

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 230 and 239

[Release No. 33–9416; Release No. 34–69960; Release No. IC–30595; File No. S7–06–13]

RIN 3235–AL46

### Amendments to Regulation D, Form D and Rule 156

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rules.

**SUMMARY:** The Securities and Exchange Commission, which today in separate releases amended Rule 506 of Regulation D, Form D and Rule 144A under the Securities Act of 1933 to implement Section 201(a) of the Jumpstart Our Business Startups Act and Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, is publishing for comment a number of proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act. These proposed amendments are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise in connection with permitting issuers to engage in general solicitation and general advertising under new paragraph (c) of Rule 506. Specifically, the proposed amendments to Regulation D would require the filing of a Form D in Rule 506(c) offerings before the issuer engages in general solicitation; require the filing of a closing amendment to Form D after the termination of any Rule 506 offering; require written general solicitation materials used in Rule 506(c) offerings to include certain legends and other disclosures; require the submission, on a temporary basis, of written general solicitation materials used in Rule 506(c) offerings to the Commission; and disqualify an issuer from relying on Rule 506 for one year for future offerings if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering. The proposed amendments to Form D would require an issuer to include additional information about offerings conducted in reliance on Regulation D. Finally, the proposed amendments to Rule 156 would extend the antifraud guidance contained in the rule to the sales literature of private funds.

**DATES:** Comments should be received on or before September 23, 2013.

**ADDRESSES:** Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7–06–13 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

#### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–06–13. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

#### FOR FURTHER INFORMATION CONTACT:

Charles Kwon, Special Counsel or Ted Yu, Senior Special Counsel, Office of Chief Counsel, or Karen C. Wiedemann, Attorney Fellow, Office of Small Business Policy, Division of Corporation Finance, at (202) 551–3500; or, with respect to private funds, Melissa Gainor or Alpa Patel, Senior Counsels, Investment Adviser Regulation Office, Division of Investment Management, at (202) 551–6787, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are proposing amendments to Rule 156,<sup>1</sup> Rules 503,<sup>2</sup> 506<sup>3</sup> and 507<sup>4</sup> of Regulation D,<sup>5</sup> and Form D<sup>6</sup> under the Securities

Act of 1933.<sup>7</sup> We are proposing to add Rule 509 and Rule 510T of Regulation D under the Securities Act.

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<sup>1</sup> 17 CFR 230.156.

<sup>2</sup> 17 CFR 230.503.

<sup>3</sup> 17 CFR 230.506.

<sup>4</sup> 17 CFR 230.507.

<sup>5</sup> 17 CFR 230.500 through 230.508.

<sup>6</sup> 17 CFR 239.500.

<sup>7</sup> 15 U.S.C. 77a et seq.

1. Mandated Legends and Other Disclosures for Written General Solicitation Materials
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## I. Introduction

We are adopting today, in separate releases, amendments to Rule 506 of Regulation D<sup>8</sup> and to Form D<sup>9</sup> to implement Section 201(a)(1) of the Jumpstart Our Business Startups Act (the “JOBS Act”)<sup>10</sup> and Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).<sup>11</sup> Rule 506 was originally adopted as a non-exclusive safe harbor under Section 4(a)(2) of the Securities Act of 1933 (the “Securities Act”), the statutory exemption from Securities Act registration for transactions by an issuer “not involving any public offering.”<sup>12</sup>

<sup>8</sup> 17 CFR 230.506. The Commission adopted Rule 506 and Regulation D in 1982 as a result of the Commission’s evaluation of the impact of its rules on the ability of small businesses to raise capital. See *Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales*, Release No. 33-6389 (Mar. 8, 1982) [47 FR 11251 (Mar. 16, 1982)]. Over the years, the Commission has revised various provisions of Regulation D in order to address, among other things, specific concerns relating to facilitating capital raising as well as abuses that have arisen under Regulation D. See, e.g., *Additional Small Business Initiatives*, Release No. 33-6996 (Apr. 28, 1993) [58 FR 26509 (May 4, 1993)] and *Revision of Rule 504 of Regulation D, the “Seed Capital” Exemption*, Release No. 33-7644 (Feb. 25, 1999) [64 FR 11090 (Mar. 8, 1999)].

<sup>9</sup> 17 CFR 239.500.

<sup>10</sup> Public Law 112-106, sec. 201(a), 126 Stat. 306, 313 (Apr. 5, 2012). See *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Release No. 33-9354 (Aug. 29, 2012) [77 FR 54464 (Sept. 5, 2012)] (“Rule 506(c) Proposing Release”).

<sup>11</sup> Public Law 111-203, sec. 926, 124 Stat. 1376, 1851 (July 21, 2010) (codified at 15 U.S.C. 77d note).

<sup>12</sup> 15 U.S.C. 77d(a)(2). As with the Section 4(a)(2) statutory exemption, Rule 506 is available only to the issuer of the securities and not to any affiliate of the issuer or to any other person for resales of the issuer’s securities. See 17 CFR 230.500(d).

To implement Section 201(a)(1) of the JOBS Act, we are adding new paragraph (c) to Rule 506, which permits issuers to use general solicitation and general advertising (collectively, “general solicitation”) when conducting an offering pursuant to this new paragraph, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that such purchasers are accredited investors.<sup>13</sup> We are also adding a new check box to Form D to require issuers to indicate that they are relying on Rule 506(c) for their offering.<sup>14</sup> To implement Section 926 of the Dodd-Frank Act, we are adding new paragraph (d) to Rule 506, which disqualifies issuers and other market participants from relying on Rule 506 if “felons and other ‘bad actors’” are participating in the offering.<sup>15</sup> We are also amending the form of the signature block to Form D to include a certification whereby issuers claiming a Rule 506 exemption will confirm that the offering is not disqualified from reliance on Rule 506.

We anticipate that new Rule 506(c) will have a significant impact on Rule 506 offerings and on current capital-raising practices. Among other things, we anticipate that issuers using Rule 506(c) will be able to reach a greater number of potential investors than is currently the case in Rule 506 offerings, thereby increasing their access to sources of capital.<sup>16</sup> As a result, accredited investors may be able to find and potentially invest in a larger and more diverse pool of investment opportunities, which could result in a more efficient allocation of capital by accredited investors. On the other hand,

<sup>13</sup> *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Release No. 33-9415 (July 10, 2013) (“Rule 506(c) Adopting Release”). In addition to these requirements, under new Rule 506(c), all terms and conditions of Rule 501 and Rules 502(a) and 502(d) of Regulation D [17 CFR 230.501 and 502(a) and (d)] must be satisfied.

<sup>14</sup> As discussed in Section II.A of this release, Form D is the notice of an offering of securities made without registration under the Securities Act in reliance on an exemption provided by Regulation D or Section 4(a)(5) of the Securities Act.

<sup>15</sup> *Disqualification of Felons and Other “Bad Actors” from Rule 506 Offerings*, Release No. 33-9414 (July 10, 2013).

<sup>16</sup> Currently, under Rule 506(b) [17 CFR 230.506(b)], an issuer may sell securities, without any limitation on the offering amount, to an unlimited number of “accredited investors,” as defined in Rule 501(a) of Regulation D, and to no more than 35 non-accredited investors who meet certain “sophistication” requirements. The availability of Rule 506(b) is subject to the terms and conditions of Rules 501 and 502 and is conditioned on the issuer, or any person acting on its behalf, not offering or selling securities through any form of “general solicitation or general advertising.”

we recognize the concerns raised by a number of commenters that a general solicitation for a Rule 506(c) offering would attract both accredited and non-accredited investors and could result in an increase in fraudulent activity in the Rule 506 market, as well as an increase in unlawful sales of securities to non-accredited investors.

Many comments submitted on the Rule 506(c) Proposing Release, including the comments submitted by the Investor Advisory Committee, urged the Commission to propose or adopt other amendments to Regulation D or to Form D<sup>17</sup> that they believed would be appropriate in connection with the adoption of the amendments to implement Section 201(a) of the JOBS Act.<sup>18</sup> For example, several commenters suggested that we amend Regulation D to provide that the availability of the new Rule 506(c) exemption be conditioned on compliance with the

<sup>17</sup> To facilitate public input on JOBS Act rulemaking before the issuance of rule proposals, the Commission invited members of the public to make their views known on various JOBS Act initiatives in advance of any rulemaking by submitting comment letters to the Commission’s Web site at <http://www.sec.gov/spotlight/jobsactcomments.shtml>. The comment letters relating to Section 201(a) of the JOBS Act submitted in response to this invitation are located at <http://www.sec.gov/comments/jobs-title-ii/jobs-title-ii.shtml>. The comment letters submitted in response to the Rule 506(c) Proposing Release are located at <http://www.sec.gov/comments/s7-07-12/s70712.shtml>. Many commenters submitted comment letters both before and after the issuance of the Rule 506(c) Proposing Release. Our references to comment letters in this release that are not dated refer to the comment letters submitted in response to the Rule 506(c) Proposing Release. Dated comment letters refer to those submitted before the issuance of the Rule 506(c) Proposing Release or by commenters that submitted multiple letters.

<sup>18</sup> See, e.g., letters from Fund Democracy, Inc. (“Fund Democracy”); North American Securities Administrators Association, Inc. (“NASAA”); Consumer Federation of America (“Consumer Federation”); SEC Investor Advisory Committee (“Investor Advisory Committee”). The Investor Advisory Committee was established in April 2012 pursuant to Section 911 of the Dodd-Frank Act to advise the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. The Dodd-Frank Act authorizes the Investor Advisory Committee to submit findings and recommendations for review and consideration by the Commission.

On October 12, 2012, the Investor Advisory Committee unanimously approved and submitted recommendations to the Commission titled, *Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Lift the Ban on General Solicitation and Advertising in Rule 506 Offerings: Efficiently Balancing Investor Protection, Capital Formation and Market Integrity*. The recommendations are available at <http://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-general-solicitation-advertising-recommendations.pdf>.

Form D filing requirement,<sup>19</sup> require Form D to be filed in advance of any general solicitation<sup>20</sup> and add to the information requirements of Form D.<sup>21</sup> In light of the fact that the financial thresholds in the definition of “accredited investor” that relate to natural persons have not been updated since their adoption in 1982,<sup>22</sup> some commenters recommended that the Commission also amend the definition of “accredited investor” as it relates to natural persons.<sup>23</sup> Other commenters suggested that we propose rules governing the content and manner of general solicitations used in offerings conducted pursuant to the new Rule 506(c) exemption, particularly with respect to offerings by private funds.<sup>24</sup>

<sup>19</sup> See, e.g., letters from Investor Advisory Committee; NASAA; AARP; Consumer Federation.

<sup>20</sup> See, e.g., letters from Office of the Secretary of the Commonwealth of Massachusetts Securities Division (“Massachusetts Securities Division”) (July 2, 2012); NASAA; Securities Division, Nevada Secretary of State (“Nevada Securities Division”); Ohio Division of Securities; Securities Commissioner, State of South Carolina (“South Carolina Securities Commissioner”); State Corporation Commission, Division of Securities and Retail Franchising, Commonwealth of Virginia (“Virginia Division of Securities”).

<sup>21</sup> See, e.g., letters from AARP; AFL–CIO and Americans for Financial Reform (“AFR”); Consumer Federation; Massachusetts Securities Division (July 2, 2012); NASAA.

<sup>22</sup> See Release No. 33–6389. For natural persons, Rule 501(a) defines an accredited investor as a person whose individual net worth, or joint net worth with that person’s spouse, exceeds \$1 million, excluding the value of the person’s primary residence (the “net worth test”) or who had an individual income in excess of \$200,000 in each of the two most recent years, or joint income with that person’s spouse in excess of \$300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year (the “income test”).

Although the Dodd-Frank Act did not change the amount of the \$1 million net worth test, it did change how that amount is to be calculated—by excluding the value of a person’s primary residence. This change took effect upon the enactment of the Dodd-Frank Act, and in December 2011, we amended Rule 501 to incorporate this change into the definition of accredited investor. See *Net Worth Standard for Accredited Investors*, Release No. 33–9287 (Dec. 21, 2011) [76 FR 81793 (Dec. 29, 2011)].

<sup>23</sup> See, e.g., letters from AARP; Consumer Federation; Investment Company Institute (“ICI”); Investor Advisory Committee; Massachusetts Securities Division (July 2, 2012); Ohio Division of Securities (July 3, 2012). Several commenters noted that under the Commission’s proposal in 2007 to partially lift the prohibition on general solicitation for offerings sold only to “large accredited investors,” such investors who were natural persons would have been required to have at least \$400,000 in annual income or \$2.5 million in investments. See letters from AFL–CIO and AFR; Fund Democracy; AARP. One commenter, however, opposed increasing the thresholds for accredited investor status. See letter from National Small Business Association (June 12, 2012).

<sup>24</sup> See, e.g., letters from ICI; AFL–CIO and AFR; Consumer Federation; Investor Advisory Committee; Independent Directors Council (“IDC”); NASAA; Sens. Reed, Levin, Durbin, Harkin, Lautenberg, Franken and Akaka.

Several commenters also recommended that we require the filing or submission of general solicitation materials used pursuant to the new Rule 506(c) exemption, whether to the Financial Industry Regulatory Authority (“FINRA”),<sup>25</sup> to an electronic “drop box” to be created by the Commission specifically to receive general solicitation materials<sup>26</sup> or as an exhibit to Form D.<sup>27</sup>

In light of these comments and the magnitude of the change that the elimination of the prohibition against general solicitation represents to the Rule 506 market, we are proposing today a number of amendments in conjunction with the adoption of new Rule 506(c). These amendments are intended to enhance the Commission’s understanding of the Rule 506 market by improving compliance with Form D filing requirements, expanding the information requirements of Form D, primarily with respect to Rule 506 offerings, and requiring the submission, on a temporary basis, of written general solicitation materials used in Rule 506(c) offerings to the Commission. We believe that the elimination of the prohibition against general solicitation for Rule 506(c) offerings will have a significant impact on the Rule 506 market, including the types of issuers that raise capital using Rule 506, the investors who are solicited and ultimately purchase securities in the offerings, the intermediaries that participate in this market, the practices employed by issuers and intermediaries and the amount of capital that will be raised. To review and analyze these changes more effectively, and to facilitate the assessment of the effects of such changes on investor protection and capital formation, the Commission staff will need better tools to evaluate this changing market than are currently provided by the existing filing and information requirements of Form D. Further, we believe that the proposed changes to the filing and information requirements of Form D could assist the enforcement efforts of both federal and state regulators, which rely on Form D as an important source of information about the private offering market.

<sup>25</sup> See letters from AFL–CIO and AFR; BetterInvesting (recommending that “the SEC require all public solicitation materials under Rule 506 to be independently reviewed for compliance (perhaps by an independent authority such as FINRA, which already reviews broker-dealer advertising) before or after the public solicitation” (emphasis omitted)); ICI.

<sup>26</sup> See letters from Investor Advisory Committee; Consumer Federation.

<sup>27</sup> See letters from Massachusetts Securities Division (July 2, 2012); Ohio Division of Securities (July 3, 2012).

Specifically, with respect to Form D and to Regulation D as it relates to Form D, we are proposing to:

- Amend Rule 503 of Regulation D to require: (1) The filing of a Form D no later than 15 calendar days in advance of the first use of general solicitation in a Rule 506(c) offering; and (2) the filing of a closing Form D amendment within 30 calendar days after the termination of a Rule 506 offering;

- amend Form D to require additional information primarily in regard to offerings conducted in reliance on Rule 506; and

- amend Rule 507 of Regulation D to disqualify an issuer from relying on Rule 506 for one year for future offerings if the issuer, or any predecessor or affiliate<sup>28</sup> of the issuer, did not comply, within the last five years, with all of the Form D filing requirements in a Rule 506 offering.

In addition, in light of the ability of issuers to publicly advertise Rule 506(c) offerings, we are concerned that prospective investors may not be sufficiently informed as to whether they are qualified to participate in these offerings, the type of offerings being conducted and certain potential risks associated with such offerings. To address these concerns, we are proposing new Rule 509 of Regulation D, which would require issuers to include prescribed legends in any written communication that constitutes a general solicitation in any offering conducted in reliance on Rule 506(c) (“written general solicitation materials”). Private funds would also be required to include a legend disclosing that the securities being offered are not subject to the protections of the Investment Company Act of 1940 (“Investment Company Act”) and additional disclosures in written general solicitation materials that include performance data so that potential investors are aware that there are limitations on the usefulness of such data and provide context to understand the data presented.<sup>29</sup> We are proposing to disqualify an issuer from relying on Rule 506 for future offerings if such

<sup>28</sup> An “affiliate” is defined in Rule 501(b) of Regulation D [17 CFR 230.501(b)] as a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

<sup>29</sup> A private fund is an issuer that would be an investment company, as defined in Section 3 of the Investment Company Act, but for the exclusion from the definition of “investment company” in Section 3(c)(1) or Section 3(c)(7) of that Act. We also refer in this release to “pooled investment funds” because that term is used in Form D. Issuers that rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act are a subset of pooled investment funds.

issuer, or any predecessor or affiliate of the issuer, has been subject to any order, judgment or court decree enjoining such person for failure to comply with proposed Rule 509.

We are also proposing to amend Rule 156 under the Securities Act,<sup>30</sup> which interprets the antifraud provisions of the federal securities laws in connection with sales literature used by investment companies, to apply to the sales literature of private funds because we believe it is important for private funds to consider the Commission's views on the applicability of the antifraud provisions to their sales literature. We are also soliciting comment on a recommendation made by commenters on the Rule 506(c) Proposing Release to mandate additional manner and content restrictions on written general solicitation materials used by private funds.

As the Commission will need to be aware of developments in the Rule 506 market after the effectiveness of Rule 506(c), we are proposing Rule 510T to require issuers, on a temporary basis, to submit any written general solicitation materials used in their Rule 506(c) offerings to the Commission no later than the date of the first use of these materials. Such materials would be required to be submitted through an intake page on the Commission's Web site. We are not proposing, at this time, that these materials would be available to the public; therefore, issuers would not file their written general solicitation materials through the Commission's EDGAR system. We are proposing to disqualify an issuer from relying on Rule 506 for future offerings if such issuer, or any predecessor or affiliate of the issuer, has been subject to any order, judgment or court decree enjoining such person for failure to comply with proposed Rule 510T.

We also appreciate the need to undertake a broader effort to review and analyze the market impact and developing market practices resulting from permitting general solicitation in connection with offerings relying on new Rule 506(c). Accordingly, we will evaluate the use of Rule 506(c) by issuers and market participants, and, in particular, the steps they take to verify that the purchasers of the offered securities are accredited investors. We have directed the Commission staff to execute a comprehensive work plan upon the effectiveness of Rule 506(c) to review and analyze the use of Rule 506(c) (the "Rule 506(c) Work Plan"), which will involve a coordinated effort of staff from the Division of Corporation

Finance, the Division of Economic and Risk Analysis ("DERA"), the Division of Investment Management, the Division of Trading and Markets, the Office of Compliance Inspections and Examinations ("OCIE") and the Division of Enforcement. The Commission staff will, among other things:

- Evaluate the range of purchaser verification practices used by issuers and other participants in these offerings, including whether these verification practices are excluding or identifying non-accredited investors;
- evaluate whether the absence of the prohibition against general solicitation has been accompanied by an increase in sales to non-accredited investors;
- assess whether the availability of Rule 506(c) has facilitated new capital formation or has shifted capital formation from registered offerings and unregistered non-Rule 506(c) offerings to Rule 506(c) offerings;
- examine the information submitted or available to the Commission on Rule 506(c) offerings, including the information in Form D filings and the form and content of written general solicitation materials submitted to the Commission;
- monitor the market for Rule 506(c) offerings for increased incidence of fraud and develop risk characteristics regarding the types of issuers and market participants that conduct or participate in Rule 506(c) offerings and the types of investors targeted in these offerings to assist with this effort;
- incorporate an evaluation of the practices in Rule 506(c) offerings in the staff's examinations of registered broker-dealers and registered investment advisers;<sup>31</sup> and
- coordinate with state securities regulators on sharing information about Rule 506(c) offerings.

Implementation of the Rule 506(c) Work Plan will assist the Commission in evaluating the development of market practices in Rule 506(c) offerings. The amendments we propose today would, if adopted, support the Rule 506(c) Work Plan by enhancing the timeliness, quality and completeness of information on the issuers, investors and financial intermediaries that participate in the Rule 506 market and by requiring the submission of written general solicitation materials to the Commission. The proposed

<sup>31</sup> OCIE currently examines multiple types of market participants that have involvement in private offerings, including registered broker-dealers that advise issuers on private placements and registered investment advisers that advise clients investing in private placements or advise private funds that offer fund interests pursuant to private offerings.

amendments would also assist the Commission's efforts to protect investors and to evaluate the development of market practices in Rule 506(c) offerings and would support future Commission consideration of any additional changes related to Rule 506(c), consistent with the Commission's mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

In addition, many commenters stated, and we agree, that the definition of accredited investor as it relates to natural persons should be reviewed and, if necessary or appropriate, amended. The Commission staff has begun a review of the definition of accredited investor as it relates to natural persons, including the need for any changes to this definition following the effectiveness of Rule 506(c). We further discuss the definition of accredited investor, and request comment on the definition, in Section V of this release.

## II. Proposed Amendments Relating to Form D

### A. Background

Form D is the notice of an offering of securities conducted without registration under the Securities Act in reliance on Rule 504, 505 or 506 of Regulation D.<sup>32</sup> Under Rule 503 of Regulation D, an issuer offering or selling securities in reliance on Rule 504, 505 or 506 of Regulation D must file a notice of sales on Form D with the Commission for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering.<sup>33</sup> Form D is currently organized around 16 numbered items or categories of information. The information required to be provided in a Form D filing includes basic identifying information, such as the name of the issuer of the securities and the issuer's year and place of

<sup>32</sup> Regulation D contains separate exemptions for limited offerings in Rules 504, 505 and 506. Rule 504 [17 CFR 230.504] exempts the offer and sale of up to \$1 million of securities in a 12-month period by issuers that are not subject to reporting requirements under the Securities Exchange Act of 1934 (the "Exchange Act"). Rule 505 [17 CFR 230.505] exempts offerings by issuers of up to \$5 million of securities in a 12-month period. Form D also applies to offerings of securities without registration in reliance on the exemption contained in Section 4(a)(5) of the Securities Act [15 U.S.C. 77d(a)(5)].

<sup>33</sup> This 15-day time frame has remained unchanged since the adoption of Regulation D in 1982. In 2008, we revised Rule 503 to provide that when a Form D filing otherwise would be due on a weekend or holiday it will be deemed due on the next business day. *Electronic Filing and Revision of Form D*, Release No. 33-8891 (Feb. 6, 2008) [73 FR 10592 (Feb. 27, 2008)].

<sup>30</sup> 17 CFR 230.156.

incorporation or organization; information about related persons (executive officers, directors and promoters); the exemption or exemptions being claimed for the offering; and factual information about the offering, such as the duration of the offering, the type of securities offered and the total offering amount. Although the requirement to file a Form D pursuant to Rule 503 was a condition of Rules 504, 505 and 506 when all of these rules were originally adopted,<sup>34</sup> it is currently not a condition of those rules. Instead, under Rule 507 of Regulation D, an issuer will be disqualified from using Regulation D if it, or a predecessor or affiliate, is enjoined by a court for failure to comply with Rule 503.<sup>35</sup> The Commission can waive any such disqualification upon a showing of good cause.<sup>36</sup>

At the time the Commission adopted Regulation D and Form D in 1982, the Form D filing requirements in Rule 503 were intended to serve an important data collection function, including, among other things, for the Commission's rulemaking efforts.<sup>37</sup> Until 2008, however, issuers made Form D filings in paper format, making the extraction of information for large-scale

statistical analysis problematic.<sup>38</sup> In 2008, we adopted rule and form amendments that mandated the electronic filing of Form D on the Commission's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system in a structured format.<sup>39</sup> As a result of these amendments, which were phased in from September 2008 to March 2009, Form D filings are now machine-readable, and the Commission, its staff, other securities regulators and the public at large now have a greater ability to analyze the Regulation D offering market through the information supplied in electronic Form D filings. In addition, the information in Form D filings has been useful for a number of other purposes, such as serving as a source of information for investors<sup>40</sup> and facilitating the enforcement of the federal securities laws and the enforcement efforts of state securities regulators and FINRA.<sup>41</sup> For example, state securities regulators typically rely on Form D as their sole notice that a Rule 506 offering is being conducted because securities issued in Rule 506 offerings are "covered securities" under Section 18(b)(4)(D) of the Securities

Act<sup>42</sup> and therefore are exempt from state blue sky registration requirements.

We understand that some issuers are not making a Form D filing for Rule 506 offerings because the filing of Form D is not a condition of Rule 506. In addition, we are limited in our ability to gather information about Rule 506 offerings at the commencement of these offerings because Form D currently is not required to be filed until 15 calendar days after the first sale of securities in the offerings; and the absence of a closing filing requirement means that the Commission does not have a complete picture of Rule 506 offerings, such as the total amount of capital actually raised in these offerings. Other than the newly adopted requirement for issuers to indicate in Form D whether they are relying on Rule 506(c), Form D does not require information specific to Rule 506(c) offerings, such as information about the issuer's plans to engage in general solicitation, any practices used to satisfy the verification requirement in Rule 506(c) and the types of investors participating in Rule 506(c) offerings.

Accordingly, we are proposing a number of amendments to Regulation D and Form D. These amendments would require the advance filing of Form D for Rule 506(c) offerings, require the filing of an amendment to Form D after termination of a Rule 506 offering, expand the information requirements in Form D for offerings conducted under Rule 506 and disqualify issuers from using Rule 506 for future offerings until one year has elapsed after the required Form D filings are made if they, or their predecessors or affiliates, failed to comply, within the past five years, with the Form D filing requirements for a Rule 506 offering.

#### B. Timing of the Filing of Form D

We are proposing to amend Rule 503 to require issuers that intend to engage in general solicitation for a Rule 506(c) offering to file an initial Form D in advance of conducting any general solicitation activities. Currently, Rule 503 requires an issuer to file a Form D not later than 15 calendar days after the first sale of securities in a Regulation D offering. Under the proposed amendment, if an issuer has not otherwise filed a Form D for a Rule

<sup>34</sup> In 1988, the Commission proposed to eliminate the requirement to file a Form D as a condition to the availability of the Regulation D exemptions, noting that "[c]ommenters have frequently criticized" this condition. *Regulation D*, Release No. 33-6759 (Mar. 3, 1988) [53 FR 7870 (Mar. 10, 1988)]; *Regulation D*, Release No. 33-6812 (Dec. 20, 1988) [54 FR 309 (Jan. 5, 1989)] (reproposing the elimination of Rule 503 as a condition of the Regulation D exemptions after commenters expressed concern over the effect of the proposals on enforcement efforts and potential impairment of private rights of action). In 1989, the Commission removed the filing of Form D as a condition to the Regulation D exemptions. *Regulation D*, Release No. 33-6825 (Mar. 15, 1989) [54 FR 11369 (Mar. 20, 1989)].

<sup>35</sup> See Release No. 33-6759 ("As proposed, the filing obligation under Rule 503 would continue but would no longer be a condition to the exemption. In order to provide an incentive for filing the Form D in a timely manner, the Commission is proposing new Rule 507, which would disqualify an issuer from the use of the Regulation D exemptions if it had been found to have violated Rule 503."); Release No. 33-6825 (adopting Rule 507 as proposed).

<sup>36</sup> Rule 507(b) [17 CFR 230.507(b)].

<sup>37</sup> We stated in the proposing release for Regulation D:

An important purpose of the notice \* \* \* is to collect empirical data which will provide a basis for further action by the Commission either in terms of amending existing rules and regulations or proposing new ones. \* \* \* Further, the proposed Form will allow the Commission to elicit information necessary in assessing the effectiveness of Regulation D as a capital raising device for small businesses.

*Proposed Revision of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales*, Release No. 33-6339 (Aug. 7, 1981) [46 FR 41791, 41799 (Aug. 18, 1981)].

<sup>38</sup> In 1996, we proposed to eliminate the Form D filing requirement entirely and replace it with an issuer obligation to complete a Form D and retain it for a period of time. *Phase Two Recommendations of Task Force on Disclosure Simplification*, Release No. 33-7301 (May 31, 1996) [61 FR 30405 (June 14, 1996)]. After reviewing comments on the proposal, we decided to retain the requirement because the information collected in Form D filings was still useful to us "in conducting economic and other analyses of the private placement market." *Phase Two Recommendations of Task Force on Disclosure Simplification*, Release No. 33-7431 (July 18, 1997) [62 FR 39755, 39756 (July 24, 1997)].

<sup>39</sup> See Release No. 33-8891. At that time, we substantially revised Form D to simplify and restructure the form, eliminate outdated information requirements and update and supplement other information requirements. For example, we added requirements to provide revenue range information for the issuer, or net asset value range information in the case of pooled investment funds (subject to an option in both cases to decline to disclose); more specific information on the registration exemption claimed as well as information on any exclusion claimed from the definition of "investment company" under the Investment Company Act; information on the date of first sale in the offering; and information on whether the offering is expected to last over a year.

<sup>40</sup> *Id.* (noting that the Commission's Web site "advises potential investors in Regulation D offerings to check whether the company making the offering has filed a Form D notice and advises that '[i]f the company has not filed a Form D, this should alert you that the company might not be in compliance with the federal securities laws'").

<sup>41</sup> *Id.* (stating that "[t]he staffs of state securities regulators and [FINRA] also use Form D information to enforce securities laws and the rules of securities self-regulatory organizations").

<sup>42</sup> 15 U.S.C. 77r(b)(4)(D). Although Securities Act Section 18 preempts state registration and review of offerings of "covered securities," the states have investigated and brought a number of enforcement actions alleging fraud and deceit in Rule 506 offerings. See, e.g., letter from NASAA (stating that, in 2011, "state regulators took more than 200 enforcement actions related specifically to Rule 506 offerings").

506(c) offering, it would be required, at least 15 calendar days before commencing general solicitation for the offering, to file an initial Form D that includes the information required by the following items of Form D (the "Advance Form D"):

- Item 1. Basic identifying information on the issuer;
- Item 2. Information on the issuer's principal place of business and contact information;
- Item 3. Information on related persons;
- Item 4. Information on the issuer's industry group;
- Item 6. Identification of the exemption or exemptions being claimed for the offering;
- Item 7. Indication of whether the filing is a new filing or an amendment;
- Item 9. Information on the type(s) of security to be offered;<sup>43</sup>
- Item 10. Indication of whether the offering is related to a business combination;
- Item 12. Information on persons receiving sales compensation;<sup>44</sup> and
- Item 16. Information on the use of proceeds from the offering.

After the filing of an Advance Form D, the issuer would be required to file an amendment providing the remaining information required by Form D within 15 calendar days after the date of first sale of securities in the offering, as is currently required by Rule 503.<sup>45</sup>

A number of commenters on the Rule 506(c) Proposing Release, including numerous state securities regulators and several investor organizations, suggested that the Commission require Form D to be filed in advance of any general solicitation in Rule 506(c) offerings.<sup>46</sup>

<sup>43</sup> An issuer would be required to include the information required by Item 9 only to the extent that the information is known at the time of filing the Advance Form D.

<sup>44</sup> An issuer would be required to include the information required by Item 12 only to the extent that the information is known at the time of filing the Advance Form D.

<sup>45</sup> An issuer that has already filed a Form D containing complete information with respect to a Rule 506(c) offering would not be required to file an Advance Form D. This could occur, for example, when the use of general solicitation begins after the offering is underway and the first sale of securities has occurred for which a Form D has been filed more than 15 calendar days before the commencement of general solicitation in the offering.

<sup>46</sup> See, e.g., letters from AARP; AFL-CIO and AFR; Consumer Federation; Commissioner of Securities, State of Hawaii ("Hawaii Commissioner of Securities"); Indiana Securities Division; Massachusetts Securities Division (July 2, 2012) (noting that an advance filing requirement for Form D "will notify federal and state regulators that these offerings are in the marketplace, and they will give potential investors an opportunity to obtain basic information about the issuer and the offering"); Commissioner of Securities, State of Missouri

Some of these commenters stated that the advance filing of Form D would enable state securities regulators and investors, after seeing an advertisement or other notice for an offering, to more easily determine whether an issuer is at least attempting to comply with Rule 506(c).<sup>47</sup> One commenter noted that state securities regulators routinely review Form D filings to ensure that the offerings actually qualify for an exemption under Rule 506 and to look for "red flags" that may indicate that an offering may be fraudulent.<sup>48</sup> Other commenters stated that, with the advance filing of Form D, state securities regulators would be in a better position to ensure that no bad actors are participating in a Rule 506 offering<sup>49</sup> and to answer questions from investors who contact them after seeing an advertised offering.<sup>50</sup>

On the other hand, one commenter stated that the current 15-calendar day time frame to file a Form D following a sale provides a reasonable period for an issuer to prepare and submit the form while providing appropriate notice to regulators of a new Regulation D offering.<sup>51</sup> This commenter also argued that an issuer may not be certain of whether it will rely on Rule 506(b) or Rule 506(c) ahead of time.<sup>52</sup>

We appreciate these recommendations and recognize the concerns as well. We believe that requiring issuers to file an Advance Form D would assist the Commission's efforts to evaluate the use of Rule 506(c).

("Missouri Commissioner of Securities"); Commissioner of Securities and Insurance, State of Montana ("Montana Commissioner of Securities"); NASAA (noting that without an advance filing requirement for Form D and a filing requirement that is a condition of the exemption, "[a]n investigator who sees an advertised offering will have no simple way of knowing whether the issuer is engaged in a compliant Rule 506 offering or is merely advertising an unregistered, non-exempt public offering"); Fund Democracy, Consumer Action, Consumer Federation, AFL-CIO and AFR (May 24, 2012); Nevada Securities Division; Ohio Division of Securities; South Carolina Securities Commissioner; Virginia Division of Securities.

