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September 23, 2013

VIA EMAIL

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
rule-comments@sec.gov
File Number S7-06-13

Re: Amendments to Regulation D, Form D and Rule 156 under the Securities Act

Ladies and Gentlemen:

We are submitting this letter in response to a request for comments from the Securities and Exchange Commission (the "***SEC***" or the "***Commission***") regarding the proposed rules described in Release No. 33-9416 (the "***Proposed Rules***").

We appreciate the opportunity to comment on the Proposed Rules, and look forward to working with the Commission and its staff as the comments are reviewed. While we understand the Commission's mandate of protecting investors, we respectfully request that the Commission fully consider the concerns raised in this response letter.

These comments address the SEC's proposed rulemaking with respect to the exemption provided by Rule 506 of the Securities act of 1933, as amended. We support the general approach taken by Congress in allowing an issuer to engage in general solicitation and still be permitted to rely on Regulation D. However, we are concerned that the Proposed Rules, when combined with the recently adopted final rules[1] (the "***Final Rules***"), create an undue burden on issuers and go against the Congressional intent of the JOBS Act. Far from encouraging issuers to take advantage of general solicitation as envisioned by Congress, we believe that issuers will view the Proposed Rules as an unwarranted imposition of excessive bureaucratic rules. To the extent this is true, issuers will shy (or run) away from Regulation D (both Rule 506(b) and Rule 506(c)), and will instead seek capital in a manner that avoids such heavy-handed compliance. This will include seeking capital from non-US investors (perhaps in reliance on Regulation S) or

[1] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings (Release 33-9415) and Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings (Release 33-9414).

from US investors located in states with more "friendly" Blue Sky laws. As a result, it is difficult to see how the Proposed Rules will effectively promote investor protection.

By way of background, this firm serves as outside counsel to over 170 venture capital firms and thousands of privately held companies.[2] We have been recognized as a national and international leader in the representation of venture capital firms, and our client base represents some of the most active, influential and highly respected venture capital firms in the industry. Most importantly, for purposes of this response letter, we advise numerous private companies and private funds with respect to their structure, formation and organization so as to ensure compliance with applicable law in the offering and sale of their interests to prospective investors. As such, we possess an expertise in the manner in which private funds raise capital. It is our belief that the Proposed Rules do not effectively address investor protection, but instead impose unnecessary administrative hurdles that will irrevocably damage the capital markets and the Commission's ability to observe them.

I. General Observations

As a general matter, we are concerned that the SEC is considering the Proposed Rules without taking into account the total compliance burden currently imposed on issuers and the negative impact that the Proposed Rules will have both on the ability of the Commission to gather market information and on the broadening of the capital markets to all US citizens. The Proposed Rules cannot be viewed in a vacuum. The incremental burdens being imposed on issuers must be analyzed in the context of all existing and recent regulatory actions that impact such issuers.

Prior to the issuance of the Proposed Rules and the Final Rules, private funds were still reeling from the additional compliance burdens imposed by changes to the Investment Advisers Act of 1940 (the "***Advisers Act***") as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Such additional registration and/or reporting obligations on Form D and Form PF, as well as additional reporting under Form 13H, pay-to-play compliance procedures, and existing Schedule 13D/G reporting all create a rather unfriendly regulatory atmosphere. The operational drag on capital formation will only increase as a result of these Proposed Rules and Final Rules, with virtually no corresponding benefit towards investor protection.

We do not believe that the Commission has properly addressed the actual cost of compliance, which we contend must be measured in a number of ways. Certainly, there is the actual cost, in terms of dollars, which includes the incremental personnel, legal and verification expenses. However, the Final Rules and these Proposed Rules also impose additional costs:

1. *Loss of Competitiveness*. Additional public disclosure of proprietary information in the Form D (to include the actual amount of capital raised, time frame in which it took to raise such capital, number of investors and type (natural person/entity)) can be used by competitors in the private

[2] This comment letter is not being submitted on behalf of any issuer, and does not necessarily represent the views of any client of this firm.

market seeking to glean any nugget of confidential information that is not normally disclosed by such private issuers.

2. *Delays in Fundraising*. The Proposed Rules would impose significant delays in the ability of an issuer to raise capital, especially if a CEO or fund manager must be muzzled for 15 days before a Form D is filed.

3. *Restrictions in Manner of Advertising*. Under the Proposed Rules, an issuer desiring to engage in any form of written general solicitation would be prohibited from using methods that do not allow for the insertion of statutory legends (such tweets, blogs, internet posts, billboards, etc.).

4. *Eliminations of Safe Harbor*. We do not believe that the SEC has taken into account the fact that issuers may now be more inclined to offer their securities only to non-US residents or to a select few US residents who are in states that have self-executing Blue Sky securities exemptions. We believe that the additional restrictions imposed on issuers by the Final Rules and these Proposed Rules will cause a flight away from Regulation D. Issuers will simply turn to the federal exemption under 4(a)(2) and rely on Regulation S or Blue Sky compliance in "friendly" states. Investors that are in a state that does not provide for a self-executing exemption will simply be out of luck.

With all of these costs, the natural question is who ultimately pays the price for such burdensome compliance? To say that the issuer pays really means that the burden falls on the investors, or those investor's funds are used by issuers to cover increased compliance costs. And so long as the investors are accredited, we contend that such persons are paying a price for protections that they do not need. However, the cost will also be borne by employees, clients, customers, portfolio companies and existing investors. Such restrictions in capital formation will impact all levels of the issuer, at every growth stage, with disproportionate damage imposed on smaller issuers.

