AMERICAN BAR ASSOCIATION
Business Law Section

ABA BUSINESS LAW SECTION

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Via email to: rule_comments@sec.gov

December 6, 2013

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

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

Dear Ms. Murphy:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee" or "we") of the Business Law Section (the "Section") of the American Bar Association (the "ABA"), in response to the request for comments by the U.S. Securities and Exchange Commission (the "Commission") in its July 10, 2013 proposing release referenced above (the "Proposing Release").[1] This letter has been pre with the participation of, and in conjunction with, the Middle Market and Small Business Committee, the Private Equity and Venture Capital Committee and the State Regulation of Securities Committee (with the Committee, the "Committees") of the Section. The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

[1] 78 Fed. Reg. 44806 (Jul. 24, 2013).

I. Overview

The Commission proposed additional changes to Regulation D, Form D and Rule 156 under the Securities Act of 1933, as amended (the "Securities Act"), at the same time that it adopted amendments to Rule 506 of Regulation D to permit general solicitation if certain conditions are met and add "bad actor" disqualification provisions applicable to Rule 506 offerings. [2] The Commission explained the proposed changes as designed to provide it with additional information to monitor the use and impact of the new offering opportunities made available under Rule 506(c), and to address investor protection concerns. We support these objectives of the Commission, and acknowledge that the ability to engage in general solicitation in connection with an exempt private offering could significantly change the regulatory landscape. The integrity of the investing marketplace is an essential ingredient for thriving capital formation and, therefore, we understand and support the Commission's desire to monitor the use of these new offering opportunities.

We believe that the Commission, in proposing additional rule changes to implement its objectives, should strike the appropriate balance between facilitating capital formation by small and emerging growth issuers, in furtherance of the Congressional purpose underpinning the Jumpstart Our Business Startups Act (the "JOBS Act"), and ensuring investor protection. We respectfully submit that the proposed rule changes would not, if adopted, achieve that balance. Small businesses are the life-blood of growth and employment in our economy. The proposals seem especially ill-suited to help these issuers, which often operate without the advice of sophisticated counsel that would be necessary to ensure compliance with the proposed rules' detailed requirements, and avoid their pitfalls. In our view, there are other, less intrusive and less burdensome measures that the Commission could adopt to achieve its goals while mitigating the substantial additional costs of compliance that otherwise would be imposed on issuers.

The proposals, if adopted, also would have an adverse impact on other types of issuers, such as private investment funds, particularly those that are, or may be, involved in continuous offerings of securities. For private funds, "affiliation" presents issues very different from those faced by other types of issuers.[3] Moreover, many private funds are advised by advisers that are subject

[2] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, SEC Rel. No. 33-9415 (Jul. 10, 2013), 78 Fed. Reg. 44771 (July 24, 2013); Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings, SEC Rel. No. 33-9914 (Jul. 10, 2013), 78 Fed. Reg. 44729 (Jul. 24, 2013).

[3] Private fund issuers are frequently managed by management companies that manage more than one such issuer, thus creating affiliate relationships among "sister" funds that otherwise have no connection with one another. Moreover, certain private funds may be deemed

to extensive, sometimes more stringent, regulations that we believe already address the Commission's investor protection concerns.[4]

While there may be some concern over the possible future development of abusive practices and fraudulent conduct in a general solicitation context, we believe that Congress considered and appropriately dealt with such concerns by limiting the eligible purchaser pool to accredited investors, and imposing a "reasonable verification" requirement in Rule 506(c) offerings. In our view, the Commission should take a "wait-and-see" approach in the near term and allow such offerings to evolve accompanied by the safeguards Congress contemplated when adopting Title II of the JOBS Act, as well as the "bad actor" disqualification provisions of Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act that are now effective in the form of new subsections (d) and (e) of Rule 506, before adding more filing and disclosure burdens that are likely to discourage the use of Rule 506(c) and ultimately may prove unnecessary to prevent fraud. As reflected in the Proposing Release, multiple divisions and offices of the Commission have been charged with monitoring and assisting the Commission in evaluating the development of market practices in Rule 506(c) offerings. In the meantime, the Commission will be free in 2014, should it choose to do so, to propose ways of tightening the definition of "accredited investor" in Regulation D as applied to natural persons – the investor group that presumably raises the most concern on the part of both the Commission and state regulators.

As Congress recognized in enacting the JOBS Act, there are many legitimate sources of private capital that are critical to fostering a growing economy, such as angel investing networks and other non-institutional investors. Small and emerging businesses, many of which do not have the resources to tap broker-dealer intermediaries or other market professionals in raising seed capital, can benefit from the deregulation of communications effected by the

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technically to be affiliated with the portfolio companies in which they (and even their "sister" funds) invest, although they generally do not control the management of those companies (except through stock ownership and representation on the boards of directors).

4 For example, many advisers to private funds are registered under the Investment Advisers Act of 1940, as amended (the "Advisers Act") or by commodity pool operators ("CPOs") or commodity trading advisors registered under the Commodity Exchange Act ("CEA"). Advisers may also be registered under applicable state registration requirements. As such, these advisers operate under one or more additional antifraud regulatory regimes governing the conduct of their affairs, along with specific rules regarding the safeguarding of the assets of the managed fund investors, reporting and examination. Issuers with registered investment advisers subject to Rule 205-3 under the Advisers Act, that rely on the exception from the definition of investment company set forth in Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, as amended (the "Investment Company Act"), or whose CPOs rely on exemption under Rule 4.13(a)(3) of the Commodity Futures Trading Commission, are also subject to investor net worth tests that, in certain respects, may exceed those set forth in the definition of "accredited investor" in Regulation D.

Commission's adoption of Rule 506(c) permitting general solicitation. However, we believe those benefits may not be realized if companies are unduly deterred by the latest round of proposed regulatory restrictions (if adopted) from engaging in general solicitation/advertising activities under Rule 506(c). Moreover, those proposals could make more difficult compliance with original Rule 506, now codified in Rule 506(b), for those issuers and intermediaries choosing not to engage in general solicitation. One source of that difficulty is the uncertainty of determining what forms of evolving electronic communications media may be regarded by the Commission as constituting general solicitation, making unplanned or inadvertent general solicitations a matter of serious concern. As such, the Commission's proposals not only threaten to chill the growth of a Rule 506(c) market, but also may harm the already-thriving private market that has developed under what is now Rule 506(b) (the original Rule 506).[5]

The Commission has proposed certain filing, document submission and disclosure requirements that are triggered by the use of a general solicitation in connection with Rule 506(c) offerings. In this regard, we recommend that the Commission move away from tying requirements to the existing, amorphous regulatory concepts of "general solicitation" and "general advertising" (hereinafter referred to in this letter as "general solicitation") which carry a significant amount of interpretive history that could unnecessarily burden the offering process under Rule 506(c). Even inherently private communications can be deemed a general solicitation if conducted by or on behalf of an issuer with prospective investors with whom the issuer does not have a prior substantive relationship.[6] In this circumstance, it appears that the proposed amendments

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[5] *See* Division of Economic and Risk Analysis ("DERA"), Securities and Exchange Commission, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009-2012* (July 2013)("DERA Study"), available at http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistrered-offerings-ref-d.pdf. According to the DERA Study, Rule 506 (now Rule 506(b)) accounted for 99% of amounts sold through Regulation D during the years 2009-2012 (as reported via Form Ds and amendments filed with the Commission); in 2012, the amount raised was $903 billion, up from $863 billion in 2011. A total of $1,025 billion was raised in 2010. *Id*. at 3-4.

[6] We are not suggesting that a pre-existing relationship between the Issuer (or placement agent) and prospective investors is an independent requirement. To the contrary, "[i]t is clear that an issuer may approach theretofore unknown institutional investors and execute a perfectly good private placement." Committee on Federal Regulation of Securities, ABA Section of Business Law, *Law of Private Placements (Non-Public Offerings) Not Entitled to Benefits of Safe Harbor*, 66 Bus. Law 85, 95 (Nov. 2010) ("ABA, Law of Private Placements"). *See also* Use of Electronic Media, SEC Rel. No. 34-42728 (April 29, 2000), available at http://www.sec.gov/rules/interp/34-42728.htm#seciic.2 ("Use of Electronic Media Release") n. 86, citing Regulation D, SEC Rel. No. 33-6825 (Mar. 15, 1989) [54 Fed. Reg. 11369] n. 12 ("the staff has never suggested, and it is not the case, that prior relationship is the only way to show the absence of a general solicitation"). However, such a relationship can dispel the existence of a general solicitation. Also, the presence or absence of such a relationship is relevant to the

would trigger an advance Form D filing, and require the submission of materials to the Commission and the inclusion of legends – with severe consequences for noncompliance. If the enhanced requirements for Rule 506(c) offerings are to be adopted in some form, we therefore suggest that these requirements be revised so that they do not apply unless a particular communication is both a general solicitation and is broadly disseminated through such readily accessible public means as posting on an unrestricted website or publication in a widely circulated newspaper, magazine or television broadcast. In this regard, we note that the Commission has previously employed a similar concept of broad, unrestricted dissemination in the registered offering context, in determining whether a free-writing prospectus prepared by an offering participant needs to be filed with the Commission.[7] In our view, that basic approach could be adapted effectively to Rule 506(c) offerings.

In sum, we urge the Commission to find other, less restrictive ways of monitoring development of the new Rule 506(c) offering process and addressing investor protection concerns, such as those suggested below. We also provide some observations on the Regulation D changes that were adopted this July and became effective on September 23, 2013, and identify additional areas where further Commission action or guidance would be beneficial.

Before we begin, we also note that we are not commenting at this time on the current definition of "accredited investor" in Rule 501(a) in response to the Commission Requests for Comments in Part V of the Proposing Release. However, we may do so at the appropriate time in the future, as we have in the past on this subject. (*See*, *e.g.*, Letter dated October 12, 2007 from the American Bar Association Section of Business Law Committees on Federal Regulation of Securities, Middle Market and Small Business, and State Regulation of Securities in response to the Commission's request for comments on Release No. 33-8828 with respect to proposed revisions to the limited offering exemptions in Regulation D; available at http://www.sec.gov/comments/s7-18-07/s71807-52.pdf).

II. Summary of Committee's Recommendations

A. The proposed requirement to file an advance Form D 15 calendar days before engaging in general solicitation in connection with a Rule 506(c)

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determination of whether offerees have access to the type of information necessary to make an informed investment decision and/or, in the case of an indeterminate number of previously unknown offerees who may or may not be financially sophisticated, whether or not violations of "manner of offering" constraints on Section 4(a)(2)-exempt offerings may have occurred. *See* ABA, Law of Private Placements at 96.

[7] Securities Act Rule 433(d)(1)(ii).

offering is not justified in light of the significant burdens it would impose on issuers and the private placement market if adopted. Should the Commission nevertheless determine that a pre-sale Form D should be filed in Rule 506(c) offerings, we recommend that the filing deadline be the date of first use of communications constituting broadly disseminated written general solicitations or, in the case of inadvertent general solicitations (*i.e.*, "foot-faults"), up to four business days after the issuer becomes aware of such communications by any offering participant.

B. The Commission should not amend Rule 503 to require the filing of a closing amendment to Form D within 30 calendar days of terminating an offering, because it will impose unnecessary disclosure obligations and costs on all issuers, particularly small private companies.

C. We support the Commission's determination not to condition the availability of Rule 506 on the timely filing of a Form D. However, we believe that the proposed one-year automatic disqualification period triggered by the failure to timely file a Form D is still a draconian result. A one-year disqualification should not be mandatory in all cases but, instead, should be one of the sanctions that can be considered by a court or the Commission as necessary or appropriate.

D. Proposed Rule 507(b) should not apply to filings made by affiliates that are not under the actual control of an issuer, because of the inability to influence the non-controlled affiliate's compliance with the applicable provisions of Rule 506, and the difficulty that all issuers, but particularly small private companies, will have in conducting due diligence on non-controlled affiliates (*e.g.*, portfolio companies under common "control" of private investment funds).

E. The Commission should provide additional guidance regarding the operation of the waiver process contemplated by Rule 507, in order to mitigate the costs and uncertainty associated with the process.

F. We generally support a requirement to include specified legends in certain written offering materials pursuant to proposed Rule 509(a) and (b), but believe revisions should be made to ensure that the legends are presented in a prominent manner and don't become viewed as boilerplate by the intended beneficiaries.

G. The Commission should not adopt proposed Rule 509(c) to require additional disclosure of performance data by private funds, given the sufficiency of existing disclosure requirements and the extensive oversight of such disclosure by the Commission and the state regulators.

H. The Commission should not adopt proposed Rule 510T to require the submission of written general solicitation materials because we believe the cost of compliance will greatly outweigh any benefits afforded by the ability to use Rule 506(c).

I. The Commission should not adopt the proposed revisions to Rule 156, because existing regulations applicable to private fund advertising are sufficient to address the Commission's concerns.

J. The Commission's proposed changes to Form D should not apply to Rule 506(b) offerings, in light of the absence of evidence of abuse over the course of the Commission's 30-plus years of experience overseeing these offerings; absent such evidence, the burdens of compliance, with such changes, if adopted, would outweigh any potential informational benefits.

K. Should the Commission adopt changes to Form D, certain information should be permitted to be submitted on a confidential basis to minimize the potential that private companies will suffer competitive harm from making public disclosures with the Commission.

L. If revisions are made to Form D, the Commission should make specified other changes to certain of the proposed line-item requirements, in order to minimize the potential material adverse impact on small private issuers while still allowing the Commission to gather information on Rule 506(c) offerings.

