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November 4, 2013

VIA ELECTRONIC DELIVERY

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

Re: Release No. 33-9458; (File No. S7-06-13): Re-opening of Comment Period for Amendments to Regulation D, Form D and Rule 156; and

Release No. 33-9416 (File No. S7-06-13): Amendments to Regulation D, Form D and Rule 156 under the Securities Act ("**Proposing Release**")

Dear Ms. Murphy:

We respectfully submit this letter in response to a request by the Securities and Exchange Commission (the "**Commission**" or "**SEC**") for comments regarding the above-referenced Proposing Release. The Proposing Release was issued in conjunction with SEC rules that lift the ban on general solicitation in connection with certain private offerings made pursuant to Regulation D under the Securities Act of 1933 (the "**1933 Act**"), as required by the Jumpstart Our Business Start-ups Act (the "**JOBS Act**").[1] The proposals set forth in the Proposing Release would amend certain Form D filing requirements and increase penalties for failure to comply with the new requirements. In addition, the proposed rules would extend the provisions of Rule 156 under the 1933 Act to offerings by "private funds"[2] and expand disclosure and impose filing requirements for written materials used in general solicitations under Regulation D.

Dechert LLP is an international law firm with a wide-ranging financial services practice that serves clients in the United States and abroad. We advise more than 700 private funds and their fund management groups, representing the full range of fund types, investment strategies

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1 Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in various sections of 15 U.S.C.).

2 The Proposing Release defines a "private fund" as an issuer that would be an investment company, as defined in Section 3 of the Investment Company Act of 1940 (the "**1940 Act**"), but for the exclusions from the definition of an investment company provided by Sections 3(c)(1) and 3(c)(7) of the 1940 Act.

and asset classes. We represent such funds in connection with their operation, formation and marketing. Our clients also include a substantial number of U.S. mutual fund complexes, fund boards, fund independent directors, fund advisers and service providers to funds. In developing these comments, we have drawn on our extensive experience in the financial services industry. The comments that follow reflect the views of a group of attorneys in our financial services practice, and not necessarily the views of all members of our financial services group, the firm, or any client of the firm. Additionally, our comments reflect our views on how the proposed rules impact private funds only, and do not relate to the impact on other types of issuers using Regulation D or other issuers generally.

We support the Commission's goal of protecting unsophisticated investors from the risks associated with investing in unregistered securities and we appreciate the obvious care and thought that informed the Proposing Release. While the issues underlying these proposals raise important policy issues, which are vigorously debated in other comment letters, we will focus our comments on the more practical aspects and uncertain legal issues that we anticipate we would confront in advising market participants in implementing these proposals. We believe that certain of the proposed rules would impose undue burden on industry participants and be overly difficult to apply in practice, and in particular on private fund issuers and their investment managers, without significantly furthering the Commission's goal of investor protection. Moreover, we note areas where the Proposing Release does not adequately address recently implemented data gathering by the Commission about private funds under the Investment Advisers Act of 1940 ("**Advisers Act**"), which seems to evidence a "siloed" rather than holistic approach to regulation. We therefore offer these comments to address certain areas where we believe the Commission should modify its approach.

I. Advance Form D Filing for Rule 506(c) Offerings and Consequences of Failure to File

We believe that the proposed amendment to Rule 503 of Regulation D under the 1933 Act, which would require issuers intending to offer securities under Rule 506(c) to file a Form D at least fifteen (15) calendar days in advance of first use of general solicitation, should be eliminated. This requirement will not meaningfully advance the SEC's information gathering objectives and will, instead, impose unnecessary burdens on issuers' legitimate capital raising activities. Therefore, such a requirement would not meaningfully advance the Commission's goals and is inconsistent with the clear policy underlying the JOBS Act.