We note three disturbing observations that we believe may result if the Proposed Rules are enacted:

1. The overall impact of the Final Rules and these Proposed Rules will result in less disclosure, not more. Issuers will now have a meaningful incentive to avoid reliance on Regulation D and making any public filing on Form D.

2. The Proposed Rules go far beyond what the JOBS Act contemplated. In fact, we contend that the Proposed Rules are contrary to the JOBS Act's purpose, as application of the Proposed Rules and the Final Rules will impose a chilling effect on all issuers who rely on Regulation D, and not just those engaging in general solicitation.

3. Throughout the Proposed Rules, the Commission cites two primary goals: investor protection and greater insight for the Commission into the private

placement market. We expect that the enactment of the Proposed Rules will have the opposite, unintended impact. Issuers will move away from Regulation D, meaning that the (i) Commission will have less relevant information regarding the markets and how best to protect investors and (ii) issuers will be biased against prospective investors who are located in states with burdensome Blue Sky laws (perhaps even favoring non-US investors over US residents).

Due to this material chilling effect, the move away from Regulation D will likely have a negative impact on market efficiency. Quite simply, the additional drags imposed on issuers will not facilitate capital formation. In fact, we believe that the Proposed Rules will actually backfire and result in issuers avoiding Regulation D altogether.

II. Request for Comments.

Below are responses to the specific requests for comment in Release No. 33-9416.

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?*

   We do not believe that such a 15-day quiet period is useful or appropriate. In fact, such an imposition would prevent issuers from taking advantage of opportunistic openings to speak at lectures, talk with the press or otherwise engage in appropriate business activities. The information provided in a Form D would not provide prospective investors with any meaningful information that would need to be disseminated in advance of general solicitation.

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?*

   We do not believe that an Advance Form D should be filed. In any event, an administrative action such as failing to file a Form D should in no way result in any issuer losing an exemption under Regulation D. Who would really hurt by an issuer's failure to file an Advance Form D? The loss of an exemption would mean that every employee of, and investor in, such issuer would be unduly harmed.

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, 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?

This is a prime example of why such an Advanced Form D should not be required. Imposing such a muzzle on issuers will inevitably result in inadvertent dissemination. Comparing Regulation D (private placements) with reporting under Regulation FD (governing public companies) further highlights the unnecessary burden that will be placed on small issuers, which often do not have the resources available to a public company or a company contemplating a public offering.

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?*

Private placements can be very complicated matters, especially for smaller issuers that are not accustomed to raising third party capital. Determining an exact point of time of when an offering is "contemplated" may be impossible. Furthermore, if there is a 15-day requirement, plus penalties imposed for violating such a quiet period, it seems unusual to penalize and issuer for "filing too early." Also, considering that many public statements by a CEO or a fund manager could be inadvertently construed as general solicitation by a regulator, why wouldn't an issuer file such a protective Form D?

The Form D is not an offering document. The additional information is not of the type that would assist an investor in making an educated investment decision. Instead, the list of additional items is likely to benefit regulators (who are seeking census-like information), competitors (seeking any information advantage against any company in their operating space) and journalists (seeking a timely scoop). If regulators truly need this information, then the SEC should consider making the Form D a private filing, accessible only by regulators. The additional proposed information in the Form D would only serve to harm an issuer by having such potentially sensitive information being needlessly disclosed to persons not directly involved in the offering.

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?*

   As stated above, to the extent additional restrictions and conditions are placed on issuers (to include additional reporting items in the Form D or additional pre- and post-sales filings that must be made), we believe that many issuers will decide to forego undertaking an offering in reliance on Regulation D. As such, the Commission's desire to analyze the Rule 506 market would be materially skewed since the Final Rules and Proposed Rules will likely change the participants in such market. Accordingly, we would not advise any changes that eliminate an issuer's optionality in the offering process. Furthermore, since we believe that the public disclosure of Form D information may harm an issuer, we believe that the less information that is made available through an initial Form D (if ultimately required), the better.

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?*

   We firmly believe that the Final Rules and the Proposed Rules will influence an issuer's decision as to whether to rely on an exemption other than Regulation D. If that is the case, we believe that issuers will seek to offer their interests to potential investors located in a state that has a self-executing or more simple filing requirement (such as California) or to non-US investors. The net result would result in less transparency to the SEC, greater attractiveness of non-US capital and potential discrimination against investors in states that are perceived as "less friendly" for private placements.

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?*

It is highly doubtful that individuals would rush to the SEC's website to look at an Advanced Form D. The information provided in the Form D is not of the type that is critical for an investor to make an informed decision. On the other hand, journalists may very well rush to review and publish information appearing on an Advanced Form D and to further speculate about the filing issuer, which may lead to more inaccurate information in the marketplace.

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

To the extent an issuer is relying on Regulation D, and selling securities only to accredited investors, we do not believe that an Advanced Form D should be required. The additional costs associated with offering securities to persons able to fend for themselves clearly outweighs any negligible benefits that could be obtained by filing an Advance Form D.

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?*

If required at all, an Advance Form D should only be mandated if an issuer is targeting non-accredited investors.

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?*

We believe that a Rule 506(c) offering made exclusively to qualified purchasers/knowledgeable employees (for example, in the course of raising a private fund that relies on the exemption under 3(c)(7) of the Investment Company Act of 1940 (the "***Company Act***")) should not be subject to any of the additional requirements being suggested in the Proposed Rules.

