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

Elizabeth Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. S7-06-13 - Release Nos. 33-9416, 34-69960, IC-305985 - SEC Rule Proposal on Regulation D

Dear Ms. Murphy:

This letter is submitted in response to the request for comments by the Securities and Exchange Commission ("SEC") in Release Nos. 33-9416, 34-69960, IC-305985, File No. S7-06-13 (the "Rule Proposal"). In the Rule Proposal, SEC has proposed to revise SEC Regulation D, Form D and SEC Rule 156.

The undersigned are members of the Securities Committee (the "Committee") of the Business Law Section (the "Section") of the State Bar of Texas. Mr. Fahy is the Committee Chair. Each advises securities issuers, including small public and private issuers. Please note that the comments expressed in this letter represent the views of the undersigned only and do not represent the views of their colleagues, clients or law firms or the official position of the Committee, the Section or the State Bar of Texas. None of the undersigned are being compensated, directly or indirectly, for our work on this comment submission.

The Rule Proposal Lacks a Small Issuer Perspective

We advise small issuers. Title II of the JOBS Act was intended to facilitate the raising of capital by small issuers in order to accelerate economic activity and enhance employment growth. But, the Rule Proposal manifests a lack of understanding of the operational realities facing small issuers in complying with technical requirements of securities law. Most small issuers raising capital do not have in-house attorneys or full-time compliance personnel. From their perspective, calling outside counsel to assist in preparing securities offering documents is expensive and small issuers are often hesitant to incur such costs.

While the Commission has a duty under the Securities Act to protect investors, Congress has also charged the Commission in its rulemaking to consider "whether the action will promote efficiency, competition and capital formation."[1] Since small issuers use Regulation D almost exclusively for soliciting investors for their capital needs, the Commission should view whether the requirements in the Rule Proposal impose needless burdens on small issuers that hamper their business efficiency and impair capital formation.

The SEC's Division of Economic and Risk Analysis demonstrated that Rule 506 offerings for non-investment company issuers are primarily made by small issuers in its July 2012 white paper. For 2009- 2012 the white paper stated:

> Issuer revenue ranges reported in Figure 8 show that issuers of private offerings tend to be small. Although a significant number of issuers decline to disclose their revenues (55%), for those that do, most have revenues of less than $1 million. Only 1.4% of all new offerings are by issuers that report more than $100 million in revenues. . . .
>
> From the data contained in Figure 8, it can be determined that of those that did disclose their revenue over 66% had revenue less than $1 million.[2]

The White Paper further stated:

- Consistent with the original intent of Regulation D to target the capital formation needs of small business, there have been more than 40,000 issuances by non-financial issuers since 2009 with a median offer size of less than $2 million.

- Form D filings report that more than 234,000 investors participated in Regulation D offerings in 2012, of which 91,000 participated in offerings by non-financial issuers, more than double the number of investors participating in hedge fund offerings. Nonaccredited investors were present in only 10% of Regulation D offerings.

- Only 13% of Regulation D offerings since 2009 report using a financial intermediary (broker-dealer or finder).[3]

1 Securities Act of 1933 Section 1(b)
2 *An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009 – 2012*, by Vladimir Ivanov and Scott Bauguess of SEC Division of Economic and Risk Analysis dated July 2013, p. 12.
3 *id* at page 3.

Consequently, the SEC should design its rules so that these small issuers can easily comply with technical requirements and not penalize such small businesses with "gotcha" requirements in governmental notice documents that are not provided to investors.

The Commission should consider its regulatory initiatives related to Title II of the JOBS Act from the perspective of a small issuer with one or two principals that lacks the cashflow to sustain internal audit, legal or compliance functions. Securities attorneys and Commission staff often lapse into myopia because they look at one area of regulation all the time. But, an entrepreneur has other concerns and considers securities compliance as just one of many tasks to complete. For example, entrepreneurs also must obtain and comply with necessary local and state permits, set up a tax compliance regimen, establish protocols for compliance with a myriad of state and federal employment, insurance and deferred compensation laws and create a compliance system for the specific industry in which the entrepreneurs engage. Entrepreneurs should be able to focus on actually running a business and generating sufficient cashflow to meet expenses. This includes actually obtaining customers and clients, providing goods and services and employing people – the stated purpose of the JOBS Act.

Small issuers require regulatory simplicity to be efficient and compliant. The SEC should not substantially increase the length and complexity of notice forms that are never provided to investors, require multiple amendments be filed while also tying technical deficiencies in filing these notice forms to the loss of a securities registration exemption and the concomitant creation of a financially devastating rescission liability.

Moreover, we note that under the Rule Proposal the Form D has gotten substantially longer and includes requests for extremely detailed information on the method of solicitation for each investor, the method of verification of accredited investor status, how each investor qualifies as an accredited investor, and a use of proceeds allocation which includes specific percentage ranges of the use of proceeds. In our experience, gathering this additional information will take at least twice as long than the time needed to complete the Form D in its current condition, an approach that does not appear to take into consideration the realities of operating a small business.

From a small issuer perspective the decision by the Commission to even propose the automatic disqualification from an offering exemption for a period of one or five years for not filing a <u>NOTICE</u> form which, among other things, may only relate to a close of an offering or an annual amendment, is problematic. Prospective investors do not receive the Form D. There is no Form D delivery requirement as there is with a Form S-1.

Consequently, the proposed changes to Form D are not about investor protection, they are about punishing small issuers for not providing the SEC with statistical information about issuers, the brokers who sell for them and the fund advisers to exempt investment companies. There is no conceivable investor protection rationale to provide an automatic offering disqualification for not filing a notice form that is consistent with the Commission's legal requirements that its rulemaking promote efficiency, competition and capital formation.

Beyond the Rule Proposal's exemption penalty box provisions, the actual effect on a small issuer for not correctly filing a governmental notice form can be huge. It can lead to a disastrous rescission liability that will permanently hamper the small issuer's ability to raise future capital despite resulting only from the deficient filing of a notice form.

For example, take a nascent company that has begun successful operations. It chooses to seek audited financial statements for its next round of financing But, the auditor notices that there was some defect in the Form D filing regime for the initial investors and books a rescission liability for the full amount of the investments by the founding investors. Moreover, such booked liability is inevitably booked as a current liability. This turns the balance sheet upside down and no investor will ever invest in this enterprise that needs capital to grow. Moreover, if the small issuer has a credit facility from a bank, this accounting adjustment will cause a breach of the issuer's financial covenants in its credit facility, bring notice of an event of default and could result in the seizure of all issuer's assets to the detriment of previous investors. Surely, this is not the result envisioned by Congress in the JOBS Act.

Complex requirements for offering exemptions for small issuers have real world impacts on the small issuers, their investors, their employees, and the prospective employees these issuers seek to hire.

Under the Rule Proposal an issuer with an adequate disclosure to investors that failed to timely file a closing Amended Form D (that would never be provided to investors) would be disqualified from using Regulation D for one or five years. But, an issuer with possibly inadequate disclosures to investors who timely filed the Amended Form D would not be disqualified from using Regulation D. How does that comport with promoting investor protection, efficiency, competition or capital formation?

This perspective on the notice filing/offering disqualification issue causes us to be concerned that a similar perspective was applied to other aspects of the Rule Proposal. In evaluating the Rule Proposal on a going forward basis, we suggest that the Commission use the perspective of a small issuer without internal legal, compliance or audit personnel and the need of such issuers for securities compliance to be simple and easy. Use the information provided by your own staff in the 2013 White Paper which clearly shows that the vast majority of Form D filers are small issuers with less than $2 million in revenue. From this perspective, the information on the notice form should have an ease of compliance, no need to conduct research to find the information to complete the notice form and avoid “gotchas” that shift liabilities[4] based on deficiencies in filing a governmental notice form that is not even provided to the investors the Commission is charged with protecting.

Request for Comment 1 - We are proposing that issuers file an Advance Form D no later than 15 calendar days before the commencement of general solicitation in a Rule 506(c) offering. Is such an advance filing useful and appropriate for an effective analysis of the Rule 506(c) market? Should the 15-calendar day period be increased or decreased? Why or why not? Should the filing deadline be tied to the commencement of general solicitation or the commencement of the offering, whether or not general solicitation is used?

Request for Comment 1 relates to the Rule Proposal’s requirement that an “Advance Form D” that lacks Items 5, 11, 13, 14 and 15 of the proposed Form D be filed no later than 15 days before the first use of general solicitation, if the issuer has not otherwise filed a full Form D.

Viewing this requirement through the prism of a small issuer, this requirement is needlessly burdensome. Because Rule 503(a)(2) notice filings (the full Form D) are not due until 15 days after the first sale of securities, this requirement in effect necessitates filing two Forms D to cover the same offering, costing time and money. The Rule Proposal’s economic analysis estimated the compliance burden of the advance Form D at more than $26 million annually,[5] based on four hours’ work per Form D and the amendment process for the Form D at more than $39 million annually. It is unlikely that there is a commensurate benefit from these increased costs.

Second, since the Form D is a notice filing, there seems to be no purpose in requiring a 15 day delay in the offering. We believe that this shows a misunderstanding of the securities offering process. Form D requires very specific information about the offering terms, including the specific amount of the offering and anticipated commissions. This means that by the time that the terms of the offering are sufficiently well-defined to be described in a Form D, the offering is ready to be sold. Completing the Form D is among the very last items that are covered before commencing the offering. We find no business or regulatory rationale to place such an additional hurdle before actually selling the offering.

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4 *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

5 Rule Proposal p. 101.

Third, as Representatives McHenry and Garrett have pointed out, Congress has not authorized the SEC to impose a 15 day general solicitation ban in Rule 506(c) offerings.[6] Moreover, securities issuers have First Amendment rights. This 15 days delay constitutes an unconstitutional prior restraint on free speech without Congressional authorization. The Supreme Court has held that commercial speech has First Amendment protections and that the government cannot restrain advertising that is not inherently misleading.[7] The Rule Proposal seeks to restrain allowable advertising that is not misleading by delaying it for at least two weeks, which is unconstitutional. In *Bates* and *Virginia Pharmacy Board* the Supreme Court rejected a litany of regulatory rationales for the restraints on commercial advertising.

The Commission's stated rationale for the prior restraint on legal advertising is:

> We recognized the concerns raised by a number of commentators that a general solicitation for a Rule 506(c) offering would attract both accredited and non-accredited investors and could result in an increase in fraudulent activity in the Rule 506 market, as well as an increase in unlawful sales to non-accredited investors.[8]

This rationale is pure speculation and ignores the intentional structural change to federal securities law made by the Title II of the JOBS Act. Title II of the JOBS Act changed the Securities Act of 1933 shifted the focus of securities regulation from regulating the offer to regulating the purchase of securities. Congress intended for non-accredited investors (currently involved in only 10% of Regulation D offerings) to receive offers and for them to be excluded through the verification process. The prior restraint on advertising is inconsistent with the regulatory approach of the JOBS Act.