In particular, the lack of clear guidance as to the types of activities that constitute "general solicitation" makes it impossible to be certain as to when an advance Form D filing is due. Over the years, very few examples have been provided of what clearly would not be a general solicitation. As a result, issuers may make numerous advance Form D filings as a

precautionary measure to preserve their ability to make a Rule 506(c) offering for fear of running afoul of the requirements under Rule 503 even where they ultimately decide to rely on Rule 506(b) or otherwise do not engage in a general solicitation. They will likely do so even where their activities would fall short of analogous activities constituting an offering in the public offering context. On the other hand, given the lack of clarity of when the fifteen (15) day compliance period begins, many issuers may also fail to make these filings on a timely basis, thereby incorrectly signaling to the Commission the date on which a general solicitation commenced. Because the proposed rule can be expected to result in missed or delayed filings, or unnecessary (precautionary) filings, the proposed rule will distort the data received by the SEC, thereby reducing the reliability of the data for purposes of evaluating the actual use of Rule 506(c). We believe that the SEC would receive more accurate information on the actual use of Rule 506(c) under the current framework of requiring an initial Form D filing to be made after the date of first sale.[3] The current framework has the benefit of utilizing a clear trigger date for Form D filing.

In addition, as the SEC notes in the Proposing Release, inadvertent communications may raise complexities as to determining the trigger date for a Form D filing. When inadvertent communications occur, an issuer's legal counsel is often left to assess whether such a communication by or with respect to an issuer actually constitutes a general solicitation and whether, as a result, the issuer will be unable to rely on Rule 506(b). With the adoption of Rule 506(c), an issuer in this scenario who has theretofore engaged in a Rule 506(b) offering should be permitted to switch to a Rule 506(c) offering if it is determined by the issuer that a general solicitation has occurred (provided that all future sales comply with Rule 506(c) requirements, including the requirement that all such sales be made only to accredited investors). It is important to note that in such a scenario, compliance with an advance Form D filing requirement would be impossible.[4]

The timing requirement would restrict the ability of issuers to raise capital where such issuers need to move quickly. An issuer may encounter a situation where it needs new capital to take advantage of an investment opportunity where quick action is required (similar to where the public markets use shelf registrations). Or, an issuer may need a capital infusion due to

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[3] In fact, the proposed rules would require an issuer to make two Form D filings—one prior to the commencement of the use of general solicitation and a second after the first sale—that duplicate certain information relating to the initial offer and sale of the issuer's securities. Such duplicative reporting is an unnecessary burden on issuers given the questionable informational benefit derived from the advance filing.

[4] Scenarios such as these are also a reason why we oppose the proposed penalties for failure to make a Form D filing as discussed in more detail below.

unforeseen circumstances. It would be more than ironic if a pre-filing requirement increased the risk of the failure of an issuer for want of quick access to available additional capital.

Although we believe that advance Form D filing is inappropriate and inconsistent with the JOBS Act policy goals, to the extent the Commission decides to adopt such a requirement, and as discussed further below in our comments to proposed Rule 507(b), there should be no automatic or severe consequence for failure to file an advance Form D because (i) the Form D filing requirement does not serve an investor protection purpose, (ii) the Commission's data gathering goals will not be significantly affected by a late filing, and (iii) as noted above, there will be practical uncertainties and complexities with respect to determining when a filing requirement would be triggered under the proposed rules. Under these circumstances, imposing a penalty, such as loss of the Rule 506(c) exemption, is unreasonably harsh.

II. Form D Closing Amendment for Rule 506 Offerings and Ongoing Offerings

A. General

In contrast to advance filings, a closing Form D amendment will assist the SEC in evaluating the use and success of Regulation D offerings. We suggest, however, that any such requirement apply uniformly to all offerings made under Regulation D insofar as the purpose of the data collected pursuant to the Form D filings is to determine the extent to which issuers have taken advantage of Regulation D. We believe that certain information included in a closing Form D filing, such as the final value of securities sold pursuant to an offering (or similar calculations indicative of the success of an offering), may be viewed as proprietary and issuers should have the option of shielding this data from public availability. Such financial information may affect the company's reputation and companies that chose to remain privately held should not be required to disclose such information. In addition, as is currently the case with Form D itself, a closing Form D amendment should not be a condition for relying on the private placement exemptions available under Rule 506.

