October 5, 2007

Via Electronic Filing

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

Re: Revisions of Limited Offering Exemptions in Regulation D (Release No. 33-8828; IC-27922; File No. S7-18-07)

Dear Ms. Morris:

The Investment Adviser Association[1] appreciates the opportunity to comment on the Commission's proposal to create a new exemption to the registration requirements of the Securities Act of 1933 for offers and sales to "large accredited investors" in proposed Rule 507 under Regulation D, among other Regulation D proposed amendments.[2] In connection with this Proposal, the Commission also requests additional comment on its December 2006 proposal to require investors in private investment funds formed under Section 3(c)(1) of the Investment Company Act of 1940 to be "accredited natural persons" under Regulation D ("Accredited Natural Person Proposal").[3] The IAA previously submitted comments to the Commission on the Accredited Natural Person

[1] The IAA (formerly the Investment Counsel Association of America) is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937, the Association's current membership consists of about 500 firms that collectively manage in excess of $8 trillion in assets for a wide variety of individual and institutional clients. For more information, please visit our web site: www.investmentadviser.org.

[2] *See Revisions of Limited Offering Exemptions in Regulation D*, SEC Rel. No. 33-8828; IC-27922 (Aug. 3, 2007) (Proposing Release or Proposal), available at http://www.sec.gov/rules/proposed/2007/33-8828.pdf, as published in 72 Fed. Reg. 45116 (Aug. 10, 2007).

[3] *See Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles*, SEC Release No. 33-8766; IA-2576; File No. S7-25-06 (Dec. 27, 2006), available at http://www.sec.gov/rules/proposed/2006/33-8766.pdf, as published in 72 Fed. Reg. 400 (Jan. 4, 2007). The SEC proposed to increase the eligibility amounts for natural person investors in hedge funds and private equity funds relying on Section 3(c)(1) of the Investment Company Act to require: (i) net worth of $1million or income of $200,000 individually (or $300,000 jointly with the spouse); and (ii) $2.5 million in investments (each as adjusted for inflation). Section 3(c)(1) funds are beneficially owned by 100 or fewer persons and do not make or propose to make a public offering of their securities.

Proposal, which we have attached again here for your convenience.[4] We incorporate that letter by reference and reemphasize certain of those comments.

The IAA commends the Commission and its staff for addressing important issues of investor eligibility for Regulation D offerings and for seeking comments on how this Proposal affects the Accredited Natural Person Proposal. While we generally support the Commission's reassessment of the financial eligibility standards for Regulation D offerings, we propose several modifications as discussed below. Specifically, we request the Commission to:

(1) Permit Section 3(c)(7) funds to utilize the limited advertising proposed in Rule 507;

(2) Harmonize the Accredited Natural Person Proposal for Section 3(c)(1) funds with the qualified client standard under the Investment Advisers Act of 1940;

(3) Harmonize the definition of "joint investments" in the two pending proposals with the definition of joint investments in Investment Company Act Rule 2a51-1;

(4) Retain the standard in Rule 501(a) of Regulation D for issuers to form a reasonable belief as to the qualification of investors; and

(5) Adopt a fiduciary adviser exemption to the Accredited Natural Person Proposal.

1. Section 3(c)(7) Funds Should Be Able to Utilize the Limited Advertising Proposed in Rule 507

The Commission proposes an exemption under new Rule 507 for offers and sales of securities to "large accredited investors." Individuals would be large accredited investors if they owned more than $2.5 million in investments (or joint investments) or have had individual annual income of more than $400,000 in the last two years (or $600,000 with one's spouse), each as adjusted for inflation.[5]

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[4] *See* Letter from Karen L. Barr, General Counsel and Monique S. Botkin, Counsel, Investment Adviser Association to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission (Mar. 9, 2007) ("March 9 Letter").

[5] The Commission selected the $2.5 million investments-owned standard for individuals and spouses based on the $2.5 million investments-owned standard it proposed in the Accredited Natural Person Proposal for certain Section 3(c)(1) funds. Entities would be required to have more than $10 million in investments (as adjusted for inflation) to qualify as large accredited investors. All purchasers would be required to be large accredited investors. Directors and officers of the issuer would be considered large accredited investors in addition to being considered accredited investors, without being subject to an income, assets, or investments requirement.

