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March 9, 2007

Re: **File No. S7-25-06**

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

Dear Ms. Morris:

We are writing in response to the Commission's request for comments on proposed new Rule 206(4)-8 under the Investment Advisers Act of 1940 (the "**Advisers Act**") and proposed new Rules 216 and 509 under the Securities Act of 1933 (the "**Securities Act**").[1] The Proposed Rules would (i) prohibit advisers to pooled investment vehicles from making false or misleading statements or otherwise defrauding investors or prospective investors (the "**Proposed Anti-Fraud Rule**")[2] and (ii) raise the requirements for natural persons to qualify as "accredited investors" in connection with the offer and sale under Regulation D or Section 4(6) of the Securities Act of interests in certain privately offered investment pools (the "**Proposed Accredited Investor Rules**")[3]. We appreciate the opportunity to comment on the Proposed Rules.[4]

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[1] PROHIBITION OF FRAUD BY ADVISERS TO CERTAIN POOLED INVESTMENT VEHICLES; ACCREDITED INVESTORS IN CERTAIN PRIVATE INVESTMENT VEHICLES, Securities and Exchange Commission Proposing Release No. 33-8766; IA-2576; File No. S7-25-06, proposed December 27, 2006 (hereinafter referred to as the "**Proposed Rules**"). Page references to the Proposed Rules herein are to the Proposed Rules as released in Commission Proposing Release IA-2266.

[2] Proposed Rules at 4-14.

[3] *Id.* at 14-32.

[4] The opinions expressed herein represent those of the undersigned and not necessarily those of our clients.

We recognize the Commission's important role in regulating the activities of investment advisers and, in general, we support the Commission's Proposed Anti-Fraud Rule, although we have concerns regarding the scope of the language used with respect to this rule as further explained below. Regarding the Proposed Accredited Investor Rules, we have a more fundamental objection, since we believe that these proposed rules are inconsistent with the Congressional intent underlying Sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 (the "**Investment Company Act**") and therefore are beyond the scope of the Commission's authority. If the Commission determines that the Proposed Accredited Investor Rules should be adopted, we respectfully submit that an alternative accredited investor standard be implemented since we believe that the standard currently proposed will effectively eviscerate, in many instances, the distinction between Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act.

I. Recommendations Regarding the Proposed Anti-Fraud Rule

If the commission decides to proceed with the Proposed Anti-Fraud Rule, we respectfully suggest the following modifications and comments to their implementation.

A. Incorporate scienter and privity requirements

We support the goal of the Proposed Anti-Fraud Rule to protect investors and potential investors in certain investment pools who rely on investment advisers.[5] However, we believe that it may result in some unfortunate consequences, such as a potential for reduced communication between a fund manager and its investors given the risk of misstatements. These unfortunate circumstances may arise because the Proposed Anti-Fraud Rule does not require scienter on the part of the investment adviser or privity between the investment adviser and investor.

As proposed, if a fund manager makes an inadvertent comment or does not know a particular communication has reached an investor or prospective investor, the fund manager may still be liable under the rule. Therefore, we propose that any adopted anti-fraud rule require (i) scienter and (ii) either privity between the investment adviser and the investor or reasonable expectation by the investment adviser of the investor's reliance. We believe that without these requirements, there is a risk that investment advisers will reduce their disclosure to and communications with investors because they will worry that, despite no intent to mislead investors or knowledge of any misstatements, they will be held to have violated Rule 206 under the Advisers Act.

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[5] *See* Proposed Rules at 4.