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?*

No, a closing Form D should not be required. Although such a filing would be very useful to journalists and competitors of an issuer, the final amount of securities sold need not be a matter of public record. In any event, if a closing Form D amendment is required, it should <u>not</u> apply to any issuer that either (i) relied on Rule 506(b), (ii) offered securities solely to qualified purchasers/knowledgeable employees (regardless of whether such issuer relied on Rule 506(c)) or has 100 or fewer beneficial owners or (iii) did not actually sell any securities.

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?*

A private offering is a complicated matter, and selecting an exact date of when the offering "terminated" is often an impossible task. If any such closing Form D amendment is required, an issuer should have some degree of flexibility. As such, a longer period would make more sense (e.g., within 12 months following the end of the calendar year in which the offering terminated).

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)?*

The filing of a closing amendment should not be a condition of Rule 506. Retroactively revoking an exemption for an administrative matter that has no bearing on the offering and sale itself would be one of the most unusual and unfair penalties imposed by the SEC. We do not understand who would benefit from such a loss of the exemption: The employees? The investors? Potential investors who elected not to participate in the offering, and thus were not harmed? How would this requirement further promote investor protection? Instead, the loss of the exemption would likely give rise to a rescission claim, which could cripple an issuer.

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?*

We do not believe that any definition or explanation of what constitutes a termination of an offering could adequately address the various circumstances that arise in the real world. Rather than focusing on a definition for a requirement that would provide no investor protection, we encourage the Commission to eliminate such an unnecessary requirement.

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.*

In addition to the legal and personnel costs associated with any filing with the SEC, an issuer will need to take into consideration the costs associated with the public disclosure of such information. Competitors and journalists will know the exact amount of capital raised, the time within which the fundraising occurred and whether or not the issuer was successful in its endeavors. This requirement would be a very strong deterrent against conducting a Rule 506 offering. If the SEC truly believes that such information is critical to the Commission, it would ensure that all such closing Form D amendments were made privately, and not posted on EDGAR and available to the public.

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?*

We do not believe that any closing Form D amendment should be required. Accredited investors are able to inquire of an issuer as to whether an offering is complete, and the extent of the offering. Requiring an ex post facto filing protects neither the investors who participated in the offering nor those that did not.

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?*

If the proposed closing amendment to Form D is adopted, we recommend that all other interim amendments be eliminated. Considering the lack of utility that the Form D has with respect to private placements, we believe that the fewer filings the better for the issuer, the investors and the capital markets. The additional costs associated with multiple filings only serve as a drag to the issuer's operations.

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?*

Filing a Form D amendment, especially when such amendments are made after the sale of securities, does not provide any material investor protection. Given the drag that such amendments impose on an issuer (financial and otherwise), we support the Commission's narrowing of circumstances as to when any amendment to the Form D needs to be filed.

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 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?*

Requiring an issuer to file such amendments imposes a significant operational and financial drag on such issuer. In addition to the legal and personnel costs associated with having to make such public amendments during a private placement, an issuer must also consider the ramifications of having such updated information be publicly available to competitors. We believe that an amendment should not be required as a result of a change in the additional information that is being suggested in the Proposed Rules. The SEC has not offered any evidence that the public disclosure of such information (initial or updated) assists in investor protection.

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?*

No. The SEC should not take lightly any additional filing requirement. Any filing with the SEC constitutes a material burden on issuers, from the initial obtaining of SEC codes, to consultation with legal counsel, to weighing the impact of having a private issuer's information disclosed to the public. There is no compelling reason to force an issuer to make any more amendments to the Form D than is currently required.

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?

We do not believe that any failure to file a Form D should result in an issuer losing its exemption under rule 506. So long as the substantive requirements of Rule 506 have been met (i.e., selling to accredited investors), failure to make an administrative filing and losing an exemption constitutes a grossly unreasonable penalty. If actual penalties are to be imposed, then the SEC must be specific as to what constitutes a reasonable period of time. However, the facts and circumstances of every situation will dictate what constitutes a reasonable period, rendering any such specific time period arbitrary and often burdensome to the issuer.

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?*

No. It is often times unclear whether an offering remains open, and an issuer should have the flexibility to determine when such an annual amendment need be made.

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?*

Yes.

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?*

Bringing current a Form D filing requires a material amount of time and expense. As such, the costs associated with updating all information can be significant, especially in light of the reason as to why the amendment was filed. Unless such other information in the Form D is required to be kept current, we believe that it is appropriate to only update that information that is required to be amended.

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?*

If a closing Form D is required (and we strongly advocate against such a requirement), then it should simply state that the offering has closed. No additional information (amount sold, number of investors, etc.) relating to a private placement is relevant. As stated above, any additional disclosure can only assist competitors and journalists.

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?*

If a closing Form D is required (and we strongly advocate against such a requirement), then it should simply state that the offering has closed. No additional information (amount sold, number of investors, etc.) relating to a private placement is relevant to the public or to regulators. As stated above, any additional disclosure can only assist competitors and journalists.

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.*

We believe that if a closing amendment were to be required, such an obligation should not apply to issuers that (i) relied on Rule 506(b) for the offering, or (ii) are private funds and relied on the exemption from either 3(c)(1) or 3(c)(7) of the Investment Company Act (since, by definition, sales were either limited to less than 100 investors or all investors are qualified purchasers).

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?*

Requiring such additional information will be problematic for a number of reasons. First, reliance on an exemption for a private placement by a privately held issuer should not mean that such issuer must be forced to disclose any sensitive information to the public. Second, requiring the disclosure of such additional information could ultimately provide a false sense of security to investors, who may believe that such SEC-mandated items are all that are material to a prospective investor's decision. Finally, Rule 506 is intended to act as an exemption for sales of securities to persons who are either sophisticated or can otherwise fend for themselves based on their net worth/annual compensation. Imposing such additional disclosure items is a rather paternalistic approach by the SEC that assumes that accredited investors are, in fact, unable to ask such questions (such as the names of the issuers counsel, accountants or auditors) themselves.