The exemption would permit limited written advertising (an "announcement") of these offerings, to include specified information outlined in the proposed Rule and optional information such as name, type, number, and price of securities being offered, and a brief description of the business of the issuer in 25 or fewer words. The Rule would permit an issuer to provide information in addition to the announcement if it reasonably believes the prospective purchaser is a large accredited investor. This information may be delivered to prospective purchasers through an electronic database that is restricted to large accredited investors. The Commission states in the Proposing Release that, "publication of such an announcement would not contravene the prohibition on general solicitation and advertising otherwise applicable to the offer and sale of securities in a Rule 507 transaction."[6]

In proposing the new Rule, the Commission relied on its exemptive authority under Section 28 of the Securities Act, rather than on Section 4(2) of the Securities Act. The Commission states in the Proposing Release that pooled investment vehicles formed under Section 3(c)(1) or Section 3(c)(7)[7] of the Investment Company Act would not be able to take advantage of the limited advertising proposed to be permitted under Rule 507. The Commission reasoned that because those funds are required to sell their securities in transactions not involving a public offering, and such vehicles typically rely on Section 4(2) through Rule 506, which expressly forbids general solicitation and general advertising, the funds would be precluded from selling their securities in reliance on new Rule 507.[8]

This position appears to be inconsistent with recommendations and conclusions made in the 2003 Commission Staff Report, *Implications on the Growth of Hedge Funds* ("Hedge Fund Report").[9] In the Hedge Fund Report, the staff recommended to the Commission that it eliminate the restrictions on general solicitation for private placement offerings of interests in Section 3(c)(7) funds. Specifically, the staff indicated that:

> [I]t may be worthwhile to consider the need for [general solicitation] limitations for funds whose owners are limited to investors that clearly meet a higher standard or may be presumed to be able to 'fend for themselves' such as, for example, the 'qualified purchaser' standard of Section 3(c)(7).[10]

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[6] Proposing Release at 20. The Commission notes that the proposal does not eliminate the prohibition on general solicitation and general advertising from the conditions of the exemption. *Id.* at 10.

[7] Section 3(c)(7) funds are offered to "qualified purchasers" and do not make or propose to make a public offering of their securities. Qualified purchasers include natural persons who own at least $5 million in investments.

[8] Proposing Release at 27.

[9] The Hedge Fund Report is available at http://www.sec.gov/news/studies/hedgefunds0903.pdf.

[10] Hedge Fund Report at 87.

The staff further noted that:

> 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 only sold to qualified purchasers. . . . [P]ermitting funds, including hedge funds, that limit their investors to a higher standard (e.g., 'qualified purchasers') to engage in a general solicitation could facilitate capital formation without raising significant investor protection concerns.[11]

We agree with the staff's conclusion in the Hedge Fund Report that qualified purchasers in Section 3(c)(7) funds are financially sophisticated enough to fend for themselves in offerings, such that they should be eligible to participate in an offering with limited advertising permitted by proposed Rule 507. The Commission stated in the Proposing Release that it proposed higher dollar thresholds for large accredited investors due to increased investor risks relating to the limited advertising that would be allowed under Rule 507.[12] However, the $5 million investments threshold for natural person qualified purchasers in 3(c)(7) funds is twice the $2.5 million investment threshold proposed for large accredited investors. Thus, if large accredited investors would be considered sufficiently protected from any perceived risks associated with limited advertising under Rule 507 by virtue of their amount of investments, qualified purchasers would be sufficiently protected as well.

Accordingly, we believe the Commission should adopt the broader staff recommendations on general solicitation and general advertising articulated in the Hedge Fund Report. At a minimum, we urge the Commission under appropriate authority to permit 3(c)(7) funds to use the type of limited advertising that would be available to other issuers under proposed Rule 507.

2. The Accredited Natural Person Proposal Should Be Harmonized with the Qualified Client Standard

The Commission seeks comments on whether it should revise the Accredited Natural Person Proposal to include alternative income and investment standards similar to those used in the definition of "large accredited investor" in proposed Rule 507, or otherwise change the proposed accredited natural person standard. As we stated in our March 9 Letter, we believe the Commission should harmonize the accredited natural person standard with that of the $1.5 million net worth requirement applicable to

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[11] Hedge Fund Report at 100-101.

