September 23, 2013

VIA ELECTRONIC MAIL

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Amendments to Regulation D, Form D, and Rule 156 under the Securities Act; SEC Rel. Nos. 33-9416; 34-69960; IC-30595; File No. S7-06-13

Dear Ms. Murphy:

The Investment Adviser Association[1] appreciates the opportunity to comment on the Securities and Exchange Commission's ("Commission" or "SEC") proposed rulemaking and rule amendments under Regulation D, Form D, and Rule 156 under the Securities Act of 1933, as amended ("Securities Act").[2] This far-reaching Proposal would require issuers, including private fund issuers, to (1) file a notice 15 days before first engaging in general solicitation; (2) provide substantial additional information in notice filings and file a closing amendment; (3) include legends and disclosures in written general solicitation materials; and (4) submit all written general solicitation or general advertising materials to the Commission for a period of two years. The Proposal also would disqualify issuers that fail to file the required notices from using the Rule 506 exemption under Regulation D in new offerings for one year. The Commission also proposes to extend certain anti-fraud guidance for registered investment companies to all private funds whether or not they use general solicitation.

The Commission issued the Proposal on the same day that it adopted new rules under the Jumpstart Our Business Startups Act ("JOBS Act"),[3] which directed the Commission to amend Rule 506 to permit general solicitation or general advertising in Rule 506 offerings,

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[1] The Investment Adviser Association ("IAA") is a not-for-profit association that represents the interests of investment adviser firms registered with the SEC. Founded in 1937, the IAA's membership consists of more than 500 firms that collectively manage in excess of $11 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit our website: www.investmentadviser.org.

[2] *Proposed Amendments to Regulation D, Form D and Rule 156 under the Securities Act*, SEC Rel. Nos. 33-9416; 34-69960; IC-30595; File No. S7-06-12 (July 10, 2013) ("Proposal"), available at: http://www.sec.gov/rules/proposed/2013/33-9416.pdf.

[3] Pub. L. No. 112-106, § 201(a), 126 Stat. 306, 313 (Apr. 5, 2012), available at: http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf.

provided that the purchasers of the securities are accredited investors.[4] New Rule 506(c), which becomes effective on September 23, 2013, permits an issuer to engage in general solicitation or general advertising in offering and selling securities, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that such purchasers are accredited investors.

The Commission states in the Proposal that the amendments "are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise in connection with permitting issuers to engage in general solicitation and general advertising under new paragraph (c) of Rule 506."[5] We understand and share the Commission's goal of investor protection in connection with lifting the ban on general solicitation and general advertising under Rule 506. We are concerned, however, that many aspects of the Proposal would result in unintended negative consequences for private fund issuers relying on Rule 506. Accordingly, we recommend that the Commission: (1) modify the disqualification provisions in proposed Rule 507(b); (2) narrow the scope for proposed Rule 509 legends; (3) eliminate the proposed requirement to file with the Commission any written communication that constitutes a general solicitation in a Rule 506(c) offering; (4) modify the Form D filing proposal; (5) clarify that any new rules would not apply to offerings initiated prior to the new rule's effective date; (6) reconsider proposed amendments to Rule 156; and (7) consider recommendations made by the GAO in evaluating the definition of accredited investor.

We discuss our recommendations below.

1. The Commission Should Modify the Disproportionate Disqualification Provisions in the Proposed Amendments to Rule 507

Currently, Rule 503 under Regulation D requires issuers relying on Rule 504, 505, or 506 to file with the Commission a Form D notice of sales containing certain information for each new offering of securities "no later than 15 calendar days after the first sale of securities in the offering."[6] The Commission proposes to change the content, timing, and number of

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[4] *See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings,* SEC Rel. No. 33-9415 (July 10, 2013) ("Rule 506(c) Adopting Release"), available at http://www.gpo.gov/fdsys/pkg/FR-2013-07-24/pdf/2013-16883.pdf. In the same release the Commission also eliminated the prohibition on general solicitation for Rule 144A offerings, provided that the securities are only offered to qualified institutional buyers (QIBs). Also on July 10, 2013, as required by Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the Commission adopted amendments to Rule 506 to disqualify issuers and other market participants from relying on Rule 506 if "felons or other 'bad actors'" are participating in the offering. *See Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings*, SEC Rel. No 33-9414 (July 10, 2013), available at http://www.sec.gov/rules/final/2013/33-9414.pdf.