B. Timing of Closing Form D Amendment and Annual Amendments for Ongoing Offerings

Because the information provided on Form D is for SEC data gathering purposes, and is not intended to serve as disclosure to the market generally or to provide investor protection benefits, issuers should not be subject to short or frequent Form D filing deadlines. Compressed and frequent compliance dates will impose undue burdens on issuers without any investor protection benefits or market disclosure. Therefore, we suggest that the SEC provide issuers with a ninety (90) day timeframe within which to make a closing Form D filing. Likewise, issuers conducting ongoing offerings should not be required to amend their Form D filings more

frequently than annually. Annual amendments to Form D are sufficient to satisfy the SEC's data needs regarding Regulation D offerings.

III. Content Amendments to Form D

Compliance with the proposed content requirements for Form D imposes unnecessary burdens on issuers. These requirements take additional time and, often, result in additional legal costs. These costs should be weighed carefully against the benefits that the additional information would confer on the SEC and investors. Because the proposed content amendments to Form D would not serve to increase investor protection, but merely to augment the SEC's information base regarding private offerings, we believe that many of the proposed amendments to the content requirements of Form D should be eliminated.[5]

The proposed amendments to the Form D content requirements are especially not appropriate for private funds that rely on Rule 506, as they are duplicative of the existing adviser reporting forms (i.e., Form ADV and Form PF) that registered private fund advisers must file periodically.[6] These Forms currently require extensive disclosure regarding private funds advised by RIAs and ERAs, including information on such private funds' service providers (such as fund administrators, auditors and marketers), gross asset value and number of beneficial owners. To the extent the additional information that is proposed for inclusion on Form D is repetitive of information already included in a Form ADV and/or Form PF filed by a private fund's adviser, the private fund should not be required to duplicate such information on Form D. Also, the costs of duplicative reporting should be more fully considered. Further, the proposed amendment to Item 3 of Form D requiring disclosure of controlling persons[7] could have the result, in the private fund context, of potentially resulting in the disclosure of a fund's large or anchor investors. Such disclosure could result in an adviser or fund breaching investor confidentiality obligations and

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5 In this respect, we again note that the Form D filing requirement is not meant to serve an investor disclosure purpose and that, in the private fund context in particular, this purpose is instead served through the delivery of private placement memoranda and other available public disclosure documentation, including in the case of a registered investment adviser ("**RIA**") or "exempt reporting adviser" ("**ERA**"), the Form ADV. ERAs include investment advisers that rely on the private fund adviser exemption under Rule 203(m)-1 under the Advisers Act as well as advisers that rely on the venture capital fund adviser exemption under Section 203(l) of the Advisers Act.

6 ERAs must also file an abbreviated Form ADV with the SEC. State registered advisers also file Form ADV.

7 The proposed rule would require, when an issuer is conducting a Rule 506(c) offering, the name and address of any person who directly or indirectly "controls" the issuer, in addition to the information currently required regarding "related persons."

would have a chilling effect on a fund's ability to raise large investments from institutional investors or the fund's willingness to rely on Regulation D for this reason. Moreover, the Commission determined not to require this information on Form ADV for private funds or even in the confidential, non-public Form PF. For most private funds, investor identities are among their most important proprietary information. The sensitivity of this type of information is acknowledged in the Advisers Act where even the Commission access to information about clients is limited to essentially a "need to know" basis.[8]

To the extent the SEC requires such information to monitor the Regulation D marketplace, with respect to private funds managed by RIAs or ERAs, we note that the SEC has the authority and ability to review the books and records of such advisers to obtain the additional information proposed to be included on Form D for Rule 506(c) offerings. Those books and records are deemed to include the books and records of the private funds of the adviser.[9] Further, to the extent that the SEC desires information regarding an RIA's or ERA's processes to verify the accredited investor status of a private fund's investors, the SEC has the authority to directly request such information from the adviser at any time. In fact, the offering process is already something reviewed on examination by Commission staff.

IV. Rule 507 – Disqualifying Issuers for Failure to File Form D

A. General

We believe that the amendment to Rule 507 under the 1933 Act, which would disqualify an issuer from relying on Rule 506 for future offerings if the issuer (or its affiliates) failed to comply with the Form D filing requirement within the past five years, is inappropriate given that Form D is principally designed for information gathering purposes and not for investor protection. Failure to file a Form D would not deprive investors of any information upon which to make informed investment decisions. It is inconsistent with the JOBS Act, and the SEC's mission generally, to limit an issuer's access to capital for any period of time for reasons other than investor protection. As discussed below, we believe that the Commission has other tools available to it to incentivize Form D filings in the private fund context. The fact that the Commission over the years has elected not to pursue its existing enforcement authority frequently to compel the filing of Form D may be grounds for reexamining that policy, but not for increasing the penalties.

