities Act definition of "affiliate" includes issuers that are under common control, proposed Rule 507(b) could also result in a portfolio company that is disqualified from relying on Rule 506 to cause the automatic disqualification of other portfolio companies that are commonly controlled by the same private fund, even if such other portfolio companies did not fail to comply with the requirements of Rule 503. Such outcomes would therefore make it difficult for such portfolio companies to raise capital or operate. Generally, the provision seems not only burdensome because it would impose on issuers the impossible task of assuring the compliance of all of their affiliates, including parent companies, and sister companies, with all Form D filing requirements in order to be able to rely on a Rule 506 exemption, but also extremely harsh considering that an issuer may have no visibility into or control over the timely filing of Forms D of predecessors and affiliates. For example, even though two issuers may be affiliates under such term's Securities Act definition, the issuers may be operated as separate businesses with separate management teams and without overlapping personnel. In such a case, it would seem unfair for one issuer to be disqualified as a result of the failed timely filing of a Form D by the other issuer. We therefore recommend that proposed Rule 507(b) only reference the issuer and not its predecessors or affiliates. To the extent the Commission is concerned that issuers could circumvent proposed Rule 507(b) by issuing securities through an affiliate, the Commission could put in place alternative measures to address such concerns, as it has in other contexts in which it was concerned with circumvention.[21]

Moreover, we are concerned that the proposed Rule 507(b) appears to be "automatic" and does not require notice to an issuer or a court injunction or order. This introduces substantial uncertainty into the offering process because an issuer may be disqualified without knowing that a failure to comply with the Form D requirements, even if inadvertent, by one of its affiliates had actually barred the issuer from relying on a Rule 506 exemption for a period of time.

Furthermore, we believe that the proposed Rule 507(b) could be as effective in establishing "meaningful consequences for failing to file the form"[22] if the look-back period was

[21] For example, Section 12(g)(1)(A) of the Exchange Act provides that an issuer would be required to register its securities with the Commission if it has total assets exceeding $10 million (consistent with the current threshold found in Rule 12g-1) and a class of equity security (other than an exempted security) that is "held of record" by either (i) 2,000 persons or (ii) 500 persons who are not "accredited investors. Realizing that forms of holding could be abused to avoid triggering the registration thresholds of Section 12(g)(1)(a), in order to prevent circumvention, the Commission adopted Rule 12g5-1(b)(3), which states that "[i]f the issuer knows or has reason to know that the form of holding securities of record is used primarily to circumvent the provisions of Section 12(g) or 15(d) of the Act, the beneficial owners of such securities shall be deemed to be the record owners thereof."

[22] Proposing Release at 50.

one year, as opposed to five years, as proposed by the Commission. We believe that the five-year look-back period (especially if coupled with the requirement to canvass potential failed timely filings of Forms D of predecessors and affiliates) would impose an unreasonable due diligence burden on an issuer that exceeds any corresponding benefit, and such a burden could prevent an issuer from being certain that it could conduct an offering of securities in reliance on Rule 506.

In addition, we recommend that the cure period, which the Commission proposes to be 30 days, be increased to at least 45 days. Filing a Form D requires an issuer to retain counsel, gather the information necessary to complete the Form D and provide such information to its counsel, who would need time to prepare the Form D and review it with the issuer. Given that it may take some time for the issuer to discover that a Form D filing was not timely made, coupled with the time- and resource-intensive process to file a Form D, an issuer would likely need more than 30 days to cure in most instances.

In addition, the proposed one-year disqualification period proposed by the Commission is so long that it could have exceedingly debilitating consequences for an issuer. We believe, that a one-year disqualification period is profoundly disproportionate to having failed to make a timely Form D filing and believe that a 90-day disqualification period would serve the same deterrent purpose without unduly and unreasonably penalizing an issuer.

Finally, as discussed above, if the Commission adopts final rules requiring the filing of an Advance Form D and a Form D Closing Amendment, we recommend that the failure to file either such form not trigger a disqualification under proposed Rule 507(b). Notably, under the Proposed Amendments, an issuer would still be required to file a Form D within 15 calendar days after the date of first sale of securities in the offering, which, even without the filing of an Advance Form D and a Closing Form D Amendment, would provide the Commission with almost all of the information it would obtain even if all three Forms D were filed. Therefore, we believe that only the Form D required to be filed within 15 calendar days after the date of first sale should trigger disqualification under proposed Rule 507(b) if the disqualification penalty is retained in the final rule.

V. Required Legends on Written General Solicitation Materials Under New Proposed Rule 509

New proposed Rule 509 would require that specific legends warning investors of certain risks and restrictions associated with the offering be included in any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on Rule 506(c) ("**Written General Solicitation Materials**") and additional disclosures for Written General Solicitation Materials used by private funds that include performance data.[23] The Proposing Release neither defines the term "written communication" as used in proposed Rule

[23] Proposed Rule 509 requires legends to be included, in a prominent manner, to the effect that (i) the securities may be sold only to accredited investors, which for natural persons are investors who meet certain minimum annual income or net worth thresholds; (ii) the securities are being offered in reliance on an exemption from the registration requirements of the Securities Act, as amended, and are not required to comply with specific disclosure requirements that apply to registered offerings; (iii) the Commission has not passed upon the merits of or given its approval to the securities, the terms of the offering or the accuracy or completeness of any offering materials; (iv) the securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and (v) investing in securities involves risk, and investors should be able to bear the loss of their investment. Proposing Release at 64.

