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Via E-mail: rule-comments@sec.gov

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

Re: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings: File No. S7-07-12

Dear Ms. Murphy:

This letter is submitted on behalf of the Committee on Securities Regulation (the "Committee") of the New York City Bar Association in response to the Securities and Exchange Commission's (the "Commission") request for comment on the proposed amendments to Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933, as amended,¹ which would implement Section 201(a) of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"). We welcome the opportunity to comment on the proposal.

Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms, counsel to corporations, investment banks, investors and government agencies, and academics in the field of law. As such, this letter does not necessarily

¹ Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, SEC Rel. No. 33-9354 (Aug. 29, 2012), 77 Fed. Reg. 54464 (the "Release").

reflect the individual views of all members of the Committee.

Overall, the Committee supports the proposal and commends the Commission for its thoughtful consideration of comments submitted in advance of the issuance of the proposal, including those of this Committee in our letter to the Commission dated May 4, 2012 (the “May 4 Letter”). We believe the proposal implements Section 201(a) of the JOBS Act in a way that appropriately balances investor protection concerns and the JOBS Act’s stated goal of improving access to the public capital markets.

In particular, we support the retention of the existing Rule 506(b) safe harbor for offerings that do not use general solicitation or general advertising (collectively, “general solicitation”), and we agree with the Commission that the statutory directive to modify Rule 506 to remove the prohibition against general solicitation in offerings to accredited investors should not be understood to require the imposition of new requirements for a traditional Rule 506(b) offering that does not involve general solicitation. We also thank the Commission for clarifying in the Release that the reasonable belief standard included in the definition of “accredited investor” in Rule 501(a) will apply to new Rule 506(c) and for providing its views with respect to the interplay between Regulation D and Rule 144A offerings and the Regulation S safe harbor, both of which we recommended in the May 4 Letter. We encourage the Commission, to the extent appropriate, to reiterate those statements in the final release.

We offer the following comments with respect to specific aspects of the proposal and certain of the Commission’s requests for comment.

1. We support a flexible approach to “reasonable steps to verify”

We commend the Commission for taking a flexible approach to the congressional mandate to require “reasonable steps” to verify that purchasers of securities in a Rule 506(c) offering are accredited investors. As we noted in the May 4 Letter, given the importance of Rule 506 offerings as a means of capital raising and the wide variety of circumstances in which they are used, unduly detailed or prescriptive rules for determining investors’ status would have the potential to result in significant economic harm. We agree that a flexible, facts-and-circumstances approach to the “reasonable steps” requirement avoids imposing ill-suited, inappropriate or unduly burdensome procedures and will allow adaptation over time to changing market practices. We also noted in the May 4 Letter the substantial body of market practice that has built up over many years, and commend the Commission for its recognition in the Release that many existing practices used in connection with existing Rule 506 offerings would satisfy the verification requirement for Rule 506(c). We encourage the Commission, to the extent appropriate, to reiterate that statement in the final release.

We do believe that some guidance regarding the verification requirement, accompanied by clear language emphasizing the non-exclusive nature of the steps, affords greater certainty to issuers making use of the Rule 506(c) safe harbor and thus is beneficial. The Commission’s discussion in the Release of the different factors to be considered when determining the reasonableness of the verification steps provides helpful guidance in this regard. One aspect of verification that might benefit from additional clarification is what steps might be appropriate to confirm that a purchaser’s cash investment is not being financed by the issuer or a third party. An issuer can verify whether it has provided financing to the investor itself, but verification of the lack of third-party financing is more difficult given the wide range of potential sources of financing, including friends or family. Consequently, we encourage the Commission to confirm in the final release that, as a general matter, an issuer may rely on a specific investor representation as to the extent of any third-party financing.

In addition, to the extent that issuers and other offering participants use third-party service providers to verify accredited investor status, the Commission staff should consider sanctioning the procedures developed by those third-party service providers, as appropriate, through the no-action letter process as it has done in similar contexts.² We also encourage the Commission, as it monitors and studies the development of verification practices, to consider further interpretive guidance with respect to verification methods, to the extent appropriate and without limiting the wide range of acceptable practices.