The Investor Advisory Committee recommended that the Commission require issuers to file either a new "Form GS" or a revised version of Form D as a precondition for relying on Rule 506(c). See letter from Investor Advisory Committee.

<sup>47</sup> See, e.g., letters from NASAA; Missouri Commissioner of Securities; Nevada Securities Division.

<sup>48</sup> See letter from NASAA. See also letter from Missouri Commissioner of Securities (stating that "filing the Form D better equips the state securities regulators to ensure compliance with Federal and state securities laws").

<sup>49</sup> See letter from Ohio Division of Securities (July 3, 2012).

<sup>50</sup> See, e.g., letters from Missouri Commissioner of Securities; NASAA.

<sup>51</sup> See letter from Managed Funds Association ("MFA") (Mar. 22, 2013).

<sup>52</sup> See letter from MFA (Sept. 28, 2012).

Although the Commission does not anticipate that its staff will review each Advance Form D filing as it is being made, the Advance Form D would be useful to the Commission and the Commission staff, as it would enhance the information available to the Commission to analyze offerings initiated under Rule 506(c), including issuers that initiated Rule 506(c) offerings but were unsuccessful in selling any securities through these offerings or chose alternative forms of raising capital. Currently, Form D is required to be filed only after the first sale of securities, which means that issuers that offered securities, but did not complete a sale, are not required to file a Form D, thereby limiting the Commission's ability to determine which issuers are facing challenges raising capital under Rule 506(c) and whether further steps by the Commission are needed to facilitate issuers' ability to raise capital under Rule 506(c). We also understand that the Advance Form D would be useful to state securities regulators and to investors in gathering timely information about Rule 506(c) offerings and the use of Rule 506(c).

We appreciate the sensitivity that some issuers may have regarding the disclosure of detailed information about a contemplated offering before the issuer has made a final decision to raise capital in a Rule 506(c) offering or before the first sale of securities has occurred. For this reason, we propose that the Advance Form D for Rule 506(c) offerings require only the information set forth above, with a requirement to file an amendment to the Form D that includes the remainder of the information required by Form D (including information regarding the terms of the offering that may not have been known at the time of the filing of the Advance Form D and therefore omitted from the Advance Form D, such as those called for by Item 9 and Item 12 of Form D) following the completion of a sale of securities in a Rule 506(c) offering on the timetable currently required under Rule 503. An issuer that wishes to provide all of the information required by Form D in the Advance Form D may do so, obviating the need to file an additional amendment unless otherwise required under Rule 503. An issuer could also file an Advance Form D without contemplating a specific offering, in order to have the flexibility to conduct an offering using general solicitation. We believe that this approach would allow the Commission to gather the information that it needs through Advance Form D filings

without unnecessarily burdening issuers or requiring issuers to disclose specific information about capital-raising plans before these plans have been determined.

#### Request for Comment

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

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

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

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

provide in the Advance Form D? Would it be more difficult for issuers to provide certain information in an Advance Form D? If so, which information?

5. We are proposing that an issuer have the option of either filing an Advance Form D for Rule 506(c) offerings to provide certain information required by Form D, with the complete Form D information provided in a subsequent amendment to Form D filed no later than 15 calendar days after the first sale of securities, or providing all of the required Form D information in the Advance Form D, if known at that point in the offering. Should issuers be provided this option? Or should issuers be limited to providing certain specified information in the Advance Form D and required to file a subsequent amendment, after the first sale of securities, to provide the remainder of the information required by Form D? Would allowing issuers to have the option of providing all of the information required by Form D no later than 15 calendar days before they commence general solicitation (as compared to the current requirement of no later than 15 calendar days after the first sale of securities) affect the quality or usefulness of the Form D information for purposes of the Commission's efforts to analyze the Rule 506 market? For example, what is the likelihood that issuers will be in a position to provide all of the information required by Form D no later than 15 calendar days before the commencement of general solicitation?

6. What would be the benefits of requiring the Advance Form D for Rule 506(c) offerings? What would be the costs to issuers, market participants and other parties? Would the requirement to file an Advance Form D deter issuers from conducting Rule 506(c) offerings? Would the requirement to file an Advance Form D have differing or unique effects on certain types of issuers, such as Exchange Act reporting companies, non-reporting companies, foreign companies or private funds?

7. Would potential investors or other market participants review Advance Form D filings on a real-time basis? If so, how would they use the information in the filings? How would state securities regulators use the Advance Form D filings?

8. Are there situations in which an Advance Form D filing should not be required? If so, what are these situations?

9. Should an Advance Form D filing be required before or at the commencement of all offerings under Rule 506, or all offerings under Regulation D? If not, why?

10. Are any other rule amendments necessary if the Commission were to require the advance filing of Form D for Rule 506(c) offerings, as proposed?

#### C. Form D Closing Amendment for Rule 506 Offerings

We are also proposing to amend Rule 503 to require the filing of a final amendment to Form D within 30 calendar days after the termination of any offering conducted in reliance on Rule 506. Regulation D does not currently contain a requirement to file a final amendment to Form D. When Regulation D was originally adopted, issuers were required to amend the Form D filing every six months during the course of an ongoing offering and were required to make a final Form D filing within 30 days of the final sale of securities in the offering.<sup>54</sup> In 1986, we eliminated these requirements, anticipating that removing the final Form D filing requirement would have negligible consequences for investors and would result in some savings for both issuers and the Commission.<sup>55</sup>

A number of commenters on the Rule 506(c) Proposing Release suggested that the Commission reinstate a closing Form D filing requirement to enhance the flow of information to the Commission, other regulators and investors, and to improve the ability of the Commission and others to track the use of Rule 506.<sup>56</sup> For example, one commenter stated that the "information provided in a closing amendment will be invaluable to the Commission and states in determining the extent to which issuers are making exempt public offerings."<sup>57</sup>

In order to gather more complete information about the size and characteristics of the Rule 506 offering market, we believe that it would be appropriate to propose requiring the filing of a closing amendment for offerings conducted in reliance on Rule 506. The proposed requirement would be in addition to the existing provisions of Rule 503 that require the filing of an amendment to Form D to correct a material mistake of fact or error in a previously filed Form D, to reflect a change in information provided in a

<sup>54</sup> See Release No. 33-6389.

<sup>55</sup> We noted at the time that "[t]he information contained in the original notification has proved sufficient for the Commission's enforcement surveillance for compliance with the requirements of Regulation D." *Form D and Regulation D*, Release No. 33-6663 (Oct. 2, 1986) [51 FR 36385, 36386 (Oct. 10, 1986)].

<sup>56</sup> See letters from NASAA; Ohio Division of Securities (July 3, 2012); Massachusetts Securities Division (July 2, 2012).

<sup>57</sup> Letter from Ohio Division of Securities (July 3, 2012).

<sup>53</sup> 17 CFR 243.100(a)(2).



previously filed Form D except in certain instances, and on an annual basis for offerings that are ongoing. The filing of a separate closing amendment within 30 days after termination of the offering would not be required if all of the information that would be included in such an amendment has already been provided in a Form D filing and the issuer has checked the box for a closing filing in such filing.

As noted above, the Commission today has a greater ability to analyze the Regulation D offering market due to electronically-filed Forms D. In recent years, the Regulation D market has also grown considerably in size and significance.<sup>58</sup> These factors suggest that collecting information upon the termination of Rule 506 offerings would provide greater benefits than it did in 1986, when this requirement was eliminated.

We propose to require the filing of a closing amendment to Form D for offerings under both Rule 506(b) and Rule 506(c). This is, in part, to enable more complete analysis and comparison of the use of long-standing Rule 506(b) and new Rule 506(c). In addition, because the overwhelming majority of Regulation D offerings are conducted in reliance on Rule 506, and these offerings account for substantially all of the capital reported as being raised under Regulation D, this approach should provide the Commission with substantially complete information about the Regulation D market without imposing additional compliance burdens on smaller offerings conducted in reliance on Rule 504 or Rule 505.<sup>59</sup>

A closing Form D amendment, in conjunction with changes to Form D to require additional information on Rule 506 offerings, as discussed below, would provide the Commission with more complete information about Rule 506 offerings. For example, under current rules, information about the amount of capital raised in a Regulation D offering is limited to the “total amount sold” as of the date of the last Form D filing. Any amounts sold between the date of the last Form D filing and the date the offering is terminated are not currently required to be reported on Form D. As a result, the

actual amount of capital raised at the time the offering is terminated cannot be conclusively determined.<sup>60</sup>

Under our proposal, the closing amendment would be due no later than 30 calendar days after termination of the offering;<sup>61</sup> in contrast, Rule 503 formerly required a closing amendment to be made no later than 30 days “after the last sale of securities” in the offering.<sup>62</sup> Our proposed change addresses the potential concern that issuers may not know, at the time a sale is made, that such sale will be the last sale of securities in the offering. As proposed, the closing amendment must be filed when the issuer terminates the offering, whether after the final sale of securities in the offering or upon the issuer’s determination to abandon the offering. Until the closing amendment is filed, the offering is deemed to be ongoing and the issuer would be subject to the current Rule 503 requirements to file amendments to Form D at least annually and otherwise as needed to reflect changes in previously filed information and to correct material mistakes and errors.<sup>63</sup>

#### Request for Comment

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

12. As proposed, a closing Form D amendment would be required to be filed not later than 30 calendar days after the termination of a Rule 506 offering. Should we use a different time frame for the filing of the closing Form D amendment? If so, why and how long?

13. We have not proposed that the filing of a closing amendment be a condition of Rule 506. If the closing amendment were a condition of Rule 506 and an issuer failed to make the required filing, the issuer would lose the exemption for the entire offering at issue, including sales that were made while the issuer was in compliance with

Rule 503. Should the filing of a closing Form D amendment be a condition to Rule 506(b) or Rule 506(c)?

14. As proposed, the closing amendment must be filed within 30 calendar days after the issuer terminates the offering. Should we provide a more detailed explanation of what constitutes the termination of an offering?

15. What would be the costs to issuers of filing a closing Form D amendment? Would a requirement to file a closing Form D amendment deter issuers from conducting Rule 506 offerings? Are there any costs or benefits that we have not discussed? If so, please specify.

16. What are the alternatives to requiring a closing amendment to Form D? For example, rather than requiring a closing amendment to Form D for all Rule 506 offerings, should the Commission only require an amendment when an issuer sells an amount of securities in excess of a certain percentage (for example, 10%) above the amount reported as sold in the last Form D or Form D amendment previously filed for the offering?

17. Rule 503(a)(3)(ii) currently requires issuers to file an amendment to a previously filed Form D to reflect changes in the information provided, subject to certain enumerated exceptions. Should the proposed closing amendment to Form D serve as a substitute for this type of Form D amendment? If the proposed closing amendment requirement is adopted, should Rule 503(a)(3)(ii) be eliminated or simplified, so that only certain changes (e.g., the size of the offering) would trigger the obligation to amend Form D?

18. Alternatively, in light of the proposal to impose disqualification from reliance on Rule 506 for failures to comply with Rule 503, as discussed in Section II.E below, should the Commission further amend Rule 503(a)(3)(ii), or provide additional guidance, in regard to the circumstances in which an amendment to Form D is or is not required? For example, should the Commission amend Rule 503 to set forth additional situations in which an amendment to Form D would not be required to reflect a change in the information provided in a previously filed Form D? Conversely, should the Commission amend Rule 503 to require the filing of an amendment to Form D to reflect a change in information where such amendment is not currently required under Rule 503?

19. As discussed in Section II.D below, we are proposing amendments to Form D to require additional information, primarily with respect to Rule 506 offerings. After an issuer files

<sup>58</sup> See Vladimir Ivanov and Scott Bauguess, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009–2012* (July 2013), available at <http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf> (“Ivanov/Bauguess Study”).

<sup>59</sup> See *id.* (in 2012, approximately 95% of Regulation D offerings claimed reliance on Rule 506; these offerings accounted for approximately 99% of capital reported as being raised under Regulation D for the year).

<sup>60</sup> For example, in 2010, issuers sought to raise \$1.2 trillion in reported Regulation D offerings, but only \$905 billion was reported as sold at the time of the initial filing. See *id.*

<sup>61</sup> See Proposed Rule 503(a)(4)(v).

<sup>62</sup> See Release No. 33–6389.

<sup>63</sup> 17 CFR 230.503(a)(3).



a Form D that includes this additional information, any change to this information (for example, a change in the number of purchasers who qualified as accredited investors or the methods used to verify accredited investor), would generally require the filing of an amendment to Form D under current Rule 503. Should the Commission amend Rule 503 so that an amendment to Form D would not be required when there is a change to some or any of this information? If so, which information and why?

20. Should issuers conducting ongoing offerings pursuant to Rule 506(c) be required to amend their Form D filings more frequently than on an annual basis to provide, to the extent that such information has not already been provided in a previous Form D filing, updated information regarding the dollar amount of any securities sold during such period pursuant to such offering, and any other securities of the same class (or any securities convertible into or exercisable or exchangeable for securities of the same class) sold during such period pursuant to an exemption from the registration requirements of the Securities Act? If yes, how frequently? For example, on a semi-annual basis or a quarterly basis?

21. Rule 503 requires an amendment to a previously filed Form D to correct a material mistake of fact or error “as soon as practicable after discovery of the mistake or error” and an amendment to a Form D to reflect a change in the information previously provided, except in certain situations, “as soon as practicable after the change.” Would such non-specific filing deadlines make it difficult for market participants to determine whether an issuer is disqualified from reliance on Rule 506 for failure to comply with Form D filing obligations, including the determination of when a cure period expires? Should the Commission consider amending Rule 503 to set forth more specific time frames for filing these amendments to Form D?

22. Should the Commission amend Rule 503 so that an annual amendment for an ongoing offering is required to be filed on a specified date, such as the one-year anniversary of the initial filing of a Form D or Advance Form D?

23. Should the Commission provide additional guidance on what constitutes a “material mistake of fact or error” that would necessitate the filing of a Form D amendment?

24. Rule 503(a)(4) currently requires an issuer that files an amendment to a previously filed Form D to provide current information in response to all requirements of the form regardless of

why the amendment is filed. Should the Commission amend this requirement in Rule 503? If so, how? What are the costs and benefits associated with this requirement?

25. Should the presentation of information in a closing Form D amendment be different than in an initial Form D filing or in other Form D amendments? If so, how?

26. If an issuer filed an Advance Form D but subsequently terminated the offering without selling any securities, what information should the issuer be required to provide regarding the offering in its closing amendment?

27. Are any other rule amendments necessary if the Commission were to require the filing of a closing amendment, as proposed? If so, please specify.

#### *D. Proposed Amendments to the Content Requirements of Form D*

We are proposing revisions to Form D to add information requirements primarily for Rule 506 offerings, which would enable the Commission to gather additional information on the use of Rule 506 and thereby assist the Commission in evaluating the impact of Rule 506(c) on the existing Rule 506 market.<sup>64</sup> We believe that such additional information may also be useful to state securities regulators and to investors. In the Rule 506(c) Adopting Release, we adopted a revision to Form D to add a separate field or check box in Item 6 of Form D for issuers to indicate whether they are relying on Rule 506(b) or Rule 506(c).<sup>65</sup> We believe that requiring issuers to indicate in Form D that they are relying on Rule 506(c) will provide important information to assist in our efforts to evaluate the use of general solicitation in Rule 506(c) offerings and the size of this offering market as well as provide notice to state regulators and investors about issuers seeking to rely on Rule 506(c). The proposed revisions to Form D set forth below would require additional information on Rule 506 offerings, including information specific to Rule 506(c) offerings, such as the types of general solicitation used and

the methods used to verify the accredited investor status of purchasers, which we also believe will be useful.

A number of commenters on the Rule 506(c) Proposing Release recommended that the Commission further expand the information requirements of Form D in regard to offerings under Rule 506(c).<sup>66</sup> Some commenters stated that they supported amending Form D to require more information about the issuer's plans to engage in general solicitation and how the issuer plans to verify that purchasers are accredited investors.<sup>67</sup> The Investor Advisory Committee recommended that the Commission adopt either a new form or a revised version of Form D that would elicit information on, among other things, the control persons of the issuer, counsel representing the issuer (if any), the issuer's accountants or auditors (if any), the amount sought to be raised, a brief description of the issuer's general solicitation plans and a brief description of the issuer's proposed business and use of proceeds.<sup>68</sup> Another commenter proposed a list of expanded information requirements for Form D, including disclosure of the issuer's Web site; if the issuer is selling interests in a pooled investment fund, disclosure of any adviser to the fund and whether the adviser is registered as an investment adviser or is otherwise exempt; a warning that finder's fees may trigger state and federal salesperson and broker-dealer registration requirements; and certification that the offering is not disqualified under the proposed bad actor rules.<sup>69</sup> One commenter stated that Form D should be revised to indicate whether an offering will be conducted by means of an Internet platform, and if so, the identity of the Internet platform.<sup>70</sup> A number of commenters stated that the Commission should consider requiring additional information in Form D about the issuers

<sup>66</sup> See, e.g., letters from AARP; AFL-CIO and AFR; Consumer Federation; Investor Advisory Committee; NASAA (referring to the recommendations in its July 3, 2012 letter); Massachusetts Securities Division (referring to the recommendations in its July 2, 2012 letter).

<sup>67</sup> See letters from AARP; AFL-CIO and AFR (stating that “the Commission should . . . expand Form D to require additional information regarding both planned general solicitation and advertising activities and plans for verification of accredited investor status”); Consumer Federation (stating that “[i]f the Commission wishes to monitor [accredited investor verification] practices, and we believe it must, it can best achieve that by requesting information on Form D regarding the issuer's verification plans.”).

<sup>68</sup> See letter from Investor Advisory Committee.

<sup>69</sup> See letter from NASAA (referring to suggested revisions to Form D in its July 3, 2012 letter).

<sup>70</sup> See letter from Massachusetts Securities Division (July 2, 2012).

<sup>64</sup> In April 2010, we proposed numerous changes to our rules related to offerings of asset-backed securities. See *Asset-Backed Securities*, Release No. 33-9117 (Apr. 7, 2010) [75 FR 23328 (May 3, 2010)]. That proposal included proposed revisions to Form D for offerings of structured finance products. Those proposed changes are still outstanding and are not being addressed in this release.

<sup>65</sup> We also revised Item 6 of Form D by renaming the check box for “Rule 506,” which will be renamed “Rule 506(b),” and the check box for “Section 4(5),” which will be renamed “Section 4(a)(5)” to update the reference to former Section 4(5) of the Securities Act.

that propose to engage in general solicitation activities under Rule 506.<sup>71</sup>

In contrast, one commenter urged the Commission not to require additional disclosures in Form D on the issuer's proposed business and use of proceeds. This commenter asserted that Form D currently requires appropriate information on the identity of the issuer and a factual description of the offerings.<sup>72</sup>

We believe that amending Form D to require additional information on Rule 506 offerings would enable the Commission to better analyze the impact on the existing Rule 506 market of eliminating the prohibition against general solicitation in Rule 506(c) offerings. This information would enhance the ability of the Commission to evaluate the use of Rule 506(c) by requiring information in Form D on the types of investors that participate in Rule 506(c) offerings, the issuer's plans to engage in general solicitation and methods used to satisfy the verification requirement in Rule 506(c). This information may also be useful to investors seeking to learn more about an offering being conducted pursuant to Rule 506(c) or about the types of issuers conducting these offerings. Finally, this information may be useful in facilitating enforcement efforts should any fraud or other securities law violations occur in these offerings. As discussed below, we propose to revise existing Item 2, Item 3, Item 4, Item 5, Item 7, Item 9, Item 14 and Item 16 of Form D and to add new Items 17 through 22 to Form D.

Item 2, which requires the issuer to provide principal place of business and telephone contact information, would be amended to require the identification of the issuer's publicly accessible (Internet) Web site address, if any. We are proposing this change because issuers are increasingly using their public Web sites as vehicles for the dissemination of information to investors, while many investors are

turning to company Web sites as sources of information to aid in their investment decisions.<sup>73</sup> We believe that the identification of the issuer's public Web site address in Form D would be useful in gathering additional information on the issuers that conduct offerings under Regulation D. This proposed amendment would apply to offerings under Rule 504, Rule 505, Rule 506 and Section 4(a)(5).

Item 3, which requires information about "related persons" (executive officers, directors, and persons performing similar functions for the issuer, as well as persons who have functioned as a promoter of the issuer within the prior five years), would be amended to require, when the issuer is conducting a Rule 506(c) offering, the name and address of any person who directly or indirectly controls the issuer in addition to the information currently required for "related persons." We believe that more comprehensive information about persons who exercise control over the issuer would be helpful in obtaining a more complete picture of the issuers and other market participants that are involved in Rule 506(c) offerings.

In 2008, we deleted the requirement in Item 3 to identify as "related persons" owners of 10% or more of a class of the issuer's equity securities. In proposing this change to Item 3, we stated, among other things, that "we believe we can collect sufficient information to satisfy the regulatory objectives of Form D by requiring only the identification of executive officers, directors, and promoters."<sup>74</sup> We also noted that "issuers that are not reporting companies have raised privacy concerns with respect to the requirement to identify 10% equity owners who are not executive officers, directors, or promoters because they do not already have to disclose this information, and the widespread availability of the information on our Web site may raise additional privacy concerns for these companies as they seek to raise capital through a private offering."<sup>75</sup> While we continue to recognize these privacy concerns for issuers that conduct offerings under Rules 504, 505 and 506(b), we believe that this additional information on controlling persons who are not "related persons" could assist us in developing a more comprehensive

understanding of the market participants in the Rule 506(c) market.

Item 4, which requires the issuer to identify its industry group from a specified list, would be amended to require the issuer to fill in a "clarification" field if the issuer checks the "Other" box. Though Item 4 currently includes a number of different industry group classifications, we believe that requiring the issuer to further describe its industry group when it is not included in the pre-established list will enhance our understanding of the types of issuers that are seeking to rely on Regulation D, while imposing a minimal burden on the issuer. This information will assist us in having more complete information regarding the range of industries of the companies using Rule 506. Without this additional requirement, conclusions drawn regarding industry trends would exclude all those issuers who checked "Other." This proposed amendment would apply to offerings under Rules 504, Rule 505, Rule 506 and Section 4(a)(5).

Item 5, which requires information on issuer size, would be amended to replace the "Decline to Disclose" option with a "Not Available to Public" option. We are proposing this change because we believe that an operating company that includes information about its revenues, or a hedge fund or other investment fund that includes information about its net asset value, in general solicitation materials for a Rule 506(c) offering, or that otherwise makes such information publicly available, should be required to provide revenue range or net asset value range information, as applicable, in Form D. If, however, the issuer does not include this information in general solicitation materials for a Rule 506(c) offering, does not otherwise make the information publicly available and otherwise uses reasonable efforts to maintain the confidentiality of such information, we believe that the issuer should have the option of not providing such information by choosing a "Not Available to Public" checkbox. This proposed amendment would also apply to Rule 504 and Rule 505 offerings, as well as offerings under Section 4(a)(5). Requiring issuers to include this information, to the extent they otherwise publicly disclose it, would be useful to the Commission's staff in evaluating the type or size of issuers using these exemptions.

Item 7, which requires the issuer to state whether a Form D is an initial filing or an amendment to a previously filed Form D, would be amended to add separate fields or check boxes for issuers

<sup>71</sup> See, e.g., letters from Consumer Federation (stating that "[t]he Form D filing requirement could provide greater benefit to investors as well if its content was expanded to include basic information about the issuer"); Fund Democracy, Consumer Action, Consumer Federation, AFL-CIO and AFR (May 24, 2012) (stating that "[t]he Commission should also consider requiring disclosure of additional information in Form D about issuers that propose to engage in [general solicitation] activities").

<sup>72</sup> See letter from MFA (Mar. 22, 2013). This commenter also recommended that investment advisers be permitted to comply with any information requirement on Form D by either providing a reference to a publicly available Form ADV applicable to a private fund or to any publicly available information filed with a state regulator, depending on whether the investment adviser is registered with the Commission or with a state.

<sup>73</sup> See, e.g., *Commission Guidance on the Use of Company Web sites*, Release No. 34-58288 (Aug. 1, 2008) [73 FR 45862 (Aug. 7, 2008)].

<sup>74</sup> Release No. 33-8891.

<sup>75</sup> *Id.*

to indicate whether they are filing an Advance Form D or a closing Form D amendment. We are proposing this change in connection with our proposals to require the filing of an Advance Form D for Rule 506(c) offerings and the filing of a final amendment to Form D after the termination of any offering conducted in reliance on Rule 506. The addition of these check boxes would require issuers to identify clearly in a Form D whether the Form D is an Advance Form D or a closing Form D amendment and could provide information about the beginning and ending of offerings that could be useful in analyzing the market.

Item 9, which requires information on the types of securities offered, would be amended to require information, to the extent applicable, on the trading symbol and a generally available security identifier ("security identifier") for the offered securities.<sup>76</sup> In general, this amendment would be relevant only to issuers that have securities of the same class as the offered securities traded on a national securities exchange, alternative trading system ("ATS") or any other organized trading venue. We are proposing this change because we believe that requiring these types of issuers to provide the trading symbol and security identifier for the securities being offered, if any, would provide useful information on the nature of the securities being offered in Rule 506 offerings, as well as assist us in additional data gathering with respect to these offerings, without placing an undue burden on issuers.<sup>77</sup> This proposed amendment would also apply to offerings under Rule 504, Rule 505 and Section 4(a)(5).

Item 14, which elicits information on whether securities have been or may be sold to non-accredited investors and the number of investors who have already invested in the offering, would be amended to add a table requiring, with respect to Rule 506 offerings, information on the number of accredited investors and non-accredited investors

that have purchased in the offering, whether they are natural persons or legal entities and the amount raised from each category of investors. We believe that this additional information would be useful in determining, among other things, the composition of investors who invest in Rule 506 offerings, the respective amounts they have invested, and the types of offerings and issuers in which each category of investors invests.

Item 16, which requires information on the amount of the gross proceeds of the offering that the issuer used or proposes to use for payments to related persons, would be amended to require information on the percentage of the offering proceeds from a Rule 506 offering that was or will be used: (1) To repurchase or retire the issuer's existing securities; (2) to pay offering expenses; (3) to acquire assets, otherwise than in the ordinary course of business; (4) to finance acquisitions of other businesses; (5) for working capital; and (6) to discharge indebtedness. This additional information requirement would apply only to Rule 506 offerings by issuers that are not pooled investment funds. This information would enable the Commission and investors to better understand why issuers are seeking to raise capital using Rule 506.

The proposed new items of Form D—Items 17 through 22—would require issuers to provide the following additional information with respect to offerings conducted pursuant to Rule 506:

- The number and types of accredited investors that purchased securities in the offering (e.g., natural persons who qualified as accredited investors on the basis of income or net worth);
- if a class of the issuer's securities is traded on a national securities exchange, ATS or any other organized trading venue, and/or is registered under the Exchange Act, the name of the exchange, ATS or trading venue and/or the Exchange Act file number and whether the securities being offered under Rule 506 are of the same class or are convertible into or exercisable or exchangeable for such class;
- if the issuer used a registered broker-dealer in connection with the offering, whether any general solicitation materials were filed with FINRA;
- in the case of a pooled investment fund advised by investment advisers registered with, or reporting as exempt reporting advisers<sup>78</sup> to, the

Commission, the name and SEC file number for each investment adviser who functions directly or indirectly as a promoter<sup>79</sup> of the issuer;

- for Rule 506(c) offerings, the types of general solicitation used or to be used (e.g., mass mailings, emails, public Web sites, social media, print media and broadcast media);<sup>80</sup> and
  - for Rule 506(c) offerings, the methods used or to be used to verify accredited investor status (e.g., principles-based method using publicly available information, documentation provided by the purchaser or a third party, reliance on verification by a third party, or other sources of information; one of the methods in the non-exclusive list of verification methods in Rule 506(c)(2)(ii); or another method).
- Some of this additional information would be specific to Rule 506(c) offerings and would enable the Commission to develop a greater understanding of the new Rule 506(c) market. Other additional information requirements would apply to all Rule 506 offerings. As stated above, the adoption of Rule 506(c) has increased the need for information on Rule 506 offerings in general, in order to assess not only the nature and characteristics of the new Rule 506(c) market but also the changing nature of the Rule 506 market as a whole. We believe that requiring this additional information for all Rule 506 offerings would be useful to the Commission, investors and state regulators.

Although the proposed revisions to Form D primarily require additional information with respect to Rule 506

Advisers Act of 1940 (the "Advisers Act") [15 U.S.C. 80b-3(l)] because it is an adviser solely to one or more venture capital funds, or under Rule 203(m)-1 under the Advisers Act [17 CFR 275.203(m)-1] because it is an adviser solely to private funds and has assets under management in the United States of less than \$150 million. See Glossary of Terms to Form ADV.

<sup>79</sup> The definition of promoter in Rule 405 [17 CFR 230.405] includes any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer or any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

<sup>80</sup> We expect that the categories of social media, print media and broadcast media would be limited to efforts by the issuer, or an agent of the issuer, to directly communicate to potential investors, such as paid advertisements.

<sup>76</sup> We recognize that the CUSIP number is in common use domestically for this purpose, but anticipate that other suitable identifiers may become available in the future.

<sup>77</sup> We note that, in 2007, we requested comment on whether it would be appropriate to require information on CUSIP numbers and trading symbols in Form D and that we did not require this information in Form D in connection with the Form D amendments we adopted in 2008. See *Electronic Filing and Simplification of Form D*, Release No. 33-8814 (June 29, 2007) [72 FR 37376 (July 9, 2007)] and Release No. 33-8891. In light of the adoption of Rule 506(c), we are proposing to require this information in Form D at this time because we believe that this information would enable us to engage in expanded analysis of the Form D data for Rule 506 offerings.

<sup>78</sup> An exempt reporting adviser is an investment adviser that qualifies for the exemption from registration under Section 203(l) of the Investment

offerings, we note that the proposed revisions to Item 2, Item 4, Item 5 and Item 9 would require additional information on offerings under Rule 504, Rule 505 and Securities Act Section 4(a)(5). For the same reasons stated above, we believe that if an issuer has made information on its size publicly available, or does not take reasonable efforts to maintain such information as confidential, the issuer should be required to provide this information under Item 5 of Form D for offerings under the other Regulation D exemptions or under Section 4(a)(5). Similarly, we believe that the proposed additional information in Item 2, Item 4 and Item 9 would provide useful information on the nature of the issuers and the offered securities in regard to offerings under Rule 504, Rule 505 or Section 4(a)(5), while any additional burden on issuers in providing this information would be minimal.

#### Request for Comment

28. Should we require issuers to provide additional information in Form D filings as we have proposed? Should this additional information be required only for Rule 506(c) offerings? If so, why and what should that information be? For example, should the Commission require issuers to provide information in Form D about counsel representing the issuer (if any) or the issuer's accountants or auditors (if any), as some have suggested? If the additional information were required only for Rule 506(c) offerings, what impact would this requirement have on the use of Rule 506(c) as compared to the use of Rule 506(b)? Are there particular items of information that do not provide sufficiently useful information or would be especially burdensome for issuers to provide? Should some of the additional information that we propose to require in Form D not be required for offerings under Rule 506(b)? If so, which requirements and why? Would the additional information that we propose to request in Form D provide useful information to state securities regulators in responding to inquiries from constituents about offerings conducted under Rule 506 and in enforcement efforts?

29. What are the costs or burdens on issuers in providing the additional information in Form D, as proposed? Are there ways to reduce any costs or burdens on issuers? Would the requirement to provide this additional information result in issuers choosing not to rely on Rule 506 to raise capital?

30. Should some of the additional information that we propose to require

in Form D be required only in the closing amendment to Form D?

31. Should the Commission define what it means for an issuer to make information publicly available for purposes of Item 5, or to take reasonable efforts to maintain such information as confidential? For instance, would confidential information about an issuer that is publicly disseminated by a third party in violation of a duty to keep such information confidential be deemed to be publicly available?

32. Should the Commission amend Item 5 to require an issuer that conducts a Rule 506(c) offering to provide information on its revenue range or aggregate net asset value range, as applicable, regardless of whether the issuer has otherwise made this information publicly available (for example, by including this information in general solicitation materials)?

33. Should the Commission amend Form D to include a check box for issuers to indicate whether they are filing an Advance Form D or a closing amendment to Form D, as proposed? Should there be other changes to Form D to indicate that an issuer is filing an Advance Form D or a closing amendment?

34. Should the Commission amend Form D to provide a checkbox to indicate that the issuer is required to provide disclosure of prior "bad actor" events under Rule 506(b)(2)(iii)?

35. Should pooled investment funds be required to provide additional or different information in connection with Rule 506(c) offerings? Should the Commission require a pooled investment fund to disclose its investment adviser's CRD<sup>81</sup> number rather than (or in addition to) its adviser's SEC registration number? Item 3 of Form D asks for the identity of the issuer's promoter. Should information on a pooled investment fund's investment adviser be added to Item 3, rather than the proposed Item 20? Does the proposed amendment to Item 3, requiring disclosure of any controlling persons, raise any particular concerns for pooled investment funds?

36. Should the Commission require issuers to provide more or less specific information in Form D about the methods of general solicitation used in Rule 506(c) offerings? Do certain

methods of general solicitation raise particular concerns from an investor protection standpoint? For example, are some methods of general solicitation more likely to result in an increased risk of fraud or manipulation or more likely to reach non-accredited investors? Should we require additional information in Form D with respect to these methods of general solicitation? If so, what information should we require issuers to provide regarding these solicitation methods?

37. Should the Commission require issuers to provide more or less specific information on Form D about the methods used to verify accredited investor status? If so, what information should the Commission require issuers to provide regarding verification practices? For example, should we require issuers to identify any registered broker-dealers, registered investment advisers, attorneys, certified public accountants or other third parties that assisted the issuer with the verification process?

