



Association for Corporate Growth

September 23, 2013

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

**RE: Comments on Proposed Amendments to Regulation D, Form D and Rule 156 under the Securities Act – File Number S7-06-13**

Dear Ms. Murphy:

The Association for Corporate Growth (“ACG”) welcomes the opportunity to comment on the proposed rule (the “Proposed Rule”) issued by the Securities and Exchange Commission (“SEC”) to amend Regulation D, Form D and Rule 156 under the Securities Act of 1933 (“Securities Act”), particularly as these changes would apply to middle-market private equity funds.

Middle-market private equity funds offer a vital source of funding and liquidity for small and medium-sized businesses across the country. Middle-market private equity funds make investments in small and medium-sized businesses and then help those businesses grow and expand. Their success is tied directly to the success of the companies they invest in, and they neither trade securities nor, generally, employ leverage at the fund level.

We are therefore disappointed in the Proposed Rule and the impact it would have on middle-market private equity. The Proposed Rule seems to directly contradict Title II of the JOBS Act (P.L. 112-106)<sup>1</sup> by placing a number of unreasonable burdens on private equity funds that seek to take advantage of their new ability to conduct Rule 506(c) public offerings, as mandated by Congress. Moreover, ambiguity as to what constitutes a “general solicitation” will result in market confusion that will have a chilling effect on private equity funds communicating even basic information about themselves to the public. We are also very concerned about any change to the definition of an “accredited investor” that would significantly reduce the population of accredited investors, such as indexing the threshold criteria for inflation.

Given the impact the Proposed Rule would have on how middle-market private equity funds communicate with the public, we greatly appreciate the opportunity to provide industry insight and comments.

Background on the Association for Corporate Growth

The Association for Corporate Growth was founded in 1954 and currently has 14,500 members and 56 chapters throughout the world (45 of these chapters are within the United States). ACG members are people who invest in, own, lead, advise or lend to middle-market companies. This includes professionals from private equity firms, corporations, banks and other lenders to middle market companies, as well as professionals from law firms, accounting firms, investment banks and other advisors to deal making.

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<sup>1</sup> Jumpstart Our Business Startups Act (JOBS Act), H.R. 3606 (Apr. 5, 2012).

The purpose of ACG is to help facilitate growth by bringing together middle-market dealmakers and business leaders who invest in growth and build value in companies. ACG accomplishes this by hosting hundreds of chapter events every year, providing online tools for its members, structuring networking opportunities and providing leading-edge market intelligence.

### Middle Market Private Equity

A particular focus of ACG is middle-market private equity. ACG's members include hundreds of private equity firms that focus on the middle-market, the segment that accounts for 80% of private equity transactions. ACG conducts ground-breaking research to better understand the relationship of private capital investment on corporate growth and job creation. The research found that between 1995 and 2010:

- Private capital-backed companies grew jobs by 64.4%, while all other companies in the U.S. economy grew jobs by 18.3%;
- Private capital-backed companies grew sales by 112%, while all other companies in the U.S. economy grew sales by 26.4%;
- Middle-market private capital-backed companies created more than twice the amount of new jobs (339,909) than any other employment stage; and
- In every year except one over the fifteen-year period, private capital-backed companies had more relative growth compared to the general U.S. economy.<sup>2</sup>

Private equity firms invested more than \$347 billion in more than 1,500 U.S. companies in 2012 alone. Two-thirds of private equity funds come from pension funds and university endowments, but for smaller or younger funds accredited investors are a vital source of capital as well. Overall, these investors have realized a 10-year return in excess of 14% - superior to all other asset classes. Private equity firms provide that rate of return by improving the operational efficiency, governance and market strength of the companies in which they invest, as many studies have revealed. These facts are among the reasons that private equity continues to attract the investment and trust of highly demanding, sophisticated investors.

Private equity firms differ from hedge funds in that they make long-term investments in privately held companies and then add value to these companies through improving efficiencies, setting performance benchmarks, imposing fiscal discipline, improving corporate governance, facilitating add-on acquisitions and myriad other ways. Private equity firms are not engaged in short-term trades and, critically, do not employ leverage at the fund level.

Private equity firms also differ from venture capital firms in that the companies in which they invest are generally more mature and developed than venture capital firms. Rather than invest in riskier startups or early-stage companies, private equity firms invest in companies that are profitable and growing yet lack the financing or expertise to reach their full potential. This is particularly true for middle-market private equity firms.