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[8] Section 210(c) of the Advisers Act.

[9] Section 204(b)(2) of the Advisers Act.

To the extent the SEC does adopt a penalty for failure to file Form D, any penalty should only apply to a complete, knowing and intentional failure by an issuer to file Form D after providing for an ample cure period (e.g., one year). Such a cure period is imperative, particularly given some of the difficulties discussed above in determining whether (and when) a Form D filing obligation may be triggered under the proposed rules. Given the drastic result of an issuer (or any of its affiliates) being unable to rely on Regulation D for future offerings, market participants must be given appropriate time to consult with counsel and review relevant circumstances to properly ascertain whether (i) a filing requirement had in fact been triggered and missed and (ii) all affiliates of the issuer have complied with all applicable Form D filing requirements. Such determinations are not likely to be straightforward and could take considerable time, cost and effort to resolve. By providing a meaningful cure period, the SEC will be prioritizing information gathering over the imposition of a penalty, which will be in line with the Commission's objectives for Form D.[10]

The proposed amendments to Rule 507 also raise particular concerns for private funds and their portfolio companies. We believe that portfolio companies of a private fund should not be viewed as "affiliates" of a private fund (or of each other absent other relevant facts) for purposes of the disqualification provisions of proposed Rule 507(b) if such provisions are adopted by the Commission. If such portfolio companies were to be covered by the proposed rule, the failure to file a Form D by a single issuer could have a multiplier effect on the ability of other independently operated businesses to raise capital solely because such businesses are held in a common investment portfolio with the issuer. In this respect, we recommend that the Commission take the same approach that the SEC staff has taken with respect to Form ADV disclosure requirements as they apply to portfolio companies of a private fund.[11]

B. Comments on Cost-Benefit Analysis for Rule 507 Amendment

In its cost-benefit analysis regarding proposed Rule 507(b), the SEC emphasized the benefits of incentivizing issuers to comply with its Form D filing requirements. The Commission noted that, according to its best estimates, approximately 10% of offerings conducted in reliance

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[10] The Commission solicited comment on whether a check-box should be added to the Form to indicate that a filer is relying on the cure period. We see no purpose for such a check-box.

[11] Frequently Asked Questions on Form ADV and IARD, available at http://www.sec.gov/divisions/investment/iard/iardfaq.shtml. The SEC staff has stated that it would not recommend enforcement action against an investment adviser who did not disclose certain required information on Form ADV regarding operating companies that are portfolio companies of private funds advised by the adviser. In this case, such operating companies should similarly be excluded from the scope of proposed Rule 507(b) if the rule is adopted by the Commission.

on Rule 506 and which involved RIAs or registered broker-dealers did not have a Form D on file with the Commission. The SEC asserts that such non-compliance deprived it of useful information for regulating the private offering market.[12]

Given the capital raising restrictions that can result from the application of Rule 507(b) to an issuer, we believe that the SEC's cost-benefit analysis failed to properly consider the effect that recently required Form D compliance reporting has had on incentivizing compliance with Form D filing requirements by a large percentage of filers.

The Commission's data regarding non-compliance with the Form D filing requirement covers a ten-year period ending in 2012. However, as noted by the SEC, since 2012, investment advisers (both RIAs and ERAs, as well as state registered advisers filing Form ADV) have been required to include Form D data for private funds they advise in their Form ADV filings. Specifically, when submitting Form ADV, all RIAs and ERAs are required to state, under penalty of perjury, whether each private fund for which they are required to report has relied on Regulation D to conduct private offerings and, if so, to provide the applicable Form D filing number. Of course, a Form D filing number requires that the Form be filed. In our experience, this Form ADV requirement has brought private funds into almost universal compliance with Form D filing requirements for offerings where such funds have in fact relied on Regulation D for the private placement of their interests. By basing its analysis on private fund offerings that occurred prior to 2012 (as such funds are disclosed on advisers' Forms ADV), the Commission has not adequately considered the effect that the Form ADV requirement has had on offerings beginning from 2012 onward. Emphasis on this more recent data would provide a more accurate picture as to the expected non-compliance rate of private funds on a going forward basis.[13]

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[12] Proposing Release, 78 Fed. Reg. 44806, 44846 (July 24, 2013). Given that Form D's goal is to provide regulatory information and not public disclosure or investor protection, we do not believe that a 10% non-compliance rate with Form D filing requirements justifies rule changes that are likely to impact capital formation.