M. The Commission should provide additional guidance, or make additional rule changes, to better harmonize certain existing Commission rules and interpretive guidance with new Rule 506(c).

III. Proposed Revisions to Rule 503

A. Advance Form D Proposal

1. *The proposed requirement to file an advance Form D 15 calendar days before engaging in general solicitation in connection with a Rule506(c)offering is not justified in light of the significant burdens it would impose on issuers and the private placement market if adopted.*

The Commission proposes to require issuers to file a Form D notice 15 calendar days before the first use of general solicitation in connection with an offering under Rule 506(c) (an "Advance Form D"). The Proposing Release indicates that the Advance Form D would "enhance the information available to the Commission to analyze offerings initiated under Rule 506(c), including issuers that were unsuccessful in selling any securities through these offerings or chose alternative forms of raising capital."[8] Absent some indication that Rule 506(c) offerings as envisioned by Congress are or may become problematic, however, we believe that the marginal informational benefit to the Commission of an Advance Form D filing does not justify the significant burdens the requirement would impose on issuers and the broader private placement market in this country. In our view, there are less restrictive alternatives that would fulfill the Commission's informational objectives without impairing efficient capital formation under this new exemption.

One of the principal advantages of a Rule 506 offering is flexibility. Once an issuer has reached an agreement with an investor, it can close the transaction immediately if it chooses to do so. Under current Rule 506, the issuer generally can avoid announcing its intention to engage in the transaction (assuming no antifraud duty to disclose otherwise arises) until it is certain that the transaction can be completed (*i.e.*, within 15 calendar days of the date of first sale in the transaction). Market participants and competitors need not know that the issuer has abandoned an offering if no sales are in fact made. An issuer need not choose between a Rule 506(b) offering and a Rule 506(c) offering until the last minute, if the issuer wishes to keep its options open and is able to avoid a general solicitation prior to the decision point that would foreclose its ability to complete a Rule 506(b) offering. An issuer intending to conduct a Rule 506(b) offering therefore can move seamlessly to a Rule 506(c) offering if it determines that any of its communications constitute general solicitation.

In our view, the existing approach is consistent with the provisions of Section 106 of Title I of the JOBS Act applicable to emerging growth companies. Under that section, emerging growth companies are able to submit registration statements in draft form to the Commission and only need to file a registration statement publicly if, and when, the company decides to move forward with an offering. If the Commission's rules are adopted as proposed, the public disclosure burdens placed on private companies that wish to remain private, would be greater than the burdens placed on companies trying to decide whether to go public.

In addition, much of this flexibility afforded by Rule 506 will be lost if an issuer is required to make an Advance Form D filing 15 calendar days before using general solicitation in an offering. Based on our collective experience representing small and emerging issuers, we believe that a significant number of such issuers would refrain from using general solicitation, if to do so would require advance disclosure that would expose them to market and/or competitive risk before the general solicitation could commence. Because the proposed requirement to make an Advance Form D filing thus could have the unintended

[8] 78 Fed. Reg. at 44811.

effect of discouraging reliance on Rule 506(c) by the types of issuers the new exemption is designed to benefit, we believe its adoption could have the effect of frustrating the Congressional purpose underlying the JOBS Act.

Equally significant, Rule 506(c) would no longer be available as a "back-up" in the case of an inadvertent instance of general solicitation in an offering that had been planned as a private offering under Rule 506(b) – the "foot-fault" scenario we believe will arise frequently if the Commission proceeds to adoption with the proposed Advance Form D mandate. We are particularly concerned that a small, unsophisticated issuer may launch what it believes in good faith to be a "quiet" Rule 506(b) offering, only to discover after-the-fact that an offering participant has engaged (mistakenly or otherwise) in unauthorized communications constituting "general solicitation" – thereby making it impossible to comply with the 15-day advance notice requirement. Smaller, developing companies lack the resources to engage expert counsel to assist in formulating judgments about what communications may or may not constitute "general solicitation" pursuant to the broad, facts-and-circumstances analysis prescribed by the Commission. It is unclear whether the 30-day cure period in proposed Rule 507(b) would be available to mitigate this problem. But even if the Commission were to clarify that a 30-day "cure" period is available in the "foot-fault" context, the additional 15-day "speed bump" could delay and perhaps derail the entire offering, should an elusive open market window abruptly close during the prescribed 15-day "waiting period" between the filing of the Advance Form D and commencement of general solicitation. We respectfully submit that Congress could not have intended small businesses to have to choose between reliance on Rule 506(b) or 506(c) well before they are certain that an offering will be made, how it will be made, or whether that offering ultimately will succeed (*e.g.,* as evidenced by the first sale).

In this regard, we note that the Commission has not provided interpretive or other guidance as to what forms of emerging social media communications might qualify as "general solicitation" for purposes of Rule 502(c) of Regulation D.[9] Given that a general solicitation could consist of a private e-mail directed to, or even a telephone conversation with, one or a few investors in situations where the issuer has no substantive, pre-existing relationship with that

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[9] We recognize that the Commission has addressed the application of Regulation FD's "public disclosure" element to new and evolving forms of social media, in explaining its decision not to bring an enforcement proceeding against Netflix, Inc. and its CEO based on a Facebook posting by the CEO. *See* Report of Investigation Under Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc. and Reed Hastings (April 2, 2013), available at http://www.sec.gov/litigation/investreport/34-69279.pdf. However, the Commission has not yet indicated whether and under what circumstances an electronic communication (other than a communication posted on an unrestricted Internet website) would be considered a general solicitation within the meaning of Rule 502(c) of Regulation D.

investor(s),[10] the current lack of certainty as to what forms of communication may rise to the level of a general solicitation compounds the potentially chilling effect of the proposed Advance Form D. This is another reason an Advance Form D, if required, should only be triggered by a general solicitation that is widely disseminated.

In addition to compelling difficult early determinations on what types of communication might be viewed in hindsight to be general solicitation, an Advance Form D filing requirement also would impose the cost of an additional filing on resource-strapped, development-stage issuers. There are potentially significant legal costs associated with the preparation and review of each required filing (potentially as many as three relating to a single Rule 506(c) offering[11]) if an Advance Form D is mandated. Such costs would be incurred even if issuers were allowed to dispense with the filing normally made 15 calendar days after the first sale (the current Form D filing requirement), assuming they were able to include all of the required post-sale information in the Advance Form D. In our experience, the ability to defer the filing obligation until a reasonable period (within 15 days) after the first sale provides a significant benefit to smaller issuers. Moreover, as noted, if there is no sale, no Form D filing would be required under existing rules. Accordingly, at a minimum, we do not believe that these added costs should be imposed where no sale, in fact, occurs.

The Advance Form D requirement also could trigger significant filing compliance costs if the states adopt the Advance Form D filing requirement for "notice" purposes. If so, state filings could be required in the 50 states and four territories before the issuer knows in which jurisdictions it may extend a potential offering.[12]

Failure to file an Advance Form D in a timely manner, under the Commission's proposal, would subject issuers to a potentially severe penalty in connection with any subsequent private offerings, as further discussed below – ineligibility to use Rule 506 for one year. This punishment seems disproportionate to the offense in "foot-fault" situations, where a late filing is attributable to an unintended oversight or uncertainty over whether certain communications fall

[10] *See* note 6, above (cautioning that the absence of a pre-existing relationship between an issuer and prospective investors does not foreclose a valid private placement exemption).

[11] These would be an Advance Form D, the current Form D due within 15 calendar days after the date of first sale (unless the issuer is able to include all information required in the post-sale Form D in its Advance Form D), and the closing amendment to Form D discussed in the next part of this letter. In addition, annual updates may be required for ongoing offerings.

[12] This filing obligation would be triggered by the "notice" filing requirements of the states to file with them whatever is filed with the Commission in connection with a Rule 506 offering.

within the nebulous framework of the Rule 502(c) concept of general solicitation.

2. *Should the Commission determine that a pre-sale Form D should be filed in Rule 506(c) offerings, we recommend that the filing deadline be the date of first use of communications constituting widely-disseminated general solicitations or, in the case of inadvertent general solicitations (i.e. foot-faults), up to four business days after the issuer becomes aware of such communications by any offering participant.*

Should the Commission determine to require a pre-sale Form D, to address our concerns about the potentially chilling effect of an Advance Form D requirement on small business capital formation, we recommend that the Commission take a less restrictive approach to achieving its objectives by deferring the filing due date of an "early" (pre-sale) Form D until the date of first use of any communication constituting general solicitation,[13] or a short period of time thereafter if such use was inadvertent or mistaken (*e.g.*, four business days).[14] Such a filing would alert the Commission and other users of Form D to the commencement of a Rule 506(c) offering approximately in real time, while at the same time preserving an issuer's flexibility to elect whether to choose a "quiet" Rule 506(b) offering or a Rule 506(c) offering accompanied by general solicitation, without incurring the risk of advance market signaling that might foreclose an issuer from making any exempt offering.[15] This approach would give issuers sufficient time to analyze in advance whether a planned communication is in fact a general solicitation, and would mitigate the unnecessary issuer burdens in the "foot-fault" situations discussed above.

B. Closing Amendment Form D Proposal

Requiring an additional Form D filing to be made within 30 calendar days after termination of an offering will impose unnecessary disclosure obligations and costs on all issuers raising capital under Rule 506 but, in our view, will have a particularly adverse impact on small private companies. As discussed above, unsuccessful or failed offerings would have to be revealed, which could cause irreparable competitive and reputational harm to a small private issuer in need of capital. And if securities are sold, the amounts raised and use of proceeds

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[13] *Cf.* Securities Act Rule 433(d)(1)(deadline for filing a free-writing prospectus in connection with a registered offering).

[14] *Cf.* Securities Act Rule 433(f)(deadline for filing a free-writing prospectus, if information constituting a "written offer" that is attributable to the issuer or other offering participant, is published or distributed by the media).

[15] The Commission has acknowledged in the Proposing Release (78 Fed. Reg. at 44811) that it does not anticipate that its staff will review each Advance Form D filing when made, but will find useful the information gathered pursuant to this particular filing.

would have to be disclosed in substantial detail, regardless of whether the issuer is subject to the Commission's periodic and current reporting requirements. Our concerns about the costs and other burdens of the proposed changes to the content of Form D are set forth in Part VIII of this letter.

As in the case of Advance Form D, there is a significant possibility that small, unsophisticated issuers may fail to comply with a closing Form D requirement due to administrative oversight or lack of clarity about whether an offering had actually terminated. In this connection, the Commission has stated that it will deem an offering to be ongoing if the issuer fails to file a Form D – an apparent presumption that could raise significant issues under Section 5 of the Securities Act (*e.g.*, integration) in connection with concurrent Rule 506(b) and Rule 506(c) offerings, or Rule 506(b) offerings followed by Rule 506(c) offerings (and vice versa). Many issuers, particularly private funds and smaller operating companies, are engaged in virtually continuous offerings that frequently do not proceed in a linear, monthly form. For all these reasons, we are concerned that the difficulty of determining when one offering ends and another, separate offering begins will make it almost impossible for some issuers to comply with the 30-calendar day filing deadline, thereby exposing them to proposed new disqualification provisions that could knock them out of the private markets entirely for an entire year (as discussed further in Part IV of this letter).

Many questions already arise in the practical application when an issuer is analyzing whether an offering has terminated or instead may be continuing, including but not limited to whether an event of sale may have occurred within the meaning of Securities Act Rule 152 where a purchase commitment is made, and whether multiple private offerings should be integrated.[16] The answers necessarily will vary depending on the particular facts and circumstances of the issuer and its offering, and the quality of the legal advice obtained (if any). Moreover, the process of answering these questions is complex, time-consuming and expensive, especially for smaller or emerging growth issuers with limited resources. Establishing an arbitrary 30-day deadline that begins to run from an often indiscernible "termination" date thus would be inappropriate and inconsistent with the pro-capital formation intent of the JOBS Act.

[16] These difficulties are especially acute for private funds, which may not have a specific fund-raising target in mind at the outset, but may be seeking additional funds over time with varying degrees of intensity – e.g., a private fund may be "soft-closed" to new money, but nevertheless may accept a new investment opportunistically, depending on the circumstances. There are periods of time when sales are suspended as funds digest the amount of capital raised or managers decide temporarily to cease taking capital, but resume depending on market conditions and other factors that figure in managers' decisionmaking. An ongoing fund offering therefore may not truly "terminate" until a decision is made to wind down the fund.

We believe that the additional costs and burdens that would be incurred if a closing Form D became mandatory would discourage some issuers from utilizing Rule 506 – a result that would run contrary to the Congressional purpose animating the JOBS Act. Other issuers may terminate a Rule 506 offering prematurely out of an abundance of caution, in a desire to create their own certainty regarding the timing of their closing Form D filing obligations. Accordingly, we urge the Commission to consider carefully whether the additional information requested in a closing Form D is necessary, whether there are less burdensome ways to gather it, and whether it can be gathered for the Commission's informational purposes without being made public.[17] One viable alternative, for those issuers engaging in non-continuous offerings, would be to require confidential submissions of prescribed information – including written general solicitation materials – to be made to the Commission within a reasonable period after the end of a quarter in which any offering had been completed (to the extent reasonably determinable). Private funds and other issuers in a continuous offering mode could be required to make a confidential filing with the Commission (to include "written general solicitation" materials) at the end of any calendar year in which they had filed a Form D, providing the information sought by the Commission on an offering-by-offering basis. The Commission could collect, analyze and make statistical information derived from these filings available on an aggregated basis without identifying the issuers by name. These alternatives are discussed further in Part VI.C of this letter, relating to proposed Rule 510T.