2. **Form D Check Box Is Not Exclusive, Election of Specific Exemption or Admission of Use of General Solicitation**

First, we strongly support the Commission's decision not to change the current approach with respect to Form D, in which a failure to file the form does not result in a loss of the exemption under Regulation D.

With respect to the proposed changes to Form D, we understand the Commission's desire to add to Form D a new check box (and rename the existing Rule 506 check box) so that issuers would indicate whether they are claiming an exemption under Rule 506(b) or (c), as a way to elicit information to assist the Commission in its efforts to monitor the use of general solicitation, the development of verification practices and other practices in Rule 506(c) offerings.

The inclusion of two Rule 506 boxes raises some practical considerations. There may be circumstances in which an issuer may conduct an offering that is expected to satisfy the requirements of both Rule 506(b) and (c) – *i.e.*, an offering sold only to accredited investors and without general solicitation – in which case, the issuer would presumably check both boxes. Checking one or both boxes should not be deemed an election to use a certain exemption exclusively for any subsequent sales – an issuer should retain the ability to conduct an offering pursuant to any available exemption. An issuer may change its approach regarding the targeted investors or its use of general solicitation after the filing of the Form D, and thus change the exemption on which it is relying, as long as it meets the applicable requirements of the exemption. Such a change would necessitate the filing of an amended Form D, although again, not as a condition to the availability of the exemption. Furthermore, checking the Rule 506(c) box should not be deemed to be an affirmative statement that an issuer has used or will use general solicitation – the exemption permits but does not require the use of general solicitation. We encourage the Commission to confirm its agreement on these matters in the final release.

3. **Inclusion of Permitted General Solicitation Does Not Result in a “Public Offering” for Purposes of the Investment Company Act of 1940**

We agree with the Commission's conclusion that the inclusion of general solicitation in a Rule 506(c) offering should not result in a “public offering” for purposes of the Investment Company Act of 1940, as amended (the “1940 Act”), and that the exclusions under Sections 3(c)(1) and 3(c)(7) would both continue to be available. Similarly, the inclusion of general solicitation in a Rule 144A offering should not result in a “public offering” for purposes of the 1940 Act.³ We encourage the Commission, to the extent appropriate, to reiterate its

² For example, the staff of the Commission has sanctioned the use of “QIB lists” in Rule 144A offerings (*see CommScan, LLC* (avail. Feb. 3, 1999); *Communicator Inc.* (avail. Sept. 20, 2002)) and website-based offering procedures and the use of electronic road shows in private placements (*see IPONET* (avail. July 26, 1996); *Net Roadshow, Inc.* (avail. Jan. 30, 1998); *Net Roadshow, Inc.* (avail. Sept. 8, 1997)).

³ Rule 144A(c) states that securities offered by dealers pursuant to the rule “shall be deemed not to have been offered to the public within the meaning of Section 4(3)(A) of the [Securities] Act.”

statement with respect to Regulation D and to include a corresponding statement with respect to Rule 144A in the final release.

4. **Offering Under Rule 506(b) Should Not Be Integrated with Subsequent Offering Under Rule 506(c)**

We acknowledge that concurrent or sequential offerings under Rule 506(b) and (c) may be subject to integration under Rule 502(a). However, we believe that an offering under Rule 506(b) should not be integrated with a subsequent offering utilizing general solicitation under Rule 506(c), even if the subsequent offering occurs within the six-month period contemplated by Rule 502(a), as long as the general solicitation activities do not begin until after the completion of the Rule 506(b) offering. We encourage the Commission to clarify this interplay in the final release.