Further, this rationale does not equal the regulatory rationales already rejected by the Supreme Court in *Bates* and *Virginia Pharmacy Board* for a restraint on commercial speech. In those cases the governmental regulators had strong interests in: 1) maintaining professional standards; 2) preventing misleading advertising, 3) administering justice and 4) concerns about difficulties in enforcement. But, the Supreme Court rejected these regulatory rationales as well as others. The Rule Proposal's speculative proffered rationale does not rise to this level. Indeed, if the SEC had a proper rationale to ban advertising, it should ban all such advertising. Seeking to ban the advertising for a limited period of time just shows that there is no real policy rationale behind this proposal.

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6 Letter of Representatives Patrick McHenry and Scott Garrett to Mary Jo White, Chairman, U.S. Securities and Exchange Commission dated July 22, 2013.

7 *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976).

8 Rule Proposal p. 7-8.

If the Commission adopts a prior restraint on legal commercial speech, it will quickly be challenged by interested parties. Alternatively, it will likely be the focus of private rescission litigation in which a rescission claim will be based on not waiting 15 days to advertise even if the advertising timing had nothing to do with the investor's investment decision. In either case, we do not see this attempt to restrain legal advertising specifically authorized by Congress will pass First Amendment muster. The policy rationales behind the prior restraint on commercial speech were considered and rejected by Congress. The Commission cannot now substitute its judgment on the rationale for a prior restraint on commercial speech for Congress's.

Moreover, the Commission should take a close look at who were commentators who thought it would be a good idea to require a Form D be filed in advance of any general solicitation. All such commentators were state securities agencies (Massachusetts, Nevada, Ohio, South Carolina and Virginia) or an association of state securities agencies (North American Securities Administrators Association ("NASAA")).[9] No private party commented that a prior restraint on legal commercial speech would be a good idea. There was no groundswell for prior restraints on advertising. This, alone, shows that the proposed temporary advertising ban will be seen as governmental overreach by the SEC and state securities administrators when challenged in Court. Further, NASAA opposed the passage of Title II of the JOBS Act and such suggestions indicate that NASAA does not support the full efficacy for Title II.

We support reasonable blue sky regulation. Mr. Fahy previously directed the operations of Houston office of the Texas State Securities Board.

But, we are critical of the efforts of certain states and NASAA to seek to try to limit the scope of Congressional decisions to preempt state securities regulation in providing a national uniform private offering exemption under SEC Rule 506 in the National Securities Market Improvement Act of 1996 ("NSMIA") and the JOBS Act. Several of the commenting states have summary cease and desist authority for securities registration cases. These summary administrative actions are generally predicated on alleged general solicitation violations. Congress in the JOBS Act has now preempted state enforcement actions predicated on general solicitation. So, the Commission should not be surprised that the commenting states and NASAA have advocated a position that seeks to mitigate the preemption of state authority in the JOBS Act by requiring the filing of a notice form two weeks before general solicitation can commence. This approach would provide those agencies and other NASAA members with the ability to pursue "gotcha" cases based on alleged general solicitation violations in a manner contrary to the intent of Congress to pre-empt such actions.

Consequently, given the effect of the 15 day notice requirement before commencing general solicitation has in frustrating the Congressionally-intended pre-

9 Rule Proposal p. 8, fn 20.

emption of state securities laws in the JOBS Act, we suggest that the Commission look critically at the proffered speculative policy rationales offered by these state government commentators and their representative.

Further, we see no reason why the current 15 day after first sale requirement for the filing of the Form D should be changed. Title II of the JOBS Act switched the regulatory paradigm for securities exemption compliance from being based on offers to being based on purchases. Requiring anything but an after first sale Form D filing is inconsistent with the intent of Title II of the JOBS Act. How many issuers engage in wishful thinking in contemplating an offering and never sell any securities at all? There is no regulatory benefit in gathering information about offerings in which there will never be any investors.

Request for Comment 2 - What should the consequences be for failing to timely file an Advance Form D for a Rule 506(c) offering? Should the filing of the Advance Form D be a condition to Rule 506(c) so that failure to file results in the immediate loss of Rule 506(c) as an exemption from Securities Act registration for the offering at issue?

As stated above, requiring an Advance Form D should not be required because it is violates the intent of the JOBS Act to focus on purchases rather than offers and the prior restraint on lawful advertising is unconstitutional.

Be that as it may, there should be no consequences for failing to file an Advance Form D. The Commission should take the perspective of a small issuer without in house counsel in addressing these matters. Entrepreneurs are loathe to pay outside attorneys until they think that it is actually necessary to conduct a transaction. In the real world a great amount of discussion is conducted before attorneys are ever consulted. The comment letter from Patrick Reardon[10] includes a highly relevant hypothetical of an entrepreneur who generally solicits experienced industry personnel during an industry conference before ever calling an attorney. Such routine real world practices should not suffer the third rail penalty of voiding an exemption due to failure to file an advance Form D especially when the Form D can be filed within 15 days of receipt of consideration.

Further, imposing a penalty for failure to file an Advance Form D ignores the basic approach to securities regulation taken by Congress in Title II of the JOBS Act. Congress intended for Rule 506(c) to provide for a determination of the exempt status of the offering at the time of investment, not the time of the offering. It focused on the purchase not the offering. Voiding a Rule 506(c) exemption for failing to file an Advance Form D offering before a general solicitation would revert back to basing the Rule 506(c) exemption on the means of offering and not the status of the purchaser.

10 Patrick Reardon comment letter on Rule Proposal dated September 9, 2013

This is absolutely contrary to the Congressional intent. Such a requirement would lead to issuers being in violation of the securities registration provisions of Section 5 of the Securities Act of 1933 due to general solicitations to accredited investors when it was Congress's clear intent in the JOBS Act to provide a securities registration exemption for such solicitations.

Moreover, imposing such a penalty deprives issuers of due process. If an issuer is to be disqualified, there has to be an adjudication of some sort. Even the recently-adopted SEC Rule 506(d) provides for "bad actor" disqualification only upon convictions, court orders and judgments, final orders of the SEC, state securities administrators, US Postal Service, exchanges, registered securities associations issued pursuant to procedures approved by the SEC and others.[11]

Finally, the Rule Proposal does not address whether the imposition of an offering exemption disqualification penalty will itself, also become a disclosable event by reporting companies on Form 8-K or possibly be required to be addressed in the periodic reports' Management Discussion and Analysis section.

Request for Comment No. 3 - We are proposing to require the filing of an Advance Form D no later than 15 calendar days before the first use of general solicitation in a Rule 506(c) offering. We recognize, however, the possibility that a communication could be inadvertently disseminated beyond the intended audience without the issuer's knowledge or authorization. What should be the consequences for the issuer under such circumstances? Should there be a different filing deadline for the Advance Form D when there is an inadvertent general solicitation? For example, under Rule 100(a)(2) of Regulation FD,53 the information in a non-intentional selective disclosure must be publicly disclosed "promptly" after the issuer knows (or is reckless in not knowing) that the information selectively disclosed was both material and non-public. Should a similar filing deadline be considered for an inadvertent general solicitation?

Request for Comment No. 3 presents an analogy to Regulation FD for inadvertent disclosures of material information before an "Advance Form D" is filed. This analogy is inapposite. The Advance Form D is a non-substantive governmental notice filing. It is not intended to be provided to prospective investors. It does not contain material information that would not be disclosed elsewhere. The Advance Form D does not describe the Company's industry other than as a check box. It will not describe the issuer's business prospects and trends, number of employees, operations, financial statements, market segment, management background or any of the other information that investors would typically consider in determining whether to invest. No reasonable investor would ever base its decision on the content of an Advance Form D and most

11 SEC Release No. 33-9414 (July 10, 2013).

investors would never see them. We fail to see what benefit would be obtained by requiring that an Advance Form D notice form be promptly filed after "inadvertent disclosure" and then having all parties wait 15 days before doing anything else.

Request for Comment No. 3, does, however, show how problematic the draconian effect of gun-jumping to the issuer before an Advance Form D is filed would be. Seeking to have a cure for inadvertent failure shows that the proposed penalty for Advance Form D gun-jumping is too severe and that the entire requirement is ill-conceived.

Further, Request for Comment No. 3 appears to relate to "inadvertent disclosure" by parties acting without the issuer's authorization. But, the real problem is that this assumes a large issuer model, which, as discussed above, is untrue for most Form D filers. In the real world of small issuers, the entrepreneur will be the person talking about a possible securities transaction and what terms may interest a prospective investor well before engaging an attorney and learning about the Form D compliance regime. Only after the entrepreneur receives some sort of indication of interest or support does the entrepreneur typically engage an attorney to provide proper documentation of the offer of and subscription for securities.

Request for Comment No. 4 - Should issuers be permitted to file an Advance Form D even if no specific offering is contemplated? Why or why not? How would this impact the usefulness of the Advance Form D data? We have identified certain information that we believe should be included in the Advance Form D. Is the information proposed for the Advance Form D the appropriate information to be provided at that point of the offering? Is there other information that issuers should provide in the Advance Form D? Would it be more difficult for issuers to provide certain information in an Advance Form D? If so, which information?

If the SEC is to require the filing of a Form D 15 days before any general solicitation, then it needs to allow for filing before any specific offering is contemplated. Then the 15 day period can be used to finalize the terms of the offering rather than having the issuer wait around before it can attempt to raise capital. This sort of question continues to show how problematic the Advance Form D would be in actual practice and how little benefit to investor protection it may actually provide.

Request for Comment No. 5 - We are proposing that an issuer have the option of either filing an Advance Form D for Rule 506(c) offerings to provide certain information required by Form D, with the complete Form D information provided in a subsequent amendment to Form D filed no later than 15 calendar days after the first sale of securities, or providing all of the required Form D information in the Advance Form D, if known at that point in the offering. Should issuers be provided this option? Or should issuers be limited to providing certain specified information in the Advance Form D

and required to file a subsequent amendment, after the first sale of securities, to provide the remainder of the information required by Form D? Would allowing issuers to have the option of providing all of the information required by Form D no later than 15 calendar days before they commence general solicitation (as compared to the current requirement of no later than 15 calendar days after the first sale of securities) affect the quality or usefulness of the Form D information for purposes of the Commission's efforts to analyze the Rule 506 market? For example, what is the likelihood that issuers will be in a position to provide all of the information required by Form D no later than 15 calendar days before the commencement of general solicitation?