B. Limit the Proposed Anti-Fraud Rule to the general anti-fraud clause only

We also note that the Proposed Anti-Fraud Rule appears to go far beyond the stated goal of the Commission which is to resolve uncertainties arising following Goldstein v. SEC regarding the obligations that investment advisers have to investors in pooled vehicles. We believe that the Commission's goal would be achieved if the Proposed Anti-Fraud Rule were limited solely to the general anti-fraud provision contained in clause (2) of the proposed rule. Proposed clause (1) is an anti-fraud rule that applies specifically to misstatements of fact. We raise concerns with respect to proposed clause (1) because it imports concepts relating to disclosure that have previously only been implemented in connection with a particular event, the offering and sale of securities. While these standards are well understood with respect to the preparation and dissemination of offering memoranda and other marketing material relating to a private offering of securities, it appears onerous and unnecessary to apply such principles to every possible communication between an adviser and any existing or prospective investor in a pooled investment vehicle. We also note that no comparable standard is applicable to communications directly between an adviser and its clients (such as clients that have established managed accounts with the adviser).

C. Scope of pooled investment vehicles under the Proposed Anti-Fraud Rule

We concur with limiting the application of the Proposed Anti-Fraud Rule only to those pooled vehicles that are offered pursuant to Section 3(c)(1) or 3(c)(7) of the Investment Company Act and do not believe it would be appropriate to expand the scope to encompass companies exempt under other Section 3(c) provisions.[6]

Advisers to companies exempt under other Section 3(c) provisions would not expect to be captured under Investment Company Act anti-fraud provisions as these companies provide entirely different functions than the investment vehicles that are offered pursuant to Section 3(c)(1) or 3(c)(7). For instance, an adviser to banks or insurance companies, two types of exempted entities under Section 3(c)(3) of the Investment Company Act, would not expect to have to look-through the bank or insurance company to the underlying investors.

The legislative history for the Investment Company Act and the Advisers Act that created the Section 3(c) exemptions explains: "Provision is made generally to exclude from the bill companies primarily engaged, directly or through subsidiaries, in the operation of a business other than that of an

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[6] *Id.* at 11.

investment company. In addition, the bill specifically excludes brokers, underwriters, banks, insurance companies [and other Section 3(c) exempted companies]."[7] Thus, whereas the Section 3(c)(1) and 3(c)(7) exemptions can apply to investment pools in the business of investing, the other exemptions carve out specific examples of non-investment companies who may have otherwise fallen under the definition of investment company in the Act and are not engaged in the business of an investment company. We believe the motivation to apply the Proposed Anti-Fraud Rule to protect investors in these non-investment companies is absent.

As noted by the Commission, privately offered pooled investment vehicles are generally offered pursuant to either Section 3(c)(1) or 3(c)(7) of the Investment Company Act,[8] and therefore, as drafted, the Proposed Anti-Fraud Rule should protect investors in these pooled vehicles. To include other companies would expand the application of the rule beyond its intent.

II. Raising the Accredited Investor Standard

We acknowledge the Commission's desire to protect natural persons investing in private pools,[9] but we believe raising the accredited investor standard in the manner proscribed in the Proposed Accredited Investor Rules is inappropriate in light of Congressional intent underlying the framework of investor protections that have been established under Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act.

The legislative history indicates that while the Section 3(c)(7) exemption was designed to provide a two-step process for determining "qualified purchaser" status based on investor sophistication, Section 3(c)(1) was intended to be relatively free of these requirements; rather, Congress viewed the 100 investor limit itself as a reasonable limit to federal regulation of funds. Section 3(c)(1) was thus designed to exclude from the definition of investment company any fund with 100 or fewer beneficial owners, without regard to investor sophistication as long as the fund satisfies the standards for private placements in order not to be engaged in a general solicitation. Thus, the only sophistication requirement that Congress imposed on private investment pools under the 1940 Act relates to

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[7] INVESTMENT COMPANY ACT AND INVESTMENT ADVISERS ACT OF 1940, CONG. REC., 76th Cong., 2nd Sess. 9810 (1940) (House of Representatives Report); *see also id.* at 2846 (Senate Report saying "The bill does not cover companies which are not investment companies. It therefore excludes companies primarily engaged, directly or through subsidiaries, in the management and operation of a noninvestment business or businesses.").

