



THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



October 5, 2012

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. S7-07-12

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")¹ and The Financial Services Roundtable² are writing to respond to the Securities and Exchange Commission's (the "Commission") request for comment on File No. S7-07-12 (the "Proposal"), which would eliminate the prohibition against general solicitation and general advertising in certain offerings.

I. INTRODUCTION

For the reasons set forth herein, we support the Proposal and encourage the Commission to adopt it. Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act") directs the Commission to eliminate the prohibition against general solicitation and general advertising³ in certain offerings made pursuant to Rule 506 of Regulation D under the Securities Act of 1933 (the "Securities Act") and permit offers to persons other than qualified institutional buyers in offerings made pursuant to Rule 144A under the Securities Act, provided in the case of such a Rule 506 transaction that all purchasers are "accredited investors" and that the issuer takes "reasonable steps to verify that purchasers ... are accredited investors, using such methods as determined by the Commission." The Proposal would achieve that directive and implement the "reasonable steps to verify" requirement in a thoughtful manner that strikes the proper balance between the need to protect investors and the risk of creating unnecessary and ineffective procedures.

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 Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue and 2.3 million jobs.

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

II. PROPOSED AMENDMENTS TO REGULATION D

2.1 *The Proposal Correctly Retains Rule 506(b)*

We strongly support the Proposal's retention of Rule 506(b) for offerings conducted without general solicitation. This rule has been in existence for many years and, as the Commission correctly characterizes it, is an important source of capital for issuers of all sizes. Preserving Rule 506(b) will allow issuers to continue to offer and sell securities to up to 35 non-accredited investors that meet Rule 506(b)'s sophistication requirements and to an unlimited number of purchasers that are accredited investors at the time of sale, as long as such issuers do not employ general solicitation and they comply with the other conditions in existing Rule 506(b). We believe both the language of Section 201(a) and the legislative purpose of the JOBS Act compel the retention of Rule 506(b) in its current form.

2.2 *The Proposal Appropriately Implements the JOBS Act Mandate with Respect to "Reasonable Steps to Verify"*

We support the objective, facts-and-circumstances approach taken in the Proposal to implement the JOBS Act requirement that issuers in specified offerings "take reasonable steps to verify that purchasers of the securities are accredited investors." Given that the circumstances of each issuer, offering and prospective investor can vary significantly, the Commission has rightly proposed a framework that will afford an issuer the flexibility to tailor its verification procedures to the particulars of its offering while providing useful conceptual guidance in the text of the proposing release for creating and evaluating those procedures. We believe the flexibility afforded by the Proposal will allow the development of tailored, reliable and cost-effective procedures for verification.

Although other approaches could have been taken, the Commission prudently declined to (i) prescribe specific procedures an issuer must follow or (ii) establish a safe harbor with non-exclusive procedures an issuer can follow, in either case, to satisfy the reasonable verification requirement. A prescriptive list would be a rigid framework that would be overly burdensome and costly in some contexts and ineffective in others. For example, requiring an issuer to conduct specific factual inquiries of each prospective purchaser would be unnecessary and onerous if the issuer has access to other types of information that reasonably verify the accredited investor status of purchasers. A safe harbor with a non-exclusive list would be similarly problematic, as the list would likely be treated by market participants (as safe harbors often are) as *de facto* requirements that would be difficult to apply in many circumstances. Put differently, we believe either of the two alternate approaches described above would benefit a small subset of issuers whose circumstances happen to fall squarely within the contours of such a rule. Yet the private placement market is too broad and deep for either approach as a practical matter to address the wide variety of circumstances of the full set of issuers. Moreover, many issuers and their agents have existing procedures for purposes of forming a "reasonable belief" (the standard currently applicable under Rule 506) that are tailored to their particular circumstances and investor audience. As discussed further in Section 2.3 below, we believe these procedures are a better starting point for developing verification steps.

