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March 8, 2007

VIA ELECTRONIC MAIL

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549-1090

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Re: Release No. 33-8766, File No. S7-25-06, "Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles"

Dear Ms. Morris:

We are writing on behalf of our client, Oppenheimer & Close, Inc. ("Oppenheimer"), to comment on the Securities and Exchange Commission's (the "Commission" or the "SEC") recently proposed new antifraud rule under the Investment Advisers Act of 1940 ("Advisers Act") and amendments to the accredited investor standard for individuals investing in certain private investment vehicles ("Rule Proposal").[1]

While Oppenheimer agrees with the first part of the Rule Proposal, which would strengthen the antifraud provisions of the Advisers Act governing investment companies and other pooled investment vehicles, our client believes that the second part of the Rule Proposal, which modifies the definition of accredited investor under Regulation D, fails to enhance investor protection, unnecessarily curtails investor choice, and unduly burdens capital formation. Our comment letter is limited to discussing the proposed new definition of accredited investor.

OPPENHEIMER

Oppenheimer is dually registered with the Commission as an investment adviser and broker-dealer. Oppenheimer is a member firm of NASD, Inc. Oppenheimer has been in the investment management business since 1984. Oppenheimer's clients include individuals, pension funds, family charitable trusts, and foundations.

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[1] The amendments to the definition of accredited investor would be limited to certain private investment vehicles, such as private funds exempt from registering as investment companies with the Commission under Section 3(c)(1) of the Investment Company Act of 1940 ("1940 Act").

Oppenheimer provides a range of asset management services to its clients, including investments in private funds. Oppenheimer's clients include multiple generations of the same family. The firm serves the children and grandchildren of some of its first clients. Oppenheimer has first-hand experience understanding the relative levels of financial and investment sophistication and experience of high net worth individuals and families and how such sophistication and experience translates (or does not translate) into understanding and appreciating the risks associated with investing in private investment funds.

Philip Oppenheimer, the founder of Oppenheimer, has worked at the highest levels of the asset management industry for over forty-years. He has established multiple private funds and has worked with a diverse group of high net worth individuals and families in analyzing private fund investments. Prior to founding Oppenheimer, Mr. Oppenheimer was a Senior Vice President of A.G. Becker (Warburg Paribas Becker Inc.), an investment banking firm. He spent over eighteen years with A.G. Becker, working on a broad range of issues in the investment banking industry, including issues particular to investing in private funds. Mr. Oppenheimer received a B.A. from St. Lawrence University, Canton, New York and attended Fordham University Law School. He also served in the U.S. Marine Corps Reserve. He has served on the NASD District Committee, the NASD District 10 Nominating Committee, the NASD National Adjudicatory Council, and the NASD Chairman's Advisory Council. Currently, Mr. Oppenheimer is a member of the NASD Small Firm Advisory Board and the Small Firms Committee of the Securities Industry and Financial Markets Association.

CURRENT APPROACH TO DEFINING ACCREDITED INVESTORS

Currently, Commission Rule 501(a) under Regulation D generally defines an "accredited investor" as an individual with a net worth, or joint net worth with that person's spouse, in excess of $1,000,000, or an individual with an annual income of $200,000 in the two most recent years or, in combination with one's spouse, an annual income of $300,000.[2] Since the adoption of Rule 501(a) in 1982, these amounts have not been adjusted. Thus, over time, an increasing percentage of the nation's population has met the accredited investor standard.

The definition of accredited investor under Regulation D applies to a broad range of different types of securities offerings that are exempt from the securities registration provisions of the Securities Act of 1933 ("Securities Act"). Currently, Regulation D uses a uniform definition of accredited investor to apply to these various types of securities offerings. Oppenheimer believes a uniform definition is consistent with the principle of enhancing investor protection and supports the public policy objective of balancing investor sophistication and risk tolerance.

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[2] *See* 17 C.F.R. § 230.501(a) (2007).

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PROPOSED RULES 509 AND 216

The Proposal in General

The Rule Proposal represents an attempt by the Commission to address the growing number of accredited investors by proposing a modification to the definition of accredited investor.[3] Specifically, proposed Rules 509 and 216 of the Rule Proposal would require, in addition to the other current elements of the definition of an accredited investor, a natural person to maintain at least $2.5 million in investments, exclusive of non-investment real estate. The proposal breaks with SEC precedent in that the Rule Proposal limits the new accredited investor standard to individuals investing in private funds exempt from investment company registration pursuant to Section 3(c)(1) of the 1940 Act ("Private Fund").

