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September 23, 2013

Via Electronic Filing

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

Dear Ms. Murphy:

We are writing in response to the Securities and Exchange Commission's (the "Commission") request for comments on proposed amendments to Regulation D and Form D (the "Proposed Rules")[1] under the Securities Act of 1933, as amended (the "Securities Act").[2] We are concerned with how certain aspects of the Proposed Rules could adversely affect the ability of private investment funds ("private funds") and their portfolio companies to raise capital in private placement transactions. The Jumpstart Our Business Startups Act (the "JOBS Act") was enacted in 2012 with the purpose of facilitating access to capital markets for emerging growth companies, but we believe that certain aspects of the Proposed Rules will instead hamper the ability of such companies to raise capital. We appreciate the opportunity to comment on the Proposed Rules.

The Proposed Rules have been issued in connection with Regulation D Rule 506 rules lifting the long-standing ban on general advertising and solicitation in connection with offerings[3]

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1 AMENDMENTS TO REGULATION D, FORM D AND RULE 156 UNDER THE SECURITIES ACT, Securities and Exchange Commission Proposing Release No. 33-9416, IC-30595, proposed July 10, 2013 (hereinafter referred to as the "*Proposing Release*"). Page references to the Proposing Release herein are to the Proposing Release as released in Commission Proposing Release 33-9416, IC-30595.

2 The opinions expressed herein represent those of the undersigned and not necessarily those of our clients.

3 ELIMINATING THE PROHIBITION AGAINST GENERAL SOLICITATION AND GENERAL ADVERTISING IN RULE 506 AND RULE 144A OFFERINGS, Securities and Exchange Commission Adopting Release No. 33-9415, IA-3624, adopted July 10, 2013.

and are intended to enhance the Commission's understanding of the Rule 506 market.[4] The Commission anticipates significant changes in the Rule 506 market as a result of this change. Accordingly, the Commission proposed to (a) amend Rule 503 of Regulation D to change certain Form D filing requirements, (b) amend Form D to require additional disclosures primarily related to offerings conducted in reliance on Rule 506 and (c) amend Rule 507 of Regulation D to automatically disqualify an issuer, for a one year period, from relying on Rule 506 for future offerings (a "Rule 507 Disqualification" or "Disqualification") if the issuer, or any predecessor or affiliate of the issuer, fails to comply with the new Form D filing requirements, including amendment requirements.[5] We understand and appreciate the Commission's increased sensitivity to investor protection in a new and developing Rule 506 market. However, we believe that the Commission's incorporation into the Proposed Rules of the expansive definition of "affiliate" in Rule 501(b) of Regulation D[6] is overly broad, particularly as it applies to the private fund industry, could chill portfolio companies' ability to raise capital, which would be at odds with the purposes of the JOBS Act, fails to enhance investor protection and will result in disproportionate consequences that needlessly burden and unsettle the private fund industry and investors.[7] We also note that the severity of Disqualification and the potential scope of "affiliate" could result in fewer issuers using Regulation D if issuers determine that it is a safer course to rely on the statutory exemption available in Section 4(a)(2) of the Securities Act. Because the Section 4(a)(2) exemption requires no filing, the Commission's proposed Form D requirements could have the unintended effect of depriving the Commission of information relating to private offerings.

Rule 501(b) of Regulation D defines an "affiliate" as a person that "directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified." The Commission has not adopted a precise definition of "control"; however, in various securities law contexts the Commission has indicated that ownership of substantially less than a majority of an issuer's voting securities constitutes control, particularly in instances where there is not another significant equity owner of the issuer's voting securities.

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4 Proposing Release at 10.

5 *Id.* at 11.

6 *Id.*

7 We also note that this definition of "affiliate," and the consequences we describe, may apply with respect to the Commission's recently adopted Rule 506(d) of Regulation D, which generally disqualifies an issuer from reliance on Rule 506 of Regulation D for securities offerings if the issuer or certain persons related to the issuer, including "affiliates," have been subject to specified disqualifying events. We believe that noncompliance with the "bad actor" rules is less likely because the specified disqualifying events occur with relative infrequency, but we would ask that any narrowing of "affiliate" for purposes of Rule 507 be extended to Rule 506(d).

