HANDLER THAYER, LLP
ATTORNEYS AND COUNSELORS AT LAW

October 4, 2012

Via E-Mail: Rule-comments@sec.gov
Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

Re: Comments on Proposed Rule Eliminating the Prohibition against General Solicitation and General Advertising Rule 506 and Rule 144A Offerings—File No. S7-07-12

Dear Ms. Murphy:

Handler Thayer, LLP (the "Firm") is submitting this letter in response to the Securities and Exchange Commission's (the "Commission") request for comments to amend Rule 506 of Regulation D ("Rule 506") under the Securities Act of 1933 (the "Securities Act").[1] The Firm appreciates this opportunity to comment on the matters discussed in the Commission's proposed rule, "Eliminating the Prohibition against General Solicitation and General Advertising Rule 506 and Rule 144A Offerings" (the "Release"). Please be advised that the opinions in this letter are the Firm's comments and not made on behalf of any client of the Firm.

As the Commission stated in the Release, Rule 506 is a widely-used safe harbor under Section 4(a)(2) from the registration requirements of the Securities Act.[2] Generally, Rule 506 permits sales of securities to an unlimited number of accredited investors for an unlimited amount of capital.[3] Rule 506(b) has several limitations on issuer's activities. First, issuers may not sell securities to more than thirty-five (35) unaccredited investors.[4] Second, issuers are prohibited from general solicitation and advertising ("General Solicitation").[5] While General Solicitation was initially defined as "advertisements published in the newspapers and magazines,

[1] Securities Act Release No. 33,9354 (Aug. 29, 2012).

[2] Securities Act of 1933, 15 U.S.C. § 77d(a)(2) (2012).

[3] 17 CFR § 230.506 (2012).

[4] 17 CFR § 230.506(b)(2)(ii) (2012) (stating that even unaccredited investors must possess, or the issuer must reasonably believe that these investors possess, either alone or with a purchaser representative "such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment").

[5] 17 CFR § 230.502(c) (2012).

communications broadcast over television and radio, and seminars whose attendees have been invited by [General Solicitation]"; after the advent of the internet, the Commission later expanded this definition to include unrestricted websites.[6]

The Jumpstart Our Business Startups Act (the "JOBS Act") was enacted on April 5, 2012, as a measure to aid capital formation and increase small business access to private equity. As set forth in Section 201(a) of the JOBS Act, the Commission is required to promulgate rules that expand Rule 506 to allow General Solicitation for these private offerings as long as sales of securities are made only to accredited investors.[7] Under Rule 506(c), proposed in the Release, the Commission will allow General Solicitation if "reasonable steps" are taken to confirm every purchaser's accreditation status. In the Release, the Commission stated that it intends for the "reasonable steps" standard to be flexible and objective based on the particular facts and circumstances of a given transaction.[8]

The Firm commends the Commission's initial steps to implement the JOBS Act and to provide considerable flexibility to small business issuers in pursuing offerings under the proposed Rule 506(c). The Firm believes, however, that the Release raises a number of questions and concerns, especially regarding the definition of "reasonable steps," that the Commission has included for specific comment. The Firm addresses some of these points below.

I. Clarify the Term "Reasonable Steps"

As stated above, the proposed rule requires that issuers take "reasonable steps" to verify that the purchaser of securities is an accredited investor.[9] Significantly, the Commission will consider the following factors when determining whether an issuer is taking "reasonable steps" in their due diligence:

1) The nature of the purchaser and the type of accredited investor the purchaser claims to be;
2) The amount and type of information that the issuer has about the purchaser; and,

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[6] Securities Act Release No. 33,9354 (Aug. 29, 2012); Use of Electronic Media for Delivery Purposes, Securities Act Release No. 33,7233 (Oct. 6, 1995); Use of Electronic Media, Securities Act Release No. 33,7856 (Apr. 28, 2000).

[7] Jumpstart Our Business Startups Act, H.R. 3606, 112th Cong. § 201 (2012).

[8] Securities Act Release No. 33,9354 (Aug. 29, 2012).

[9] Id.

3) The nature of the offering, including the terms and conditions.[10]

While the Commission should be commended for its desire to create a flexible standard as opposed to a rigid standard, a flexible standard without further clarification as to what is acceptable, is an ambiguous standard. An important aspect of compliance with the securities laws is having a full grasp on the expectations of the Commission. While an ambiguous standard may give the Commission greater enforcement options, it does not help issuers or their counsel complete their offerings in a compliant manner. Without some firm guidelines or safe harbors, issuers and their counsel will live in fear of future enforcement actions not knowing whether their actions are reasonable or unreasonable.