In the context of the proposed facts and circumstances test, the Commission's guidance in the proposing release as to examples of factors that may be considered when evaluating verification procedures will be useful to many market participants. We note that many of our members already consider the three exemplary factors described in the release⁴ when crafting procedures to form a reasonable belief under existing Rule 506. Market participants will be able to use these factors as part of their analysis to determine whether incremental changes are needed to satisfy the proposed reasonable steps to verify standard. For example, an issuer that

⁴ These factors are (i) the nature of the purchaser and the type of accredited investor that the purchaser claims to be; (ii) the amount and type of information that the issuer has about the purchaser; and (iii) the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

solicits new investors through a publicly available website would, as the Commission posits in connection with the third factor, typically take greater measures to verify accredited investor status than an issuer whose solicitation is limited to investors included in a database of pre-screened investors. Furthermore, we agree that the ability of a prospective purchaser to satisfy a high minimum investment amount could reasonably be taken into account in determining whether that purchaser is an accredited investor.

Given the usefulness of the guidance in the proposing release, we encourage the Commission to repeat it in the adopting release and to consider memorializing it in a series of Compliance and Disclosure Interpretations.

2.3 The Proposal Builds on Current, Effective Market Practices

The Proposal is cost-effective in that it would allow market participants to build on the highly effective practices they have developed over several decades of Regulation D practice for forming a “reasonable belief” that purchasers are accredited investors, the standard currently applicable under Rule 506, rather than mandating new, costly and potentially less effective procedures. In some cases these existing practices would, as the Commission correctly observes, satisfy the verification requirement in proposed Rule 506(c), and in others we believe they would only require incremental enhancements.

We concur in particular with the Commission’s position that an issuer may take into account information regarding a purchaser from a third-party source, such as a broker-dealer. For example, many issuers currently engage a placement agent (which may be affiliated or unaffiliated with the issuer) to facilitate a Rule 506 transaction. Placement agents are typically familiar with a prospective purchaser’s financial affairs because of know-your-customer or suitability requirements, or as a result of other interactions and relationships with the prospective purchaser. We believe an issuer may consider any information that derives from the placement agent’s familiarity with a prospective purchaser.

We also strongly support the Commission’s suggestion that issuers may rely on verifications completed by third parties, including services or databases that may be developed in the future. Services that exist in similar contexts, such as the “QIB lists” sanctioned by the staff of the Commission for use in Rule 144A offerings,⁵ are a very efficient, effective and widely used tool.

2.4 The Commission Should Amend Form D to Elicit Information on the Use of Rule 506 as Amended

We support amending Form D to include check boxes for issuers to indicate whether they are relying on Rule 506(b) or Rule 506(c). We believe, however, that checking the Rule 506(b) or Rule 506(c) box would not serve as an election by the issuer to avail itself exclusively of the safe harbor in the specified subsection. It is important that an issuer be able to maintain the ability to conduct the offering pursuant to the other subsection of Rule 506 or any other exemption under the Securities Act. For example, we believe an issuer that initially checks the Rule 506(b) box would be able to rely on Rule 506(c) (assuming it complies with all of Rule 506(c)’s conditions) if it grows concerned that a post-Form D filing communication regarding the offering that is inadvertently disseminated broadly may constitute general solicitation. Likewise, an issuer that initially checks the Rule 506(c) box and intends to engage in general solicitation would have the ability to change course, before any general solicitation occurs, and rely on Rule 506(b) if it decides to offer only to investors with whom it has a preexisting relationship. We request the Commission to confirm in the adopting release that it agrees with our view on the foregoing.

⁵ See CommScan, LLC (avail. Feb. 3, 1999); Communicator Inc. (avail. Sept. 20, 2002).