[5] Proposal at 1.

[6] Rule 503(a)(1) of the Securities Act.

Form D filings required for both Rule 506(b) and Rule 506(c) offerings. The Commission also proposes to "improve Form D filing compliance in connection with Rule 506 offerings," by adopting a new Rule 507(b) that would automatically disqualify an issuer from relying on Rule 506(b) or (c) for one year for any future offerings if "the issuer, or any of its predecessors or affiliates" did not comply, within the five preceding years, with all of the Rule 503 Form D filing requirements in a Rule 506(b) or (c) offering (*i.e.*, a one-year disqualification period, commencing when the required filings are made). The Commission states that the provision "should increase the incentive for issuers to submit timely filings of Form D,"[7] which is "intended primarily to provide information to the Commission."[8]

While we appreciate the Commission's decision not to propose making Form D filing a condition of Rule 506, we believe the proposed disqualification provisions for failure to comply with all aspects of revised Rule 503 would have disproportionately broad consequences. The Proposal would likely result in a penalty that could be too punitive and not commensurate with a potential violation. Instead, we believe the Commission should adopt a more tailored means to achieve its goal to increase compliance with filing the Form D. We recommend that: (1) the rule should not apply to affiliates of an issuer in a Rule 506 offering; (2) the rule, modified to exclude affiliates, should only apply with respect to Rule 506(c) issuers or offerings, rather than to Rule 506(b) offerings; and (3) the cure period should be broadened to permit good faith corrections at any time.

First, we believe the proposed rule should be narrowed to exclude a disqualification from applying to an "affiliate" of an issuer.[9] We are concerned that the broad reach of the proposal to cover affiliates of an issuer where the issuer may have mistakenly filed a Form D at the wrong time or with inadvertent errors would have significant adverse consequences for many issuers. For instance, private fund issuers that have the same sponsor may frequently rely on Rule 506, and they may all have frequent Form D filing requirements. A private fund adviser may be disqualified with respect to dozens or even hundreds of private funds as a result of one inadvertent mistake by one fund. Further, the inadvertent failure by a private equity fund to file a complete Form D may have the unintended result of disqualifying offerings by a portfolio company that is deemed an affiliate when the portfolio company had no connection to or control over the error.

Similarly, in large financial institutions, a private fund issuer may have dozens of other private funds, affiliates, parent companies, or sister companies, and possibly hundreds

[7] Proposal at 146.

[8] Proposal at 50.

[9] The proposed rule would incorporate the definition of "affiliate" in Rule 501(b) of the Securities Act, which states that "[a]n affiliate of, or person affiliated with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified." *See* Proposal at 11, footnote 28.

of other private funds and their portfolio companies, that are operationally independent from the issuer, have no business dealings with the issuer, have no knowledge (or, in some cases, possible awareness) of any capital raising by an affiliate, and/or have no control over or awareness of Form D filing errors made by the issuer. Further, they may have no involvement in each other's portfolio management, trading, operations, or internal management activities. Moreover, despite technically coming within the "common control" definition, affiliates often may be outside the actual daily control of the issuer. Large financial services organizations may have dozens of registered investment advisers that invest in different asset classes, are located in different areas or even countries, and while under common control, are managed by local management who do not have frequent contact with their affiliated peers. Therefore, this provision would unfairly and negatively affect an affiliated entity that has not been involved in the issuer's offering, and vice versa. Through no fault of its own, an issuer may be disqualified from relying on Rule 506. For these reasons, we urge the Commission to remove the word "affiliate" in the final rule.

If the Commission disagrees, we urge the Commission to narrow the scope of the provision by applying any disqualification provision only to an affiliated entity that controls or is controlled by the issuer, rather than to any affiliated entity under common control with an issuer. This application of the provision is more narrowly tailored to address the Commission's concern that an issuer could evade the repercussions of a failure to file Form D by using entities it controls for its own capital raising purposes.[10]

Second, given the serious consequences of the proposed disqualification period and the focus of this "package"[11] of rulemakings on newly permitted general solicitation, we submit that the disqualification provision, as modified to exclude affiliates, should apply only to issuers relying on Rule 506(c). The investor protection concerns articulated by the Commission regarding new Rule 506(c) and the desire to gather information about such offerings in Form D would be better addressed by tailoring the disqualification to Rule 506(c) offerings only. We submit that issuers relying on Rule 506(b) should not be subject to the proposed disqualification provisions.

