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July 14, 2011

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

Re: File No. S7-21-11

Dear: Ms. Murphy:

We appreciate this opportunity to respond to the Commission's request for comments in its Release No. 33-9211, File No. S7-21-11, regarding proposed rules for "Disqualification of Felons and Other 'Bad Actors' from Rule 506 Offerings" (the "Release"). The proposed rules would, among other things, amend Rule 506 of Regulation D by adding a new Rule 506(c) to implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

We represent a number of institutions and individuals involved in one or more regulated businesses that are or may be affected by the proposed rules, including securities broker-dealers, placement agents, finders, investment advisers, futures commission merchants, introducing brokers, commodity trading advisers, commodity pool operators, banks and insurance companies. Certain of our clients, from time to time, engage in capital raising activities through the offer and sale of securities in reliance on the private placement exemption from registration contained in Section 4(2) of the Securities Act of 1933 and the safe harbor provisions of Rule 506. It is for this reason that we are responding to the Commission's request for comments.

Our comments are limited to two areas of the Release where the Commission has specifically requested comments – (i) whether new Rule 506(c) should include among disqualifying events criminal convictions, court injunctions and restraining orders and final orders of state and federal regulators relating to commodity-related transgressions (see, e.g., Part II.C., Questions 13, 36-38) and (ii) whether persons who may have been permanently barred by a state or federal agency from having certain associations or engaging in certain types of activities should be subject to the disqualification rules of new Rule 506(c) on a permanent basis (see Part II.C., Question 21).

Commodity-Related Transgressions

When adopted, new Rule 506(c) will be a substantive rule of the Commission, promulgated pursuant to an express delegation of authority from Congress, and will have the force and effect of law.[1] Once adopted, new Rule 506(c) will be binding unless it is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law (such as if the Commission exceeded its statutory authority) or otherwise defective under the Administrative Procedure Act.[2]

In the instant situation, we are not suggesting that proposed Rule 506(c) is arbitrary or capricious, represents an abuse of discretion by the Commission or is otherwise defective under the Administrative Procedure Act. In our view, however, proposed Rule 506(c), if it includes disqualifications for persons involved in commodity-related transgressions, would exceed the power delegated to the Commission by Congress.[3]

As the Commission is well aware, Section 926 of Dodd-Frank requires the Commission to adopt rules that disqualify securities offerings from the safe harbor provisions of Rule 506 which are "substantially similar" to Rule 262, the disqualification provisions of Regulation A under the Securities Act, and that cover matters otherwise specifically enumerated in Section 926. Neither Rule 262 nor the other provisions of Section 926 contain provisions relating to commodity-related transgressions. For this reason, in our view, the Commission is without authority to adopt a new Rule 506(c) that includes disqualifications for commodity-related transgressions.

We recognize, of course, that Congress may enact legislation in the future that authorizes or requires the Commission to adopt rules containing disqualifications for commodity-related transgressions. However, we do not believe the Commission is vested with such authority under the current legislation.

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1 *Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed. Cir. 2006).

2 *United States v. Southern Union Co.*, 630 F.3d 17, 29 (1st Cir. 2010).

3 An agency may act only pursuant to authority delegated to it by Congress. *Lyng v. Payne*, 476 U.S. 926, 937 (1986). An agency's power is no greater than that delegated by Congress. *Lyng*, 476 U.S. at 937. When an agency has acted beyond its delegated authority, a reviewing court will hold such action *ultra vires*. See 5 U.S.C. §706(2)(C); *National Pork Producers Council v. United States Environmental Protection Agency*, 635 F.3d 738, 751 (5th Cir. 2011).

Look-Back Provisions

Proposed Rule 506(c) imposes disqualifications for various covered persons based on, among other things, (i) convictions of any felony or misdemeanor involving specified crimes within five years (in the case of issuers) or 10 years (in the case of other covered persons) of any Rule 506 sale of securities, (ii) orders, judgments or decrees of any court of competent jurisdiction relating to specified offenses entered within five years before any Rule 506 sale of securities or (iii) final orders of certain specified state and federal authorities (a) barring covered persons from certain activities or relationships (including association with an entity regulated by any of such authorities) or (b) prohibiting fraudulent, manipulative or deceptive conduct entered within 10 years before any Rule 506 sale of securities.

We have no particular comments about the differing look-back standards for various types of transgressions set forth in Section 926 of Dodd-Frank, Rule 262 or proposed Rule 506(c). We are concerned, however, about those provisions of proposed Rule 506(c) which contain no look-back limitations and that, in the case of persons subject to permanent bars from specified activities or relationships, would result in permanent disqualifications of such persons from engaging in private placements under Rule 506. In our view, someone who is barred, for example, from ever applying for registration with a regulatory authority should not be disqualified for a longer period than would apply if such person had been convicted of a related crime.

We believe that a distinction is required between the disqualification provisions of new Rule 506(c) and otherwise applicable antifraud provisions of federal and state securities laws. It may be appropriate for certain persons to be disqualified for a finite period of time from being able to participate in a Rule 506 private placement. In our view, however, any such mandatory "sit-on-the-sidelines" rule should expire at some point in time. Persons involved in otherwise disqualifying activities will have been prosecuted – civilly, criminally or administratively – and at some point should be permitted to participate in the full range of capital formation activities, including being involved in private placements under Rule 506.

That said, those responsible for the preparation of any private placement memorandum or other offering document relating to a Rule 506 private placement will need to consider the antifraud provisions of federal and state securities laws. Depending upon the nature of a given person's past misconduct, appropriate disclosure of such past misconduct may be required even if the disqualification period contained in new Rule 506(c) or other applicable rule has expired.

Should you have any questions regarding our comments, please feel free to contact Frank Zaffere at fzaffere@srcattorneys.com or (312) 565-1096 or Jeffrey Barclay at jbarclay@srcattorneys.com or (312) 565- 8425.

Very truly yours,

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By: Frank Zaffere
A Partner