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September 20, 2013

Submitted Via Email to Rule-Comments@SEC.gov

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

Re: File No. S7-06-13

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is writing to respond to the request of the Securities and Exchange Commission (the "Commission") for comment on File No. S7-06-13 (the "Rule Proposals"), which contain proposed amendments to Regulation D ("Regulation D"), Form D ("Form D") and Rule 156 ("Rule 156") under the Securities Act of 1933 (the "Securities Act").

I. INTRODUCTION

SIFMA commends the Commission's adoption of Rule 506(c) and revision of Rule 144A, pursuant to the Jumpstart Our Business Startups Act (the "JOBS Act"),[2] to eliminate the prohibition on general solicitation and general advertising in offerings conducted under those rules (the "Adopted Rules").[3]

We welcome the opportunity now to comment on the Rule Proposals. In this comment letter, we will not address all of the Commission's requests for comment on the Rule Proposals, but rather will highlight elements of the proposed rules we believe are most problematic and suggest alternative approaches.

We would appreciate the staff of the Commission's consideration of our suggested changes, which we believe would strike a better balance between investor protection measures and initiatives to encourage capital formation. While we respect and support the Commission's investor protection mandate and efforts to gather information needed to evaluate market practices in Regulation D offerings, we urge the Commission

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1 SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

2 The Adopted Rules eliminate the prohibition against general solicitation and general advertising in certain offerings made pursuant to Rule 506 of Regulation D ("Rule 506") and permit offers to persons other than qualified institutional buyers in offerings made pursuant to Rule 144A ("Rule 144A"), provided that in the case of such a Rule 506 transaction all purchasers are "accredited investors" and the issuer takes "reasonable steps to verify that purchasers … are accredited investors, using such methods as determined by the Commission."

3 Consistent with the Adopted Rules, this comment letter refers to general solicitation and general advertising collectively as "general solicitation."

not to adopt new rules that would have an unduly chilling effect on issuers' use of general solicitation in private offerings and thus impede the realization of the objectives of the JOBS Act.

II. PROPOSED AMENDMENTS TO REGULATION D AND FORM D

2.1 The Proposed Amendment to Rule 503 to Require an Advance Form D Filing Would Create a "Speed Bump" and Impede Capital Formation

We believe the proposed amendment to Rule 503 of Regulation D ("Rule 503") to require issuers intending to offer securities under Rule 506(c) to file a Form D notice with the Commission at least 15 calendar days prior to "any general solicitation activities" (an "Advance Form D") is one of the most problematic aspects of the Rule Proposals. We recognize the Commission's desire, as stated in the Rule Proposals, for more lead time to enable itself, as well as state regulators, to better ensure the requirements of Rule 506(c) are being complied with and therefore facilitate investor protection in real time. However, the potential benefits to enforcement by the Commission and other regulators that would come from requiring an Advance Form D filing would be greatly outweighed by the potential impediment to capital raising created by the requirement.

The 15-calendar day Advance Form D filing requirement takes an unrealistic view of and is inconsistent with how the private capital markets function. Issuers frequently make decisions to raise capital that are almost immediately followed by initiation of the offering process. The decision to engage in a Regulation D offering is often made on short notice based on external factors such as market conditions, which could change rapidly. Adding a 15-day "speed bump" may cause issuers to miss an advantageous offering window, or impose market timing costs on an offering that does proceed. Issuers may be reluctant to signal a plan to raise funds so far in advance of actually entering the market. If faced with a requirement to file an Advance Form D and announce its intentions at least 15 days prior to engaging in general solicitation activities, an issuer may elect not to take advantage of Rule 506(c), and potentially not pursue an offering it otherwise would have undertaken.

Commenters have objected to other types of speed bumps when proposed by the Commission in the past, and the Commission has ultimately not implemented those proposals, in part because they were unnecessary.[4] We acknowledge that the Rule Proposals call for comment on whether the filing of an Advance Form D not in contemplation of a specific offering should be permitted. While we do not object to that option, we do not believe it would resolve issuers' concerns around prematurely signaling the market and competitors.

We suggest a compromise approach that would require the Form D to be filed at the time of the first use of general solicitation (but in any event, not later than 15 calendar days after the first sale). That alternative approach would alert the Commission and other regulators as soon as the offering process begins, providing a significant time advantage over the current regime, which imposes the first Form D filing requirement 15 calendar days *after* the first sale.[5] A date of first use requirement would also be consistent with the approach the Commission is taking in proposed Rule 510T of Regulation D ("Rule 510T"), which would require issuers conducting an offering in reliance on Rule 506(c) to submit to the Commission written general solicitation

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4 *See, e.g.,* the "1998 Aircraft Carrier" proposal (Release No. 33-7606 (November 3, 1998) as amended by Release No. 33-7606A (Nov. 13, 1998)). *See, e.g.,* the comment letter submitted by the Committee on the Federal Regulation of Securities of the Section of Business Law of the American Bar Association regarding the Aircraft Carrier proposal (Sep. 28, 1999) ("The prospectus and term sheet delivery requirements are structured to interpose "artificial" delays and regulatory "speed bumps" prior to sale, with no discernible benefits to investors that outweigh the costs to issuers and underwriters or the burdens imposed on domestic capital markets.").