We believe the Commission may apply a substantially less than majority equity ownership threshold for the purposes of determining what entities are "control affiliates" in applying Rule 507 to a noncompliant issuer. In the absence of a specified securities ownership threshold constituting "control," the definition of "control" is vague and difficult to apply in complicated organizational structures such as those routinely employed by the general partners and investment managers of private equity funds, with the likely result being that managers will feel compelled to monitor any entity in which a fund holds any meaningful level of direct or indirect voting interest. Accordingly, we believe the scope of "affiliate," particularly with respect to the "under common control" component of the definition, is overly broad and will result in uncertainty with respect to the private fund industry's ability to participate in the Regulation D market and in the potential Disqualification of issuers who are inadvertently noncompliant with the Proposed Rules because of the actions or omissions of a far-flung, technical "affiliate."

As an example of the reach of a potential Rule 507 Disqualification, consider a typical private equity firm structure in which a management company and one or more general partners are under common control and, in turn, control private funds, each of which owns multiple portfolio companies. Each of those portfolio companies has three subsidiaries, and one of the subsidiaries holds a 25% voting interest in another operating company. This operating company relies on Regulation D to issue stock options to certain key employees and is required to file a Form D not later than 15 days after the exercise of the first stock option.[8] The company makes the initial filing but fails to make a timely amendment. If the subsidiary is found to "control" the operating company, such failure could subject the general partner, the management company, the private fund and each of the other portfolio companies to a Rule 507 Disqualification because the scope of the "under common control" component of the definition of "affiliate" may be read to encompass each of these entities. The example above is overly simplified but illustrates how a seemingly simple rule will require extensive monitoring and coordination among various parties. Given the variety and frequency of Regulation D offerings, the potential need for ongoing Form D monitoring even after the issuance of the Regulation D securities (as in the stock option example above) and the low and indeterminate ownership threshold for a determination that one entity is controlled by another, we submit that Disqualification under the Proposed Rules for inadvertent and technical reasons is likely.

The Rule 506 exemption is critical to the private fund industry and other issuers that lack access to the public markets, and therefore we think Disqualification under the above circumstances represents an inappropriate and disproportionate consequence relative to the Commission's stated objective. We understand that the new Disqualification measure is meant

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[8] We submit the stock option example to suggest the variety of offerings that rely on Regulation D in addition to showing that Form D compliance can require ongoing monitoring even after the issuance of securities.

to provide an incentive for compliance with the Form D requirements so that the Commission may evaluate the developing Rule 506 market, but we respectfully note that such incentives are inapt and ineffectual when they are trying to curb or encourage inadvertent behavior. Given the inadequacy of the incentive, we also fail to see how the broad definition of "affiliate" in the Proposed Rules will aid the Commission's goal of enhancing investor protection.

As an alternative, we believe the Commission should exclude affiliates from inclusion in the proposed Rule 507 Disqualification provision. We believe that the severity of the consequence is sufficiently compelling to encourage those with more immediate knowledge of an offering to comply with the Form D filing requirements and therefore think that attempts by issuers to sidestep the requirements are unlikely. As an alternative to the exclusion of "affiliate" from the Rule 507 Disqualification provision, we would ask the Commission to consider severing the "affiliate" link between ultimate general partners, general partners and management companies, on the one hand, and the portfolio companies they may indirectly control, on the other hand, by expressly curbing the scope of the "under common control" component in the Rule 501(b) definition of "affiliate" as it applies to Rule 507 such that non-compliance by a private fund or portfolio company does not result in the Disqualification of every other private fund and portfolio company deemed to be "under common control" with the noncompliant entity. Should the Commission determine to adopt the proposed definition of "affiliate," we would ask the Commission to consider adding an exception to the Rule 507 Disqualification for any noncompliance that occurs prior to affiliation, so long as the newly affiliated entity is not in control of the Form D noncompliant issuer or under common control with the issuer by a third party that was in control of the newly affiliated entity at the time of such Form D noncompliance.[9] In addition, in instances when the newly affiliated entity does take control of a previously noncompliant issuer, we would ask the Commission to exempt the new affiliate from the Rule 507 Disqualification so long as it did not know, after having made a reasonable inquiry, of the entity's noncompliance.

If the Commission determines that the Proposed Rules should be adopted, we respectfully submit that the Proposed Rules should be revised to better balance the Commission's role in protecting investors with the impact on the Regulation D market, particularly with respect to the private fund industry's reliance on that market. We ask that the Commission consider the foregoing issues and recommendations prior to final adoption of the Proposed Rules.

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[9] We note that there is a similar exception in recently adopted Rule 506(d)(3) of Regluation D for "bad actor" conduct occurring prior to affiliation.

If you have any questions regarding these comments, please contact Scott Moehrke at [redacted] or Nancy Kowalczyk at ([redacted]

Sincerely,

Scott A. Moehrke