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[10] At a minimum, the Commission should narrow the disqualification provision to exclude affiliated private funds, given the disproportionate effect the provision could have on private funds, as discussed above. Further, private fund advisers are already incentivized to comply with Form D because they are required to identify on Form ADV, Part 1, Schedule D whether any private fund they advise relies on an exemption from registration of its securities under Regulation D, and if so, the private fund's Form D file number (if any is filed.) *See* Rule 203-1 under the Investment Advisers Act of 1940 ("Advisers Act") and Form ADV (available at: http://www.sec.gov/about/forms/formadv.pdf).

[11] *See, e.g., Opening Remarks Regarding the Adoption of Rules Eliminating the Prohibition Against General Solicitation, the Adoption of Rules Regarding Disqualification of "Bad Actors" from Rule 506 Offerings,* by Commissioner Elisse B. Walter (July 10, 2013), available at http://www.sec.gov/News/Speech/Detail/Speech/1370539699218.

Finally, we believe the proposed cure period is too narrow and restrictive in cases where a bona fide need to amend a Form D exists and the issuer would be penalized if the need arose outside of the 30-day period or more than once per offering. The cure period should permit issuers to correct an existing Form D filing in good faith any time after it is filed for any period of time and as needed. Such a revision is consistent with the purpose of the Form D -- to notify the Commission of a sale in reliance on Rule 504, Rule 505, or Rule 506 under Regulation D. Thus, the disqualification provision should apply only to failures to file Form D or to file corrections to Form D that are not in good faith.[12] Further, we urge the Commission to reduce the five-year look back to a more appropriate period such as one year.

2. The Commission Should Narrow Proposed Rule 509 for Specific Legends

The Commission proposes new Rule 509 under Regulation D, which would require issuers to include prescribed legends "in any written communication that constitutes a general solicitation or general advertising" in any offering under Rule 506(c).[13]

We understand the Commission's policy goal of providing more information and context for a Rule 506(c) offering where solicitation materials may be viewed by the general public. We submit, however, that including these disclosures in every applicable communication would be burdensome and impractical. It may be very difficult to include lengthy and "prominent" legends in short pieces or electronic communications. It may also be time-consuming to ensure that the disclosures are included in a potentially broad range of communications of various types. Thus, we urge the Commission to consider alternatives.

For example, the Commission should consider permitting a 506(c) issuer to include an electronic link to the requisite disclaimers on a website that provides information about the offering. Alternatives could also include permitting a Rule 506(c) issuer, at its option, to include any required legends in the risk factor or disclosure language in the private placement

[12] We would be pleased to work with the Commission to identify criteria or indicia of filings made in good faith.

[13] *See* Proposed Rule 509(a). All Rule 506(c) issuers would be required to include, in a prominent manner, the following legends in any written communication that constitutes a general solicitation or general advertising: (1) that the securities may be sold only to "accredited investors," which for natural persons are investors who meet certain minimum annual income or net worth thresholds; (2) that the securities are being offered in reliance on an exemption from the registration requirements of the Securities Act and are not required to comply with specific disclosure requirements that apply to registration under the Securities Act; (3) that the Commission has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials; (4) that the securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and (5) that investing in securities involves risk, and investors should be able to bear the loss of their investment. Private fund issuers relying on Rule 506(c) would also be required to include: (1) a legend that the securities offered are not subject to the protections of the Investment Company Act of 1940, as amended ("Investment Company Act"); and (2) additional disclosures if written general solicitation materials include performance data, similar to disclosures required in Securities Act Rule 482 for advertisements and sales literature of registered investment companies.

memoranda or offering document. As long as investors are provided the requisite information, it should not be necessary to include all of the information on each applicable written communication.

In response to the Commission's request for comment, we strongly urge the Commission not to require that any "legends" be read or given to prospective investors in connection with oral communications in a 506(c) offering. No compelling reasons exist to treat such oral communications as subject to new 506(c) requirements. Furthermore, the burdens and costs of such a requirement would exceed any perceived benefit.