IV. Proposed Revisions to Rule 507

A. We agree with the Commission's determination not to make the filing of a Form D a condition of the exemption, but we do not favor a mandatory disqualification pursuant to the proposed amendment to Rule 507(a); rather, we believe that disqualification should be a remedy to be considered in the discretion of a court or the Commission.

We agree with the Commission's determination not to propose making a Form D filing (including amendments) a condition to reliance on Rule 506, and commend the Commission for its "reluctan[ce] to impose a sanction as severe as the loss of a Securities Act exemption, which would give purchasers rescission rights and result in loss of 'blue sky' preemption, for failure to file a form that is intended primarily to provide information to the Commission."[18] In general, we concur with the Commission's judgment, as reflected in proposed Rule 507(a), that a prior judicial order, judgment or decree finding a violation of Rule 503,

[17] We discuss these questions in greater detail below, in Part VIII of our letter.
[18] 78 Fed. Reg. at 44818 (footnote omitted).

and/or (for the first time) newly proposed Rules 509 or 510T, should be a predicate to disqualification from use of Rule 506 (as well as Rules 504 and 505). And we appreciate the preservation of the waiver process in re-designated Rule 506(c). That said, we urge the Commission to inject the concept of "materiality" into amended Rule 507(a) (and (b), as discussed in the next section), and recommend that the Commission limit the Rule 503 disqualification triggers to untimely or unfiled Form Ds (and amendments thereto).

We would expect that a judicial order, judgment or decree (whether preliminary or permanent) would not be issued unless the court of competent jurisdiction found the violation to be intentional (or reckless) and also material to the offering in question. Focusing solely on Rule 503 for purposes of this analysis, we believe that failures to file a Form D (or required amendments thereto) caused by mere negligence, or that are immaterial to the offering, should not lead to the severe penalty of disqualification – subject only to the availability of a Commission waiver for good cause shown "that it is not necessary under the circumstances that [the] exemption be denied." Because the concept of materiality is of major concern, we urge the Commission to build it into the language of the relevant rule amendments – including newly re-designated Rule 507(c) (now Rule 507(b)) – so that no issuer would be excluded from using Rule 506 as a result of immaterial violations.

With respect to non-compliance with Rule 503 as a disqualification trigger, we recommend that the Commission clarify that only a failure to file a Form D or amendment as required, or to file these documents in a timely manner, will cause Rule 506 disqualification. Thus, a failure to include some item of information in a Form D or amendment thereto in accordance with Rule 503 should not disqualify an issuer, unless a particular Form D filing is materially deficient.[19]

Moreover, we suggest that proposed Rule 507(a) be revised to indicate that disqualification may be a remedy, but not the sole or mandatory remedy in

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[19] It is unclear whether the Commission intends to limit the proposed disqualification provisions to failures to file and late filings. The reference in proposed Rule 507 to "compliance with the requirements of Rule 503" could be read to encompass the informational content of Form D, as well as the filing obligation. Accordingly, we urge the Commission to clarify the proposed regulatory text to focus solely on an issuer's Form D (and amendment) timely filing obligations. Consistent with the staff's approach in other contexts (*see, e.g.,* Division of Corporation Finance, Compliance and Disclosure Interpretations, Securities Act Rules, Item 603.03), only a "materially deficient" Form D would be treated as not having been filed in a timely manner. Although we acknowledge that current Rule 507(a) does not recognize any distinction, for purposes of Rule 503, between a Form D's timely filing and its content, the Commission has acknowledged that it has brought few enforcement actions in this area that otherwise might offer insight into the Commission's thinking on the significance of this distinction, if any, under current Rule 507. *See* 78 Fed. Reg. at 44818 n. 84.

all situations. One way to accomplish this goal without forcing issuers to resort to the post-hoc Commission waiver process would be to reverse the presumption of disqualification triggered by a relevant court order, judgment or decree and put the burden on the Commission either to: (a) ask the presiding judge to impose a one-year prospective disqualification as a remedy, thereby enabling a defendant to convince the judge otherwise; or (2) determine, as a condition precedent to disqualification based on a court order, judgment or decree, that the adjudicated violation in question was in fact material to the particular offering.

We believe it would be more appropriate and consistent with how the law operates with respect to failure to comply fully with other Commission filing requirements, that the court of competent jurisdiction should have the ability to fashion an appropriate remedy short of disqualification for a one-year period in light of all the relevant facts and circumstances. Alternatively, the Commission could identify circumstances in which a waiver would be available, as discussed further below. An appropriate remedy other than complete exclusion from the Rule 506 market for a year could include enjoining future violations in some circumstances, or imposing a shorter disqualification period (*i.e.* six months) in other circumstances. To illustrate, the Commission could specify that an isolated failure to comply with otherwise effective internal filing compliance controls and procedures is something that a court (or the Commission, in the waiver process) could and should weigh in mitigation. Conversely, a court could take into account, in finding that disqualification is warranted in a given case, facts demonstrating that the issuer was reckless in failing, depending on the circumstances, to have adequate compliance controls and procedures in place.

B. Automatic loss of ability to rely on Rule 506 for one year under proposed Rule 507(b) is draconian and not necessary to further the goal of encouraging more timely Form D filings.

We understand that the Commission seeks to create strong incentives to promote compliance with the Form D filing requirements, and thereby to obtain better information regarding the private offering market. We believe this is an important and appropriate goal, as is the Commission's desire to promote compliance with Form D filing requirements without conditioning the availability of Rule 506 on such compliance. However, the proposed amendments to Rule 507 to add a new subsection (b), which would disqualify an issuer automatically from relying on Rule 506 for one year for future offerings if the issuer, or a predecessor or affiliate, failed to comply during the last five years with Form D filing requirements in any Rule 506 offering, are not commensurate with the harm that we believe would be caused by late or otherwise deficient filings. Automatic disqualification is an especially drastic penalty, given the uncertainty of this penalty's application to non- or late filings vs. compliance with Form D line-item requirements,[20] the proposed imposition of multiple and potentially confusing Form D filing obligations that create new traps for the unwary issuer (as described in Part III of this letter), the absence of a materiality qualifier as discussed above, and the protracted look-back period (five years) which includes the conduct not only of the issuer, but also of affiliates and predecessors, as disqualification triggers (which we discuss further in the next part of this letter). When considered in conjunction with the current lack of Commission guidance on the contours of the general solicitation concept in an era of rapidly changing and increasingly pervasive social media communication, we believe that these disincentives would operate substantially to raise the cost of capital for the small and emerging issuers that are the intended beneficiaries of the JOBS Act reforms.

The alternatives available to an issuer that is disqualified from using Rule 506 are significantly limited, and far more costly. An issuer would have to rely on the statutory private placement exemption under Section 4(a)(2) of the Securities Act, and undertake to comply with state "blue-sky" laws for private limited offerings (including but not limited to state "bad-actor" disqualification provisions), because the securities would not be considered "covered securities" within the meaning of Section 18 of the Securities Act. Domestic offerings under Regulation A and Rules 504 and 505 similarly are not viable alternatives, because of the applicability of state blue-sky laws and fixed limitations on the amount of capital that can be raised.[21] Nor is an offshore offering under Regulation S a realistic or cost-effective alternative for many U.S. start-ups. For some struggling small businesses, the inability cost-effectively to access the private markets for a full year could be the equivalent of the "death penalty."

In our view, a five-year look back period in an automatic disqualification context is unduly burdensome when evaluated in light of the Commission's primarily information-gathering purpose. The breadth and uncertainty of the fact-intensive "affiliate" analysis covering the lengthy period of five years could be an insurmountable barrier for a small business under common control, with numerous other portfolio companies, of a private equity or venture capital fund, and with no legal or practical ability to obtain the requisite information from any of its "sister" companies or its upstream affiliates. (We discuss the special problems the broad affiliate concept presents for private funds in the next part of this letter). The Committee believes that the substantial diligence costs and other burdens a small issuer would have to incur to perform the requisite diligence on all predecessors and affiliates over a five-year period, in order to avoid automatic disqualification based on the acts or omissions of other persons

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[20] *See* note 19, above, and accompanying text.

[21] *See* DERA Study, note 5, above, at 7-8.

or entities, would far outweigh any informational benefits to the Commission and would not, in our view, benefit investors. We therefore recommend that the Commission carve the disqualifying acts or omissions of affiliates out of proposed Rule 507(b), because of the disproportionately negative consequences for issuers. In our view, the addition of a strong "anti-evasion" provision to this rule is a more constructive way to address the potential for collusive behavior among affiliates.

Should the Commission determine to adopt a look-back period for automatic disqualification, we recommend that the Commission significantly shorten this period. We suggest a two-year look-back that is prospective only (as the Commission has proposed), and does not extend past (*i.e.* earlier than) the effective date of the final rule amendments. We further suggest that the Commission consider providing a longer one-time "cure" period in which to make the required Form D filings – for example, 45 days – given the drastic consequences of disqualification that we have outlined.

In specific response to the Commission Request for Comment No. 53, we support the addition of a provision similar to existing Rule 508, under which insignificant deviations from the requirements of Rule 503 would not result in disqualification under proposed Rule 507(b) if the issuer could demonstrate good faith and a reasonable attempt to comply with the Rule 503 filing requirements.

The Committee does not support, whether as an alternative to a cure period or for any other reason, a Commission amendment to Rule 507 that would add a Commission cease-and-desist order as a disqualification trigger. Our position applies both to Rule 507(a) as proposed to be amended, and to new Rule 507(b). (Commission Requests for Comment Nos. 53 and 54).

C. Automatic disqualification under Proposed Rule 507(b) would have a disproportionately adverse impact on private funds, because of the nature of their business and their complex organizational structures.

Automatic disqualification under proposed Rule 507(b) presents special difficulties for private equity and venture capital funds, because they often invest in numerous portfolio companies and have complex structures comprised of multiple related "sister" funds. As a result, private funds are likely to have many more "affiliates" than other issuers and, due to the nature of their business as investors, frequently do not exercise actual control over the day-to-day management of their affiliates. While we understand the Commission's concerns regarding possible evasion of Rule 507(b)'s one-year prospective disqualification via offerings through affiliated issuers, we recommend that the

Commission take a less restrictive approach to addressing this potential problem by adding strong anti-evasion language to the proposed rule amendments and monitoring the Rule 506 market for possible abuse in this area.

To exclude a private fund from reliance on Rule 506 because an affiliated (i.e. sister) fund failed to comply with Rule 503's technical filing requirements would, under current practice, condemn that sister private fund to be excluded from raising capital for an extended period of time.

Similarly, because the broad "affiliate" concept captures otherwise unrelated issuers under common control, numerous small, developing portfolio companies would be deprived of access to the Rule 506 market if a "sister" company or affiliated private fund is subject to automatic disqualification. It is highly unlikely, in our view, that a private fund would be in a position to influence compliance with the relevant Regulation D provisions by its portfolio companies. And it would be extremely difficult and expensive for any of these affiliated entities – especially the many small, non-reporting issuers with a common fund investor that have no visibility into the activities of sister issuers – to conduct the necessary diligence over a five-year historical period.[22]

It can be argued that disqualifying a private fund from using Rule 506 does not preclude it from raising capital under Securities Act Section 4(a)(2). However, the vast majority of new capital being raised by private funds comes from institutional investors, and the fact that the fund is "disqualified" as an "affiliated entity" from using Rule 506 will be a significant deterrent to institutional investors considering whether to commit their capital to such a fund. In addition, as we touched upon in the previous section, the fund issuer would lose the considerable benefits of state blue-sky law preemption under Section 18 of the Securities Act. Most of the state-prescribed "blue-sky" exemptions that are available in connection with a Section 4(a)(2) offering place limitations on the number of purchasers in the state, and in some states, on the number of offerees in the offering. For private funds and other issuers engaged in continuous offerings, the "covered securities" status of securities offered and sold under Rule 506 is of crucial importance to the success of their capital formation activities.

Yet, with the proposed revision to Rule 507 extending to the conduct of predecessors and affiliates, the dire consequences of an unintentional error

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[22] The availability of a waiver, once a fund and/or investee issuer has been disqualified automatically by virtue of the conduct of an affiliate over which that issuer exercises no actual control, would not compensate for the heightened diligence costs associated with the five-year look-back, even if the Commission limits the beginning of the look-back to the effective date as proposed. Moreover, even more costs – legal and otherwise – would be incurred seeking a waiver from the Commission or its staff, as discussed below in Part IV.D. of this letter.

committed by one private investment company would be visited upon separate, albeit related, funds and portfolio companies. It is difficult to imagine the investor protection analysis that properly arrives at the conclusion that the investors in a separate private investment company, or the non-affiliated shareholders of separately operated, but technically affiliated portfolio companies, should suffer solely as the result of a Rule 503 filing violation by a single affiliate within a large fund complex.

D. The Commission should provide additional guidance with respect to the waiver process, particularly in the automatic disqualification context.

The Proposing Release notes that the Commission may waive disqualification under proposed Rule 507, and provides a few examples of circumstances that might justify a waiver. As discussed above, however, the proposed one-year disqualification would impose an undue burden on Rule 506 capital-raising activities, notwithstanding the one-time 30-day "cure" period available under proposed Rule 507(b), and the possibility of obtaining a waiver. To mitigate the costs associated with waiver requests, we recommend (in response to Commission Request for Comment No. 56) that the Commission provide concrete guidance regarding the possible grounds for relief, the anticipated pendency of a request, and other aspects of the waiver process.