509 nor the term "written general solicitation materials." In addition, neither the terms "general solicitation" nor "general advertising" are defined in the Proposing Release or in Regulation D, although Rule 502(c) provides examples, and the Commission has provided certain additional guidance through its interpretations. Given that these terms are largely undefined and could be construed broadly, it is unclear which Written General Solicitation Materials would require the specified legends under proposed Rule 509.

In addition, issuers may wish to communicate through certain modes of social media, such as Twitter, which limits communications to 140 characters. To the extent "tweets" constitute Written General Solicitation Materials, the Commission offers no guidance on how to incorporate the proposed legends.

We recommend that the Commission clarify what constitutes Written General Solicitation Materials and provide guidance on how to comply with proposed Rule 509 given the constraints of social media, such as Twitter. For example, we believe that the Commission's stated purpose of proposed Rule 509[24] could be satisfied by referring potential investors to an issuer's website that contains the proposed Rule 509 legends or by providing a stand-alone separate notice to potential investors. We further believe that disclosures be permitted to be included in a tweet immediately prior to one that contains performance data or be included in the tweet itself by use of a hyperlink to the issuer's website that contains the required legends.

In determining what constitutes Written General Solicitation Materials for purposes of proposed Rule 509, we suggest that the Commission provide guidance that tracks the requirements of FINRA Rule 5123, which requires private placement memoranda, term sheets and other documents that set forth the terms of the offering, including any materially amended versions thereof, used in connection with the sale of securities in a private placement to be filed with FINRA.[25]

Finally, the Commission gives no guidance whether an issuer may cure or remedy any Written General Solicitation Materials that did not contain the proposed Rule 509 legends and disclosures following an inadvertent general solicitation. We respectfully suggest that the Commission clarify what procedure exists for remedying such a situation in any adopted final rule or in future guidance.

VI. Mandatory Submission of Written General Solicitation Materials Under New Proposed Rule 510T

Under new proposed Rule 510T, an issuer would be required to submit to the Commission any Written General Solicitation Materials no later than the date of the first use. As discussed above in connection with proposed Rule 509, due to the potential breadth and uncertainty of what might constitute Written General Solicitation Materials, proposed Rule 510T would require issuers to submit a voluminous amount of documents to the Commission and to

[24] The Commission's stated purpose of proposed Rule 509 is to "better inform potential investors as to whether they are qualified to participate in Rule 506(c) offerings and certain potential risks that may be associated with such offerings." Proposing Release at 64.

[25] FINRA Rule 5123 requires any FINRA member that sells an issuer's securities in certain private placements to file within 15 calendar days after the date of first sale, a copy of any private placement memorandum, term sheet or other offering document, including any materially amended versions thereof, used in connection with such sale.

retain each such submission consistent with their recordkeeping obligations. It would also create administrative difficulties and burdens on issuers because of the need to continuously submit to the Commission materials that are constantly being updated during the course of an offering.

We propose that the Commission only require submission of Written General Solicitation Materials upon the request of the Commission, rather than obligating issuers to file all Written General Solicitation Materials. As the Commission has indicated, it may be unable to review more than a small percentage of the Written General Solicitation Materials submitted to it under proposed Rule 510T.[26] It therefore seems needlessly burdensome to require all issuers to submit all such materials. To the extent the submission of Written General Solicitation Materials under proposed Rule 510T supports the Commission's analytical or market evaluation needs, the Commission could require submission of materials from randomly selected issuers that have checked the box on their Form D indicating that their offering of securities is being made in reliance on Rule 506(c). Alternatively, if the Commission determines that proposed Rule 510T should be adopted as proposed, we recommend the Commission limit the Written General Solicitation Materials required to be submitted pursuant to proposed Rule 510T to those documents required to be filed under FINRA Rule 5123 (*e.g.*, only private placement memoranda, term sheets and other documents that set forth the terms of the offering, including any materially amended versions thereof) – similar to our comments to proposed Rule 509. This would decrease the total volume of documents to be submitted to the Commission, which would significantly alleviate the compliance burden on issuers.

Additionally, what constitutes the "date of first use" for purposes of proposed Rule 510T is not specified in the Proposing Release and is otherwise unclear. We seek confirmation that this means the date the written communication that constitutes a general solicitation or general advertising is first provided to an outside investor.

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[26] See Proposing Release at 91. Request for Comment 89 seeks comment on of the costs and benefits of proposed Rule 510T if the Commission were able to conduct "only limited review of a small portion of the materials submitted."

We appreciate the opportunity to respond to the Commission's request for comments and we hope that these comments and observations contribute to the important work of the Commission. If you have any questions with respect to the matters raised in this letter, please contact Yukako Kawata (see contact information below) or Susan Reibstein at [redacted] or [redacted]

Very truly yours,

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