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August 5, 2008

The Honorable Christopher Cox, Chairman
The Honorable Kathleen L. Casey
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Proposed Amendments to Regulation D (File No. S7-18-07)

Ladies and Gentlemen:

The undersigned have practiced under the federal securities laws in many capacities over many decades. We write to urge the Commission to eliminate, in the context of the current proposed amendments to Regulation D, the prohibition on a "general solicitation" in connection with private placements.

We have previously expressed our views on this subject[1] but believe that we should do so again in view of the time that has passed and the additional opportunity afforded by the addition of three new members to the Commission. In short, we believe that the prohibition against "general solicitation" of investors, as currently interpreted and applied by the Staff, is a significant impediment to capital formation without providing any meaningful benefits in the nature of investor protection. We also believe it interferes with the ability of many entities to communicate with segments of the public and thereby creates an unwarranted—and perhaps even unconstitutional—interference with the free flow of information that the Commission should be encouraging. We do not minimize the importance of investor protection; rather, we believe that existing interpretations of the "general solicitation" prohibition do not advance investor protection and that more than adequate protection is provided by other existing rules.

1. The prohibition on "general solicitation" is an obstacle to capital formation. In explaining the need for Securities Offering Reform only three years ago, the Commission pointed to advances in technology and communications that had caused the 1933 Act's "gun-jumping" provisions to become "substantial and increasingly unworkable restrictions on many communications that would be beneficial to investors and markets

[1] This letter states the writers' personal views and not necessarily those of their respective firms or any other persons.

…." We believe that the costs and inefficiencies associated with the prohibition on general solicitation in private placements are at least as significant—and quite probably more significant—than those associated with gun-jumping in connection with registered public offerings and that they demand equally bold action from the Commission.

The prohibition on general solicitation makes it impossible for issuers and investors to take full advantage of websites and other means of communicating with eligible investors for private placements. In some instances, counsel advise against the creation of any website, even one that is clearly not advancing any pending offering, for fear of running afoul of the Commission's interpretation of "general solicitation," and of course the Commission's guidance of August 1, 2008 on company websites does nothing to alleviate these concerns because it is expressly inapplicble to the 1933 Act implications of websites. The prohbition also makes it difficult for issuers to communicate publicly even on non-offering-related matters with third parties such as their stockholders, debtholders, the rating agencies or the trade or financial press. On occasion, the prohibition forces issuers to delay or even cancel offerings because of communications – sometimes inadvertent – that could be viewed in hindsight as a solicitation. The need to police communications by transaction participants, and to analyze and remedy inadvertent communications, also adds significantly to the cost of effecting private placements.

2. <u>The Commission can eliminate the prohibition without weakening investor protection</u>. Investors do not need to be protected from information. They need to be protected from investing in unregistered securities where they do not have the sophistication to safeguard their interests in a private negotiation, and the existing robust limitations on those to whom an issuer may sell are fully adequate for this purpose. Every sophisticated observer of private placements has noted the illogic of trying to "protect" investors by preventing them from being exposed to information about transactions in which they cannot participate because they do not meet the eligibility standards established by existing Commission rules for such transactions. This illogic applies also to information about issuers, e.g., private investment vehicles, in which investors cannot participate. Indeed, it is one of the paradoxes of the current rules that they inhibit transparency initiatives by private investment vehicles. The Commission and other regulatory bodies have recognized the value of transparency. The Commission should eliminate impediments to transparency, particularly those that do not advance any important Commission policies.

3. If the Commission is unwilling to eliminate the prohibition, it should limit its application.

   A. The Commission could propose a category of sophisticated investor and eliminate the prohibition in private placements that are available for actual investment only by those investors. (In fact, we see no more logic in this proposal than in the current rule, but it would achieve some progress and perhaps make it easier for the Commission to eliminate the prohibition at some future date.)

   B. The Commission could separate the prohibitions on solicitation and advertising, e.g., by continuing to apply the prohibition to (a) television or radio broadcasts prepared by or used by the issuer or an agent or (b) advertisements or other communications paid for by the issuer or an agent. There is precedent for such a separation in Rule 433(b)(2)(i) relating to free-writing prospectuses used by non-reporting and unseasoned issuers. The result would be to afford relief to non-deal-related communications and to inadvertent communications that refer to a private placement.

   C. The Commission could state explicitly that a general solicitation is not prohibited if it is not used to identify investors for a private placement. By such a statement, the Commission would only be confirming what it has already said in connection with foreign companies' publicly-available websites and all companies' pending registration statements. Nonetheless, we believe that a focused reiteration of that view, with specific application to this context, would provide some meaningful clarity.

4. The Commission has ample exemptive power to eliminate or relax the prohibition. We are aware of staff comments to the effect that the Commission may not have the statutory authority to eliminate or relax the prohibition. We believe the Commission has all the authority it needs in specific existing statutory provisions and we would be pleased to engage in further discussion on this point.

In closing, we note recent allegations that the prohibition on general solicitations may implicate First Amendment considerations. We think the policy considerations discussed above are a sufficient basis for the Commission to eliminate the prohibition or limit its application, but one of the key tests for evaluating a governmental restriction on speech – even speech that is alleged to be "commercial speech" – is whether the restriction is no more extensive than necessary. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980). If the Commission does not act to eliminate the general solicitation prohibition or limit its application, it should consider articulating why the prohibition advances any meaningful policy goal of the securities laws.

Very truly yours,

/s/ /s/

Simon M. Lorne Joseph McLaughlin

cc: John W. White
Brian Cartwright
Thomas Kim
Nancy M. Morris