Some issuers will have sufficient information to be able to file a pre-sale full Form D and should be allowed to do so. This would mean that such issuers would save time and money by filing one less Form D. The minimum number of Form Ds for a particular offering would then drop from three Forms D (advance, first sale and closing) to two (advance and closing.)

The Form D requirement should continue to be tied to first sale to save out-of-pocket costs in failed offerings.

Request for Comment No. 6 - What would be the benefits of requiring the Advance Form D for Rule 506(c) offerings? What would be the costs to issuers, market participants and other parties? Would the requirement to file an Advance Form D deter issuers from conducting Rule 506(c) offerings? Would the requirement to file an Advance Form D have differing or unique effects on certain types of issuers, such as Exchange Act reporting companies, non-reporting companies, foreign companies or private funds?

We see no tangible investor protection benefits for the Advance Form D. Such forms are governmental notice forms, do not provide prospective investors with substantive information about the offering, and are typically never seen by the prospective investors in making an investment decision.

We also view requiring multiple filings of the same governmental notice form to be wasteful and duplicative. The Rule Proposal's economic analysis estimated the compliance burden of the advance Form D at more than $26 million annually,[12] based on four hours' work per Form D. We do not see these costs being justified by requiring an Advance Form D when the information in it will be repeated in short time with the full Form D.

12 Rule Proposal p. 101.

Request for Comment No. 7 - Would potential investors or other market participants review Advance Form D filings on a real-time basis? If so, how would they use the information in the filings? How would state securities regulators use the Advance Form D filings?

In our experience potential investors and other market participants never look at Form D filings except as part of the investor's attorney's due diligence survey relating to prior offerings. We do not believe that potential investors would review Advance Form D filings as part of examining investments. But, we think that such filings will be data-mined to generate leads for service providers such as reverse-merger promoters and advance-fee loan schemers.

Further, we note that it has now been five years since the SEC began requiring electronic Form Ds. Yet the state securities regulators, to date, have still been unable to build a portal to provide for electronic filing of an electronic form already filed with the SEC or for accepting payments of the Blue Sky fees. In our view, while the state regulators may claim that they will use the Advance Form D filings, they have not shown any ability to create an electronic notice system by which they can efficiently use such system. If state regulators cannot even set up a portal for the filing of Form Ds and the payment of fees over five years, something that Internet retail operations can do within 30 days, claims that they will make comprehensive use of Advance Form Ds should be treated with due skepticism.

Comment No. 8 - Are there situations in which an Advance Form D filing should not be required? If so, what are these situations?

If despite, all the issues pointed out above and by others, the SEC is still determined to require an Advance Form D, it should not be required of small issuers for the reasons stated above. As for what threshold should be chosen for a small issuer exemption, we suggest exempting both issuers with less than $10,000,000 in revenue and issuers with less than $10,000,000 in assets (this asset standard also occurs Section 12(g)(1)(A) of the Securities Exchange Act of 1934).

As for investment companies, we suggest that only investment companies advised by state-registered advisers not be required to file the Advance Form D as this will indirectly refer to the AUM thresholds set by the Dodd-Frank Act and the adviser rules issued under the Dodd-Frank Act. As such, this standard will require Advance Forms D from investment companies advised by SEC-registered advisers and by unregistered advisers.

Request for Comment No. 9 - Should an Advance Form D filing be required before or at the commencement of all offerings under Rule 506, or all offerings under Regulation D? If not, why?

We fail to see the purpose of requiring an Advance Form D in Rule 506 offerings for which no general solicitation or advertising is contemplated. If the purpose of the Advance Form D is to provide a two week brake to general solicitation to ostensibly provide regulators notice that such solicitations are coming, that policy rationale does not apply to issuers who will not engage in general solicitation.

Request for Comment No. 10 - Are any other rule amendments necessary if the Commission were to require the advance filing of Form D for Rule 506(c) offerings, as proposed?

We refer the Commission to our response to Request for Comment No. 8 in which we recommend that no Advance Forms D be required of small issuers.

Alternatively, small issuers should not be subject to exemption disqualification or being disqualified in using Regulation D for failing to file Advance Forms D.

Request for Comment No. 11 - Should we require a closing Form D amendment for Rule 506 offerings, as proposed? Why or why not? Should the closing amendment requirement apply to all Regulation D offerings, as was the case when Regulation D was originally adopted? Alternatively, should the closing amendment requirement apply only to offerings under new Rule 506(c)? Are there situations where a closing amendment to Form D should not be required? If so, what are these situations? For example, should no closing amendment be required if no sales of securities have been made?

Having a Closing Form D would be useful to regulators in providing data as to how much has actually been raised pursuant to Regulation D offerings. But, as presented in the Rule Proposal, no penalty should be imposed for inadvertent failure to file a Closing Form D. If the offering is already concluded, it should not lose a securities registration exemption for failure to filed a governmental notice form without some opportunity for notice and a right to cure.

If there are issues with obtaining Closing Form Ds, the SEC should take the least punitive approach possible. Form ID contain e-mail addresses for filers of their service agents. These e-mail addresses are in the EDGAR filing system. The SEC should use these e-mail addresses and the automation of the information obtained by Form D to send reminder notices to issuers when a Closing Form D has not been filed for offerings that were filed to be open for one year. That approach would allow issuers who have overlooked such a requirement to complete the closing filing.

Given the ability of the SEC to program the sending of automated e-mails to remind issuers of a Closing Form D obligation, we see no reason to impose punitive measures on issuers without providing them an opportunity to cure.

Request for Comment No. 12 - As proposed, a closing Form D amendment would be required to be filed not later than 30 calendar days after the termination of a Rule 506 offering. Should we use a different time frame for the filing of the closing Form D amendment? If so, why and how long?

We believe that 60 calendar days after closing the offering or 30 days after a reminder notice from the Commission is suitable. The Form D is a notice form. It does not have a substantive effect on when an offering is closed. 60 days is appropriate given the operational realities of small issuers who do not have in-house legal or compliance personnel. Our view on the number of calendar days after the closing of the offering for the Closing Form D is subject to our views on punitive enforcement of the Closing Form D requirements described in our response to Request for Comment No. 11 above.

Request for Comment No. 13 - We have not proposed that the filing of a closing amendment be a condition of Rule 506. If the closing amendment were a condition of Rule 506 and an issuer failed to make the required filing, the issuer would lose the exemption for the entire offering at issue, including sales that were made while the issuer was in compliance with Rule 503. Should the filing of a closing Form D amendment be a condition to Rule 506(b) or Rule 506(c)?

Filing a closing amendment should not be a condition of qualifying for qualifying for a Rule 506(b) or Rule 506(c) exemption. First the Form D is governmental notice form, not substantive information provided to investors. Second, concluded exempt offerings should not lose their exemption merely because someone failed to file a notice form with the SEC. From a practical standpoint issuers, brokers, dealers, advisers and attorneys need to be able to determine whether an offering qualifies for a Rule 506(b) or Rule 506(c) exemption at the time of the offering, not long after the offering is concluded.

Further, such a remedy for not filing a governmental notice form is too harsh and the SEC has lesser means to encourage compliance. As stated above, the loss of an exemption can have a draconian impact on small issuers' balance sheets and banking obligations if the auditor requires the recognition of a potential rescission claim as a current liability, thus crippling its ability to raise further capital and throwing its credit facility into default. Instead, the SEC could set up an automated e-mail system using the e-mail addresses on record in EDGAR for the issuer and the calendar records derived from the Forms D and send a reminder a year after the first sale Form D saying that the issuer was obligated at that time to file an amendment, an annual Form D or a closing

Form D. Until the SEC has tried and evaluated less severe approaches using modern technology and the data available to it from the electronic Form Ds to obtaining compliance with the closing Form D requirement, it should not require the closing Form D as a condition of the Rule 506(b) or Rule 506(c) offering exemption.

Request for Comment No. 14 - As proposed, the closing amendment must be filed within 30 calendar days after the issuer terminates the offering. Should we provide a more detailed explanation of what constitutes the termination of an offering?

Small issuers offering securities may be slow to recognize those adverse market forces and remain too long in a wishful thinking mode. So, while offerings for stated dates or for stated amounts can be defined to be concluded when such dates end or such amount has been raised, other offerings will require a formal determination by the issuer that the offering is concluded. Consequently, for the purposes of defining a close of an offering, we suggest using the earliest of several alternative dates:

1) The last stated date of the offering;
2) The date the full offering amount has been received and the subscription for such amount has been <u>accepted</u> by the issuer plus any additional days that may be required under state securities law for rescission opportunities[13]; or
3) The date that the issuer determines to cease the referenced securities offering.

Request for Comment No. 16 - What are the alternatives to requiring a closing amendment to Form D? For example, rather than requiring a closing amendment to Form D for all Rule 506 offerings, should the Commission only require an amendment when an issuer sells an amount of securities in excess of a certain percentage (for example, 10%) above the amount reported as sold in the last Form D or Form D amendment previously filed for the offering?

We would prefer the requiring of a Form D closing amendment rather than serial filings reflecting changes of the amount sold as the offering progresses. Requiring such serial Form D filings would substantially increase the administrative burden and cost of Form D compliance. Plus, presumably, there would still need to be an amendment filed reflecting the final amount the offering raised anyway.

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13 *See e.g.* Section 207(m)(2) of the Pennsylvania Securities Act of 1972, 70 Pennsylvania Statutes § 1-207(m)(2) and Rule 207.130 thereunder.

Request for Comment No. 17 - Rule 503(a)(3)(ii) currently requires issuers to file an amendment to a previously filed Form D to reflect changes in the information provided, subject to certain enumerated exceptions. Should the proposed closing amendment to Form D serve as a substitute for this type of Form D amendment? If the proposed closing amendment requirement is adopted, should Rule 503(a)(3)(ii) be eliminated or simplified, so that only certain changes (e.g., the size of the offering) would trigger the obligation to amend Form D?

Due to the extensive exemptions from amendment filing requirements provided by SEC Rule 503(a)(3)(ii), Form D amendments are typically only filed for increases in offering amounts and selling compensation and decreases in minimum subscription amounts. These are fair and reasonable requirements for amendments. Most of the information required by a closing amendment is exempted from a required amendment in SEC Rule 503(a)(3)(ii). Consequently, we do not view the requiring of a closing amendment as necessitating a change to SEC Rule 503(a)(3)(ii).

