September 19, 2013

By e-mail: rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: Amendments to Regulation D, Form D and Rule 156 under the Securities Act
(File No. S7-06-13)

Ladies and Gentlemen:

Artivest Holdings, Inc. ("Artivest") appreciates this opportunity to comment on the proposal of the Securities and Exchange Commission (the "Commission") to amend Regulation D, Form D, and Rule 156 under the Securities Act of 1933, as amended (the "Securities Act"), in order to provide enhanced transparency regarding the private placement market and promote investor protection concerns that may arise in relation to private offerings relying on the use of general solicitation and general advertising.

Who is Artivest?

Artivest is a new entrant to the marketplace, and has developed an engaging platform for offering investors and their advisers access to alternative investment strategies. Artivest uses online communications and a web-based approach to transparency in order to transform the experience of personal investing. We intend to engage directly with prospective investors through our website, empowering them to make informed investment decisions based on the relevant content we provide.

Along with a series of alternatives-inspired exchange-traded products, we plan to offer a private fund platform comprised of a select group of private asset managers who have undergone our thorough diligence process. We enable investors to learn about each manager and strategy and, if they so choose and provided they meet accreditation standards, to allocate assets to a manager via an Artivest "feeder" fund dedicated to such purpose. We coordinate with each underlying manager to generate content to provide to potential investors, and engage directly to answer any further questions the potential investor may have while evaluating an investment. We provide similarly relevant content to fund investors on an ongoing basis as well.

We support general solicitation.

General solicitation permits more free-flowing communication between money managers and investors, enabling much needed transparency and investor education. The Artivest website is our way to present investors with a curated set of private fund managers, and to provide the benefits of our diligence and transparency. We strongly believe that our online communications efforts will be an effective way to attract appropriate potential investors to funds and to engage beneficially with those who do invest. It is for these reasons that Artivest enthusiastically supported the Commission's action to implement the mandate of Section 201 of the Jumpstart Our Business Startups ("JOBS") Act. Relaxing the archaic prohibition against general solicitation will permit private funds to communicate with a broader range of potential investors, many of whom may not historically have been able to access alternative investment opportunities or benefit from learning about the risks and rewards associated with such investments.

We oppose the proposed amendments.

We are deeply concerned that the Commission's proposals discussed herein will stifle the desire, especially on the part of private funds that are continuously engaged in financings, to rely on general solicitation for fear that it may lead to unintended securities law violations or result in excessive compliance expenses. These consequences may be especially challenging for smaller, fast-growing private funds, which are exactly the marketplace constituency that the JOBS Act was designed to benefit.

We are further concerned that, due to unavoidable ambiguities that will at first be present around what does and does not constitute general solicitation, the proposals will create an atmosphere of fear for *all* private securities issuers, such that issuers conducting the exact same types of solicitation efforts as they always have will now either communicate even less than they already do with potential investors for fear of the draconian consequences of an unintended violation or, alternatively, that such issuers will spend excessive time and capital on unnecessary compliance. Thus, these proposals might not just *cancel out* any benefits of Title II of the JOBS Act; they might actually result in making the entire capital raising process *worse* for investors and issuers alike regardless of their interest in engaging in general solicitation.

We summarize our concerns on certain key aspects of the Commission's proposals below, and suggest alternatives that may further the Commission's objectives to (i) obtain more information about this developing market; and (ii) protect investors. As requested, we comment specifically on: the proposed changes to Form D, the loss of the offering exemption for Form D noncompliance, the legend and submission requirements for general solicitation materials, the proposed changes to Rule 156 and the accredited investor standard.

I. Proposed changes to Form D and Form D filing requirements.

We applaud the Commission's desire to collect more information about the private offering market, and to seek to understand the ways in which market participants are benefiting from–or misusing–the ability to communicate more freely in the context of certain Rule 506 offerings.

However, we believe that the Commission's proposed changes to the Form D filing requirements are excessive and may create traps for the unwary, especially for private funds that are engaged in continuous financings.

Proposed Rule 503 would require an issuer intending to engage in general solicitation for a Rule 506(c) offering to make at least three Form D filings. This seems unnecessarily burdensome if the objective is information gathering. The proposal contemplates that an issuer would be required to file an initial Form D at least 15 calendar days in advance of commencing any general solicitation. In the context of a fund, this raises many questions:

- Is it possible to identify with any degree of certainty and precision (sufficient to ensure that adequate compliance measures have been undertaken) when a private fund is commencing a financing and when a private fund is completing a financing?
- Is "commencement" when the fund's managers decide to raise capital? Is it the first communication that that decision has been made?
- Is "commencement" the first meeting with a potential investor? Is it when the first documents have been signed by an investor?
- Is "commencement" when the first bit of capital arrives in a bank account?

