Public Statement

Statement on Proposed Amendments to the Exempt Offering Framework

Commissioner Allison Herren Lee

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Harmonizing the exempt offering framework makes good sense as a concept. It's reasonable to examine the increasingly complex patchwork of exemptions from registration to ensure the regime is operating well as a whole, eliminate overlap, and fill in gaps. But today's proposal goes far beyond what can rightly be called harmonization. If adopted, it would erode significant distinctions between the public and private markets that are well-grounded in law and policy. Specifically, today's proposal would weaken two cornerstones of protection for retail investors in private markets – the ban on general solicitation for the bulk of private offerings, and the limitation on sales of those offerings mainly to accredited investors.

Equally concerning, we are doing so in the face of a data deficit of our own making regarding the nature and extent of offerings under Regulation D. More new capital is raised through such offerings than any other form of offering.[1] Given the size of this market, it is difficult to see why we have not made an effort to enhance our limited visibility into these offerings.[2] Even more troubling, however, is that we continue to propose rules to expand this market, such as today's rule and the accredited investor proposal from last December, while failing to take simple but critical steps related to Form D filings that would help us to gather data necessary to inform our rulemaking.

As always, I appreciate the work of the staff.[3] I know this proposal was a heavy lift by many and I am grateful for their hard work and expertise. My disagreement is with the policy direction of this proposal, which blurs important differences between public and private markets – differences that go to the heart of our core mission of protecting investors.

Among other things, today's proposal would:

- raise the offering limits for three different exempt offerings;
- remove statutorily imposed investment limitations for certain investors;
- shorten the integration safe harbor period from six months to 30 days, thus effectively collapsing different exemptions to the lowest common denominator for investor protection;
- reduce the disclosure required for non-accredited investors under Regulation D;
- expand the use of test-the-waters communications across all exempt offerings and for all types of investors;
- expand the use of general solicitation overall; and,
- weaken requirements for establishing whether an investor is accredited to little more than self-certification.

This does not reflect a balanced approach to revising the exempt offering framework.[4]

This proposal covers a tremendous amount of ground—indeed the proposed changes taken as a whole are sweeping—but I want to draw attention to two concepts that have traditionally served as limiting principles on private offerings: general solicitation and the accredited investor definition.

Historically, general solicitation has been permitted in our public markets because offerings in that market carry the protections of registration and robust disclosure requirements. By contrast, in the private markets where those protections are largely absent, general solicitation has been carefully limited and, for some exempt offerings, banned.[5]

Today's proposed expansion of general solicitation, however, has the potential to undercut the prohibition in its entirety across all exempt offerings. Presently, an issuer conducting an exempt offering that prohibits general solicitation generally cannot rely on the exemption if investors in the offering were identified or contacted through general solicitation.[6] Under the new proposed integration framework, however, it does not matter if the investor was in fact identified through general solicitation. The issuer can still rely on an exemption that purports to prohibit general solicitation as long as the issuer has a reasonable belief of a pre-existing substantive relationship with the purchaser.[7] Even if that relationship was developed pursuant to a general solicitation.

Could an issuer conduct a general solicitation, ask those who respond to the general solicitation to fill out a few cursory forms, then sell those investors securities in a subsequent offering that bans general solicitation? It is not clear from the proposing release that this scenario would be impermissible.[8] In addition, the proposal includes new test-the-waters provisions that effectively permit general solicitation prior to any type of exempt offering.[9] The upshot of these proposed changes may be a nearly wholesale importation of general solicitation into the private markets.[10]

Next, accredited investors. Traditionally, we have limited the bulk of exempt offerings under Regulation D to accredited investors, those deemed able to assess and bear the greater risks of those offerings. The concept of accredited investors, although an imperfect proxy for sophistication,[11] serves as an important protection for investors in the private market. But it is only as effective as the efforts of issuers to verify that investors actually meet the definition.