Request for Comment No. 18 - Alternatively, in light of the proposal to impose disqualification from reliance on Rule 506 for failures to comply with Rule 503, as discussed in Section II.E below, should the Commission further amend Rule 503(a)(3)(ii), or provide additional guidance, in regard to the circumstances in which an amendment to Form D is or is not required? For example, should the Commission amend Rule 503 to set forth additional situations in which an amendment to Form D would not be required to reflect a change in the information provided in a previously filed Form D? Conversely, should the Commission amend Rule 503 to require the filing of an amendment to Form D to reflect a change in information where such amendment is not currently required under Rule 503?

First, we think that the draconian effect of disqualification of an exemption (plus the time out from using the exemption) is far too severe a penalty for failing to file an amendment to a notice filing showing an increase in offering amount or selling compensation or a decrease in minimum offering amount. Moreover, if a closing amendment is required, such a provision would be wholly unnecessary.

If the Commission does determine to impose onerous exemption disqualification penalties for the failure to file amendments to a governmental notice filing, then it should expand the itemized list to encompass all areas for which such a penalty would be inappropriate, including increases in offering amounts and selling compensation and decreases in minimum offering amounts.

Request for Comment No. 19 - As discussed in Section II.D below, we are proposing amendments to Form D to require additional information, primarily with respect to Rule 506 offerings. After an issuer files a Form D that includes this additional information, any change to this information (for example, a change in the number of purchasers who qualified as accredited investors or the methods used to verify accredited investor), would generally require the filing of an amendment to Form D under current Rule 503. Should the Commission amend Rule 503 so that an amendment to Form D would not be required when there is a change to some or any of this information? If so, which information and why?

The Commission should amend Rule 503 to add the additional Form D items such as use of proceeds, form of advertising and the method of determination of having a reasonable basis that an investor is an accredited investors to the amendment exemption list in Rule 503(a)(3)(ii), especially if there is a closing amendment required that contains such information Requiring additional amendments imposes unnecessary costs and provide no benefit to regulators as the amended information would be captured in a closing amendment.

Request for Comment No. 20 - Should issuers conducting ongoing offerings pursuant to Rule 506(c) be required to amend their Form D filings more frequently than on an annual basis to provide, to the extent that such information has not already been provided in a previous Form D filing, updated information regarding the dollar amount of any securities sold during such period pursuant to such offering, and any other securities of the same class (or any securities convertible into or exercisable or exchangeable for securities of the same class) sold during such period pursuant to an exemption from the registration requirements of the Securities Act? If yes, how frequently? For example, on a semi-annual basis or a quarterly basis?

Requiring the filing of multiple Forms D imposes administrative burdens, legal fees and filing agent costs on issuers. Annual filings or closing amendments are sufficient to provide regulators notice of the offering status in a cost-effective manner.

Request for Comment No. 21 - Rule 503 requires an amendment to a previously filed Form D to correct a material mistake of fact or error "as soon as practicable after discovery of the mistake or error" and an amendment to a Form D to reflect a change in the information previously provided, except in certain situations, "as soon as practicable after the change." Would such non-specific filing deadlines make it difficult for market participants to determine whether an issuer is disqualified from reliance on Rule 506 for failure to comply with Form D filing obligations, including the determination of when a cure period expires? Should the

Commission consider amending Rule 503 to set forth more specific time frames for filing these amendments to Form D?

We object to having a Regulation D disqualification for mistakes of fact or errors because the Forms D are governmental notice forms and not substantive disclosures to prospective investors. Many small issuers do not have in house counsel. Mistakes will happen. The wrong box may get checked. Small issuers should be granted considerable leeway in correcting Forms D.

Request for Comment No. 22 appears to assume that small issuers without in house counsel or compliance personnel regularly review their own Forms D for errors. In fact, they do not. The Commission should not expect any such systematic review to occur except at the annual or closing periods required by the Form D filing rules.

Thus, if the SEC does intend to provide for an exemption disqualification due to defects in a filed notice form, it should provide a generous period for correction. Indeed, the corrective period should be meshed into the annual or closing Form D amendment otherwise required.

Request for Comment No. 22 - Should the Commission amend Rule 503 so that an annual amendment for an ongoing offering is required to be filed on a specified date, such as the one-year anniversary of the initial filing of a Form D or Advance Form D?

Since the Forms D are merely governmental notice forms and not substantive investor disclosures (such as Form 10-Q or 10-K), there is little policy impetus to place strict filing dates for updates. Further, there is no policy impetus to use a date from the Advance Form D because, as planned, such date would, in substance, be at least fifteen days before commencing the offering. We suggest that such annual filings be required by the date within one year and two months of the original filing date of the full Form D and for such deadline to be repeated on an annual basis. This would facilitate the ability of small issuers to comply with such provisions.

Request for Comment No. 23 - Should the Commission provide additional guidance on what constitutes a "material mistake of fact or error" that would necessitate the filing of a Form D amendment?

Since the Form D is a check the box governmental notice form and not a securities disclosure document provided to investors, it should not borrow terms like "material" from the securities disclosure requirements. Instead, the Commission should list what changes require filing a Form D amendment.

Request for Comment No. 24 - Rule 503(a)(4) currently requires an issuer that files an amendment to a previously filed Form D to provide current information in response to all requirements of the form regardless of why the amendment is filed. Should the Commission amend this requirement in Rule 503? If so, how? What are the costs and benefits associated with this requirement?

We find Rule 503(a)(4) acceptable as written.

Request for Comment No. 25 - Should the presentation of information in a closing Form D amendment be different than in an initial Form D filing or in other Form D amendments? If so, how?

The presentation of information in the Closing Form D should not be different than the initial Form D filing form. Small issuers would benefit from having fewer different forms to deal with. A box check designating the Form D as a Closing Form D should be sufficient. The EDGAR filing system should be able to store the original Form D in its system for ease of updating.

Request for Comment No. 26 - If an issuer filed an Advance Form D but subsequently terminated the offering without selling any securities, what information should the issuer be required to provide regarding the offering in its closing amendment?

An Advance Form D should not trigger any obligation to file a closing amendment. Securities regulators should understand that at the time of the filing of the Advance Form D no securities are sold. Advance Form D is designed to be a notice of a "testing of the waters" not actual securities subscriptions. The trigger to having to file a closing amendment should be the filing of the initial Form D which is required within 15 days of the first sale of securities in the offering. The initial Form D is much more likely to be tied to a real offering of securities.

Request for Comment No. 28 - Should we require issuers to provide additional information in Form D filings as we have proposed? Should this additional information be required only for Rule 506(c) offerings? If so, why and what should that information be? For example, should the Commission require issuers to provide information in Form D about counsel representing the issuer (if any) or the issuer's accountants or auditors (if any), as some have suggested? If the additional information were required only for Rule 506(c) offerings, what impact would this requirement have on the use of Rule 506(c) as compared to the use of Rule 506(b)? Are there particular items of information that do not provide sufficiently useful information or would be especially burdensome for issuers to provide? Should some of the additional information that we

propose to require in Form D not be required for offerings under Rule 506(b)? If so, which requirements and why? Would the additional information that we propose to request in Form D provide useful information to state securities regulators in responding to inquiries from constituents about offerings conducted under Rule 506 and in enforcement efforts?

We recommend not adding requirements for additional information further than the Rule Proposal. For example, requiring that legal counsel or auditor be listed would increase legal fees as it would appear that the private offering is trading on the counsel's or auditor's reputation. Further, these private offerings are not subject to any disclosure comment process and there is no reason for the staff to need to call counsel as it would with a registration statement under the Securities Act of 1933. Plus, we fail to see what benefit having such information would be to regulators, although it would be a lead harvesting boon to issuer service providers.

Such disclosure is not needed for securities enforcement purposes. The Enforcement Division never had any difficulties identifying securities counsel in private offerings.

Patrick Reardon's comment letter provided a prescient example of what would happen to securities counsel fees if their name is required by the SEC to be disclosed in connection with the offering,[14] causing the offering to begin to trade on the reputation of counsel. Such a requirement would inevitably be used as negotiating leverage to raise legal fees paid to issuer's counsel.

As for Rule 506(b), we have not seen any material deficiencies in the detail of the information provided in the Form D and see no reason to add the name of the auditor or securities counsel.

Part II of Request for Comment No. 28 asks about "particular items of information that do not provide sufficiently useful information or would be especially burdensome for issuers." The proposed Form D Item 3 would expand disclosure to cover "controlling persons (for Rule 506(c) offerings only). The "controlling persons" apparently is intended to include ten percent equity owners in the issuer without any clarity as to whether it was limited to voting ownership.

The same day the Commission approved the Rule Proposal; it also approved Release No. 33-9414 which adopted Rule 506(d). In considering Rule 506(d) in that release the Commission went through a thorough analysis as to who should be a covered person and determined to use "any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power." The

14 Patrick Reardon comment letter on Rule Proposal dated September 9, 2013

considerations that went into the Rule 506(d) standard are present in the Form D Item 3 proposed in the Rule Proposal.

Rule 506 relates to private issuers. There is no compelling need to provide disclosure of shareholder concentration because of impact on market liquidity and possible acquisitions as there is with publicly-traded shares under the Williams Act. So, the disclosure threshold should be based on those who actually have a chance to control the issuer. The Rule Proposal would require the disclosure of ten percent equity shareholders with no voting rights, or perhaps the ten percent owner or any class of securities, regardless of the actual beneficial ownership of the issuer's entire capital structure.

The Commission considered this precise same issue in another context in determining to adopt Rule 506(d) and decided that for private issuer that 20% ownership of voting securities provides the indicia of control to merit an exemption disqualification. We see no reason why Item 3 of Form D should use a different standard for disclosure. We see no reason to have different control thresholds for SEC Rule 506(c) and Rule 506(d).

Request for Comment No. 29 - What are the costs or burdens on issuers in providing the additional information in Form D, as proposed? Are there ways to reduce any costs or burdens on issuers? Would the requirement to provide this additional information result in issuers choosing not to rely on Rule 506 to raise capital?

If the SEC seeks information that is not maintained systematically by a small issuer, such as a listing of the various methods by which an offering may be publicized or a breakdown of the various types of accredited investor verifications and the number of accredited investors for each type of accreditation, it will cost the issuers time and money to go through those files and gather such information.

One approach to reduce costs is to not require such information for each Form D filed, and perhaps limit such requirements to annual and closing amendments so that the information does not need to be compiled more than once a year.

Request for Comment No. 30 - Should some of the additional information that we propose to require in Form D be required only in the closing amendment to Form D?

See response to Comment No. 29.

Request for Comment No. 33 - Should the Commission amend Form D to include a check box for issuers to indicate whether they are filing an Advance Form D or a closing amendment to Form D, as proposed? Should there be other changes to Form D to indicate that an issuer is filing an Advance Form D or a closing amendment?