In sum, a private fund will encounter artificial speed bumps to the funding process as it attempts to distinguish the timing of a particular "offering," only to ensure compliance with the proposed rule. This seems at odds with the Congressional intent of relaxing the ban in order to promote access to capital formation. It also seems to disregard the fluid manner in which private funds generally conduct their financing activities.

At Artivest, there is an extra layer of complexity: we employ a structure whereby funds are raised by a feeder fund of ours that will invest into a specific underlying private fund. Will the "commencement" of a financing be understood to mean the commencement of a financing by the feeder fund, or by the underlying private fund? Even if a private fund has otherwise completed its offering, including reserving an allocation for the related Artivest feeder fund, will the private fund be deemed to be engaged in a continuous offering if Artivest is accepting subscriptions from limited partners for the feeder fund? This additional level of complexity arises for any number of distribution platforms, also including aggregators and funds of funds. Prior to the elimination of the prohibition on general solicitation, this issue was easier to navigate: funds followed the same rules and procedures at all times, and feeder platforms followed those same rules.

There is also enough uncertainty concerning what constitutes "general solicitation" such that a private fund might file an initial Form D just out of caution even if does not intend to engage in broad-based communications. For decades prior to the JOBS Act, lawyers and other market participants noted that the private offering process was inefficient and stymied by the lack of certainty regarding the types of communications that might be deemed "general solicitation" by the Commission. Generally, lawyers advised clients that "general solicitation" may be interpreted broadly by regulators, and this has had a chilling effect on communications. In this new environment, we would anticipate that issuers and their counsel will be quite cautious and take the view that "general solicitation" will be interpreted broadly by the Commission, and will want to tread carefully for fear of inadvertently engaging in a communication prior to the proposed initial Form D filing.

These are just a few examples that are intended to illustrate that the financing life cycle is rarely as ordered or orderly as the Commission's proposed rule would tend to suggest, and, especially if the penalty for violating the proposed Form D initial filing requirement is an onerous one, many private funds will desist from engaging in general solicitation, resulting in less information available broadly to investors. Again, this seems an unintended result. Furthermore, if private funds now feel the need to file an initial Form D for the very same perfectly acceptable and useful solicitation communications they previously engaged in, or—worse—if they no longer engage in those communications with interested investors at all, the proposed requirement may actually hinder the fundraising process for both issuers and investors and thus the capital formation objective of the JOBS Act.

We suggest that the Commission:

- Consider requiring that the Form D be filed contemporaneously with the commencement of a financing, rather than 15 days prior.
- Provide guidance for market participants as to when it would consider a financing "terminated," especially for a private fund, so that market participants can formulate a better understanding of how best to comply with the proposed "termination" Form D filing requirement. (Furthermore, it seems unnecessarily punitive to consider an offering ongoing even if the issuer has received definitive purchase commitments from investors simply because the issuer has failed to make the termination Form D filing. In other contexts, the Commission has concluded that an offering is "terminated" or considered completed when definitive purchase commitments are received and the conditions to closing are outside of the control of the investors. Would the private offering be deemed "ongoing" for all purposes, including, for example, in the context of undertaking an integration analysis? This would seem an unusual result.)
- Evaluate whether a single Form D filing might address the Commission's need to monitor market practices.
- Consider requiring that a Form D be filed at the commencement of a financing and *either* at termination of the financing *or* at abandonment of the financing *or* simply annually. This will provide the Commission with data without being nearly as burdensome.
- Allow a third party, like Artivest, to make a Form D filing on an issuer's behalf to relieve the compliance burden for funds.
- Provide further guidance on the types of communication that warrant the filing of a Form D.

II. Loss of Offering Exemption for Failure to Comply with Form D Filing Requirements

We believe the noncompliance penalty in the Commission's proposal to amend Rule 507 is draconian.

Currently, the exemptions provided by Rules 504, 505 and 506 are not conditioned on compliance with the Form D filing requirements. We understand the Commission's concern that, without meaningful consequences for failures to comply, market participants have not been sufficiently diligent with respect to Form D filings. However, the Rule 507 proposal, that an issuer be automatically disqualified 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 the Form D filing requirements in a Rule 506 offering, concerns us.

Given the significance of Rule 506 for private funds, as revealed by the Commission's own recently released study, the loss of the offering exemption would be a severe penalty. A private fund would have extremely limited financing alternatives. Indeed, it would be relegated to reliance on the Section 4(a)(2) private placement exemption and would be required to comply with state blue sky requirements.