5 A date of first use requirement would also address the Commission's concern under the current rules about lack of visibility into issuers who offer securities but do not complete a sale, and allow the Commission to assess which issuers are facing challenges raising capital under Rule 506(c).

materials used in connection with an offering no later than the date of first use.[6] Changing Rule 503 as we suggest would be a practical approach, allowing issuers to file the first Form D and submit their general solicitation materials simultaneously.

We believe the Commission should also create a means to permit an issuer to file a Form D and remain within Rule 506(c) after discovering that it has engaged in inadvertent general solicitation. This is important given the potential consequences of a failure to file any required Form D, as contemplated by the proposed amendments to Rule 507 of Regulation D ("Rule 507").[7] Inadvertent general solicitation most often arises when the media publishes an article about a proposed private placement. Although the Commission, in its request for comments, suggested an analogy to Regulation FD and its treatment of "non-intentional" selective disclosure, we believe a better analogy in this context is Rule 433(f) under the Securities Act ("Rule 433(f)"). Rule 433(f) deals with free writing prospectuses published or distributed by media, and specifically provides for when that type of free writing prospectus must be filed with the Commission. Unlike Regulation FD, which imposes a next business day requirement for public dissemination after discovery to address, as quickly as reasonably possible, the unfair advantage to certain market participants of selective disclosure of material nonpublic information, Rule 433(f) provides for a longer, four business days period after discovery to satisfy a Commission filing requirement. Because the filing of an Advance Form D similarly is intended to provide information to the Commission rather than to address harm to the trading market, we believe a four business day period following discovery of inadvertent general solicitation is a more appropriate timing requirement for filing an Advance Form D in these circumstances.[8]

2.2 The Proposed Amendment to Rule 503 to Require a Closing Form D Filing Should Provide for Confidential Submission

The Commission proposes to amend Rule 503 to require issuers to file a final amendment to Form D (a "Closing Form D") following termination or abandonment of any Regulation D offering, whether conducted pursuant to Rule 506(b) or Rule 506(c). While we note the proposed rules would have the effect of requiring an issuer relying on the Rule 506(c) safe harbor to file Form D three separate times,[9] thus creating a heavier filing burden on issuers than under the current regulatory scheme, we recognize that the rules currently in effect do not give the Commission much insight into the total amount of capital actually being raised in Rule 506 offerings. We believe that, if Closing Form Ds are to become a requirement, issuers should be permitted to submit them to the Commission on a confidential basis. Issuers will not want to publicly disclose whether or not their offerings were successful for a number of reasons, including competitive and reputational concerns.[10] The ability to keep information about the ultimate success or failure of offerings confidential is

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6 This timing would also be similar to the required filing of a free writing prospectus in a registered offering under Rule 433(d)(1) under the Securities Act.

7 The issue of inadvertent general solicitation becomes even more critical if the Commission retains the 15-day prior to use of general solicitation filing requirement, as an issuer will automatically miss the advance filing deadline if it was not aware of, and thus not intending to, use general solicitation.

8 We also note that the unintentional failure to file an Advance Form D due to inadvertent general solicitation is not dissimilar from the unintentional failure to file a free writing prospectus, where the standard for filing is as soon as practicable after the failure is discovered. *See* Rule 164(b) under the Securities Act, providing that an immaterial or unintentional failure to file a free writing prospectus as required under Rule 433 will not result in the loss of the Section 5 relief afforded by Rule 164 as long as a good faith and reasonable effort was made to comply with the filing condition and the free writing prospectus is filed as soon as practicable after discovery of the failure to file.

9 An Advance Form D 15 days prior to using general solicitation, an amendment 15 days after the first sale in the offering (if all information was not submitted in the Advance Form D), and a Closing Form D 30 days after termination of the offering.

10 Of course, issuers must observe any other disclosure requirements to which they may be subject, such as under Section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") and the rules of the Commission

one of the reasons issuers choose to pursue private placements, and the loss of that ability may discourage issuers from pursuing them, thus hindering the capital formation that the JOBS Act and Adopted Rules are intended to promote.