A check box to indicate Advance and Closing Form Ds would be appropriate and sufficient. We see no justification for further changes to record whether the Form D is an Advance Form D or a Closing Form D.

Request for Comment No. 34 - Should the Commission amend Form D to provide a checkbox to indicate that the issuer is required to provide disclosure of prior "bad actor" events under Rule 506(b)(2)(iii)?

We are unclear about Request for Comment No. 34 as our set of the Securities Act Rules (which includes the new Rule 506(c) or 506(d)) contain no section (b)(2)(iii) in Rule 506. Further the Rule Proposal adds no Rule 506(b)(2)(iii) to Rule 506.

That said, Form D is a notice form, not an investor disclosure document. Relevant bad actors are already barred from Rule 506 under SEC Rule 506(d). So, we do not see the purpose of any additional bad actor disclosure in Form D. If the Commission chooses to require such disclosures, the requirement should be reasonably time limited and limited to cover only regulatory actions.

Request for Comment No. 36 - Should the Commission require issuers to provide more or less specific information in Form D about the methods of general solicitation used in Rule 506(c) offerings? Do certain methods of general solicitation raise particular concerns from an investor protection standpoint? For example, are some methods of general solicitation more likely to result in an increased risk of fraud or manipulation or more likely to reach non-accredited investors? Should we require additional information in Form D with respect to these methods of general solicitation? If so, what information should we require issuers to provide regarding these solicitation methods?

We view the compilation of methods of verification before a closing or annual amendment Form D as very burdensome because it will require the compilation of the same information multiple times. Further, if verification us used by other methods than specified, such as publicly available information or documentation provided by the purchaser, we see no reason to be required to specify such information. And if "other" is required for multiple investors, will the issuer to be required to list the multiple various approaches to verification?

Request for Comment No. 37 - Should the Commission require issuers to provide more or less specific information on Form D about the methods used to verify accredited investor status? If so, what information should the Commission require issuers to provide regarding verification practices? For example, should we require issuers to identify any registered broker-dealers, registered investment advisers, attorneys, certified public accountants or other third parties that assisted the issuer with the verification process?

Requiring the identification of the broker-dealer, registered investment adviser, attorney, certified public accountant or other third party that assists with the verification process will be difficult because offerings can have multiple investors and each investor could have a different third party. This could require and issuer listing dozens of service professionals who help with the verification process and would make completing the Form D very burdensome.

We think that if a regulator wants to dig down and obtain this information on any particular offering, this can easily be obtained. But, it is not necessary to impose this burden on all offerings.

Request for Comment No. 38 - Is disqualifying issuers and their affiliates and successors from reliance on Rule 506 for future offerings an appropriate sanction to incentivize compliance with Form D filing requirements? Why or why not? How would these amendments affect the Rule 506 market?

As stated above, based on Form D filings, 50% of all Regulation D offerings are below $1 million and 66% come from issuers that reported less than $1 million in revenue.[15] These small issuers typically have no in-house counsel or compliance officers and must rely on the efforts (and related expenses) of outside counsel. Further, Congress in the JOBS Act was very clear about its intentions to facilitate the raising of capital by small issuers.

It would be inconsistent with the JOBS Act and an unreasonable burden on the raising of capital by small issuers to impose punitive effects based on defects in the filing of, or defects in, governmental notice filings such as Form D. Issuers do not typically provide Forms D to investors. Forms D cannot be used to meet the issuer's disclosure obligations to investors. Forms D cannot be used to qualify investors as accredited investors. The Commission should not impose substantive exemption disqualifications based on non-substantive notice forms.

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15 *An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009 – 2012*, by Vladimir Ivanov and Scott Bauguess of SEC Division of Economic and Risk Analysis dated July 2013, p. 14.

Further, the other disqualifications in Rule 507 require a final order issued with due process. The proposed disqualification in the proposed Rule 507 amendment has no such due process requirement.

Finally, such disqualifications would inevitably disproportionately fall on small issuers without in-house legal and compliance staff. This is inconsistent with the intent to help small issuers in the JOBS Act. Plus, the time periods for the disqualification - five years/one year – will likely affect small issuers in need of the second round of capital to finance growth.

The Rule Proposal contains zero economic analysis indicating that such a disqualification would provide any economic benefit as opposed to a proposed implementing an anti-fraud rule. So, it is of questionable benefit.

Likewise, the Rule Proposal's economic analysis says nothing about the negative economic impact on small issuers who would be barred from raising necessary capital for their businesses for such purposes as business expansion and hiring additional employees. Such disqualifications lead to a lost opportunity cost, a well-understood economic principle. Yet, the Rule Proposal contains no assessment of the value of such costs resulting from the proposed disqualification, which we understand to be substantial.

Section 1(b) of the Securities Act of 1933 requires SEC rules to "promote efficiency, competition and capital formation." The proposed disqualification rule hinders efficiency competition and especially capital formation. At the very least, the Division of Economic and Risk Analysis should be required to prepare an analysis regarding the delta impact of the inability of issuers disqualified from raising capital for defects in filing governmental notice forms for the full five years/one year period in regards to jobs and business revenue and adjustments to GDP. Such information would be required for the Commission to make an informed decision about the disqualification procedure under Section 1(b) of the Securities Act of 1933.

Request for Comment No. 39 - Proposed Rule 507(b) would not impose any consequences with respect to the offering for which an issuer failed to file or amend a Form D as required, or for other offerings that were ongoing at the time of the failure to file. Would disqualification from reliance on Rule 506 for future offerings be a sufficient incentive for issuers to comply with Form D filing requirements? Why or why not? Should an issuer engaged in an ongoing offering be permitted to continue relying on Rule 506 if it or an affiliate failed to comply with the filing requirements of Rule 503?

The determination date for when Rule 506 is available for an offering should be the date of the commencement of the offering. Post facto disqualifications based on deficiencies in filing governmental notice forms that are not part of the disclosure documents provided to investors are inappropriate. Please see Response to Comment No. 38 for further details.

Request for Comment No. 40 - Should the result be the same for failure to comply with all parts of Rule 503? For example, should the result be the same when the issuer does not file an amendment to a Form D as it would when the issuer does not make an Advance Form D filing or an initial Form D filing? Should there be a distinction between annual amendments to Form D and amendments required to correct a material mistake of fact or error or to reflect a change in information?

Disqualifications from using Rule Regulation D due to Form D amendment filing deficiencies is not an appropriate requirement due to the negative impact on small issuers for deficiencies in filing a notice form that is not part of the disclosures required to be provided to investors. Please see Response to Comment No. 38 for further details.

Request for Comment No. 41 - As proposed, outside of the cure period, disqualification under Rule 507(b) would not be lifted until one year after all required Form D filings are made or, in the case of offerings that had been terminated, a closing amendment is made. Is this an appropriate requirement? If not, what are the alternatives?

The disqualification under Rule 507(b) is not an appropriate requirement due to its negative impact and harm done to small issuers in need of capital. Please See Response to Comment No. 38.

Request for Comment No. 42 - What would be an appropriate disqualification period as an alternative to the proposal, such that issuers would be sufficiently incentivized to comply with Form D filing obligations without unduly burdening capital formation under Regulation D? Is the proposed one-year disqualification period appropriate, or should the disqualification period be shorter or longer? Why?

If the Commission determines to have an offering exemption disqualification period for deficiencies in filing a governmental notice form that is not part of the required disclosures to be made to investors, the disqualification period should be as short as possible to avoid the needless negative impact derived from depriving entrepreneurial issuers from access to capital needed to develop and grow the issuers and to hire employees.

Request for Comment No. 43 - Under the proposal, disqualification would not be triggered by any failure to comply with Rule 503 that occurred more than five years before the offering. Is it appropriate to include a look-back period in this way? Why or why not? If so, is the five-year period proposed appropriate, or should it be shorter or longer? If so, why?

The Rule Proposal has no economic analysis of the cost of the five year look back. The Commission needs that information. In our view the greatest costs would relate to the additional legal and compliance costs necessary to do a thorough review of all an issuer's sales of securities in the previous five years to make a due diligence determination as to whether the issuer would be eligible for the Rule 506 exemption. This added legal and compliance work could take as much time and effort as actually preparing the offering and disclosure documents for the contemplated offering and will provide sustenance to legions of law firm securities law associates.

The Commission should consider the negative impact of all this added expense to the cost of raising capital. On a percentage basis this added expense will disproportionately negatively impact small issuers – the same issuers that Congress intended to help in the JOBS Act. The Rule Proposal includes no mention of the expense of paying legal and compliance personnel to review all of an issuer's securities transactions for the previous five years to determine compliance with Rule 506 – an effort that must be completed again with each new offering. The Commission cannot reasonably determine the impact of the Rule Proposal on capital formation as required by Section 1(b) of the Securities Act of 1933 without having made an effort to determine how much this would actually cost for each of the 24,000 or more Form D offerings made each year.

The five year look back will substantially increase the costs of third party due diligence reports. In addition to examining the fairness of the offering terms and the operation of the issuer's business, the due diligence firms will now need to include a section on the firm's determination as to whether the issuer was fully compliant with its Form D filing requirements for the previous five year period. This means that all such due diligence reports will have a material price increase that in the end is imposed on the issuer and hinders capital formation, contrary to the Commission's mission under Section 1(b) of the Securities Act of 1933.

The Rule Proposal's economic analysis myopically focuses only on those issuers who may have had a Form D filing deficiency and the effort required to cure that deficiency for the purpose of comparison to the Rule Proposal's benefits. But, this approach leaves out the added expense incurred by the vast majority of the issuers who were fully compliant for the previous five years but still must pay legal and compliance costs relating to confirming Rule 506 eligibility. Simply put, this economic analysis is inadequate, will not stand up to court review and needs to be done again from scratch – this time including the costs the Rule Proposal heaps upon compliant issuers.

Request for Comment No. 44 - The look-back period would not extend to the period prior to the effective date of proposed Rule 507(b). Is it appropriate not to consider these filings before the effective date of the rule? Why or why not?

Given the various issues with the look-back period referenced in the Response to Request for Comment No. 43, we do not support adding to these issues by providing a post factor disqualification relating to offerings for which the issuers had not notice of a possible forthcoming disqualification for deficiencies in filing a governmental notice form that is not used as a basis for investment decisions by investors.

Request for Comment No. 45 - Are there particular situations where disqualification under Rule 507(b) should not be triggered for failure to file a required Form D or Form D amendment?

As stated above in other contexts, it would be appropriate to exempt small issuers from these provisions because such issuers cannot be expected to have in-house legal and compliance personnel to track the filing of governmental notice forms. The small issuer exemption should be at least $10 million in revenue and $10 million in net assets.