[13] In fact, the Commission itself notes that the non-compliance rate that it identified using Form ADV filings "could overstate the actual number of private funds that did not file a Form D due to typographical errors in the name of the private fund or filing number. Also, registered investment advisers are required to identify Form D filing numbers only for private funds that are currently offering their securities. As a result, the Form ADV filings of advisers to private funds that are closed to new investments or are no longer engaged in a Regulation D offering of their securities are not required to disclose a Form D filing number." Proposing Release at 44842. Given these shortcomings in the historical data that the Commission analyzed based on 2012 Form ADV filings, data for recently offered funds should be emphasized to determine compliance with Form D filing requirements.

Because the Commission's data for non-compliance with Form D covers periods prior to 2012, its cost-benefit analysis of the Rule 507 amendments fails to account for the effect that the Form ADV requirement has had (and would be expected to have) on compliance with the Form D filing requirement by RIAs and ERAs with respect to newly offered private funds since 2012. We believe that the Form ADV disclosure requirement provides proper and sufficient incentive to RIAs and ERAs to make timely Form D filings with respect to private funds offered in reliance on Regulation D. Further, from an information gathering perspective, Form ADV provides a list of all private funds advised by a RIA or ERA that are not in compliance with the Form D filing requirement. If the Commission wishes to enforce the filing requirement among RIAs and ERAs, it already has available the tools required to do so—a separate disqualifying provision is not necessary.

By de-emphasizing recent data and the Form ADV requirement, the SEC's analysis exaggerates the effect that the proposed amendments would have in encouraging greater compliance with Form D. We believe that the Commission currently has the appropriate tools to incentivize compliance with Form D by private funds without need to resort to measures that inhibit capital formation. Thus, at a minimum, re-proposal of the amendments would be required so that the public may comment on the marginal benefit of applying penalties to a group of regulated entities that already is incentivized to comply fully with Form D filing requirements. Such revised cost-benefit analysis should include appropriate consideration of the purpose of filing as weighed against the SEC's mission of protecting investors, maintaining orderly, fair and efficient markets and facilitating capital formation.[14]

V. Proposed Amendments Relating to General Solicitation Materials

A. Mandatory Legends

The SEC's proposed Rule 509 would require issuers to include specific legends "in any written communication that constitutes a general solicitation or general advertising" in any Rule 506(c) offering. Of particular concern for issuers is being able to identify when legends are needed, as it requires issuers to determine when materials constitute written communication or general solicitations. However, the Proposing Release does not define the terms "written communication" or "general solicitation" as they apply in the proposed rule (nor does the SEC define "general solicitation" in Regulation D, generally). Further, written communications may be made in a variety of media which may not be conducive to the inclusion of mandatory legends from both a content or space standpoint.

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[14] *See Business Roundtable v. SEC*, 647 F.3d 1144, 1155 (D.C. Cir. 2011) (vacating an agency rule directed to investment companies because the agency "failed adequately to address" whether existing regulation "reduce[d] the need for, and hence the benefit to be had from," further regulation).

Should the Commission require legends to be included in written general solicitation communications, we urge the Commission to re-propose Rule 509 to include a new, clear standard for when legends would be required. Such a standard should clearly define the types of communications that require legends, keeping in mind that it is impractical to include a detailed legend on certain types of communications. Additionally, where additional legend requirements are necessary, we believe that the proposed amendments should not specify either the precise wording of required legends or the specific requirements for the legends and disclosures, such as the type size, type style, location and proximity, but rather state general principles.

In the event that the Commission adopts a mandatory legend and disclosure requirement, because the application of the proposed rules may create compliance difficulties, we agree with the Commission that the availability of Rule 506(c) should not be conditioned on compliance with the proposed requirements of Rule 509.