2.5 *The Commission Should Confirm that an Offering Under Rule 506(b) Will Not Be Integrated with a Subsequent Offering Under Rule 506(c)*

We believe the Proposal would not preclude an issuer from conducting an offering without the use of general solicitation in reliance on Rule 506(b) to sell to up to 35 non-accredited investors that meet Rule 506(b)'s sophistication requirements, and then subsequently utilizing general solicitation in an offering made in reliance on Rule 506(c). We note that this view is consistent with Rule 152 under the Securities Act, which applies in an analogous context. We encourage the Commission to confirm in the adopting release that an offering under Rule 506(b) will not be integrated with a subsequent offering under Rule 506(c) and thus will not affect the validity of the prior private placement.

III. PROPOSED AMENDMENT TO RULE 144A

We concur with the proposed amendments to Rule 144A. The Proposal accords with Section 201(a)'s clear statutory directive.

IV. OTHER AMENDMENTS

We agree with the Commission that it should focus its rulemaking efforts on adopting a proposal that discharges the Commission's obligation under the JOBS Act to amend Rule 506 and Rule 144A. Consistent with the Commission's suggested approach, no amendments other than those included in the Proposal are necessary or appropriate at this time. Expanding the Proposal to consider additional rulemaking initiatives would only risk delaying the implementation of the JOBS Act mandate further.

We note in particular that Rules 506 and 144A, if amended as proposed, would strike the appropriate balance between the need to protect investors and the risk of creating rigid procedures that would diminish the utility of the amended rules and thus undermine the purpose of the JOBS Act. In enacting the JOBS Act, Congress recognized that issuers should have greater flexibility to make use of modern means of communications to raise capital without jeopardizing their ability to undertake transactions that rely on Rule 506 or Rule 144A, provided that the only investors that purchase the securities on offer are reasonably believed to be sufficiently sophisticated (and the issuer takes steps to verify such sophistication in the Rule 506 context). In addition to the safeguards built into Rules 506 and 144A, the U.S. federal securities laws include other investor protections, including additional sophistication qualifications where warranted (e.g., the requirement that private funds relying on Section 3(c)(7) of the Investment Company Act of 1940 limit ownership in its securities to investors that meet the "qualified purchaser" criteria) and various anti-fraud provisions that make materially misleading statements illegal whether they are made in a private placement memorandum distributed to a few investors or in an email sent to many. We see no reason for the Commission to add to these rules at this time.

We note the congressional intent of the JOBS Act to facilitate access to capital. The Commission proposes to implement that intent in a manner that is balanced and efficient. However, other regulatory agencies will need to take action in order for the full benefits of the JOBS Act and the Proposal to be realized. In particular, organizers of private funds that rely on certain exemptions from registration with, or other compliance obligations of, the Commodity Futures Trading Commission (the "CFTC"), for example under CFTC Rules 4.7, 4.13(a)(3) and 4.14, are required not to make a public offering of their fund interests. In order to more fully effectuate the purpose of the JOBS Act, we encourage the Commission to work with the CFTC to facilitate the alignment of these exemptions with the expanded scope of permitted solicitation provided in the Commission's proposed amendments to Rules 506 and 144A.

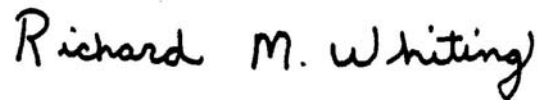
V. CONCLUSION

In sum, we agree with the Proposal and encourage the Commission to move swiftly toward the adoption of 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, Rich Foster of The Financial Services Roundtable at (202) 589-2424, or our counsel on this matter, David Lopez of Cleary Gottlieb Steen & Hamilton LLP at (212) 225-2632.

Sincerely,



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



Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable

cc: The Honorable Mary L. Schapiro, 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 Troy A. Paredes, Commissioner, Securities and Exchange Commission
The Honorable Elisse B. Walter, Commissioner, Securities and Exchange Commission
The Honorable Gary Gensler, Chairman, Commodity Futures Trading Commission
The Honorable Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight,
Commodity Futures Trading Commission