An Attempt to Indirectly Regulate Hedge Funds

As the Commission states in the proposing release, the Commission has for several years been reviewing a variety of issues relating to hedge funds. For example, in 2004 the Commission attempted to directly regulate hedge funds by requiring certain hedge fund investment advisers to register with the Commission. This initiative, however, was overturned by an opinion of the Court of Appeals of the D.C. Circuit.[4] Oppenheimer believes that the current Rule Proposal is an attempt to indirectly regulate hedge funds, something the D.C. Circuit held the Commission could not do directly. Oppenheimer believes if the Commission desires to regulate hedge funds the Commission should directly address this issue either through rulemaking or by approaching Congress to implement appropriate legislative changes.

Net Worth and Financial Sophistication

The Commission's stated goal for the Rule Proposal is to provide "an objective and clear standard for ascertaining whether a purchaser ... is likely to have sufficient knowledge and financial sophistication" to understand the risks associated with investing in a Private Fund.[5] While the proposal provides investors with a bright line test, Oppenheimer believes that an investor's net worth alone should not be the only indicator of an investor's level of financial sophistication. Although an investor's assets may serve as a useful gauge of risk tolerance and acumen regarding financial and investment matters, the level of assets does not necessarily correlate with the investor's overall level of financial or investment sophistication and, therefore, Oppenheimer believes that an investor's assets should be viewed as only one factor, in a series of factors, that are used to determine whether an investor has a

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[3] *See* Securities Act Release No. 8766 (Dec. 27, 2006), 72 Fed. Reg. 400 (Jan. 4, 2007).

[4] *Golstein v. Securities and Exchange Commission,* 451 F3d 873 (D.C. Cir. 2006).

[5] *Id* at 405.

sufficient level of financial and investment sophistication to understand the risks associated with investing in a Private Fund.

Oppenheimer believes, and the Rule Proposal recognizes, that investor financial and investment sophistication should be a component in determining who may invest in Private Funds. The proposed rule, however, paints with too broad a brush and arbitrarily may prevent many highly sophisticated investors from investing in Private Funds while simultaneously leaving the door open for some unsophisticated high net worth individuals to make investment decisions without understanding the ramifications of such decisions. Oppenheimer believes this unintended adverse consequence is contrary to the public interest. Our client's experience has shown that the accumulation of wealth (*i.e.*, having a high net worth) does not necessarily result in a higher than average level of financial or investment sophistication and, conversely, a lower net worth does not *de facto* imply that a person lacks the financial and investment sophistication to evaluate and understand the risks associated with investing in Private Funds.

Net Worth and Complexity of Private Funds

As further support for the Rule Proposal, the Commission suggests that over the years Private Funds have become more and more complex.[6] The Rule Proposal, however, offers no evidence to support this conclusion. In fact, the Rule Proposal is silent on the many different types of private funds available to the public and presupposes all private funds have become increasingly complex. The latter is an invalid conclusion. Nor does the Rule Proposal make note of the extent to which the market and private investors have already responded to this perceived increase in complexity. For example, we note that since 1982 the emergence of the internet has dramatically increased the ability of investors to independently perform due diligence on their investments and hedge fund advisers. The wealth of information and analytical tools available to most private citizens over the internet and otherwise has dramatically shifted the paradigm for determining financial and investment sophistication. The Commission itself has been a catalyst for making the public more aware of the many analytical tools available.[7] The Commission's Rule Proposal, however, does not address this increased access to information and analytical tools.

Private Funds v. Other Investments

The Rule Proposal focuses on amending the definition of accredited investor under Regulation D. As stated previously, the new definition of accredited investor

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[6] *See* Securities Act Release No. 8766 (December 27, 2006), 72 Fed. Reg. 400, 404 (January 4, 2007).

[7] *See, e.g.*, Christopher Cox, Chairman, SEC, The Promise of Interactive Data, Address before the 14th International XBRL Conference (Dec. 5, 2006) [available online at: http://www.sec.gov/news/speech/2006/spch120506cc.htm] (last visited Mar. 7, 2007); SEC Report to the Congress, The Impact of Recent Technological Advances on the Securities Markets (Nov. 1997) [available online at: http://www.sec.gov/news/studies/techrp97.htm] (last visited Mar. 7, 2007).

under Regulation D is limited solely to investments in private funds that are structured to comply with the exception from investment company registration pursuant to Section 3(c)(1) of the 1940 Act.[8] The Rule Proposal fails to take note, however, that there is a very broad range of investment vehicles that rely on the Section 3(c)(1) exception. It is very difficult to lump together all these diverse investment vehicles and treat them similarly for purposes of determining who has the sufficient level of financial or investment sophistication to invest in them.