Request for Comment No. 46 - As proposed, issuers would be disqualified from using Rule 506 based on noncompliance with Rule 503 within the past five years in connection with a Rule 506 offering by their predecessors and affiliates. Is it appropriate to disqualify issuers for non-compliance by their predecessors and affiliates? If not, would it be too easy to avoid disqualification by using an affiliate or successor entity to conduct a Rule 506 offering? How should the Commission address this concern?

Our response to Request for Comment No. 43 described the increased costs imposed on all Rule 506 issuers for the five year lookback rule. These costs would be exacerbated if the lookback rule covered predecessors and affiliates. The Commission should understand that it has very broad definitions of "affiliate"[16] and "predecessor."[17] Consequently, legal and compliance personnel would need to expand their review to cover affiliates and predecessors for each offering for a five year period, imposing commensurate costs on raising capital. These added costs would have a disproportionate impact on the ability of small issuers to raise capital.

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16 See SEC Rule 144(a)(1).

17 See SEC Rule 405:"The term predecessor means a person the major portion of the business and assets of which another person acquired in a single succession, or in a series of related successions in each of which the acquiring person acquired the major portion of the business and assets of the acquired person."

Request for Comment No. 47 - Would portfolio companies that are affiliates of a private fund be unduly affected by any disqualification triggered by noncompliance of the private fund, its predecessors and its affiliates with Rule 503? If so, should the Commission treat portfolio companies of private funds differently for disqualification purposes? If yes, how?

Portfolio companies of private funds are affiliates. We fail to see the justification for exempting just this class of large private issuers and their subsidiaries from the impact and costly impact of the lookback rule while imposing such disproportionate costs on all small issuers. The JOBS Act was intended to facilitate the raising of capital by small issuers. We do not see that a decision to exempt certain large issuers from the constraints and costs of the lookback rule while imposing such constraints and costs on small issuers would be consistent with this purpose for the JOBS Act or facilitation of capital formation. The Commission should remember that this is all about a governmental notice form that is not part of the substantive presentation of the prospective investment to investors. The Rule Proposal too often treats Form D as if it were an actual disclosure document intended to be provided to prospective investors.

Request for Comment No. 48 - Is it appropriate to prohibit a private fund or its successors or affiliates from engaging in a subsequent offering under Rule 506 if the private fund failed to comply with Rule 503? For instance, if a private fund issuer fails to file its Form D or the appropriate amendments in accordance with the filing requirements of Rule 503, is it a disproportionate response to prohibit any private funds affiliated with the private fund from relying on Rule 506? Should proposed Rule 507(b) contain an express provision that excludes affiliated private funds from such consequences?

Our response to Request for Comment No. 47 also applies to Request for Comment No. 48. If a Rule 506 exemption disqualification is so draconian for private funds that are managed by investment advisers required to have chief compliance officers that the Commission is considering a special exemption from this provision, we fail to understand why the Commission would not also exempt small issuers who do not have the cashflow to maintain the securities compliance infrastructure required of advisers to private funds.

Request for Comment No. 49 - Is it appropriate to include a cure period for noncompliance with Rule 503? Would the benefits of including a cure period justify the potential detriments, such as undercutting issuers' incentive to comply with the existing Rule 503 filing deadlines? If a cure period is included, should it apply to all required Form D filings, or only some? For example, should there be a cure period for the closing amendment only? Or for amendments, but not the initial filing? Should the Advance Form D have a cure period? Instead of providing a cure period,

should we move back the deadlines for Form D filings? Are there other alternatives to a cure period or further provisions that the Commission should consider?

These and other proposals call into question the Rule Proposal's regulatory approach. If one of the JOBS Act's purposes was to enable small issuers to raise capital and one of the purposes of the Securities Act is capital formation, then there should be a cure period relating to deficiencies in filing a governmental notice form that is not part of securities disclosures to investors. The consideration of disqualification periods for not filing an Advance Form D or an amendment to a Form D is too onerous a response to deficiencies in filing governmental notice forms. Form Ds are not substantive investor disclosure requirements. They are not like Form 10-Q or 10-K. There is no material policy impetus to require that such advance forms and amendments be filed precisely on time.

Further, there are less onerous means of encouraging compliance. If a closing or annual amendment may be due, the SEC can send automated e-mails to the e-mail addressee listed in the issuer's Form D to allow compliance. The Commission should not consider imposing disqualifications based on deficiencies in governmental notice forms that are hurt the ability of small issuers to raise capital without testing lesser remedies or providing a notice and cure period. The Commission should take advantage of the electronic Form D and the commensurate automation to send e-mails to issuers who have not filed amendments or closing notices a year after the Form D filing. If such efforts yield a large amount of non-compliance then the Commission could consider more severe approaches. But disqualification of the use of the offering should not be the beginning point of the policy approach. It should be the end point after other options have failed due to the costs imposed on our economy and small issuers by such disqualifications.

Request for Comment No. 50 - The cure period is not available if the issuer has previously failed to comply with a Form D filing deadline in connection with the same offering. Is this condition appropriate? Why or why not? Should the cure period be available if the issuer has failed to timely file a Form D or Form D amendment more than once in connection with the same offering? If so, how many times in a single offering or otherwise how frequently should an issuer be able to invoke the cure period? Should the cure period become available again after a certain amount of time, such as five years, has elapsed since the issuer previously failed to comply with a Form D filing deadline? Should we impose additional requirements or conditions on an issuer's ability to take advantage of the cure period? For example, should the cure period be unavailable if the failure to file Form D was intentional? Would additional guidance be necessary to explain what constitutes intentional or repeated failures to file? Should the issuer have to indicate that the filing is late and state the reason for its being late? Should

there be more specific requirements to rely on the cure, such as the issuer suffered an intervening event (for example, a clerical or technological problem)? Alternatively, should the cure period be automatically available to all issuers without other conditions or qualifications? Are there other events that should make the cure period unavailable to an issuer?

Request for Comment 50 contains 250 words asking very specific and technical issues relating to the availability of proposed cure periods. The very complexity of such requests for comments shows that the requirement that Form D compliance be simple and easy has been lost in the Rule Proposal. The complexity of the cure period questions indicates that there should be no disqualification at all.

For reasons stated herein, any cure period should be automatically available to all issuers without conditions or qualifications. The other more complex approaches are just inconsistent with the expected resources of small issuers who view the filing of Form Ds to be one of several governmental notice forms to be filed to operate their small business. Thus, the Form D needs to be simple and easy and not mired in complexities relating to a variety of technical conditions placed on cure periods. Plus, such an approach would be inconsistent with the approaches of other governmental notice filings that entrepreneurs must make. For example, applications for building permits, certificates of occupancy, sales tax permits etc. can be amended or refiled if they are deficient without penalty. Only the Commission is considering imposing punitive measures on deficient governmental notice forms filed by small businesses. Further since the SEC Form D is electronically, the SEC can automate its search for deficient Form Ds and e-mail the filers, providing a less severe approach to encouraging compliance.

Request for Comment No. 51 - Should a cure period be available for repeated or intentional failures to comply with Rule 503? If yes, should there be a look-back period for determining whether failures to comply with Rule 503 are repeated?

We think it is impractical for issuers or their counsel to be required to conduct an investigation and assess intentional or repeated failures to comply with Rule 504 to determine whether the issuer is eligible for a cure period. Such determinations are inherently very fact-intensive and outside the scope of normal due diligence. This more expansive due diligence as to the issuers intentions or practice would increase legal and compliance costs in determining whether the issuer would be eligible for a cure period. Further, the “intentional” or “repeated” standard would insert unmanageable uncertainty into the due diligence process in determining whether an issuer is eligible to use a cure period. Indeed, we fail to see how a determination can be made about repeated or intentional failures to comply with Rule 503 without administrative or court action.

Request for Comment No. 52 - If a cure period is included, is the 30-day period we propose appropriate? Should the cure period be shorter or longer? Should it be the same for all types of filings, or should the Commission vary the cure period for different filings? For example, should there be a shorter or longer cure period provided for the Advance Form D filing, the closing amendment or other amendments, compared to other Form D filings?

Request for Comment No. 52 is another example of Rule Proposal using a paradigm of an issuer with in-house legal and compliance personnel. But, the Rule Proposal should not use the in-house legal and compliance staff paradigm because the SEC Division of Economic and Risk Analysis said that Rule 506 is used primarily by small issuers with less than $2 million in reported revenue.[18]

The Division of Economic and Risk Analysis white paper also reported that almost 50% of all Regulation D offerings for 2009 - 2012 were approximately $1 million or less.[19]

So, in considering the cure period, the Commission should consider when it should reasonably expect small issuers to actually revisit the previous Form D filed. It would be reasonable to expect small issuers to review previous Forms D when it is preparing the closing Form D or the annual amended Form D. That process would trigger the review of previous filings. Consequently, we recommend that any such cure period be tied to when it can expect small issuers to revisit a filed Form D.

Request for Comment No. 53 - As an alternative or in addition to a cure period, should we amend Rule 507 so that disqualification can be triggered by a Commission cease-and-desist order as well as court injunction? Should we add a provision similar to existing Rule 508,101 under which insignificant deviations from the requirements of Rule 503 would not result in disqualification under proposed Rule 507(b) if the issuer could demonstrate good faith and a reasonable attempt to comply with filing requirements?

Commission enforcement actions are suitable venues to determine disqualifications and whether filing failures are “intentional” or “repeated.”[20]

The Commission should include provisions in Rule 507 similar to Rule 508 regarding insignificant deviations from the requirements of Rule 503 not resulting in

18 *An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009 – 2012*, by Vladimir Ivanov and Scott Bauguess of SEC Division of Economic and Risk Analysis dated July 2013, p. 14.
19 *id* at page 7.
20 See Request for Comment No. 51 in the Rule Proposal.

disqualification under proposed Rule 507(b) if the issuer could demonstrate good faith and a reasonable attempt to comply with filing requirements. Such an approach would be consistent with treating the Form D as a governmental notice filing rather than as a substantive investor disclosure document. It would also provide consistency with the treatment of Rule 506(b) offerings.

Request for Comment No. 54 - Should we amend Rule 507 to disqualify an issuer from relying on Rule 506 for future offerings if such issuer, or any predecessor or affiliate of the issuer, has been subject to a Commission order requiring such person to cease-and-desist from committing or causing any violation or future violation of proposed Rule 509 or proposed Rule 510T, both of which are discussed below?

Prospective Rule 509 would govern the content of communications directly provided to prospective investors and should be enforced by the Commission using remedies deemed appropriate by the Commission for the facts and circumstances of the particular matter.

