

*The Commonwealth of Massachusetts*

*Secretary of the Commonwealth*

*State House, Boston, Massachusetts 02133*

*William Francis Galvin*  
*Secretary of the Commonwealth*

November 7, 2013

***Submitted electronically to rule-comments@sec.gov***

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

**RE: Comments in Response to S.E.C. Release “Amendments to Regulation D, Form D and Rule 156 under the Securities Act” (the “Release” or the “Proposal”) Release Nos. 33-9416, 34-69960, IC-30595 (File No. S7-06-13)**

Dear Ms. Murphy,

I am writing in my capacity as the chief securities regulator for Massachusetts via the administration of the Massachusetts Uniform Securities Act by the Massachusetts Securities Division (the “Securities Division”). This letter supplements the comment letter the Securities Division submitted to the U.S Securities and Exchange Commission (the “SEC” or the “Commission”) on September 23, 2013 regarding the above-referenced Release.

We are disturbed by the comments submitted by some commenters on the Release that the Commission should do little or no substantive rulemaking in connection with the Rule 506(c) exemption under Title II of the JOBS Act. We are especially alarmed that some commenters urge that the Commission should not adopt any standards for issuers to verify that investors in Rule 506(c) transactions are actually accredited. A number of these commenters urge that investors be allowed to self-certify their accredited status. This position is fundamentally flawed on several grounds. In particular: (i) the JOBS Act specifically requires that issuers must verify that investors are accredited, and (ii) the Rule 506(c) exemption will permit unregistered offerings to be offered in a manner (using general solicitation) formerly available only for registered offerings, a change that will bring high-risk offerings into a the retail market.

## **The JOBS Act Specifically Requires that the Commission Prescribe Reasonable Steps to Verify that Investors in Rule 506(c) Offerings Are Accredited**

Section 201(a)(1) of the JOBS Act of 2012 requires with respect to the Rule 506(c) exemption that all investors shall be accredited investors and that the SEC shall adopt rules for the exemption, such that:

"Such rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission."

The Commission's initial proposal for the Rule 506(c) exemption simply restated the statutory language that issuers would be required to take "reasonable steps" to verify that purchasers were accredited.<sup>1</sup> In the initial proposal, the SEC did not even include any safe harbor methods of verification. This was based on the Commission's stated concern that there was a risk that safe harbors could turn into *de facto* requirements.

We were pleased that in the adopting release, the Commission did include some safe harbor verification methods,<sup>2</sup> but the Commission unfortunately also stated that "reasonable steps" to verify accredited status are a matter of facts and circumstances. While this approach gives issuers flexibility, the "facts and circumstances" approach means it will be hard for any regulator, except in truly egregious circumstances, to take the position that a given issuer did not take the legally-required reasonable steps to verify that investors were accredited.

We urge the Commission to establish clearer and more prescriptive standards for verification. We strongly believe this is what the text of the JOBS Act requires. In view of the risks that many Rule 506(c) offerings will involve, and the broad segment of the public that may receive solicitations for these offerings, the Commission must do more than state that verification is a matter of facts and circumstances, and that the listed safe harbors are among the reasonable steps that issuers may use to verify accredited status.

### **Key Factors in Verifying that Investors Are Truly Accredited**

To be concise, our concerns on verification methods can be expressed in a few main points:

1) The accredited status of investors is the key protection built into the Rule 506(c) exemption. For this reason alone it is appropriate to require issuers to take every reasonable step to assure that investors meet the standard of being accredited.

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<sup>1</sup> SEC Release: *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Rel. 33-9354, S7-07-12, August 29, 2012.

<sup>2</sup> SEC Release: *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Rel. 33-9415, S7-07-12, July 10, 2013 (Adopting Release).

- 2) The JOBS Act calls for the SEC to determine by rule the reasonable steps for issuers to take to verify that all investors are accredited. Instead, the Commission's current rulemaking on the verification requirement is unreasonably lax.
- 3) Subject to the above, the safe harbor verification methods established by the Commission are helpful, but they do not provide a clear basis for regulators to police this standard, again because the "facts and circumstances" standard is too vague and flexible.
- 4) Some issuers, left to their own judgment, will simply ask investors to self-certify their accredited status, or they will do only a little more as "verification." The Commission needs to state clearly that such methods are not sufficient.
- 5) We are dismayed to see some commenters advocate that the regulations should be even looser, permitting investor self-certification, because issuers want these transactions to be frictionless, with minimal obligations falling on the issuers. Again, this is not what the JOBS Act requires, and it is contrary to the logic of limiting sales under the exemption to purchasers who can truly fend for themselves.
- 6) In this context, the plain English meaning of "verification" should mean that issuers must collect basic objective information to assure that investors are actually accredited. Anything less than this falls short of statutory requirements.

**The Commission Should Strengthen the Incentives under the Law for Issuers to Comply with the Requirement to Take Reasonable Steps to Verify that Investors Are Accredited**

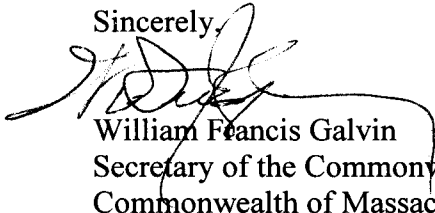
Issuers in many Rule 506(c) offerings will face fundamental conflicts of interest regarding investor verification, because they will be naturally reluctant to lose potential investors in the course of verifying their accredited status. For this reason, we urge that the Commission needs to create strong incentives for issuers to carry out meaningful verifications.

Based on our reading of Title II the JOBS Act, an issuer that does not take reasonable steps to verify that investors are accredited would fail meet a condition of the Rule 506(c) exemption, and therefore would lose that exemption. We urge the Commission to notify and admonish issuers on this important requirement. If the Commission does not believe that the exemption would be lost in such a case, we urge the Commission to put into place a one-year penalty period that would disqualify any issuer from using the Rule 506(c) exemption if that issuer had failed in an earlier offering to take reasonable steps to verify that all investors were accredited. We are suggesting this penalty period based on the disqualifications included in the Release that would apply to issuers that: (i) fail to timely file Form D; (ii) fail to include required legends on solicitation materials; or (iii) fail to comply with temporary regulations on the filing of solicitation materials. The requirement that issuers must take reasonable steps to verify the accredited status of investors is even more important to the protection of investors than any of the foregoing.

The requirement that issuers must verify that investors are accredited will only be meaningful if there are consequences for issuers that fail to do so. We urge the Commission to give the verification requirement some teeth in order to assure that issuers will comply with this fundamental requirement.

We appreciate this opportunity to comment on these important issues. If you have questions about this letter or if my Office can assist in any way, please contact me or Bryan Lantagne, Director of the Massachusetts Securities Division. Mr. Lantagne's telephone number is ( [REDACTED] ) and his e-mail address is [REDACTED]

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Galvin', with a long horizontal flourish extending to the right.

William Francis Galvin  
Secretary of the Commonwealth  
Commonwealth of Massachusetts