2.3 In Light of the Proposed Amendments to Rule 503 and Rule 507, Further Changes are Needed to the Rules Regarding Form D Amendments

The Commission has requested comments on whether changes to the Form D amendment process are necessary in light of the other changes proposed to Rule 503, Rule 507 and Form D. We believe that, if the Rule Proposals are adopted, two related changes should be made. First, as written, Rule 503(a)(ii) requires issuers to file an amendment to a previously filed Form D "to reflect a change in the information provided in the previously filed notice of sales on Form D… ." In our view, such amendments should only be required for material changes in information previously provided, and we suggest the Commission clarify this point by amending Rule 503(a)(3)(ii) to add the word "material." Our assumption is that this provision was always intended only to apply to material changes in information, which would be consistent with the approach the Commission has taken in Rule 503(a)(3)(i), which requires an amendment to correct a mistake of fact in a previously filed Form D only if the mistake is material. We do not believe there is a rationale for treating mistakes and changes in information differently. Furthermore, a materiality trigger for amendments is advisable since, if the changes to Rules 503 and 507 are adopted as proposed, a one-year disqualification from the ability to rely on Rule 506 would occur automatically after failure to file any required Form D, as opposed to (under the current rules) only after imposition of a court order enjoining the issuer for failure to comply with Rule 503.[11]

Second, the Commission requested comment regarding whether it should expand the list of specified items for which a change to the item does not trigger an amendment requirement to include any of the new disclosure items proposed to be added to Form D. We believe the proposed new Form D items (Items 17-22) should be added to the list of exceptions in Rule 503(a)(3)(ii). As the majority of those new items relate to general solicitation and accredited investor verification, responses to those items may evolve over the course of the offering process[12] and requiring an amendment each time they change would create an undue administrative burden for the issuer. Because issuers will now need to file a Closing Form D, they can provide full information to the Commission (to the extent changed from the time of the initial complete Form D filing) at the time they file the Closing Form D, making intermediary amendments unnecessary. With respect to the proposed changes to existing Form D items, we note that, where information on certain items is excluded from the amendment requirement under current rules (*i.e.*, Item 3, Item 5 and Item 14 information), we expect that such exclusion will also apply to any changes to those items and ask the Commission to confirm its agreement with this view.

In addition, we wish to address the Commission's request for comment on whether the current timing requirement to file an amendment to Form D "as soon as practicable" after information changes or after

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thereunder, the Securities Act and the rules of the Commission thereunder, including Regulation FD and Rule 10b-5.

11 In the absence of a materiality qualification, an issuer may be left in a position of asking the Commission to confirm on a case-by-case basis that it does not believe the issuer has breached the filing requirements, and as such is eligible to conduct offerings under Rule 506. This is too burdensome, and creates too much uncertainty concerning whether issuers are Rule 506 eligible, especially considering the ramifications of an incorrect determination regarding Rule 506 status (i.e., potential loss of Section 4 exemption and Section 5 liability). Faced with such uncertainty, issuers may refrain from engaging in Regulation D offerings, which is at odds with the objectives of the JOBS Act.

12 For example, the number of purchasers who qualify as accredited investors or methods used to verify accredited investor status may change each time an additional sale is made in the offering.

discovering a material mistake is appropriate, or whether it creates too much uncertainty for market participants to ascertain whether they have complied with the Form D filing requirements. While we appreciate the flexibility of the "as soon as practicable" standard and think retaining it is appropriate, we suggest that the Commission add a non-exclusive safe harbor indicating that filing the amendment within four business days of the change or discovery would meet the standard. Adding a safe harbor would provide a greater degree of certainty regarding what qualifies as "as soon as practicable," which is particularly desirable in view of the heightened disqualification risk under Rule 507 for failure to meet the requirement. A safe harbor would continue to allow issuers who require more than four business days the opportunity to justify why their filing still meets the "as soon as practicable" criteria. As in other contexts, a non-exclusive safe harbor strikes an appropriate balance between certainty and flexibility.

2.4 Some of the Proposed Changes to Disclosure Items in Form D are Too Burdensome to Require in the Private Offering Context, and Others Should Provide for Confidential Submission

While we understand the Commission's desire to collect information on Regulation D offerings to better analyze the impact of eliminating the prohibition on general solicitation in Rule 506(c) offerings, we do not believe all of the items proposed to be added to Form D should be made available to the public. Issuers may elect not to engage in Rule 506 offerings if that information must be filed publicly. The Commission should be able to meet its oversight objectives by allowing certain Form D items to be submitted confidentially. In addition, some of the items proposed to be added to Form D, regardless of whether they are required to be filed publicly or submitted confidentially, are simply too burdensome in the private offering context. In the following paragraphs, we identify the new items that we think are too onerous to be required under any circumstances, as well as those we think should be submitted on a confidential basis and those we think require further clarification by the Commission.