The smaller, unsophisticated issuers that can least afford to retain legal counsel to help navigate the complicated proposed amendments to Regulation D to avoid a one-year disqualification may be the ones most in need of a post hoc waiver, for all the reasons previously discussed.[23] Without more guidance from the Commission as to what factors will be considered in evaluating the appropriateness of a waiver request, the added costs (legal and otherwise) of seeking a waiver for these issuers may far exceed the amount raised in the original offering. During the pendency of a waiver request, moreover, an issuer will be unable to tap the Rule 506 marketplace for more capital.

[23] It is worth noting that these smaller, non-fund issuers recently were found by the Commission's staff to "account for the majority (60%) of all new offerings [the overwhelming majority of which are conducted under Rule 506, as discussed in note 21, above, and accompanying text] and Form D filings." DERA Study, note 5, above, at 11; *see id*. at 12 (these issuers tend to be small when measured in terms of revenue ranges disclosed in Form D filings).

V. Proposed New Rule 509

A. We generally support a requirement to include specified legends in certain written offering materials, but believe revisions should be made to the proposal.

We generally support the legend requirement in proposed new Rules 509(a) and (b). Indeed, the inclusion of legends in certain written offering materials is commonplace in connection with virtually all offerings made in reliance on Rule 506. We recommend, however, that the Commission reconsider the proposed requirement that the legends be included "in any written communication" that constitutes (or may be deemed to constitute) a general solicitation. Compliance with this requirement will be unnecessarily burdensome and costly, both because of (a) the volume of "written communications" that will or may need to include the legends, and (b) the legal and other expenses that will be incurred by issuers seeking guidance as to whether a particular communication or type of communication constitutes a "general solicitation," especially in the absence of a current, more focused definition of either term that takes into account the realities of current market practices and still-evolving social media platforms.

The burden of complying with the proposed rule, if adopted, will be particularly onerous for the multitude of private funds that engage in continuous offerings and will, as a result, seriously increase the cost and expense and thus inhibit these funds from raising capital pursuant to Rule 506(c). The lack of clarity concerning what materials may constitute general solicitations may lead issuers simply to include the required legends in all materials. Such "over-disclosure" would diminish the impact of the required legends because recipients may tire of receiving the same disclosures multiple times. The legends could quickly be viewed as boilerplate. We will return to this issue in the discussion of proposed new Rule 510T below.

We believe the objectives of the Commission can be achieved at far less cost by revising proposed new Rule 509(a) and (b) to:

(i) delete the requirement that specified legends be included in "any written communication" that constitutes general solicitation; and

(ii) require the legends only on any written communication that is a general solicitation that is broadly disseminated.

As so revised, the proposed new rule would ensure that the specified legends would be brought to the attention of all investors in a prominent manner, without forcing the issuer to incur the unnecessary costs and other burdens discussed above and without the legends eventually being regarded by investors as mere boilerplate. Moreover, requiring the specified legends to be included in a written communication that is broadly disseminated would obviate the need for providing such legends in connection with oral communications.

As for the legends themselves, we note that Commission Request for Comment No. 66 states that "the proposed amendments do not specify the precise wording of any required legends." However, the text of the proposed rule itself suggests that the specific wording therein must be set forth in the legend, and nothing in the proposed note suggests that any variation is permissible. Accordingly, we recommend that the note to proposed new Rule 509 be revised to make clear that the issuer may modify the text of the required legends so long as the substance thereof is preserved.

As stated elsewhere in our letter, we urge the Commission to provide guidance on what types of cyber-communications will be deemed: (a) to be "written" (*i.e.*, do the definitions in Securities Act Rule 405 apply?); and (b) to rise to the level of general solicitation for purposes of both Rule 506(c) and proposed Rules 509 and 510T, should the latter be adopted. In our view, only those communications that qualify as general solicitation and, in addition, are widely disseminated, should require legends. It would be very helpful, in this regard, if the Commission were to confirm that legends and other cautionary language (*e.g.*, Regulation G-mandated reconciliations) may be included in a written communication by hyperlink; for example, in the context of a tweet subject to number-of-character limitations.

B. Although we share the Commission's concern regarding the disclosure of performance data by private funds, we believe that additional requirements in this area are not necessary or appropriate for the protection of investors.

The Commission recognizes in the Proposing Release that private fund offering materials, including the presentation of performance information, are already subject to extensive antifraud requirements, including Section 17(a) of the Securities Act, Section 10 of the Exchange Act and Rule 10b-5 thereunder, as well as Section 206 of the Advisers Act and the rules thereunder, which prohibit investment advisers from engaging in any act, practice or course of conduct which is fraudulent, deceptive or manipulative. For example, Rule 206(4)-8, which applies to prospective as well as actual investors, prohibits an adviser from making an untrue statement of a material fact or omitting to state a material fact necessary to render the statements made, in the light of the circumstances under which they were made, not misleading. There is also considerable staff no-action and interpretive guidance available on fund advertising materials, which guidance already requires disclosing that "past performance does not guarantee future results," and stating how performance returns may be presented. Private fund offering materials are subject to review and examination for compliance by the SEC staff for investment advisers which are registered with the SEC, and by state securities commissioners for fund managers who are registered with the states. We believe that these requirements, guidance and supervision are sufficient for investor protection purposes, and recommend that the Commission reconsider the need for the additional disclosures set forth in proposed new Rule 509(c).

In particular, we believe it would be misleading to show performance data as of an undisclosed date, or to show performance that is substantially outdated, and that there already exists guidance on when gross and net performance may be shown. In addition, we are concerned that the disclosures mandated by proposed new Rule 509(c) – that "a private fund is not required to follow any standard methodology when calculating and representing performance data" and "that the performance of the private fund may not be directly comparable to the performance of other funds" – could lead investors mistakenly to believe that the performance data are not compiled or presented in a reliable manner. We do not believe this was intended by the Commission, which recognizes in the Proposing Release that differences in valuation depend on individual strategies, and that the Commission is not mandating a singular valuation method. Auditors review the appropriateness of valuation procedures (and the adviser is also required to set appropriate valuation procedures), but different judgments implied in different valuation models may lead to different results. If the valuation models are appropriate and identified for investors, this should be sufficient for antifraud purposes. Our concern is that differences in results are not unique to private funds: the same issues apply to the financial statements of other issuers in comparing their earnings, and investors should not (by reason of the proposed legends) be led to be concerned that audited financial statements of private funds are less reliable than those of other issuers. We also believe (in response to the Commission's question on this subject), that only private funds with audited financial statements (except during the initial period prior to the completion of the first annual audit) should be permitted to show performance data in a Rule 506(c) offering for a private fund, and that this would substantially relieve concerns about the appropriate standards for performance data.

We share the Commission's concern that private fund performance data be updated, as appropriate. As discussed above, we believe use of outdated performance data in written general solicitation materials would be inconsistent with current antifraud rules under the Advisers Act. However, we are also concerned that the requirement in proposed new Rule 509(c) to make available to investors recent performance data "as of the most recent practicable date" raises other issues. To illustrate, issuers may compile performance information solely for internal purposes without the level of review and certainty that would allow for public disclosure of such information. Private fund issuers who compile this information monthly, quarterly or semi-annually (generally depending upon the strategy involved) should not have to undergo the additional expense of fully reviewing and preparing this information more frequently with the level of certainty required for public disclosure. In addition, the requirement to include a phone number or website for investors to obtain the most recent performance data will create the impression that preparation of performance data is required more frequently than may be practicable and, as such, is contrary both to the proposed limitation in the rule that such information only needs to be provided as of the most recent practicable date, and to the suggestion in the Proposing Release that the Commission does not expect a private fund to value its portfolio for the sole purpose of providing updated current performance under proposed new Rule 509(c).

We also agree with the Commission's determination not to impose manner and content restrictions on private fund general solicitation materials, such as requirements for use of standardized or audited calculation of performance data. The Commission correctly recognizes that the methods for performance calculations for private funds vary for a number of legitimate reasons, such as the type of fund, the assumptions underlying the calculations and investor preferences.

Finally, we agree with the Commission's decision not to prohibit the inclusion of performance information in general solicitation materials, although, as noted above, we believe it would be reasonable and provide assurance to investors to permit only issuers that have audited financial statements to include performance data in Rule 506(c) offerings. The Commission correctly acknowledges that investors consider performance to be a significant factor in selecting private funds and are therefore entitled to such information.

VI. Proposed New Rule 510T

A. We recommend that the Commission not adopt proposed Rule 510T.

We believe that the Commission has underestimated the burdens and costs, including the risk of legal liability, that new Rule 510T would impose on issuers if adopted as proposed. At the outset, the legal standard for determining what constitutes "written general solicitation materials" that must be submitted under proposed new Rule 510T is highly uncertain and would be difficult to apply absent further guidance from the Commission. At the same time, business practices related to the dissemination of information in the context of securities offerings are evolving quickly, resulting in a high volume of varied forms of communication that are distributed across a range of new media. Whether or not such new or evolving forms of communication, beyond an unrestricted Internet web site, constitute "written general solicitation materials" is a complex topic that the Commission has not addressed in over a decade.[24]

The Commission estimates the burden to submit written general solicitation materials to be two hours per offering under Rule 506(c), including the time needed to prepare applicable disclosures and to submit them through the Commission's website, and assumes that this burden will be carried solely by the issuer. We believe that the average time spent by issuers to submit the materials likely will substantially exceed two hours per offering, at a minimum because legal advice will have to be sought in determining which written communications with prospective investors rise to the level of a general solicitation prior to submission to the Commission. Thus, in our view, the costs attendant to compliance with proposed Rule 510T are likely to be considerable.

Proposed new Rule 510T, as just noted, would require issuers to determine whether materials used in connection with or related to an offering are in fact "written general solicitation materials." More specifically, the proposed rules require the submission of "any written communication that constitutes a general solicitation … in any offering conducted in reliance on …" Rule 506(c). An issuer and its legal counsel would need to understand and apply the meaning of both "written communication" and "general solicitation" in light of today's ever-changing social media communications environment. Even as defined in Rule 405 ("written communication") and rule 502(c) ("general solicitation") under the Securities Act, neither term has a clear and unequivocal meaning, but instead must be analyzed in light of all relevant facts and circumstances (including but not limited to the presence or absence of some form of "pre-existing relationship" between the issuer and the recipient of a particular communication that may or may not be a "general solicitation"). When interpreting the two terms together, the analysis of what constitutes "written general solicitation materials" becomes even more subjective and fact-specific. While the standard is inexact to begin with, the fact that business practices now widely accept means of written communication through new media and other platforms – which communications are frequently accessible to large communities, if not the general public – raises new questions for which there are no clear answers. The total volume of written communications disseminated over the course of a typical offering that will need to be reviewed under these vague standards will further burden the issuer. For all these reasons, we believe that proposed new Rule 510T, if adopted, will result in a significant burden in terms of both time and cost to the issuer.

[24] *See* Use of Electronic Media Release; *see also* note 9, above.

We believe the proposed requirement of submitting "written general solicitation materials" pursuant to proposed new Rule 510T must be evaluated in the broader context of: (a) the additional burdens placed upon issuers to verify/accredit investors for Rule 506(c) offerings; (b) the additional requirements imposed on issuers to conform to the "bad actor" requirements for all Rule 506 offerings, as required by new Rule 506(d); (c) the potential for disqualification from reliance on Rule 506 resulting from non-compliance with Form D filing and/or written submission requirements; and (d) the other burdens placed on issuers in light of the other proposed rules (*e.g.*, enhanced Form D content and multiple Form D filings).

The cost of compliance with these additional requirements may be viewed by many issuers as greatly exceeding the benefits afforded by the ability to use general solicitation in a private exempt offering context. As a result, we believe that it is possible that some, if not many, non-reporting smaller issuers will choose not to undertake Rule 506(c) offerings. This outcome would certainly be at odds with the JOBS Act goal of facilitating capital formation by small and emerging companies.

1. *Proposed new Rule 510T may negatively impact Regulation D offerings as a whole.*

We are also concerned that many issuers and other market participants (such as angel investor groups and existing accredited investor investment platforms) may conclude, in consultation with their counsel, that the new rules for general solicitation under Rule 506(c) significantly reduce their comfort level with certain practices that have become common and generally accepted (although not explicitly accepted by the Commission) in connection with private placements effected under pre-existing Rule 506 (new Rule 506(b)). These practices include presentations at angel venture fairs and incubator demo days, and the current practices involving accredited investor online offering platforms. Without a clearly delineated distinction as to which forms of communication in a Rule 506(c) offering would be considered "general solicitations," we believe that it is possible that smaller, early-stage issuers that opt to make a Rule 506(c) offering may conclude that they are required to submit materials to the Commission that previously had been used in connection with offerings conducted in reliance on Rule 506(b) and its predecessor Rule 506. Such a conclusion, if widespread, would call into question the continued efficacy of soliciting practices previously deemed compatible with private placements under Rule 506(b) and its predecessor, Rule 506, and thus could have a significant negative impact on overall private capital formation. This would be especially troublesome because, as the Commission's staff has observed, Rule 506(b) (formerly Rule 506) has been the dominant exemption used by issuers in conducting private offerings.