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?*

As described above, the costs must be measured not only in dollars and cents, but also in the drag on the capital formation process and the significant costs to an issuer required to publicly disclose potentially sensitive information (especially to competitors and customers/clients, who might come to incorrect assumptions based on information in the Form D). We believe that such additional restrictions will serve as a forcing function, causing many issuers to elect not to rely on Regulation D. Were that to occur, then, as discussed above, we believe that the SEC would ultimately have less information for its market analysis, and investors located in certain states would be excluded from these offerings. Issuers may develop a preference for non-US investors, especially those from jurisdictions with accommodating private placement regimes, potentially to the exclusion of US investors.

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?*

We believe that none of the additional information the Commission proposes should be included in any Form D. Likewise, we do not believe that an issuer should be required to file a closing amendment on Form D. If any such additional information is required, or if a closing amendment on Form D is required, then we suggest it be done in a private filing with the Commission.

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?*

We believe that if an issuer does not affirmatively disclose such information, then such information should not be considered available to the public. Actions by a third party that are not approved by an issuer should not cause such issuer to then make public disclosures.

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)?*

Unless an issuer voluntarily elects to make such information available to the public, such issuer should not be required to tell the world of its revenue range or net asset value. The Commission has not provided any evidence as to how this requirement would provide any benefit that outweighs the harm done as a result of giving this information to an issuer's competitors. If the Commission is seeking this information primarily for its own census-like research, then it should allow issuers to provide the information to the Commission's staff in a confidential manner.

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?*

If the Commission ultimately requires such an Advance Form D or a closing amendment, then a check box would be useful.

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)?*

Compliance with Regulation D requires that an issuer fulfill various obligations under the rules. Whether a checkbox is included does not eliminate the obligation under rule 506(b)(2)(iii). As such, we do not see the need for this checkbox.

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 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?*

To remain exempt from the registration requirements of the Company Act, a private fund is generally excepted from the definition of an investment company by virtue of relying on either section 3(c)(1) or 3(c)(7) of the Company Act. As such, these vehicles must either exclusively limit sales to qualified purchasers (who certainly do not need protection from the SEC) or have less than 100 investors (a rather low de minimis limit). As such, we believe that private funds should not be required to provide any additional information, even if the offering is in connection with a Rule 506(c) offering.

Furthermore, we note that a newly formed investment adviser will not have a CRD number, and an adviser that is exempt from registration with the SEC (an "exempt reporting adviser" or ERA) need not file its initial Form ADV for up to 60 days. In the case of an existing adviser, such adviser's Form ADV is on file and easily accessible by the public via the IAPD portal through FINRA. Requiring any such additional information for existing advisers is superfluous. All information concerning control persons of an investment adviser are listed in such adviser's Form ADV.

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?*

We do not believe that such specific information regarding the methods of general solicitation are necessary or useful. We anticipate that an issuer would simply indicate that it might use every listed method. During the life of a private placement offering, it is conceivable that an issuer's solicitation strategy will change and evolve. We do not believe that any particular method of general solicitation raises investor protection concerns. Instead, the Commission should focus on the substance of the message, rather than its manner of delivery. Anti-fraud rules may be violated just as easily under any method of general solicitation, and focusing on one method over another is a red herring. We do not believe that any information regarding solicitation methods should need to be provided.

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?*

We do not believe that the Commission should require any specific information regarding the methods used to verify accredited investor status. Every investor's status as an accredited investor will need to be verified in accordance with the specific facts and circumstances surrounding such investor. What would be the purpose of listing a broker-dealer, investment adviser or attorney who represented an investor and was able to submit a verification statement on behalf of his client?

If there are 200 investors in a company, such a requirement could result in the public listing of over 200 CPAs, attorneys, broker-dealers and RIAs. Since such persons represent the investors, not the issuer, we do not believe that public disclosure by the issuer serves any purpose.

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?*

Such a suggestion represents an incredible example of form over substance. The filing of a Form D represents a ministerial action, which pales in comparison to the substantive requirements of Rule 506. Imposing such a penalty could result in recission claims that could literally cripple an issuer, causing irreparable damage to its clients, customers, employees and existing investors.

Most disturbing is the reference to "affiliates" in this proposal. Since the SEC has not provided any concrete definition of affiliate status, the concept of "common control" would create confusion and cause unintended results. As proposed, the failure of company A to make a Form D filing would cause company B to be disqualified from relying on Rule 506, if only because each company might share (unbeknownst to one another) a common investor. Even if this common investor were completely passive, and took no role in the day-to-day activities of these two companies (such as filing a Form D), under the existing prevalent understanding of "control," such ownership could cause company A and company B to be deemed affiliates of one another. How could the Commission justify imposing such a fatal penalty on an issuer as a result of the unknown actions of an "affiliate" (as currently vaguely defined)? Were this proposed rule to be adopted, it would undoubtedly result in an enormous chilling effect on <u>all</u> issuers contemplating a Rule 506 offering.

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?*

Tying any disqualification to the actions of an "affiliate," especially if such person is not directly responsible for the issuer's compliance under Regulation D, will certainly result in an absurd and perverse outcome. Regardless of any affiliation between two issuers, so long as each issuer is a separate legal entity, the actions (or inactions) of one should not, under any circumstances, be attributed to the other.