With regard to private funds, we agree with the Commission's determination not to propose standardized calculation methodologies for performance of private funds. Developing standard methodologies would be difficult, if not impossible, due to the varying methodologies used based on the type of fund and asset class, assumptions underlying the calculations, and investor preferences. These potential requirements are clearly outside the scope of the JOBS Act rulemaking under Rule 506(c) and are not necessary or appropriate due to the varied nature of issuers that may rely on Rule 506(c).

We also support the Commission's determination not to propose that required specific performance information be disclosed and do not recommend that the Commission include any specific content restrictions on any private fund solicitation materials. As the Commission notes, use of this information is already subject to the anti-fraud provisions of the securities laws. In particular, SEC-registered investment advisers to private funds (*i.e.*, pooled investment vehicles) are already subject to Rule 206(4)-8 under the Advisers Act, which provides that it is a fraudulent, deceptive, or manipulative act, practice, or course of business under Section 206(4) of the Advisers Act to: make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.[14] Thus, advisers to private funds are prohibited from making any untrue statement to any prospective private fund investor. Further, as the Commission notes, advisers to private funds are required to develop and implement policies and procedures addressing the use and content of sales material.[15]

[14] Rule 206(4)-8 under the Advisers Act.

[15] Proposal at 72 (citing Rule 506(c) Adopting Release).

3. The Commission Should Not Require Rule 506(c) Issuers to File Written General Solicitation Materials under Proposed Rule 510T

The Commission proposes new Rule 510T under Regulation D that would require issuers relying on Rule 506(c) to submit "any written communication that constitutes a general solicitation or general advertising" used in their Rule 506(c) offerings to the Commission no later than the date of the first use of these materials. The rule would expire two years after its effective date. The Commission states that the proposed rule is intended to give it the ability to assess market practices through which issuers solicit investors in reliance on Rule 506(c).

While we understand the Commission's policy goal, we oppose the proposed approach to require all 506(c) issuers to file every written communication that constitutes a general solicitation or general advertising with the Commission. The proposed approach is overly broad, burdensome, and costly. Because the Commission has not defined general solicitation or general advertising for these purposes, the types of materials to be filed could be very broad and voluminous. Further, as a result of the potential consequences of noncompliance, issuers would be required to file essentially the same documents on a repeated basis out of an abundance of caution if a document included any change or update at all from the version previously filed, including for instance, any change in the relevant performance period, assets under management, or change of address. Similarly, because of the proposed requirement to file prior to first use, caution may lead issuers to file materials that they do not ultimately use in a general solicitation. In light of the substantial costs that would be imposed on issuers, the resources for the Commission to receive and review all the material, and the availability of less burdensome alternatives, we respectfully submit that the burden and cost of filing these materials would outweigh any meaningful analyses or use of this information.

At a minimum, before proceeding to proposed rulemaking, the Commission should consider sampling the materials in the public domain, such as websites, that will be available after Rule 506(c) becomes effective. After that initial analysis, the Commission could consider whether it needs to conduct additional rulemaking in this area for purposes of supporting the Rule 506(c) market or to address any investor protection concerns.

In the event the Commission determines to proceed with rulemaking at this time, it should consider several alternatives to more appropriately tailor the proposal. First, we urge the Commission to exclude private fund issuers from any filing requirement because there are more tailored means to gather information about private fund marketing practices. Currently, the Commission receives significant amounts of data about private funds on an investment adviser's Form ADV and on Form PF (for advisers that manage over $150 million in private fund assets).[16] This critical information includes, for example in Form PF, issuer positions,

[16] Rule 203-1 and Rule 204(b)-1 under the Advisers Act require advisers to comply with SEC registration on Form ADV and Schedule D (private fund reporting, including for example identifying information, ownership,

strategies, leverage, performance, and beneficial ownership, among other details. The Commission and the public also have extensive information about private funds in all private fund advisers' Forms ADV, Part 1, including information about marketers, auditors, and service providers hired by such funds, as well as information about the type of fund, gross asset value, minimum investment commitment, number of beneficial owners, and related party beneficial ownership. In addition, the Commission has proposed additional information to be provided in Form D. Based on this extensive information, the Commission could select private fund advisers from which to gather information through its examination process about the Rule 506(c) market or to become more familiar with practices in the market and those private funds that will rely on Rule 506(c). The Commission could even incorporate such a review into its "presence examinations" for private fund advisers.