#### E. Proposed Amendment to Rule 507

We are proposing an amendment to Rule 507 of Regulation D that is intended to improve Form D filing compliance in connection with Rule 506 offerings. Rule 507 currently only disqualifies an issuer from using Regulation D if the issuer, or a predecessor or affiliate, has been enjoined by a court for violating the filing requirements in Rule 503. We propose to amend Rule 507 so that, in addition to the existing disqualification from Rules 504, 505 and 506 of Regulation D that arises from a court injunction, an issuer would be disqualified automatically from using Rule 506 in any new offering for one year if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the past five years, with Form D filing requirements in a Rule 506 offering; provided that such one-year period would commence following the filing of all required Form D filings or, if the offering has been terminated, following the filing of a closing amendment.

When Regulation D was originally adopted in 1982, compliance with Form D filing obligations was a condition of Rules 504, 505 and 506. In 1989, the Commission amended Regulation D to eliminate the filing of Form D as a condition to those rules.<sup>82</sup> The Commission did so with the expectation that the concurrent adoption of Rule 507 would provide an incentive for issuers

<sup>81</sup> A Central Registration Depository ("CRD") number is a system identification number assigned to each investment adviser that registers or files reports with the SEC or a state through the Investment Adviser Registration Depository Web site. The Web site facilitates registration of investment advisers and reporting by exempt reporting advisers. CRD numbers also are assigned to broker-dealers.

<sup>82</sup> See Release No. 33-6825.

to file Form D.<sup>83</sup> In fact, the disqualification provision of Rule 507 has rarely been invoked since its adoption,<sup>84</sup> and we understand that some issuers are not filing a Form D for Rule 506 offerings.<sup>85</sup>

A number of commenters on the Rule 506(c) Proposing Release, including the Investor Advisory Committee, urged us to require the filing of Form D as a condition to Rule 506(c), so that the failure to file a Form D would result in the loss of the exemption for the offering.<sup>86</sup> One commenter stated that it generally supported conditioning the availability of Regulation D on the filing of Form D, provided that an issuer that filed a Form D in good faith but with inadvertent technical errors would have an adequate opportunity to cure its mistake while relying on Regulation D.<sup>87</sup>

Other commenters argued against conditioning Rule 506(c) on the filing of a Form D.<sup>88</sup> One commenter stated that

<sup>83</sup> See *id.*

<sup>84</sup> In order to invoke the Rule 507 disqualification provision, the Commission must first bring a civil injunctive action in a federal district court and receive a court order enjoining the defendant from future violations of Rule 503. The Commission has brought few such enforcement actions. See *SEC v. Printz Capital Management*, No. 10–7379 (E.D. Pa. Mar. 15, 2011) (order enjoining defendants from, among other things, failing to file a Form D for a Regulation D offering).

<sup>85</sup> Many commenters have asserted that non-compliance with Form D filing obligations is widespread. See, e.g., letters from Investor Advisory Committee (stating that “[i]t is generally acknowledged that a significant number of issuers do not currently file Form D . . .”); AARP (stating that “[s]imply adding a checkbox to a form that too often goes unfilled and then only after the fact is inadequate to the task at hand.”); AFL–CIO and AFR (stating that “many issuers today flout the Form D filing requirement for such offerings, further limiting the Commission’s ability to provide effective oversight”). See also Securities and Exchange Commission, Office of Inspector General, *Regulation D Exemption Process* (Mar. 31, 2009) (“OIG Report”), available at <http://www.sec-oig.gov/Reports/AuditsInspections/2009/459.pdf> (stating that while the Commission staff “strongly encourage companies to comply with Rule 503, they are aware of instances in which issuers have failed to comply with Rule 503 . . .”). Based on its analysis of the filings required by FINRA Rules 5122 and 5123 during the period of December 3, 2012 to February 5, 2013, DERA estimates that as much as 9% of the offerings represented in the FINRA filings for Regulation D or other private offerings that used a registered broker-dealer did not have a corresponding Form D filing. See Section IX.B.4.a of this release.

<sup>86</sup> See letters from Investor Advisory Committee (stating that “[t]he filing of Form D should be made a condition for relying on the Regulation D exemption.”); Massachusetts Securities Division (referring to the recommendations in its July 2, 2012 letter); NASAA; Consumer Federation; AARP.

<sup>87</sup> See letter from MFA (Mar. 22, 2013).

<sup>88</sup> See letters from Committee on Securities Regulation of the New York City Bar Association; Federal Regulation of Securities Committee, Business Law Section of the American Bar Association (“ABA Fed. Reg. Comm.”); Securities

such a condition would have potential negative effects on the private placement market.<sup>89</sup> Another commenter argued that if Rule 506(c) were conditioned on the filing of a Form D, the consequences of losing the exemption would be significantly disproportionate to the harm of failing to file the Form D, including the loss of “covered security” status under Section 18 of the Securities Act.<sup>90</sup> One commenter maintained that conditioning the availability of the exemption on the filing of a Form D would be inappropriate in light of the purpose of Form D to enable the Commission to better understand and analyze how Regulation D is being used.<sup>91</sup>

We believe it is appropriate to strengthen the incentives for issuers to comply with Rule 503, which would make it more likely that the Commission will obtain Form D data that provides a more complete perspective on Rule 506(c) offerings and the Rule 506 marketplace as a whole, thereby facilitating efforts by both the Commission and state securities regulators to analyze developments in that marketplace. Further, we believe that an effective incentive for issuers to comply with the Form D filing requirement is one that results in meaningful consequences for failing to file the form, without requiring action on the part of the Commission or the courts. We are nonetheless mindful that the incentive should be commensurate to the obligation so that the failure to comply does not give rise to disproportionate consequences.

Although we considered requiring compliance with Rule 503 as a condition of Rule 506, or at least Rule 506(c), we have determined not to propose making Form D filing a condition of Rule 506. We are reluctant to impose a sanction on an issuer as severe as the loss of a Securities Act exemption, which would give purchasers rescission rights and result in loss of “blue sky” pre-emption,<sup>92</sup> for

Regulation Committee, Business Law Section of the New York State Bar Association (“SRC of NYSBA”); Linklaters LLP.

<sup>89</sup> See letter from Linklaters LLP.

<sup>90</sup> See letter from SRC of NYSBA.

<sup>91</sup> See letter from ABA Fed. Reg. Comm.

<sup>92</sup> Section 18 of the Securities Act exempts “covered securities” from state review and registration requirements. Under Section 18(b)(4)(D), “covered securities” is defined to include securities offered or sold in transactions pursuant to Commission rules issued under Section 4(a)(2). Thus, if an offering fails to comply with Rule 506, the securities offered and sold in the offering would not be “covered securities,” and the issuer would violate state law unless it had complied with applicable review and registration

failure to file a form that is intended primarily to provide information to the Commission. If compliance with Rule 503 were reinstated as a condition to Rule 506, then non-compliance at any stage of an offering could result in the entire offering being held to violate Section 5 of the Securities Act and applicable state securities laws. For example, in the case of a continuous or long-lived offering, this could mean that an issuer’s failure to file an annual amendment or closing amendment would trigger loss of the Securities Act exemption, which would give purchasers rescission rights and result in loss of blue sky pre-emption for offers and sales that occurred, in certain cases, years before the failure to file a Form D triggered the loss of an exemption. We believe that the consequences of a Section 5 violation would be disproportionate in those circumstances. More generally, we are concerned about possible disruptions in the Rule 506 market if market participants could not be certain of the availability of Rule 506 for an offering until after the offering was terminated and all filings required under Rule 503 were made. We are, however, soliciting comment on whether Rule 506 should be conditioned on Form D filing compliance.

Instead of making the Form D filing a condition to Rule 506, we propose to amend Rule 507 by adding new paragraph (b), under which issuers would be disqualified from using Rule 506 for future offerings if they, or their predecessors or affiliates, had failed to comply within the past five years with the Form D filing requirements of Rule 503 in connection with an offering under Rule 506.<sup>93</sup> Under proposed Rule 507(b), disqualification would end one year after the required Form D filings are made or, if the offering has been terminated, one year after a closing amendment is made.<sup>94</sup> We believe that a one-year disqualification period, which would not commence until the required filings are made, should create a significant incentive to file Form D on a timely basis without unduly burdening market participants.

The proposed disqualification would not affect offerings of an issuer or an affiliate that are ongoing at the time of the filing non-compliance, including the offering for which the issuer failed to make a required filing, and these offerings could continue to rely on Rule

requirements or could avail itself of a state law exemption.

<sup>93</sup> Existing Rule 507(b) would be redesignated as Rule 507(c).

<sup>94</sup> See Proposed Rule 507(b).

506 as long as the conditions of Rule 506 continue to be met. Disqualification would apply only to future offerings. We further propose that disqualification from using Rule 506 for future offerings would be subject to a cure period and the waiver provisions in Rule 507, as discussed below. As with the proposed closing amendment requirement and for the same reasons, we propose to apply new Rule 507(b) to all offerings under Rule 506.

Under the proposal, disqualification would arise only with respect to non-compliance with Rule 503 that occurred after the effectiveness of new Rule 507(b). We considered whether to apply the disqualification for failure to comply with the filing requirement before the effective date of the rule. We are not proposing such a requirement. We are proposing to include a five-year look-back period, so that non-compliance that occurred more than five years before the commencement of a Rule 506 offering would not trigger disqualification, even if the required Form D filings had not been made. We believe that this limitation would avoid potential burdens on market participants that might otherwise be created, such as the possibility of indefinite disqualification in situations where it is not possible for the required Form D filings for a previous offering to be made, without undermining the incentive for issuers in Rule 506 offerings to comply with their Form D filing obligations. A look-back period would also reduce the cost of confirming whether an issuer is disqualified from reliance on Rule 506, and could reduce the number of delinquent filings required to be made before the one-year disqualification period starts to run. The look-back period would not extend past the effective date of the rule, so issuers seeking to conduct a Rule 506 offering would assess compliance with Rule 503 by looking back only to the effective date of the disqualification rule.

Disqualification would arise based on non-compliance with Rule 503 by the issuer and its predecessors and affiliates, as provided in current Rule 507. We believe that proposed Rule 507(b) should be structured in this manner so that an issuer cannot avoid disqualification by simply conducting future offerings through a successor or other affiliated entity. We are soliciting comment on whether this approach is appropriate for all issuers.

Because this approach creates potentially significant consequences for an issuer's future capital-raising activities based on its failure to file or amend the form for a current or prior

offering, we anticipate that proposed Rule 507(b), if adopted, could significantly reduce non-compliance with Form D filing requirements for Rule 506 offerings. We further believe that disqualification from using Rule 506 for a one-year period after all required Form D filings have been made is a sufficient period of time to incentivize compliance with Rule 503 while at the same time not serving as a disproportionate penalty for the failure to file or amend Form D.

When we amended Regulation D to remove Rule 503 compliance as a condition to Rules 504, 505 and 506, we noted that the Form D filing condition was subject to frequent criticism.<sup>95</sup> As discussed above, however, the usefulness of Form D filings has increased significantly since we required them to be filed in electronic form on EDGAR. In addition, the proposed amendment differs from the prior Rule 503 condition in that the amendment would impose disqualification only prospectively and would not apply to any offerings that are ongoing at the time of filing non-compliance. Disqualification would also be limited to one year after all Form D filing requirements have been satisfied, and the look-back period for Rule 506 offerings that were not in compliance with Rule 503 would be limited to five years and would not extend to non-compliance that occurred prior to the effective date of proposed Rule 507(b).

The proposed amendment also includes mitigating provisions that were not applicable when compliance with Rule 503 was a condition to Regulation D. As discussed below, under the proposal, there would be a cure period for late filings, as well as recourse to the waiver provision of Rule 507, under which disqualification may be waived by the Commission for good cause shown. We believe that these provisions should help address concerns regarding the disproportionality and consequences of inadvertent failures to file or amend Form D.

**Cure period.** We propose that, solely for purposes of determining whether disqualification under Rule 507 would arise, issuers would generally be regarded as having complied with the Rule 503 filing deadlines for a Form D or Form D amendment if they filed the relevant filing within a cure period after the filing is due under Rule 503.

A number of commenters expressed concern about the possibility that an issuer could be unfairly penalized for inadvertent technical errors relating to its Form D filing and recommended that

the Commission provide an opportunity for the issuer to correct such errors.<sup>96</sup> We recognize this concern and therefore propose a cure period of 30 calendar days, which would be available in the case of an issuer's failure to file a Form D or Form D amendment on a timely basis. This provision is intended to allow an additional period of time in which issuers could detect a failure to file or amend Form D (for example, due to clerical error or technological problem) and make the requisite filing. We believe that 30 calendar days is a sufficient period of time for issuers to address an inadvertent error and that a longer period may have the effect of encouraging a greater degree of non-compliance with the deadlines for Form D filings. By including a cure period of 30 calendar days, we would provide issuers with certainty that the benefits of Rule 506 would remain available so long as a failure to file Form D was corrected during the specified time frame.

The proposed cure period would be available only for an issuer's first failure to file timely a Form D or Form D amendment in connection with a particular offering. We believe that permitting issuers to repeatedly rely on the 30-day cure period for Form D filings for the same offering would undermine incentives to comply with the filing deadlines specified in Rule 503.

**Waiver.** Rule 507 currently provides that disqualification under the rule may be waived by the Commission if the Commission determines "upon a showing of good cause, that it is not necessary under the circumstances that exemption be denied."<sup>97</sup> This formulation is substantially the same as the waiver provision included in new Rule 506(d), the bad actor disqualification provisions for Rule 506 adopted today.<sup>98</sup> We believe that the

<sup>96</sup> See, e.g., letters from MFA (Mar. 22, 2013) (stating that "[w]e generally support the filing of Form D being made a condition to relying on Regulation D, provided that an issuer that filed the Form in good faith but with inadvertent technical errors in the Form would have sufficient opportunity to cure its mistake while maintaining its reliance on Regulation D. \* \* \* Upon notice of such an error, a fund manager or issuer should be provided a reasonable period of time to file a corrected Form D."); Investor Advisory Committee (stating that "[i]n implementing this recommendation [to condition a Regulation D exemption on the filing of Form D], which is intended to encourage broad compliance with the filing requirement, the Committee encourages the Commission also to consider incorporating measures to ensure that it does not impose undue penalties for inadvertent violations by small, unsophisticated issuers.").

<sup>97</sup> Rule 507(b).

<sup>98</sup> See Rule 506(d)(2)(iii).

<sup>95</sup> See Release No. 33-6759.

Commission should have the ability to waive disqualification in situations where an issuer or its predecessors or affiliates have failed to comply with Rule 503, provided that the issuer can demonstrate good cause that it is not necessary to deny the exemption. For example, a waiver may be appropriate if an issuer can show that the persons who controlled the issuer at the time of the failure to file no longer exercise influence over it, or if curing the failure is impossible (for example, because a defaulting affiliate no longer exists and therefore cannot make the missing Form D filings or amendments) and good cause can otherwise be shown that it is not necessary in the circumstances to deny the exemption.

Under current rules, the Commission has delegated authority to the Director of the Division of Corporation Finance to grant disqualification waivers under Rule 507.<sup>99</sup> We anticipate that, if the proposal were adopted, we would similarly delegate authority for waivers of disqualification under new Rule 507(b).

#### Request for Comment

38. Is disqualifying issuers and their affiliates and successors from reliance on Rule 506 for future offerings an appropriate sanction to incentivize compliance with Form D filing requirements? Why or why not? How would these amendments affect the Rule 506 market?

39. Proposed Rule 507(b) would not impose any consequences with respect to the offering for which an issuer failed to file or amend a Form D as required, or for other offerings that were ongoing at the time of the failure to file. Would disqualification from reliance on Rule 506 for future offerings be a sufficient incentive for issuers to comply with Form D filing requirements? Why or why not? Should an issuer engaged in an ongoing offering be permitted to continue relying on Rule 506 if it or an affiliate failed to comply with the filing requirements of Rule 503?

40. Should the result be the same for failure to comply with all parts of Rule 503? For example, should the result be the same when the issuer does not file an amendment to a Form D as it would when the issuer does not make an Advance Form D filing or an initial Form D filing? Should there be a distinction between annual amendments to Form D and amendments required to correct a

material mistake of fact or error or to reflect a change in information?

41. As proposed, outside of the cure period, disqualification under Rule 507(b) would not be lifted until one year after all required Form D filings are made or, in the case of offerings that had been terminated, a closing amendment is made. Is this an appropriate requirement? If not, what are the alternatives?

42. What would be an appropriate disqualification period as an alternative to the proposal, such that issuers would be sufficiently incentivized to comply with Form D filing obligations without unduly burdening capital formation under Regulation D? Is the proposed one-year disqualification period appropriate, or should the disqualification period be shorter or longer? Why?

43. Under the proposal, disqualification would not be triggered by any failure to comply with Rule 503 that occurred more than five years before the offering. Is it appropriate to include a look-back period in this way? Why or why not? If so, is the five-year period proposed appropriate, or should it be shorter or longer? If so, why?

44. The look-back period would not extend to the period prior to the effective date of proposed Rule 507(b). Is it appropriate not to consider these filings before the effective date of the rule? Why or why not?

45. Are there particular situations where disqualification under Rule 507(b) should not be triggered for failure to file a required Form D or Form D amendment?

46. As proposed, issuers would be disqualified from using Rule 506 based on noncompliance with Rule 503 within the past five years in connection with a Rule 506 offering by their predecessors and affiliates. Is it appropriate to disqualify issuers for non-compliance by their predecessors and affiliates? If not, would it be too easy to avoid disqualification by using an affiliate or successor entity to conduct a Rule 506 offering? How should the Commission address this concern?

47. Would portfolio companies that are affiliates of a private fund be unduly affected by any disqualification triggered by noncompliance of the private fund, its predecessors and its affiliates with Rule 503? If so, should the Commission treat portfolio companies of private funds differently for disqualification purposes? If yes, how?

48. Is it appropriate to prohibit a private fund or its successors or affiliates from engaging in a subsequent offering under Rule 506 if the private

fund failed to comply with Rule 503?

For instance, if a private fund issuer fails to file its Form D or the appropriate amendments in accordance with the filing requirements of Rule 503, is it a disproportionate response to prohibit any private funds affiliated with the private fund from relying on Rule 506? Should proposed Rule 507(b) contain an express provision that excludes affiliated private funds from such consequences?

49. Is it appropriate to include a cure period for noncompliance with Rule 503? Would the benefits of including a cure period justify the potential detriments, such as undercutting issuers' incentive to comply with the existing Rule 503 filing deadlines? If a cure period is included, should it apply to all required Form D filings, or only some? For example, should there be a cure period for the closing amendment only? Or for amendments, but not the initial filing? Should the Advance Form D have a cure period? Instead of providing a cure period, should we move back the deadlines for Form D filings? Are there other alternatives to a cure period or further provisions that the Commission should consider?

50. The cure period is not available if the issuer has previously failed to comply with a Form D filing deadline in connection with the same offering. Is this condition appropriate? Why or why not? Should the cure period be available if the issuer has failed to timely file a Form D or Form D amendment more than once in connection with the same offering? If so, how many times in a single offering or otherwise how frequently should an issuer be able to invoke the cure period? Should the cure period become available again after a certain amount of time, such as five years, has elapsed since the issuer previously failed to comply with a Form D filing deadline?<sup>100</sup> Should we impose additional requirements or conditions on an issuer's ability to take advantage of the cure period? For example, should the cure period be unavailable if the failure to file Form D was intentional? Would additional guidance be necessary to explain what constitutes intentional or repeated failures to file? Should the issuer have to indicate that the filing is late and state the reason for its being late? Should there be more specific requirements to rely on the cure, such as the issuer suffered an intervening event (for example, a clerical or technological problem)? Alternatively,

<sup>100</sup> For example, should an issuer, such as a private fund, that is conducting a continuous offering be permitted to have a cure period if five or more years have elapsed since the initial failure to timely file a Form D?

<sup>99</sup> See Rule 30–1(c) of the Commission's Rules of Organization and Program Management [17 CFR 200.30–1(c)].



should the cure period be automatically available to all issuers without other conditions or qualifications? Are there other events that should make the cure period unavailable to an issuer?

51. Should a cure period be available for repeated or intentional failures to comply with Rule 503? If yes, should there be a look-back period for determining whether failures to comply with Rule 503 are repeated?

52. If a cure period is included, is the 30-day period we propose appropriate? Should the cure period be shorter or longer? Should it be the same for all types of filings, or should the Commission vary the cure period for different filings? For example, should there be a shorter or longer cure period provided for the Advance Form D filing, the closing amendment or other amendments, compared to other Form D filings?

53. As an alternative or in addition to a cure period, should we amend Rule 507 so that disqualification can be triggered by a Commission cease-and-desist order as well as court injunction? Should we add a provision similar to existing Rule 508,<sup>101</sup> under which insignificant deviations from the requirements of Rule 503 would not result in disqualification under proposed Rule 507(b) if the issuer could demonstrate good faith and a reasonable attempt to comply with filing requirements?

54. Should we amend Rule 507 to disqualify an issuer from relying on Rule 506 for future offerings if such issuer, or any predecessor or affiliate of the issuer, has been subject to a Commission order requiring such person to cease-and-desist from committing or causing any violation or future violation of proposed Rule 509 or proposed Rule 510T, both of which are discussed below?

55. Should the Commission amend Form D to provide a checkbox to indicate that the issuer is relying on the proposed cure period?

56. Is it appropriate to amend Rule 507's existing waiver provision so it applies to proposed Rule 507(b)? Should we provide guidance regarding factors

that the Commission may take into account when considering whether to grant a waiver?

57. Are there other methods for improving compliance with Rule 503 that the Commission should consider? For example, should there be other consequences for non-compliance with Form D filing requirements? Would the combination of proposed Rule 507(b) and increased enforcement of existing Rule 503, which could result in monetary penalties or imposition of disqualification under existing Rule 507, provide a sufficient incentive to comply with these requirements?

58. As an alternative to proposed Rule 507(b), should the availability of Rule 506 be conditioned on compliance with Rule 503, as was the case when Regulation D was originally adopted? If so, should compliance with Rule 503 be a condition to both Rule 506(b) and Rule 506(c), as well as to Rules 504 and 505? Alternatively, should compliance with Rule 503 be a condition to reliance on new Rule 506(c) only? Should the availability of Rule 506 be conditioned on compliance with all of the filing requirements of Rule 503 or should it be conditioned on compliance with only some of the filing requirements of Rule 503 (and if so which filing requirements)? If compliance with Rule 503 is a condition to Rule 506, should there be a mechanism for issuers to request a waiver from Form D filing requirements? If so, how should that mechanism work? Are any other rule amendments necessary if the Commission were to require compliance with Form D filing requirements as a condition to reliance on Rule 506? If so, what amendments?

### III. Proposed Rule and Rule Amendments Relating to General Solicitation Materials

We are proposing new requirements and amendments to address investor protection concerns arising from the ability of issuers, including private funds, to generally solicit for their Rule 506(c) offerings. First, we propose to add new Rule 509 to require all issuers to include: (i) Legends in any written general solicitation materials used in a Rule 506(c) offering; and (ii) additional disclosures for private funds if such materials include performance data. Second, we propose amendments to Rule 156 under the Securities Act that would extend the guidance contained in the rule to the sales literature of private funds. Each of these proposals is discussed in greater detail below. Finally, we request comment on manner and content restrictions for general solicitation materials of private funds, a

subject on which we received a number of comments and suggestions.

#### A. Mandated Legends and Other Disclosures for Written General Solicitation Materials

In light of issuers' ability to generally solicit their Rule 506(c) offerings, we are proposing requirements for issuers to better inform potential investors as to whether they are qualified to participate in these offerings, the type of offerings being conducted and certain potential risks associated with such offerings. A number of commenters on the Rule 506(c) Proposing Release recommended that the Commission adopt content restrictions or other requirements with respect to general solicitation materials used by issuers, such as private funds, in Rule 506(c) offerings.<sup>102</sup> For example, the Investor Advisory Committee recommended that the Commission "take steps to ensure that any performance claims in materials used as part of general solicitations are based on appropriate performance reporting standards."<sup>103</sup> Some commenters also recommended that the Commission require the inclusion of legends, warning labels or mandatory risk disclosures in general solicitation materials used in these offerings.<sup>104</sup>

While we believe that further consideration following experience with offerings under new Rule 506(c) is needed with respect to potential content restrictions for issuers' general solicitation materials, we are proposing new Rule 509, which would require all issuers to include the following prominent legends in all written general solicitation materials:

- The securities may be sold only to accredited investors, which for natural persons, are investors who meet certain minimum annual income or net worth thresholds;<sup>105</sup>

<sup>102</sup> See, e.g., letters from AFL-CIO and AFR; Investor Advisory Committee; Sen. Levin; CFA Institute; Consumer Federation; Hawaii Commissioner of Securities; ICI; IDC; L. Neumann; Montana Commissioner of Securities; NASAA; Nevada Securities Division; Ohio Division of Securities; P. Turney; Sens. Reed, Levin, Durbin, Harkin, Lautenberg, Franken and Akaka; South Carolina Securities Commissioner; Virginia Division of Securities.

<sup>103</sup> Letter from Investor Advisory Committee.

<sup>104</sup> See letters from P. Rutledge (recommending a legend stating that all sales in the offering will be to accredited investors); CFA Institute (recommending a prominent "surgeon's general"-type warning label and mandated disclosures that address the potential risks of Rule 506(c) offerings); BetterInvesting (recommending mandatory risk disclosure language that would appear at the beginning of all general solicitation materials).

<sup>105</sup> This part of the legend may be modified in accordance with any higher standards that may be applicable to the issuer, such as qualified clients (as

<sup>101</sup> 17 CFR 230.508. Under Rule 508, the failure to comply with a term, condition or requirement of Rule 504, Rule 505 or Rule 506 will not result in the loss of the exemption from the registration requirements of Section 5 for any offer or sale of securities to a particular individual or entity, if the person relying on the exemption shows the failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; the failure to comply was insignificant with respect to the offering as a whole; and a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Rule 504, Rule 505 or Rule 506. *Id.*

- The securities are being offered in reliance on an exemption from the registration requirements of the Securities Act and are not required to comply with specific disclosure requirements that apply to registration under the Securities Act;
- The Commission has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials;
- The securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and
- Investing in securities involves risk, and investors should be able to bear the loss of their investment.

We believe that such legends would better inform potential investors as to whether they are qualified to participate in Rule 506(c) offerings and certain potential risks that may be associated with such offerings. Written general solicitation materials may combine two or more of these required statements in a single sentence, provided that each of the required disclosures is clear and easy to understand. Similarly, written general solicitation materials may use any wording that clearly communicates the information required to be disclosed. Compliance with the proposed legend requirements, however, does not relieve an issuer from the requirement to take reasonable steps to verify that purchasers in a Rule 506(c) offering are accredited investors.

We also recognize the specific concerns that commenters have expressed regarding private funds' ability to advertise to the general public, especially in light of the fact that private funds raise a significant amount of capital in Rule 506 offerings.<sup>106</sup> Under Rule 506(c), private funds, such as hedge funds, venture capital funds and private equity funds, will be permitted to engage in general solicitation in compliance with the rule without losing the exclusions from the definition of "investment company" under Section 3(c)(1)<sup>107</sup> or Section 3(c)(7)<sup>108</sup> of the

defined by Rule 205-3 under the Advisers Act [17 CFR 275.205-3]) or qualified purchasers (as defined by Section 2(a)(51) of the Investment Company Act [15 U.S.C. 80a-2(a)(51)]).

<sup>106</sup> See Ivanov/Bauguess Study.

<sup>107</sup> 15 U.S.C. 80a-3(c)(1) (excluding from the definition of "investment company" any "issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities").

<sup>108</sup> 15 U.S.C. 80a-3(c)(7) (excluding from the definition of "investment company" any "issuer, the outstanding securities of which are owned exclusively by persons who, at the time of

Investment Company Act.<sup>109</sup> Several commenters on the Rule 506(c) Proposing Release recommended that we impose additional conditions on private funds that rely on Rule 506(c). In particular, these commenters believed that general solicitation materials of private funds should be subject to some form of content requirements and/or restrictions.<sup>110</sup> For example, some believed that private funds engaging in general solicitation should be held to performance and advertising standards that are analogous to mutual fund standards.<sup>111</sup> One of these commenters suggested that the Commission develop a rule tailored to the manner in which private funds calculate and present performance, rather than extending mutual fund performance rules to private funds.<sup>112</sup> Some commenters made other suggestions, such as requiring each private fund relying on Rule 506(c) to disclose that the private fund is not registered with the Commission and should not be confused with a registered fund, such as a mutual fund.<sup>113</sup>

In response to these concerns, we are proposing that an additional legend and disclosures be required for private fund written general solicitation materials. First, we propose that private funds

acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities"). The term "qualified purchaser" is defined in Section 2(a)(51) of the Investment Company Act [15 U.S.C. 80a-2(a)(51)] and the rules thereunder.

<sup>109</sup> See Rule 506(c) Adopting Release, at Section II.E (discussing the effect of Section 201(b) of the JOBS Act, which provides that "[o]ffers and sales exempt under [amended Rule 506] shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation").

<sup>110</sup> See, e.g., letters from AFL-CIO and AFR; Consumer Federation; Rep. Waters (supporting the establishment of standards for reporting performance and fees by private funds); ICI (recommending the imposition of content restrictions on private fund advertising and requiring certain disclosures in private fund advertisements to avoid investor confusion with mutual funds).

<sup>111</sup> See, e.g., letters from Fund Democracy; ICI; IDC; Sen. Levin; NASAA.

<sup>112</sup> See letter from ICI (stating that "[w]e do not recommend that the content rule applicable to mutual fund performance advertisements . . . be extended to private funds. We strongly recommend, rather, that the Commission develop a rule tailored to the ways private funds calculate and present performance.").

<sup>113</sup> See, e.g., letters from Consumer Federation (stating that the Commission should require private fund advertisements to include "a clear, prominent warning that they are not mutual funds and carry special risks."); Fund Democracy (stating that the Commission should "require explicit, large-font disclaimers that hedge funds are not mutual funds and present special risks."); ICI (recommending that the Commission require disclaimers regarding the performance figures or measures displayed in any private fund advertisements).

include a legend on any written general solicitation materials that the securities offered are not subject to the protections of the Investment Company Act.<sup>114</sup> We believe it is appropriate to include a legend regarding a private fund's status under the Investment Company Act because the Act provides important protections that are not applicable to private funds or their investors. For example, the Investment Company Act includes limitations on self-dealing, affiliated transactions and leverage and requirements regarding independent board members, none of which apply to private funds, and the proposed legend would serve to alert investors and the broader general public to this fact. The legend also may help address any misimpression regarding the level of statutory and regulatory protections that apply to investors in a private fund.

Second, we propose that Rule 509 require private funds to include certain disclosures in any written general solicitation materials that include performance data. These disclosures are similar to certain disclosures required by Rule 482 under the Securities Act for advertisements and other sales materials of registered investment companies.<sup>115</sup> Specifically, proposed Rule 509(c) would require any private fund written general solicitation materials that include performance data to include a legend disclosing that:

- Performance data represents past performance;
- past performance does not guarantee future results;
- current performance may be lower or higher than the performance data presented;
- the private fund is not required by law to follow any standard methodology

<sup>114</sup> Private funds could combine the legend regarding the Investment Company Act with the legend regarding disclosure obligations under the Securities Act to simply state that the securities offered are not subject to the protections of the Investment Company Act or required to comply with specific disclosure requirements that apply to registration under the Securities Act.

<sup>115</sup> 17 CFR 230.482. We note that the Commission proposed amendments to Rule 482, which have not yet been adopted, as part of its recent money market fund reform proposals. The proposed amendments would require money market funds to include certain disclosure statements on advertisements and sales materials designed to inform investors about the risks of investing in money market funds and the risks of a floating net asset value, if applicable. See *Money Market Fund Reform; Amendments to Form PF*, Release No. 33-9408 (June 5, 2013) [78 FR 36834 (June 19, 2013)].

We are requesting comment on the extent to which "liquidity funds," which are private funds that seek to maintain a stable net asset value (or minimize fluctuations in their net asset values) and thus can resemble money market funds, should be required to include similar disclosure statements in written general solicitation materials.

when calculating and representing performance data; and

- the performance of the fund may not be directly comparable to the performance of other private or registered funds.

The proposed rule would also require the legend to identify either a telephone number or a Web site where an investor may obtain current performance data.

We believe that many investors, both sophisticated and unsophisticated, consider performance to be a significant factor when selecting investments, including when selecting private funds.<sup>116</sup> As such, we believe that the proposed disclosures are a meaningful way to highlight that there are limitations on the usefulness of past performance data, as well as the inherent difficulty of comparing performance of a private fund with other private funds and with registered products, such as mutual funds.

Further, we are proposing to require that if a private fund's written general solicitation materials include performance data, then such data must be as of the most recent practicable date considering the type of private fund and the media through which the data will be conveyed, and the private fund would be required to disclose the period for which performance is presented.<sup>117</sup> Because investors consider performance to be one of the most significant factors when evaluating investments, we are concerned that private funds presenting non-current performance data may confuse, and even mislead, investors regarding the fund's current performance, particularly if the fund's performance has changed significantly after the period reflected in the advertisement. In addition, by proposing to require disclosure of either a telephone number or a Web site where an investor may obtain current performance data, we seek to address the concern that a potential investor may be reviewing written general

solicitation materials with performance data that, although at the time it was published was as of the most recent practicable date, could now be considered non-current because more current performance data is available.<sup>118</sup>

We are also proposing to require private funds that include performance data that does not reflect the deduction of fees and expenses in their written general solicitation materials to disclose that fees and expenses have not been deducted and that if such fees and expenses had been deducted, performance may be lower than presented. We believe it is important for investors to be informed about whether performance information presented reflects the deduction of fees and expenses.