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?*

Failing to comply with any part of Rule 503 (whether an Advance, initial, amended or final Form D filing) should not be grounds for disqualification from a Rule 506 offering. Such a penalty would deliver a disproportionately severe and crushing blow to an issuer.[3]

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?*

This is not an appropriate requirement. We are not aware of a single example where a defrauded investor would have been saved from deception had the issuer timely filed a Form D. Can the Commission provide an example? If the primary rationale for requiring additional information and additional Form D filings is to provide the Commission with "census-like" data, then such a disqualification penalty cannot be justified.

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?*

No disqualification period is appropriate. Any action that disqualifies an issuer from relying on Rule 506 would not only impose an undue burden on capital formation, but also be a potentially fatal strike to the issuer. An inability to raise capital for a year (or any extended period of time) could mean that creditors are not paid, employees are let go, capital expansion is put on hold, R&D is shelved, etc.

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?*

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[3] Such an action would be akin to killing a fly with a hand grenade. The collateral damage would extend far, far beyond just the intended target. Loss of a Rule 506 exemption would often mean that a company cannot raise sufficient capital, which would likely result in numerous third parties being adversely impacted: employees, customers, vendors, existing investors, etc.

Per the above, no disqualification period is appropriate.

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?*

Per the above, no disqualification period is appropriate.

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?*

Per the above, no disqualification period is appropriate.

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?*

In no event should any disqualification ever occur as a result of actions or inactions by an "affiliate." This term is so vaguely defined that it offers absolutely no assurances as to whose behavior could trigger a violation. Only if a person exercises actual influence and control over an issuer, with the specific intent to defraud investors, should a disqualification be considered (and this concept is already covered in the recently adopted "bad actor" rules applicable to Rule 506).

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?*

Absolutely. Under the suggested changes, a portfolio company of a private fund would be disqualified not only by noncompliance by a private fund, but also by noncompliance of any other portfolio company of such private fund (or any other private fund affiliated with such private fund). Because of the uncertainty of how far "affiliation" could spread, reliance on Rule 506 could come to a grinding halt.

The Commission should only disqualify an issuer if such issuer has truly engaged in egregious actions. This is already covered under the recently adopted "bad actor" construct of Rule 506(d).

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?

Failure to file a Form D should not result in any disqualification under Rule 506. Such a penalty would result in a disproportionate response: If a private fund were prohibited from relying on Rule 506, what would be the result? Either (a) capital would not be formed and deployed by the fund manager, or (b) the private fund would be formed in reliance on 4(2) and various Blue Sky exemptions, or from non-US sources in reliance on Regulation S. Forming the private fund outside of Rule 506 would mean that the SEC and the public would obtain little information about the offering, and the offerees would be limited to non-US investors or US investors residing in "friendly" states.

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?*

In the event the Commission comes to the unfortunate decision to implement a disqualification for failure to make an administrative filing of a Form D, then a cure period is absolutely necessary and should apply to *all* filings. Disqualification is perhaps the most draconian action that the Commission could take against an issuer, and a cure period is at least one example of a reasonable step that must be taken. In all cases, an issuer's cure period should commence after the issuer has been notified by the Commission of a failure to file a Form D.

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? 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, 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?

A cure period should be automatically available to all issuers without other conditions or qualifications. Disqualification should only be imposed if an issuer has failed to make the appropriate filing during the cure period after having been notified by the Commission <u>and</u> such failure directly resulted in an investor being defrauded.

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?*

    A cure period should be automatically available to all issuers without other conditions or qualifications. Disqualification should only be imposed if an issuer has failed to make the appropriate filing during the cure period after having been notified by the Commission <u>and</u> such failure directly resulted in an investor being defrauded.

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?*

    The cure period should be the same for each type of Form D filing. So long as the cure period starts upon notification by the SEC to the issuer of a missed filing, then 30 days should be sufficient.

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, 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?*

    Disqualification should <u>only</u> be administered if the failure to timely file a Form D directly resulted in an investor being defrauded by the issuer. Cease-and-desist orders and court injunctions are public records, which investors have access to and can weigh when deciding whether or not to invest in an issuer.

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?

No. Cease-and-desist orders and court injunctions are public records, which investors have access to and can weigh when deciding whether or not to invest in an issuer. If the action rises to the level of the issuer being deemed a "bad actor," then newly adopted Rule 506(d) shall apply.

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

No.

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?*

The Commission should retain full flexibility in its ability to grant a waiver, and should be permitted to take into account all factors that it deems reasonable.

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?*

We believe that the Commission should let the market decide whether compliance with Rule 503 is actually necessary. Accredited investors are able to, and actually do, obtain information contained in the Form D from the issuer or from other public sources.

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?*

Compliance with Rule 503 should not in any way be a condition to reliance on Rule 506. We are not aware of any example in which an issuer directly defrauded an investor by failing to timely file a Form D.

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?*

Legends in written general solicitation materials will not provide any material degree of investor protection. First, accredited investors are already aware of the general risks outlined in the legends. Second, investors do not read legends. It is our experience that investors view such legends as boilerplate, and simply gloss over such fine print. We do not believe that such legends would have any material impact on investor protection. In fact, they might give some investors a false sense of security that the offering is legitimate because statements include such SEC-mandated boilerplate.

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?*

No. In the absence of actual fraud on an investor, the failure to include a boilerplate legend should not result in any disqualification under Rule 506. Requiring issuers to include boilerplate legends is a misguided action, which will not result in any meaningful investor protection.

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? If so, what should be the parameters of this cure mechanism?*

No. In the absence of actual fraud on an investor, the failure to include a boilerplate legend should not result in any disqualification under Rule 506.

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?