[8] *Id.* at 10 ("We believe that most of the pooled investment vehicles privately offered to investors are organized under [one or the other of Section 3(c)(1) or Section 3(c)(7)]."]

[9] *See* Proposed Rules at 18.

Section 3(c)(7) funds. They imposed no sophistication requirement under the 1940 Act on investors in Section 3(c)(1) funds.

The Senate Report regarding the adoption of Section 3(c)(1) states that "[it] was intended to exclude from the [Investment Company Act] private companies in which there is no significant public interest and which are not appropriate subjects of federal regulation."[10] Similarly, the House of Representatives Report discusses concerns regarding beneficial ownership rules and circumvention of the 100 investor limit, but does not raise specific concerns regarding investor sophistication.[11] Given this background, we believe that there is evidence that Congress intended that the same offering requirements would be applicable to both 3(c)(1) and 3(c)(7) funds. By enacting the Proposed Accredited Investor Rules, the Commission would, through indirect means, establish a new sophistication requirement applicable to a select group of 3(c)(1) funds that would cut against the principles established by Congress.

In the Commission's own report leading to adoption of Section 3(c)(7), the Commission wrote:

> Section 3(c)(1) reflects Congress's belief that federal regulation of private investment companies is not warranted. The 100 investor limit and public offering prohibition are both designed to ensure the private nature of exempted issuers...The legislative history of Section 3(c)(1) indicates that the 100 investor limit represents an outer limit of an investor base likely to be composed of people with personal, familial, or similar ties.[12]

The report continues by mentioning that "[i]n certain circumstances, investor protection concerns may be raised by small investment pools whose securities are held by investors of modest means," but concludes that "the concept that the investors in these smaller pools are bound by personal or familial ties retains some validity, and in any case, federal oversight of these pools under the Investment Company Act would be impractical."[13]

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[10] SMALL BUSINESS SECURITIES ACTS AMENDMENTS OF 1980, S. REP. NO. 96-958, 20 (1980).

[11] SMALL BUSINESS INVESTMENT INCENTIVE ACT OF 1980, H.R. REP. NO. 96-1341, 34 (1980).

[12] Division of Investment Management, SEC, PROTECTING INVESTORS: A HALF CENTURY OF INVESTMENT COMPANY REGULATION at 105 (1992).

[13] *Id.* at 106.

Because "large-scale capital participation by sophisticated investors in private investment companies is frustrated by the requirements of Section 3(c)(1)"[14] the Commission recommended another exemption, the future Section 3(c)(7). "In contrast to the existing private investment company exception [Section 3(c)(1)], an exception for funds owned by sophisticated investors would be premised on the theory that such investors can adequately safeguard their interests in a pooled investment vehicle without extensive federal regulation."[15] The interaction between Section 3(c)(1) and Section 3(c)(7) was made clear in the Proposing Release to rules adopted under Section 3(c)(7) in 1996:

> In 1992, the Commission concluded that the 100-investor limit, while reasonably reflecting the point beyond which federal regulatory concerns incorporated in the Investment Company Act are raised, may place unnecessary constraints on investment pools that sell their securities exclusively to sophisticated purchasers. The Commission recommended that Congress amend the Investment Company Act to create an alternative exclusion for investment companies whose securities are owned exclusively by sophisticated investors. Congress implemented this recommendation in the 1996 Act.... [in] new section 3(c)(7) of the Investment Company Act...[16]

We believe the Proposed Accredited Investor Rules confuse the basis on which Congress established the exemption created under of Section 3(c)(7), which specifically deals with investors' sophistication, with that of Section 3(c)(1), which does not. Accordingly, if the Proposed Accredited Investor Rules were to be adopted, this specific intent of Congress in creating two separate exemptions would be ignored. Grafting stringent eligibility requirements to Section 3(c)(1) is beyond the scope of what was intended to be an exemption available to companies whose investors are limited in number, but not limited based on sophistication.