5. **Knowledgeable Employees and Other Offerees with a “Pre-existing Relationship”**

One area where the proposed rules seem at odds with current practice and would limit issuers’ existing flexibility is with respect to offerings to a subset of non-accredited investors who generally are considered not to need the protection provided by the prohibition against general solicitation. “Knowledgeable employees” are one such category of investors. The Commission has determined these investors have the requisite sophistication and knowledge to purchase interests in 1940 Act Section 3(c)(1) and 3(c)(7) private funds without limitation. For Section 3(c)(7) funds, this approach effectively equates them to “qualified purchasers,” a category of investors similar to accredited investors but subject to a higher standard.⁴ Some knowledgeable employees may not qualify as accredited investors (such as employees who participate in the investment activities of the issuer), and may be included in a Rule 506 offering within the permitted 35 non-accredited investors. Under the proposed rules, these investors would be excluded from a Rule 506(c) offering. We acknowledge that other commentators have requested that the definition of “accredited investor” under Regulation D be expanded to include “knowledgeable employees,”⁵ and that the Commission determined not to include such a change in its proposal.⁶

We encourage the Commission to reconsider this issue. We also note that addressing this issue need not entail a revision to the definition of “accredited investor” for all purposes. Instead, the Commission could determine that an issuer that is conducting a Rule 506(c) offering could conduct a concurrent or subsequent offering to a limited number of knowledgeable employees (and, potentially, other persons with whom the issuer has a pre-existing relationship), and that this offering would not be integrated with the Rule 506(c) offering. The existence of the employment relationship or other pre-existing relationship would alleviate any concern that these offerees were solicited through the general solicitation. This position would be consistent with the series of no-action and interpretive letters in which the Commission staff indicated that there is no contravention of the prohibition on general

⁴ Knowledgeable employees may invest in a Section 3(c)(1) fund without regard to the 100-holder limit and are permitted to invest in a Section 3(c)(7) fund, which is otherwise limited to qualified purchasers. The Commission staff also recommended in a September 2003 report that the Commission consider permitting general solicitation in private placements by Section 3(c)(7) funds, as due to the nature of the investors in those funds, “[t]here seems to be little compelling policy justification for prohibiting general solicitation or general advertising.” Staff Report to the Commission, *Implications of the Growth of Hedge Funds* (Sept. 2003), available at <http://www.sec.gov/news/studies/hedgefunds0903.pdf>.

⁵ See Letter to the Commission from Managed Funds Association, re: Request for Comments on Regulatory Initiatives Under the Jumpstart Our Business Startups Act (May 4, 2012).

⁶ See Release, pp. 9-10.

solicitation if there is a pre-existing relationship with the offerees⁷ (a category of investors which typically includes “knowledgeable employees,” among others). In particular, in 2007, the Commission concluded that even a public registered offering need not impact the availability of a private placement exemption if the investors in the private placement became interested in the offering through a substantive pre-existing relationship or other means that did not involve a general solicitation.⁸ We believe that general solicitation in a Rule 506(c) offering should present even fewer investor protection concerns than in the public registered offering context.

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Members of the Committee would be pleased to answer any questions you may have concerning our comments.

Respectfully submitted,



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⁷ See Release, p.13 at n.40, citing as examples *Mineral Lands Research and Marketing Corp.* (Nov. 3, 1985); *E.F. Hutton & Co.* (Dec. 3, 1985); see also *Robert T. Willis, Jr., P.C.* (avail. Jan. 18, 1988); *Woodtrails-Seattle, Ltd.* (avail. Aug. 9, 1982).

⁸ See SEC Release No. 33-8828 (Aug. 3, 2007), Part II.C (“[I]f the prospective private placement investor became interested in the concurrent private placement through some means other than the registration statement that did not involve a general solicitation and otherwise was consistent with Section 4(2), such as through a substantive, pre-existing relationship with the company or direct contact by the company or its agents outside of the public offering effort, then the prior filing of the registration statement generally would not impact the potential availability of the Section 4(2) exemption for that private placement and the private placement could be conducted while the registration statement for the public offering was on file with the Commission.”).

Committee on Securities Regulation

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