Today's proposal weakens the verification requirement for issuers in Rule 506(c) offerings. Rule 506(c) permits general solicitation, but only if the issuer takes reasonable steps to verify that all those who invest are accredited. The proposal contains new guidance on verification under Rule 506(c), including the statement that "in some circumstances, the reasonable steps determination may not be substantially different from an issuer's development of a 'reasonable belief' for Rule 506(b) purposes."[12] This suggests that the "reasonable steps" verification requirement of 506(c), may require no more than the "reasonable belief" standard. That standard has been understood to require less of issuers and potentially permit an issuer to rely on self-certification by investors of their accredited status.[13] The proposal retains a single footnote stating that it would not be enough to require an investor to check a box or sign a form to satisfy the verification requirement. But the language in the text suggests that very little, if anything, else is required. At best, this new guidance creates ambiguity; at worst, it degrades what should be rigorous standards for verification under 506(c).[14]

Consider how these two changes may operate together. The proposal would loosen restrictions on general solicitation, which increases the risk that non-accredited investors may become aware of and attempt to invest in private offerings that our rules purport to limit to accredited investors. Simultaneously, we would require less verification that investors in Rule 506(c) offerings are actually accredited. Thus we increase the risk at every turn that non-accredited investors may end up investing in offerings that we purport to limit to accredited investors.

The limitations on general solicitation and the accredited investor definition have served as important protections for investors in the private markets, and as important markers between the public and private markets. We are steadily making exempt offerings larger, and more and more widely available to the general public. In other words, making them more and more like public offerings, but without the protections the public market affords. At the same time, in other rulemakings, we steadily reduce the disclosure and registration requirements for public offerings, reducing the traditional benefits to investors of those offerings.[15] Thus we chip away at the differences in these markets from both sides, dismantling significant legal and policy barriers between public and private markets.

What's more, we fail in both contexts to adequately address a significant factor in the decline of the public markets – the growing availability of increasingly unrestricted private offerings.[16] Without conducting a thorough analysis of the how these markets do and should interrelate, we put investors at risk, both by diminishing incentives for issuers to engage in public offerings—with all the benefits to investors such offerings entail—and by weakening the traditional investor protections in both markets.

Finally, and very significantly, I note that we have repeatedly identified in today's rulemaking the limitations of data available to us due to the limitations of Form D.[17] Yet, we are proposing changes affecting the private markets, particularly the expansion of general solicitation, without doing the work we plainly acknowledged needed to be done when general solicitation under Rule 506(c) was adopted in 2013.

In 2013, following the elimination of the prohibition of general solicitation in Rule 506 offerings, the Commission proposed amendments to Regulation D, Form D and Rule 156. Those amendments were intended in part to enhance the Commission's ability to evaluate market practices in Rule 506 offerings.[18] Indeed, the proposal even included a direction to the Commission staff to develop an inter-divisional "506 (c) work plan" that was supposed to, among other things, "evaluate the range of purchaser verification practices used by issuers and other participants in these offering," "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," and "monitor the market for Rule 506(c) offerings for increased incidence of fraud."[19]

Since the 2013 proposal, we've seen further growth in this market.[20] Yet, not only have we failed to finalize this rule or gather information to consider the effects of Rule 506(c) on investor protection concerns, capital formation, and other market practices, we now forge ahead with more changes and an even greater expansion of the Regulation D market without an adequate understanding of how that market is functioning.[21]

We should gather data, and bring critical thought and informed analysis to the relationship between our public and private markets before proceeding with rulemaking, and especially before proceeding with rulemaking that would erode critically important differences between the two markets. Unfortunately, I cannot support this proposal, but I'm hopeful that commenters will weigh in to help us find a path forward that reflects a balanced, thoughtful, and data-driven approach.

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[1] In 2019, exempt offerings accounted for approximately $2.7 trillion of new capital, compared to $1.2 trillion in registered offerings. *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Proposed Rule, Rel. No. 33-10763, 8 (Mar. 4, 2020) [Proposing Release]. Regulation D offerings accounted for over $1.5 trillion of the capital raised in exempt offerings. *See id*. at Table 1.