Moreover, under the Proposed Accredited Investor Rules, we submit that the new requirements for accredited investor status would render the qualified purchaser test useless for most married persons, and in the future for all natural persons. Under the Proposed Accredited Investor Rules, the treatment of investments a natural person may own jointly or with that person's spouse that are

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[14] *Id.* at 104.

[15] *Id.* at 110.

[16] INVESTMENT COMPANY ACT—EXEMPTIONS—PRIVATE INVESTMENT COMPANIES—QUALIFIED PURCHASERS—DEFINITION, Securities and Exchange Commission Proposing Release No. IC-22405, ¶4-5 (December 18, 1996).

part of a shared community interest differs from the treatment of similar interests under Section 3(c)(7). Under Section 3(c)(7) a natural person investing on his or her own behalf may include in the calculation of "investments" all of such person's investments held jointly with that person's spouse and any investments in which that person shares a community property or similar shared ownership interest with that person's spouse. Therefore, if a married couple jointly owns $5 million in investments, each member of the couple individually will qualify as a "qualified purchaser" as defined in Section 2(a)(51)(A).[17] In contrast, the Proposed Accredited Investor Rules only allow a natural person to include in its calculation of investable assets fifty percent of the investments owned jointly or investments in which ownership is shared, with that person's spouse. Consequently, the new accredited investor standard would also require the married couple to own $5 million in joint investments and community property in order for each member of the couple to meet the $2.5 million threshold.[18] This complicates an already complicated regulatory system by now requiring joint investments and community property to be treated one way under the qualified purchaser standard, and to be treated in another more stringent manner under the proposed accredited investor standard.

Furthermore, because the Proposed Accredited Investor Rules contemplate adjusting the accredited investor standard for inflation,[19] eventually the threshold for a natural person to qualify as an accredited investor with respect to investments in funds relying on Section 3(c)(1) will exceed the requirements for a natural person to qualify as a qualified purchaser under Section 3(c)(7) (which are not adjusted for inflation), making the Section 3(c)(1) exemption irrelevant for such investors. We believe Congress did not intend for such a result.

We also believe Congress did not consider private investment vehicles to be more risky than other issuers of securities. Many types of securities and issuers are often far more complicated and risky than interests in private investment vehicles. Even investing in single operating companies may present more risk than investing in a private fund that holds a diversified range of investments. In addition, an investor who makes a direct investment in a complicated security has less protection under the securities laws than if he invested in a pooled vehicle, since such direct investments are not being actively managed by an investment adviser that is regulated by the Investment Advisers Act. Yet, the Proposed Accredited Investor Rules target only private investment vehicles offered in reliance on Section 3(c)(1) of the Investment Company Act,[20]

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[17] *See* Rule 2a51-1(g)(2); Proposed Rules at 27-28.

[18] *See* Proposed Rules at 28.

[19] *Id.* at 23-24.

[20] *Id.* at 20.

and not other issuers, thereby making a judgment that private investment vehicles are more risky to investors than other securities. We believe this premise is incorrect and results in unfairly disparate treatment of private investment vehicles while other, even riskier securities, are regularly sold to investors without enhanced sophistication requirements. We would urge the Commission to engage in further study regarding the risks associated with private investment vehicles, since we believe that these vehicles are often managed with the objective to reduce volatility of returns to a level below that of the broad market indexes. We acknowledge that if the accredited investor standard was raised in the Securities Act for all such offers while not specifically targeting Section 3(c)(1) and Section 3(c)(7) funds that there would not be a problem.

We respectfully recommend that the accredited investor standards should be kept as currently stands in the manner Congress intended for all private placements of securities that do not involve a general solicitation.