As proposed, the requirement to include these legends and other disclosures, as applicable, would not be a condition of the Rule 506(c) exemption. Therefore, the failure to include legends or other disclosures in any written general solicitation materials as required by Rule 509 would not render Rule 506(c) unavailable for the offering. We recognize the potentially disproportionate consequences that would result if an inadvertent error in, or omission of, the legends or disclosures results in a violation of Section 5 of the Securities Act, as well as state securities laws and the uncertainty that issuers would have regarding the availability of Rule 506(c) for their offerings.

Instead, we are proposing to amend existing Rule 507(a) so that Rule 506 would be unavailable for an issuer if such issuer, or any of its predecessors or affiliates, has been subject to any order, judgment or court decree enjoining such person for failure to comply with Rule 509. We believe that the possibility of disqualification from reliance on Rule 506 would provide issuers with sufficient incentive to comply with the requirements of Rule 509, without penalizing them unduly for an inadvertent error in, or the omission of, a legend or other required disclosure in written general solicitation materials.

We recognize the Commission's experience with Rule 507 as it relates to compliance with the Form D filing requirements of Rule 503 and our belief today that the incentives for compliance with these requirements must be

strengthened.<sup>119</sup> We have decided, however, not to propose that non-compliance with Rule 509 would result in disqualification from reliance on Rule 506 without requiring action on the part of the Commission or the courts. We recognize this differs from our treatment of non-compliance with Rule 503 under proposed Rule 507(b); however, we are concerned that such a disqualification provision could result in disproportionate consequences for inadvertent errors or omissions, particularly in light of the large amounts of written communications that many issuers may use during the course of a Rule 506(c) offering that could be viewed as written general solicitation materials triggering proposed Rule 509. Consideration of an approach similar to proposed Rule 507(b) may be more appropriate after first assessing the level of compliance Rule 509 once it is in effect. In this regard, we believe that it is reasonable to expect a higher level of compliance with proposed Rule 509, which would require limited, standardized information about Rule 506(c) offerings, than the current level of compliance with Rule 503, which requires the public filing of a Form D that notifies the market of the occurrence of an offering and contains issuer- and offering-specific information. As a result, including the required legends and other disclosures in written general solicitation materials would seem less likely to raise any concerns for issuers. We believe that Rule 507(a), with its provision that disqualification would occur only if a court takes injunctive action, may be better suited for addressing the varied facts and circumstances that may cause an issuer not to include the required legends and other disclosures in its written general solicitation materials and for determining whether disqualification for this failure is appropriate. While we are not proposing that compliance with Rule 509 be a condition to Rule 506(c) or that non-compliance trigger disqualification without action on the part of the Commission or courts, we are soliciting comment on both of these alternative approaches.

We also are requesting comment on whether content restrictions should apply to private fund general solicitation materials, but we are not proposing to prohibit private funds from including performance information in general solicitation materials at this time. The presentation of performance information, like other information used in general solicitation and other

<sup>116</sup> See *Study Regarding Financial Literacy Among Investors* (Aug. 30, 2012), available at <http://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf> (Commission staff study indicating that retail investors find information regarding investment performance to be useful and relevant before purchasing an investment product); see also *Proposed Amendments to Investment Company Advertising Rules*, Release No. 33-8101 (May 17, 2002) [67 FR 36712 (May 24, 2002)].

<sup>117</sup> We are not proposing that private funds provide performance data for a specific period (e.g., as of the most recently completed month) because we understand that the investment strategies employed by private funds vary. For instance, the most recent practicable date for which performance data is available may differ between a hedge fund with liquid assets and a private equity fund with illiquid and hard-to-value assets.

<sup>118</sup> Under the proposed rule, we intend current performance data to mean as of the last date on which the private fund customarily determined the valuation of its portfolio securities. We do not expect a private fund to value its portfolio for the sole purpose of providing updated current performance under proposed Rule 509.

<sup>119</sup> See Section II.E of this release.

materials, is subject to the antifraud provisions of the federal securities laws.<sup>120</sup> Compliance with the proposed legend and disclosure requirements does not relieve an issuer from the obligation to comply with these antifraud requirements. We note that performance data for certain private funds are available from other sources and that material deviations between reported performance and performance included on general solicitation materials could be misleading.<sup>121</sup> Furthermore, as we noted in the Rule 506(c) Adopting Release, we believe it is appropriate for advisers to private funds to review their compliance policies and procedures and make appropriate updates to such policies and procedures, particularly if the private funds intend to engage in general solicitation activity.<sup>122</sup>

<sup>120</sup> See, e.g., *In the Matter of Oppenheimer Asset Management Inc. and Oppenheimer Alternative Investment Management, LLC*, Release No. IA-3566 (Mar. 11, 2013); *In the Matter of Sentinel Investment Management Corp.*, Release No. IA-3556 (Feb. 22, 2013) (settled enforcement action alleging that adviser misrepresented to investors that client's investments in private limited partnerships were growing and performing well); *In the Matter of Calhoun Asset Management, LLC, et al.*, Release No. IA-3428 (July 9, 2012) (settled enforcement action alleging that hedge fund adviser disseminated marketing materials that contained misrepresentations about performance and unsupported performance returns); *In the Matter of Belal K. Faruki*, Release No. IA-3405 (May 17, 2012) (settled enforcement action alleging hedge fund adviser made material misrepresentations to an investor regarding the fund's track record); *In the Matter of GMB Capital Management LLC, et al.*, Release No. IA-3399 (Apr. 20, 2012) (settled enforcement action alleging hedge fund adviser made misrepresentations in marketing materials, meetings with potential investors, and a Web site interview that the adviser subsequently reprinted and distributed to investors and potential investors regarding the funds' historic performance).

<sup>121</sup> For instance, performance information must be reported to the Commission in a non-public filing on Form PF. Question 17 of Form PF requires certain registered investment advisers managing private funds to report to the Commission the private fund's performance information as reported to current and prospective investors. While Question 17 instructs advisers to provide the most representative performance results if the fund reports different performance results to different groups of investors, we would expect an adviser to be able to explain and justify the difference between performance information included in any written communications used in a Rule 506(c) offering and that which is reported in such adviser's Form PF report, if applicable. Private funds may also voluntarily report performance data to publicly-available databases.

<sup>122</sup> See Rule 506(c) Adopting Release, at Section II.E (noting that "[w]e believe that investment advisers that have implemented appropriate policies and procedures regarding, among other things, the nature and content of private fund sales literature, including general solicitation materials, are less likely to use materials that materially mislead investors or otherwise violate the federal securities laws.").

## Request for Comment

59. Should we require all issuers to include the proposed legends in written general solicitation materials? Why or why not? Are accredited investors already aware of the information included in the proposed legends? Would the proposed legends be effective in reducing the incidence of non-accredited investors participating in Rule 506(c) offerings?

60. Is it appropriate for the Commission to provide for disqualification from reliance on Rule 506 for non-compliance with Rule 509? How would this affect the Rule 506(c) market? Should the Commission amend Rule 507 to also include Commission cease-and-desist and administrative proceedings? Would another mechanism provide a better incentive for issuers to include legends and other disclosures in written general solicitation materials that relied on a simpler enforcement mechanism but did not impose an immediate disqualification?

61. Should the Commission condition Rule 506(c) on compliance with the proposed requirements of Rule 509? What effect would such a condition have on the Rule 506 market? If compliance with Rule 509 were a condition of Rule 506(c), should the Commission provide for a cure mechanism for inadvertent errors in, or the omission of, legends or other required disclosure in the written general solicitation materials?<sup>123</sup> If so, what should be the parameters of this cure mechanism?

62. Do the proposed legends and required disclosures appropriately inform potential investors as to whether they are qualified to participate in Rule 506(c) offerings, the type of offerings being conducted and the potential risks that may be associated with such offerings? If not, how could they be revised to do so? Should additional legends or disclosures be required and, if so, what should these additional legends or disclosures be?

<sup>123</sup> For example, Securities Act Rule 164 [17 CFR 230.164] permits an issuer or an offering participant to cure an unintentional or immaterial failure to include the specified legend in any free writing prospectus, as long as a good faith and reasonable effort is made to comply with the legend condition and the free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend. In addition, if a free writing prospectus has been transmitted to potential investors without the specified legend, the free writing prospectus must be retransmitted with the appropriate legend by substantially the same means as, and directed to substantially the same investors to whom, it was originally transmitted. Securities Act Rule 163 [17 CFR 230.163] provides a similar cure provision.

63. Should we have specific requirements for the legends and disclosures, such as for type size, type style, location and proximity? If so, what should they be? Alternatively, should we require the legends and disclosures to be presented in any manner reasonably calculated to draw investor attention to them?

64. Should we define the types of communications that constitute written general solicitation materials for purposes of the proposed requirements of Rule 509? If so, how should we define written general solicitation materials? For example, should we refer to the definition of "written communications" in Rule 405 under the Securities Act?<sup>124</sup> Should we specify that the term includes any electronic communications?

65. Should comparable disclosure be required to be provided in oral communications used in a Rule 506(c) offering that constitute general solicitations? Why or why not? Should the legends and required disclosures be required to be included in all offering materials or just the materials used in connection with general solicitation activities? How would issuers provide such disclosure?

66. Are there alternative methods for encouraging important explanatory information regarding performance to be given sufficient prominence in written general solicitation materials? Would mandated legends be helpful in mitigating concerns regarding fraudulent statements in written general solicitation materials?

67. The proposed amendments do not specify the precise wording of any required legends. Is that appropriate? Or should we require specific wording? If so, what would that be?

68. Should we specifically require disclosure of the date as of which any performance data included in the written general solicitation materials was calculated? Should we require all such performance data to be current as

<sup>124</sup> Rule 405 defines "written communications" as, except as otherwise specifically provided or the context otherwise requires, any communication that is written, printed, a radio or television broadcast, or a graphic communication. Rule 405 defines "graphic communication" as including all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation. "Graphic communication" does not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means.

of the most recent practicable date? To give issuers certainty, should we provide more specific guidance as to what constitutes the most recent practicable date? Should we require performance data to be provided for a specific period (e.g., for the last one, five, and ten year periods)? Should we require such performance data to be updated at specified intervals? If so, what interval or intervals would be appropriate? Should we require a private fund to provide narrative disclosure regarding the methodology used to calculate performance data? Will such required disclosure become standardized or unwieldy and, therefore, less useful to investors?

69. If all purchasers in an offering receive a private placement memorandum that includes all of the required legends, is it necessary that other materials also include these legends?

70. To what extent do issuers, including private funds, currently use legends similar to those proposed in this release (for example, in the private placement memoranda given to the potential investors)? To what extent do they use other legends? Does this differ depending on the type of document used? For example, do private placement memoranda contain more extensive legends than other marketing materials?

71. As proposed, private funds would be required to include a telephone number or a Web site where an investor may obtain current performance data. Is this requirement appropriate? Should private funds be required to provide performance information on a Web site? Should private funds be allowed to restrict access to such Web site through the use of passwords or other measures?

72. Do the proposed disclosures relating to performance data appropriately inform investors that there are limitations on the usefulness of past performance data and the difficulty of comparing the performance of one private fund to other funds, particularly in light of the fact that private funds are not required by law to calculate or present performance pursuant to a standard methodology? If so, how? If not, why not?

73. If the amendments to Rule 482 proposed in the money market fund reform proposals are adopted,<sup>125</sup> should we require liquidity funds to include similar disclosure statements in written general solicitation materials? For example, should we require liquidity funds to include a statement that the fund's sponsor has no legal obligation to

provide financial support to the fund, and that an investor should not expect that the sponsor will provide financial support to the fund at any time? Why or why not?

74. Rule 506(c) may cause certain types of issuers that have historically registered offerings under the Securities Act to instead conduct offerings under Rule 506(c). These issuers also may use performance data in written general solicitation materials. For example, non-traded REITs, which have historically included prior performance data in Securities Act registration statements and sales literature, may instead conduct Rule 506(c) offerings and provide similar data in written general solicitation materials. Should we adopt legends or other disclosure requirements that are tailored to additional types of issuers, such as non-traded REITs? If so, which types of issuers should be required to include legends or other required disclosure in their written general solicitation materials? What information should be required?

75. What are the costs or burdens on issuers in providing the legends and other required disclosures, as proposed? Are there ways to reduce any costs or burdens on issuers?

76. Should we adopt additional or different legends or disclosure requirements for written general solicitation materials used by private funds in Rule 506(c) offerings when performance data is included?

#### *B. Proposed Amendments to Rule 156*

We are also proposing to amend Rule 156 under the Securities Act to apply the guidance contained in the rule to the sales literature of private funds.<sup>126</sup> We are proposing the amendments because we believe it is important to provide guidance to private funds in developing sales literature that is neither fraudulent nor misleading, particularly in light of the Commission's adoption of Rule 506(c).<sup>127</sup> We are of the view that private funds should now be considering the principles underlying Rule 156 to avoid making fraudulent statements in their sales literature.

Rule 156 provides guidance on the types of information in investment company sales literature that could be

misleading for purposes of the federal securities laws, including Section 17(a) of the Securities Act<sup>128</sup> and Section 10(b) of the Exchange Act<sup>129</sup> and Rule 10b-5 thereunder.<sup>130</sup> Under these provisions, whether a statement involving a material fact is misleading depends on an evaluation of the context in which it is made. Rule 156 outlines certain situations in which a statement could be misleading. These include certain general factors that could cause a statement to be misleading,<sup>131</sup> as well as circumstances where representations about past or future investment performance<sup>132</sup> and statements involving a material fact about the characteristics or attributes of an investment company<sup>133</sup> could be misleading.<sup>134</sup>

<sup>128</sup> 15 U.S.C. 77q(a).

<sup>129</sup> 15 U.S.C. 78j(b).

<sup>130</sup> 17 CFR 240.10b-5.

<sup>131</sup> A statement could be misleading because of other statements being made in connection with the offer of sale or sale of the securities in question; the absence of explanations, qualifications, limitations, or other statements necessary or appropriate to make such statement not misleading; or general economic or financial conditions or circumstances. See Rule 156(b)(1).

<sup>132</sup> Representations about past or future investment performance about an investment company could be misleading because of statements or omissions made involving a material fact, including situations where portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances, including portrayals that omit explanations, qualifications, limitations, or other statements necessary or appropriate to make the portrayals not misleading; and representations, whether express or implied, are made about future investment performance, including: (a) representations, as to security of capital, possible future gains or income, or expenses associated with an investment; (b) representations implying that future gain or income may be inferred from or predicted based on past investment performance; or (c) portrayals of past performance, made in a manner which would imply that gains or income realized in the past would be repeated in the future. See Rule 156(b)(2).

<sup>133</sup> A statement involving a material fact about the characteristics or attributes of an investment company could be misleading because of statements about possible benefits connected with or resulting from services to be provided or methods of operation which do not give equal prominence to discussion of any risks or limitations associated therewith; exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by the company, services, security of investment or funds, effects of government supervision, or other attributes; and unwarranted or incompletely explained comparisons to other investment vehicles or to indexes. See Rule 156(b)(3).

<sup>134</sup> We note that the Commission proposed amendments to Rule 156, which have not yet been adopted, to address concerns that emanated from target date funds but are applicable to all investment companies. The proposed amendments would provide that a statement suggesting that securities of an investment company are an appropriate investment could be misleading in two

Continued

<sup>125</sup> See Release No. 33-9408.

<sup>127</sup> See Rule 506(c) Adopting Release.

The Commission adopted Rule 156 as an interpretive rule to provide guidance in certain areas which, based on the Commission's regulatory experience with investment company sales literature, had proven to be particularly susceptible to misleading statements.<sup>135</sup> Just as the antifraud provisions of the Securities Act and the Exchange Act apply to the offer and sale of securities issued by an investment company, those same provisions apply to the offer and sale of securities issued by a private fund.<sup>136</sup> We note that some commenters on the Rule 506(c) Proposing Release requested that the Commission clarify whether the interpretive guidance in Rule 156 also applies to private funds.<sup>137</sup> Accordingly, the Commission believes it is important to provide interpretive guidance to private funds regarding the types of information in sales literature that could be fraudulent or misleading.

While the adoption of Rule 506(c) is the impetus for proposing amendments to Rule 156 to extend its guidance to private funds, the proposed amendments would apply to all private funds, including private funds engaged in general solicitation activity under Rule 506(c). This reflects our view that statements or representations have the potential to mislead investors regardless of the type of offering, investors' level of sophistication or whether such materials are used in a general solicitation.<sup>138</sup>

circumstances: (i) a statement could be misleading because of the emphasis it places on a single factor as the basis for determining that an investment is appropriate; or (ii) a statement suggesting that securities of an investment company are an appropriate investment could be misleading because of representations that investing in the securities is a simple investment plan or that it requires little or no monitoring by the investor. See *Investment Company Advertising: Target Date Retirement Fund Names and Marketing*, Release No. 33-9126 (June 16, 2010) [75 FR 35920 (Jun. 23, 2010)].

If the Commission were to adopt those amendments, we anticipate that such amendments would also apply to private fund sales literature because we believe the descriptions of what statements could be misleading (for example, a statement emphasizing a single factor as the basis for determining that an investment is appropriate) would apply equally to statements made in the sales literature of private funds.

<sup>135</sup> See *Mutual Fund Sales Literature Interpretive Rule*, Release No. 33-6140 (Oct. 26, 1979) [44 FR 64070 (Nov. 6, 1979)].

<sup>136</sup> In addition, statements by an investment adviser to any investor or prospective investor in a private fund that are fraudulent or materially misleading also violate Section 206 of the Advisers Act [15 U.S.C. 80b-6(4)] and Rule 206(4)-8 under the Advisers Act [17 CFR 275.206(4)-8].

<sup>137</sup> See letters from ICI and NASAA.

<sup>138</sup> For example, misleading statements or representations could be made in materials for an offering pursuant to Rule 506(b).

Rule 156 does not prohibit or permit any particular representations or presentations. The circumstances in which statements or representations in investment company sales materials may be viewed as misleading appear to be similar to the circumstances in which statements or representations in private fund sales materials may be viewed as misleading. Based on enforcement and regulatory experience regarding private funds, we believe that the areas identified in Rule 156 as being vulnerable to misleading statements in investment company sales literature are similarly vulnerable with respect to private fund sales literature. For example, the Commission has brought enforcement actions against private fund advisers and others for material misrepresentations to investors and prospective investors regarding past or future investment performance and characteristics or attributes of the private fund. Such actions have included instances in which defendants were charged with misrepresenting a private fund's prior investment performance,<sup>139</sup> exaggerating their personal employment history and qualifications,<sup>140</sup> omitting information regarding their disciplinary history,<sup>141</sup> misrepresenting information about the holdings of the fund's investment portfolio,<sup>142</sup> making fraudulent claims that the fund was performing better than the major stock indexes,<sup>143</sup> and falsely valuing the fund's investments.<sup>144</sup>

As the Commission previously described in connection with amendments to Rule 156, we have been particularly concerned that representations regarding past performance or future investment performance could be misleading given that many investors consider performance to be one of the most significant factors when selecting or evaluating mutual funds.<sup>145</sup> The Commission explained that it was

<sup>139</sup> See, *SEC v. Alero Odell Mack, Jr., Steven Enrico Lopez, Sr., Easy Equity Asset Management, Inc., Easy Equity Management, L.P., Easy Equity Partners, L.P., Alero Equities the Real Estate Company, L.L.C., and Alero I.X. Corp.*, Litigation Release No. 21731 (Nov. 4, 2010) (settled action).

<sup>140</sup> See *id.*; *SEC v. Jean Baptiste Jean Pierre, Gabriel Toks Pearce, and Darius L. Lee*, Litigation Release No. 17303 (Jan. 10, 2002) (settled action).

<sup>141</sup> See *In the Matter of LeadDog Capital Markets, LLC, f/k/a LeadDog Capital Partners, Inc., Chris Messalas and Joseph Larocco, Esq.*, Administrative Proceeding File No. 3-14623, Initial Decision Release No. 468 (Sept. 14, 2012) (Finality Order, Release No. 34-68205 (Nov. 12, 2012)).

<sup>142</sup> See *id.*; *In the Matter of Michael Lauer*, Administrative Proceeding File No. 3-13265 (Jan. 29, 2009) (settled action).

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> See Release No. 33-8101.

concerned that past performance information that did not contain an adequate explanation of other facts may create unrealistic investor expectations or mislead potential investors.<sup>146</sup> The amendments were intended to address concerns about: (i) Advertising performance without providing adequate disclosure of unusual circumstances that have contributed to fund performance; (ii) advertising performance without providing adequate disclosure of the performance period or that more current information about performance is available and it may be lower than advertised performance; and (iii) advertising performance based on selective time periods without providing disclosure that would permit an investor to evaluate the significance of performance that is based on selective time periods.<sup>147</sup> The Commission also highlighted how some funds addressed these concerns through narrative disclosure when performance presentations were provided.<sup>148</sup>

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77. Are there certain types of private funds that will find it difficult to apply the guidance in Rule 156 to their sales literature? If so, which types of private funds and why? Are there changes to the guidance in Rule 156 that would be appropriate to consider in connection with the extension of the guidance to private funds?

78. Are there additional amendments to Rule 156 that would help to clarify the obligations of private funds under the antifraud provisions?

79. If the amendments to Rule 156 proposed in the target date fund rulemaking are adopted,<sup>149</sup> we anticipate making such amendments also applicable to sales literature of private funds. Is there any reason such

<sup>146</sup> See *Amendments to Investment Company Advertising Rules*, Release No. 33-8294 (Sept. 29, 2003) [68 FR 57760 (Oct. 6, 2003)].

<sup>147</sup> See Release No. 33-8101.

<sup>148</sup> For example, the Commission noted that such narrative disclosures were designed to inform investors that: (i) The advertised performance was achieved through the fund's use of particular investment strategies under specified circumstances that are not likely to recur (e.g., disclosing that a significant portion of the advertised performance was attributable to the allocation of an initial public offering of securities to the fund but indicated that such allocation would not likely continue in the future); (ii) the advertised performance is not the fund's current performance and that due to market volatility or other factors, the fund's performance changes over time or that the fund's current performance may be lower than the advertised performance; or (iii) the fund's performance may be volatile or that the advertised performance is not representative of the fund's historical performance. *Id.*

<sup>149</sup> See Release No. 33-9126.

guidance should not apply to sales literature of private funds?

80. Would antifraud guidance be useful regarding issues that may arise with respect to sales literature disseminated by other types of issuers in connection with offerings pursuant to Rule 506(c), such as non-traded REITs? Would similar guidance be appropriate for other types of issuers, such as statements that sales material should present a balanced discussion of risk and reward, and be consistent with representations in offering documents? What are the expected costs and benefits with respect to any such guidance?

### *C. Request for Comment on Manner and Content Restrictions for Private Funds*

As noted above, some commenters have expressed particular concern that eliminating the prohibition against general solicitation may create more opportunities for private funds to distribute misleading and fraudulent information.<sup>150</sup> Commenters recommending content restrictions expressed concern that general solicitation materials for private funds raise a substantial risk of investor confusion, and may cause an investor to draw unwarranted conclusions when comparing the performance of private funds, which are not subject to standardized performance calculation and reporting requirements, to the performance of other funds.<sup>151</sup> Commenters also noted that, among other things, private fund portfolios tend to be more illiquid and difficult to value than registered investment companies, which may result in misleading performance data due to faulty valuations.<sup>152</sup> Some commenters

have also suggested that, until the Commission can develop standardized performance methodologies, private funds should be prohibited from including performance data in general solicitation materials.<sup>153</sup> Other commenters, however, have stated that the risk of investor harm is limited because only accredited investors can purchase private funds offered under Rule 506(c).<sup>154</sup>

With respect to performance calculations for private funds, we note that the methodologies can vary for a number of reasons, such as the type of the fund, assumptions underlying the calculations and investor preferences. Given that legitimate reasons may result in different approaches to calculating performance for private funds, we have determined not to propose standardized calculation methodologies for performance of private funds without further study.

We believe that the antifraud provisions of the federal securities laws, and the requirement that purchasers of a private fund offered under Rule 506(c) be accredited investors, provide a level of investor protection and thus we are not proposing to prohibit or restrict the use of performance data at this time. We are soliciting specific comment on this issue as well as on whether other manner and content restrictions related to the removal of the prohibition against general solicitation are necessary or appropriate for Rule 506(c) offerings by private funds or other issuers. As stated previously, we have directed the Commission staff to review and analyze developments in the new Rule 506(c) market, including the form and content

of written general solicitation materials submitted to the Commission.<sup>155</sup>

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81. Commenters have expressed concern about private funds including performance information in general solicitations materials. Should the Commission apply any content restrictions to performance advertising by private funds? Why or why not? Should the Commission apply content standards to specific types of performance advertising (e.g., model or hypothetical performance)? Why or why not? Are there current practices that would be affected? If the performance information is otherwise truthful and not misleading, what should the Commission consider in deciding whether any content restriction is appropriate or necessary? Does the fact that investors in a private fund engaged in a Rule 506(c) offering must be accredited to purchase securities suggest a level of financial sophistication such that content restrictions in general, or certain content restrictions specifically, should not be required?

82. How do the different types of private funds (e.g., hedge funds, private equity funds, venture capital funds, and securitized asset funds) calculate and present performance? Should private funds be subject to standardized performance reporting? If so, what reporting standard(s) should apply? Is there any standard that is widely used by private funds and should we consider requiring the use of such standard? Would one standardized performance reporting methodology be appropriate for different types of private funds?

83. Should the use of performance claims by a private fund as part of a general solicitation be conditioned on a requirement that the private fund be subject to an audit by an independent public accountant? Would such a requirement provide some level of protection that the performance claims were at least based on valuations of assets audited by an independent third party? To what extent do private funds typically have such an audit?

84. Is there a concern that, without content restrictions, materials used as part of general solicitations may vary depending upon who is selling the product (e.g., a broker-dealer's material subject to FINRA rules may differ from an issuer's materials)?

85. Is investor confusion (or confusion by the general public) a concern with respect to a private fund's general solicitation materials? If so, what is the

<sup>150</sup> See, e.g., letters from AFL-CIO and AFR; Consumer Federation; ICI; IDC.

<sup>151</sup> See, e.g., letters from ICI (noting that comparisons may be particularly difficult when a private fund is compared to a mutual fund, which is subject to specific calculation methodologies for performance data); and IDC (stating that "[i]nvestors viewing mutual fund advertisements and private fund advertisements may see wide variations in performance information, without any explanation or way to understand the bases for the differences").

<sup>152</sup> See, e.g., letters from NASAA (explaining that "the investment strategies of private funds are typically more opaque, risky, and illiquid than those of mutual funds"); ICI (May 21, 2012) (noting that private funds often "invest in securities that are difficult to value or relatively illiquid" and citing a 2003 NASD sweep of broker-dealers that found several areas of concern in hedge fund advertisements and sales literature, including with respect to the presentation of performance data). Commission staff in our Office of Investor Education and Advocacy also recently issued an investor bulletin regarding hedge funds, advising investors that "[h]edge funds do not need to follow any standard methodology when calculating performance, and they may invest in securities that are relative illiquid and difficult to value." See Office of Investor Education and Advocacy, *Investor*

*Bulletin: Hedge Funds* (Oct. 2012), available at [http://sec.gov/investor/alerts/ib\\_hedgefunds.pdf](http://sec.gov/investor/alerts/ib_hedgefunds.pdf).

<sup>153</sup> See, e.g., letters from ICI (recommending a prohibition on use of performance advertising by private funds until the Commission can develop a new rule regarding such advertising); IDC; Consumer Federation (recommending that "the Commission should at the very least adopt clear standards for the reporting of performance and fees by private funds, and delay their eligibility from engaging in general solicitation and advertising until such time as those standards are in place").

<sup>154</sup> See, e.g., letters from BlackRock (stating its belief that "the requirement that only sophisticated institutions and individuals may ultimately purchase interests in these funds . . . eliminates the risk that investors could be harmed as a result of a manager engaging in general advertising or solicitation") and MFA (Sept. 28, 2012) (stating that "only sophisticated investors may purchase interests in hedge funds, including those that in the future are offered and sold in reliance on revised Rule 506"). See also letter from MFA (June 20, 2013) (asserting that the Dodd-Frank Act and the Commission's regulatory implementation of the Dodd-Frank Act have significantly strengthened regulatory oversight of investment advisers to hedge funds).

<sup>155</sup> See Section I of this release.



specific nature of that confusion given that ultimately only accredited investors may invest in private funds engaged in a Rule 506(c) offering?

86. Should the Commission draw a distinction between general solicitation activity engaged in by a private fund relying on Section 3(c)(1) of the Investment Company Act compared to a fund relying on Section 3(c)(7) of the Investment Company Act?<sup>156</sup> If so, how and why? General solicitation can be conducted through a broad array of media, including, but not limited to, print advertisements, billboards, television, the Internet and radio. Which ones will be most likely used in private fund offerings? Are there certain types of media that present heightened investor protection concerns?

#### IV. Proposed Temporary Rule for Mandatory Submission of Written General Solicitation Materials

We are proposing new Rule 510T of Regulation D to require that an issuer conducting an offering in reliance on Rule 506(c) submit to the Commission any written general solicitation materials prepared by or on behalf of the issuer and used in connection with the Rule 506(c) offering. Under the proposed rule, the written general solicitation materials must be submitted no later than the date of first use of such materials in the offering. We are proposing the rule as a temporary rule that would expire two years after its effective date.

In connection with the Rule 506(c) Proposing Release, a number of commenters recommended that the Commission require materials used in general solicitations under Rule 506(c) to be filed with, or furnished to, either the Commission or FINRA. Some commenters recommended that we require the submission of all proposed general solicitation materials as an exhibit to Form D.<sup>157</sup> Other commenters, including the Investor Advisory Committee, suggested the creation of a publicly-available online electronic “drop box” on the Commission’s Web site into which all general solicitation materials (whether in print, audio or video forms) could be deposited, together with a cover form identifying the issuer using the general solicitation materials and the circumstances under which the materials are to be used, with the Rule 506(c) exemption conditioned on such filings being made either before first use

or promptly after first use.<sup>158</sup> Still other commenters recommended that we consider requiring the pre-filing of all general solicitation materials under Rule 506(c) with FINRA, regardless of whether any broker-dealer involved in the offering is exempt from registration under the Exchange Act.<sup>159</sup> These commenters generally asserted that such a requirement is needed as a safeguard for investor protection.

The Commission will need to understand developments in the Rule 506 market after the effectiveness of Rule 506(c). One of these developments would be the market practices through which issuers would solicit potential purchasers of securities offered in reliance on Rule 506(c). We believe that it is important that the Commission have the ability to assess these market practices. Proposed Rule 510T would facilitate this assessment by requiring issuers to submit any written general solicitation materials used in their Rule 506(c) offerings no later than the date of the first use of these materials. Such materials would be required to be submitted through an intake page on the Commission’s Web site. To allow the Commission to assess market developments prior to the adoption of proposed Rule 510T, the Commission will establish and make available for use the intake page upon the effectiveness of Rule 506(c). Doing so will allow issuers, investors and other market participants to submit voluntarily any written general solicitation materials used in Rule 506(c) offerings. The submitted materials would be considered by the Commission staff as part of the Rule 506(c) Work Plan.

We are not proposing, at this time, that issuers file their written general solicitation materials through the Commission’s EDGAR system. Written general solicitation materials submitted to the Commission pursuant to proposed Rule 510T would not be treated as being “filed” or “furnished” for purposes of the Securities Act or Exchange Act, including the liability provisions of those Acts. As the written general solicitation materials would be submitted to the Commission for the purpose of furthering the Commission’s understanding of the market practices in the Rule 506 market, we are not

proposing to make the written general solicitation materials publicly available on the Commission’s Web site.<sup>160</sup> Oral communications used to solicit potential purchasers of securities offered through Rule 506(c) offerings would not be subject to proposed Rule 510T. We believe that limiting the requirements of proposed Rule 510T in this manner is reasonable as we expect that many issuers will prefer to use written general solicitation materials due to the potentially greater reach and lower costs of such solicitation methods. Thus, we expect that requiring the submission of only written general solicitation materials should provide us with an efficient way to assess developments in the Rule 506 market.

Compliance with proposed Rule 510T would not be a condition of Rule 506(c). As with the proposed Rule 509 requirement that issuers include legends and other disclosures in written general solicitation materials, we believe that conditioning the availability of Rule 506(c) on such compliance could lead to disproportionate consequences in the event of non-compliance. Instead, we are proposing to amend existing Rule 507(a) so that Rule 506 would be unavailable for an issuer if such issuer, or any of its predecessors or affiliates, has been subject to any order, judgment or court decree enjoining such person for failure to comply with Rule 510T. As with proposed Rule 509, we believe that the possibility of disqualification from reliance on Rule 506 would provide issuers with sufficient incentive to comply with the requirement of Rule 510T, without penalizing them unfairly for an inadvertent error or failure to submit written general solicitation materials. We also believe that Rule 507(a), with its provision that disqualification would occur only if a court issues an injunction, may be better suited for addressing the varied facts and circumstances that may cause an issuer not to submit written general solicitation materials and for determining whether disqualification for this failure is appropriate.

As noted above, we are proposing Rule 510T as a temporary rule that will expire two years after the effective date of proposed Rule 510T. We believe that a two-year period would provide sufficient time for the Commission and the Commission staff to assess many of the market practices used to solicit potential purchasers of securities offered through Rule 506(c) offerings

<sup>158</sup> See letters from Investor Advisory Committee; Consumer Federation.

<sup>159</sup> See letters from AFL-CIO and AFR; BetterInvesting (recommending that “the SEC require all public solicitation materials under Rule 506 to be independently reviewed for compliance (perhaps by an independent authority such as FINRA, which already reviews broker-dealer advertising) before or after the public solicitation” (emphasis omitted)); ICI.

<sup>156</sup> See notes 107 and 108.

<sup>157</sup> See letters from Massachusetts Securities Division (July 2, 2012); Ohio Division of Securities (July 3, 2012).