The Commission has acknowledged that the proposed rule could increase the regulatory burden for issuers in the Rule 506(b) and 506(c) markets, which could drive potential issuers, especially small issuers, to the Rule 504 and Rule 505 markets, or even to the public markets, but contends that the benefits of permitting general solicitation outweigh this burden. This contention ignores findings by the Commission's staff (as outlined in the Proposing Release and the DERA Study) that Rules 504 and 505 accounted for only 1% of all capital raised under Regulation D from 2009 to 2012. Securities offered under those rules are not "covered securities" and therefore are subject to substantive state securities regulation, which can add substantial cost to an offering and result in significant delays. This contention also ignores the Commission staff's finding that almost 90% of Regulation D offerings did not involve non-accredited investors. One obvious reason for this statistic is the desire of issuers to avoid the cost and delays attendant to meeting specific disclosure requirements imposed by Rule 502(b) in connection with sales to non-accredited investors. As a result, it is unlikely that a significant number of issuers unwilling to bear the burdens of Rule 506(c) offerings would switch to Rules 504 or 505. The more likely result is that the regulatory burdens would severely reduce Regulation D offerings as a whole. Obviously, this result would be entirely contrary to the Congressional intent underpinning the JOBS Act.

The adoption of Rule 506(c) has raised issuer concerns regarding the chilling effect of the broad concept of general solicitation on longstanding practices in a traditional Rule 506(b) offering, such as "demo days" and angel investor symposia. Although there has been no recent guidance in this area, we note, as an example, a staff interpretive letter, issued by the Commission's Division of Corporation Finance to the Michigan Growth Capital Symposium in 1995, which clarified that presentations made by small businesses, at the invitation of a state-run university, to an audience of sophisticated venture capital firms and other suppliers of capital, would not be considered a "general solicitation" under specified conditions.[25] It would be helpful if the Commission were to adopt – and amplify – prior staff interpretive positions indicating which practices will not be deemed to be a "general solicitation" in the context of a Rule 506(b) offering.

2. *We believe there are less burdensome methods for monitoring "market practices."*

We believe that requiring issuers to submit written general solicitation materials is not an effective and efficient means for the Commission to monitor and understand Rule 506(c) "market practices," and that there are less burdensome methods of accomplishing the Commission's goal that could

[25] *See* Michigan Growth Capital Symposium (May 4, 1995).

enhance the utility and clarity of the information collected. These practices could be adopted as part of the Commission's Rule 506(c) "work plan" discussed in the Proposing Release.

First, the Commission could establish advisory committees or panels of market participants and experts to assist the staff in gathering and analyzing sample data to assess market practices, rather than requiring the entire population of issuers to submit a wide variety of materials. In our view, the Commission currently lacks sufficient infrastructure, time or resources to review all materials that would be collected if proposed Rule 510T were to be adopted as proposed.

Second, rather than requiring issuers to submit all written general solicitation materials before their first use, the Commission could easily obtain such materials from other, publicly available sources. Online investment platforms are likely to become a ready source of such materials. In addition, the Commission could commission the development of automated information technology to search the Internet for offering materials fitting any criteria desired by the Commission. These materials then could be examined using any number of web browsers, which have become the *de facto* standardizing mechanism for viewing online materials in any format.

Third, if a broker-dealer that is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA") is acting as placement agent or otherwise participating in the Rule 506 offering, the broker-dealer is required to submit certain materials to FINRA pursuant to FINRA Rule 5123. The Commission could obtain copies of documents from FINRA rather than require the submission by issuers of duplicate documents to the Commission.

B. If the Commission decides to require submission of written general solicitation materials in Rule 506(c) offerings, these materials should be limited to those falling within certain categories, should be required to be submitted only upon request of the Commission and should not be made available to the public.

If issuers are required to submit written general solicitation materials, we believe that the materials should be limited to those that are intended to generally solicit and identify potential purchasers (in contrast to materials that have traditionally been distributed on a confidential basis to a limited number of potential purchasers), and that these materials should not be made available to the public after submission. In addition, as previously discussed, we urge the Commission to compel submission only of those materials that have been broadly disseminated to the public at large.

1. *Materials required to be submitted should be limited to broadly disseminated materials.*

As discussed above, the determination of what constitutes "general solicitation" will be difficult for issuers to make in practice due in major part to the ambiguity of the term as applied to current communications technology. We believe that the written general solicitation materials the Commission should be interested in reviewing are those that are more broadly disseminated to the public in order to generate preliminary interest from potential investors. The Commission should not be interested in other, more detailed written offering materials or transaction documents, the transmission of which may be restricted to limited groups of potential investors once a relationship is established between such investors and the issuer (or placement agent) after a broad solicitation. The offering materials distributed to this more limited audience could include private offering memoranda, detailed business plans, projections, and financial statements, which have been distributed to potential investors in traditional Rule 506 (now 506(b)) private placements on a confidential basis. These materials are often the subject of non-disclosure agreements and generally are not considered to constitute general solicitations. A requirement that all written offering materials associated with a Rule 506(c) offering, including those containing confidential, proprietary information, be submitted to the Commission likely would result in far fewer issuers taking advantage of Rule 506(c). As discussed, in private placements accompanied by a general solicitation involving FINRA member firms, these materials are already required to be submitted to FINRA under FINRA Rule 5123. Filing with the Commission would be, therefore, duplicative and unnecessary.

2. *Materials should be required to be submitted only upon request of the Commission.*

While we appreciate the objectives that the Commission wishes to achieve in collecting and reviewing written communications that are used in connection with making a 506(c) offering, compliance with the rule, as proposed, will substantially increase the costs and burdens of raising capital. Again, each issuer will first need to determine which written communications constitute general solicitations and, thereafter, submit those written communications that are (or may be) general solicitations to the Commission on or prior to the date of first use thereof and, where applicable, take appropriate steps to attempt to preserve the confidentiality of proprietary information that was included in such written communications. Those costs would be burdensome and onerous, particularly for issuers that engage in continuous offerings. Beyond that, the requirement that the relevant written communications be submitted to the Commission on or prior to the date of the first use thereof, represents both a trap for the unwary and, for those aware of the consequences of non-compliance, a disincentive to use of Rule 506(c). Moreover, we believe that, the staff of the Commission would be overwhelmed by the submission of written materials that constitute, or may be deemed to constitute, general solicitations and will not have the resources to review more than a fraction of these materials.

We suggest that proposed new Rule 510T(a) be revised to require only that each issuer submit to the Commission, upon request, any written communication that constitutes a general solicitation in any offering conducted in reliance on Rule 506(c). As so revised, the proposed new rule would minimize the burden that issuers engaging in general solicitation otherwise would bear, while permitting the Commission, based upon Form D filings and other information that comes to its attention, to obtain from selected issuers representative written communications that constitute general solicitation used in 506(c) offerings. The revised rule would also enable issuers to take appropriate steps, on a case-by-case basis, to preserve the confidentiality of proprietary and/or competitively sensitive information included in written communications that, while sent to a limited group of prospective investors, nonetheless might fall within the broad definition of general solicitation. In this regard, as discussed above, it would be helpful if the Commission were to focus only on those general solicitations that are broadly disseminated to the public.

3. *Submitted materials should not be made available to the public.*

If written general solicitation materials are required to be submitted to the Commission by issuers engaging in a Rule 506(c) offering, such materials should not be made available to the general public. Otherwise, issuers that include proprietary information in their offering materials would be reluctant to engage in a Rule 506(c) offering, in contravention of the legislative intent underpinning the JOBS Act. We also believe (in response to the Commission's question on this subject) that the public availability of materials submitted under proposed new Rule 510T, whether through EDGAR or another means, would not encourage investor interest in these offerings beyond what issuers and other market participants would attract by simply engaging in general solicitation efforts.

C. Assuming proposed Rule 510T is adopted substantially as proposed, we recommend that the requirement of making multiple submissions on a "first use" basis should be replaced with a single, post-closing submission requirement, or an annual submission requirement for continuous offerings.

Proposed new Rule 510T would require issuers conducting offerings under Rule 506(c) to submit to the Commission "any written communication that constitutes a general solicitation or general advertising…no later than the date of first use." The Commission has asked whether the solicitation materials should be submitted at a time other than the date of first use. For the reasons described in more detail above, we believe that this submission requirement, if adopted, would impose undue burdens on such issuers. Accordingly, as discussed, we have recommended that the Commission determine not to adopt proposed Rule 510T.

However, if the Commission ultimately decides to require issuers to submit written general solicitation materials used in a Rule 506(c) offering, we strongly recommend that issuers not be required to submit such materials "no later than the date of first use." We believe that this requirement would be unduly burdensome for issuers for a number of reasons. Specifically, it would be impractical for issuers to implement, would cause issuers to incur unnecessary costs, would delay the dissemination of information to prospective investors (and could delay the commencement of offerings) and would likely increase the risk of a significant degree of inadvertent non-compliance. Because of these factors, some issuers would be less likely to conduct Rule 506(c) offerings, whereas others might resort to use of non-written communications. Neither result would be desirable from a public policy standpoint.

In formulating an alternative to the proposed requirement that issuers submit written communications to the Commission no later than the date of first use, we considered: (a) the purpose of the requirement, as stated by the Commission, "of furthering the Commission's understanding of the market practices in the Rule 506 market"; (b) the costs and other burdens that a submission requirement would impose on issuers; and (c) the objective of minimizing the risk of non-compliance with the requirement, especially inadvertent non-compliance. Although we recognize that some commentators have noted that the "first use" requirement appears to suggest an enforcement objective, we have not included this objective in our analysis.

Given the stated limited purpose of the proposed submission requirement, we believe it is sufficient that the requisite written communications be provided to the Commission within a reasonable timeframe. Compliance with the submission requirement would encounter numerous obstacles, beginning with difficulties in determining, first, which communications constitute "written general solicitation materials" and, then what constitutes "first use" of the materials. These difficulties would be exacerbated by the many forms of communication that issuers use today to communicate with a variety of constituencies, in addition to or including investors, and the potential need to update or otherwise revise solicitation materials frequently during a Rule 506(c) offering.

In the proposed rule's present form, the issuer would be required to make numerous submissions to the Commission, in each instance no later than the date of first use. Managing this process would impose unnecessary costs and personnel burdens on smaller issuers and increase the risk of non-compliance. These costs and burdens would be exacerbated in the case of continuous offerings. In certain instances, the dissemination of important new information would be delayed while issuers and their counsel determine whether the subject communication constitutes "written general solicitation materials." These costs and delays are inconsistent with the objectives of the JOBS Act and otherwise do not appear to benefit either issuers or investors.

In order to avoid these costs, delays, risks and other burdens, while putting the requisite materials in the hands of the Commission, we recommend that, if submission is required at all, issuers be required to submit written general solicitation communications to the Commission in a single submission within some reasonable timeframe following the completion of an offering (*e.g.*, within 30 days after the end of the calendar quarter in which a non-continuous offering was completed). With respect to continuous offerings, we believe that an annual submission would be appropriate.[26]

This approach would minimize both issuers' costs of compliance and the burdens on their personnel. It would also enhance compliance with the submission requirement by enabling issuers and their counsel to make well-considered determinations as to which communications constitute written general solicitation materials – as opposed to making these complex determinations on multiple occasions in the heat of a particular offering, often while under pressure to disseminate important new information quickly. Although we acknowledge the difficulties of applying a "completion" standard on an offering-by-offering basis (as discussed above in Part III.B. of this letter), such a standard would be preferable to a "first use" requirement.

We further recommend that the Commission consider the following:

1. If a Rule 506(c) offering is terminated without sales of securities, the issuer should not be required to submit any solicitation materials.

2. The Commission should exclude regularly released factual business information from the definition of "general solicitation," or create a safe harbor for such communications similar to Securities Act Rule 169.

[26] *See* Part III.B. of this letter (discussing the proposed closing amendment to Form D).

D. If proposed new Rule 510T is adopted, the Commission should exempt small offerings.

We also recommend that, if proposed new Rule 510T is adopted, the Commission exempt offerings of not more than a specified amount, such as $5,000,000. The requirement that issuers submit written general solicitation materials to the Commission would impose the greatest burdens relative to the capital sought in offerings of this size, especially as these offerings are most likely to be undertaken by development-stage companies and other small issuers that have neither sophisticated compliance systems nor the resources to afford expensive legal advice to facilitate compliance.

Our selection of $5,000,000 as the maximum amount that could be sought in an offering would be exempt from proposed new Rule 510T is influenced by the use of that amount in Rule 505 of Regulation D. Rule 505 provides an exemption from registration under Section 3(b) of the Securities Act for non-reporting issuers. Significantly, the exemption provided by Rule 505 is available without regard as to whether purchasers are accredited or non-accredited investors. Perhaps more to the point, Rule 505 does not require that written solicitation materials be submitted to the Commission.

Rule 505 reflects a regulatory judgment that, in exempt public offerings of not more than $5,000,000, the burdens of submitting offering materials to the Commission that are subject to staff review outweigh any benefits. In the context of Rule 506(c) offerings, where all purchasers are accredited investors and, therefore, deemed to be able to fend for themselves with regard to the wisdom of their investment decisions, that determination holds equally true. Accordingly, we are of the view that proposed new Rule 510T should not require the submission of written general solicitation materials for offerings of not more than $5,000,000.

E. Failure to submit required materials should not subject the issuer to severe sanctions.

To the extent that the Commission requires the submission of "written general solicitation materials" in Rule 506(c) offerings, we agree with the Commission that disqualification from relying on Rule 506 for future offerings should occur only if an issuer, or any predecessor or affiliate of the issuer, has been subject to any order, judgment or court decree enjoining such person for failure to comply with proposed new Rule 510T. For the reasons articulated above in Part IV.A. of this letter, however, an issuer's failure to file these materials should not give rise to disproportionate or overly severe consequences.