[2] Throughout today's release we acknowledge the limitations on our ability to analyze this market due to the limitations of Form D. *See, e.g.*, Proposing Release at 44, n.94 ("These estimates of the number of investors may represent a lower bound because they rely on available Form D filings, and because a final Form D upon the conclusion of an offering is not required to be filed.); *id*. at 177, n.376 ("[B]ecause Form D does not provide disclosure of contractual terms and private placement memoranda from Regulation D or Section 4(a)(2) offerings are not required to be filed, data on the terms obtained by various investors in private placements is generally not available."); *id*. at 180-81, n.378 ("It is likely that the reported data on Regulation D offerings underestimates the actual amount raised through these offerings. First, Rule 503 of Regulation D requires issuers to file a Form D no later than 15 days after the first sale of securities, but a failure to file the notice does not invalidate the exemption. Accordingly, it is possible that some issuers do not file Form D for offerings relying on Regulation D. Second, underreporting could also occur because a Form D may be filed prior to completion of the offering, and our rules do not require issuers to amend a Form D to report the total amount sold on completion of the offering or to reflect additional amounts offered if the aggregate offering amount does not exceed the original offering size by more than

10 percent."); *id*. at 184 ("[A] closeout filing on Form D is not required, making it difficult to know when the offering closed or how much was raised.").

[3] In particular, I would like to thank Bill Hinman, Elizabeth Murphy, Jennifer Zepralka, Anthony Barone, Steven Hearne, Jeb Byrne, Elizabeth Walsh and Jim Budge from the Division of Corporation Finance; S.P. Kothari, Chyhe Becker, Hari Phatak, Vladimir Ivanov, Marie-Louise Huth, Daniel Bresler, and Anzhela Knyazeva from the Division of Economic and Risk Analysis; Bob Stebbins, Bryant Morris, Dorothy McCuaig, Shehzad Niazi, and Evan Jacobson from the Office of the General Counsel; Lawrence Pace, Brian M. Johnson, Ben Kalish, Sarah ten Siethoff, David Bartels, Holly Hunter-Ceci, Melissa Gainor, Mike Pawluk, Dan Chang, and Mark Uyeda from the Division of Investment Management; and Joanne Rutkowski, Tim White, and Geeta Dhingra from the Division of Trading and Markets.

[4] Instead, as with so many of the rules and proposals from the last several months, the policy choices go mainly in one direction, toward easing restrictions on issuers without adequately weighing the concerns of investors. Today's proposal, for instance, would shorten the integration safe harbor from six months to 30 days, which industry commenters generally favored and investors and their advocates opposed. *See* Proposing Release at nn.86-90. The proposal would also raise the Regulation A, Tier 2 offerings limits, which industry commenters generally favored and investors and their advocates opposed. *See id*. at nn.240-241. The proposal would raise the Rule 504 offering limits, which an industry commenter favored and investors and their advocates opposed. *See id*. at nn.265-266. The proposal would raise the offering limits for Regulation Crowdfunding, which industry commenters generally favored and investors and their advocates opposed. *See id*. at 292-93. The proposal would lift investment limitations for accredited investors under Regulation Crowdfunding, which industry commenters generally favored and investors and their advocates opposed. *See id*. at nn.294-95.

[5] Rule 506(b), which accounts for the largest segment of capital raising under Regulation D, prohibits general solicitation, as does Rule 504 in most circumstances. *See* Proposing Release at Table 2. Past experimentation with lifting limitations on general solicitation in the private market under Rule 504 resulted in serious risks to investors leading to its repeal. *See* Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption, Final Rule, Rel. No. 33-7644 (Feb. 25, 1999) (after lifting the ban on general solicitation in Rule 504 to help smaller issuers raise "seed capital," the Commission reversed itself within approximately seven years, due to fraudulent transactions). Pursuant to the JOBS Act, recent years have seen the expansion of the availability of general solicitation in certain private offerings, including the elimination of the ban on general solicitation with the creation of Rule 506(c), and the availability of general solicitation, with some restrictions, under Regulation A and Crowdfunding. This expansion has been a mixed bag for investors, with some observing compliance problems with both Regulation A and Crowdfunding offerings and disappointing returns for investors. *See, e.g*., Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment: Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Investor Prot., Entrepreneurship & Capital Mkts., 112th Cong. (Sept. 11, 2019) (Written Testimony of Michael S. Pieciak, NASAA Past President and Vermont Commissioner of Financial Regulation at 10-11), https://docs.house.gov/meetings/BA/BA16/20190911/109907/HHRG-116-BA16-Wstate-PieciakM-20190911.pdf (calling recent performance of Reg A+ offerings that elected to list on NYSE or Nasdaq "abysmal" and observing that Reg A+ "not only entails objectively increased investment risk but puts retail investors into a position of essentially competing with sophisticated investors for access to investment opportunities in attractive pre-IPO companies"); Alexander Osipovich, IPOs, Exchanges Shy Away from Mini-IPOs After Fraud Concerns, Wall St. J., June 10, 2019, https://www.wsj.com/articles/exchanges-shy-away-from-mini-ipos-after-fraud-concerns-11560177205 (noting Nasdaq's "broader concerns about corporate governance and potential fraud in Reg A+ companies."); Letter from CrowdCheck (Oct. 30, 2019) ("In the course of our business, and in the course of an in-depth survey that we conducted with respect to compliance by 100 crowdfunding companies (the 'Compliance Survey'), we have identified a number of problematic practices in Regulation CF offerings, some of which may be viewed as 'fraud' within the meaning of that term in securities law").