<sup>160</sup> We do not contemplate that the submitted written general solicitation materials would be subject to a staff review similar to that conducted on Securities Act registration statements.

and determine whether further action is warranted.

#### Request for Comment

87. Should we require the submission of written general solicitation materials used in Rule 506(c) offerings, as proposed? Should oral communications that constitute general solicitation be required to be submitted in some form? If so, how should a requirement to submit general solicitation materials be applied to telephone solicitations, solicitations through broadcast media or oral communications?

88. What are the appropriate ramifications for an issuer that fails to submit written general solicitation materials? Should failure to submit general solicitation materials disqualify an issuer from using Rule 506 for future offerings without court action? Should a cure period be provided? Should submission of written general solicitation materials be a condition to the Rule 506(c) exemption?

89. What are the benefits and costs of requiring the submission of written general solicitation materials in Rule 506(c) offerings? If the staff were able to conduct only limited review of a small portion of the materials submitted, how does that impact an assessment of costs and benefits?

90. Should the submitted written general solicitation materials be made publicly available on the Commission's Web site? Would the availability of such materials on the Commission's Web site give undue credibility to the materials and create the impression that submitted materials have been reviewed and/or approved by the Commission?

91. Should written general solicitation materials be required to be submitted as an exhibit to Form D? Why or why not? Could submission of these materials publicly, through EDGAR or another means, have the effect of encouraging broadened investor interest in these offerings, beyond what the offerors would achieve by engaging in their own general solicitation efforts? Would this be in the interests of investors?

92. Should the written general solicitation materials be submitted at a time other than the date of first use of such materials? For example, currently, free writing prospectuses in the form of media publications or broadcasts that include information about the issuer, its securities, or the offering provided, authorized, or approved by or on behalf of the issuer or an offering participant and that are published or disseminated by unaffiliated media must be filed within four business days after the issuer or offering participant becomes aware of its publication or first

broadcast. Should a similar deadline be considered for the submission of written general solicitation materials that are in the form of media publications or broadcasts and that include information provided or authorized by the issuer or an offering participant?

93. Should a requirement to submit written general solicitation materials be applied to all Rule 506(c) offerings, or should certain issuers or certain Rule 506(c) offerings be excluded or exempted from such a requirement? If yes, what issuers or offerings should be excluded or exempted? Should smaller issuers or smaller offerings be excluded or exempted?

94. As proposed, only the issuer relying on Rule 506(c) would have an obligation under Rule 510T to submit written general solicitation materials to the Commission, even if the materials were prepared and disseminated by an offering participant on behalf of the issuer. Should this requirement extend to the submission of all written general solicitation materials used by other offering participants in the same offering? Would this requirement further the Commission's assessment of the market practices used by issuers in Rule 506(c) offerings?

95. How would a requirement that written general solicitation materials be submitted to the Commission affect the amount or quality of information in such materials? How would it affect the use of Rule 506(c)?

96. Should the proposed requirement for issuers to submit written general solicitation materials be in the form of a temporary rule? Should this requirement be made a permanent one? If it is in the form of a temporary rule, is the proposed two-year period sufficient for purpose of understanding the market practices used by issuers to solicit potential purchasers in Rule 506(c) offerings?

#### V. Request for Comment on the Definition of "Accredited Investor"

Many commenters stated, and we agree, that the definition of accredited investor as it relates to natural persons should be reviewed and, if necessary or appropriate, amended. Several commenters recommended that the accredited investor definition be revised to include a financial knowledge or investment experience component.<sup>161</sup>

<sup>161</sup> See letters from AARP; BetterInvesting; CFA Institute; Consumer Federation; ICI; Massachusetts Securities Division (July 2, 2012). One commenter recommended adding "knowledgeable employees" to the accredited investor definition. See letter from MFA (May 4, 2012). Another commenter suggested having the Commission offer investor education classes whereby investors who meet a lower

and/or a threshold based on the amount of securities investments owned by the purchaser, which, in their view, may be a more appropriate proxy for financial sophistication.<sup>162</sup>

At the outset, we note that amending the definition of "accredited investor" raises a number of issues separate from the implementation of Section 201(a). The accredited investor definition is subject to a number of independent regulatory requirements that mandate review and consideration of the definition. For example, Section 415 of the Dodd-Frank Act mandates the completion of a study by the Government Accountability Office ("GAO") regarding the appropriate criteria for determining the financial thresholds or other criteria for qualifying as an accredited investor not later than three years after the date of enactment of the Dodd-Frank Act, which would be July 20, 2013. Under Section 413(b) of the Dodd-Frank Act, the Commission is required to undertake a review of the accredited investor definition as it relates to natural persons in its entirety four years after the enactment of the Dodd-Frank Act, and once every four years thereafter. Also, Section 413(a) of the Dodd-Frank Act stipulates that the net worth standard shall be \$1 million, excluding the value of a person's primary residence, until July 2014.

Because any change we would propose to the definition of accredited investor would benefit from our consideration of these mandated reviews as well as from the ability to consider modifications to the net worth standard, we are not proposing any amendments to the accredited investor definition at this time. Nonetheless, in light of the considerations that commenters raised, the Commission staff has begun a review of the definition of accredited investor as it relates to natural persons, including the need for any changes to this definition following the effectiveness of Rule 506(c). This review, which we anticipate will be completed in a timely manner, will encompass, among other things, both the question of whether net worth and annual income should be

financial threshold but pass a qualifying test could be granted accredited investor status. See letter from Cambridge Innovation Center (June 13, 2012).

All of the commenters that recommended that the Commission amend the definition of accredited investor focused on the definition as it relates to natural persons. See, e.g., letters from AARP; AFL-CIO and AFR; BetterInvesting; CFA Institute; Consumer Federation; ICI; Investor Advisory Committee; Massachusetts Securities Division (July 2, 2012).

<sup>162</sup> See letters from AARP; Consumer Federation; ICI.

used as the tests for determining whether a natural person is an accredited investor and the question of what the thresholds should be for those and other potential tests. We believe that it would be appropriate to coordinate the review and consideration of the accredited investor definition required by Section 413(b) of the Dodd-Frank Act with the completion of the Commission staff's ongoing review and the GAO study.

#### Request for Comment

97. Are the net worth test and the income test currently provided in Rule 501(a)(5) and Rule 501(a)(6), respectively, the appropriate tests for determining whether a natural person is an accredited investor? Do such tests indicate whether an investor has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of a prospective investment? If not, what other criteria should be considered as an appropriate test for investment sophistication?

98. Are the current financial thresholds in the net worth test and the income test still the appropriate thresholds for determining whether a natural person is an accredited investor? Should any revised thresholds be indexed for inflation?

99. Currently, the financial thresholds in the income test and net worth test are based on fixed dollar amounts (such as having an individual income in excess of \$200,000 for a natural person to qualify as an accredited investor). Should the net worth test and the income test be changed to use thresholds that are not tied to fixed dollar amounts (for example, thresholds based on a certain formula or percentage)?

#### VI. Additional Requests for Comment

We are also soliciting comment on the following additional matters:

100. Should it be a condition of Rule 506(c) that, prior to any sale of a security in reliance on the Rule, the purchaser shall have received an offering document containing specified information? If so, should such information requirements be the same as, or more or less inclusive than, the information requirements set forth in Rule 502(b) of Regulation D (which apply only when an issuer sells securities under Rule 505 or Rule 506 to a purchaser that is not an accredited investor)?

101. Should an issuer subject to the reporting requirements of Sections 13 or 15(d) of the Exchange Act be permitted

to use Rule 506(c) if it is not current in its reporting obligations?

#### VII. General Request for Comment

We request and encourage any interested person to submit comments regarding the proposed rule and form amendments, specific issues discussed in this release, and other matters that may have an effect on the proposed rules. We request comment from the point of view of issuers, investors and other market participants. With regard to any comments, we note that such comments are of particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments. Commenters are urged to be as specific as possible.

#### VIII. Paperwork Reduction Act

##### A. Background

The proposed rule and form amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").<sup>163</sup> The titles of these requirements are:

- "Form D" (OMB Control No. 3235-0076);<sup>164</sup> and
- "Rule 506(c) General Solicitation Materials" (a proposed new collection of information).

We are submitting these requirements to the Office of Management and Budget ("OMB") for review and approval in accordance with the PRA and its implementing regulations.<sup>165</sup> We are applying for an OMB control number for the proposed new collection of information in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13, and OMB has not yet assigned a control number to the new collection. If adopted, responses to the new collection of information would be mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

##### B. Burden and Cost Estimates Related to the Proposed Amendments

##### 1. Proposed Amendments Relating to Form D

We adopted Regulation D and Form D as part of the establishment of a series of exemptions for offerings and sales of securities under the Securities Act. Form D contains collection of

information requirements, requiring an issuer to file a notice of sale of securities pursuant to Regulation D or Section 4(a)(5) of the Securities Act. The Form D is required to include basic information about the issuer, certain related persons and the offering. This information is needed for implementing the exemptions and evaluating their use. The information collection requirements related to the filing of Form D with the Commission are mandatory to the extent that an issuer elects to make an offering of securities in reliance on the relevant exemption. Responses are not confidential. The hours and costs associated with preparing and filing forms and retaining records constitute reporting and cost burdens imposed by the collection of information requirements.

We are proposing to require the advance filing of Form D for Rule 506(c) offerings and to require the filing of a closing amendment to Form D after the termination of all Rule 506 offerings. In addition, we are proposing to amend Item 2 of Form D to require the identification of the issuer's publicly accessible (Internet) Web site address, if any; Item 3 of Form D to require, in Rule 506(c) offerings, the name and address of controlling persons, in addition to the information currently required for "related persons;" Item 4 of Form D to require the issuer to briefly describe its industry group if the issuer checks the "Other" box; Item 5 of Form D to replace the "Decline to Disclose" option with a "Not Available to Public" option; Item 7 of Form D to add separate fields or check boxes for issuers to indicate whether they are filing a Form D in advance of a Rule 506(c) offering or a closing Form D amendment for a Rule 506 offering; Item 9 of Form D to require information on the ticker symbol and security identifier for the offered securities, if any; Item 14 of Form D to add a table requiring information, in regard to Rule 506 offerings, on the number of accredited investors and non-accredited investors, whether they are natural persons or entities, and the amount raised from each category of investor; and Item 16 of Form D to require information, if the issuer is not a pooled investment fund, on the percentage of the offering proceeds from a Rule 506 offering that was or will be used (1) to repurchase or retire the issuer's existing securities; (2) to pay offering expenses; (3) to acquire assets, otherwise than in the ordinary course of business; (4) to finance acquisitions of other businesses; (5) for working capital; and (6) to discharge indebtedness.

We are also proposing to add new items to Form D, which would require

<sup>163</sup> 44 U.S.C. 3501 *et seq.*

<sup>164</sup> Form D was adopted pursuant to Sections 2(a)(15), 3(b), 4(a)(2), 19(a) and 19(c)(3) of the Securities Act (15 U.S.C. 77b(a)(15), 77c(b), 77d(a)(2), 77s(a) and 77s(c)(3)).

<sup>165</sup> 44 U.S.C. 3507(d); 5 CFR 1320.11.

the following additional information in regard to offerings conducted under Rule 506: The number and types of accredited investors that purchased securities in the offering; for Rule 506(c) offerings, the methods used to verify accredited investor status and the types of general solicitation used; if a class of the issuer's securities is traded on a national securities exchange, ATS or any other organized trading venue, and/or is registered under the Exchange Act, the name of the exchange, ATS or trading venue and/or the Exchange Act file number and whether the securities being offered under Rule 506 are of the same class or are convertible into or exercisable or exchangeable for such class; if the issuer used a registered broker-dealer in connection with the offering, whether any general solicitation materials were filed with FINRA; and in the case of pooled investment funds, the name and SEC file number for each investment adviser

who functions directly or indirectly as a promoter of the issuer.

We anticipate that if the proposed amendments to require the advance filing of Form D for Rule 506(c) offerings, the filing of a closing amendment to Form D after the termination of Rule 506 offerings, and additional information in Form D are adopted, the burden for responding to the collection of information in Form D would increase for most issuers. For purposes of the PRA, we estimate that the annual compliance burden of the collection of information requirements for issuers making Form D filings after these proposed amendments would be an aggregate 32,736 hours of issuer personnel time and \$39,283,200 for the services of outside professionals per year. Our methodologies for deriving the above estimates are discussed below.

The table below shows the current total annual compliance burden, in hours and in costs, of the collection of information pursuant to Form D in

connection with the rule and form amendments to implement Section 201(a) of the JOBS Act we are adopting today. For purposes of the PRA, prepared in connection with the amendments to Form D adopted today, we estimate that, over a three-year period, the average burden estimate will be four hours per Form D filing. Our burden estimate represents the average burden for all issuers. This burden is reflected as a one hour burden of preparation on the company and a cost of \$1,200 per filing. In deriving these estimates, we assume that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of \$400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

TABLE 1—ESTIMATED PAPERWORK BURDEN UNDER FORM D, PRE-AMENDMENTS TO REGULATION D AND FORM D

	Number of responses	Burden hours/form	Total burden hours	Internal issuer time	External professional time	Professional costs
	(A) <sup>166</sup>	(B)	(C) = (A) * (B)	(D)	(E)	(F) = (E) * \$400
Form D .....	21,824	4	87,296	21,824	65,472	\$26,188,800

We believe that the proposed amendments to Form D, if adopted, would increase the existing paperwork burden of the form by requiring additional information in Form D, particularly with respect to Rule 506 offerings. In addition, while we do not anticipate that these proposed rule and form amendments will result in an increase in the number of Regulation D offerings, we believe that the paperwork burden of the form would increase as a result of the advance filing requirement for Rule 506(c) offerings and the requirement to file an additional

amendment after the termination of Rule 506 offerings.<sup>167</sup> We estimate that the paperwork burden associated with filing the required information on Form D over the span of a particular offering would increase to approximately 6 hours per offering.<sup>168</sup>

The table below illustrates the total annual compliance burden of the collection of information in hours and in cost under the proposed amendments to Regulation D and Form D. The burden estimates were calculated by multiplying the estimated number of responses by the estimated average

amount of time it would take an issuer to prepare and review a Form D filing consistent with the assumptions above. We continue to estimate that 25 percent of the burden of preparation is carried by the company internally and that 75 percent of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of \$400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

TABLE 2—ESTIMATED PAPERWORK BURDEN UNDER FORM D, POST-AMENDMENTS TO REGULATION D AND FORM D

	Number of responses	Burden hours/form	Total burden hours	Internal issuer time	External professional time	Professional costs
	(A)	(B)	(C) = (A) * (B)	(D)	(E)	(F) = (E) * \$400
Form D .....	21,824	6	130,944	32,736	98,208	\$39,283,200

<sup>166</sup> The information in this column is based on the 18,187 new Form D filings that were actually made in 2012, plus the additional 3,637 filings we estimate would be filed in the first year after the effective date of Rule 506(c).

<sup>167</sup> As discussed in Section IX.B.4.a of this release, there is evidence that some issuers are not filing Form D for their offerings in compliance with Rule 503.

<sup>168</sup> The estimate of approximately 6 hours per offering is a blended average of the paperwork burden for all offerings for which a Form D is required to be filed, not only offerings under Rule 506.

## 2. Rule 506(c) General Solicitation Materials

We are proposing new Rule 510T of Regulation D to require that an issuer conducting an offering in reliance on Rule 506(c) submit to the Commission any written general solicitation materials prepared by or on behalf of the issuer and used in connection with the Rule 506(c) offering. Under the proposed rule, the written general solicitation materials must be submitted to the Commission through an intake page on the Commission's Web site no later than the date of first use of such materials in the offering. Written general solicitation materials submitted to the Commission in this manner would not be publicly available on the Commission's Web site. We are proposing Rule 510T as a temporary rule that will expire two years after the effective date of proposed Rule 510T. In addition, we are proposing a number of legends and other disclosures that would need to be included in written general solicitation materials used in Rule 506(c) offerings. All such materials would need to disclose that only accredited investors can purchase in the Rule 506(c) offering. All such materials used by private funds would need to disclose that the securities offered are not subject to the protections of the Investment Company Act. And finally, any private fund that includes performance data in its written general solicitation materials would need to disclose certain information about the performance data. We propose to prescribe the basic elements of the disclosures but not the exact wording. We do not believe that any of the disclosures would be burdensome to prepare.

For purposes of the PRA, we estimate that the annual compliance burden of this collection of information requirement for issuers conducting Rule 506(c) offerings would be an aggregate 7,274 hours of issuer personnel time. We estimate that compliance with the proposed requirements related to written general solicitation materials would result in an estimated burden of two hours per offering under Rule 506(c). This estimated two hour burden includes the time it would take to prepare any applicable disclosures for the written general solicitation materials and to submit such materials through the Commission's Web site. Our burden estimate represents the average burden for all issuers per Rule 506(c) offering. In deriving this estimate, we assume that 100% of the burden of preparation will be carried by the issuer internally, which is reflected as an hourly burden.

Although it is not possible to predict the number of future offerings made in reliance on Rule 506(c) with any degree of accuracy, particularly because Rule 506(c) is not yet effective, for purposes of this analysis we estimate that there would be 3,637 Rule 506(c) offerings per year.<sup>169</sup> We assume for purposes of this analysis that all Rule 506(c) offerings will involve the use of written general solicitation materials.<sup>170</sup> Based on this estimated number of Rule 506(c) offerings and an estimated burden of two hours per Rule 506(c) offering, we estimate that the annual compliance burden of this collection of information requirement for the first year in which issuers would be required to submit written general solicitation materials to the Commission pursuant to Rule 510T would be an aggregate of 7,274 hours of issuer personnel time.

### C. Request for Comment

We request comment in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the

<sup>169</sup> As a reference point for the potential increase in the total number of Rule 506 offerings after the adoption of Rule 506(c), we use the impact of another past rule change on the market for Regulation D offerings. In 1997, the Commission amended Rule 144(d) under the Securities Act [17 CFR 230.144(d)] to reduce the holding period for restricted securities from two years to one year, thereby increasing the attractiveness of Regulation D offerings to investors and to issuers. See *Revision of Holding Period Requirements in Rules 144 and 145*, Release No. 33-7390 (Feb. 20, 1997) [62 FR 9242 (Feb. 28, 1997)]. There were 10,341 Form D filings in 1996. This was followed by a 20% increase in the number of Form D filings in each of the subsequent three calendar years, reaching 17,830 by 1999. We assume that there could be a similarly significant increase in the overall number of Rule 506 offerings following the adoption of Rule 506(c). We also assume, for purposes of this analysis, that this 20% increase will be comprised entirely of Rule 506(c) offerings because of the benefits to issuers in using general solicitation, including wider access to accredited investors, and because non-accredited investors reportedly purchased securities in only 11% of the Rule 506 offerings conducted between 2009 and 2012. See Ivanov/Bauguess Study.

According to DERA, for the year ended December 31, 2012, there were 18,187 new Form D filings. A 20% increase in this number would result in a total of 21,824 new Regulation D offerings. Assuming the entire 20% increase is comprised of Rule 506(c) offerings, this would result in an estimated 3,637 Rule 506(c) offerings per year after adoption of the rule.

<sup>170</sup> Not all Rule 506(c) offerings will involve the use of written general solicitation materials and not all private funds will include performance data in their written general solicitation materials but we cannot predict with any degree of accuracy how issuers will conduct their Rule 506(c) offerings. Therefore, for purposes of this analysis, we are assigning two hours per Rule 506(c) offering, which we think represents a reasonable estimate of the average cost to issuers in Rule 506(c) offerings of complying with the proposed information requirements related to written general solicitation materials.

functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of our estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090, with reference to File No. S7-06-13. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-06-13, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington, DC 20549. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

## IX. Economic Analysis

As directed by Section 201(a)(1) of the JOBS Act, the Commission has amended Rule 506 of Regulation D to permit general solicitation for offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify their accredited investor status. This rule amendment has raised a number of concerns with respect to the Commission's ability to evaluate and assess the changing nature of the Rule 506 market and investor awareness of the risks associated with offerings under Rule 506(c). We are proposing amendments to Regulation D, Form D and Rule 156 of the Securities Act to address these concerns.

The proposed amendments to Form D and Regulation D as it relates to Form D would:

- Require the advance filing of Form D in Rule 506(c) offerings;
- require the filing of a closing amendment to Form D after the termination of a Rule 506 offering;
- require issuers to provide additional information in Form D primarily in regard to Rule 506 offerings; and
- disqualify an issuer from relying on Rule 506 for future offerings until one year after the required Form D filings are made if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering.

These proposed amendments are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings. In addition, these proposed amendments are expected to support and facilitate examination and enforcement efforts by the Commission and other regulators.

We are also proposing a new rule in Regulation D and an amendment to Rule 156 designed to address investor protection concerns arising from the ability of issuers to engage in general solicitation in their Rule 506(c) offerings. The new rule and the amendment to Rule 156 would:

- Require written general solicitation materials used in these offerings to include certain legends and other disclosures; and
- extend the interpretive guidance contained within Rule 156 to the sales literature of private funds.

Further, we are soliciting comment on whether manner or content restrictions should be imposed on general solicitation materials used by private funds.

We are proposing a new rule in Regulation D to require issuers, on a temporary basis, to submit any written general solicitation materials used in their Rule 506(c) offerings to the Commission. Such materials would be required to be submitted through an intake page on the Commission's Web site no later than the date of the first use of the materials in a Rule 506(c) offering. If adopted, this new rule would expire two years after the effective date of the rule.

We are mindful of the costs imposed by and the benefits obtained from our rules. The discussion below addresses the potential economic effects of these proposed amendments, including the likely benefits and costs of the amendments and their potential impact on efficiency, competition and capital

formation.<sup>171</sup> These costs and benefits are not a result of the statutory mandate of Section 201(a) and are affected by the discretion we may exercise in implementing measures to supplement the implementation of the statutory mandate as contained in the amendments we are adopting today.

#### A. Broad Economic Considerations

As we highlight in our baseline analysis below, we note that a large percentage of current Rule 506 offerings are conducted by small issuers, which is consistent with the original Commission initiative in the early 1980s to facilitate capital formation by small issuers.<sup>172</sup> We stated at that time that an important purpose of the Form D filing requirement was "to collect empirical data which will provide a basis for further action by the Commission either in terms of amending existing rules and regulations or proposing new ones. Further, the proposed Form would allow the Commission to elicit information necessary in assessing the effectiveness of Regulation D as a capital raising device for small businesses."<sup>173</sup>

As previously noted, we substantially revised Form D in 2008 to mandate its filing in electronic form.<sup>174</sup> At that time, we highlighted that a searchable electronic database of machine-readable filings would enable both federal and state securities regulators to analyze exempt securities transactions more effectively, thereby improving coordination among regulators and enhancing investor protections.<sup>175</sup> Since the adoption of the electronic Form D, we have been able to systematically extract information from the machine-readable filings, which are the best source of data about Rule 506 offerings and the basis of the baseline information provided below.

With the adoption of Rule 506(c), issuers are expected to have access to a greater number of capital sources

because they will be able to generally solicit investors through a variety of means, thereby lowering search costs. While participating investors must be accredited investors, and Rule 506(c) requires issuers to take reasonable steps to verify that such persons are accredited investors, it is possible that some verification methods could lead to participation by non-accredited investors. Non-accredited investors who are not detected by reasonable verification methods could then participate in Rule 506(c) offerings for which they may not be well suited. There is also an increased likelihood of non-accredited investor participation in Rule 506(c) offerings if verification methods are deficient. Both of these likelihoods increase with issuers' ability to generally solicit their offers to an audience of potential investors through broader communication and advertising channels.

The proposed enhancements to the Form D filing requirements are prompted, in part, by the additional investor protection concerns associated with the ability to generally solicit private offerings. The proposed additional information and filing requirements should also enable the Commission to better evaluate the effectiveness of general solicitation in raising capital for small businesses.

All of these proposed rules could also impose certain costs on issuers, including filing burdens, reduced flexibility in offering methods and disclosure of potentially sensitive information. We discuss these potential costs in relation to the anticipated benefits in the sections below.

#### B. Economic Baseline

To assess the economic impact of the proposed rules, we are using as our baseline the regulation of private offerings as it exists today, including the adoption of Rule 506(c), which removes the prohibition on general solicitation for offerings under Rule 506. We also include in our baseline the provisions enacted with the adoption of the bad actor rule, which disqualifies issuers and other market participants from relying on Rule 506 if "felons and other 'bad actors'" are participating in the offering. Because these provisions are being adopted today, the information provided below regarding the current state of the private offering market in the United States does not include data related to the use of general solicitation in Rule 506(c) offerings or the disqualification of bad actors, because no such data exist. Hence, some of our analysis of the potential impact of the proposed rules considers the anticipated

<sup>171</sup> Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. 15 U.S.C. 77b(b); 15 U.S.C. 78c(f). Section 23(a)(2) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. 15 U.S.C. 78w(a)(2).

<sup>172</sup> Form D and Regulation D were adopted in 1982. Release No. 33-6389 (adopting Form D as a replacement for Forms 4(6), 146, 240 and 242).

<sup>173</sup> Release No. 33-6339.

<sup>174</sup> See Release No. 33-8891.

<sup>175</sup> *Id.*

effects of the adoption of Rules 506(c) and 506(d). As a result, many of the potential costs and benefits are difficult to quantify with any degree of certainty, especially as the practices of market participants are expected to evolve and adapt to the ability to generally solicit in Rule 506(c) offerings. To the extent applicable, we will consider developments in the private offering market subsequent to the adoption of today's rule amendments in any future assessment of the potential economic impact of the rules proposed today.

The baseline analysis that follows is in large part based on information collected from Form D filings submitted by issuers relying on Regulation D to raise capital, which is based on issuer reporting practices and requirements that could change because of the proposed amendments. As we describe in more detail below, we believe that we do not have a complete view of the Rule 506 market, particularly with respect to the amount of capital raised. Currently, issuers are required to file an initial Form D within 15 days of the first sale of securities, and are required to report additional sales through amended filings only under certain conditions. In addition, issuers do not report all required information, either due to error

or because they do not wish to make the information public. Commenters have suggested and we also have evidence that some issuers are not filing a Form D for their offerings in compliance with Rule 503.<sup>176</sup> Consequently, the analysis that follows is necessarily subject to these limitations in the current Form D reporting process.

Some of the proposed rules, such as an Advance Form D filing for Rule 506(c) offerings, a closing Form D amendment for Rule 506 offerings, and expanded information requirements in Form D primarily in regard to Rule 506 offerings, seek to address these reporting limitations and are intended to result in more complete information on the Rule 506 market.

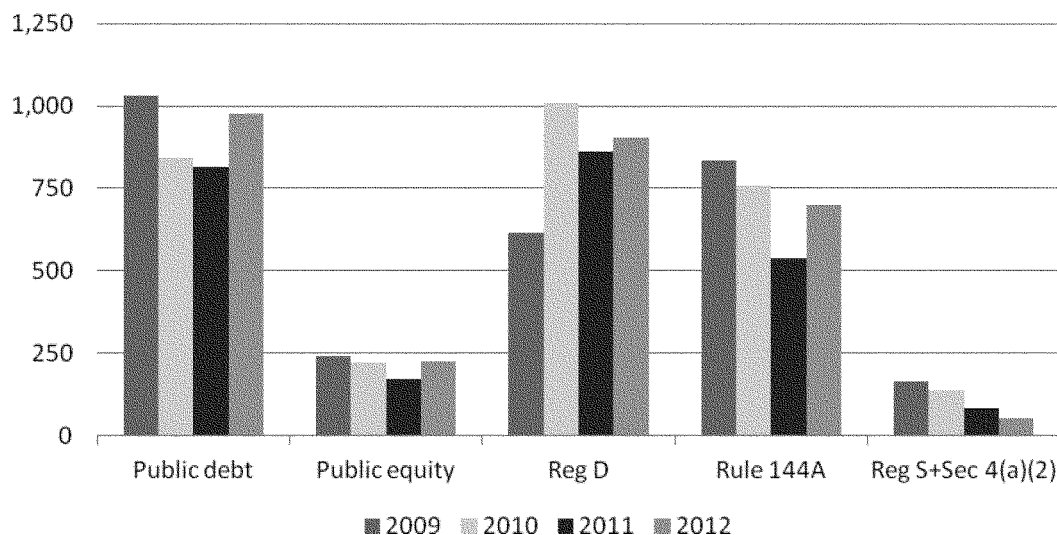
#### 1. Size of the Exempt Offering Market

Exempt offerings play a significant role in capital formation in the United States. Offerings conducted in reliance on Rule 506 account for 99% of the capital reported as being raised under Regulation D from 2009 to 2012, and represent approximately 94% of the number of Regulation D offerings.<sup>177</sup> The significance of Rule 506 offerings is underscored by the comparison to registered offerings. In 2012, the estimated amount of capital reported as being raised in Rule 506 offerings

(including both equity and debt) was \$898 billion, compared to \$1.2 trillion raised in registered offerings.<sup>178</sup> Of this \$898 billion, operating companies (issuers that are not pooled investment funds) reported raising \$173 billion, while pooled investment funds reported raising \$725 billion.<sup>179</sup> The amount reported as being raised by pooled investment funds is comparable to the amount of capital raised by registered investment funds. In 2012, registered investment funds (which include money market mutual funds, long-term mutual funds, exchange-traded funds, closed-end funds and unit investment trusts) raised approximately \$727 billion.<sup>180</sup>

In 2011, the estimated amount of capital (including both equity and debt) reported as being raised in Rule 506 offerings was \$849 billion compared to \$985 billion raised in registered offerings.<sup>181</sup> Of the \$849 billion, operating companies reported raising \$71 billion, while pooled investment funds reported raising \$778 billion.<sup>182</sup> More generally, when including offerings pursuant to other exemptions—Rule 144A, Regulation S and Section 4(a)(2)—significantly more capital appears to be raised through exempt offerings than registered offerings (Figure 1).<sup>183</sup>

**Figure 1: Capital Raised in U.S. Capital Markets during 2009-2012<sup>184</sup>**



<sup>176</sup> See note 85.

<sup>177</sup> See Ivanov/Bauguess Study.

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> In calculating the amount of capital raised by registered investment funds, we use the net amounts (plus reinvested dividends and reinvested

capital gains), which reflect redemptions, and not gross amounts, by open-ended registered investment funds because they face frequent redemptions, and do not have redemption restrictions and lock-up periods common among private funds. In addition, we use the new issuances of registered closed-end funds and the new deposits of registered unit investment trusts.

See 2013 Investment Company Institute Factbook, available at <http://www.icifactbook.org>.

<sup>181</sup> See Ivanov/Bauguess Study.

<sup>182</sup> See *id.*

<sup>183</sup> See *id.*

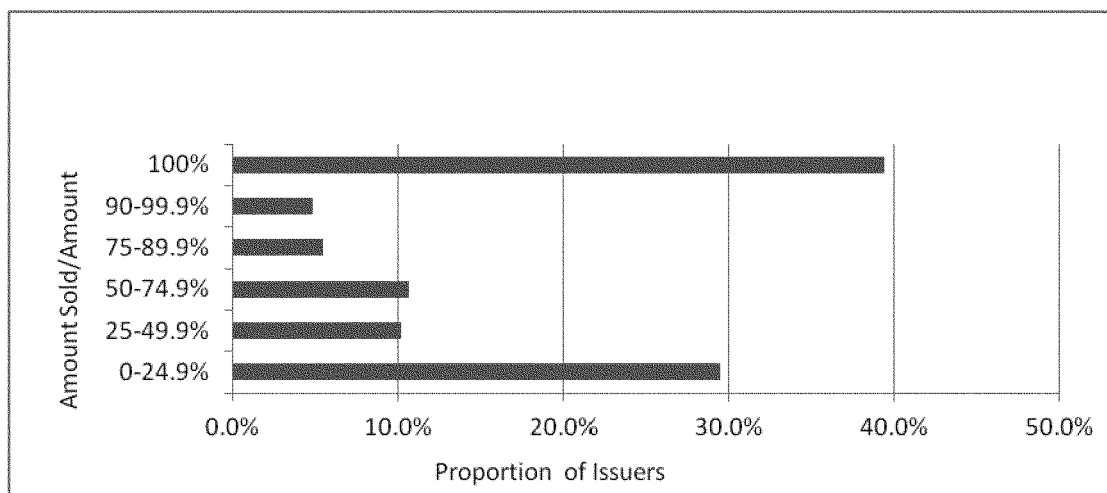


At present, issuers are required to file a Form D not later than 15 days after the first sale of securities in a Regulation D offering and an amendment to the Form D only under certain circumstances. Since issuers are not required to submit a filing when an offering is completed, and submit amendments only under

certain circumstances, we have no definitive information on the final amounts raised. Figure 2, below, illustrates that at the time of the initial Form D filing, only 39% of offerings by non-pooled investment fund issuers were completed relative to the total amount sought. Separately, 70% of

pooled investment funds state their total offering amount to be “Indefinite” in their Form D filings. As a result, the initial Form D filings of these pooled investment funds likely do not accurately reflect the total amount of securities offered or sold.

**Figure 2: Amount Sold as Percentage of Total Offering Amount by Non-Pooled Investment Fund Issuers in Regulation D Offerings at the Time of Form D Filing: 2009-2012**



## 2. Affected Market Participants

The amendments to Rule 506 we are adopting today in a separate release will affect a number of different market participants. Issuers of securities in Rule 506 offerings include both reporting and non-reporting operating companies and pooled investment funds. Investment advisers organize and sponsor pooled investment funds that conduct Rule 506 offerings. Intermediaries that facilitate Rule 506 offerings include registered broker-dealers, finders and placement agents. Investors in Rule 506 offerings include accredited investors (both natural persons and legal entities) and non-accredited investors who meet certain “sophistication” requirements. Affected market participants might also include investors that are not eligible to participate in Rule 506(c) offerings, but do because of poor investor verification standards or fraudulent activities. Each

of these market participants is discussed in further detail below.

