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Via Email rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: File No. S7-18-07; Release No. 33-8828 (the "Release")

Dear Ms. Morris:

This letter offers my comments to the Securities and Exchange Commission's proposed amendments to the rules and regulations relating to Regulation D, and more specifically to the proposed disqualification provisions under new Rule 502(e). I am a securities practitioner with over 40 years of experience, including having served as a former SEC attorney and an adjunct professor of law in securities regulation at two difference schools of law. I have numerous clients that rely upon the private offering exemptions promulgated under Regulation D, and my comments are offered based upon my years of experience in the securities industry and because of my concern for possible unintended consequences to the changes currently proposed with respect to the disqualification provisions of Rule 502(e).

With respect to the proposed "bad actor" provisions, the Release states that the "proposed disqualification provisions all relate to determinations by regulators and courts of problematic behavior or wrongdoing." (Release, at 63.) In the first instance, by eliminating the need for a finding of fraud or deceit in connection with the purchase or sale of a security, the proposed disqualifications would paint all alleged "wrongdoing" with the same broad brush. For example, an issuer that is subject to a cease and desist order for an alleged registration violation would be subject to the same 5 year disqualification from reliance on Regulation D as would an issuer that is subject to an order for alleged fraudulent activities. Such one-size fits all provisions are not equitable.

Additionally, by including temporary injunctions and restraining orders along with permanent orders in the disqualification provisions, once again, the punishment of disqualification may not "fit the crime." This provision raises serious due-process concerns, as the burden of proof required to obtain a temporary restraining order is significantly lower than that required to obtain a permanent injunction or an order of a court with findings of fact and conclusions of law. Temporary restraining orders and cease and desist orders are simply designed to preserve the status quo and are not based upon full and fair adjudication of the claims alleged. Accordingly, to subject an issuer to disqualification from reliance on Regulation D based solely upon the issuer being subject to a temporary injunctive order or cease and desist order is inappropriate and unnecessarily punitive.

Likewise, the provision in subsection (iii) concerning an adjudication or determination of a violation, even after notice and opportunity for hearing, does not satisfy all due-process considerations for an issuer who may appeal such an adjudication or determination, notwithstanding that it received notice and opportunity for a hearing. Thus, while an issuer may indeed be the subject of an adjudication by a state regulator that the issuer violated a state (or even federal) securities law, until the issuer has exhausted its appellate rights, any disqualification based on the initial adjudication is premature and violates the issuer's right to due process of law.

For an issuer to be precluded from relying on Regulation D in all states and contexts for a period of 5 years based upon a single determination by a single state regulator of an alleged violation of a state securities law is extraordinarily harsh. If enacted and carried out against all issuers based upon the regulation of all fifty state-securities regulatory bodies, these disqualification provisions are likely to have wide-spread, dramatic, and harmful effects on the national securities markets, in direct contravention of the legislative purpose of the National Securities Markets Improvement Act of 1996 ("NSMIA").

In contrast, the Model Accredited Investor Exemption limits disqualification to situations where there are findings of fraud or deceit in connection with the purchase or sale of a security, which appropriately limits the punishment of disqualification to true "bad actors" and not to those whose behavior does not rise to the level of fraud. As written, the disqualification provisions provide no incentive for issuers to correct their mistakes, particularly those that are largely ministerial in nature. Rather, it effectively bans all issuers, regardless of whether they are found to have engaged in a relatively minor infraction, such as an alleged general solicitation violation (*i.e.,* a cold call) or a more serious, criminal violation such as securities fraud. To the extent the "exemptive" provisions of section (2) are intended to counter the harsh effects of subsections (i)-(iv), they are inadequate and would be unduly cumbersome for the Commission to equitably apply or for an issuer to affirmatively defend.

The Request for Comment on proposed Rule 502(e) asks, "What would be the effects on disqualified issuers? How many issuers would be affected?". The answer to the first question is discussed above. The answer to the second is difficult to say, but presumably, a significant amount of issuers would be affected as the individual states zealously regulate the activities within their borders, based upon the individual states' laws and the states' interpretations of regulatory infractions, both state and federal. Suffice it to say, many issuers find themselves subject to state cease and desist orders for all manner of activities, including in some cases, where no sale has yet taken place within the state, and frequently without any allegation of fraud or deceit. The disqualification from relying on Regulation D for being subject to a cease and desist order for such violations would be more harmful than helpful to investors and the markets in the long run and does not serve the goals of the securities laws. Mandatory disclosure of adverse orders, judgments, and determinations is far preferable to mandatory disqualification for any offense, regardless of a finding of fraud, deceit, or criminal activity, or based upon at least two or more violations within the previous five years.

With respect to the request for comment concerning the phase-in of the proposed disqualification provisions, there are numerous factors to consider. First, there are constitutional questions that must be addressed. For example, if an issuer is subject to a consent order in a particular state for an alleged violation of the state's securities laws (which may or may not contain findings of fact and conclusions of law, but which in all likelihood would contain the statement that the consent was entered into by the issuer without admitting or denying any wrongdoing), and the issuer is subsequently disqualified from relying on Regulation D for a period of five years (as a result of Rule 502(e)), the issuer's due process rights will have been violated. The issuer would not have had the benefit of knowing that such a consequence was possible for agreeing to enter into such a consent order, and the issuer might have otherwise chosen to fully litigate the matter or to seek to negotiate with the state regulator for a different resolution of the matter. Retroactive enforcement of this rule would likewise equate to an unconstitutional ex post facto enactment.

Additionally, strictly from a policy perspective, if the Commission would like for the disqualification provisions to serve as a deterrent from "bad acts," the Rule should be prospective only, and issuers should be provided an opportunity to proceed with a clean slate from the effective date forward. Otherwise, the rule provides little or no disincentive from violations for any issuer with an existing violation within the previous five years, regardless of how well-behaved it may have been since the date of the violation. Also, from an enforcement and logistics standpoint, prospective enforcement makes the most sense in order for all concerned to establish the necessary procedures and communications to effect the rule.

In summary, the proposed disqualification provisions are unnecessarily harsh and overly broad and in addition to having the intended effect of deterring Regulation D recidivist violators, they are just as likely to have the unintended effect of significantly and negatively impacting the formation of the capital markets. The penalty of disqualification from reliance on Regulation D for 5 to 10 years for both serious securities laws violations (which may be wholly justified) as well as for relatively minor infractions is unnecessary. Either the inclusion of the fraud or deceit language or a system that encompasses some type of sliding scale such that the punishment fits the violation is far preferable to the one-size-fits-all approach in the proposed rule. Additionally, if enacted as written, the phase-in must include a grandfather provision and a prospective enforcement date; otherwise it would be unconstitutional under both the due process and ex post facto clauses.

Sincerely,

Baker & McKenzie LLP

Joel Held

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