Further, the proposal sets multiple traps for the unwary. The proposed multiple Form D filing requirements may well confuse market participants. The proposal suggests that affiliates also may be affected by any disqualification triggered by an issuer's failure to comply. It seems unreasonable for the Commission to propose potentially confusing rules coupled with severely destructive penalties for violating those rules for the confused party and all potential affiliates.

We suggest that the Commission:

- Reconsider the penalty, given the extremely limited financing alternatives.
- If it intends to proceed with the noncompliance penalty, the Commission might draw brighter lines around the affiliated entities that are intended to be disqualified.
- Provide active guidance related to reliance on the proposed rules.

The opportunity to engage in general solicitation is a significant departure from past practices, which suggests that market practice will develop over time. It would be constructive for market participants and regulators to move forward together, in frequent communication, in order to navigate the new private offering world. As with any change in the regulatory environment, it is likely that there will be missteps and that there will be violators (unintended and otherwise), but, over time, much will be learned and best practices will take shape. We applaud the Staff of the Commission in actively providing guidance in the form of Frequently Asked Questions relating to reliance on the provisions of Title I of the JOBS Act, the so-called "IPO on-ramp." This timely and practical guidance was extremely valuable to market participants, and experience has shown that practices and prevailing views have developed as to emerging growth company IPOs. By contrast, as the proposed rules currently stand, if, at the outset of the effectiveness of amended Rule 506, the Commission moves forward to adopt cumbersome, ambiguous rules with draconian consequences for noncompliance, many market participants, including Artivest and our private fund partners, will be reluctant to avail themselves of the ability to communicate more freely.

III. General Solicitation Materials

We believe that the legend and submission requirements may have a chilling effect on the use of general solicitation and may cause issuers to refrain from using general solicitation or simply refrain from using written materials altogether.

Legend Requirement

The Commission proposes a new Rule 509 that would require an issuer to include certain legends in all written general solicitation materials, and private funds would also be required to include certain performance-related legends. "Boilerplate" disclosure ultimately is ignored by investors. Blanket disclosure requirements like those specified in the proposal, as well as the submission requirements discussed below, discourage the use of forms of media that have become ubiquitous and useful, such as social media. We at Artivest would be discouraged from using micro-blogs, like Twitter, open online discussion forums, or any other fast and dynamic form of 21st Century media to inform investors quickly, and to provide the type of valuable color that comes from an ongoing engagement with investors. We favor tailored disclosures that allow issuers to include that which is relevant. Moreover, there are existing, well-worn requirements for registered investment advisers and FINRA requirements (applicable to member firms) that already address the content of "advertising" materials and materials that discuss performance records. Funds that are commodity pools also are already subject to requirements relating to their advertising and disclosure materials. Any requirements relating to the presentation of performance data should be harmonized.

We strongly believe that an existing framework already is in place for regulating the content of information that may be used to solicit prospective investors under Rule 506(c). In this regard, we believe that existing anti-fraud provisions of the federal securities laws provide a significant deterrent to the use of misleading or deceptive materials in the course of any offering, including the types of offerings contemplated by Rule 506(c). It is not clear that the mere inclusion of a legend would minimize the chance that a non-accredited investor might participate in a Rule 506(c) offering, or serve to reinforce the need for materials to be balanced.

We suggest that the Commission:

- Abandon the blanket legend requirement, and instead allow issuers to tailor their disclosures.
- Alternatively, if the legend requirement will be enforced, then perhaps the Commission might clarify the types of written materials to which these requirements will apply, and confirm that, in the context of communications made using social media, a hyperlink to the required legend would satisfy the requirement, if applicable.

Submission Requirement

The Commission proposes to adopt new Rule 510(t), which 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 offering no later than the date of first use. Many market participants will have difficulty assessing the types of communications that would actually be considered to be "written materials" by the Commission. It is also not clear how "general solicitation" should be interpreted in this context. We also do not know whether the Commission intends that all "uses" of a communication should each be subject to a filing requirement. This raises a number of questions regarding materials used for investor communications and website content:

- If the issuer prepares summary investment highlights and uses these in various communications, without material modification, should each such communication be filed with the Commission?
- Is a script used for investor presentations, but not actually shared with investors, subject to filing?
- Will comment sections below website content be subject to filing? Will standard internal approvals prior to permitting each comment to be posted no longer be sufficient?
- Will any question & answer session be subject to filing? How about discussion forums?