Prospective Rule 510T would not govern the content of communications directly provided to prospective investors. It is just a document filing requirement. Consequently, it would not be appropriate to allow for a disqualification relating to future offerings premised solely upon a failure to comply with a temporary filing requirement.

Further, the Enforcement Division has limited resources. We would be surprised to see a case seeking an offering disqualification premised solely on the failure to file documents under Rule 510T. Indeed, we expect that we would only see such a cause of action from the Enforcement Division as part of a complaint or Order Instituting Proceedings alleging much more serious transgressions involving actual business dealings with investors. So, as a practical matter, a disqualification cause of action for a Rule 510T violation would be of neglible practical use.

Request for Comment No. 55 - Should the Commission amend Form D to provide a checkbox to indicate that the issuer is relying on the proposed cure period?

If the proposed Form D additions are adopted, Form D will already be a lengthy and complicated form. It would not be consistent with keeping the Form D simple and easy to include a cure period box on <u>every</u> Form D. That will just cause countless questions from issuer staff to their attorneys on offerings where such cure periods are not relevant.

Request for Comment No. 56 - Is it appropriate to amend Rule 507's existing waiver provision so it applies to proposed Rule 507(b)? Should we provide guidance regarding factors that the Commission may take into account when considering whether to grant a waiver?

Securities regulators should have waiver authority just as they do in Rule 507.

Request for Comment No. 57 - Are there other methods for improving compliance with Rule 503 that the Commission should consider? For example, should there be other consequences for non-compliance with Form D filing requirements? Would the combination of proposed Rule 507(b) and increased enforcement of existing Rule 503, which could result in monetary penalties or imposition of disqualification under existing Rule 507, provide a sufficient incentive to comply with these requirements?

Form Ds are electronically filed and the SEC has issuer e-mail addresses in the EDGAR system. Such systems can be used to provide reminder notices on unfiled annual amendments and closing amendments.

Request for Comment No. 58 - As an alternative to proposed Rule 507(b), should the availability of Rule 506 be conditioned on compliance with Rule 503, as was the case when Regulation D was originally adopted? If so, should compliance with Rule 503 be a condition to both Rule 506(b) and Rule 506(c), as well as to Rules 504 and 505? Alternatively, should compliance with Rule 503 be a condition to reliance on new Rule 506(c) only? Should the availability of Rule 506 be conditioned on compliance with all of the filing requirements of Rule 503 or should it be conditioned on compliance with only some of the filing requirements of Rule 503 (and if so which filing requirements)? If compliance with Rule 503 is a condition to Rule 506, should there be a mechanism for issuers to request a waiver from Form D filing requirements? If so, how should that mechanism work? Are any other rule amendments necessary if the Commission were to require compliance with Form D filing requirements as a condition to reliance on Rule 506? If so, what amendments?

A private offering exemption should not be strictly conditioned on the filing of a governmental notice form not provided to investors because that is a hindrance to capital formation.

Request for Comment No. 59 - Should we require all issuers to include the proposed legends in written general solicitation materials? Why or why not? Are accredited investors already aware of the information included in the proposed legends? Would the proposed legends be effective in reducing the incidence of non-accredited investors participating in Rule 506(c) offerings?

We understand that the Rule Proposal does not require the usage of the precise words used in the Rule. But, the Commission should understand that in issuers and their counsel will track Proposed Rule 509's language as closely as possible.

The proposed Rule 509 advertising legend requirement is 138 words. Private funds would also need to disclose that: "the securities offered are not subject to the protections of the Investment Company Act" – another 14 words. The proposed private fund requirements for advertising that includes performance data is 189 words. That means the private fund offering with performance data legend is 341 words, or well more than half a page of text.

These legends are simply too long for many forms of advertising. The excessive legend length will result in the text being crammed into minuscule fonts that investors will not be able to read without magnifying glasses. By comparison we refer the Commission to the advertising legend required in FINRA Rule 3160(a)(4)(B) relating to the sale of securities by bank employees. That legend has a total of 9 words. Brevity can be achieved.

Many forms of advertising do not allow for such lengthy legend verbiage. Twitter is limited to 140 characters. Standard Internet advertisements are limited to approximately 256 characters. Ads sent to smartphone mobile devises show on tiny screens.

If "written communication" is to include scripted audio and video, these lengthy legends would be also poor options for radio, telephone and YouTube-type advertising. Requiring the proposed legends on all advertising will stoke demand for the superfast-talking disclaimer reading actors who can get through the 138 (or 341) words within seconds without mumbling. Such rapidly-spoken disclaimers will be widely ignored by investors. Internet Youtube-type advertising are also problematic. Even if a written or spoken disclaimer is used, there is no assurance that the prospective investor would not exit the video before reaching that point.

The Rule Proposal contains zero reference to any literature relevant to the considering whether such advertising legends have any beneficial effect commensurate with their costs.[21]

21 See e.g., "Reading the Product: Warnings, Disclaimers, and Literary Theory" Laura Heymann (William

If the Commission is to consider requiring advertising legends, it should make such legends much shorter and not require legends for social media or Internet advertisements linked to other Internet locations where such disclosure may be provided.

Investors should understand the information contained in the proposed legends before they invest. But, boilerplate legends in miniscule fonts will not accomplish that goal. A more appropriate venue for such disclosure would be in the actual offering disclosure documents reviewed by investors or in the contracts signed by investors.

Other securities regulators have gone this route. For example, FINRA Rule 2268 requires that any predispute arbitration clause in a customer agreement shall be highlighted and immediately preceded by seven highlighted warnings about arbitration. Such requirements provide the required disclosure at the time the investor is making the investment decision rather than at the response to advertising phase. It also to the issuer's benefit that the investor acknowledge that the investment is limited to accredited investors, is not registered, has not been approved by the Commission or any other regulator, are subject to transfer restrictions and contains risk in the subscription agreement rather than by clicking through a smartphone social media ad or patiently waiting to the end of an online video.

In sum, the Commission should consider reasonable alternatives to requiring lengthy and impractical legends on micro-advertisements.

Request for Comment No. 60 - Is it appropriate for the Commission to provide for disqualification from reliance on Rule 506 for non-compliance with Rule 509? How would this affect the Rule 506(c) market? Should the Commission amend Rule 507 to also include Commission cease-and-desist and administrative proceedings? Would another mechanism provide a better incentive for issuers to include legends and other disclosures in written general solicitation materials that relied on a simpler enforcement mechanism but did not impose an immediate disqualification?

The Commission should not provide for an exemption disqualification based on advertising legends, especially when disclosure documents and subscription agreements contain similar admonishments.

& Mary Law School), 22 Yale J.L. & Human. 393 (2010) found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619843.

Request for Comment No. 61 - Should the Commission condition Rule 506(c) on compliance with the proposed requirements of Rule 509? What effect would such a condition have on the Rule 506 market? If compliance with Rule 509 were a condition of Rule 506(c), should the Commission provide for a cure mechanism for inadvertent errors in, or the omission of, legends or other required disclosure in the written general solicitation materials? If so, what should be the parameters of this cure mechanism?

The Commission should not condition an offering's exemption compliance based on advertising legends, especially when disclosure documents and subscription agreements contain similar admonishments.

If the Commission does condition the exemption on legends in advertisements, the issuer should be able to cure this defect by including the same disclosure in offering documents or subscription agreements.

Request for Comment No. 62 - Do the proposed legends and required disclosures appropriately inform potential investors as to whether they are qualified to participate in Rule 506(c) offerings, the type of offerings being conducted and the potential risks that may be associated with such offerings? If not, how could they be revised to do so? Should additional legends or disclosures be required and, if so, what should these additional legends or disclosures be?

Advertising is merely the beginning of a process. Advertising's goal is to generate leads, not generate actual investments. As part of that process issuers will be appropriately informing potential investors as to whether they are qualified to invest through the required accredited investor verification process. Further, the anti-fraud provisions of the Securities Act and the Securities Exchange Act already require material risk disclosure. The Commission should refrain from making duplicative disclosure rules for one type of offering.

Request for Comment No. 63 - Should we have specific requirements for the legends and disclosures, such as for type size, type style, location and proximity? If so, what should they be? Alternatively, should we require the legends and disclosures to be presented in any manner reasonably calculated to draw investor attention to them?

Specific size, type, style location and proximity locations for required should have a principles-based standard due to the wide variety of possible advertising media. The Commission should not be seeking to determine where a legend should be located on a billboard, smartphone display, hot air balloon or the world's largest HD video display.[22]

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22 The "Big Hoss" video screen is currently being installed at Texas Motor Speedway in Fort Worth. It

Request for Comment No. 64 - Should we define the types of communications that constitute written general solicitation materials for purposes of the proposed requirements of Rule 509? If so, how should we define written general solicitation materials? For example, should we refer to the definition of "written communications" in Rule 405 under the Securities Act? Should we specify that the term includes any electronic communications?

Written communication that constitutes general solicitation or general advertising should be defined in the Form D instructions to determine whether the following are "written communication:"

1) Scripted audio and video communication;
2) On-line or mobile device media advertisements that link back to a website with offering information;
3) Advertising that tells prospective investors what website to review; and
4) Media interviews and any media-posted transcripts of such interviews.

Request for Comment No. 65 - Should comparable disclosure be required to be provided in oral communications used in a Rule 506(c) offering that constitute general solicitations? Why or why not? Should the legends and required disclosures be required to be included in all offering materials or just the materials used in connection with general solicitation activities? How would issuers provide such disclosure?

Given the length of the proposed required legends, we support requiring such legends to be in the offering materials and not the advertising because the purpose of the advertising is to generate leads.

With public securities such as mutual funds, investors can see an ad, log into their brokerage accounts and purchase the securities directly without necessarily having received an offering memorandum. Rule 506 offerings will instead be sold through offering disclosures and subscription agreements. Thus, it is acceptable to have the disclosures in the offering materials rather than the advertising.

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will be 218 feet wide and 94 ½ feet tall, contain 20,666 feet of 1080 HD display, weigh 108 tons and rise 125 feet above ground level.

Request for Comment No. 67 - The proposed amendments do not specify the precise wording of any required legends. Is that appropriate? Or should we require specific wording? If so, what would that be?

We prefer having a very brief set of required words – similar to the 9 word approach FINRA took in FINRA Rule 3160(a)(4)(B).

Request for Comment No. 69 - If all purchasers in an offering receive a offering memorandum that includes all of the required legends, is it necessary that other materials also include these legends?

If all purchasers receive a offering memorandum containing the required legends, it makes the advertising legends moot. Consequently it would not be necessary for other media to contain such legends. In addition to the offering memorandum, issuers should also receive credit for legend disclosure if the required legends are prominently included in the subscription agreements.