A. Items That are Too Onerous

As proposed, Item 3 would now require issuers to disclose "controlling persons," described in the Rule Proposals as "each person who directly or indirectly controls the issuer."[13] That level of disclosure requires a subjective analysis of control and goes well beyond current disclosure requirements for reporting companies and registered offerings, which other than in an initial public offering and immediately thereafter,[14] generally use bright line ownership tests for that kind of disclosure.[15] Item 3 would require issuers in the private offering context to make subjective determinations about control that are challenging and would require, among other things, otherwise unnecessary consultations with counsel regarding the definition of "control." We believe a fairer and more pragmatic approach would be to require disclosure of owners of 20% or more of an issuer's voting securities. 20% ownership is a more traditional and objective indicator of control, and is one the Commission itself has recognized in the context of the newly adopted Rule 506(d).[16] If the Commission accepts our suggestion and imposes a 20% ownership disclosure threshold, this information should be permitted to be submitted confidentially. To require that ownership information be made public

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13 This disclosure is in addition to the current required disclosure of "related persons," defined in Form D as each executive officer and director of the issuer and person performing similar functions for the issuer, and each person who has functioned directly or indirectly as a promoter of the issuer within the past five years.

14 Even with respect to initial public offerings and immediately thereafter, where disclosure of certain specified information with respect to "control persons" (similarly defined) is required, disclosure of every control person is not required. *See* Item 401(g) of Regulation S-K, which requires the disclosure of certain legal proceedings with respect to control persons.

15 For example, Item 403 and Item 404 of Regulation S-K.

16 Under Rule 506(d), the Rule 506 safe harbor is unavailable for a sale of securities if any beneficial owner of 20% or more of the issuer's outstanding voting equity securities is considered a "bad actor" under the criteria set forth in Rule 506(d).

would be inconsistent with one of the primary reasons some companies choose to stay private – namely, to respect the privacy interests of their large investors, particularly for issuers from emerging markets with concerns regarding personal safety.

The proposed change to Item 16 to expand the disclosure of specific information regarding the use of proceeds from Rule 506 offerings, including percentage breakdowns, is, we believe, too burdensome, even if submitted on a confidential basis. The proposed use of proceeds disclosure is significantly more detailed than that currently required for registered public offerings pursuant to Item 504 of Regulation S-K.[17] We see no rationale for requiring companies in a private placement to provide more detailed information than what is required in public offerings, and far more than is conventionally negotiated in the private offering context. Finally, the level of detail requested is so specific that issuers may not even have determined it at the time of the required Form D filing. Therefore, we respectfully suggest that the Commission decline to adopt any changes to Item 16.[18]

We believe that, as proposed, the Item 22 requirement for issuers to specify the information or documentation used to verify the accredited investor status of each investor not falling within one of the reasonable steps safe harbors is too burdensome. Through the Adopted Rules, the Commission has created a structure that will afford an issuer the flexibility to tailor its verification procedures to the particularities of an offering. Because an issuer may use different sources of information for different investors, requiring disclosure of the information or documentation used could entail very lengthy Form D disclosures and overly burden issuers. We suggest that the Commission adopt a more generic check-the-box approach. For example, an issuer could be required to indicate whether it used publicly available information, information provided by the prospective purchaser, information provided by a third party, verification by a third party, use of a questionnaire or "other" (without further elaboration). This approach would be less burdensome for issuers and would not detract from the Commission's ability to monitor Rule 506(c) offerings.

B. Items That Should be Submitted on a Confidential Basis

We believe issuers should be able to submit confidentially the new information proposed to be required under Item 14 (the number of natural persons or legal entities included in each category of accredited investors and non-accredited investors in the offering and the amount raised from each category of investors). We do not see why data providing insight into the composition of investors who invest in Rule 506 offerings and the types of offerings and issuers in which each category of investors invests, and that is collected to help the Commission regulate the market, need be disclosed to the public at large.

C. Items That Should be Clarified

The proposed change to remove the "Decline to Disclose" option for issuer size in Item 5 and replace it with a "Not Available to Public" option would essentially require issuers to disclose their size publicly if that information has previously been made public in any way, including in general solicitation materials. However, the inclusion of information in general solicitation materials does not necessarily mean that the information has been made public. For example, a Rule 506(c) offering may involve communications that are considered general solicitation because they are made to a large number of prospective investors with which the issuer or its agent does not have any "substantive pre-existing relationship," even if subject to a confidentiality agreement. Supplying issuer size information to that limited group of investors is not the same thing as

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17 Item 504 of Regulation S-K requires issuers to "state the principal purposes for which the net proceeds to the registrant from the securities to be offered are intended to be used and the approximate amount intended to be used for each such purpose."

18 If the Commission believes that expanded use of proceeds information is essential, it should tailor it to match the Item 504 of Regulation S-K requirements and permit the information to be submitted confidentially to avoid forcing issuers to reveal business plans publicly that might put them at a competitive disadvantage.

disclosing that information to the public at large. Accordingly, we believe this instruction should be revised to require disclosure of issuer size only if that information has truly been made public.