The Commission should at least establish enforcement procedures for potential violations of proposed Rule 506(c) so that issuers are able to recognize the Commission's areas of concerns for these offerings. As the Commission correctly noted in the Release, "a method that is reasonable under one set of circumstances may not be reasonable under a different set of circumstances."[11] Nevertheless, it is imperative for issuers to understand what these distinctions are and how the line will be drawn by the Commission prior to blindly conducting an offering. Furthermore, creating these general standards for due diligence will also provide consistency for no-action relief and enforcement actions that will develop the industry's understanding of General Solicitation in the future. In doing so, the Commission can further develop its expectations of issuers conducting General Solicitation offerings under Rule 506(c) and issuers can be more cost-efficient and effective in their compliance methods.

II. Allow Issuers to Rely on Declarations from Investors and/or Third Parties

The Firm believes that creating safe harbors and clear standards is the best way to insure that "reasonable steps" are being taken to insure compliance with the Securities laws. Currently, many sophisticated issuers (hedge funds, private equity funds, and larger companies) provide subscription agreements that include detailed investor questionnaires that require investors to represent and warrant to issuers their status as an accredited investor. The questionnaires typically require that the investor state that he or she is an accredited investor and most questionnaires require that the investor state the provision under which they claim accreditation. This "check-the-box" approach allows the issuer to rely on the affirmative representations of the investor with minimal cost burden and virtually no time burden on the issuer. The Commission has stated, however, that the "check-the-box" investor questionnaire will no longer be acceptable under Rule 506(c) and should be replaced by more in depth due diligence methods that will be more onerous for the issuer and the investor alike.

[10] Id.

[11] Id. at 26.

Like issuers, investors also have a legal obligation not to make material misstatements or omissions in connection with the purchase of a security. Arguably, asking investors to "honestly" and affirmatively check-the-box as to their specific status as an accredited investor is the best way to confirm that an investor is accredited. Asking an investor's attorneys, accountants, or investment advisors, to state that their client is an accredited investor also seems like a reasonable way to verify their status as an accredited investor, yet the Commission was unwilling to affirmatively state that this would be acceptable in all circumstances. Investors, or advisors to investors, who knowingly misrepresent the accreditation status are otherwise in violation of the Securities Act. Furthermore, to put the burden of verifying the representations and statements of the investors on the issuer unfairly shifts the liability for these misstatements to the issuer. Perhaps reminding investors that misstatements made in connection with the sale of a security are subject to civil and criminal penalties would be helpful. Respectfully, the Firm believes that the Commission is taking a concept that could be very simple, such as check-the-box, and making it unnecessarily complicated.

The Commission should also consider the fact that requiring issuers to verify the personal financial status of each investor will also increase the opportunity for fraud related to the misappropriation or theft of personal financial information. If issuers are required to gather, transmit, and store personal financial information from investors there is a greater chance that this information will be stolen or used for illicit purposes, especially information that is being transmitted over the Internet. For example, fraudulent issuers could conduct phony offerings for the sole purpose of gathering personal financial information under the guise that this information is being gathered pursuant to the requirements of Rule 506(c) of Regulation D. As counsel to high net worth individuals and family offices, we can assure the Commission that accredited investors generally have little or no interest in providing personal financial information such as tax returns, financial statements, or brokerage statements, to anyone other than their most trusted advisors.

Another concern stemming from the Release is the time and cost burden that will be imposed on issuers. Currently, offerings are expensive and difficult transactions for small business owners. Imposing additional obligations to verify statements being made by investors will not only increase the cost of an offering, but will also increase the time it takes to compete an offering. Investors may also bear the additional expenses of having to pay advisors to verify their status as an accredited investor.

The Firm recognizes that the Release and proposed Rule 506(c) is attempting to balance the Commission's mission of both protecting investors on the one hand, and facilitating the formation of capital on the other. The Commission, however, should definitively state what works, and what doesn't work, so that issuers and their advisors can conduct offerings that are compliant with the Securities laws.

The Firm appreciates this opportunity to provide you with our thoughts on the Release. We would be pleased to discuss these matters with you, if you wish. Please feel free to contact Steven J. Thayer at (312) 641-2100.

Very truly yours,

Handler Thayer, LLP