It is highly unlikely that prospective investors will review these legends. To the extent they do, then the proposed legends certainly inform potential investors as to whether they are qualified to participate in Rule 506(c) offerings.

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?*

Given the various methods of written general solicitation materials, imposing a one-size-fits-all requirement would likely cause confusion and may be inapplicable due to the diverse methods of written general solicitation available to an issuer. Type size, type style, location and proximity would all vary depending on whether the solicitation was on a flyer, a standard private placement memorandum, a billboard, a t-shirt or made via social media.

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? Should we specify that the term includes any electronic communications?*

It would be helpful if the Commission developed an exhaustive list of all types of communications that constitute written general solicitation materials. It is conceivable that issuers may use all forms of creativity in order to reach as many prospective investors as possible within the accredited investor community. In addition to standard written materials, the Commission should also consider all forms, to include temporary materials (advertising on billboards and blimps), electronic means (emails, texts, tweets, blogs, internet forums) and other unorthodox methods (advertising on coffee cups, t-shirts and other handouts). It would be very helpful for issuers to know whether any of these forms of communication are <u>not</u> considered general solicitation by the Commission.

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?*

It would be functionally impossible to provide boilerplate disclosures via oral communications.

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?

As stated above, we do not believe that boilerplate legends provide any form of meaningful investor protection to accredited investors. To the extent such legends are required, an issuer should be able to include them in the applicable securities instrument (such as in the stock purchase agreement for a stock offering or in the limited partnership agreement or subscription materials for a private fund).

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?*

The specific wording need not be included. Securities attorneys have access to such boilerplate, and can readily insert preferred provisions.

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 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?*

Disclosure of the date as of which any performance data was calculated should be included, as this is a customary practice. However, the date of such data should be left up to the issuer, as a variety of factors will dictate what is most practicable. Given the wide variety of issuers, and the type of performance data being disclosed, we believe that such required disclosure will become unwieldly.

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?*

No. If all of the purchasers receive the required legends (whether they be in a private placement memorandum, limited partnership agreement, subscription agreement, investor questionnaire or otherwise), then any disclosure requirement should be considered satisfied.

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?

In our experience, advisers to private funds will include extensive legends in offering materials. Such legends often cover all aspects of the securities laws (such as the Company Act and Advisers Act matters, in addition to '33 Act concerns), as well as other domestic and foreign legal matters. The private placement memorandum (if one is used) is often the repository for such legends.

Unfortunately, much of the industry views the use of such legends as "cheap insurance." It is not believed that investors actually read the legends or gain any protection if they do. As such, these boilerplate legends are often included in solicitation and subscription materials not because it is believed that a prospective investor will actually read the materials, but instead as a defensive measure for the benefit of the issuer.

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?*

The requirement to provide a telephone number or a Web site address is not necessary. An issuer should be able to provide whatever form of contact information it believes is most appropriate, which may instead be an email or physical address. Requiring a private fund to include performance information would seem to indicate that the Commission views prior performance as a gauge of future success. In many cases, a private fund is newly formed, and does not have prior performance information. In all cases, a private fund (and any other issuer) should absolutely be permitted to provide relevant offering materials via a password-protected Web site or any other manner in which access to the issuer's information would be restricted.

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?*

Yes, the proposed legends are specific enough, and provide sufficient warnings to a prospective investor. However, we contend that accredited investors are aware of such risks, that investors do not read such legends and that such legends do not provide any meaningful investor protection.

73. *If the amendments to Rule 482 proposed in the money market fund reform proposals are adopted, 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?

As a general matter, we do not believe that the use of boilerplate legends provides any material investor protection.

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?*

As a general matter, we do not believe that the use of boilerplate legends provides any material investor protection.

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?*

A primary concern is how an issuer will be able to comply with the legend requirements for certain methods of written general solicitation. If an issuer prefers to use social media to inform the accredited investor community of an offering, do the Proposed Rules forbid such communications? For example, Twitter allows a user to send a single communication (or *tweet*) that consists of no more than 140 characters. The Proposed Rules would seem to prohibit an issuer from using Twitter since the proposed legends could not be affixed to a tweet.

As a general matter, we do not believe that the use of boilerplate legends provides any material investor protection. However, if the Commission adopts the Proposed Rules and requires that such legends be provided, we recommend that an issuer is able to satisfy this requirement so long as the legends are provided to a prospective investor at anytime prior to the consummation of the sale of securities. Inserting such legends into the subscription or other offering materials is a customary practice.

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?*

Advisers to private funds are bound by the anti-fraud rules of Section 206 of the Advisers Act. These antifraud rules apply regardless of whether the adviser is registered or exempt from registration with the SEC. Furthermore, recent rule changes now provide that the materials provided to investors and prospective investors of a private fund must not be misleading. The Commission has not provided any evidence as to why the protections afforded by Rule 206(4)-8 of the Advisers Act are insufficient.

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?*

We do not believe that the Commission should revise Rule 156 to make it applicable to the sales literature of private funds. Section 206 of the Advisers Act contains antifraud rules that apply to advisers of private funds (regardless of whether such advisers are registered with the SEC or exempt from registration). The Proposed Rules do not provide any explanation as to why the safeguards contained in Section 206 and Rule 206(4)-8 of the Advisers Act are insufficient. As such, we are not convinced that any changes are required. We note that there is already a significant body of interpretive authority regarding sales literature under Section 206, and the Division of Investment Management is well versed in its application. Bringing Rule 156 to bear on private funds would likely impose a new set of overlapping and potentially confusing regulatory guidance.

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

We do not believe that Rule 156 should apply to private funds. Section 206 and Rule 206(4)-8 of the Advisers Act provides significant guidance and investor protections, and the Division of Investment Management is well versed in its application to private fund advisers.