[6] *See* Proposing Release at 26, n.54 ("If an issuer files a registration statement and then seeks to offer and sell securities without registration to an investor who became interested in the purportedly private placement offering by means of the registration statement, then the Section 4(a)(2) exemption would not be available for that

offering."); *see also* Concept Release on Harmonization of Securities Offering Exemptions, Rel. No. 33-10649, 160-61, n.482 (June 18, 2019) ("For a concurrent offering under Rule 506(b), purchasers in the Rule 506(b) offering could not be solicited by means of a general solicitation under Regulation A (including any 'testing the waters' communications), Regulation Crowdfunding, or Rule 147 or 147A. The issuer would need an alternative means of establishing how purchasers in the Rule 506(b) offering were solicited. For example, the issuer may have had a preexisting substantive relationship with such purchasers. Otherwise, the solicitation conducted in connection with the Regulation A (including any 'testing the waters' communications), Regulation Crowdfunding, or Rule 147 or 147A offering would very likely preclude reliance on Rule 506(b).").

[7] The release is inconsistent in the way it discusses the application of the integration analysis following a general solicitation. In the first application of the general principle of integration, the proposed rule provides that an issuer may rely on an exemption that prohibits general solicitation if it has a <u>reasonable belief</u> that purchasers were not solicited through general solicitation <u>or</u> it has a <u>reasonable belief</u> of a pre-existing substantive relationship with the purchasers. In the application of the integration analysis in the proposed 30-day safe harbor, however, the rule sets forth the same two conditions, except that it omits the "reasonable belief" language. Further, in the discussion of the application of the integration analysis to test-the-waters communications, the release seem to say that the purchasers in an offering prohibiting general solicitation must not have been contacted through general solicitation for the issuer to rely on the exemption, without including the "reasonable belief" language and without allowing for the pre-existing substantive relationship condition. *Compare* Proposing Release at 32 ("For an exempt offering for which general solicitation is not permitted, offers and sales will not be integrated with other offerings if the issuer has a reasonable belief, based on the facts and circumstances, that (i) the purchasers in each exempt offering were not solicited through the use of general solicitation, or (ii) the purchasers in each exempt offering established a substantive relationship with the issuer (or person acting on the issuer's behalf) prior to the commencement of the offering not permitting general solicitation."), *with id*. at 37-38 ("Any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, will not be integrated, provided that: For an exempt offering for which general solicitation is not permitted, the purchasers either: (i) were not solicited through the use of general solicitation, or (ii) established a substantive relationship with the issuer prior to the commencement of the offering for which general solicitation is not permitted."), and *id*. at 75 ("Note, however, that even if the 30-day safe harbor is available, the issuer would not be able to follow a generic solicitation of interest that used a general solicitation with an offering pursuant to an exemption that does not permit general solicitation, such as Rule 506(b), if the offerees contacted in connection with the Rule 506(b) offering were solicited by means of the general solicitation.").

[8] The release states that "[w]e do not believe that self-certification alone (by checking a box) without any other knowledge of a person's financial circumstances or sophistication would be sufficient to form a "substantive" relationship for these purposes." *Id*. at 35, n.72. This is a very narrow limitation and seems to open the door to other forms of self-certification that include slightly more than "checking a box" to suffice to form a "substantive" relationship.