### a. Issuers

Based on the information submitted in 112,467 new and amended Form D filings between 2009 and 2012, there were 67,706 new Regulation D offerings by 49,740 unique issuers during this four-year period.<sup>185</sup> The size of the average Regulation D offering during this period was approximately \$30 million, whereas the size of the median offering was approximately \$1.5 million.<sup>186</sup> The difference between the average and median offering sizes indicates that the Regulation D market is comprised of many small offerings, which is consistent with the view that many smaller businesses are relying on Regulation D to raise capital, and a smaller number of much larger offerings.

Some information about issuer size is available from Item 5 in Form D, which

requires issuers in Regulation D offerings to report their size in terms of revenue ranges or, in the case of pooled investment funds, net asset value ranges. All issuers can currently choose not to disclose this size information, however, and a significant majority of issuers that are not pooled investment funds declined to disclose their revenue ranges in the Forms D that they filed between 2009 and 2012. For those that did, most reported a revenue range of less than \$1 million (Figure 3).<sup>187</sup> During the 2009–2011 period, approximately 10% of all public companies raised capital in Regulation D offerings; in 2012, approximately 6% of such companies did so.<sup>188</sup> These public companies tended to be smaller and less profitable than their industry peers, which illustrates the importance of the private capital markets to smaller companies, whether public or private.<sup>189</sup>

<sup>184</sup> The 2012 non-ABS Rule 144A offerings data is based on an extrapolation of currently available data through May 2012 from Sagient Research System's Placement Tracker database. For more detail, see the Ivanov/Bauguess Study.

<sup>185</sup> See Ivanov/Bauguess Study.

<sup>186</sup> See *id.* The average and median amounts are calculated based on the amounts sold by Regulation

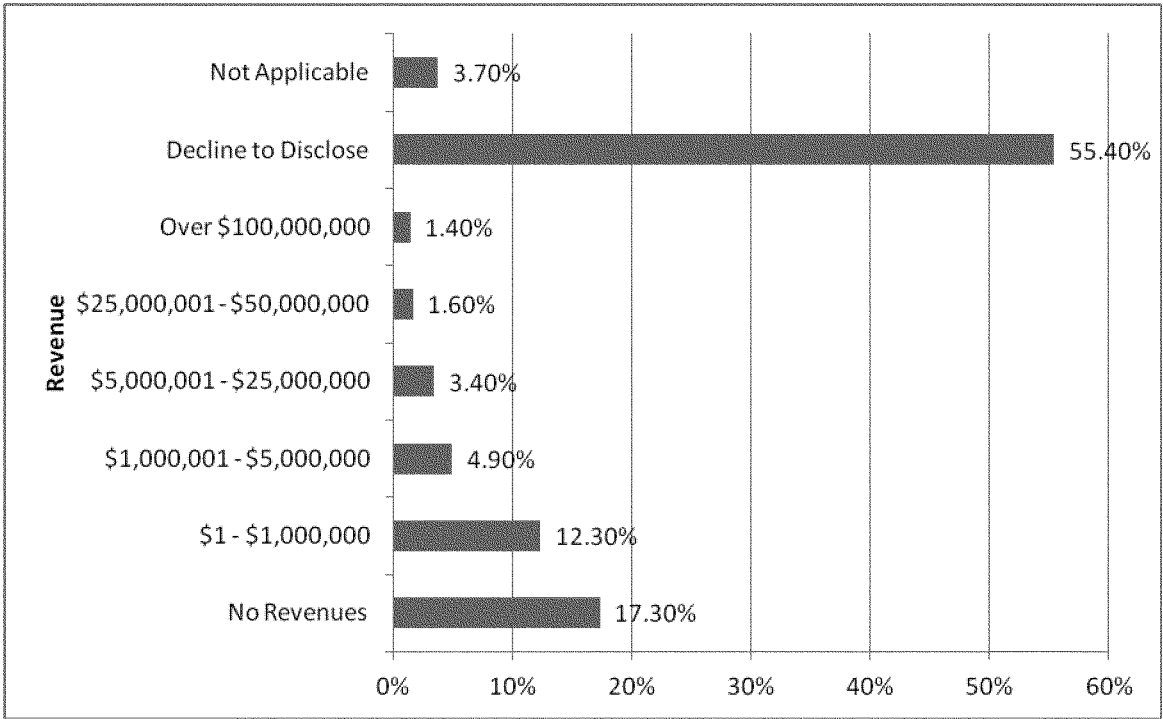
D issuers as reported in their Form D filings. A study of unregistered equity offerings by publicly-traded companies over the period 1980–1996 finds that the mean offering amount was \$12.7 million, whereas the median offering amount was \$4.5 million. See Michael Hertzel, Michael Lemmon, James Linck and Lynn Rees, *Long-Run Performance Following Private Placements of Equity*, 57 *Journal of Finance* 2595 (2002).

<sup>187</sup> See Ivanov/Bauguess Study.

<sup>188</sup> *Id.* (explaining methodology of using listings in the Standard & Poor's Compustat database and the University of Chicago's Center for Research in Securities Prices database to determine which companies were public companies).

<sup>189</sup> *Id.*

**Figure 3: Distribution of Non-Pooled Investment Fund Issuers in Regulation D Market by Revenue: 2009-2012**



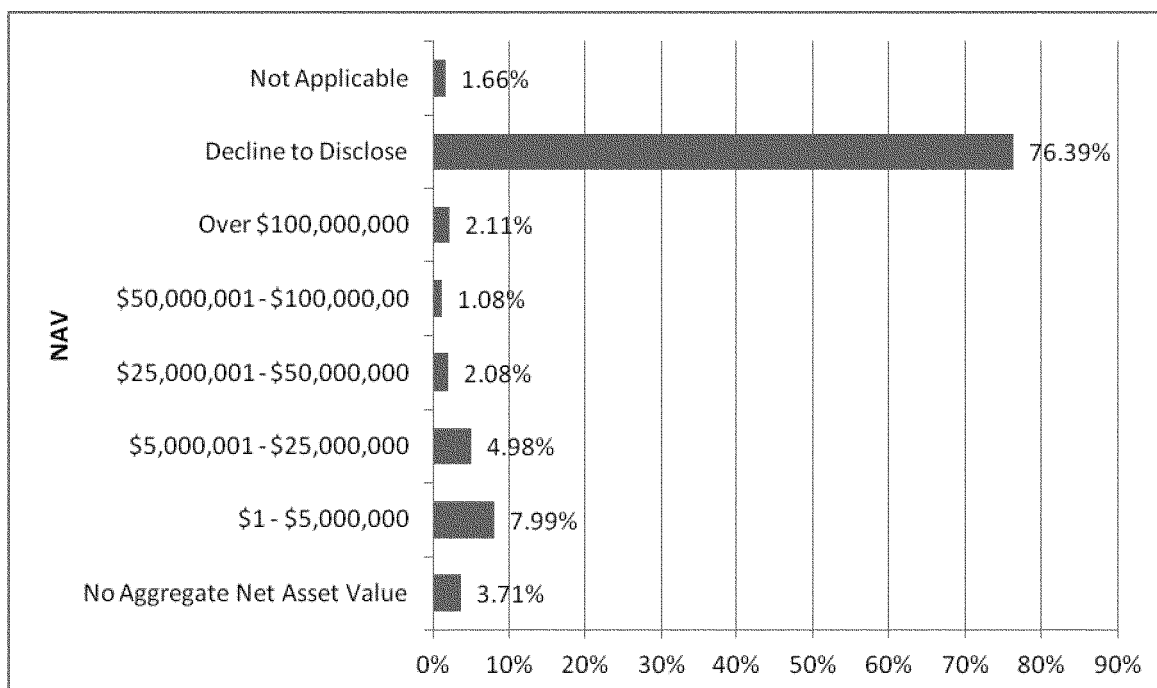
During this period, pooled investment funds conducted approximately 24% of the total number of Regulation D offerings and raised approximately 81% of the total amount of capital raised in Regulation D offerings.<sup>190</sup> More than

75% of pooled investment funds declined to disclose their net asset value range. The proposed amendments to Form D would eliminate this voluntary choice to decline to report fund size (or issuer size for those that are not pooled

investment funds), except for issuers who do not include such information in general solicitation materials under Rule 506(c) or otherwise make this information publicly available.

<sup>190</sup> *Id.*

**Figure 4: Distribution of Pooled Investment Fund Issuers in Regulation D Market by Net Asset Value: 2009-2012**



Between 2009 and 2012, approximately 66% of Regulation D offerings were of equity securities, and almost two-thirds of these were by issuers other than pooled investment funds.<sup>191</sup> Non-U.S. issuers accounted for approximately 19% of the amount of capital raised in Regulation D offerings, indicating that the U.S. market is a significant source of capital for these issuers.<sup>192</sup>

**b. Investors**

We have relatively little information on the types and number of investors in Rule 506 offerings. Form D currently requires issuers in Rule 506 offerings to provide information about the total number of investors who have already invested in the offering and the number of persons who do not qualify as

accredited investors.<sup>193</sup> In 2012, approximately 153,000 investors participated in offerings by operating companies, while approximately 81,000 investors invested in offerings by pooled investment funds.<sup>194</sup> Because some investors participate in multiple offerings, these numbers likely overestimate the actual number of unique investors in these reported offerings. We do not know what fraction of these investors are natural persons or entities because Form D does not require any other information on the types of investors.<sup>195</sup> In offerings under Rule 506(b), both accredited investors and up to 35 non-accredited investors who meet certain “sophistication” requirements are eligible to purchase securities. In offerings under new Rule

506(c), only accredited investors will be eligible to purchase securities.

Information collected from Form D filings indicates that most Rule 506 offerings do not involve broad investor participation. More than two-thirds of these offerings have ten or fewer investors, while less than 5% of these offerings have more than 30 investors. Although Rule 506 currently allows for the participation of non-accredited investors who meet certain sophistication requirements, such non-accredited investors purchased securities in only 11% of the Rule 506 offerings conducted between 2009 and 2012.<sup>196</sup> Only 8% of the offerings by pooled investment funds included non-accredited investors, compared to 12% of the offerings by other issuers.<sup>197</sup>

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See Item 14 of Form D. Form D does not require any other information on the types of

investors, such as whether they are natural persons or legal entities.

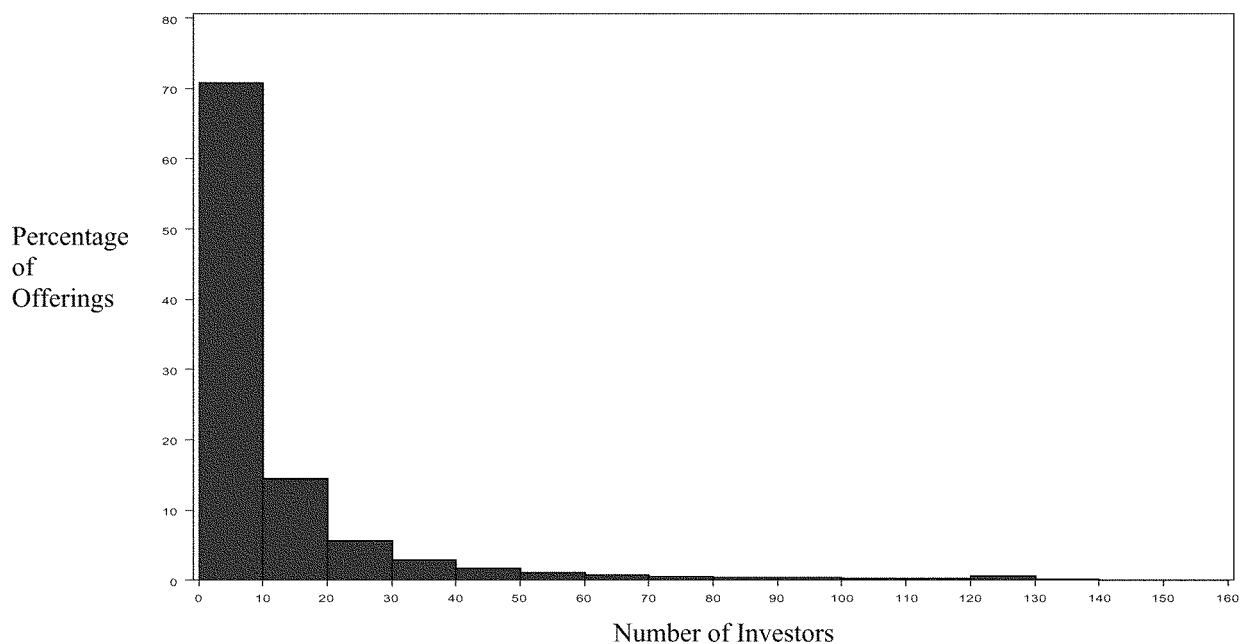
<sup>194</sup> These numbers are based on initial Form D filings submitted in 2012.

<sup>195</sup> See Item 14 of Form D.

<sup>196</sup> See Ivanov/Bauguess Study.

<sup>197</sup> *Id.*

**Figure 5: Distribution of Regulation D Offerings by Number of Investors: 2009-2012**



As stated above, between 2009 and 2012, the size of the median Regulation D offering, based on the information in Form D filings, was approximately \$1.5 million. The presence of so many relatively small offerings suggests that a sizable number of current investors in Rule 506 offerings are natural persons or legal entities in which all equity owners are natural persons. This is because smaller offerings may not provide sufficient scale for institutional investors to earn a sizable return. Institutional investors typically have a larger investible capital base and more formal screening procedures compared to investors who are natural persons,

and the associated costs of identifying potential investments and monitoring their investment portfolio lead them to make larger investments than natural persons.<sup>198</sup> As for whether natural persons investing in these offerings are accredited investors or non-accredited investors, almost 90% of the Regulation D offerings conducted between 2009 and 2012 did not involve any non-accredited investors.<sup>199</sup>

While we do not know what percentage of investors in Rule 506 offerings are natural persons, the vast majority of Regulation D offerings are conducted without the use of an intermediary,<sup>200</sup> suggesting that many of

the investors in Regulation D offerings likely have a pre-existing relationship with the issuer or its management because these offerings would not have been conducted using general solicitation. This category of investors is likely to be much smaller than the total number of eligible investors for Rule 506(c) offerings, which is potentially very large. We estimate that at least 8.7 million U.S. households, or 7.4% of all U.S. households, qualified as accredited investors in 2010, based on the net worth standard in the definition of “accredited investor” (Figure 6).<sup>201</sup>

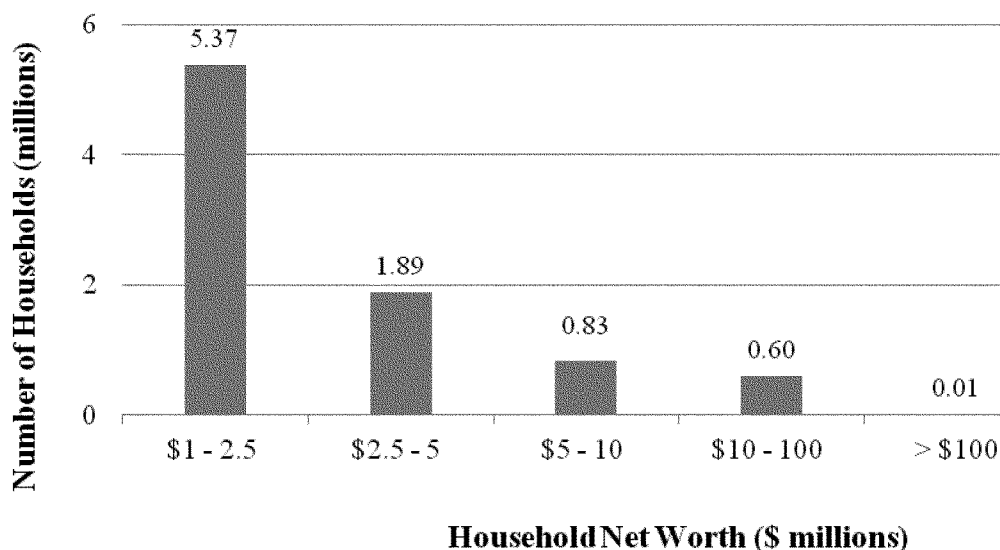
<sup>198</sup> See, e.g., George Fenn, Nellie Liang and Stephen Prowes, *The Economics of Private Equity Markets* (1998); Steven Kaplan and Per Strömberg, *Leveraged Buyouts and Private Equity*, 23 *Journal of Economic Perspectives* 121 (2009).

<sup>199</sup> See Ivanov/Bauguess Study.

<sup>200</sup> An analysis of all Form D filings submitted between 2009 to 2012 shows that approximately 11% of all new offerings reported sales commissions of greater than zero because the issuers used intermediaries. See Ivanov/Bauguess Study. We assume that the lack of a commission indicates the absence of an intermediary.

<sup>201</sup> This estimate is based on net worth and household data from the Federal Reserve Board's Triennial Survey of Consumer Finances 2010. Our calculations are based on all 32,410 observations in the 2010 survey.

**Figure 6: Number of U.S. Households that Qualify as Accredited Investors Based on 2010 Net Worth**



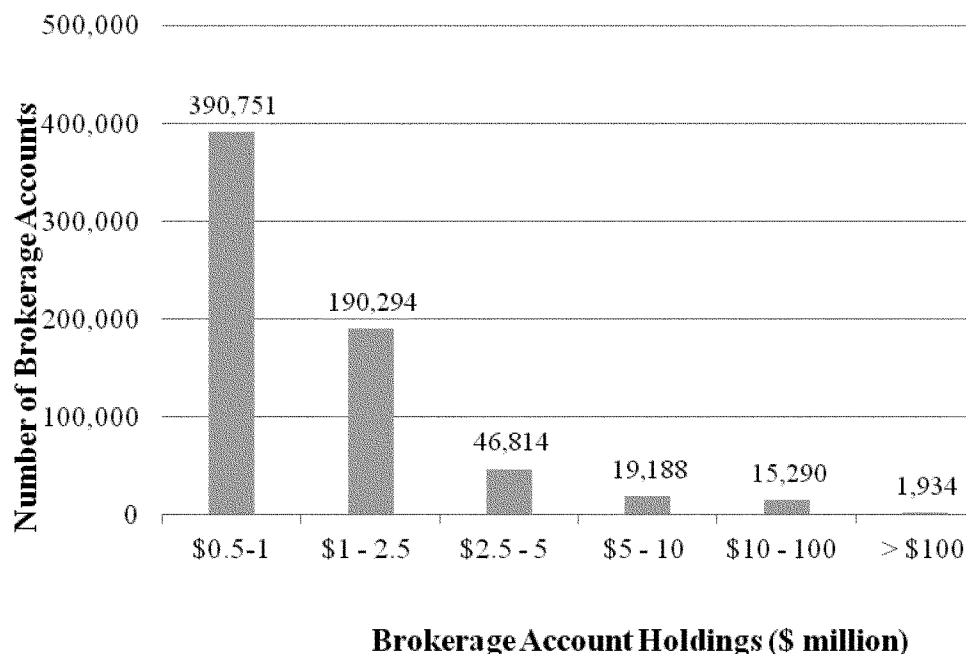
Our analysis, however, leads us to believe that only a small percentage of these households are likely to participate in securities offerings, especially exempt offerings. First, as mentioned above, data from Form D filings in 2012 suggests that fewer than 234,000 investors (of which an unknown subset are natural persons) participated in Regulation D offerings, which is small compared to the 8.7 million households that qualify as accredited investors. Second, evidence suggests that only a small fraction of the

total accredited investor population has significant levels of direct stockholdings. Based on an analysis of retail stock holding data for 33 million brokerage accounts in 2010, only 3.7 million accounts had at least \$100,000 of direct investments in equity securities issued by public companies listed on domestic national securities exchanges, while only 664,000 accounts had at least \$500,000 of direct investments in such equity securities (Figure 7).<sup>202</sup> Assuming that investments in publicly-traded equity

securities are a gateway to investments in securities issued in exempt offerings, and accredited investors with investment experience in publicly-traded equity securities are more likely to participate in an exempt offering than accredited investors who do not, the set of accredited investors likely to be interested in investing in Rule 506(c) offerings could be significantly smaller than the total accredited investor population.

<sup>202</sup> This analysis by DERA is based on the stock holdings of retail investors from more than 100

brokerage firms covering more than 33 million accounts during the period June 2010-May 2011.

**Figure 7: Direct Stock Holdings of Retail Investors, 2010**

#### c. Investment Advisers

As of December 2012, there were 10,870 Commission-registered investment advisers that filed Form ADV with the Commission, representing approximately \$50 trillion total assets under management.<sup>203</sup> The average investment adviser registered with the Commission has assets under management of approximately \$4.6 billion; the median size of assets under management for these registered investment advisers is \$258 million.

Approximately one-fourth of registered investment advisers (2,842) currently advise (or advised) private funds that filed Form D between 2002 and 2012, while another 1,250 registered investment advisers currently advise (or advised) private funds that did not file Form D during the same period. The registered investment advisers advising private funds that submitted Form D filings during this period had average assets under management of \$8.7 billion, while the ones advising private funds that did not submit Form D filings had average assets under management of \$8.6 billion. Registered investment advisers that did not advise private funds (6,623)

are considerably smaller, with average assets under management of \$2.1 billion.

#### d. Broker-Dealers

As of December 2012, there were 4,450 broker-dealers registered with the Commission who file on Form X-17A-5, with average total assets of approximately \$1.1 billion per broker-dealer. The aggregate total assets of these registered broker-dealers are approximately \$4.9 trillion. Of these registered broker-dealers, 410 are dually registered as investment advisers. The dually registered broker-dealers are larger (average total assets of \$6.4 billion) than those that are not dually registered. Among the dually registered broker-dealers, we identified 24 that currently have or have had private funds that submitted Form D filings between 2002 and 2012.

#### 3. Incidence of Fraud in Securities Offerings

As discussed above, commenters expressed concern that the use of general solicitation in Rule 506(c) offerings could lead to greater incidence of fraud in this market as those seeking to conduct fraudulent offerings would be able to directly solicit unsophisticated investors. Our principal source of data about the Rule 506 market is Form D filings and the incidence of fraud detected by us and

other regulators. Because data on the incidence of fraud in private securities offerings is extremely limited, we are unable to estimate the extent of fraud in the existing market for privately offered securities or the degree, if any, to which such fraud may increase upon the adoption of Rule 506(c).

Some commenters suggested that we look to our experience with offerings conducted pursuant to Rule 504, as amended in 1992, as a means of evaluating the potential for fraud in the Rule 506(c) market. We do not believe that our experience with the 1992 amendments to Rule 504 is particularly instructive with respect to the potential incidence of fraud resulting from our implementation of Section 201(a) of the JOBS Act.<sup>204</sup>

<sup>204</sup> In 1992, when we amended Rule 504 to eliminate the prohibition against general solicitation, we also provided that the securities issued in these Rule 504 offerings would not be "restricted securities" for purposes of resale pursuant to Rule 144 under the Securities Act. As a result, a non-reporting company could sell up to \$1 million of immediately freely-tradable securities in a 12-month period and be subject only to the antifraud and civil liability provisions of the federal securities laws.

By 1998, we concluded that securities issued in these Rule 504 offerings facilitated a number of fraudulent secondary transactions in the over-the-counter markets, and that these securities were issued by "microcap" companies, characterized by thin capitalization, low share prices and little or no analyst coverage.

Moreover, we stated that, while "we believe that the scope of abuse is small in relation to the actual

<sup>203</sup> For the same time period, 2,303 exempt reporting advisers filed a Form ADV with the Commission. Certain investment advisers that are ineligible to register with the Commission may also be exempt from registration with any state.

Several commenters echoed concerns regarding the potential of fraud related to private funds in the Rule 506(c) market.<sup>205</sup> Empirical evidence on the extent of fraud involving private funds is not readily available. While a few economic studies suggest that certain hedge funds engage in various types of misreporting, such as misrepresenting past performance,<sup>206</sup> delaying disclosure of returns<sup>207</sup> and inflating returns at the end of the fiscal year in order to earn higher fees,<sup>208</sup> these studies do not provide information about the extent or magnitude of any such misreporting activities. In a 2003 report, the Commission staff noted that there was no evidence that hedge funds were disproportionately involved in fraudulent activity and that the charges brought by the Commission in 38 enforcement actions against hedge fund advisers and hedge funds between 1999 and 2003 were similar to the charges against other types of investment advisers.<sup>209</sup> Evidence on the extent of

usage of the exemption, we also believe that a regulatory response may be necessary.” As the freely-tradable nature of the securities facilitated the fraudulent secondary transactions, we proposed to “implement the same resale restrictions on securities issued in a Rule 504 transaction as apply to transactions under the other Regulation D exemptions,” in addition to reinstating the prohibition against general solicitation. Although we recognized that resale restrictions would have “some impact upon small businesses trying to raise ‘seed capital’ in bona fide transactions,” we believed that such restrictions were necessary so that “unscrupulous stock promoters will be less likely to use Rule 504 as the source of the freely tradable securities they need to facilitate their fraudulent activities in the secondary markets.” *Revision of Rule 504 of Regulation D, the “Seed Capital” Exemption*, Release No. 33–7541 (May 21, 1998) [63 FR 29168, 29169].

In contrast, issuers using Rule 506(c) can sell only to accredited investors, and the securities issued in these offerings are deemed to be “restricted securities” for purposes of resale under Rule 144. As a result, schemes involving price manipulation to defraud unknowing investors in the immediate resale of securities purchased directly from issuers (colloquially referred to as “pump and dump” schemes) are not the types of fraud we believe are likely to occur in Rule 506(c) offerings, given the holding period requirement in Rule 144(d) and other structural impediments, such as restricted transfer legends on stock certificates.

<sup>205</sup> See letters from Consumer Federation; Fund Democracy; IDC.

<sup>206</sup> See Andrew Patton, Tarun Ramadorai and Michael Streatfield, *Change You Can Believe In? Hedge Fund Data Revisions* (Duke University, Working Paper, 2013). But see letter from MFA (June 20, 2013) (questioning the reliability of the underlying data used in the study).

<sup>207</sup> See George Aragon and Vikram Nanda, *Strategic Delays and Clustering in Hedge Fund Reported Returns* (Arizona State University, Working Paper, 2013).

<sup>208</sup> See Vikas Agarwal, Naveen Daniel and Narayanan Naik, *Do Hedge Funds Manage Their Reported Returns?*, 24 *Review of Financial Studies* 3282 (2011).

<sup>209</sup> See *Implications of the Growth of Hedge Funds*, Staff Report to the U.S. Securities and

fraud involving other types of pooled investment funds also is sparse. A more recent study has identified 245 lawsuits (both federal and state) involving 200 venture capitalists as defendants between 1975 and 2007, and has shown that venture capital funds that are older and have a larger presence in terms of size and network are less likely to be sued.<sup>210</sup>

For comparison purposes, a recent study using enforcement actions brought by the Commission and private securities class action lawsuits to measure the incidence of fraud in the registered offering market found that approximately 3% of registered initial public offerings during the period from 1995 to 2007 were associated with allegations of fraud.<sup>211</sup> This study used the filing of a securities lawsuit against an issuer for financial misreporting during the initial public offering process as the proxy for detected fraud. The analysis covered 3,297 initial public offerings that resulted in 110 cases. The study determined that the incidence of fraud increased to 12% when securities law violations committed in years subsequent to the initial public offering were included. These are cases where fraud was detected and the Commission filed or instituted enforcement action; at best, they represent a lower bound on incidence of fraud in those markets.

While we cannot estimate the extent of fraud in the market for privately offered securities, we do know, based upon our own experience enforcing the federal securities laws and the enforcement efforts of criminal authorities and state securities regulators, that fraud exists in this market. One of the primary objectives of the amendments to Regulation D and Form D being proposed today is to increase the information available to the Commission about the Rule 506 market so that we can better assess, and, if necessary, take steps to respond to, fraudulent practices in the market for privately offered securities.

#### 4. Current Practices

The potential economic impact of the proposed amendments will depend on the current practices of issuers and market participants in Rule 506

offerings—specifically, on the extent to which issuers currently file Form D and their incentives for doing so in the future. The analysis below provides an assessment of current compliance rates with respect to Form D filing requirements.

##### a. Missing Form D Filings

Issuers that use an exemption under Regulation D to raise capital are required to file a Form D not later than 15 days after the first sale of securities in the offering; however, the filing of Form D is not a condition to the use of Regulation D. Commenters have indicated that a number of issuers in Regulation D offerings do not file the form, even though the filing of Form D is a requirement of Regulation D. Assessing the prevalence of current non-compliance is difficult because a Form D filing is often the only public record of a Regulation D offering. We can provide an estimate of filing compliance for issuers under Rule 506 that use a registered broker-dealer in these offerings and for private funds that are managed by a Commission-registered investment adviser.<sup>212</sup> Because information related to private offerings for these sets of issuers is available in other filings, we can determine, in certain cases, when a Form D should have been but was not filed. In the analyses below, we present evidence on the corresponding rate at which we observe Form D filings. It should be noted that our estimates are subject to some degree of error because in some instances it is possible that a Form D was filed even though we could not match it to a specific offering. In other instances, a Form D may not have been filed because the issuer may be relying on another exemption from Securities Act registration that does not require a Form D filing, such as the statutory exemption under Section 4(a)(2). Our estimates of compliance for issuers that use a registered investment adviser or broker-dealer also may not reflect the rate of compliance among issuers that do not. To the extent that Forms D are more likely to be filed when a registered entity is involved, there could be a greater rate of non-compliance among the remaining Rule 506 offerings that do

*Exchange Commission* (Sept. 2003), available at <http://www.sec.gov/news/studies/hedgefunds0903.pdf>.

<sup>210</sup> See Vladimir Atanasov, Vladimir Ivanov and Kate Litvak, *Does Reputation Limit Opportunistic Behavior in the VC Industry? Evidence From Litigation Against VCs*, 67 *Journal of Finance* 2215 (2012).

<sup>211</sup> See Tracy Wang, Andrew Winton and Xiaoyun Yu, *Corporate Fraud and Business Conditions: Evidence from IPOs*, 65 *Journal of Finance* 2255 (2010).

<sup>212</sup> Broker-dealers registered with FINRA are required to file private placement memoranda under FINRA Rules 5122 and 5123 for their or their client's private offering. Sections 203 and 204 of the Advisers Act [15 U.S.C. 80b–3 and 80b–4] authorize the Commission to collect the information required by Form ADV. Investment advisers that are required to register with the Commission and exempt reporting advisers are required to file Form ADV with the Commission. The form includes disclosure of Regulation D offerings that they conduct for their client issuers.



not involve a registered investment adviser or broker-dealer.<sup>213</sup>

*Form D and Form ADV reconciliation.* Our estimate of Form D filing compliance among Commission-registered investment advisers that manage private funds is based on their requirement to report to the Commission on Form ADV the Regulation D offerings that they conduct. We matched the Form D file numbers reported on Form ADV filings from 2012 to the actual Form D and Form D amendments filed on EDGAR. This created a universe of 18,276 private funds identified on Form ADV filings for the period between 2002 and 2012.<sup>214</sup> The matching was done in two steps. First, we matched the file number of each Regulation D offering as reported by the investment adviser on Form ADV to the file numbers in EDGAR.<sup>215</sup> Second, if there was no file number for the Regulation D offering, we matched by private fund name. We compared the name of the private fund reported by the investment adviser in its Form ADV to the issuer names in the Form D and Form D amendment filings. Conducting both steps resulted in an 89% match—i.e., during the period from 2002 to 2012, as many as 11% of the private funds advised by registered investment advisers did not file a Form D when relying on the Regulation D exemption. This number, however, could overstate the actual number of private funds that did not file a Form D due to typographical errors in the name of the private fund or filing number. Also, registered investment advisers are required to identify Form D filing numbers only for private funds that are currently offering their securities. As a result, the Form ADV filings of advisers to private funds that are closed to new investments or are no longer engaged in a Regulation D offering of their securities are not required to disclose a Form D filing number.

*Form D and FINRA filing reconciliation.* Our estimate of Form D filing compliance among registered broker-dealers that facilitate private offerings is based on their compliance

with FINRA Rules 5122 and 5123 (the latter rule took effect on December 3, 2012), which requires member firms that sell securities in certain private offerings to file with FINRA copies of any private placement memorandum, term sheet or other offering document used in these offerings (or amendments thereof) or, alternatively, to file a notice stating that no such offering document was used.<sup>216</sup> As of December 31, 2012, FINRA oversaw nearly 4,300 brokerage firms.<sup>217</sup> During the period from December 3, 2012 to February 5, 2013, FINRA received 366 filings under this rule. Each private offering could have multiple broker-dealers and consequently the 366 filings could represent fewer than 366 unique offerings. Further, FINRA rules require filing by broker-dealers associated with a Regulation D or other private offerings, not all of which require the filing of Form D. A Form D filing is only required by issuers that undertake Regulation D offerings. We cannot identify how many of the 366 filings are related to non-Regulation D offerings.

We matched these FINRA filings to the Form D and Form D amendment filings received on EDGAR. The matching was done in multiple steps. First, we matched using the issuer CIK number and the Form D filing number<sup>218</sup> contained in each of the separate filings. Then, for each unmatched FINRA filing, we searched the issuer name, and variants of the name, in EDGAR to determine if a Form D was filed for that issuer's offering. Applying both procedures resulted in a 91% match—i.e., during this three-month period, subject to the limitations described above, as many as 9% of the offerings represented in the FINRA filings for Regulation D or other private offerings that used a registered broker did not have a corresponding Form D.

#### b. Legends and Other Disclosures in Regulation D Offering Materials

Prior to the effectiveness of Rule 506(c), general solicitation has not been permitted for private offerings under Rule 506. Although advertising by

issuers is prohibited, issuers may provide some material or information to intermediaries and interested investors regarding themselves and their offering. Because this information is not filed with the Commission, we do not know if legends and relevant disclosures are included in any such material.