79. *If the amendments to Rule 156 proposed in the target date fund rulemaking are adopted, we anticipate making such amendments also applicable to sales literature of private funds. Is there any reason such guidance should not apply to sales literature of private funds?*

We do not believe that Rule 156 should apply to private funds. We note that there is already a significant body of interpretive authority regarding sales literature under Section 206 of the Advisers Act, and the Division of Investment Management is well versed in its application. Bringing Rule 156 to bear on private funds would likely impose a new set of overlapping and potentially confusing regulatory guidance.

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?*

Guidance such as a general statement that "sales material should present a balanced discussion of risk and reward" does not provide any meaningful direction to issuers. If guidance is to be provided by the Commission, it must be very specific.

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?*

If performance information is truthful and not misleading, then the Commission should not impose any content restrictions. Given the restrictive nature of private funds (i.e., they are offered solely to qualified purchasers or they must have fewer than 100 beneficial owners), we do not understand the Commission's focus on these issuers and why such restrictions on commercial speech are being considered.

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?*

There is no set standard as to how private funds calculate and present performance. Some advisers focus of the aggregate performance of their prior funds, while other advisers will highlight the separate track records of the individual fund managers who are expected to play a key role in the private fund. Still, other advisers will emphasize performance based on other metrics, such as how they assist portfolio companies to increase clients, revenues, headcount, etc.

It should be no surprise that a one-size-fits-all approach does not work for any issuer, especially private funds. Rather than trying to develop standardized performance reporting, we believe that the emphasis should be on private funds providing performance information that is truthful and not misleading, regardless of the format (as is currently required under Rule 206(4)-8 of the Advisers Act).

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?*

Performance can be measured by information from a variety of sources. Oftentimes, past performance of an adviser to a private fund is either tied to a prior fund managed by such adviser or disclosure of the specific track record of the individual fund managers of the private fund being offered. Thus, imposing an audit requirement would require a retroactive audit on funds that are not necessarily part of the current offering.

We are concerned that such a requirement could have an unintended impact. For example, would an audit requirement mean that only audited information could be reported (and bad performance of an underperforming private fund that was not audited could not be disclosed)? Similarly, would an adviser have to refuse to disclose prior performance if it was not audited (even if requested as part of an investor's due diligence)? An inability to disclose such information (whether or not it is audited) would seem to be, in and of itself, potentially misleading.

Finally, we have significant concerns about the costs of such audits. While it is true that many private funds are subject to an annual audit by an independent third party, many smaller private funds forego such costly audits. Investors in such funds do not want to bear such audit expenses, especially if such audit costs represent a disproportionately high proportion of the private fund's expenses. In the case of certain private funds (such as venture capital funds), valuations really only matter as investments are realized, and audits of interim book value estimates of the illiquid portfolio are not meaningful.

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)?*

No. It is expected that materials will vary depending on who is selling the product. Imposing FINRA rules on privately held issuers would constitute an unfair burden and expense in a private placement.

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

We do not believe that there is general investor confusion with respect to a private fund's solicitation materials. So long as the solicitation materials are truthful and not misleading, then accredited investors understand the 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? 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?*

The Commission should not impose any additional restrictions on the general solicitation activities of 3(c)(7) or 3(c)(1) private funds. The Commission does not need to expend undue time or resources with respect to vehicles available only to qualified purchasers or limited to no more than 100 beneficial owners. Advisers to private funds, whether registered with the SEC or exempt from registration, are already subject to extensive oversight and regulation under the Advisers Act.

We anticipate that advisers to private funds may use any and all forms of media in connection with general solicitation activities. Although it is impossible to predict, we would expect most of such advertising to be made via the Internet and other forms of social media. We do not believe that any one form of social media is more problematic than another. However, advertisements directed primarily to a susceptible group (such as the elderly or veterans) would raise greater concern than advertising that is targeted to a more sophisticated audience (such as to accredited investors via trade journals, Web sites or magazines geared to the financial industry, such as the WSJ, Forbes, Fortune, etc.).

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?*

No. We do not believe that requiring the submission of written general solicitation materials would serve any material purpose towards investor protection. On the contrary, the burdens associated with having to track and submit every document that could be viewed as a general solicitation would clearly outweigh any benefit to be gained. Imposing such an obligation would likely drive issuers away from Rule 506(c) offerings, which means that the same small group of known investors would continue to be approached by issuers, while all other accredited investors across the US would be excluded.

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?*

We do not believe that issuers should be required to submit written general solicitation materials to the SEC. To the extent the Commission feels it is necessary to receive such materials, then submission by an issuer should be voluntary. Using disqualification from reliance on Rule 506 will ultimately drive issuers away from Regulation D, which would limit the number of available US investors and expand the attractiveness of seeking capital from non-US sources.

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?*

We do not see any benefits to requiring the submission of written general solicitation materials.

As for costs, we are unsure how the Commission has sufficient resources to review and analyze these submissions. Arguably, better use of the Commission's time would be spent on enforcement of issuers that are actually defrauding investors, rather than focusing on mere submission of paperwork. The costs to an issuer would be material, as additional personnel and legal resources would need to be dedicated to ensure compliance with such an administrative undertaking.

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?*

Making such materials publicly available would likely result in unintended consequences. First, we believe that there would be a chilling effect on advertising. If an issuer intended to tailor an advertisement to a specific group of accredited investors (CPAs, doctors, university alumni, etc.), it would be an odd outcome if such materials were shared with persons who are not part of the intended audience. Second, we believe that displaying these materials on the SEC's Web site would provide undue credibility and allow an issuer to use the Web site as a mechanism to essentially advertise its securities to the entire world. We anticipate such a construct would cause the SEC Web site to become an online classifieds section for potential investors seeking issuers.