[9] We are creating a further exemption from the definition of general solicitation for "demo days." While I would support a carefully crafted rule that would make demo days more viable for small businesses, I am concerned the parameters of this exemption may not be sufficiently well-defined. For example, the exemption would apply to communications made in connection with a seminar or meeting by "a college, university, or other institution of higher education, a local government, a nonprofit organization, or an angel investor group, incubator, or accelerator sponsoring the seminar or meeting." Could an issuer form a nonprofit organization for purposes of engaging in general solicitation? Would "college, university, or other institution of higher education" include for-profit colleges and universities and, if so, are there risks associated with permitting those institutions to qualify for this exemption? I encourage commenters to weigh in to help us tailor this exemption appropriately. While I am not necessarily opposed to this piece of the proposal, I am troubled by the supposition in the release that this exemption will particularly benefit issuers "that have historically had less access to capital at start up," such as "women-owned and minority-owned businesses." *See* Proposing Release at 67-68, n.134. This is the second time in recent months we have made such an unsupported claim that a proposal that applies to all issuers will somehow particularly benefit women-owned or minority-owned businesses. *See* Amending the Accredited Investor Definition,

Proposed Rule, Rel. No. 33-10734, 129-30 (Dec. 18, 2019). This proposal in no way addresses the systemic issues that have traditionally acted as barriers to capital raising for such issuers. *See e.g*., Robert W. Fairlie, Ph. D. and Alicia M. Robb, Ph.D., "Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs," U.S. Dept. of Commerce, Minority Business Development Agency (Jan. 2010) ("A review of national and regional studies over several decades indicates that limited financial, human, and social capital as well as racial discrimination are primarily responsible for the disparities in minority business performance…. Minority-owned businesses are found to pay higher interest rates on loans. They are also more likely to be denied credit, and are less likely to apply for loans because they fear their applications will be denied.").

[10] This also presents challenges for enforcement of registration violations and violations of existing prohibitions against general solicitation for state regulators. *See* Letter from NASAA (Oct. 3, 2012), https://www.sec.gov/comments/s7-07-12/s70712-92.pdf (discussing the difficulty of policing offerings given the increased availability of general solicitation especially in light of the limitations of Form D, saying an "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").

[11] As I discussed in my statement on the accredited investor proposal in December, because we have not adjusted the wealth thresholds in that definition for over 37 years, the definition has become over-inclusive, capturing dramatically more investors today than at the time the wealth thresholds were set. As long as we continue to do nothing to address this rulemaking by accretion, the door to the private market will continue to open to more and more investors who are not in a position to bear the risks of that market.

[12] Proposing Release at 91.

[13] When the Commission proposed changes to Rule 506 to permit general solicitation for 506(c) offerings and to require issuers to take "reasonable steps" to verify accredited investor status, it emphasized that it was preserving the opportunity for issuers engage in offerings not involving general solicitation under Rule 506(b), recognizing that some issuers may not wish to "become subject to the new requirement to take reasonable steps to verify the accredited investor status of purchasers." *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and 144A Offerings, Proposed Rule, Rel. No. 33-9354, 12 (Aug. 29, 2012). Thus the Commission characterized the "reasonable steps" verification requirement under 506(c) as a new requirement, not simply redundant to the existing "reasonable belief" standard for other offerings to accredited investors. The Commission was also clear at the time the "reasonable steps" verification standard was adopted that it would not be satisfied if an issuer "required only that a person check a box in a questionnaire or sign a form, absent other information about the purchaser indicating accredited investor status." *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and 144A Offerings, Final Rules, Rel. No. 33-9415, 33-34 (July 10, 2013). The "reasonable belief" standard applicable to Rule 506(b) offerings, by contrast, has been viewed as requiring less of issuers and potentially permitting self-certification. *See* Peter Rasmussen, *Rule 506(c)'s General Solicitation Remains Generally Disappointing*, Bloomberg (May 26, 2017), https://www.bna.com/rule-506cs-general-b73014451604/ (Under the 506(b) reasonable belief standard, "[t]he issuer does not have to establish that its buyers meet the accredited investor standard. Rather, it is sufficient if the issuer reasonably believes that the buyers are eligible. Self-certification accomplished through the use of an investor questionnaire is common practice to reach this result. For 506(c) offerings, however, the bar has been raised. A reasonable belief is not sufficient."); *see also* Solicitations of Interest Prior to a Registered Public Offering, Final Rule, Rel. No. 33-10699 (Sept. 25, 2019) (declining to reject "check the box" self-certification to satisfy the reasonable belief standard: "in response to this commenter's concern regarding issuers relying on a 'check-the-box' or other self-certification method of determining investor status, we reiterate that the steps necessary to establish a reasonable belief as to investor status will be dependent on the facts and circumstances of the contemplated offering and each potential issuer.").