#### C. Analysis of the Amendments Relating to Form D

We are proposing amendments to Form D and Regulation D as they relate to Form D in order to enhance our understanding of the Rule 506 market, particularly the impact of the adoption of Rule 506(c). These proposed amendments would:

- Require the filing of Form D 15 calendar days in advance of the first use of general solicitation in a Rule 506(c) offering;
- require the filing of a closing amendment to Form D within 30 calendar days after the termination of a Rule 506 offering;
- require issuers to provide additional information in Form D primarily with respect to Rule 506 offerings; and
- disqualify an issuer from relying on Rule 506 for future offerings until one year after the required Form D filings are made if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering.

The proposals relating to the Form D filing requirements are intended to improve the availability of Form D information to the Commission that would enable it to evaluate market developments in the Rule 506 market. The amendments to the information requirements of Form D would enable the Commission to obtain more complete information about the Rule 506 market than it has now, especially with respect to the composition of investors and the general solicitation practices and verification methods employed in Rule 506(c) offerings.

#### 1. Advance Filing of Form D for Rule 506(c) Offerings

We are proposing to amend Rule 503 of Regulation D to require issuers that intend to engage in general solicitation for Rule 506(c) offerings to file an initial Form D with certain information 15 calendar days in advance of any general solicitation for the offering. We believe that requiring issuers to file an Advance Form D would assist the Commission's efforts to evaluate the use of Rule 506(c). The Advance Form D would be useful to the Commission and the Commission staff, as it would enhance the

<sup>213</sup> Approximately 20% of Rule 506 offerings use either a broker-dealer or investment adviser.

<sup>214</sup> We chose this period because Form D file numbers are not available for Form D filings submitted prior to January 1, 2002.

<sup>215</sup> Some advisers identify a private fund's Form D file number as a series of 9s because they may not be able to locate the fund's Form D file number (particularly with respect to Form D filings made prior to January 1, 2002 because such file numbers are not available through an EDGAR search). Advisers may also mask the Form D file number to maintain the anonymity of a private fund's name. These factors will understate the number of funds that file Form D and Form D amendments. Thus, in such cases we attempted to match by fund name.

<sup>216</sup> Not all broker-dealers that sell securities in private offerings have to file private placement memoranda with FINRA under FINRA Rules 5122 and 5123. FINRA filings represent a small proportion of Regulation D offerings. For example, if a broker-dealer is not registered as a member of FINRA, they will not file with FINRA. Further only those private offerings that have retail investors, i.e., natural persons, trigger the requirement for the broker-dealer to file the private placement memorandum with FINRA.

<sup>217</sup> See <http://www.finra.org/Newsroom/Statistics/>.

<sup>218</sup> The Form D filing number is the 021—Commission filing number reported in the header of the Form D filing.

information available to the Commission to analyze issuers that attempted to conduct Rule 506(c) offerings but were unsuccessful in selling any securities through these offerings or chose alternative forms of raising capital. Currently, Form D is required to be filed only after the first sale of securities, which means that issuers that attempted to, but did not, complete a sale are not required to file a Form D, thereby limiting the Commission's ability to determine which issuers are facing challenges raising capital under Rule 506(c) and whether further steps are needed to facilitate issuers' ability to raise capital under Rule 506(c). We also understand that the Advance Form D would be useful to state securities regulators and to investors in gathering timely information about the use of Rule 506(c).

On the other hand, to the extent that an Advance Form D filing signals planned capital-raising activity and related details to potential competitors, some issuers may be reluctant to use Rule 506(c) when they might otherwise. The proposed Advance Form D filing requirement could thus deter some issuers from using Rule 506(c) as they would be forced to indicate their capital raising plans to a limited extent prior to commencing their general solicitation activities. In addition, the proposed Advance Form D filing requirement could impose market timing costs to the extent that an issuer would like to move quickly but has not yet filed an Advance Form D. We have proposed an advance filing deadline that we think appropriately balances the benefits of advance notice with these market timing costs. Nevertheless, many issuers may choose to file an Advance Form D just in case they decide to conduct a Rule 506(c) offering. As a result, many Advance Form D filings may not reflect the true intent of issuers to conduct these offerings. If there are large numbers of issuers that frequently engage in this practice, there could be a sizable number of premature, and possibly even meaningless, notices of Rule 506(c) offerings; however, requiring specific information about the anticipated offering could decrease the likelihood that issuers file an Advance Form D when they do not intend to conduct an offering in the near term.

To complete an Advance Form D would cause issuers to incur costs; however, because the information in Advance Form D mirrors the information required to be filed within 15 days of the first sale of securities, the additional expense to collect the information for the Advance Form D

would be offset by the lack of any need to do so for the subsequent filings.

## 2. Form D Closing Amendment for Rule 506 Offerings

We are also proposing to amend Rule 503 to require the filing of a final amendment to Form D within 30 calendar days after the termination of a Rule 506 offering. Requiring a closing filing through a Form D amendment upon the termination of a Rule 506 offering, in combination with the changes to Form D to require additional information on Rule 506 offerings, would provide more complete information of the total amounts of capital raised in these offerings by the types of investor and the methods used to verify accredited investor status in Rule 506(c) offerings.

At present, issuers are required to file a Form D within 15 days of the first sale of securities in a Regulation D offering and amendments to the Form D under certain circumstances. As a result, if the total offering amount remains the same or is increased by less than 10%, any capital raised or any change in the composition of subscribing investors, subsequent to the last filing for the offering, is not required to be reported in a Form D. For example, in 2010, issuers sought to raise \$1.2 trillion in reported Regulation D offerings, but only \$905 billion was reported as sold at the time of the initial Form D filing.<sup>219</sup> Thus, based on the available information, we are not able to determine the actual amount raised. A requirement to file a closing amendment to Form D for a Rule 506 offering that confirms the actual amount raised in the offering could provide more complete information.

Without a closing Form D amendment requirement, it may be difficult to clearly ascertain, for example, all of the methods of general solicitation that issuers used in Rule 506(c) offerings or the types of investors solicited in these offerings, particularly if any changes in solicitation methods or targeted investors after the initial Form D filing are not otherwise required to be reported. In such case, any analysis of the information in Form D filings would be based on incomplete data, which may limit the intended benefits of collecting the Form D information. Updated and more conclusive data on Rule 506 offerings from closing Form D amendments would provide the Commission with a more complete

account of the flow of capital in the Rule 506 market, how the flow relates to offering characteristics and the potential associated risks and would assist the Commission in evaluating whether further regulatory action is necessary.

Requiring a closing Form D amendment for Rule 506 offerings would likely come at a nominal cost to issuers in terms of filing another notice, particularly because the filing would be substantially similar to the initial Form D filing or prior Form D amendments for the offering.

## 3. Amendments to the Content Requirements of Form D

The information about Regulation D offerings collected to date and described in this release illustrates and underscores the importance of the non-registered offering market to the U.S. economy. Form D is the primary source of information for the Commission to assess the Regulation D market. Much of what we know about the size and characteristics of the private offering market comes from Form D filings. The continued collection of this information following the elimination of the prohibition against general solicitation in Rule 506(c) offerings will be an important tool for determining the ongoing impact of Rule 506(c).

A number of the proposed amendments to Form D would require additional information specific to Rule 506(c) offerings, which would enable the Commission to develop a greater understanding of the new Rule 506(c) market, particularly with respect to those matters where limited to no information would otherwise be available. Other proposed revisions to Form D would require additional information in regard to both Rule 506(b) offerings and Rule 506(c) offerings, which would permit a more complete analysis and comparison of the use of current Rule 506(b) and new Rule 506(c).<sup>220</sup> Without a substantially similar set of information collected for both Rule 506(b) and 506(c) offerings, the effects of the use of general solicitation on the Rule 506 market may be difficult to measure or identify. Increased consistency in the reporting of information in Form D filings for offerings under Rules 506(b) and 506(c) would promote the availability of comparable data for the two types of offerings and, consequently, may result in a more complete assessment of the

<sup>219</sup> See Ivanov/Bauguess Study. For issuers that reported their offering amount as 'Indefinite', we assumed that amount offered is equal to amount raised.

<sup>220</sup> A number of the proposed revisions to Form D would also require additional information in regard to offerings under Rule 504, Rule 505, and Section 4(a)(5).

effects of the elimination of the prohibition against general solicitation on raising capital under Regulation D. In addition, because the overwhelming majority of Regulation D offerings are conducted in reliance on Rule 506, this should provide the Commission with substantially more complete information about the Regulation D market generally, which, when considered along with the information collected as part of the Commission's Rule 506 review program, would help the Commission evaluate the need for additional action to enhance investor protection.

On the other hand, the proposed amendments to Form D may result in higher compliance costs for issuers conducting offerings in reliance on Rule 506(b) and new Rule 506(c). Issuers relying on Rule 506(b) would have to provide more information than is currently the case in regard to Form D, which would be coupled with the risk of disqualification from using Rule 506 in future offerings, under proposed Rule 507(b), if they or their affiliates or predecessors fail to comply with the additional Form D filing requirements. Nevertheless, we believe that the additional burden to provide the additional required information to be minimal. The proposed amendments would also require, depending on the circumstances, additional information under Items 5 and 9 of Form D with respect to offerings under Rule 504, Rule 505 or Section 4(a)(5), which, as discussed below, we do not believe would result in materially higher compliance costs for issuers conducting these offerings.

Issuers may view the increased reporting requirements as a greater regulatory burden and a loss of commercial privacy,<sup>221</sup> which could put certain issuers at a competitive disadvantage if the costs are sufficient to deter them from raising capital in the private offering market. Requiring issuers to report more information in Form D could also result in some issuers choosing to consider other capital-raising options.

A discussion of a number of the proposed amendments to Form D is set forth below.

#### a. Investor Types

The proposed amendment to Item 14 (Investors) of Form D would require information, with respect to Rule 506

offerings, on the number of investors under the following categories: natural persons who are accredited investors, legal entities that are accredited investors, and if applicable, non-accredited natural persons and non-accredited legal entities. The additional required information would include the amount raised from each of the four categories of investors. At present, Form D requires information on the total amount of capital expected to be raised and the number of accredited and non-accredited investors that have purchased securities in a particular offering. We do not have information on the number of investors who are natural persons or legal entities, or the amounts raised from each of these investor categories. The proposed amendment would thus require more detailed information on the composition of investors in the Rule 506 market than is currently available. Because all purchasers in Rule 506(c) offerings must be accredited investors, and offerings under Rule 506(b) can have no more than 35 non-accredited investors who meet certain sophistication requirements, disaggregated data regarding the number of each type of investor and the amount invested by accredited and non-accredited investors would provide a more complete view of their participation in the Rule 506 market.

Understanding the composition of investors in Rule 506 offerings as between natural persons and legal entities would also be important for risk assessment purposes. Institutional investors usually have a greater amount of resources at their disposal and therefore are more likely to have better information and greater sophistication when considering the potential risks and benefits of a particular investment, as compared to natural persons.<sup>222</sup> To the extent that natural persons are less sophisticated and more prone to be targets of fraud than institutional investors, understanding how many natural persons are participating in Rule 506(c) offering could help identify those Rule 506(c) offerings that raise greater investor protection concerns. This information could also help the Commission better understand how general solicitation is used with respect to the types of investors. Additionally, concerns about verification methods to assess accredited investor status are greatest as it relates to natural persons. Having a better understanding of the involvement of natural persons in Rule 506(c) offerings would assist the

Commission in its assessment of the efficacy of the verification provisions.

Issuers relying on Rule 506(c) will be collecting such information as part of their verification of accredited investor status for Rule 506(c) offerings. We do not expect the requirement that issuers report this information on Form D to impose significant additional costs.

#### b. Issuer Size

The proposed amendment to Item 5 (Issuer Size) of Form D would replace the "Decline to Disclose" option with "Not Available to Public" option. This change to Form D would assist the Commission in obtaining a greater amount of information on the size of issuers that conduct Rule 506 offerings. This proposed amendment would also apply to offerings under Rule 504, Rule 505 and Section 4(a)(5). At present, a majority of Form D filings do not provide information on the size of the issuer's revenue (if the issuer is an operating company) or net asset value (if the issuer is a hedge fund or other investment fund). It is likely that some issuers keep this information private for competitive purposes and therefore do not make this information widely available. For those issuers that already make this information publicly available, or that do not currently make a reasonable effort to keep such information confidential, reporting their size range in a Form D filing would not impose a material cost. Having this information would provide a more complete picture of the Rule 506 market and allow the Commission to more accurately assess the impact of allowing general solicitation on capital formation across issuer sizes. This information would be particularly useful in better understanding the effects of general solicitation on capital formation by small businesses, a set of issuers that otherwise face significantly greater challenges than larger issuers in finding investors.

#### c. Issuer Industry Group

Industry information is an important issuer characteristic that helps in assessing the effectiveness of private markets in promoting capital formation across industry groups. An analysis of Form D filings over the period 2009–2012 indicates that the "Other" category was checked in over 15% of offerings.<sup>223</sup> The proposed amendment to Item 4 (Industry Group) would require an explanation to be provided when an issuer checks "Other" as its industry. This would allow a better assessment of the representation of a

<sup>221</sup> Issuers may not wish to reveal certain information such as the timing of amounts offered and raised, including whether an offering was successfully completed, which could inform other market participants, including competitors, about the issuers' ability to finance investments.

<sup>222</sup> See note 198.

<sup>223</sup> See Ivanov/Bauguess Study.

particular industry or sub-industry in Regulation D offerings and help the Commission evaluate whether industry classifications are appropriately defined in Form D.

#### d. Control Persons

The proposed amendment to Item 3 (Related Persons) to include controlling persons when the issuer seeks to use general solicitation in a Rule 506(c) offering will expand the set of persons covered under the existing list of related persons that includes promoters, directors and executive officers. Thus, a beneficial owner who has a significant equity stake in an issuer but may not be a managing executive would now need to be identified. This information may be helpful to the Commission in developing a more comprehensive understanding of the issuers and other market participants that are involved in Rule 506(c) offerings.

Including information regarding control persons would enable investors to better identify persons who may be in positions to influence the Rule 506(c) offering. The identity information could also be useful if questions arise about the offering. Issuers would incur additional reporting costs when there are control persons that are not also related persons. In many instances this information is readily available and easy to collect, particularly to the extent that issuers identify controlling shareholders under the bad actor provisions we are adopting today. Issuers could, however, find this amendment burdensome as they may want to keep information on controlling persons private.

There could be instances where some shareholders who own a significant stake in the issuers' equity but are passive owners are incorrectly identified as control persons in a publicly filed form. Because this information would be required only for Rule 506(c) offerings, issuers would not face these privacy concerns if they do not rely on Rule 506(c) for their offering.

#### e. Trading Venue and Security Identifiers

Proposed Item 18 would require issuers to identify if any of its securities are traded on a national securities exchange, ATS or any other organized trading venue. If the issuer answers in the affirmative, it is required to identify the names of such trading venues where its securities are being traded and the SEC file number for such class of securities. The issuer, under proposed Item 18, would also need to identify if the securities to be sold in the offering are of the same class as the class of securities listed or quoted on the trading

venue. Further, the proposed amendment to Item 9 (Types of Securities Offered) of Form D would require information on the trading symbol and security identifier, such as a CUSIP number<sup>224</sup> or ISIN (International Securities Identification Number), for the offered securities, if any.

These proposed amendments would apply to offerings under Rule 506 as well as to offerings under Rule 504, Rule 505 and Section 4(a)(5). In many cases, the class of an issuer's security offered through a Rule 506 offering may not be eligible for trading on a national securities exchange, ATS or any other organized trading venue, and may not have an assigned security identifier.

For classes of securities where this information is available, regulators could link the offered securities to financial information about the issuer and the class of security—such as accounting data and security-price data—that is not available on Form D but is available through common third-party data aggregation platforms and through the associated trading venues. The inclusion of a security identifier in Form D would be relevant information for a number of private offerings. For example, analysis of Form D filings shows that approximately 10% of Exchange Act reporting companies conducted Regulation D offerings during the period between 2009 to 2011.<sup>225</sup>

The inclusion of this information could be useful to the Commission in evaluating developments in the Rule 506 market in several ways. First, with respect to a security identifier, linking Rule 506 offerings and financial information about the issuer from other financial data providers would allow for a more effective evaluation of one part of the Rule 506 market. In particular, the availability of a security identifier would enable us to automatically match and process financial and other information about the issuer in a manner that would be significantly less burdensome than if we had to rely solely on a firm name and other identifying information. Security

identifiers also could facilitate tracking multiple issuances by the same issuer, which might not otherwise be clear if a security identifier exists but is not made available. In addition, identifying the trading venue for an offered security could help us assess whether particular trading venues—or the lack of trading venue—is associated with higher prevalence of fraud and other illegal activities.

Identifying whether the securities being offered in reliance on Rule 506 are of the same class of securities, or are convertible into, or exercisable, or exchangeable for such class of securities will provide additional informational linkages between publicly available data and private offerings. The marginal cost to issuers of providing this information is likely to be low because this information should be readily available to the issuers of the offered securities.

#### f. Use of Proceeds

The proposed amendment to Item 16 (Use of Proceeds) of Form D would require issuers that are not pooled investment funds to report information on the portion of proceeds (if any) from Rule 506 offerings that will be used to repurchase or retire the issuer's existing securities. This information would allow the Commission to distinguish between offerings that raise capital to allow insiders and/or incumbent shareholders a partial or full exit and offerings that use the proceeds for investments or capital expenditures. This information could help us better distinguish the impact of the ability to use general solicitation in Rule 506(c) offerings on capital formation versus investment exit strategies, particularly for small businesses. It may also help inform investors and the market generally about the issuer's incentives or related risks. For example, proceeds used towards redemption of securities could indicate that existing shareholders are lowering their investment exposure in the issuer.

The proposed amendment also requires issuers, other than pooled investment funds, that are relying on Rule 506 to provide more information on the use of offering proceeds. Issuers will be required to indicate what part of the proceeds is being used to pay for offering expenses, asset acquisition, working capital, business acquisition or repayment of existing debts. For non-fund issuers, this information would help us evaluate whether and how Rule 506 enhances capital formation that would be used for new investments, consistent with the intent of the JOBS Act, as compared to refinancing and capital restructuring. However, the

<sup>224</sup> CUSIP (Committee on Uniform Securities Identification Procedures) is a universally recognized identification for more than 9 million unique financial instruments. The CUSIP system, owned by the American Bankers Association and operated by Standard & Poor's, facilitates the clearing and settlement process of securities. The number consists of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of security. See <https://www.cusip.com/cusip/index.htm>. CUSIP is one of the most widely available securities identifiers and is available for the securities issued by Exchange Act reporting companies.

<sup>225</sup> Ivanov/Bauguess Study.

additional information may reveal previously non-public information about issuer plans that could put the issuer at a competitive disadvantage. Moreover, an issuer may not be certain as to the ultimate use of proceeds or may alter its intended use as time passes and market conditions change. In these cases, the Form D information may not accurately reflect issuer plans or the issuer may be required to file an amended Form D.

#### g. Issuer Web Site

The proposed amendment to Item 2 (Principal Place of Business and Contact Information) would require all Regulation D issuers to provide their publicly accessible business Web site, if they have one. Web sites for operating businesses have become ubiquitous and are part of their contact information, and in some instances, businesses could be operating only via the Internet and may not have a physical location. When available, this information would be a useful component of issuer identification and would not be burdensome to provide.

#### h. Types of General Solicitation Used

The proposed amendments to Form D would include adding a requirement for issuers to provide information on the types of general solicitation used in Rule 506(c) offerings. The options would include oral communications, written communications, such as mass mailings and emails, Web sites or television and the web link to the advertising if the advertising is presented on a Web site. Having this information would help the Commission perform reviews of the Rule 506 market to better understand how the different methods of solicitation correspond to issuer behavior, including potentially fraudulent activity, identified through the Commission's Rule 506 review program.

#### i. Verification Methods

The proposed amendments to Form D would include adding requirements for issuers to provide information about how the investors in the offerings qualified as accredited investors, such as a natural person on the basis of income or net worth, as well as information on the types of methods used for verifying the accredited investor status of purchasers. This information would help us assess the nature of the verification methods used and how issuers are complying with the requirement to take reasonable steps to verify the accredited investor status of purchasers in Rule 506(c) offerings. The

Commission may be able to use this information to analyze whether there are correlations between certain verification methods and the incidence of fraud in the private offering market. Similarly, information about verification practices learned through the Commission's Rule 506 review program could be applied to subsequent Commission reviews of any practices, or combinations of practices and other offering characteristics, associated with the increased likelihood of fraudulent activity.

#### 4. Proposed Amendment to Rule 507

The proposed amendment to Rule 507 would disqualify an issuer from using Rule 506 for future offerings if the issuer, or its predecessors or affiliates, had conducted an offering under Rule 506 in which, within the last five years, it or they did not comply with the Form D filing requirements of Rule 503 in Rule 506 offerings. Disqualification would extend for a period of one year after the filing of all required Forms D and Form D amendments have been made. This provision should increase the incentive for issuers to submit timely filings of Form D.

As described above, we could not locate Form D filings for approximately 10% of Regulation D offerings where broker-dealers or registered investment advisers were involved.<sup>226</sup> Although we cannot estimate the rate of compliance among the issuers of the remaining 89% of Rule 506 offerings that do not use a registered investment adviser or broker-dealer, it may be reasonable to assume that they are no more likely to file a Form D, particularly to the extent that they undertake an offering without the assistance of a regulated entity. This evidence suggests that many private issuers are failing to file a Form D even though this is a requirement under Regulation D. By disqualifying an issuer from relying on the Rule 506 exemption for one year for future offerings when the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering, the Commission intends to increase the incentive for issuers to comply with the Form D filing requirements.

Greater compliance with Form D filing requirements would provide a more complete picture of the Regulation D market. It would enhance the Commission's ability to assess the effectiveness and efficiency of the

private offering market and the impact of the elimination of the prohibition against general solicitation. As the Commission obtains more comprehensive data on Regulation D offerings, it would be able to better evaluate activity in Rule 506(b) and Rule 506(c) markets and undertake regulatory action in a more informed manner. In particular, to the extent that certain issuer and offering characteristics collected through Form D are associated with illegal market practices, regulators would be in a better position to focus monitoring efforts on offerings that present heightened investor protection concerns.

A better-informed view of capital-raising in the Rule 506 market could help the Commission engage in targeted regulatory responses to the potential for fraudulent activity in the Rule 506 market. To the extent that these regulatory responses decrease fraudulent activity, they could promote investor protection and investor interests potentially leading to higher participation by eligible investors, especially natural persons who are accredited investors, and to greater capital-raising opportunities.

While the proposed disqualification provision is designed to encourage a higher rate of compliance with the Form D filing requirements, it would make failure to file costly to Rule 506 issuers if they or their successors and affiliates cannot rely on Rule 506 in a timely manner for future offerings and they would otherwise do so. The loss of access to Rule 506 offerings could impair their competitiveness if they are unable to secure alternative sources of capital at the same cost.

For those issuers that submit their Form D filings in a timely manner, the potential for disqualification under proposed Rule 507 would pose little additional risk, such as from an accidental failure to file a Form D or the late filing of a Form D that was not identified and corrected during the cure period. Those issuers that, in the past, have chosen not to file a Form D or filed it late may have a stronger incentive to file (*i.e.*, the risk of losing the ability to conduct a Rule 506 offerings in the future may outweigh the cost of giving their competitors better access to certain capital-raising information). To the extent that these issuers otherwise engage in legitimate capital raising activities, the cost of conditioning the future use of Rule 506 on Form D filings could be disproportionate to the benefit of having a public notice of their offering.

We are not proposing to disqualify an issuer from reliance on Rule 506 in its

<sup>226</sup> This evidence was based on 11 years of Form ADV filings by registered investment advisers, and three months of data at the beginning of 2012 for broker-dealers filing offering documents with FINRA.

current offering for failure to file a Form D for such offering; an issuer that does not comply with the filing requirements will therefore not be subject to immediate costs, such as the loss of an offering exemption and potential rescission rights of investors. Disqualification for future offerings only would provide a less severe consequence for inadvertent missed filings and late filings, and would limit the potential costs to more active issuers of securities in private markets. In this regard, repeat issuers in Rule 506 offerings would be more affected by the disqualification provision but would be more likely to understand the Rule 503 filing requirements.

The inclusion of a cure period and providing the disqualification to be lifted for one-year after the required Form D filings have been made or by virtue of a waiver by the Commission, would help moderate issuers' costs of non-compliance in Form D filings. At the same time, making issuers that repeatedly fail to file Form D ineligible for a cure period will provide a strong incentive for timely compliance with the filing requirements. This would increase the cost associated with non-compliance, although issuers that have been disqualified from future use of Rule 506 would retain the option of applying for a waiver. We believe that disqualifying an issuer from relying on Rule 506 for one year may be a sufficient incentive for achieving higher filing compliance, and is not so severe that it would deter issuers from using Rule 506 for their capital-raising activity.

#### *D. Analysis of the Proposed Rule and Rule Amendments Relating to General Solicitation Materials*

We are proposing a new rule under Regulation D and an amendment to a Securities Act rule in connection with an issuer's ability to engage in general solicitation in Rule 506(c) offerings.

##### **1. Mandated Legends and Other Disclosures for Written Solicitation Materials**

We are proposing new Rule 509 of Regulation D to require issuers to include legends in all written general solicitation materials used in a Rule 506(c) offering and to require private funds to include an additional legend and other disclosures where the written general solicitation materials include performance data. Specifically, issuers would be required to include:

- Eligibility legends that advise investors that securities offered under Rule 506(c) may be purchased only by accredited investors.

- Risk legends that advise investors of the following: the securities are being offered in reliance on an exemption from the registration requirements of the Securities Act and are not required to comply with specific disclosure requirements under the Securities Act; the Commission has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials; the securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and investing in securities involves risk and purchasers should be able to bear the loss of the entire investment. Private funds would be required to include a legend informing investors that the funds are not subject to the protections of the Investment Company Act.

- Performance disclosures in the case of private funds informing investors that the performance data represents past performance, that past performance is not indicative of future results, that the current performance may be lower or higher than the performance presented, that performance data is not calculated on a standardized basis as is required for registered funds, and that the performance of the private fund may not be directly comparable to the performance of other funds. Private funds also would be required to include only performance data as of the most recent practicable date and to include a telephone number or Web site where an investor may obtain current performance data. Private funds also would be required to disclose the period for which performance is presented and if performance data does not reflect the deduction of fees and expenses, private funds would be required to disclose that fees and expenses have not been deducted and that if such fees and expenses had been deducted, performance may be lower than presented.

The inclusion of mandated legends would better inform potential investors as to whether they are qualified to purchase in Rule 506(c) offerings. Including risk and performance legends could make investors more aware of the potential risks associated with such offerings and, with respect to offerings by private funds, could help investors avoid confusing private funds with registered funds, which have a different risk and regulatory profile. Performance disclosures for private funds would also assist potential investors in assessing performance claims that may be included in the general solicitation materials. These legends would alert

potential investors to certain investment risks.

Even though only accredited investors are allowed to purchase in Rule 506(c) offerings, advertising and other activities by issuers and intermediaries could induce non-accredited investors to believe that they are eligible to participate in these investment opportunities. Legends notifying them that only accredited investors are eligible to invest in these offerings could help alert non-accredited investors as to their ineligibility to participate.

We anticipate that the cost of including such legends in sales materials would be minimal for issuers. In some instances, the legends may be of limited benefit to investors because legends do not address whether the offering is fraudulent. It is possible that some unsuspecting accredited investors might erroneously believe that the inclusion of legends validates all of the information and risks regarding the offering. Further, it is possible that because these legends may contain standardized language, investors might discount the relevance of these legends.

Requiring additional disclosures for private funds, similar to those required by Rule 482 under the Securities Act for registered investment companies, would increase the likelihood that the performance data that is reported in the written general solicitation material is timely and would provide additional information and context about the performance presented. Because there are no standardized performance reporting requirements for private funds, such disclosure would address some concerns about investors being misled or confused in interpreting the performance information and may decrease the likelihood of misleading or exaggerated performance information being presented in private fund written general solicitation materials. While flexibility in reporting performance data may be appropriate for private funds that have a varied scope of investment strategies, performance calculation methodologies that are non-standardized or complicated limit how much investors can appropriately glean from the data advertised in the written material. The purpose for requiring these additional disclosures is to provide context so investors can better understand fund performance information.

The proposed requirement for private funds to include a telephone number or Web site where an investor may obtain current performance data could impose costs, including the cost of establishing a telephone line or establishing a Web site for this information. We have

attempted to address these costs by providing flexibility to distribute the information either through a telephone number or a Web site. We have also determined to not require that the telephone number be toll-free or collect. We believe that most private funds (or their advisers) currently maintain either a telephone number or Web site, though we recognize that some private funds or their advisers may incur additional costs for staff and technology. The current information that a private fund would be required to provide would only need to be as of the most recent practicable date. Because this requirement would not require a private fund to calculate performance for dates on which the fund would not otherwise be calculating performance, we believe this will limit the costs incurred by private funds. In addition, updated current performance would be provided as of the last date on which the private fund determined the valuation of its portfolio securities. We do not expect a private fund to value its portfolio solely for the purpose of providing updated current performance under proposed Rule 509, which would not increase costs.

## 2. Proposed Amendments to Rule 156

Rule 156 under the Securities Act is an interpretive rule that provides guidance on the types of information in investment company sales literature that could be misleading for purposes of the federal securities laws, including Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. We are proposing amendments to Rule 156 to apply the guidance contained in the rule to sales literature used by private funds. The sales literature and other offering materials used by private funds are already subject to the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5. The proposed amendments to Rule 156 are intended to provide helpful guidance to private fund issuers in developing sales literature that is neither fraudulent nor misleading. The proposal may also encourage private funds to include additional disclosure regarding performance and other statements or representations about the characteristics of the fund. Funds may incur some costs in reviewing their sales literature for consistency with the interpretive guidance set forth in Rule 156. We note, however, that private funds should already be reviewing their sales literature for misleading statements to avoid violating the antifraud provisions of the federal securities laws.

Accordingly, we believe that the amendments to Rule 156 would not impose significant compliance costs on private funds.

## 3. Request for Comment on Manner and Content Restrictions for Private Funds

Commenters have suggested that there be standards or requirements that would govern the content and/or manner of general solicitations by private funds in Rule 506(c) offerings. As discussed above, there may be investor protection concerns with respect to the offering materials used by private funds as these funds are not subject to specific disclosure requirements in reporting their performance, unlike registered funds. Some commenters have advocated that, in order to engage in general solicitation, the materials used by private funds should be held to standards that are analogous to those that are applicable to the materials used by mutual funds. They have also advocated for restricting the use of performance data in general solicitation materials by private funds until the Commission can develop standardized performance calculation and reporting requirements. We recognize, however, that prescribing performance standards in general solicitation materials could reduce the flexibility of issuers when methodologies for calculating performance may vary for legitimate reasons, including investor preferences, and could be burdensome for issuers, especially if their general solicitation materials are otherwise not misleading.

## E. Analysis of Temporary Rule Relating to Mandatory Submission of Written General Solicitation Materials

Proposed new Rule 510T in Regulation D would require an issuer conducting a Rule 506(c) offering to submit to the Commission any written general solicitation materials prepared by or on behalf of the issuer and used in connection with the Rule 506(c) offering. This requirement would enable the Commission to evaluate the use of written general solicitation materials. It could also serve as a deterrent against potential forms of misleading advertising or other fraud because the written general solicitation materials would be submitted to the Commission and accessible to other securities regulators. Having access to the written general solicitation material could help regulators evaluate market practices.

The written general solicitation material would not be treated as filed or furnished with the Commission and is therefore not subject to the particular liability provisions under the Securities Act or the Exchange Act for filings.

Conditioning the future availability of Rule 506 on not being subject to any order, judgment or court decree for failure to comply with proposed Rule 510T would provide incentives for submitting written general solicitation material. Inclusion of a two-year sunset period for this rule would provide a finite period of time (and information) for issuers to submit written general solicitation materials for the Commission's consideration in assessing general solicitation in Rule 506(c) offerings and would therefore also limit issuers' costs of compliance.

Under the proposed rule, written general solicitation materials would be required to be submitted no later than the date of first use of such materials. Issuers are required to submit only written general solicitation materials, so to the extent issuers' written general solicitation materials do not change, they should not be costly to submit. If the written general solicitation materials change or are updated during the course of an offering, however, submission of these materials at multiple times could create an increased burden for issuers.

## F. Analysis of Potential Impacts on Efficiency, Competition and Capital Formation

The proposed amendments to the Form D filing requirements would enable the Commission to evaluate the effectiveness of Regulation D market more systematically and to more accurately determine the economic impact of eliminating the prohibition against general solicitation in Rule 506 offerings. A more complete understanding of how and where capital is being raised in offerings relying on Rule 506(b) or Rule 506(c) would help the Commission better assess the risk in these markets and evaluate the effectiveness of the use of general solicitation materials in capital-raising activity. Appropriate and timely regulatory responses to Rule 506 market developments would enhance investor protection, and could encourage greater investor participation in the Rule 506 markets, which would lead to higher aggregate of capital formation.<sup>227</sup>

The proposed amendments to the Form D filing requirements would also provide the Commission, other regulators and investors with more information about market participants and practices in the private offering market. The increased quantity and quality of information about private offerings is designed to make it easier

<sup>227</sup> See, e.g., Andrei Shleifer and Daniel Wolfenzon, *Investor Protection and Equity Markets*, 66 Journal of Financial Economics 3 (2002).



for regulators to identify poor or inappropriate market practices, which may help deter fraudulent activity. A better understood and regulated market would promote investor protection and contribute to broader participation by accredited investors.

The inclusion of legends and additional disclosures would inform investors about the differences between Rule 506(c) offerings and registered offerings, allowing for greater transparency and better understanding of the differences in the underlying risks of the two types of offerings. This would improve investor decision-making and thereby, the allocative efficiency of capital in the Rule 506 market. The proposed amendments to Securities Act Rule 156 may also make private funds and their investment advisers more aware of potentially misleading statements in their sales literature and written general solicitation material.