There are many details that would have to be clarified if this requirement were adopted in order to promote consistency and certainty. However, it is not clear that the Commission has considered the costs associated with imposing a submission requirement. There are already filing requirements for a variety of types of communication. For example, "retail communications" are required to be filed by a broker-dealer with the Financial Industry Regulatory Authority ("FINRA"). FINRA Rule 5123 requires the filing of certain information relating to private placements. The National Futures Authority (the "NFA") requires the filing of certain disclosure materials used by commodity pools and their operators or advisers. These self-regulatory organizations also impose certain recordkeeping requirements as to these materials.

We suggest that the Commission:

- Coordinate with FINRA and with the NFA if the objective of the submission requirement is to obtain information about the types of materials that are being used.
- Alternatively, if the Commission were to proceed with the submission requirement, consider the appropriate penalty for failure to file. The proposal suggests that the failure to submit materials would result in disqualification from reliance on Rule 506(c). In our estimation, this penalty is inappropriate for the violation.

IV. Proposed Changes to Rule 156

We believe the Commission's proposal to extend Rule 156 to all sales materials used by private funds regardless of whether offerings involve general solicitation is neither needed nor warranted.

As stated above, antifraud provisions already apply to securities offerings of private funds. Extending Rule 156 without the benefit of any cost-benefit analysis, and without coordinating or harmonizing the communications requirements to which private funds already are subject, seems ill-considered. If additional restrictions along these lines were to be applied, there should be an additional comment period for this part of the proposed rule change.

We have previously shared with the Commission our views regarding content restrictions.[1] New content restrictions are unnecessary, and create a barrier to engagement with investors about financial products. We do not believe that the lack of content standards with respect to these types of offerings will inevitably result in investors being taken advantage of with misleading and deceptive marketing material. In fact, we believe that any chilling effect that might result from these rules would have the opposite effect and would reduce the amount of educational material available for investors to make informed decisions. Any attempt to impose restrictions on, or standards for, content would severely curtail the attractiveness of Rule 506(c) as an exemption and undermine the purpose of the JOBS Act. This proposed change would actually make communications *more challenging* than they were prior to the JOBS Act.

Broker-dealers and registered investment advisers already are subject to certain standards of conduct. Specifically with respect to Artivest's contemplated private fund platform, we note that there is pre-existing guidance about the types of performance information that may be provided by a broker-dealer. Further, for those private funds managed by a registered commodity pool operator ("CPO"), NFA Rule 2-29 contains standards regarding marketing materials. In general, the NFA's rules do not distinguish content based on the public or private nature of the offering. For example, a manager cannot include claims regarding seasonal trades in marketing materials

[1] *See* letter from Artivest (October 23, 2012) [http://www.sec.gov/comments/s7-07-12/s70712-167.pdf].

regardless of whether the offering is public or private. The only content-based distinction in NFA Rule 2-29 relates to the use of certain hypothetical performance information, and that distinction is drawn along investor suitability lines, rather than the breadth or scope of the relevant offering.

V. The Accredited Investor Standard

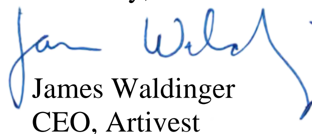
We believe that the Commission should consider modifying the "accredited investor" definition as it relates to natural persons in order to incorporate better indicia of financial sophistication.

Financial services professionals, as well as certain others having financial experience, such as certified financial advisers, accountants, etc., should be considered eligible to participate in Rule 506 offerings. Similarly, investors advised by an investment professional should be permitted to participate in such offerings. Knowledgeable employees of a private fund also should be eligible for that fund's Rule 506 offering.

The Commission should consider a percentage of net worth or percentage of liquid assets limitation (*e.g.*, an investor cannot invest more than 10% of the investor's stated net worth into certain types of products). Finally, we agreed with the Commission when it stated in its final rule release regarding the elimination of the prohibition on general solicitation, "We continue to believe that there is merit to the view that a purchaser's ability to meet a high minimum investment amount could be a relevant factor to the issuer's evaluation of the types of steps that would be reasonable to take in order to verify that purchaser's status as an accredited investor."[2] We would take this a step further and argue that if a purchaser seeks to make a direct cash investment in an amount sufficiently high that only an accredited investor could reasonably be expected to make such an investment, we would expect that purchaser to satisfy the accreditation standards and be able to participate in the offering.

We appreciate the opportunity to comment on these proposals, and we would be pleased to meet with the Commission's staff to discuss these issues or to answer any questions.

Sincerely,



James Waldinger
CEO, Artivest

[2] *See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Release No. 33-9415 (July 10, 2013)[http://www.sec.gov/rules/final/2013/33-9415.pdf] (the "Final Rule").