III. Alternative Accredited Investor Standard

You have requested comments regarding the appropriate accredited natural person investable asset test under the Proposed Accredited Investor Rules.[21] We believe that if the Commission, despite the arguments noted above, raises the accredited investor standard with respect to private investment vehicles offered in reliance on Section 3(c)(1), the new standard should not be the one proposed but rather the "qualified client" standard set forth under Rule 205-3 under the Advisers Act.[22] Rule 205-3 prohibits advisers from collecting performance-based fees from anyone other than qualified clients. Among the methods of qualification is a net worth test: a natural person who has a net worth of $1.5 million or more is a qualified client.[23]

In the proposing release for Rule 205-3, the Commission stated that the test used for qualified clients was designed to "adequately ensure the rule would be limited to advisory contracts with clients who are capable of understanding and bearing the increased risks which may be associated with incentive fee arrangements." [24] Registered advisers must already comply with the qualified client requirements in order to charge performance based fees. Due to the "look-

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[21] Proposed Rules at 22-23, 25.

[22] *See id.* at 25.

[23] Rule 205-3(d)(1)(i)(A) under the Advisers Act.

[24] CONDITIONAL EXEMPTION TO ALLOW INVESTMENT ADVISERS TO CHARGE FEES BASED UPON A SHARE OF CAPITAL GAINS UPON OR CAPITAL APPRECIATION OF A CLIENT'S ACCOUNT, Securities and Exchange Commission Proposing Release No. IA-961, ¶14 (July 15, 1998).

through" provision in Rule 205-3,[25] registered advisers who have investment companies or exempted pooled investment vehicles as clients must look through their clients "to the ultimate client to determine whether the arrangement satisfies the requirements of the rule."[26] For registered advisers to private investment vehicles, this "look-through" entails looking through the fund being advised to the fund's investors. Using the same test for accredited natural persons will minimize the cost and administrative burden on private funds that have registered advisers, as these funds already ascertain whether their investors satisfy the qualified client test. Further, creating a new test for accredited natural person is unnecessarily confusing when it is intended to establish investor sophistication – the very intent behind Rule 205-3. If the Proposed Accredited Investor Rules are adopted, advisers will have at least three and frequently four different standards for investor protection to which they must conform (the "qualified purchaser," "accredited investor," and "qualified client" standards as well as those applicable under CFTC regulations). Adding this different standard seems unnecessary and costly.

Therefore, we believe the "qualified client" standard set forth under Rule 205-3 is a worthy alternative to raising the accredited investor standard to the level set forth in the Proposed Accredited Investor Rules.

IV. Other Recommendations Regarding the Proposed Accredited Investor Rules

If the commission decides to proceed with the Proposed Accredited Investor Rules, we respectfully suggest the following modifications and clarifications to the Proposed Accredited Investor Rules and their implementation.

A. Grandfather existing accredited investors

Under the Proposed Accredited Investor Rules, an existing accredited investor who no longer qualifies under the new standard would not be allowed to make further investments. The Commission has asked for comments as to whether this is appropriate.[27] We believe these investors have already gained meaningful exposure to investing in private investment vehicles and should be considered sophisticated enough to continue to do so. Further, we are concerned that smaller private investment vehicles' potential investor base would dwindle under the

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[25] Rule 205-3(b) under the Advisers Act.

[26] *See* EXEMPTION TO ALLOW INVESTMENT ADVISERS TO CHARGE FEES BASED UPON A SHARE OF CAPITAL GAINS UPON OR CAPITAL APPRECIATION OF A CLIENT'S ACCOUNT, Securities and Exchange Commission Adopting Release No. IA-1731 at 19-20 (July 15, 1998).

[27] Proposed Rules at 25.

Proposed Accredited Investor Rules because many of their current investors would no longer qualify as accredited investors. We believe they should be allowed to offer additional interests to such existing investors. Hence, we suggest a grandfather clause be incorporated into the new rules such that all current investors in a Section 3(c)(1) fund who qualify as accredited investors under existing regulations would continue to qualify with regard to future investments in such fund.