VII. Proposed revisions to Rule 156

The Commission proposes to amend Rule 156 to extend the rule to the sales literature of private funds. For 34 years, Rule 156 has provided guidance with respect to the sales literature used in connection with the marketing of registered investment companies. A parallel set of requirements with respect to the marketing of interests in private funds has developed through rulemaking under the Advisers Act and guidance from the Commission's staff. The Commission's proposal to amend Rule 156 would regulate the marketing practices of public and private funds pursuant to a single rule, despite the rather fundamental differences between the products being marketed and the nature of the investors who are eligible to purchase each product.

Private funds are advertised by their investment advisers and by broker-dealers. All marketing materials are subject to the antifraud provisions of the federal securities laws, including Section 17(a) of the Securities Act, Section 10(b) under the Exchange Act, and Rule 10b-5 thereunder, and Section 206 under the Advisers Act. In addition, Rule 206(4)-8 under the Advisers Act – known as the "Advertising Rule" – broadly prohibits any false or misleading statements by an adviser to a pooled vehicle to a prospective or existing investor in the pooled vehicle, without any scienter requirement. When private funds are marketed by U.S. broker dealers, the marketing materials are subject to FINRA's content requirements and the Advertising Rule.

In seeking to justify the costs associated with amending Rule 156, the Commission acknowledged that private fund marketing material is already subject to review. Rule 156 parallels the Advertising Rule and the Commission staff's guidance thereunder, with some variations. Both Rule 156 and the Advertising Rule include a broad prohibition on materially misleading marketing materials. (Rules 156(a) and 206(4)-1(a)). Rule 156 contains a provision explaining how performance reporting may be misleading. The Advertising Rule and related guidance, list specific circumstances in which advertising may address past specific performance. (Rule 206(4)-1(a)(2)). Rule 156 provides specific guidance with respect to marketing statements about characteristics of an investment company. This section of Rule 156 identifies a variety of practices that may be misleading, including "unwarranted" comparisons to other investment vehicles or to indices. The Advertising Rule does not explicitly reference such statements, but does include restrictions on the use of testimonials as well as general antifraud prohibitions.

It is not apparent why interpretive guidance with respect to the marketing of funds open to the public should be combined with the marketing of funds that are sold primarily, if not exclusively (under Rule 506(c)), to accredited investors. By simply inserting the term "private fund" into Rule 156, the

Commission will create ambiguity as to the applicability of the rule and the Commission staff's guidance with respect to that rule. In the Economic Analysis section of the Proposing Release, the Commission acknowledges that the marketing of private funds already is subject to antifraud provisions and guidance ("We note that private funds should already be reviewing their sales literature for misleading statements to avoid violating the antifraud provisions of the federal securities laws.") In fact, the Commission relies on these pre-existing requirements to determine that "the amendments to Rule 156 would not impose significant costs on private funds." The Commission does not, however, acknowledge the new costs that will be associated with private funds trying to reconcile the application of Rule 156 (designed for retail sales of mutual funds) to sales by private funds to eligible purchasers. We believe that the Commission underestimates the cost of superimposing the guidance of Rule 156 on the existing guidance for private funds, and that the proposal to include private funds in Rule 156 will impose additional costs with no ascertainable benefits.

In addition, it is quite likely that a large percentage of the investment advisers to private funds offered under Regulation D will be registered with the Commission as investment advisers. Many, if not most, of those private funds will compensate their investment advisers through some form of performance-based allocation or fee. In these cases, the investors in such funds would, at a minimum, have to meet the Qualified Client test, which requires a net worth of $2 million (excluding the principal residence). When the Commission revised the Qualified Client test in 2012, it determined that there were 4.2 million households that met the test.[27] Based on the 2010 census, that would mean that only 3.6% of the family households in the United States would qualify. And, that does not take into account the large number of Qualified Purchasers who we believe invest in private funds offered under Regulation D. Analyzed in this fashion, it is of even greater concern that the Commission proposes to amend Rule 156 to cover private fund offerings. The Advisers Act (including the Advertising Rule) provides ample protection to Qualified Purchasers and Qualified Clients. As with other aspects of the proposal, we are concerned that the proposed revisions to Rule 156 lack sufficient discernible benefits to these classes of investors to justify imposing the additional costs.

VIII. Proposed revisions to Form D

A. Balancing the Commission's desire for more data against competitive harm to issuers

We understand the Commission's desire to collect additional data about offerings under Regulation D, particularly with respect to the use by issuers of

[27] *See* SEC Rel. No. IA-3372 (Feb. 15, 2012), available at http://www.sec.gov/rules/final/2012/ia-3372.pdf.

newly adopted Rule 506(c). However, we are concerned about the nature of certain information and the level of detail that would be required to be disclosed in a publicly filed Form D. We strongly urge that the information required to be included in the Form D be scaled back significantly. If the Commission concludes that it must obtain such information, we suggest that a Form D filer be permitted to omit the information from the public Form D and instead include an undertaking to provide the information to the Commission upon request. In turn, the Commission would agree to keep the information confidential, but would be permitted to include it in collective statistical data, with no information included that would identify the particular companies included in the aggregated or "group" data.

In the past decade or so, we have observed an increasing reluctance on the part of private companies to file a Form D with respect to a financing transaction, and have witnessed many situations where venture capital investors insist that a Form D not be filed by the issuer. We anticipate that the potential for these difficult situations will increase to a significant degree if the proposed changes to Form D are adopted. There are a number of reasons for this.

First, there is a serious and pervasive concern about disclosing in any way (other than to the company's executive officers, board of directors and potential investors who sign a non-disclosure agreement) a non-reporting company's revenues, operating results and financial condition. This is highly confidential information that is not appropriate for broader public disclosure. We see no reason for requiring public disclosure of any financial information by private companies that either will not be selling securities to non-accredited investors under Rule 506(c), or are providing extensive written disclosures privately to no more than 35 sophisticated non-accredited investors under Rule 506(b), so long as these private issuers otherwise do not trigger the threshold for registration of a class of equity securities under Section 12(g) of the Exchange Act.

Finally, we note that, if the revised Form D and related rules are adopted as set forth in the Proposing Release, even more private operating companies and their investors will avoid using Regulation D to the extent possible (notwithstanding the costs of state "blue-sky" compliance described earlier). This could mean less, not more, data that the Commission can collect and analyze about Regulation D offerings, and ultimately may impair what the DERA Study recently found to be a thriving private placement market.[28] We strongly urge the Commission to significantly reduce the information that would be required to be included in the revised Form D to avoid this result, as discussed further below.

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[28] *See* note 5, above, and accompanying text.

The Commission has proposed substantial changes to Form D that would require disclosure of additional information in connection with all 506 offerings. According to the Commission, these revisions are intended to accomplish multiple objectives, as follows: (1) to enable the Commission to gather more information on Rule 506 offerings, principally as a means to evaluate "the impact of Rule 506(c) on the existing Rule 506 market"[29]; and (2) to "provide notice to state regulators and investors about issuers seeking to rely on Rule 506(c)."[30] Item 6 of Form D already requires issuers to indicate whether they are relying on Rule 506(b) or Rule 506(c).

Although we understand the Commission's desire to surveil the nascent Rule 506(c) marketplace, both to assure compliance with the conditions of the new exemption (thereby reducing the risk of Section 5 violations) and to prevent or deter fraud, we urge the Commission to take the least restrictive approach possible to attaining this goal in light of Congress's clear intent – as expressed in the plain language of Title II of the JOBS Act – to promote small and emerging issuer capital formation consistent with investor protection. We have serious concerns that the heightened liability exposure and other costs of complying with the expanded Form D informational requirements, whether considered in isolation or together with the accelerated filing deadlines the Commission has proposed for Rule 506(c) offerings (which we address above), ultimately will discourage many small and emerging issuers from using the new exemption. Equally important, we do not see any meaningful countervailing public benefit. Some of the new or amended Form D line-item requirements call for proprietary, often competitively sensitive, information, and therefore should either be narrowed or shifted entirely out of the public Form D and, to the extent deemed important to the Commission's stated monitoring objective, made the subject of confidential submission to the Commission.

B. The Committee's recommendations

1. Clarify the purpose of Form D.

When the Commission adopted Regulation D in 1982, Form D was not regarded as an investor disclosure document. As the Commission points out in the Proposing Release, Form D originally was designed to "'collect empirical data which will provide a basis for further action by the Commission either in terms of amending existing rules or regulations or proposing new ones … [and also to] allow the Commission to elicit information necessary in assessing the effectiveness of Regulation D as a capital raising device for small businesses.'"[31]

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[29] Proposing Release, 78 Fed. Reg. at 44814 (footnote omitted).

[30] *Id.*

[31] *Id.* at 44810 n. 40 (quoting from the initial Regulation D proposing release, SEC Rel. No. 33-6339 (Aug. 7, 1981) [46 FR 41799 (Aug. 18. 1981)]).

Because the Form D was filed in paper format until 2008, it was far less accessible to the public than other forms filed with the Commission. Once Form D became subject to mandatory EDGAR filing beginning in September 2008, "the Commission and its staff, other securities regulators [*i.e.*, the states] and the public at large … [gained] … an ability to analyze the Regulation D offering market through the information supplied in electronic Form D filings."[32] Only then did the Commission begin to recognize the utility of electronic Forms D for "other purposes, such as serving as a source of information for investors and facilitating the enforcement of the federal securities laws and the enforcement efforts of state securities regulators and FINRA."[33] Since then, and today, a Form D filing is not due until 15 calendar days after the first sale – which in many instances is after the offering has been completed – and therefore has not been a substantial factor in investor purchase decisions in a particular offering.

Nowhere in the Proposing Release does the Commission suggest that Form D, as proposed to be amended, should serve as a substitute for or supplement to any written offering materials – or oral communications, for that matter – that an issuer may (or, if securities are to be sold to non-accredited investors pursuant to Rule 505 or Rule 506(b) by a non-reporting issuer, must) provide to prospective purchasers in order to meet its disclosure obligations under the federal securities laws.[34] This is a significant point, because we believe that the Commission should analyze the costs and other burdens for small and emerging companies of the proposed Form D amendments, relating both to content and filing deadlines, not only in terms of their primary intended functions as a Commission data collection device and an enhanced enforcement investigative tool for federal and state securities regulators[35] and FINRA, but also in terms of the anticipated informational benefits to investors. This is not to minimize the importance of any of these objectives, but rather to underscore that the requisite cost-benefit analysis must be undertaken in a context where eligible investors by definition are deemed able to fend for themselves and traditionally have not relied on Form D as a source of investment-related information relating to specific offerings,[36] and where the Commission has

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32 *Id.* at 44810.

33 *Id.* (footnote omitted).

34 *See* Item 502(b)(2)(i) of Regulation D (financial and other information that must be furnished to non-accredited investors in offerings made under Rule 505 or 506(b) of this Regulation by non-reporting issuers); Section 10(b) and Rule 10b-5 under the Exchange Act (applicable to all offerings, whether exempt or registered, by reporting and non-reporting issuers).

35 *See* Sections 18(a)(1)(A), (b)(4)(D) and (c)(1) of the Securities Act (displacing state "blue-sky" securities regulation with respect to "covered securities" as defined in Section 18, and outlining the limited remaining role of the states in connection with offerings conducted under any exemption for private placements under what is now Securities Act Section 4(a) – essentially, the ability to use Form D as a notice mechanism and to exercise residual antifraud authority).

36 This may be attributable to two factors: (a) until September 23, 2013, the effective date of Rule 506(c), issuers had no reason to use Form D as an offering document, because general

already acted to implement Congress's mandate to lift the Rule 502(c) ban on general solicitation by adopting new Rule 506(c) enabling issuers to make exempt private placements accompanied by general solicitation, so long as sales are limited to "accredited investors" (as still defined in Rule 501(a) of Regulation D) and the issuer has taken the necessary "reasonable steps to verify" each purchaser's accredited investor status.

That said, we agree that Form D information, which has been publicly available via EDGAR since 2009, is now widely reviewed by the financial and investment community. In the case of private companies, Form D information may be the only publicly available information regarding an issuer. In the case of public companies, Form D information supplements an issuer's obligation to provide disclosure of unregistered equity transactions. However, as discussed above, we do not believe that any of this information would be of any greater value to regulators or investors if filed in advance in connection with Rule 506(c) offerings, by comparison with the countervailing burdens on issuers.

Given the potential for public scrutiny of Form D information, we recommend that the Commission consider either including in the body of the Form, or allowing issuers to include therein, an explicit statement that the mere filing of the Form D is not intended to make the form a marketing or disclosure document in connection with the offering of securities, and that the information disclosed in the Form should not be relied upon by any person for the purpose of making an investment decision. Such a statement would make clear, or enable issuers to make clear, if desired, that the paramount purpose of Form D remains the same – Commission data collection and enforcement of the securities laws – and that the Form should not be regarded by investors as offering material. We also believe that such a statement would mitigate concerns that the Form D information will be viewed by investors as an offering document and/or a general solicitation.

2. *The proposed changes to Form D should not apply to Rule 506(b) offerings.*

The Proposing Release proposes a number of new Form D disclosure requirements that would be applicable to Rule 506(b) offerings, including:

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solicitation were prohibited in Rule 506 offerings; and (b) the Form has not been required to be filed, and still is not required to be filed absent the Commission's adoption of an advance Form D filing requirement for Rule 506(c) offerings, until 15 calendar days after the date of the first sale of securities. For the reasons discussed previously in this letter (Part III.A.), we oppose the advance Form D filing proposal.