### The JOBS Act

In order to promote job creation and economic growth, in early 2012 the President signed the JOBS Act – which had been passed by Congress with strong bipartisan support. Section 201 of the JOBS Act

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<sup>2</sup> Driving Growth: The Impact of Private Capital on the U.S. Economy (March 2013), available at: [http://www.acg.org/UserFiles/file/global/Driving%20Growth/DrivingGrowth\\_WEB.pdf](http://www.acg.org/UserFiles/file/global/Driving%20Growth/DrivingGrowth_WEB.pdf).

sought to facilitate capital formation by companies and private funds<sup>3</sup> (“Issuers”) by directing the SEC to remove the prohibition on general solicitation or general advertising for securities offerings relying on Rule 506, provided that sales are limited to accredited investors and the Issuer takes reasonable steps to verify that all purchasers of the securities are accredited investors.

In response to the JOBS Act, the SEC created a new category of offerings under Rule 506(c) of Regulation D for Issuers who chose to conduct general solicitations or general offerings (“General Solicitations”). On the same day that the SEC approved the Final Rule Eliminating the Prohibition Against General Solicitations and General Advertising in Rule 506 and Rule 144A Offerings (“Final Rule”) it issued the Proposed Rule, resulting in some market confusion by simultaneously permitting general solicitations and proposing new regulations.

While much of the Proposed Rule focuses on General Solicitations by corporate Issuers, there are many implications that are specific to private funds and, in particular, middle-market private equity funds. With this background in mind, ACG is pleased to present the following comments on the Proposed Rule.

#### Any Amendment to the Definition of an Accredited Investor Should not Unduly Limit the Category

As noted in the Proposed Rule, one of the intended byproducts of the JOBS Act and the Final Rule is that “accredited investors may be able to find and potentially invest in a larger and more diverse pool of investment opportunities, which could result in a more efficient allocation of capital by accredited investors.”<sup>4</sup> However, the opportunity to meaningfully increase the efficient flow of capital may be squandered if the definition of an Accredited Investor is limited dramatically.

The effect would be particularly significant for middle-market, lower middle-market and first-time private equity funds, which rely on investments from Accredited Investors.

Accredited investors are a vitally important source of funding for middle-market private equity funds. This is especially true now, as over the past several years other sources of funding have reduced their investments in private equity. Public pension funds are increasingly inclined to make bigger investments in larger funds that invest globally. In addition, as a result of the Volcker Rule, banks – long a funding source for private equity firms – are reducing their investments in private equity firms as well.

The fact that these historical sources of funding for middle-market private equity firms are drying up makes it all the more important that the SEC not take any action which would significantly reduce the number of accredited investors.

We believe that the net income and net worth thresholds should not be simply indexed for inflation, as some have suggested. A recent report from the U.S. Government Accountability Office (“GAO”) found that adjusting the \$1 million minimum net worth threshold to approximately \$2.3 million to account for inflation would decrease the number of households qualifying as accredited from approximately 8.5 million to 3.7 million.<sup>5</sup> This would have a material adverse impact in middle-market private equity funds.

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<sup>3</sup> A private fund is defined as an issuer that would be an investment company, as defined in Section 3 of the Investment Company Act of 1940 (the “ICA”), but for Section 3(c)(1) or 3(c)(7) of the ICA.

<sup>4</sup> Proposed Rule, p. 7

<sup>5</sup> U.S. Government Accountability Office, Alternative Criteria for Qualifying as an Accredited Investor Should be Considered (July 18, 2013), available at: <http://www.gao.gov/assets/660/655963.pdf>.

It is worth noting that Dodd-Frank already tightened the definition of an accredited investor by excluding the value of a person's primary residence from the net worth calculations. No more tightening of the definition is required.

If the definition of an accredited investor is to be changed, it should be done in a thoughtful manner that takes a number of different factors into consideration. Factors that might be considered in determining whether an individual is accredited include:

- Whether the person has a high school or college degree;
- Whether the person has a business background; and
- The individual's investment history – i.e. whether they have previously invested in private funds.

#### Many of the Proposed Amendments to Form D are Unduly Burdensome and May Contradict The Text of the JOBS Act

The Proposed Rule would impose a number of significant changes to Form D that would unreasonably restrict Issuers seeking to undertake a General Solicitation and, in some cases, violate the text of the JOBS Act.