Second, the Commission should consider exempting from any filing requirement written communications that constitute a general solicitation or general advertising targeted to institutional investors that are accredited investors under Rule 501(a). For example, materials placed in publications targeted to institutional investors would not have to be filed, while material more broadly aimed at the retail public, such as in publications of general circulation, would be required to be filed. This would better tailor the rule to the types of individual investors about which the Commission has expressed concern in connection with the JOBS Act.

Third, we urge the Commission to narrow the scope of the rule to a sample of written communications rather than requiring every Rule 506(c) issuer to file every written communication that constitutes a general solicitation or general advertising. In adopting such an approach, the Commission could use a developed methodology to narrow the rule to certain timeframes or types of documents or issuers. For example, for the purpose of Rule 510T, the Commission could define the scope of material to be filed to include only offering memoranda for the private offering where the terms of the offering are presented. Any other material could be made available upon request through the SEC exam program.

In addition, we do not believe any materials required to be filed by Rule 506(c) issuers should become publicly available on the SEC website or otherwise made available to the public. While an issuer relying on Rule 506(c) may undoubtedly post some written general solicitation or general advertising material on its or another authorized third party's website, it would likely prefer to control the time and placement of such posting, and such offerings may be targeted to particular audiences that the issuer wishes to control. Further, many private fund advisers may rely on 506(c) only out of an abundance of caution but may not engage in general advertising or general solicitation in the traditional sense.

Finally, we urge the Commission to provide Freedom of Information Act ("FOIA") protection to documents filed under Rule 510T. Otherwise, the information filed by issuers

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service providers, gross asset value) and reporting of private funds over $150 million on Form PF, respectively. *See* Form PF, available at http://www.sec.gov/about/forms/formpf.pdf.

could potentially be subject to constant and ongoing disclosure to competitors, media, or other third parties seeking to determine which firms are marketing which products and the types of materials being used. In addition, information that may be filed but not ultimately used by an issuer in a general solicitation should not be subject to FOIA requests.

4. The Commission Should Reconsider Form D Proposed Changes

a. The Proposed Requirement to Pre-file Form D for Rule 506(c) Offerings Should Be Eliminated or Modified

Currently, Form D is required to be filed 15 calendar days after the first sale of a securities offering relying on Rule 504, 505, or 506 of Regulation D.[17] Issuers that offered, but did not complete, a sale are not required to file a Form D. The Commission proposes to amend Rule 503 of Regulation D to require the filing of a Form D no later than 15 calendar days in advance of the first use of general solicitation in a Rule 506(c) offering ("Advance Form D").[18] After the filing of a Form D, the issuer would be required to file an amendment providing the remaining information required by Form D within 15 calendar days after the date of first sale of securities in the offering, as currently required by Rule 503.

We believe a requirement to file Form D 15 days in advance of the first "use" of general solicitation material is burdensome and would not produce any meaningful benefit to the Commission that cannot be achieved by a less burdensome method. Many issuers will not be able to determine the exact 15th day before the very first time of use of general solicitation or general advertising. This, in essence, may result in issuers filing their advance Form D any time and long before 15 days before first use of general solicitation or general advertising so that they do not run afoul of the deadline. This deadline may also cause many inadvertent violations.

Further, filing Form D 15 days in advance of the first use of general solicitation is not necessary to address the issues raised by commenters. For example, one of the main proponents of requiring pre-filing of the Form D reasons that a state "investigator who sees an advertised offering will have no simple way of knowing whether the issuer is engaged in a compliant Rule 506 offering or is merely advertising an unregistered, non-exempt public

[17] *See* current Rule 503(a).

[18] The Advance Form D for Rule 506(c) offerings would include the following partial Form D information: Items 1 (basic identifying information), 2 (issuer's principal place of business and contact information), 3 (related persons), 4 (industry group), 6 (exemption(s) being claimed), 7 (new or amended filing), 9 (type of security offered), 10 (business combination), 12 (persons receiving sales compensation), and 16 (use of proceeds from offering); but 9 and 12 only to the extent known at the time of filing the Advance Form D. The remainder of the information required by Form D would need to be filed in an amendment to Form D following completion of a sale of securities in a Rule 506(c) offering, under the timetable required by Rule 503.

offering."[19] Filing an advance Form D 15 days prior to the first use of general solicitation or general advertising, however, does not necessarily reveal whether an offering under Rule 506 is "compliant." Further, a regulator who sees an advertisement or is approached by an investor before a Form D is filed can contact the issuer for more information.