Finally, turning to the newly proposed Form D items, we do not believe the Commission was seeking to impose an accredited investor verification requirement on Rule 506(b) offerings through the proposal that there be Item 17 disclosure of the number of accredited investors who qualified under each of the reasonable steps to verify tests. We therefore request that the Commission clarify that Item 17 is only applicable to Rule 506(c) offerings.

2.5 The Commission Was Correct in its Decision Not to Make Filing Form D a Condition for Use of Rule 506, But Further Modifications to Rule 507 are in Order, Including Adding a Notice Requirement Prior to Prospective Regulation D Disqualification

The Commission has also requested comment on the suggestion that it make compliance with Rule 503's Form D filing requirements a condition to the use of Rule 506, or at least Rule 506(c). We fully support the Commission's decision not to condition use of Rule 506 on filing Form D. As the Commission properly notes in the Rule Proposals, removing an issuer's Rule 506 safe harbor for failure to file a required Form D at any stage of an offering (including any required amendment or the Closing Form D after termination of the offering) could result in a violation of Section 5 of the Securities Act, creating a rescission right for purchasers under Section 12(a)(1) of the Securities Act, as well as result in the loss of applicable state securities law exemptions for the entire offering. That would be a draconian and disproportionate penalty for failure to file a form that, as the Commission remarks in the Rule Proposals, is "intended primarily to provide information to the Commission." Issuers may be reluctant to engage in Rule 506 offerings if a mistaken failure to file a required Form D at any point during the offering process would lead to loss of the safe harbor for that offering, including retroactively after completion of the offering. A rule that weakens issuers' desire or ability to access the capital markets does not further the stated purposes of the JOBS Act, and therefore we urge the Commission to adhere to its current position and not tie Rule 506 availability to compliance with Rule 503.

Further, we believe even prospective automatic disqualification for failure to file Form D is too extreme and could have an excessive chilling effect on issuers' use of Rule 506, for the same reasons set forth above with respect to ongoing Rule 506 offerings. Issuers may be reluctant to engage in Rule 506 offerings if they are uncertain whether they have unknowingly lost eligibility to use Rule 506 due to unintentional failure to file a Form D required in connection with a prior offering. They might determine it is not worth raising capital through Rule 506 offerings if there is a chance it would later be discovered they had violated Rule 503 in a previous offering and thus become ineligible for the Rule 506 safe harbor, thereby losing their registration exemption and opening themselves up to possible Section 12 liability. One way to avoid that draconian result is to have the Commission notify issuers under Rule 507(b) before they are disqualified. A notice requirement would be a more effective disqualification trigger than the current rule, which requires an enforcement action before disqualification, while striking a fairer balance than the proposed automatic disqualification standard. We acknowledge the Commission's desire to motivate issuers to make the required Form D filings, but also believe the Commission's primary focus should be issuers using Regulation D abusively, particularly in the context of offerings using general solicitation. We believe the Commission should not create a trap for the unwary, but rather should put itself in a position to halt willful wrongdoers. A notice requirement will allow the Commission to disqualify issuers consciously not filing Form D, while not jeopardizing issuers acting in good faith that inadvertently miss a required Form D filing.

In addition, as proposed, Rule 507 creates some burdens we believe are unnecessary and likely to be counter-productive. First, we think the change to Rule 507 – from disqualification based on an enforcement action to automatic disqualification for compliance failures (or even disqualification triggered by Commission notice as we propose above) – is significant enough to make disqualification of an issuer's affiliates (in addition to the issuer itself) too burdensome and harsh for issuers. Although current Rule 507 contains an affiliate disqualification provision, we request the Commission remove that trigger in revised Rule 507, as an issuer would need assurances from all its affiliates that they had made all required Form D filings within the past five years before it could itself be comfortable relying on any Rule 506 exemption. If the Commission's concern is that companies may use schemes to evade Rule 507 disqualification (*e.g.*, by creating new ownership structures), we suggest the Commission amend Rule 507 to remove affiliate disqualification generally and instead directly address schemes to evade, as it does in many other contexts.[19]