B. Knowledgeable employees should be carved-out from the accredited investor standard

Under the current Rule 3c-5 of the Investment Company Act, "knowledgeable employees" as defined in Rule 3c-5(4) are excluded from being counted as a beneficial owners of a private investment vehicle under the Section 3(c)(1) 100 investor limit and may invest in Section 3(c)(7) funds even if they do not otherwise satisfy the definition of qualified purchaser.[28] However, as stated in the Proposing Accredited Investor Rules asking for comments on this issue, knowledgeable employees are not currently excluded from the definition of accredited investor under the Securities Act. Therefore, in order for a private investment vehicle to have a valid private placement under the Securities Act, knowledgeable employees must either be accredited investors or the private investment vehicle must satisfy one of a limited number of exemptions from the Securities Act that may be relied upon in connection with offers to unaccredited investors.[29] Each of these exemptions has some difficulty (as described below) and raising the requirement for accredited investors will result in fewer knowledgeable employees being permitted to invest in their funds.

Currently, an issuer can offer to knowledgeable employees who are unaccredited investors under Rule 506 of Regulation D of the Securities Act ("**Regulation D**"), but that exemption limits the number of knowledgeable employees to 35 purchasers only,[30] and subjects the issuer to burdensome and costly information requirements under Rule 502(b) of the Securities Act, similar to that of a registration statement.[31] This is especially unnecessary when dealing with a purchaser who is a knowledgeable employee and who, in connection with

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[28] *See* Rule 3c-5(b) of the Investment Company Act.

[29] Outside of qualifying as an accredited investor, the Proposed Rules note three options: (a) rely on Rule 506 of Regulation D, (b) make an offering pursuant to Section 4(2) of the Securities Act, or (c) rely on Rule 701 of the Securities Act. Proposed Rules at 26.

[30] *See* Proposed Rules at 15-16; *id.* at 16, n.37.

[31] Rule 502(2)(A) of Regulation D requires an issuer not eligible to use Regulation A to furnish to the purchaser "the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use."

his or her functions or duties, participates in the investment activities and has access to considerable information about the fund.[32] Alternatively, an offer to knowledgeable employees can be exempted from the Securities Act registration requirements under Section 4(2) of the Securities Act alone,[33] but that method, unlike Regulation D, is not a safe harbor, and also requires the issuer to make burdensome filings to satisfy state blue sky requirements. Finally, utilizing the exemption under Rule 701 of the Securities Act would require structuring and creating a compensatory benefit plan, a difficult and costly process that does not suit the needs of knowledgeable employees who simply want to invest alongside their clients.

We believe exempting knowledgeable employees from the accredited investor standard is consistent with the Commission's goals. Investor protection concerns are absent in a carve-out of knowledgeable employees because they possess the necessary sophistication and have access to more information than a typical non-employee investor. In the adopting release of the revision to Rule 205-3 under the Advisers Act regarding performance fee contracts, the Commission wrote: "The Commission agrees that employees who actively participate in the investment activities of the adviser are likely to be sophisticated financially and do not need the protections of the performance fee prohibition."[34] Knowledgeable employees are defined as those who participate in the investment activities of the fund[35] and hence possess the sophistication to invest and deserve an exemption under the Securities Act.[36]

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[32] In a Commission interpretation letter concerning Rule 3c-5, the Commission states, "Rule 3c-5 generally defines a 'knowledgeable employee' ... to include certain executives ... and non-executive employees who, in connection with their regular functions or duties, participate in the investment decisions of the Fund.... Rule 3c-5 is intended to cover non-executive employees only if they actively participate in the investment activities of the Fund." American Bar Association Section of Business Law, Securities and Exchange Commission Interpretation Letter, File No.132-3, April 22, 1999 at 10-12.

[33] *See* Proposed Rules at 15.