If, however, the Commission determines that it wishes issuers to file a Form D before the current deadline, we urge the Commission to require issuers to only file the Form D no later than the same day as, or within 15 days after, the first use of general solicitation or general advertising. This would still enable regulators to gather information about offerings initiated under Rule 506(c) and provide sufficient timeliness to respond to advertising practices and investor questions.

b. The Proposed Amendment to Require Form D Closing Amendment for All Rule 506 Offerings Should Be Modified

The Commission proposes to require the filing of a closing Form D amendment within 30 calendar days after the termination of any Rule 506 offering (whether after the final sale of securities in the offering or upon the issuer's determination to abandon the offering). As support, the Commission states that "[u]pdated and more conclusive data on Rule 506 offerings from closing Form D amendments would provide the Commission with a more complete account of the flow of capital in the Rule 506 market, how the flow relates to offering characteristics and the potential associated risks and would assist the Commission in evaluating whether further regulatory action is necessary."[20]

Private funds are often engaged in a continuous offering and may not be closed or terminated if, for example, the fund includes seed money from a sponsor used to establish a performance record. In addition, the Commission has adequate information about private fund issuers because advisers to private funds must include detailed information about the private funds they advise in their filed Form ADV and Form PF, both required by the Advisers Act. We submit that the filing of a closing Form D by private fund issuers would not provide much value to the Commission and therefore urge the Commission to exclude private fund issuers from a closing Form D filing requirement.

If, however, the Commission determines to require a closing Form D, we submit the closing Form D should only be required for Rule 506(c) offerings, rather than 506(b) offerings, so that the Commission is able to analyze the use of JOBS Act general solicitation Rule 506(c) offerings in raising capital. In addition, the Commission should permit issuers to determine what constitutes a "termination" of the offering and should permit a private fund

[19] *See Letter from NASAA to the Commission in response to Release No. 33-9354 (File No. S7-07-12), "Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A"* (Oct. 3, 2012).

[20] Proposal at 135.

issuer to file after the fund has been liquidated. Further, a closing Form D, if required, should only be required in certain circumstances, such as when an issuer sells an amount of securities in excess of a certain percentage (*e.g.*, 10%) above the reported amount in the last Form D, which would provide information about material changes from the issuer's last amendment.

We agree with the Commission's determination to not make the filing of a closing Form D a condition of reliance on Rule 506(b) and (c). The chances of inadvertent errors in filing a closing Form D are potentially greater in cases of inactivity than instances where the issuer is focusing on ongoing capital raising.

c. The Additional Information Requirements in Form D Should Be for Rule 506(c) Offerings Only

The Commission proposes to amend Form D to require a great deal of additional detailed information for offerings conducted in reliance on Rule 506. In addition, for Rule 506(c) offerings, issuers would be required to disclose types of general solicitation used and the methods used to verify accredited investor status of purchasers.[21] Item 14 would be amended to require, for all 506 offerings, the number of accredited investors and non-accredited investors that have purchased the securities, whether they are natural persons or legal entities, and the amount raised by each category of investors.

Issuers, particularly private fund issuers, will incur substantial costs, time, and effort to provide this substantial additional information both initially and in amendments. As mentioned above, for private fund advisers, this burdensome exercise is layered on the extensive information such advisers already provide to the Commission in Form ADV (also publicly) and Form PF. Accordingly, to minimize these costs and burdens, we encourage the Commission to require the additional information only for 506(c) offerings because the Proposal was issued with the goal of providing more information about such offerings.

With respect to the content of Form D, the Commission should not require issuers to identify third parties that assisted with the verification process. This requirement would unduly restrict an issuer's flexibility to select various methods during its capital formation process or, more likely, would lead to over-selection of potential methods out of an abundance of caution. We submit that the Commission does not need this information at the outset on Form D, but could obtain such information on request.

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[21] For 506(c) offerings, Item 3 would require identification of persons who directly or indirectly control the issuer. The Form would also require all 506(c) issuers to list the types of general solicitation used or to be used (*e.g.*, mass mailings, emails, websites, social media, print media, and broadcast media) and the methods used or to be used to verify accredited investor status (*e.g.*, principles-based method using publicly available information, documentation provided by the purchaser or a third party, reliance on verification by a third party, or other sources of information; one of the methods in the non-exclusive list of verification methods in Rule 506(c)(2)(ii); or another method).