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?*

What would be the purpose of doing so? An issuer might actually prefer to submit such materials as an exhibit to Form D, as doing so would provide the issuer with free advertising. Likewise, potential investors would troll the SEC website to find attractive investment opportunities. Requiring such public disclosure of general solicitation materials would effectively turn the SEC into a match-maker to facilitate private placements. It is difficult to see how this would result in heighted investor protection.

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?*

We do not believe that any written general solicitation materials should be submitted to the Commission. However, if such a requirement is adopted, then we believe that an issuer should have to submit the materials within 30 days following the completion of the offering. Since the Commission does not have adequate resources (or a compelling reason) to review solicitation materials of private issuers on a real-time basis, we do not believe that the Commission should compel an issuer to jump through any unnecessary hoops during its offering process.

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?*

We do not believe that an issuer should be required to submit written general solicitation materials to the Commission.

If the Commission adopts such a requirement, then we do not believe that any private fund should be required to submit materials. Since the offerees of a private fund are either all qualified purchasers or limited to less than 100 beneficial owners, there is little risk to the public at large. In addition, any issuer that is offering less than $100 million in securities should be exempt from having to submit written general solicitation materials to the Commission.

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?*

We do not believe that an issuer should be required to submit written general solicitation materials to the Commission.

If the Commission adopts such a requirement, then we believe that the issuer should only be required to submit materials that were used by the issuer itself in connection with the general solicitation.

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)?*

We believe that any requirement to submit materials to the Commission will cause an issuer to expend additional, unnecessary expenses in having legal counsel review and scrub every communication that could be considered written general solicitation. Issuers will likely react in an overly-cautious fashion, and may provide less information than they otherwise would.

In addition, we believe that issuers will have an incentive to avoid Regulation D. In doing so, they will either (i) seek capital from the same, well-known sources (thus excluding most accredited investors) and/or (ii) solicit capital from investors located only in states with "friendly" Blue Sky laws, or from outside the United States entirely.

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?*

We do not believe that an issuer should be required to submit written general solicitation materials to the Commission.

However, if the Commission elects to adopt this requirement, we believe that the rule should be temporary (for 12 months or less) and that the Commission should be required to report to the public (i) the costs associated with developing an online portal for the submission of such materials, (ii) the costs associated with all SEC personnel involved in creating, staffing and running such portal (to include the costs of reviews), (iii) the number of materials actually submitted to the Commission and the percentage of such materials that were reviewed by the Commission staff and (iv) the actual benefit from having reviewed such materials in the context of additional investor protection.

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?*

We believe that the current tests are appropriate, but should be expanded. Using net worth is a reasonable proxy for determining whether an investor has sufficient resources to fend for himself or herself. However, the Commission should consider adding an additional test in which a person would be able to demonstrate actual financial and business sophistication, regardless of net worth or income. For example, being a CPA, CFA, attorney or registered investment adviser (to include someone who has taken and passed a Series 65 or 63 exam) represents an objective measure of one's ability to understand the financial and business complexities associated with a private offering.

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?*

We believe that the current net worth test and income test are appropriate, especially in light of this country's most recent economic crisis. A $200,000 income or a $1 million net worth continue to represent a significant hurdle for the US population. We do believe that the SEC should reconsider the exclusion of one's primary residence in the net worth test. To the extent an individual makes an investment decision to pay down one's mortgage, such actual equity (as opposed to paper profits) should be taken into account.

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)?*

While such a formula could, theoretically, produce a more appropriate test, we are not convinced that the benefits of such a formula outweigh the complexity in understanding and administrating such a requirement. In addition, we request that the Commission take into account scenarios whereby investors might be deemed accredited for a number of years, then suddenly considered un-accredited due to the impact of such a formula. We are concerned that over-emphasis on a numerical formula, rather than actual sophistication and knowledge, could produce awkward results.

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)?*

No, we do not believe that any additional information should be required in such an offering document. The Congressional mandate to allow general solicitation did not impose any such additional burden on issuers. So long as the only purchasers are accredited investors, then the concerns surrounding the rationale for the Rule 502(b) information delivery do not exist.

We believe that any requirement to condition a Rule 506(c) offering on the information requirements set forth in Rule 502(b) would effectively neuter any potential benefit to an issuer seeking to conduct an offering in reliance on Rule 506(c). The time and costs associated with preparing such additional information would be similar to those required when a company prepares to make a public offering of its securities on Form S-1. We believe that issuers would likely conclude that the expenses and other burdens associated with such a requirement would outweigh any benefit.

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?*

We do not believe that an issuer should be precluded from using Rule 506(c).

III. Conclusion.

We request that the Commission carefully consider these concerns regarding the Proposed Rules. As drafted, the Proposed Rules may alienate issuers from relying on Rule 506. Were this to occur, we believe that (i) the Commission would have less data regarding key aspects of the private placement markets, (ii) the significant costs of such compliance would be borne by the investors and employees of issuers, and (iii) issuers will be incentivized to seek capital from non-US sources (and possibly from investors in select US jurisdictions). As such consequences far outweigh any nominal benefit provided by the Proposed Rules, we do not believe that passage of the Proposed Rules would be in the interest of the Commission or the public.

We thank the SEC very much for the opportunity to comment on this important matter. If the Commission has any questions concerning these comments, or if we may be of further assistance in connection with this matter, please do not hesitate to contact us.

Very truly yours,

Sean Caplice