[14] The proposal also includes a new provision permitting an issuer to rely on self-certification of accredited status where the issuer has previously taken reasonable steps to verify the investor's status, irrespective of how long ago

that prior verification took place, further weakening the verification requirement.

[15] We do so based on the broad intuition that reducing burdens on issuers will increase public offerings. *See, e.g.*, Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities, Final Rule, Rel. No. 33-10762 (Mar. 2, 2020) (asserting that, as a result of reducing disclosure obligations for registered debt securities, "issuers may be encouraged to offer guaranteed or collateralized securities on a registered basis"); Amendments to the Accelerated Filer and Large Accelerated Filer Definitions, Proposed Rules, Rel. No. 34-85814 (May 9, 2019) (asserting that exempting more companies from the requirement that auditors attest to management's assessment of the effectiveness of the issuer's internal control over financial reporting "may be a positive factor in the decision of additional companies to register their offering or a class of their securities"); Smaller Reporting Company Definition, Final Rules, Rel. No. 33-10513 (June 28, 2018) (asserting that making smaller reporting company status—and the corresponding reduced disclosure requirements—available to more registrants "could encourage capital formation because companies that may have been hesitant to go public may choose to do so if they face reduced disclosure requirements.").

[16] *See* Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment: Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Investor Prot., Entrepreneurship & Capital Mkts., 112th Cong. (Sept. 11, 2019) (Written Testimony of Elisabeth de Fontenay, Professor of Law, Duke University, at 5) ("The share of public companies in the U.S. has declined markedly over the last few decades, in no small part due to the dramatic deregulation of private capital over the same period"); Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment: Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Investor Prot., Entrepreneurship & Capital Mkts., 112th Cong. (Sept. 11, 2019) (Written Testimony of Renee M. Jones, Professor of Law and Associate Dean for Academic Affairs, Boston College Law School, at 5) (Regarding changes that have expanded the scope of exempt offerings, "[t]hese statutory and regulatory reforms have contributed to the shrinking of the public securities markets, and have enabled the current trend toward prolonged delays in corporate IPOs'").

[17] *See* supra note 2; *see also* Scott Bauguess, Rachita Gullapalli, and Vladimir Ivanov, *Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2017*, SEC White Paper (Aug. 2018) ("Separate analysis by DERA staff of Form D filings by funds advised by registered investment advisers and broker-dealer members of FINRA suggests that Form D filings are not made for as much as 10% of unregistered offerings eligible for relief under Regulation D."); Vlad Ivanov and Scott Baugess, *Capital Raising in the U.S. The Significance of Unregistered Offerings Using the Regulation D Exemption,* SEC White Paper (Feb. 2012) ("Further underestimation may occur to the extent that issuers do not report at all. Rule 503 requires the filing of a notice on Form D for all offerings under Regulation D. However, filing Form D is not a condition to claiming a Regulation D safe harbor or exemption. We understand that some issuers do not file Form Ds for offerings intended to be eligible for relief under Regulation D.").

[18] *See* Amendments to Regulation D, Form D, and Rule 156, Rel. No. 33-9416, 1 (July 10, 2013) ("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.").

[19] *See id.* at 13-14.

[20] *See* Bauguess, Gullapalli & Ivanov, supra note 17, at Table 2.

[21] I appreciate that we have included a question in today's proposal (request for comment number 61) regarding whether we should consider ways to enhance compliance with Form D filing requirements, and I hope commenters will weigh in on that point, as well as what other measures we should consider. It is, however, long past time for us to take action related to Form D to improve our visibility into the Regulation D market.