B. Rule 156

Extending Rule 156 under the 1933 Act to apply to private funds will create compliance uncertainties for advisers to private funds, particularly in the context of non-Rule 506(c) offerings where no general solicitation is conducted.

Rule 156 provides guidance on the types of statements in sales literature of registered investment companies that could be considered misleading to investors. By its nature, Rule 156 is designed to protect retail investors when investing in mutual funds and was not adopted, nor have interpretations thereunder been made, taking into account the particular considerations of accredited investors or of the different types and strategies of private funds, which, as noted below, impact the manner in which performance is presented. We believe that the distinction between the financial sophistication of private fund investors and retail investors is important and should be reflected in the rules regarding sales material directed at each group.

Further, investment advisers to private funds are subject to the anti-fraud provisions of the Advisers Act and specifically to Rule 206(4)-8 thereunder. These provisions are similar in their objectives to Rule 156. Adding an additional requirement, which may largely be duplicative, with which private fund advisers must comply when offering private funds (even on a non-general solicitation basis) will create confusion, add costs and be unduly burdensome. For example, uncertainties can arise as to whether an interpretation issued by the SEC staff under Rule 156 in the context of a mutual fund sold to retail investors is equally applicable to the private placement of a private fund to an accredited investor where the materials used in such private placement are otherwise consistent with the anti-fraud provisions of the Advisers Act and Rule 206(4)-8 thereunder.

C. Content Restrictions in Solicitation Materials for Private Funds

The Commission solicited comments on whether the SEC should apply any content restrictions to performance information included in general solicitation materials used for private funds. Given the breadth of the investment strategies employed by private funds, we believe it would be difficult for the Commission to formulate meaningful and standardized content restrictions that would be applicable across the industry. In particular, we note that performance information is likely the most fundamental factor that a prospective investor considers when evaluating investment opportunities, and restricting (or standardizing) the use of performance data would likely render any solicitation materials of little value to investors or issuers. A less than well-thought-out approach could well result in investors receiving less useful information, as presentations would need to be altered to fit within the standards, which might not fit some types of funds.

Moreover, standardizing the calculation and presentation of performance information for private funds would be neither practical nor useful for investors. Various types of private funds pursue different goals, and calculate performance in a way that most accurately reflects their goals. For example, private equity and other similar funds calculate performance using the "internal rate of return" or by reference to multiples of the fund's invested capital. On the other hand, depending on their investment strategies, hedge funds generally reference annualized returns alongside various risk metrics to provide a holistic (and more meaningful) presentation of the risk/reward characteristics of a fund. Even further, the definition of "private fund" encompasses many investment vehicles that are not funds at all (such as collateralized loan obligations) where appropriate performance reporting is vastly different from either hedge funds or private equity funds. Therefore, a standardized method of calculating performance would at a minimum need to reflect the investment objective and operations of the issuer.

VI. Temporary Rule 510T

The Commission solicited comment on whether it should require the submission of written general solicitation materials used in Rule 506(c) offerings. An obligation to submit all written solicitation materials to the SEC could create a moral hazard in which investors may be less vigilant about representations included in solicitation materials because they have confidence that such materials are being submitted to (and they have false confidence that such materials are being reviewed by) the SEC. Furthermore, such a rule would create uncertainty among affected issuers as to whether they are complying with the rule's requirements because, as noted above, there is a lack of clarity as to which types of communications constitute written general solicitation material.

Finally, we note that the Commission has access to the marketing material utilized by RIAs and ERAs with respect to private funds. Should the Commission wish to examine materials used in connection with a general solicitation by a private fund, the SEC can request such material on a more targeted and case by case basis as and when required. Such an approach will eliminate the unnecessary burden of filing written general solicitation materials by private fund advisers without adversely impacting the Commission's access to such materials.

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We appreciate the opportunity to comment on the Proposing Release. Please feel free to contact David A. Vaughan at 202.261.3355, Michael L. Sherman at 202.261.3449, Robert M. Friedman at 212.649.8735, Nauman S. Malik at 202.261.3456 or Eric D. Simanek at 202.261.3424 with any questions about this submission.

Sincerely,

/s/ Dechert LLP

Dechert LLP