[34] EXEMPTION TO ALLOW INVESTMENT ADVISERS TO CHARGE FEES BASED UPON A SHARE OF CAPITAL GAINS UPON OR CAPITAL APPRECIATION OF A CLIENT'S ACCOUNT, Securities and Exchange Commission Adopting Release No. IA-1731 at 18 (July 15, 1998).

[35] *See supra* note 32.

[36] For substantially the same policy reasons as stated in this section, we also support a carve out of the "qualified client" requirement for investment adviser fees in Rule 205-3 under the Advisers Act for knowledgeable employees.

Further, we believe a carve out adding knowledgeable employees[37] to the list of accredited natural persons would facilitate knowledgeable employees investing their own money along with those of clients, thus further aligning the incentives of employees and clients. We believe this modification of the Proposed Accredited Investor Rules would support the Commission's goals of increasing investor protection without imposing unnecessarily burdensome requirements on private investment vehicles.

C. The definition of venture capital fund should be expanded

Venture capital funds are excluded from the Proposed Accredited Investor Rules, and they are defined to have the same meaning as that of "business development company" in Section 202(a)(22) of the Advisers Act.[38] You requested comments on whether the definition should be modified to include other funds.[39] Rather than using the "business development company" definition, we suggest that the definition of a venture capital fund not be limited to funds organized under the laws of and having a principal place of business in the United States. Instead, we propose that companies organized and/or operating offshore and companies that invest in foreign securities should be included in the definition. While venture capital funds and business development companies are alike in many aspects of capital formation, venture capital funds have a wider scope, and their ability to seek out and drive business development both domestic and foreign is essential to their business. We believe this wider scope should be captured in the Proposed Rules.

D. Restrictions on advertising private investment pools should be reconsidered

The Proposed Accredited Investor Rules do not currently propose to revise the restrictions on general advertising under Regulation D.[40] We propose that if the accredited investor standard is raised for natural persons, then the Commission should also create a safe harbor that would permit greater publicity to be provided regarding Section 3(c)(1) and 3(c)(7) funds without being deemed a general solicitation.[41] The Commission staff recommended lifting the prohibition against

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[37] We suggest the definition of "knowledgeable employee" concur with the definition in Rule 3c-5 of the Investment Company Act.

[38] Proposed Rule at 30.

[39] *Id.* at 31-32.

[40] *See* Rule 502(c) of Regulation D.

[41] While perhaps outside the scope of the comments requested, we support permitting general solicitation in Section 3(c)(7) funds as well. *See infra* note 42.

general advertising and general solicitation for Section 3(c)(7) funds in its 2003 Staff Report to the SEC "Implications of the Growth of Hedge Funds".[42] The staff was reluctant to make the same recommendation for Section 3(c)(1) funds because "such an arrangement could increase the level of risk" for "less wealthy investors."[43] However, if the accredited investor standard were to be raised, those concerns would be mitigated. If interests in private investment pools are sold solely to a limited group of investors under the Proposed Accredited Investor Rules or solely to qualified purchasers under Section 3(c)(7), the availability of broader information regarding such investment pools would be entirely consistent with the Commission's regulation of such vehicles. Ultimately, we believe that permitting advisers in private investment pools to permit advertising with respect to Section 3(c)(1) and 3(c)(7) funds would "facilitate capital formation without raising significant investor protection concerns."[44]

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We appreciate the opportunity to respond to the Commission's request for comments and we hope that these comments and observations contribute to the important work of the Commission. If you have any questions with respect to the matters raised in this letter, please contact any of the undersigned.

Very truly yours,

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[42] The report noted "there seems to be little compelling policy justification for prohibiting general solicitation or general advertising in private placement offerings of Section 3(c)(7) funds that are sold only to qualified purchasers." IMPLICATIONS OF THE GROWTH OF HEDGE FUNDS, Staff Report to the United States Securities and Exchange Commission, 100 (September 2003), *available at* http://www.sec.gov/news/studies/hedgefunds0903.pdf.

[43] *Id.* at 101.

[44] *Id.*