The elimination of the prohibition against general solicitation may enhance the ability of accredited investors to identify and evaluate investment opportunities in private funds that would not have previously been available. This could increase the level of competition between private funds and registered funds and result in a shift in the flow of invested capital from registered to private funds. The proposed amendments to require legends and disclosures in written general solicitation materials are intended to limit such a shift to only those investors that are qualified to participate in Rule 506(c) offerings. We are not, however, able to quantify the magnitude of such a potential substitution of investment in private funds and registered funds or the extent to which the proposed legends will affect that shift.

We recognize the proposed rule and form amendments in this release could increase the regulatory burden for issuers in the Rule 506(b) and Rule 506(c) markets, which could drive potential issuers, especially small issuers, to the Rule 504 and Rule 505 markets. Some issuers may even find accessing public markets more attractive. However, with the availability of general solicitation in Rule 506(c) offerings, the benefits of using Rule 506(c) are still likely to justify the higher costs of complying with the proposed rule and form amendments.

## X. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of

1996 (“SBREFA”),<sup>228</sup> the Commission must advise the OMB as to whether a proposed regulation constitutes a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
  - a major increase in costs or prices for consumers or individual industries; or
  - significant adverse effects on competition, investment or innovation.
- If a rule is “major,” its effectiveness will generally be delayed for 60 days pending Congressional review.

We request comment on whether our proposed amendments would be a “major rule” for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment or innovation.

We request those submitting comments to provide empirical data and other factual support for their views to the extent possible.

## XI. Initial Regulatory Flexibility Analysis

The Commission has prepared this Initial Regulatory Flexibility Analysis in accordance with Section 603 of the Regulatory Flexibility Act.<sup>229</sup> This Initial Regulatory Flexibility Analysis relates to the amendments to Regulation D and Form D and Rule 156 that we are proposing in this release.

### A. Reasons for, and Objectives of, the Proposed Action

The primary reason for, and objective of, the proposed amendments to Form D and the proposed amendments to Regulation D relating to Form D is to improve the Form D data collection process with respect to offerings under Rule 506 of Regulation D and, in particular, to assist our efforts to assess the use of general solicitation in Rule 506(c) offerings. We believe these amendments, in general, would improve our Form D data collection efforts by providing a greater incentive for issuers to file Form D and by amending the information requirements of Form D to require additional information on Rule 506 offerings. Proposed Rule 509, which would require issuers to include certain

legends and other disclosures in written general solicitation materials used in Rule 506(c) offerings, is intended to address investor protection concerns arising from the ability of issuers to engage in general solicitation in these offerings. Proposed Rule 510T, which would require issuers to submit to the Commission any written general solicitation materials used in Rule 506(c) offerings, is intended to facilitate the Commission’s understanding of the market practices relating to how issuers solicit potential purchasers through written general solicitation materials for their Rule 506(c) offerings. The proposed amendments to Rule 156 are intended to provide helpful antifraud guidance to those preparing sales literature for private funds.

We are proposing the amendments to Regulation D and Form D under the authority in Sections 4(a)(2), 19(a) and 28 of the Securities Act,<sup>230</sup> as amended, and Section 201(a) of the JOBS Act.<sup>231</sup> We are proposing the amendments to Rule 156 under the authority in Section 19(a) of the Securities Act<sup>232</sup> and Sections 10(b) and 23(a) of the Exchange Act.<sup>233</sup>

### B. Small Entities Subject to the Proposed Rule and Form Amendments

For purposes of the Regulatory Flexibility Act, under our rules, an issuer, other than an investment company, is a “small business” or “small organization” if it has total assets of \$5 million or less as of the end of its most recent fiscal year and is engaged or proposing to engage in an offering of securities which does not exceed \$5 million.<sup>234</sup> For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.<sup>235</sup>

The proposed amendments would apply to all issuers that conduct offerings under Rule 506 and would affect small issuers (including both operating businesses and pooled investment funds that raise capital under Rule 506) relying on this exemption from Securities Act registration. All issuers that sell securities in reliance on Rule 506 are required to file a Form D with the Commission reporting the transaction.

<sup>230</sup> 15 U.S.C. 77d(a)(2), 77s(a), and 77z–3.

<sup>231</sup> Public Law 112–106, sec. 201(a), 126 Stat. 306, 313 (Apr. 5, 2012).

<sup>232</sup> 15 U.S.C. 77s(a).

<sup>233</sup> 15 U.S.C. 78j(b) and 78w(a).

<sup>234</sup> 17 CFR 230.157.

<sup>235</sup> 17 CFR 270.0–10(a).

<sup>228</sup> Public Law 104–121, Tit. II, 110 Stat. 857 (1996).

<sup>229</sup> See 5 U.S.C. 603.

For the year ended December 31, 2012, 16,067 issuers made 18,187 new Form D filings, of which 15,208 issuers relied on the Rule 506 exemption. Based on information reported by issuers on Form D, there were 3,958 small issuers<sup>236</sup> relying on the Rule 506 exemption in 2012. This number likely underestimates the actual number of small issuers relying on the Rule 506 exemption, however, because over 50% of issuers declined to report their size. The proposed amendments to Rule 156 would apply to all private funds.

### *C. Projected Reporting, Recordkeeping and Other Compliance Requirements*

The proposed amendments to Regulation D and Form D would impose certain reporting and compliance requirements on issuers that conduct Rule 506 offerings. The proposed amendment to disqualify an issuer from relying on the Rule 506 exemption if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering would not add a new reporting, recordkeeping or other compliance requirement because the filing of Form D is currently a requirement of Regulation D. The proposed amendments to Regulation D to require an Advance Form D filing for Rule 506(c) offerings, a closing Form D amendment for Rule 506 offerings, temporary submission of written general solicitation materials used in Rule 506(c) offerings, prescribed legends and disclosure in written general solicitation materials used in Rule 506(c) offerings, as well as the proposed amendments to Form D to require additional information, would, however, impose additional reporting and compliance requirements on issuers that conduct offerings under Rule 506 and, to a much lesser extent, offerings under Rule 504, Rule 505 and Section 4(a)(5). We expect that small entities would incur additional initial and ongoing costs related to complying with these requirements. Initial costs include those associated with preparing the first Form D filing that includes the required additional information in Form D, preparing legends and disclosures to be included in written general solicitation materials for Rule 506(c) offerings and submitting such materials to the Commission prior to the date of first use. Ongoing costs include the

additional costs arising from providing this additional information in each subsequent filing of a Form D or Form D amendment when required, including the prescribed legends in written general solicitation materials, submitting updated or new written general solicitation materials to the Commission and submitting Advance Form D filings for Rule 506(c) offerings and closing amendments to Form D for Rule 506 offerings. The proposed amendments to Rule 156 may cause small entities to incur some costs in reviewing their sales literature for consistency with the interpretative guidance set forth in Rule 156, but we do not expect these costs to be significant.

### *D. Duplicative, Overlapping or Conflicting Federal Rules*

The Commission believes that the proposed amendments would not duplicate, overlap or conflict with other federal rules.

### *E. Significant Alternatives*

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives of our amendments, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered several alternatives, including the following:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- further clarifying, consolidating or simplifying the proposed requirements;
- using performance rather than design standards; and
- providing an exemption from the proposed requirements, or any part of them, for small entities.

The Commission is not proposing the establishment of different compliance or reporting requirements or timetables for the rules, as proposed, for small entities. The Commission believes that, as to small entities, differing compliance, reporting or timetable requirements, a partial or complete exemption from the proposed requirements or the use of performance rather than design standards would be inappropriate because these approaches would detract from the completeness and uniformity of the Form D dataset and, as a result, reduce the expected benefits of more consistent submission of Rule 506 information and improved collection of data for Commission enforcement and rulemaking efforts. We believe that the proposed amendments to Rule 156 should apply to all private funds,

regardless of size. The Commission solicits comment, however, on whether differing compliance, reporting or timetable requirements, a partial or complete exemption, or the use of performance rather than design standards would be consistent with the main goal of improving the Form D data collection process with respect to Rule 506 offerings.

### *F. General Request for Comment*

The Commission is soliciting comments regarding this analysis. In particular, the Commission requests comment regarding:

- The number of small entities that may be affected by the proposed amendments;
- the existence or nature of the potential impact of the proposed amendments on small entities as discussed in this analysis, as well as any effects that have not been discussed; and
- how to quantify the impact of the proposed amendments.

The Commission asks those submitting comments to describe the nature of any impact and to provide empirical data to support the nature and extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

## **XII. Statutory Authority and Text of Proposed Rule and Form Amendments**

The Form D and Regulation D amendments contained in this release are being proposed under the authority set forth in Sections 4(a)(2), 19(a) and 28 of the Securities Act, as amended, and Section 201(a) of the JOBS Act. The amendments to Rule 156 contained in this release are being proposed under the authority set forth in Section 19(a) of the Securities Act and Sections 10(b) and 23(a) of the Exchange Act.

### **List of Subjects in 17 CFR Parts 230 and 239**

Reporting and recordkeeping requirements, Securities. Advertising, Investment companies, Securities.

For the reasons set out above, the Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations, as follows:

### **PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

- 1. The general authority citation for Part 230 is revised to read as follows:

<sup>236</sup> Of this number, 3,627 of these issuers are not investment companies, and 331 are investment companies. We also note that issuers that are not investment companies disclose only revenues on Form D, and not total assets. Hence, we use the amount of revenues as a measure of issuer size.

**Authority:** 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll (d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. No. 112-106, sec. 201(a), 126 Stat. 313 (2012), unless otherwise noted.

\* \* \* \* \*

■ 2. Amend § 230.156 by:

■ a. Revising the heading;

■ b. In paragraph (a), adding the phrase “or a private fund” at the end of the first sentence.

■ c. Revising paragraphs (b)(3) introductory text, (b)(3)(ii) and (c); and

■ d. Adding paragraph (d).

The revisions and addition read as follows:

**§ 230.156 Investment company and private fund sales literature.**

(a) \* \* \*

(b) \* \* \*

(3) A statement involving a material fact about the characteristics or attributes of an investment company or a private fund could be misleading because of:

(i) \* \* \*

(ii) Exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or the private fund or an investment in securities issued by such entity, services, security of investment or funds, effects of government supervision, or other attributes; and

\* \* \* \* \*

(c) For purposes of this section, the term sales literature shall be deemed to include any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company or private fund. Communications between issuers, underwriters and dealers are included in this definition of sales literature if such communications, or the information contained therein, can be reasonably expected to be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either written or oral form in the offer or sale of securities.

(d) For purposes of this section, the term private fund means an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), but for section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or 80a-3(c)(7)).

■ 3. Amend § 230.503 by:

■ a. Redesignating paragraphs (a)(1), (a)(2), (a)(3) and (a)(4) as paragraphs (a)(2), (a)(3), (a)(4) and (a)(6), respectively;

■ b. Adding new paragraphs (a)(1) and (a)(5);

■ c. Revising newly redesignated paragraph (a)(2);

■ d. Removing “and” in newly redesignated paragraph (a)(4)(ii)(I);

■ e. Removing the period and adding in its place “;” in newly redesignated paragraph (a)(4)(iii); and

■ f. Adding new paragraphs (a)(4)(iv) and (a)(4)(v).

The revisions and additions read as follows:

**§ 230.503 Filing of notice of sales.**

(a) *When notice of sales on Form D is required and permitted to be filed.* (1) An issuer that intends to offer or sell securities in reliance on § 230.506(c), and has not previously filed a notice under paragraph (a)(2) of this section of such intended offering in reliance on § 230.506(c), must file with the Commission, no later than 15 calendar days prior to the first use of general solicitation or general advertising for such offering, a notice of sales containing the following information required by Form D (17 CFR 239.500) for such offering:

- (i) The issuer's identity (Item 1);
- (ii) Principal place of business and contact information (Item 2);
- (iii) Related persons (Item 3);
- (iv) Industry group (Item 4);
- (v) Federal exemptions and exclusions claimed (Item 6);
- (vi) Type of filing (Item 7);
- (vii) Type(s) of Securities Offered (Item 9);
- (viii) Business combination transaction (Item 10);
- (ix) Sales compensation (Item 12); and
- (x) Use of proceeds (Item 16).

(2) An issuer offering or selling securities in reliance on § 230.504, § 230.505, or § 230.506 (other than an issuer that has previously filed a notice for such offering under paragraph (a)(1) of this section) must file with the Commission a notice of sales containing the information required by Form D (17 CFR 239.500) for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering.

\* \* \* \* \*

(4) \* \* \*

(iv) To contain the information required by Form D for such offering of securities in reliance on § 230.506(c), if the issuer is offering or selling securities in reliance on § 230.506(c) and has previously filed the notice under paragraph (a)(1) of this section, no later than 15 calendar days after the first sale of securities in the offering; and

(v) Not later than 30 calendar days after the termination of an offering

conducted in reliance on § 230.506, unless all the information that would be included in such amendment is included in a notice previously filed under this paragraph (a) and such notice indicated that it was the closing amendment to the Form D.

(5) Where the end of a period specified for filing under paragraph (a)(1), (a)(2), (a)(4)(iv) or (a)(4)(v) of this section falls on a Saturday, Sunday or holiday, the due date for such filing would be the first business day following.

\* \* \* \* \*

■ 4. Amend § 230.507 by:

■ a. Redesignating paragraph (b) as paragraph (c);

■ b. Revising paragraph (a);

■ c. Adding new paragraph (b); and

■ d. In newly redesignated paragraph (c), removing the words “Paragraph (a)” and adding in their place “Paragraphs (a) and (b)”.

The revision and addition read as follows:

**§ 230.507 Disqualifying provision relating to exemptions under §§ 230.504, 230.505 and 230.506.**

(a) No exemption under § 230.504, § 230.505 or § 230.506 shall be available for an issuer if such issuer, or any of its predecessors or affiliates, has been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with § 230.503. No exemption under § 230.506 shall be available for an issuer if such issuer, any of its predecessors or affiliates have been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with § 230.509 or § 230.510T.

(b) (1) No exemption under § 230.506 shall be available for an issuer if such issuer, or any of its predecessors or affiliates, has, within the five preceding years, failed to comply with the requirements of § 230.503 in connection with an offering conducted in reliance on § 230.506, except that such exemption shall be available for offers and sales in connection with offerings that commenced before the failure to comply occurred. In determining compliance with § 230.503 for purposes of this paragraph (b)(1), a notice on Form D (§ 239.500) or amendment thereto will be deemed timely if it is filed not later than 30 calendar days after the date specified for such filing in § 230.503, unless the issuer previously failed to comply with

such a filing deadline in connection with the same offering.

(2) One year after the filing by the issuer and such predecessor(s) and affiliate(s), as the case may be, of all notices on Form D (§ 239.500) and amendments thereto required under § 230.503 in connection with each offering conducted in reliance on § 230.506 that has not been terminated, and of the closing amendment required under § 230.503(a)(4)(v) with respect to each previous offering conducted in reliance on § 230.506 within the five preceding years that has been terminated, the issuer shall be permitted to rely on the exemption under § 230.506.

(3) For purposes of paragraph (b)(1) of this section, failures to comply with § 230.503 that occurred before [effective date of final rule] shall be disregarded.

\* \* \* \* \*

5. Add § 230.509 to read as follows:

**§ 230.509 Required legends and other disclosures.**

(a) *Required legends.* An issuer shall include, in a prominent manner, the following legends in any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on § 230.506(c):

(1) The securities may be sold only to “accredited investors,” which for natural persons are investors who meet certain minimum annual income or net worth thresholds;

(2) The securities are being offered in reliance on an exemption from the registration requirements of the Securities Act and are not required to comply with specific disclosure requirements that apply to registration under the Securities Act;

(3) The Commission has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials;

(4) The securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and

(5) Investing in securities involves risk, and investors should be able to bear the loss of their investment.

(b) *Additional legend for private funds.* If the issuer is a private fund, the issuer shall include, in a prominent manner, in any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on this § 230.506(c), a legend disclosing that the securities offered are not subject to the protections of the Investment Company Act.

(c) *Required disclosure for performance data of private funds.* If the issuer is a private fund and includes performance data in any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on this § 230.506(c):

(1) The private fund shall include in such written communication a legend disclosing that the performance data represents past performance; that past performance does not guarantee future results; that current performance may be lower or higher than the performance data presented; that the private fund is not required by law to follow any standard methodology when calculating and representing performance data; and that the performance of the private fund may not be directly comparable to the performance of other funds. The legend should also identify either a telephone number or a Web site where an investor may obtain current performance data.

(2) All performance data must be as of the most recent practicable date considering the type of private fund and the media through which the data will be conveyed, and the private fund must disclose the period for which performance is presented.

(3) If the performance presentation does not include the deduction of fees and expenses, the private fund must disclose that the presentation does not reflect the deduction of fees and expenses and that if such fees and expenses had been deducted, performance may be lower than presented.

**Note to § 230.509:** A private fund is an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) (15 U.S.C. 80a–3(c)(1) or 80a–3(c)(7)) of that Act. If applicable, a private fund may modify the required legend to reflect any higher minimum requirements to purchase in the offering, such as for qualified clients, as defined in § 275.205–3(d)(1) of this chapter, and qualified purchasers, as defined in section 2(a)(51) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(51)) and the rules thereunder.

■ 6. Add § 230.510T to read as follows:

**§ 230.510T Submission of written general solicitation materials.**

(a) An issuer shall submit to the Commission any written communication that constitutes a general solicitation or general advertising in any offering conducted in reliance on § 230.506(c) no later than the date of first use. The communication shall be submitted using the intake page designated on the Commission’s Web

site for the submission of such materials.

(b) This temporary rule shall expire and no longer be effective on [ ].

**PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

■ 7. The authority citation for Part 239 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78l, 78m, 78n, 78 o(d), 78o–7 note, 78u–5, 78w(a), 78ll, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

\* \* \* \* \*

■ 8. Amend Form D (referenced in § 239.500) by:

■ a. Revising Item 2;

■ b. Revising Item 3;

■ c. Revising Item 4;

■ d. In Item 5, in the first column, removing the phrase “Decline to Disclose” after “Over \$100,000,000” and adding in its place “Not Available to Public,” and in the second column removing the phrase “Decline to Disclose” after “Over \$100,000,000” and adding in its place “Not Available to Public”;

■ e. In Item 7, adding a check box that reads “Advance Notice—Rule 506(c) Offering” and the word “OR” before “New Notice” and adding the word “OR” after “Amendment” and adding a check box that reads “Closing Amendment—Rule 506 Offering” after the word “OR”; and

■ f. Revising Item 9;

■ g. Revising Item 14;

■ h. Revising Item 16;

■ i. Adding Items 17 through 22 to Form D; and

■ j. Revising the instruction “When to file:” and the instructions to Items 2, 3, 4, 5, 7, 9, 14 and 16, and adding instructions to Items 17 through 22 to the General Instructions to Form D.

The revisions and additions read as follows:

**Note:** The text of Form D does not, and the amendments will not, appear in the Code of Federal Regulations.

**§ 239.500 Form D, notice of sales of securities under Regulation D and section 4(5) of the Securities Act of 1933.**

\* \* \* \* \*

Form D Notice of Exempt Offerings of Securities

\* \* \* \* \*

Item 2. \* \* \*

Issuer’s publicly accessible Web site address, if any: \_\_\_\_\_

\* \* \* \* \*

Item 3. \* \* \*

Relationship(s): \* \* \* [ ] Controlling  
Person (for Rule 506(c) offerings only)

\* \* \* \* \*

Item 4. \* \* \*

Clarification of Response (if Other):

\* \* \* \* \*

Item 9. \* \* \*

Trading Symbol for the Offered  
Securities, if any: \_\_\_\_\_

Generally Available Security  
Identifier Number for the Offered  
Securities, if any: \_\_\_\_\_

\* \* \* \* \*

Item 14. \* \* \*

For offerings under Rule 506 only:		Natural Persons	Legal Entities
Accredited Investors .....	Number .....		
	Amount Raised (\$) .....		
Non-accredited Investors .....	Number .....		
	Amount Raised (\$) .....		

\* \* \* \* \*

Item 16. \* \* \*

*Issuers That Are Not Pooled Investment  
Funds—Offerings Under Rule 506*

What fraction of offering proceeds  
was or will be used to repurchase/retire  
existing securities:

- [ ] None  
[ ] Less than 10%  
[ ] 10–25%  
[ ] 25–50%  
[ ] More than 50%

What fraction of offering proceeds  
was or will be used to pay offering  
expenses:

- [ ] None  
[ ] Less than 10%  
[ ] 10–25%  
[ ] 25–50%  
[ ] More than 50%

What fraction of offering proceeds  
was or will be used to acquire assets,  
otherwise than in the ordinary course of  
business:

- [ ] None  
[ ] Less than 10%  
[ ] 10–25%  
[ ] 25–50%  
[ ] More than 50%

What fraction of offering proceeds  
was or will be used to finance  
acquisitions of other businesses:

- [ ] None  
[ ] Less than 10%  
[ ] 10–25%  
[ ] 25–50%  
[ ] More than 50%

What fraction of offering proceeds  
was or will be used for working capital:

- [ ] None  
[ ] Less than 10%  
[ ] 10–25%  
[ ] 25–50%  
[ ] More than 50%

What fraction of offering proceeds  
was or will be used to discharge  
indebtedness:

- [ ] None  
[ ] Less than 10%  
[ ] 10–25%  
[ ] 25–50%  
[ ] More than 50%

Item 17. *Offerings Under Rule 506:*  
*Specify the Number of Purchasers Who*  
*Qualified as Accredited Investors on the*  
*Basis of*

- [ ] Income  
[ ] Net worth  
[ ] Director, executive officer or general  
partner of issuer or its general partner  
[ ] Other basis

Item 18. *Offerings Under Rule 506:*  
*National Securities Exchange or*  
*Alternative Trading System*

If the issuer's securities are traded on  
a national securities exchange,  
alternative trading system or any other  
organized trading venue, the name of  
such trading venue

If a class of the issuer's securities is  
registered under the Securities  
Exchange Act of 1934, the SEC file  
number for such class of securities

Check this box [ ] if the securities  
being offered in reliance on Rule 506 are  
of the same class of securities or are  
convertible into or exercisable or  
exchangeable for such class of  
securities.

Item 19. *Offerings Under Rule 506:*  
*Filing of General Solicitation Materials*  
*with FINRA*

If the issuer used a registered broker-  
dealer in connection with the offering,  
were general solicitation materials filed  
with the Financial Industry Regulatory  
Authority (FINRA)?

- [ ] Yes [ ] No [ ] Not applicable

Item 20. *Offerings Under Rule 506:*  
*Name and SEC File Number of*  
*Investment Advisers*

If the issuer is a pooled investment  
fund, the name and SEC file number for  
each registered investment adviser or

exempt reporting adviser that functions  
directly or indirectly as a promoter of  
the issuer \_\_\_\_\_

Item 21. *Offerings Under Rule 506(c):*  
*Types of General Solicitation and*  
*General Advertising Used or To Be Used*  
*(check all that apply)*

- [ ] Email  
[ ] Mass mailing  
[ ] Telephone solicitations  
[ ] Public Web site(s) or webcast(s).  
[Specify Web address(es): \_\_\_\_\_]  
[ ] Broadcast media  
[ ] Print media  
[ ] Social media  
[ ] Other written communications  
[Specify: \_\_\_\_\_]  
[ ] Seminar(s)/meetings(s)  
[ ] Other oral communications  
[ ] Not applicable

Item 22. *Offerings Under Rule 506(c):*  
*Methods Used or To Be Used to Verify*  
*That Purchasers Are Accredited*  
*Investors (check all that apply):*

- Non-exclusive List of Verification  
Methods in Rule 506(c)(2)(ii):  
[ ] Verification of natural person's  
**income** under Rule 506(c)(2)(ii)(A)  
[ ] Verification of natural person's net  
worth under Rule 506(c)(2)(ii)(B)  
[ ] Confirmation under Rule  
506(c)(2)(ii)(C) by  
[ ] Registered broker-dealer  
[ ] SEC-registered investment adviser  
[ ] Certified public accountant  
[ ] Licensed attorney

Verification Using Other Methods  
(check all that apply):

- [ ] Publicly available information  
[Specify: \_\_\_\_\_]  
[ ] Documentation provided by  
purchaser [Specify: \_\_\_\_\_]  
[ ] Documentation provided by third  
parties [Specify: \_\_\_\_\_]  
[ ] Reliance on verification by a third  
party other than a registered broker-  
dealer, registered investment  
adviser, certified public accountant,  
or licensed attorney  
[ ] Questionnaire  
[ ] Other (Specify: \_\_\_\_\_)

\* \* \* \* \*

## General Instruction

\* \* \*

## • When to file:

○ For offerings under Rule 504, Rule 505 and Rule 506(b) of Regulation D and Section 4(a)(5) of the Securities Act, an issuer must file a new notice with the SEC for each new offering of securities no later than 15 calendar days after the “date of first sale” of securities in the offering as explained in the Instruction to Item 7. For this purpose, the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor’s subscription agreement or check. An issuer may file the notice at any time before that if it has determined to make the offering. An issuer must file a new notice with each state that requires it at the time set by the state. For state filing information, go to [www.NASAA.org](http://www.NASAA.org). A mandatory capital commitment call does not constitute a new offering, but is made under the original offering, so no new Form D filing is required.

○ When an issuer intends to offer or sell securities under Rule 506(c) of Regulation D and has not previously filed a Form D for the offering, the issuer must file a new notice with the SEC for each new offering of securities no later than 15 calendar days prior to the first use of general solicitation or general advertising for the offering. The advance Form D is required to include the following information for such offering: the issuer’s identity (Item 1), principal place of business and contact information (Item 2), related persons (Item 3), industry group (Item 4), federal exemptions and exclusions claimed (Item 6), type of filing (Item 7), type(s) of securities offered (Item 9), business combination transaction (Item 10), sales compensation (Item 12), and use of proceeds (Item 16). The information under Item 9 and Item 12 is required only to the extent that the information is known at the time of the filing of the advance Form D.

\* \* \* \* \*

○ An issuer must file an amendment to a previously filed notice for an offering:

- to provide the information required by Form D for each new offering of securities in reliance on Rule 506(c) no later than 15 calendar days after the first sale of securities in the offering;
- to correct a material mistake of fact or error in the previously filed notice, as soon as practicable after discovery of the mistake or error;

- to reflect a change in the information provided in the previously filed notice, except as provided below, as soon as practicable after the change;
- annually, on or before the first anniversary of the most recent previously filed notice, if the offering is continuing at that time; and
- not later than 30 calendar days after termination of an offering conducted in reliance on Rule 506, unless a previously filed Form D amendment for such issuer with respect to the same offering includes the information that would have been disclosed in the amendment following termination of such offering and such previously filed amendment indicates that it is the closing amendment to the Form D for the offering.

\* \* \* \* \*

## Item-by-Item Instructions

\* \* \* \* \*

**Item 2. Principal Place of Business and Contact Information.** \* \* \*

Enter the issuer’s publicly accessible Web site address, if any.

*Item 3. Related Persons.* Enter the full name and address of each person having the specified relationships with any issuer and identify each relationship:

- Each executive officer and director of the issuer and person performing similar functions (title alone is not determinative) for the issuer, such as the general and managing partners of partnerships and managing members of limited liability companies; and
- Each person who has functioned directly or indirectly as a promoter of the issuer within the past five years of first sale of securities or the date upon which the Form D filing was required to be made, whichever date is later.

- For offerings conducted in reliance on Rule 506(c) only, each person who directly or indirectly controls the issuer.

If necessary to prevent the information supplied from being misleading, also provide a clarification in the space provided.

Identify additional persons having the specified relationships by checking the box provided and attaching Item 3 continuation page(s).

**Item 4. Industry Group.** \* \* \*

If Other, provide a brief description of the issuer’s industry group in the space provided.

**Item 5. Issuer Size.**

- **Revenue Range** (for issuers that do not specify “Hedge Fund” or “Other Investment Fund” in response to Item 4): Enter the revenue range of the issuer or of all the issuers together for the most recently completed fiscal year available, or, if not in existence for a fiscal year, revenue range to date. Domestic SEC

reporting companies should state revenues in accordance with Regulation S-X under the Securities Exchange Act of 1934. Domestic non-reporting companies should state revenues in accordance with U.S. Generally Accepted Accounting Principles (GAAP). Foreign issuers should calculate revenues in U.S. dollars and state them in accordance with U.S. GAAP, home country GAAP or International Financial Reporting Standards. If the issuer(s) has not otherwise made information about its revenues publicly available (for example, in general solicitation materials for an offering conducted in reliance on Rule 506(c)) and otherwise uses reasonable efforts to maintain the confidentiality of such information, enter “Not Available to Public.” If the issuer’s(s) business is intended to produce revenue but did not, enter “No Revenues.” If the business is not intended to produce revenue (for example, the business seeks asset appreciation only), enter “Not Applicable.”

- **Aggregate Net Asset Value** (for issuers that specify “Hedge Fund” or “Other Investment Fund” in response to Item 4): Enter the aggregate net asset value range of the issuer or of all the issuers together as of the most recent practicable date. If the issuer(s) has not otherwise made information about its net asset value publicly available (for example, in general solicitation materials for an offering conducted in reliance on Rule 506(c)) and otherwise uses reasonable efforts to maintain the confidentiality of such information, enter “Not Available to Public.”

\* \* \* \* \*

**Item 7. Type of Filing.** Indicate whether the issuer is filing a new notice, an advance notice for an offering in reliance on Rule 506(c), an amendment to a notice that was filed previously, or a closing amendment for an offering in reliance on Rule 506. If this is a new notice, enter the date of the first sale of securities in the offering or indicate that the first sale has “Yet to Occur.” For this purpose, the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor’s subscription agreement or check.

\* \* \* \* \*

**Item 9. Type(s) of Securities Offered.**

Select the appropriate type or types of securities offered as to which this notice is filed. State the trading symbol and general available security identifier,

such as a CUSIP number or an International Securities Identification Number (ISIN), for the offered securities, if any. If the securities are debt convertible into other securities, however, select "Debt" and any other appropriate types of securities except for "Equity." For purposes of this filing, use the ordinary dictionary and commonly understood meanings of these categories. For instance, equity securities would be securities that represent proportional ownership in an issuer, such as ordinary common and preferred stock of corporations and partnership and limited liability company interests; debt securities would be securities representing money loaned to an issuer that must be repaid to the investor at a later date; pooled investment fund interests would be securities that represent ownership interests in a pooled or collective investment vehicle; tenant-in-common securities would be securities that include an undivided fractional interest in real property other than a mineral property; and mineral property securities would be securities that include an undivided interest in an oil, gas or other mineral property.

\* \* \* \* \*

**Item 14. Investors.** Indicate whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors as defined in Rule 501(a), 17 CFR 230.501(a), and provide the number of such investors who have already invested in the offering. In addition, regardless of whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors, specify the total number of investors who already have invested. For an offering conducted in reliance on Rule 506, state the number of natural persons who are accredited investors and non-accredited investors and purchased securities in the offering,

the number of legal entities that are accredited investors and non-accredited investors and purchased securities in the offering, and the dollar amount raised from each category of investor.

\* \* \* \* \*

**Item 16. Use of Proceeds.** For an offering conducted in reliance on Rule 506 by an issuer that is not a pooled investment fund, enter the percentage range of the offering proceeds that was or will be used to repurchase or retire the issuer's existing securities; to pay offering expenses; to acquire assets, otherwise than in the ordinary course of business; to finance acquisitions of other businesses; for working capital; and to discharge indebtedness.

**Item 17. Purchasers Who Qualified as Accredited Investors.** For an offering conducted in reliance on Rule 506, enter the number of purchasers who qualified as accredited investors on the basis of (1) income, (2) net worth, (3) being a director, executive officer or general partner of the issuer or its general partner, or (4) other basis.

**Item 18. National Securities Exchange or Alternative Trading System.** For an offering conducted in reliance on Rule 506, if the issuer's securities are traded on a national securities exchange, alternative trading system or any other organized trading venue, state the name of such trading venue. If a class of the issuer's securities is registered under the Securities Exchange Act of 1934, state the SEC file number for such class of securities. Check the box if the securities being offered in reliance on Rule 506 are of the same class of securities or are convertible into or exercisable or exchangeable for such class of securities.

**Item 19. Filing of General Solicitation Materials with FINRA.** For an offering conducted in reliance on Rule 506, if the issuer used a registered broker-dealer in connection with the offering,

indicate whether any general solicitation materials were filed with the Financial Industry Regulatory Authority (FINRA).

**Item 20. Name and SEC File Number of Investment Advisers.** For an offering conducted in reliance on Rule 506 by an issuer that is a pooled investment fund, if an investment adviser functions, directly or indirectly, as a promoter of the issuer, provide the name and Commission file number for each such investment adviser that is registered with, or reporting as an exempt reporting adviser to, the Commission.

**Item 21. Types of General Solicitation and General Advertising.** For an offering conducted in reliance on Rule 506(c), indicate each type of general solicitation and general advertising used or to be used in the offering. If public Web site(s) or webcast(s) are used, specify the Web addresses for the public Web site(s) or webcast(s). If written communications are used other than those listed in this item, briefly describe the form of such written communications.

**Item 22. Methods Used to Verify Accredited Investor Status.** For an offering conducted in reliance on Rule 506(c), indicate each method used or to be used to verify that the purchasers of securities are accredited investors. If the issuer verifies the accredited investor status of purchasers other than through the non-exclusive list of verification methods in Rule 506(c)(2)(ii), specify the publicly available information, documentation provided by the purchaser or third parties, or other methods used to verify accredited investor status.

By the Commission.

Dated: July 10, 2013.

**Elizabeth M. Murphy,**  
*Secretary.*

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**BILLING CODE 8011-01-P**