The SEC should not amend Form D for the purpose of gathering information. Post Dodd-Frank, private equity funds with more than \$150 million in assets under management already now must file both a Form ADV and a Form PF. Both of these forms are designed to gather data for regulators in order to detect systemic risk. If there are deficiencies with these forms, or if the SEC believes other information is needed from private equity funds in order to assess systemic risk, it should address these deficiencies by amending these forms, not by making changes and adding new categories of information to the Form D.

We are particularly concerned about the requirement in the Proposed Rule that issuers file an Advance Form D fifteen days before commencing a general solicitation. We strongly feel that this both contradicts the plain wording of the statute and is also unworkable as a practical matter.

The problem is particularly acute due to the uncertainty regarding what communications are considered "general solicitations." This vagueness will contribute to a chilling effect on the public transmission of vital fund information, including measurements of fund performance. We strongly encourage the SEC to provide greater clarity regarding what constitutes a "general solicitation," particularly in the context of private funds. Moreover, we urge the SEC to clarify that the mere disclosure of fund or investment performance – either on a fund's website, in a press release or through social media – alone does not constitute a general solicitation.

In light of the ambiguity surrounding the definition of a general solicitation, we believe the solution for an inadvertent violation is to create a safe harbor along the lines described above, not require the filing of a Form D.

Other elements of the Proposed Amendments to Form D are unnecessary and unduly burdensome. The requirement that Issuers file an annual amendment to Form D within 30 days of terminating a Rule 506 offering is burdensome and duplicative of information that will already be provided to the SEC via the Form ADV and Form PF filings. Thus, this will provide little to no new information to the SEC and only serve to burden the private fund Issuer with additional cost and expense. Middle-market private equity funds are generally thinly-staffed as it is, and the cost, burden and expense of complying with

these duplicative regulations takes away from their core mission of evaluating and making investments in companies.

To the extent that funds are required to provide information in Form D that is duplicative of information that the SEC already has through a prior Form ADV filing, funds should be permitted to comply with Form D by referencing the Form ADV or other publicly available information.

Amended Item 14, which would require that an Issuer provide a table containing information on the number of accredited investors and non-accredited investors that have purchased the offering, whether they are natural persons or legal entities and the amount raised from each category of investors, would require funds to publicly disclose confidential information that has no reasonable relation to informing a potential investor about the Issuer. The same holds true for new Item 17 of Form D, which appears to be duplicative of the information sought in the amended Item 14.

Proposed Item 22, requiring the Issuer to disclose the methods used or to be used to verify accredited investor status is also unduly burdensome and not reasonably related to providing meaningful information to potential investors.

We also strongly believe that the proposed amendment to Rule 507, disqualifying an Issuer for one year from future Rule 506 offerings if any affiliate of the issuer failed to comply with Form D filing requirement in past five years, is unreasonable and disproportionate. This is particularly true in the context of a private equity fund that is already filing a Form ADV and a Form PF. The relationship between a private equity fund and a portfolio company is very different than one between a parent corporation and its subsidiary. The rule should make clear that disqualifying actions taken by private equity fund will have no impact on the ability of a portfolio company to participate in a Rule 506 offering, and *vice versa*.

#### Several Proposed Restrictions Relating to General Solicitation Materials are Excessive in the Context of Private Equity Funds

Under the mantle of investor protection concerns, the Proposed Rule seeks to impose a number of burdensome and unreasonable limitations and restrictions on the use of solicitation materials by Issuers who seek to conduct General Solicitation.

The Proposed Rule would require that five legends be put on all general solicitation materials. Six legends are required for private funds that conduct general solicitations, and a total of *eleven* legends are required for private funds that conduct a general solicitation and include performance data in their solicitation materials.

There are too many required legends and the legends themselves are too long. We believe this is likely to cause investors to skip over them, thereby limiting their effectiveness. Moreover, compliance with the regulations is impossible in the context of social media sites such as Twitter, LinkedIn and Facebook. We strongly urge the SEC to reduce the number of legends required, particularly for private funds that disclose performance metrics.

Many of the restrictions in the Proposed Rule are unnecessary due to the way in which investors make investments in private equity funds. Investors in private equity funds almost always receive a highly detailed, very technical legal document called a private placement memorandum (“PPM”), which contains a wealth of legends, risk factors, caveats, disclosures, etc. Moreover, each investor is required

to sign a subscription agreement, which details their obligations to fund their full capital commitment over time, and also a lengthy partnership agreement, which describes the rights and obligations of all participants in the fund. If the SEC would like to ensure that investors receive the legends and other disclosures prior to making an investment, these materials should be required to be in the PPM, subscription agreement and/or partnership agreement, not accompany the general solicitation itself.