- disaggregated information on the number of accredited and non-accredited investors purchasing in the offering (proposed changes to Item 14);
- information on use of proceeds (proposed changes to Item 16);
- the number of purchasers who qualified as accredited investors on the basis of income, net worth, as a director, executive officer or general partner or other means (proposed new Item 17);
- if a broker-dealer was used in connection with the offering, a representation as to whether a broker-dealer filed general solicitation materials with FINRA (proposed new Item 19); and
- if the issuer is a pooled investment fund, the name and SEC file number of registered investment advisors that function directly or indirectly as a promoter (proposed new Item 20).

The Commission's recent revisions to Rule 506 left Rule 506(b) unchanged, and we expect that solicitation practices in Rule 506(b) offerings will also remain unchanged given the continued applicability of Rule 502(c)'s ban on general solicitation in such offerings. The Commission has more than 30 years of experience overseeing the regulation of 506(b) offerings. We therefore do not believe the Commission (or state regulators or investors) would derive a significant informational benefit when measured against the additional burden that would be imposed on Rule 506(b) issuers in the form of the new disclosure requirements. Accordingly, we recommend that the Commission limit the application of any additional Form D disclosure requirements it ultimately chooses to adopt – whether new or revised – to Rule 506(c) offerings, where the Commission would benefit from additional visibility into the practices that evolve in this new market.

C. Information that should be submitted on a confidential basis

In our view, some of the Commission's informational needs could be met in less onerous ways from the perspective of a small or emerging company, without impairing investor protection. There are at least two examples of efficient electronic mechanisms for the Commission's receipt of confidential, competitively sensitive information from issuers via the Commission's website, which could be replicated for this purpose: (1) the JOBS Act Title I intake portal for confidential submission of emerging growth company registration statements; and (2) the newly established portal for voluntary submission of Rule 506(c) general soliciting materials.

The Committee recommends that issuers conducting Rule 506(c) offerings be permitted to submit, on a confidential basis, such of the following detailed information now proposed to be elicited publicly pursuant to amended Form D as the Commission chooses to require. In our view, public disclosure of the following items of information would cause undue competitive harm to Rule 506 issuers without giving rise to any enhanced informational benefits to the Commission or investors. (As discussed in the preceding section, we recommend in the first instance that the Commission drop its proposal to require public disclosure of the new/revised Form D line-item requirements by Rule 506(b) issuers).

* Item 14 – the number of natural persons and legal entities included in each category of "accredited investor," along with the amount raised from each, plus (presumably in Rule 506(b) offerings only) the number of non-accredited investors (likewise broken out in terms of the number of natural persons and legal entities), and the amount raised from each category of non-accredited investor. In our view, this information is relevant only to the Commission for monitoring purposes, and to require its public disclosure – especially in "traditional" Rule 506 offerings conducted under Rule 506(b) – would impose disproportionate costs on issuers that predicate their unregistered offerings on either Rule 506(b) or Rule 506(c).

* Item 17 – the number of purchasers who qualified as accredited investors on the basis of (a) net income; (b) net worth; (c) director or executive officer or general partner of issuer, or its general partner; or (d) other. The Committee believes this information should not be disclosed in a publicly filed Form D.

* Item 19 – whether a participating broker-dealer has filed general solicitation materials with FINRA. Issuers should not be required to monitor a participating registered broker-dealer's compliance with FINRA Rule 5123, or any other FINRA requirement applicable solely to member firms, in order to rely on Rule 506(c). That said, in the event the Commission moves forward with this proposed amendment, we recommend that the Commission permit confidential submission.

* Item 22 – methods used or to be used to verify the accredited investor status of purchasers. We believe that imposing an obligation to disclose such information, either to the Commission or to the public at large, will have a chilling effect on small or emerging companies and discourage them from using Rule 506(c). If adopted, this proposed line-item could undermine, if not negate, the flexibility the Commission intended to afford issuers in fashioning a "principles-based" approach to satisfying the "reasonable steps to verify" element of Section 201 of the JOBS Act and the Commission's exemptive rule

thereunder. At a minimum, we recommend that issuers be allowed to submit this information to the Commission on a confidential basis.

D. Specific suggested changes to proposed Form D line-item requirements

The Commission has proposed changes to the content of Form D that would apply to all Regulation D offerings, including requiring disclosure of the issuer's website address (proposed changes to Item 2), securities exchange and ticker information (proposed changes to Item 9 and new Item 18) and security identification code (Item 18). For the reasons outlined above, we do not believe that these proposed changes – whether in the form of new or revised Form D line-item requirements – should be extended to Rule 506(b) issuers. In addition, we remain concerned that the changes to the Form, as proposed, may have negative unintended consequences even as applied to Rule 506(c) issuers. Therefore, we respectfully request that the Commission consider the following suggestions, in addition to permitting confidential submission of the competitively sensitive information as recommended above (in Part VIII.C.):

1. Item 2

The Commission proposes to revise Item 2 of Form D to require identification of the issuer's website address. We are concerned that investors may misinterpret the significance of such disclosure. In particular, the Commission has advised investors to review Form D information,[37] and investors may believe they are being specifically directed to review an issuer's website in connection with a Regulation D offering. In addition, we are concerned that information on an issuer's website may be deemed to be incorporated by reference into the Form D filing, and therefore subject the issuer to liability under 18 U.S.C. 1001 or the federal securities laws for statements contained on the website. Thus, we recommend that the proposal be amended to include an explicit statement that the disclosure of the issuer's website address in response to this Item is not deemed to incorporate website information into the Form D and is not deemed an "offer" with respect to the securities offering.

In addition, we recommend that the Commission clarify that disclosure of an issuer's publicly accessible website address will not, in and of itself, mean that the issuer is deemed to be using its website to engage in general solicitation in connection with a given offering. Nor should such disclosure imply that the content of the website is incorporated into the Form D or any other offering-related communication by or on behalf of the issuer.

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[37] *See* Form D, available on the Commission's website at http://www.sec.gov/answers/formd.htm.

2. Item 3

The Commission has proposed changes to Item 3 of Form D that would require issuers conducting Rule 506(c) offerings to disclose the name and address of any person who directly or indirectly "controls" the issuer. The Proposing Release notes that, in response to concerns about privacy for shareholders, the Commission removed the Form D requirement to disclose greater than 10% shareholders in connection with the 2008 adoption of mandatory EDGAR filing of the Form. The Commission maintains, however, that control person information in connection with Rule 506(c) offerings would assist it in developing a more comprehensive understanding of market participants, and may better identify persons who may be in a position to influence such offerings.

We agree with the Commission's 2008 rationale for eliminating the requirement to disclose greater than 10% shareholders in Form D, and believe that the Form is not an appropriate forum for disclosure of information regarding large shareholders – especially in the case of private companies. As to public companies, Sections 13(d)/(g) and 16 of the Exchange Act, as well as S-K Item 403, are sufficient to elicit disclosure of large holders of voting stock.

Furthermore, with respect to private funds, the issue of control presents special considerations. For example, if founding investors have special rights, consultation with counsel at additional cost likely would be required in the absence of clear guidance. Disclosure of investors as control persons will be sensitive for both the manager and the investor. If this proposed requirement is adopted, the relevant control persons for private funds who must be disclosed should be limited to the general partner, managing member or equivalent who actually manages the fund and its investments, as opposed to the limited partners.

Finally, we believe that this proposed disclosure line-item is overly broad and burdensome, particularly as applied to smaller private operating companies that otherwise do not make such information publicly available and do not intend to do so in the context of a general solicitation in connection with a Rule 506(c) offering. If adopted, this proposed line-item in effect would penalize issuers choosing to rely on Rule 506(c) by compelling them to analyze and disclose publicly their conclusions with respect to all persons or entities that might be captured by the amorphous, highly fact-intensive definition of "control" set forth in Rule 405 under the Securities Act. Were a purchaser or the Commission later to disagree with the issuer's conclusions, that issuer could be exposed to private and/or governmental enforcement litigation. Moreover, as noted, private company investors in particular may have valid privacy interests in protecting their identities and/or the size of their investments, which the

Commission is proposing to override to the extent that the issuer makes its own judgment that disclosure of such information is not necessary or appropriate to avoid running afoul of the antifraud provisions of the federal securities laws. We therefore recommend that the Commission at least define the universe of individuals and entities that it wishes to capture by delineating bright-line tests (whether level of equity ownership, position with the company or otherwise), or permitting confidential submission of this information.

3. Item 5

Form D currently requires an operating company to classify the size of its revenues, and a pooled investment fund to classify the size of its net asset value, each within specified ranges. An issuer now has the option to decline to disclose this size information. The Commission observed in the Proposing Release that a majority of Form D filers have declined to disclose size information, and that it is likely that some issuers otherwise keep this information private for competitive purposes.

The Commission has proposed to modify Item 5 of Form D to replace the "Decline to Disclose" option with a "Not Available to the Public" option. This option, as modified, may only be selected if an issuer has not otherwise made the information about its revenues or net asset value, as the case may be, publicly available, and has made reasonable efforts to maintain the confidentiality of such information.

We understand the Commission's desire to gather additional information regarding the size of the issuers utilizing Regulation D. However, the proposed revision changes the fundamental nature of Item 5 disclosure, from permissive to mandatory disclosure. Issuers that do not wish to disclose their revenues or net asset value to the general public, including but not limited to their competitors, could be forced to do so via a publicly filed Form D – thus incurring substantial competitive harm. Aside from any competitive harm that might be sustained, an issuer's analysis of whether such information might be publicly available (regardless of who is responsible for its dissemination) would be time-consuming and complex.

The Proposing Release offers as an example of public availability a situation in which an issuer included the information in question in its general solicitation materials for a Rule 506(c) offering. In our view, this is not an appropriate analogy, as an issuer may choose to disclose revenue or net asset value information in a forum, such as an investment conference, that might be deemed to constitute general solicitation for purposes of Rule 506(c), yet not rise to the level of being broadly disseminated and accessible to the issuer's competitors.

Accordingly, we recommend that the "Decline to Disclose" option be preserved for Form D filings made in connection with non-Rule 506(c) offerings. In addition, with respect to Rule 506(c) offerings, we recommend that the Commission clarify the meaning of "Not Available to the Public" within the meaning of Item 5. In our view, publicly available should be similar in concept to a broad level of dissemination. For example, if an issuer posts general solicitation materials containing revenue information on its unrestricted website, Item 5 disclosure of revenue information would be appropriate in its Form D. However, if the issuer circulates to several dozen investors an offering memorandum containing revenue information that may constitute a non-confidential general solicitation (*e.g.*, because the issuer does not have a pre-existing relationship with any of these investors), we believe that such information should not be considered publicly available for purposes of disclosure via Item 5.

Furthermore, with respect to private funds, information regarding regulatory assets under management is available on Form ADV for many private funds. It is not clear why the Commission is seeking net asset value information pursuant to Form D that would require a different calculation than that required by Form ADV. This information will fluctuate frequently for certain types of private funds, such as hedge funds whose investors subscribe for and redeem their interests on a periodic basis. These fluctuations could give rise to frequent and burdensome amendment requirements, and public disclosure of fluctuations in portfolio values during times of market crisis could produce unintended, harmful consequences such as undue market volatility.

4. Items 9 and 18

The Commission proposes to revise Items 9 and 18 to require, if applicable, identification of the issuer's trading symbol, trading venue and generally available security identifier, such as a CUSIP. In its cost-benefit analysis, the Commission stated that this information could enable the Commission automatically to match and process financial and other information about the issuer in a manner that would be significantly less burdensome. We are concerned that inclusion of this information in Form D filings by private issuers may facilitate trading strategies, including algorithmic trading strategies, that could have a negative effect on the private placement itself (particularly in offerings conducted under Rule 506(b), because of holding-period and other restrictions) and on the trading of the issuer's stock generally. A non-reporting issuer may wish, for example, to avoid the development of any secondary market interest in its equity because it is not prepared to risk triggering the burdens of registration and reporting pursuant to Section 12(g) of the Exchange Act. We respectfully request, therefore, that the Commission not require disclosure of a private issuer's trading symbol, trading venue and generally available security identifier on Form D, should they exist (*e.g,* because broker-dealers are making a market in the issuer's equity in the over-the-counter markets, or "pink sheets," without the issuer's consent or cooperation).

5. Item 14

The Commission proposes adding to Item 14 a table requiring, with respect to Rule 506 offerings, information on the number of accredited investors and non-accredited investors that purchased in the offering, whether they are natural persons or legal entities, and the amount raised from each category of investors. We believe the proposed new informational requirement should apply only to Rule 506(c) offerings, in which non-accredited investors would not be eligible to participate. Therefore, disclosure of the number of non-accredited investors would not be necessary. We recommend that the proposal be revised to only require disclosure of the number of accredited investors that purchased in the offering, and whether such accredited investors are natural persons or legal entities. Moreover, to the extent this information is required, we ask the Commission to allow confidential submission (as discussed above in Part VII.C.).

6. Item 16

The Commission proposes requiring disclosure on Form D of the percentage of gross proceeds that will be used for particular purposes in a Rule 506 offering. The Proposing Release acknowledges that an issuer may be uncertain as to the ultimate use of proceeds, and that the intended use of proceeds may change over time. The Release suggests that an issuer may file a Form D to amend its response to Item 16 as such conditions change.