Second, we believe the Commission should amend proposed Rule 507(b) to clarify that "failure to comply with the requirements of Rule 503" means a failure to file the required Form D itself. Because Rule 503 requires the filing of Form D and all of its items, it is unclear under the Rule Proposals whether an issuer will be deemed to have failed to comply with Rule 503 for Rule 507(b) purposes if it makes one mistake or misses one item in Form D.[20] We believe that outcome would be overly harsh, and that issuers should only be disqualified under Rule 507(b) if they fail to timely file Form D at all. We suggest mirroring the Form S-3 and Form F-3 approach, where reporting issuers' eligibility to use short-form registration is predicated on timely filing of all required reports under the Exchange Act during the preceding 12 months. In the Form S-3 and Form F-3 context, a good faith effort to complete the Exchange Act form is considered a timely filing for eligibility purposes.[21] A similar approach would be feasible and appropriate in the Rule 503/Rule 507 context, where it will be clear when issuers have actually filed the Form D as required (even if it contains errors or omissions), and when they have not filed at all or attempted to circumvent the requirements by filing in name only. Clarification that Rule 507(b) disqualification is triggered by failure to timely file Form D, rather than failure to comply with the requirements of Rule 503, is especially important if the Commission does not adopt our proposal to require notice of disqualification under Rule 507(b), as absent that change, as discussed above, issuers will be discouraged from engaging in Rule 506 offerings if they are unsure whether they have inadvertently lost eligibility by missing an item in a Form D filing from a prior offering.[22] However, if instead the Commission believes it must retain the "failure to comply with the requirements of Rule 503" formulation, we urge it to amend proposed Rule 507(b) to include a materiality threshold for such failure, as well as a specified list of items that would not trigger disqualification, similar to the approach in current Rule 503 with respect to required amendments of Form D.

Finally, as a technical point, we suggest that the Commission clarify that Rule 506 disqualification would end at the earlier of one year after correcting all missed filings and five years after a missed filing. Otherwise, correcting a missed filing during the fifth year following that missed filing could result in a longer disqualification than waiting for the fifth anniversary of the missed filing to pass, which could disincentivize

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19 The most recent example being the Commission's indication that it might question an issuer's status as an emerging growth company "if it appears that the issuer or its parent is engaging in a transaction for the purpose of converting a non-emerging growth company into an emerging growth company, or for the purpose of obtaining the benefits of emerging growth company status indirectly when it is not entitled to do so directly." *See* Jumpstart Our Business Startups Act Frequently Asked Questions, Generally Applicable Questions on Title I of the JOBS Act, Question 53 (Sept. 28, 2012), available at http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm.

20 For example, the discussion in the Rule Proposals about the 30-day cure period suggests that even an inadvertent technical error, if not cured within the 30-day period, would result in disqualification.

21 A error in an Exchange Act report only results in that report being considered not to have been timely filed, and therefore affects the issuer's eligibility to use Form S-3 or F-3, if it renders the report "materially deficient" – a result generally reserved only for major omissions. *See*, *e.g.*, Commission Division of Corporation Finance Compliance and Disclosure Interpretations, Question 115.02 (July 3, 2008) (omission of management's report on internal control over financial reporting renders Form 10-K "materially deficient"), available at http://www.sec.gov/divisions/corpfin/guidance/safinterp.htm.

22 We also note that granting the Commission the ability to waive disqualification does not resolve our concern, as it places too great a burden on issuers to seek the waiver, and also would not give issuers the certainty they require, since there can be no guarantee the Commission would grant a waiver in any given case.

corrective filings for the fifth year. We do not believe this was the Commission's intent, and therefore ask that it clarify the point in the adopted rules.

2.6 The Commission Should Revise Proposed Rule 509 to Provide for the Required Information to be Conveyed to Investors by a Separate Notice Instead of by Including a Legend in the General Solicitation Materials

We understand the logic behind informing investors about whether they are qualified to participate in an offering, the type of offering being conducted and certain potential risks associated with such offering. However, we think a legend requirement for general solicitation materials, as proposed by Rule 509 of Regulation D ("Rule 509"), is not the most practical or effective way of transmitting that information to investors. General solicitation materials can take many forms, and often will not lend themselves to inclusion of a legend.[23] Instead of a legend requirement, we suggest that a more effective way of conveying such information to investors would be for issuers to send purchasers in the Rule 506(c) offering a separate notice, similar to that permitted by Rule 155 under the Securities Act.[24] That notice could include all of the information Rule 509 proposes to require in a legend, thereby achieving the same result. A separate notice containing the required information would also remedy the issue a legend requirement raises with inadvertent general solicitation, which by its inadvertent nature would always fail to include a legend. In this way, anyone actually acquiring the securities in the private placement would be apprised of the relevant cautionary information.

In addition, we support the Commission's proposal that an issuer's non-compliance with Rule 509 should only create prospective disqualification from the use of Rule 506 if the issuer has been enjoined by a court for failure to comply with Rule 509. We encourage the Commission to retain this treatment in the final rules. The Commission properly observes that, in this context, an automatic (or even notice-based as we suggest in Section 2.5) disqualification provision could result in disproportionate consequences for inadvertent errors or omissions, especially in light of the potential volume of general solicitation materials that may be used in an offering.[25]

2.7 Rule 510T Submissions Should Not be Obtainable Under the Freedom of Information Act and the Rule 510T Requirements for Submitting General Solicitation Materials Should be Adjusted in Certain Situations

With respect to the proposed temporary Rule 510T regarding confidential submission to the Commission of general solicitation materials, we recognize the Commission's desire to analyze and assess the materials being used as the private securities market develops and changes with the advent of general solicitation. We appreciate that the Commission has recognized the need for these submissions to be made confidentially and not treated as filed or furnished for Securities Act and Exchange Act purposes. However, we ask the Commission to confirm that such submissions would also not be obtainable under Freedom of Information Act ("FOIA") requests. A Rule 506(c) offering may involve general solicitation that is directed at only a limited circle of investors. In such cases, issuers may not want to permit the world at large (including their competitors) to see the information they are providing to prospective investors. Those issuers would be relying on the confidentiality protection of Rule 510T, and allowing such materials to be obtainable under FOIA would vitiate the protections that confidential submission provides.