In addition, the definition of what constitutes a “general solicitation” is both overly broad and vague. We believe that greater clarity is required, and strongly urge the SEC to make clear that “written general solicitation materials” only apply where a true solicitation is actually being made – as in an advertisement or mass email. We believe there should be a unambiguous carve-out for communications that merely provide factual information, such as the closing of a transaction or fund performance metrics, regardless of whether this information is conveyed via a website, press release or through social media. We believe there should also be a clear carve-out for public interviews and handouts at industry conferences, which are common in the private equity industry.

#### Proposed Amendments to Rule 156

Under the Proposed Rule, the antifraud provisions of Rule 156 under the Securities Act would be amended to apply to the “sales literature” of private funds. Rule 156 provides guidance as to the types of information in sales literature that could be misleading for purposes of federal securities laws.

We note that the Proposed Rule would apply Rule 156 to all private funds, regardless of whether or not they are engaged in general solicitations. This is overly broad. The SEC should clarify that if Rule 156 were to apply in the context of private funds, it should only apply to materials distributed in the context of a Rule 156(c) general solicitation.

#### Comments on Disclosure of Performance Data and Other Content Restrictions

We agree with the SEC that “many investors, both sophisticated and unsophisticated, consider performance to be a significant factor when selecting investments, including when selecting private funds.”<sup>6</sup> If anything, we believe that investment performance is an even more important factor when investors choose to make an investment in a private equity fund than for other non-private fund investments.

We believe one of the most important things that can come from the lifting of the ban on general solicitations by private equity funds is the widespread disclosure of fund performance. We are therefore concerned that the Proposed Rule could have the exact opposite effect of discouraging, or even preventing, the disclosure of fund performance (in the context of a General Solicitation or otherwise) through excessive regulatory burdens or outright content restrictions.

In reporting their performance, private equity funds generally are required by their investors to have their financial statements audited annually. These financial audits are rigorous examinations, performed by independent public accounting firms. Typically, the audits are conducted in accordance with Generally Accepted Accounting Principles (“GAAP”), which requires application of rules and methodologies established by the Financial Accounting Standard Board. Key to these is the adoption of ASC 820, which provides a framework for the valuing of a private equity firm’s investments. In addition to these audits, private equity funds are also subject to the antifraud provisions of federal securities laws.

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<sup>6</sup> Proposed Rule, p. 68.

As the Proposed Rule points out, private equity funds already disclose their performance data in the Form PF. If there is a significant deviation between the performance reported in the Form PF and the performance indicated on a solicitation, this will raise red flags with the SEC and other regulators, who will be able to investigate.

Several questions posed in the Proposed Rule relate to whether content restrictions or performance guidelines should be implemented with respect to private equity fund performance. We note that in December 2012 the International Private Equity and Venture Capital Valuation Guidelines Board (IPEV) published private equity valuation guidelines that have been endorsed by over forty organizations around the world.<sup>7</sup> The guidelines are prepared so that fair value measurements are compliant with U.S. GAAP as well as International Financial Reporting Standards. Rather than impose arbitrary content restrictions, the SEC se guidelines could use these guidelines as a starting point.

Again, in order to promote the efficient flow of capital, we believe the SEC should encourage, not discourage, the public disclosure of private equity fund performance.

ACG appreciates the opportunity to comment on the Proposed Rule, and welcomes the opportunity to discuss further any of the issues addressed in this letter. If you have any questions, or if we can provide any additional information, please feel free to contact me at (312) 957-4270 or [glabranche@acg.org](mailto:glabranche@acg.org) or Christine Melendes, VP, Communications & Marketing for ACG at (312) 957-4277 or [cmelendes@acg.org](mailto:cmelendes@acg.org).

Best regards,



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<sup>7</sup> International Private Equity and Venture Capital Valuation Guidelines (December 2012), available at: [http://www.privateequityvaluation.com/fileadmin/user\\_upload/pdfs/130301\\_IPEV\\_Valuation\\_Guidelines\\_Ed\\_Dember\\_2012.pdf](http://www.privateequityvaluation.com/fileadmin/user_upload/pdfs/130301_IPEV_Valuation_Guidelines_Ed_Dember_2012.pdf).