The Commission's proposal calling for Form D disclosure of a non-investment fund issuer's use of proceeds in offerings conducted under both Rule 506(b) and 506(c) is excessively prescriptive and unduly burdensome for at least two reasons. First, this line-item would exceed the requirements of Item 504 of Regulation S-K applicable to registered offerings. Second, it may compel issuers to disclose competitively sensitive information to the public at large in situations where it is not engaging in general solicitation (*i.e.,* offerings under Rule 506(b)), or where antifraud considerations otherwise would not compel such disclosure. Accordingly, we recommend that the Commission at least narrow the scope of the proposed line- item requirement so that it is consistent with Item 504 of Regulation S-K, or consider dropping the line-item entirely and allowing issuers to make their own materiality judgments in this area. We note that this proposed line-item exceeds the ambit of disclosure that must be furnished, under Rule 502(b), in connection with Rule 506(b) offerings by non-reporting issuers involving no more than 35 non-accredited investors.

In addition, the Proposing Release suggests that an issuer is required to update use of proceeds information by filing an amended Form D. To comply with this requirement, an issuer would need to impose detailed tracking procedures for indefinite monitoring of its use of proceeds. We believe this would be unduly burdensome for all Regulation D issuers. Therefore, we recommend eliminating this proposed Item 16 requirement, because it would not yield information meaningful to an evaluation of the claimed exemption, or for future Commission rulemaking efforts – especially when the time and resources necessary to complete these sections are taken into account.

7. Item 17

The Commission proposes to add new Item 17 to Form D, which would require disclosure of the number of purchasers that qualify as accredited investors on the basis of income, net worth, insider status or other basis. We believe that disclosure of this type of disaggregated information regarding purchasers in an offering may be harmful to issuers, because it would provide competitors with information on the issuer's shareholder base. We therefore urge the Commission to revise its proposal to jettison new Item 17 for both Rule 506(b) and Rule 506(c) offerings or, as discussed above, allow this information to be submitted to the Commission on a confidential basis.

8. Item 19

The Commission proposes new Item 19, which would require Rule 506 issuers that use a broker-dealer in connection with the offering to state whether the broker-dealer filed general solicitation materials with FINRA. We believe Item 19 would create an undue burden on issuers to verify broker-dealer compliance functions. In addition, an issuer could only make a statement as to its knowledge of such matters. We therefore urge the Commission to revise its proposal to omit new Item 19 or, at a minimum, to amend this Item to include an appropriate knowledge qualifier. In addition, as discussed above, we ask that the Commission permit any information required to be submitted on a confidential basis.

9. Items 21 and 22

We respectfully ask the Commission to re-visit the illustrative, non-exclusive definition of "general solicitation" and "general advertising" now set forth in Rule 502(c), rather than proposing to create in Item 21 what reasonably could be regarded as a presumption that each communication medium listed is a form of general solicitation. To pick just a few of the types of communication listed in proposed Item 21 for discussion purposes, there may be situations in which e-mail, telephone solicitations, social media and/or seminars are used only to communicate with prospective investors with which either the issuer or the placement agent has a substantive, pre-existing relationship. Both before and after the effective date of the Rule 506 amendments, many issuers have been struggling with the thorny question of whether and when corporate use of social media platforms to target specific audiences other than investors nevertheless might constitute a general solicitation/advertisement within the meaning of Rule 506 as now amended. Without further clarification or refinement, proposed Item 21 appears both overbroad and potentially confusing.

In addition, we doubt the practical utility of this information, as prudent issuers may disclose all possible categories of general solicitation materials and investor verification methods likely to be used. We recommend that the Commission reconsider whether this type of information would be useful for overseeing the Rule 506(c) market.

With respect to Item 22, for the reasons outlined above (in Part VIII.C.), we believe that information on methods used to verify accredited investor status in a Rule 506(c) offering should not be required or, if it is, that the Commission allow it to be submitted on a confidential basis.

IX. We request the Commission consider allowing sales in Rule 506(c) offerings to knowledgeable employees who are not Regulation D "accredited investors."

In 1996, Congress added Section 3(c)(7) to the Investment Company Act and amended Section 3(c)(1) of this Act.[38] Congress also directed the Commission to prescribe rules allowing "knowledgeable employees" to invest in private funds without causing the private fund to lose its exclusion from the definition of "investment company."[39] Accordingly, the Commission issued proposed Rule 3c-5 (beneficial ownership by "knowledgeable employees"),[40] and proposed Rule 3c-6 (certain transfers of interests in Section 3(c)(1) and 3(c)(7) funds),[41] a companion rule implementing the provisions in Section 3(c)(1)(B) that allow transfers where the proximate cause is an involuntary act. In essence, Rule 3c-5 excludes a "knowledgeable employee" from the

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[38] National Securities Markets Improvement Act of 1996, Pub. L. 104-290 (1996), codified in scattered sections of the U.S. Code.

[39] For the legislative history of this provision, *see Hearings on H.R. 1495 before the Subcomm. on Telecommunications and Finance of the Comm. on Commerce, House of Representatives*, 104th Cong., 1st Sess. at 22-23 (1995) (testimony of Barry P. Barbash, Director, SEC Division of Investment Management, explaining that the purpose of the provision appears to be to allow employees of private funds who participate in their management to invest in them as a benefit of employment).

[40] *See* SEC Rel. No. IC-22405 (Dec. 18, 1996), available at http://www.sec.gov/rules/proposed/ic-22405.txt.

[41] *Id*.

calculation of "beneficial owner" for purposes of Section 3(c)(1), and from the requirement in Section 3(c)(7) that the issuer be owned exclusively by qualified purchasers; in essence, Rule 3c-6 provides the same exceptions for the estate of the transferor or a qualified donee.[42]

As finally adopted, Rule 3c-5 defines the term "knowledgeable employee" to mean a natural person who is:

> (i) an executive officer,[43] director, trustee, general partner, advisory board member, or person serving in a similar capacity, for the private fund, or
>
> (ii) an employee of the private fund "(other than an employee performing solely clerical, secretarial or administrative functions with regard to the [private fund] or its investments) who, in connection with his or her regular functions or duties, participates in the investment management activities" of such [private fund]…provided that the employee has been performing such functions and duties for or on behalf of the [private fund]…or substantially similar functions or duties for or on behalf of another company] for at least 12 months."

Although the concept of "knowledgeable employee" in Rule 3c-5 is not grounded in the types of financial pre-conditions that underlie the definitions of "accredited investor" or "qualified purchaser," a knowledgeable employee will nevertheless receive significant investor protections that the Commission previously deemed fully sufficient, taking into account all of the facts and circumstances. First, the knowledgeable employee will necessarily be very familiar with the investment vehicle involved because he or she will be participating in the investment decisions that affect that investment vehicle. Second, he or she is investing with people with whom he or she is working on a daily basis. With respect to the Securities Act, the private fund issuer normally relies on Rule 506(b) (former Rule 506) because it allows up to 35 non-accredited investors to participate in an offering. We are not aware of any abuses of the concept of "knowledgeable employee" during the past two decades since Rule 3c-5 was adopted.

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[42] SEC Rel. No. IC-22597 (April 3, 1997), available at http://www.sec.gov/rules/final/ic-22597.txt (adopting Rules 3c-5 and 3c-6).

[43] Paragraph (a)(3) of Rule 3c-5 defines the term "executive officer" to mean "the president, any vice president in charge of a principal business unit, division, or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions" for a private investment company. *Accord* Rule 501(f) of Regulation D (defining the term "executive officer").

In adopting new Rule 506(c), the Commission did not make any accommodation for "knowledgeable employees" who are not "accredited investors." The Committee recognizes that the plain language of Section 201 of the JOBS Act limits the purchaser pool in a Rule 506(c) offering to "accredited investors" within the meaning of Regulation D. We suggest, however, that the Commission interpretively allow concurrent, or "side-by-side," Rule 506(c) and Rule 506(b) offerings of the same security to be conducted by private fund issuers in situations where a particular fund would like to extend an investment opportunity to those knowledgeable employees of the fund's adviser who do not qualify as "accredited investors." Our views on interpretive issues the Commission should address are discussed further in Part X of this letter. In our view, the investor protections afforded by Rule 3c-5, coupled with the enhanced informational requirements applicable when non-accredited investors are purchasers in Rule 506(b) offerings, amply justify permitting investment advisers to private funds to continue – as they have been able to do for most of the past two decades without incident – to allow employees to invest with their affiliated private funds under Rule 506(b) either as "accredited investors" [44] or "knowledgeable employees." Non-accredited but knowledgeable employees of investment advisers will have the substantive, pre-existing relationship necessary to overcome any concerns that they may have been attracted improperly by public soliciting activities associated with a contemporaneous Rule 506(c) offering by the fund.

X. The Commission should clarify how Securities Act interpretive guidance published in 2007 relating to integration and general solicitation – as applied to consecutive and concurrent private placements and registered public offerings, respectively – should be applied in the context of new Rule 506(c). In this connection, the Commission should address the application of Rule 152 to a completed private offering (under Section 4(a)(2) and/or Rule 506(b)) followed by a Rule 506(c) offering. In addition, the Commission should clarify, either interpretively or via proposed rule amendment, how the Rule 155 safe harbor would apply in connection with abandoned or terminated Rule 506(b) (and/or Section 4(a)(2)) offerings followed by Rule 506(c) offerings accompanied by general solicitation, and vice versa.

Now that Rule 506(c) has become effective, a number of questions have arisen as to how the integration principles articulated in the Commission's 2007

[44] Rule 501(a)(4) of Regulation D defines the term "accredited investor" to include "any director, executive officer, or general partner of the issuer of securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer…."

interpretive guidance[45] should be applied in a Rule 506 offering context. Questions also arise regarding the availability of the Rule 155 safe harbor where an abandoned or terminated private offering under Section 4(a)(2) and/or Rule 506(b) is followed by a Rule 506(c) offering accompanied by general solicitation, and vice versa. In addition, issuers and their counsel are grappling with such difficult questions as: (a) what are the Commission's views on the availability of Rule 152 under the Securities Act in situations where a completed Rule 506(b) or Section 4(a)(2) offering is followed by a Rule 506(c) offering accompanied by general solicitation; (b) how does the non-integration principle outlined in the 2007 interpretive guidance, which focuses on how the investors in the "private" placement are solicited – rather than on the five-factor test for integration of multiple private exempt offerings set forth in Rule 502(a)[46] – apply to separate, but concurrent, or close in time, Rule 506(b) and Rule 506(c) offerings; and (c) how, if at all, do the safe harbors codified in Rule 155 apply to abandoned or terminated "quiet" Rule 506(b) offerings followed by "noisy" (*i.e.* accompanied by general solicitation) Rule 506(c) offerings, and vice versa? Easy resolution of these questions is complicated by the Commission's decision to invoke Section 201(a) of the JOBS Act as the sole basis for its exercise of statutory authority in adopting Rule 506(c), we believe primarily to emphasize that general solicitation remains incompatible with reliance on the Securities Act Section 4(a)(2) exemption. The Committee understands that, in taking this approach, the Commission was not suggesting that Rule 506(c) would be viewed as a "public offering" for purposes of Section 4(a)(2), particularly given the plain language of Section 201(b) of the JOBS Act (emphasis added): "Offers and sales exempt under [Rule 506(c), added pursuant to Section 201(a) of the JOBS Act] **shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation."**

That said, there are situations in which Rule 506(c) offerings involving general solicitation have a critical aspect of a public offering for purposes of Rule 152 and therefore can readily be analogized to registered public offerings solely for the purposes of applying the Commission's existing interpretive positions and the Rule 155 safe harbor. Thus, regardless of whether the Commission adopts any or all of the proposed Regulation D proposals, we recommend that the agency take a pragmatic approach to addressing these and other questions raised by multiple exempt offerings (whether one is followed in time by another, or they occur contemporaneously or in close proximity), as follows:

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[45] *See* SEC Rel. No. 33-8828 (August 3, 2007), available at http://www.sec.gov/rules/proposed/2007/33-8828.pdf. *See also* Letter from Chairman Mary Schapiro to Congressman Issa dated April 6, 2011 beginning at p.6; available at http://www.sec.gov/news/press/schapiro-issa-letter-040611.pdf

[46] *See* Division of Corporation Finance Securities Act Compliance and Disclosure Interpretation 139.25, available at http://www.sec.gov/divisions/corpfin/guidance/sasinterp.htm.

1. Confirm by interpretation or rule amendment that the Commission's 2007 interpretive guidance under Rule 152, relating to a private offering that is completed prior to the filing of a registration statement for a public offering, extends to a completed private offering under Rule 506(b) and/or Section 4(a)(2) followed by a Rule 506(c) offering accompanied by general solicitation.

2. Confirm that the 2007 Commission interpretive guidance clarifying that the sole question raised in connection with Securities Act analysis of concurrent (or close in time) private exempt offerings and registered public offerings is how the investors in the private exempt offering were solicited, applies equally to concurrent (or close in time) private exempt offerings under Rule 506(b) and/or Section 4(a)(2) and Rule 506(c) offerings accompanied by general solicitation.

3. Provide interpretive guidance and/or propose amendments to the Rule 155 safe harbor rule available in the case of abandoned or terminated private placements conducted under Rule 506(b) and/or Section 4(a)(2) followed by registered public offerings, and vice versa (abandoned registered public offerings followed by exempt private placements), that would make this safe harbor available to abandoned or terminated private placements under Rule 506(b) and/or Section 4(a)(2) followed by Rule 506(c) offerings accompanied by general solicitation, and vice versa.

* * * * *

We appreciate the opportunity to comment on the Proposing Release and respectfully request that the Commission consider our recommendations and suggestions. We are available to meet and discuss these matters with the Commission and its staff, and to respond to any questions.

Very truly yours,

<u>/s/ Catherine T. Dixon</u>
Chair of the Federal Regulation of Securities Committee

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