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23 For example, communications involving certain social media platforms, such as Twitter.

24 Rule 155(c)(4) provides that an abandoned registered offering (deemed to involve general solicitation) will not be integrated with a subsequent private offering if, among other things, the issuer notifies each offeree in the private offering that (i) the offering is not registered, (ii) the securities are restricted securities, (iii) purchasers in the offering will not have Section 11 protection, and (iv) a registration statement was filed and withdrawn, specifying the effective date of the withdrawal.

25 We also agree with the Commission's provision of the same "enjoined by a court" requirement for noncompliance with Rule 510T, based on the same rationale.

Regarding the timing requirements for submitting general solicitation materials under Rule 510T, we note the Commission requested comments on whether it should consider adopting a four business days after awareness deadline for submitting materials that are in the form of media publications or broadcasts and include information provided or authorized by the issuer or an offering participant, akin to the requirement for filing free writing prospectuses under Rule 433(f). We agree with this suggestion and recommend the Commission adopt it in the final rules, since the timing of any media publication or broadcast is not in the issuer's control and is frequently unpredictable.

Further, where inadvertent general solicitation (related to media publications or otherwise) is present, we recommend the Commission also take a similar approach to that used in Rule 433(f) and require submission of the general solicitation materials under Rule 510T within four business days after discovery of inadvertent general solicitation.[26] Requiring issuers to submit general solicitation materials on the date of first use is unworkable when dealing with inadvertent general solicitation, as issuers must be given time and opportunity to submit once they become aware that they have engaged in inadvertent general solicitation.

Finally, we note that as proposed, Rule 510T could be interpreted to require an issuer to submit every written general solicitation communication it uses, even if a communication is substantively the same as materials previously submitted by that issuer in connection with the same offering. If an issuer uses a written general solicitation communication substantively the same as one previously submitted, it should not need to make a repeat submission of the later communication, and we suggest the Commission clarify that point when adopting the final rules. This clarification, which is analogous to the exception to the free writing prospectus filing requirement in Rule 433(d)(3) under the Securities Act,[27] would lessen the burden on issuers of complying with Rule 510T. Removing substantively duplicative communications would also facilitate the Commission's ability to review the submissions it receives by reducing the overall volume of submissions.

III. PROPOSED AMENDMENTS TO RULE 156

3.1 The Commission Should Not Propose Additional Rules Addressing Manner and Content Restrictions On Written General Solicitation Materials Used by Private Funds

In the context of the proposed changes to Rule 156 and the request for comment on whether additional rules should be proposed addressing manner and content restrictions on written general solicitation materials used by private investment funds, we do not think that additional rulemaking is necessary in this context, and that overlaps (and potential inconsistencies) with Financial Industry Regulatory Authority, Investment Company Act of 1940 and Investment Advisers Act of 1940 regulations should be avoided.

IV. OTHER REQUESTS FOR COMMENT

4.1 The Definition of Accredited Investor is Correct as Currently Formulated and Should Not be Revised

In addition to offering our reactions to the proposed amendments and additions to Regulation D and Rule 156, we wish to address the Commission's request for comment on the definition of accredited investor as it relates to natural persons. We believe the definition works well as currently formulated, is broadly understood and accepted and should not be revised. In particular, we note the Commission's request for input on whether the current thresholds should be revised to account for inflation. According to analysis

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26 *See* the Section 2.1 discussion above on timing for filing an Advance Form D in the event of inadvertent general solicitation.

27 Rule 433(d)(3) states the requirement to file a free writing prospectus shall not apply if the free writing prospectus does not contain substantive changes from or additions to a free writing prospectus previously filed with the Commission.

presented by the United States Government Accountability Office, adjusting the net worth threshold from $1 million to $2.3 million to account for inflation would result in a decline in the number of households qualifying as accredited from approximately 8.5 million to 3.7 million.[28] Such a dramatic decrease in the number of eligible investors available to issuers in Rule 506 offerings would result potentially in less demand for private securities offerings, which could have a stifling effect on the market. This is inconsistent with the stated objectives of the JOBS Act. Accordingly, the definition of accredited investor should remain unchanged.

