September 23, 2013

Via e-mail to: rule-comments@sec.gov
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number S7-06-13

Ladies and Gentlemen:

This letter is submitted on behalf of the Investment Funds Committee (the "Committee") of the Business Law Section (the "Section") of the Texas State Bar with respect to the rules the Securities and Exchange Commission (the "Commission") is required to adopt pursuant to the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"). This letter is submitted in response to the Commission's request for public comments relating to the JOBS Act rulemaking.[1]

The Committee thanks the Commission for the opportunity to comment on the rulemaking the Commission is required to undertake in connection with the JOBS Act. The JOBS Act required a significant change in the Rule 506 marketplace by eliminating the ban on general solicitation in Rule 506 securities offerings. The Committee acknowledges the significance of this change and the Commission's task of balancing, through rulemaking, new capital raising opportunities with the risks of issuer fraud.

Please note that the comments expressed in this letter represent the views of the undersigned only and do not represent the views of their colleagues, clients, law firms, the official position of the Committee, the Section, or the State Bar of Texas. None of the undersigned are being compensated, directly or indirectly, for our work on this comment submission.

The Committee is concerned that the proposed Rules will unnecessarily discourage the use of general solicitation while providing only marginal additional investor protection. The Committee is also concerned that the Proposed Rules will increase the risk that many fund issuers, especially small fund issuers without large and sophisticated compliance programs, will be unable to satisfy the conditions and obligations under revised Rule 506(b) regime or under the new Proposed Rule 506(c) regime.

In addition, the Committee is concerned with the significant increase in the number of proposed filings that are required to perfect the Rule 506 exemption. This increase is of

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

particular concern when disqualifications for deficient filings are also proposed. It is highly likely that over time an investment fund would miss a filing and suffer extreme consequences for such failure.

Many of the proposed safeguards, such as legend and sales literature rules, seem to be aimed at reducing investor confusion between registered investment companies and private funds that use general solicitation. While the Committee understands this concern, it believes that this possibility of confusion is overstated, especially if the offering fund is excluded from being an "investment company" pursuant to Section 3(c)(7) (a "QP Fund"). All investors in a QP Fund have significant investment portfolios and are otherwise sophisticated.

The compliance costs associated with the offering process will likely form a significant barrier for the investment funds that intend to engage in general solicitation. Given the indirect role of the private funds in providing capital for new business, this effect seems contrary to the purposes of the JOBS Act. The outcome is of particular concern because the Committee is unpersuaded that (1) the risk of any increased fraudulent activity is significant and (2) that the Proposed Rules will have any meaningful effect in mitigating this risk to a degree that would justify the costs imposed by the Proposed Rules.

More specifically, we offer the following comments for the Commission to consider in connection with its proposed rulemaking:

- *Proposed Additional Filing Obligations Would Likely Cause Disproportionate Disqualifications*. Proposed Rule 507(b) intends to disqualify issuers from future use of 506(b) and 506(c) offerings for a period of not less than one year if the issuers fail to comply with any of the Form D filing requirements, including the proposed 15-day advance pre-filing requirement. This Proposed Rule is particularly disruptive to the existing regime of 506(b) offerings, which has been established and utilized substantially without change for several decades.

  If for any reason an investment fund has run afoul of the Proposed Rules, it may be disqualified from making Rule 506 offerings for a period of not less than a year. Certainly, such disqualification would be a major disruption to the business of the fund. The disqualification would be especially punitive for investment funds because Regulation D is effectively the exclusive way through which investment funds raise money. This result is inconsistent with the intent of the JOBS Act and the Commission's mandate to encourage capital formation.

  While the Committee understands the Commission's desire to encourage the filing of Form D for information gathering purposes, the Committee is concerned that increasing the number of required filings, while at the same time increasing the penalties for missed filings, will likely decrease the ability of fund managers and others to rely on Rule 506.

- *Lack of Clarity on Commencement of General Solicitation*. The JOBS Act was in part enacted because of the growing understanding of the incompatibility of the rigid prohibition of general solicitation with today's internet era. The Committee is concerned that the Commission may interpret "general solicitation" even more broadly after the effectiveness of Rule 506(c) and force issuers who do not advertise into Rule 506(c).

A number of new requirements would apply after the commencement of general solicitation. Even under current interpretations, it is not entirely clear in all circumstances when the general solicitation commences, particularly in the case of a registered investment adviser that manages both private funds and individual client accounts and generally advertises its services.

The Committee believes that the public will be well served by issuance of additional guidance on the concept of general solicitation with specific examples of what does or does not constitute general solicitation. The Committee believes that particularly relevant examples should include the use of electronic media, including all web-based content and public speaking.