Request for Comment No. 70 - To what extent do issuers, including private funds, currently use legends similar to those proposed in this release (for example, in the offering memoranda given to the potential investors)? To what extent do they use other legends? Does this differ depending on the type of document used? For example, do offering memoranda contain more extensive legends than other marketing materials?

Offering memoranda typically include the disclosures as to accredited investors, non-registration of securities, non-approval by securities regulators, lack of liquidity, general and specific risks of the investment, management description, financial data, business objectives, use of proceeds and description of the offered security. Before September 23, 2013 the primary document accompanying the offering memorandum was an offering summary that often contained similar information or cross-referenced the offering memorandum.

Request for Comment No. 84 - Is there a concern that, without content restrictions, materials used as part of general solicitations may vary depending upon who is selling the product (e.g., a broker-dealer's material subject to FINRA rules may differ from an issuer's materials)?

FINRA has specific rules requiring retail communications to be fair and balanced, provide a sound basis for evaluating facts relating to the investment and meet several other standards.[23] Rule 506(c) issuers using FINRA members to sell the offering will, as a matter of course, be required to comply with these provisions by the FINRA member selling the offering.

23 See FINRA Rule 2210(b)(1).

FINRA requires the filing of advertisements relating to registered securities with the FINRA Advertising Department, but this will not apply to Rule 506(c) offerings.[24] So, FINRA's Advertising Department will not be involved in setting advertising standards for Rule 506(c) offerings.

But, the analysis from the SEC's the Division of Economic and Risk Analysis shows that a majority of Rule 506 offerings involve issuers and offering amounts too small to interest many FINRA members and with too little cashflow to pay in house legal and compliance personnel. Consequently, the Commission should not place technical compliance requirements on advertising for Rule 506(c) offerings. Such advertisements would clearly be a statement by the issuer under the *Janus Capital Group*[25] case and subject to liability under the anti-fraud provisions. That should be sufficient for the small issuers.

Request for Comment No. 87 - Should we require the submission of written general solicitation materials used in Rule 506(c) offerings, as proposed? Should oral communications that constitute general solicitation be required to be submitted in some form? If so, how should a requirement to submit general solicitation materials be applied to telephone solicitations, solicitations through broadcast media or oral communications?

Proposed Rule 510T requires clarification. What does "written communication that constitutes a general solicitation or general advertising" mean? Does it encompass just the written communication on online advertisements, billboards, publications, giant video boards etc. Or does it also encompass the business plans, term sheets, offering memoranda, escrow agreement, partnership or limited liability company agreement or regulations, articles of incorporation, bylaws, etc. We believe that it should not encompass the latter. The SEC has no need to gather sensitive internal documents of private business entities to monitor general solicitations. Rule 510T should be specifically defined to state what it is supposed to encompass.

Request for Comment No. 88 – What are the appropriate ramifications for an issuer that fails to submit written general solicitation materials? Should failure to submit general solicitation materials disqualify an issuer from using Rule 506 for future offerings without court action? Should a cure period be provided? Should submission of written general solicitation materials be a condition to the Rule 506(c) exemption?

The Proposed Rule 510T does not carry an exemption disqualification relating to the filing of "written communication that constitutes a general solicitation or general

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24 See FINRA Rule 2210(b)(2) and (3).
25 *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011).

advertising." This is appropriate given that the stated reason for the proposed rule is to gather information to evaluate the market and not to substantively approve the written communication used.

Request for Comment No. 89 - What are the benefits and costs of requiring the submission of written general solicitation materials in Rule 506(c) offerings? If the staff were able to conduct only limited review of a small portion of the materials submitted, how does that impact an assessment of costs and benefits?

If the SEC does not have the staff to thoroughly review the filed written solicitation material, the benefits of filing are lost and the SEC should not require it. FINRA has an Advertising Department. If the SEC is not intending to create a similar advertising department, then it should not require the submission of the written communication.

Request for Comment No. 90 - Should the submitted written general solicitation materials be made publicly available on the Commission's website? Would the availability of such materials on the Commission's website give undue credibility to the materials and create the impression that submitted materials have been reviewed and/or approved by the Commission?

The definition of written communications is broad enough to encompass items other than advertising that may be sensitive information for private issuers. The written communication should not be posted on the Commission's website and should not be subject to Freedom of Information Act ("FOIA") request.

It is likely that if such written communications were posted on the website or subject to FOIA requests, issuers would be extremely reticent to comply with Rule 510T. Plus, from the issuer's perspective, making this information available through the website or FOIA could increase the Issuer's costs in managing the information that is publicly available about it.

Request for Comment No. 91 - Should written general solicitation materials be required to be submitted as an exhibit to Form D? Why or why not? Could submission of these materials publicly, through EDGAR or another means, have the effect of encouraging broadened investor interest in these offerings, beyond what the offerors would achieve by engaging in their own general solicitation efforts? Would this be in the interests of investors?

Under the Rule Proposal the Advance Form D and written general solicitation materials will not be available at the same time because of the required 15 day delay in using such materials. Further, the written general solicitation materials can change over the course of the offering after the filing of the Form D. If a Form D is pre-filed before the offering, then there may be no written general solicitation materials available then.

If the Commission will be unable to track the written general solicitation materials without reference to a Form D filing, it should not require the filing of such materials.

Request for Comment No. 92 – Should the written general solicitation materials be submitted at a time other than the date of first use of such materials? For example, currently, free writing prospectuses in the form of media publications or broadcasts that include information about the issuer, its securities, or the offering provided, authorized, or approved by or on behalf of the issuer or an offering participant and that are published or disseminated by unaffiliated media must be filed within four business days after the issuer or offering participant becomes aware of its publication or first broadcast. Should a similar deadline be considered for the submission of written general solicitation materials that are in the form of media publications or broadcasts and that include information provided or authorized by the issuer or an offering participant?

As stated above the Rule Proposal includes many suggestions that are inconsistent with the need to keep Form D simple and easy for the small issuers who do not possess in house legal and compliance personnel who are its most frequent users. Request for Comment No. 92 does not do that.

Short timeframes for filing of written general solicitation materials would be appropriate if the Commission had an Advertising Department to substantively monitor issuer advertising for compliance with the requirements of the Securities Act and the rules promulgated thereunder on a continual basis. But, that is not the case. Rule 510T's stated purpose is to help the Commission "understand developments in the Rule 506 market after the effectiveness of Rule 506(c)."

The comparison to free writing prospectuses is inapposite. Such documents supplement disclosure documents that are subject to SEC review and SEC-filed notices of effectiveness. These reporting issuers are accustomed to frequent SEC filing deadlines. The small issuers using Regulation 506 are not comparable.

Request for Comment No. 93 - Should a requirement to submit written general solicitation materials be applied to all Rule 506(c) offerings, or should certain issuers or certain Rule 506(c) offerings be excluded or exempted from such a requirement? If yes, what issuers or offerings should be excluded or exempted? Should smaller issuers or smaller offerings be excluded or exempted?

For reasons stated above relating to the operational structure and capacity of small issuers we recommend exempting small issuers with less than $10 million in assets and less than $10 million in revenue from the requirement to file written general solicitation materials with the Commission.

Request for Comment No. 95 - How would a requirement that written general solicitation materials be submitted to the Commission affect the amount or quality of information in such materials? How would it affect the use of Rule 506(c)?

Issuers will limit the information that is available in written communications that they know will be filed with the Commission and, if the rule is not changed, possibly posted on the SEC's website or subject to FOIA requests. This will be a material issue discussed with prospective Rule 506(c) issuers in determining how to structure a securities offering.

Request for Comment No. 96 – Should the proposed requirement for issuers to submit written general solicitation materials be in the form of a temporary rule? Should this requirement be made a permanent one? If it is in the form of a temporary rule, is the proposed two-year period sufficient for purpose of understanding the market practices used by issuers to solicit potential purchasers in Rule 506(c) offerings?

The Commission has apparently not decided to have an advertising department and cannot now properly assess the costs and benefits of proposed Rule 510T. Consequently, a temporary rule is appropriate while the Commission decides whether to establish an advertising department and the economic cost of filing the written communication becomes clarified. These economic costs will include the ancillary effects of having such communication posted on the SEC website or disclosed under FOIA.

Request for Comment No. 97 – Are the net worth test and the income test currently provided in Rule 501(a)(5) and Rule 501(a)(6), respectively, the appropriate tests for determining whether a natural person is an accredited investor? Do such tests indicate whether an investor has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of a prospective investment? If not, what other criteria should be considered as an appropriate test for investment sophistication?

Request for Comment No. 98 - Are the current financial thresholds in the net worth test and the income test still the appropriate thresholds for determining whether a natural person is an accredited investor? Should any revised thresholds be indexed for inflation?

Request for Comment No. 99 - Currently, the financial thresholds in the income test and net worth test are based on fixed dollar amounts (such as having an individual income in excess of $200,000 for a natural person to qualify as an accredited investor). Should the net worth test and the income test be changed to use thresholds that are not tied to fixed dollar amounts (for example, thresholds based on a certain formula or percentage)?

Request for Comments 97, 98 and 99 are well beyond the scope of the Rule Proposal. If the SEC is considering adjusting the financial thresholds of the accredited investor exemption, it should specifically request such comments in a separate release, rather than bury the request as Requests for Comment No. 97 - 99 out of 101 on pages 95-96 in a 185 page release. This is an important issue that merits its own separate consideration by investors and securities industry participants. This issue should not be treated as an adjunct of the current Rule Proposal.

Request for Comment No. 100 - Should it be a condition of Rule 506(c) that, prior to any sale of a security in reliance on the Rule, the purchaser shall have received an offering document containing specified information? If so, should such information requirements be the same as, or more or less inclusive than, the information requirements set forth in Rule 502(b) of Regulation D (which apply only when an issuer sells securities under Rule 505 or Rule 506 to a purchaser that is not an accredited investor)?

Rule 506 is primarily used by small issuers according to the Commission's Division of Economic and Risk Analysis, thus compliance should be simple and easy. It would be appropriate to require the legends referenced in proposed Rule 509 in Rule 506(c) offering documents. However, the Commission should not require a litany of specific items. Issuers are required to disclose material information. Such disclosure is often industry-specific. The securities bar and due diligence firms have established what is expected in offering memorandum. The Rule Proposal does not identify any material shortcomings in the current practices of the securities bar and due diligence firms in creating and reviewing Rule 506 offering documents.

Please contact the undersigned if you need further information on this matter at (817) 878-0500.

Very truly yours,

/s/ John R. Fahy
John R. Fahy
Whitaker Chalk Swindle & Schwartz PLLC

.

/s/ Wayne M. Whitaker
Wayne M. Whitaker
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