Further, we note Section 413 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") expressly provided that the Commission not review the definition of accredited investor as it applies to natural persons, which was changed by Congress in Dodd-Frank, for at least four years from the date of enactment.[29] In light of the Commission's current workload, we suggest the Commission defer review of the accredited investor definition for a further period to assess how the changes made in Dodd-Frank are functioning.

4.2 Offering Documents Should Not be Required for Rule 506(c) Offerings

The Commission requested comment on whether issuers should be required to provide an offering document containing specified information to purchasers prior to any sale under Rule 506(c), which creates a safe harbor for an offering in which only accredited investors are eligible to purchase securities. Under the current version of Rule 506 (and under Rule 506(b) when effective), issuers do not need to provide offering documents to accredited investors who participate in an offering. The provision reflects that accredited investors are more sophisticated and able to ask questions and determine whether the information available to them is sufficient to make an investment decision. We do not believe the introduction of general solicitation into the equation in Rule 506(c) changes that analysis; an influx of general solicitation materials should not overcome accredited investors' ability to be discerning and make informed decisions. Therefore, issuers should not be required to provide offering documents for Rule 506(c) offerings, in which only accredited investors may participate.

4.3 Reporting Companies Should Not be Disqualified From Using Rule 506(c) if They are Not Current in Their Reporting Obligations

The last request for comment that we would like to address is the Commission's question regarding whether issuers subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act should be disqualified from using Rule 506(c) if they are not current in their reporting obligations. The answer to this is no, they should not be disqualified. There may be far more information concerning a public company that has "gone dark" available than there is about a private company. As is generally the case with private placements, accredited investors should be allowed to make their own decisions about what information they will require from an issuer as a condition of making an investment. In addition, public companies, even (or especially) if they are not currently able to comply with their Exchange Act reporting requirements, may need to raise capital. They should not be disqualified from raising funds on the same basis as private companies not subject to Exchange Act reporting requirements. For these reasons, we urge the Commission not to disqualify reporting companies that have gone dark from using Rule 506(c).

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[28] *See* United States Government Accountability Office Report to Congressional Committees (July 2013).

[29] Section 413(b) states the Commission shall undertake a review of the accredited investor definition as it applies to natural persons not earlier than four years after the enactment of Dodd-Frank (July 2010), and not less frequently than once every four years thereafter.

V. REVISED RULE 144A

5.1 The Commission Should Use its Authority Under Section 18 of the Securities Act to Preempt Blue Sky Laws for All Offers and Sales Pursuant to Rule 144A

Finally, we would also like to address one aspect of the Adopted Rules, relating to Rule 144A. We agree with the adopted amendments to Rule 144A and believe they accord with the JOBS Act's clear statutory directive, and acknowledge that the Commission has not requested further comment on the Adopted Rules. However, as we have previously noted to the Commission, state blue sky law registration requirements under Section 18 of the Securities Act ("Section 18") are not currently preempted for all Rule 144A offerings. That is an anomaly, as state blue sky registration requirements under Section 18 are preempted with respect to all securities offered and sold pursuant to Rule 506. We see no reason for different treatment of the two, especially since purchasers in Rule 144A offerings are limited to the largest and most sophisticated institutional accredited investors, and thus are less in need of the protection of the state blue sky registration requirements than accredited investors generally, any of which can purchase securities offered and sold in a Rule 506 offering. This existing anomaly becomes more glaring in light of the policy objectives of the JOBS Act and its emphasis on improving capital formation, and accordingly we urge the Commission to align Rule 144A offerings with the existing preemption for Rule 506 offerings by using its authority under Section 18 to preempt state blue sky registration requirements for all offers and sales pursuant to Rule 144A.

VI. CONCLUSION

In sum, while we agree with many aspects of the Rule Proposals, we believe certain aspects of the Rule Proposals would potentially inhibit the use of general solicitation in Rule 506(c) offerings and thus be inconsistent with the JOBS Act mandate. We encourage the Commission to consider our suggestions in this letter when adopting final rules. If you have any questions regarding our views or require additional information, please do not hesitate to contact Sean C. Davy of SIFMA at (212) 313-1118, or our counsel on this matter, Leslie N. Silverman of Cleary Gottlieb Steen & Hamilton LLP at (212) 225-2380.

Sincerely,

Sean C. Davy
Managing Director, Capital Markets
Securities Industry and Financial Markets Association

cc: The Honorable Mary Jo White, Chairman, Securities and Exchange Commission
The Honorable Luis A. Aguilar, Commissioner, Securities and Exchange Commission
The Honorable Daniel M. Gallagher, Commissioner, Securities and Exchange Commission
The Honorable Kara M. Stein, Commissioner, Securities and Exchange Commission
The Honorable Michael S. Piwowar, Commissioner, Securities and Exchange Commission