5. The Commission Should Clarify that New Rules Will Not Apply to a Rule 506(c) Offering Initiated Prior to the Effective Date of the New Rules

We encourage the Commission to clarify in any final rules that offerings and sales made in reliance on Rule 506(c), as effective on September 23, 2013, and current Regulation D and Form D would not be retroactively subject to, during the duration of the offering, any rule changes that the Commission may adopt under the Proposal. As a matter of fundamental fairness, market participants and issuers should not be subject to rules that were not effective upon commencement of the offering.

6. The Commission Should Reconsider Proposed Amendments to Rule 156

The Commission proposes to amend Rule 156 under the Securities Act to apply the rule's anti-fraud guidance to sales literature used by all private funds (not only those relying on Rule 506(c)). Currently, Rule 156 interprets the antifraud provisions of the federal securities laws in connection with sales literature used by registered investment companies. While we support the concept of applying anti-fraud provisions to issuers relying on Rule 506(c), we believe the inclusion of private funds in Rule 156 goes beyond the intent of the JOBS Act provisions permitting issuers to use general solicitation or general advertising if the purchasers of such securities are in fact accredited investors. As discussed above, private fund advisers are already subject to anti-fraud provisions of the Advisers Act, and the funds and promoters are subject to Securities Act and Securities Exchange Act anti-fraud provisions. Specifically, under the Advisers Act, private fund advisers benefit from a great deal of interpretive guidance regarding the anti-fraud provisions, including through numerous no-action letters, examination program alerts, and other interpretative guidance.[22] The additional layer of guidance under the Investment Company Act is not necessary. In addition, application of registered investment company rules to private funds that are exempt from the Investment Company Act is contrary to the purposes of the exemption from registration.

[22] *See, e.g.,* Clover Capital Management, SEC No-Action Letter (pub. avail. Oct. 28, 1986) (investment adviser performance advertising under Advisers Act Rule 206(4)-1); SEC Office of Compliance Inspections and Examinations, "*ComplianceAlert"* (June 2007) (discussing investment adviser performance advertising), available at http://www.sec.gov/about/offices/ocie/complialert.htm; SEC Office of Compliance Inspections and Examinations, *Investment Adviser Use of Social Media* (Jan. 4, 2012), available at http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf; SEC Division of Investment Management Letter to Karen L. Barr, General Counsel, Investment Adviser Association, Re: *Investment Advisers Act of 1940 Rule 206(4)-1(a)(1)* (Dec. 2, 2005) (investment adviser advertising), available at http://www.sec.gov/divisions/investment/noaction/iaa120205.htm.

7. The Commission Should Consider Recommendations in the GAO Report in Evaluating the Accredited Investor Definition

The Commission noted in the Proposal that the SEC staff has begun a review of the definition of accredited investor as it relates to natural persons, including the need for any changes to the definition following the adoption of new Rule 506(c). The Commission is reviewing whether net worth and annual income should continue to be the tests for natural person accredited investors and will coordinate its review in connection with the recently released GAO Report on the accredited investor definition.[23] In light of this review, we recommend the Commission consider the GAO Report finding that some market participants supported alternative criteria for the accredited investor definition to include an investor's liquid investments and the use of an investment adviser.

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We appreciate the opportunity to comment on the Commission's proposals to amend Regulation D, Form D, and Rule 156 under the Securities Act and the Commission's consideration of our comments. Please do not hesitate to contact the undersigned or Karen Barr, IAA General Counsel, at (202) 293-4222 if we may provide any additional information about our comments.

Respectfully submitted,

/s/ Monique S. Botkin
IAA Associate General Counsel

cc: The Honorable Mary Jo White, Chair
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner

Mr. Keith F. Higgins, Director, Division of Corporation Finance, SEC
Mr. Norm Champ, Director, Division of Investment Management, SEC

[23] *See U.S. Government Accountability Office Report, Alternative Criteria for Qualifying As An Accredited Investor Should Be Considered* (July 2013) ("GAO Report"), available at http://www.gao.gov/products/GAO-13-640.