The diverse investment philosophies of private funds was recognized by the Commission in its hedge fund report:

> Over time, hedge funds began to diversify their investment portfolios to include other financial instruments and engage in a wider variety of investment strategies. Today, in addition to trading equities, hedge funds may trade fixed income securities, convertible securities . . . and other non-securities investments. Furthermore, hedge funds today may or may not utilize the hedging and arbitrage strategies that hedge funds historically employed, and many engage in relatively traditional, long-only equity strategies.[9]

As the above quote from the hedge fund report shows, private funds may use investment philosophies that are conservative, long-term focused, and relatively not risky or complex. If the Commission's stated goal for the Rule Proposal is to protect investors from "risky" investments, Oppenheimer believes strongly that the Commission misses the mark with the new proposed definition. In our client's experience, an investment vehicle that is structured as a 3(c)(1) fund is not *de facto* a "risky" investment. Oppenheimer suggests that there are numerous other investment vehicles subject to the Regulation D definition, such as investments in oil and gas ventures or participation interests in limited liability companies, that historically have proven to potentially be riskier investments.

The Commission's proposal fails to identify, and our client has been unable to ascertain, any public policy rationale to support the Rule Proposal's disparate treatment of 3(c)(1) funds. Instead, the carve-out of this sub-category of investment vehicles suggests that the Commission is attempting to circumvent *Goldstein* and regulate indirectly what the court held it could not regulate directly. If the Commission wishes to limit investor access to the most risky and complex investment

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[8] The Rule Proposal excludes from the new definition "venture capital funds," as defined under the new rule. *See* Securities Act Release No. 8766 (December 27, 2006), 72 Fed. Reg. 400, 416 (January 4, 2007).

[9] *See Implications of the Growth of Hedge Funds* (Sept. 2003) [available online at: http://www.sec.gov/spotlight/hedgefunds.htm] (last visited Mar. 7, 2007).

vehicles, the proposal's narrow focus on 3(c)(1) funds fails as both under- and over-inclusive.

The Proposed $2.5 Million Threshold

The Commission also fails to provide a sufficient empirical basis to justify the $2.5 million threshold. Instead, the Commission seems to simply rely on the fact that, under the Rule Proposal, a lower percentage of investors would meet the new standard. While undoubtedly true that by raising the threshold amount fewer investors would be eligible, our client notes, however, that there is no evidence to suggest that this percentage in any way approximates the percentage of investors who may possess the requisite financial and investment sophistication to understand the risks associated with investing in a Private Fund. Not only does our client believe that wealth is a poor measurement for sophistication, the arbitrary asset level chosen by the Commission undermines any perceived correlation that may exist between wealth and sophistication.

President's Working Group Report

Our client further notes that the recent report issued by the President's Working Group on Financial Markets observed that the current regulatory regime "is working well."[10] The Working Group's report reinforces previous guidance that market discipline is the rule and that government regulation should be the exception. In addition, while the Working Group stressed the importance of investor sophistication, neither net worth nor investment assets factored into their definition of a sophisticated investor. Instead, the report states that sophistication depends upon the ability "to identify, analyze and bear these risks." Oppenheimer believes, similar to the President's Working Group, that qualitative factors, such as an investor's ability to analyze and bear the risks of a particular investment, are more appropriate indicators of an investor's sophistication than other more quantitative factors such as an individual's net worth.

ALTERNATIVE APPROACH

Oppenheimer believes that the Commission should seek to develop standards that more effectively balance investor risk tolerance and sophistication. Oppenheimer appreciates the Commission's desire to provide a clear, bright-line rule on which investors and funds can rely, but the Rule Proposal sacrifices effectiveness for clarity. The current net worth and income tests already screen out many investors who may lack the requisite risk tolerance to invest in Private Funds. To the extent that the Commission wishes to impose additional regulation beyond the application of the proposed antifraud provisions, it should embrace rules that encourage increased disclosure to investors. By adopting more qualitative standards for determining

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[10] Agreement Among PWG and U.S. Agency Principals on Principles and Guidelines Regarding Private Pools of Capital (Feb. 22, 2007) [available online at: http://www.treasury.gov/press/releases/reports/hp272_principles.pdf.] (last visited Mar. 7, 2007).

investor sophistication, the Commission could accomplish its goal to provide clear standards while simultaneously enhancing investor protection. Any new regulation also should be targeted at the entire universe of investment vehicles bearing similar risk and complexity characteristics.

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Oppenheimer very much appreciates the opportunity to submit its comments and to provide its suggestions regarding the Rule Proposal. Our client hopes that the Commission will consider its views in finalizing the Rule Proposal and trusts that the Commission will feel free to contact Oppenheimer should the Commission require further discussion regarding Oppenheimer's comments and suggestions.

Sincerely,

Neal Sullivan

cc: The Honorable Christopher Cox, Chairman
Securities and Exchange Commission

The Honorable Paul S. Atkins, Commissioner
Securities and Exchange Commission

The Honorable Roel C. Campos, Commissioner
Securities and Exchange Commission

The Honorable Annette L. Nazareth, Commissioner
Securities and Exchange Commission

The Honorable Kathleen L. Casey, Commissioner
Securities and Exchange Commission

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