- *Pre-filing of Form D*. The imposition of the proposed pre-filing requirement introduces a substantial departure from the existing regime of issuing securities under Section 4(a)(2) of the Securities Act of 1933 (the "Securities Act") and the safe harbor provisions thereunder described in Rule 506 of Regulation D, especially when combined with the proposed disqualifications and ambiguity of the term "general solicitation." Under the present rules, no filing is required until 15 days after the first sale in an offering. The proposed amendments would impose an arbitrary pre-filing and waiting period in 506(c) offerings *prior* "to the first use of general solicitation or general advertising for such offering."

  Additionally, the Committee is concerned with the accuracy and the completeness of the information that many issuers may submit on an advance Form D. It is not uncommon for offering terms to change in response to changing market conditions. If such a change does occur, either the information on an advance Form D may be inaccurate or the offering will be postponed, thus risking the ultimate success of the offering. The Committee is not certain that either result is beneficial for the purposes of investor protection or capital formation.

  The risk of pre-filing an advance Form D to capital formation is significant. Certain issuers, for example, hedge funds, usually conduct continuous offerings, and it may not be clear when one offering begins and another ends. For example, it is not clear to the Committee how a hedge fund that wishes to engage in a continuous general solicitation with the intent to admit investors monthly would comply with the Proposed Rules.

  Additionally, business reasons may not allow for an arbitrary 15-day waiting period when certain investments require a more expeditious action. The timing of capital formation need not be dictated by the Commission, but should instead be determined by the marketplace.

  The Proposed Rules also create a risk of confusion by introducing the new Form D compliance requirements specifically for 506(c) offerings. It is not clear why the Commission has chosen to treat 506(c) offerings inconsistent from other type of offering made under Regulation D. The Committee believes that market participants and the Commission will benefit from a uniform filing and penalty regime for all offerings made under Regulation D.

- *Proposed Investor Protections of Rule 156 and Legending Requirements*. While the Committee appreciates that the Commission did not propose the form and content requirements applicable to registered investment companies in the original release, the Committee is concerned that the extension of Rule 156 to private funds could be a sign of

future restrictions like those to which registered investment companies are otherwise subject. Investors in private funds, especially those in QP Funds, who must have at least $5 million or $25 million in other investments, are sophisticated investors. Investors in QP Funds are typically very engaged in the investment and due diligence process.

The Committee does not believe that it is necessary to extend an additional anti-fraud rule to investment managers and private funds when they are already subject to:

- Anti-fraud rules under the Investment Advisers Act of 1940 (the "Advisers Act") relating to all investment advisers to private funds (whether registered or exempt), which prohibits making untrue statements of material fact or omitting to state a material fact necessary to make the statements made not misleading in the light in which they were made;

- The advertising rule under the Advisers Act, which, together with its no-action guidance, places similar limitations to those included in Rule 156 on advertising efforts of funds managed by registered investment advisers;

- Rule 10b-5 under the Securities Act of 1934.

The Committee is concerned that Rule 156 could be interpreted to further constrain the advertising activities of private funds. Especially in the context of QP Funds, the diligence process and the private marketplace determine how sophisticated investors wish for information to be delivered, and the Committee believes that the Commission should not limit the marketing of funds by analogizing it to the marketing activities of mutual funds.

- *Deterring Effect of Continuous Real-time Submission Requirement*. The Proposed Rule 510T requires the issuers relying on Rule 506(c) to "submit" written solicitation materials to the SEC no later than the date of first use of such materials. Although the Proposed Rule, as presently drafted only applies for the two years after effectiveness of the Proposed Rule, this requirement creates a continuous and substantial reporting obligation during that time period. The Proposed Rule appears to be intentionally broad so as to encompass all communications that can be construed as solicitations. For example, the Proposed Rule would appear to apply to communications via social networking services such as LinkedIn, Twitter, and Facebook. This continuous real-time reporting requirement could effectively prohibit and discourage many issuers, particularly smaller issuers, from participating in 506(c) offerings. Does the Commission truly intend for this broad real-time application?

The Committee believes that this rule imposes an extremely high and potentially prohibitive compliance requirement on private funds. As a result, some issuers may choose to forego 506(c) offerings altogether. With respect to those issuers, a ban on general solicitation will remain in effect despite the JOBS Act.

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We appreciate the opportunity to comment on the Proposed Rules and respectfully request that the Commission consider the comments and recommendations set forth above. The undersigned are available to discuss them should the Commission or the staff so desire.

Respectfully submitted,

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