[12] Proposing Release at 14.

"qualified clients" of an adviser that charges performance fees under Advisers Act Rule 205-3.[13]

This approach would have the benefit of avoiding the creation of yet another standard for eligibility in the securities laws – *i.e.*, adding "accredited natural person" to "accredited investor" under the Securities Act, "qualified client" under Advisers Act Rule 203-5, "qualified purchaser" under Investment Company Act Section 3(c)(7), "qualified institutional buyer" under Securities Act Rule 144A, and "qualified eligible persons" under CFTC Rule 4.7. The application of these differing standards is burdensome, complicated, and confusing. In addition, adopting different standards would result in inequitable treatment of private investment funds compared with other private offerings. This different treatment does not appear to be supported by evidence of risk or benefit differentials among various types of private investments.

3. The Definition of "Joint Investments" Should Be Harmonized with Rule 2a51-1 Used for Section 3(c)(7) Funds

The Proposing Release notes that several determinations must be made to calculate "joint investments" to determine whether a natural person is an accredited investor or a large accredited investor. If both spouses sign and are bound by the investment documentation, the full amount of their investments (whether made jointly or separately) may be included for purposes of determining whether the investors are accredited or large accredited investors. If, however, the investment documentation does not bind both spouses, the investing spouse's eligibility determination may include only 50 percent of: (a) any investments held jointly with the individual's spouse; and (b) any investments in which the individual shares a community property or similar shared ownership interest with the individual's spouse.[14]

This definition is similar to that in the Accredited Natural Person Proposal.[15] As we stated in our March 9 Letter, we believe the Commission should harmonize the definition of joint investments for the Accredited Natural Person Proposal with the definition of joint investments currently utilized for Section 3(c)(7) funds under Rule

[13] Advisers Act Rule 205-3(d)(1). Qualified clients include natural persons who immediately after entering into the advisory contract have at least $750,000 under the management of the investment adviser or have a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $1.5 million at the time the contract is entered into. *See* Accredited Natural Person Proposal at 25, n.61. Alternatively, we believe the Commission should consider adopting the proposed thresholds for a large accredited investor as the standard for an accredited natural person and confirm that the offering may include no more than 35 non-accredited purchasers.

[14] *See* Proposing Release at 40; Proposed Rule 501(j).

[15] The Commission is continuing to consider whether to permit a spouse's assets to be included in any calculation for determining whether an investor satisfies the financial criteria. *Id.* at 40, n.101.

2a51-1 under the Investment Company Act.[16] We also believe the definition of joint investments in this Proposal should be harmonized with the definition in Rule 2a51-1.

Unlike in these proposals, in determining whether a natural person is a qualified purchaser, Rule 2a51-1(g)(2) provides that there may be included in the amount of his or her investments any investments held jointly with the person's spouse or any investments in which the natural person shares a community property or similar shared ownership interest with his or her spouse. The Commission provides no rationale for this different treatment of joint investments in either proposal. Moreover, the proposed definitions would needlessly complicate eligibility determinations by requiring investors and/or fund sponsors to make determinations about the legal characterizations of the assets of an investor based on the requirements of his or her state of residence, including whether or not an asset is considered community property. This complex requirement would likely lead to inconsistent application, which would not serve to further the Commission's goals. We believe that the "bright line" test in Rule 2a51-1 continues to be the most simple and rational approach, and we urge the Commission to harmonize the definitions in the proposals accordingly.[17]

4. The Reasonable Belief Standard in Rule 501(a) Should Be Maintained

The Commission notes in the Proposing Release that its experience indicates that some issuers may not have taken appropriate measures to satisfy their obligation under Rule 501(a) to form a reasonable belief that a prospective purchaser satisfied the definition of an accredited investor.[18] The Commission seeks comment as to whether it should take additional measures to help issuers understand their obligations, including whether to create a safe harbor in Regulation D that sets forth the type of investigation required for an issuer to reach a reasonable belief that a prospective purchaser satisfied the definition of accredited investor.

Issuers, particularly private funds, engage in numerous activities to satisfy the current requirements in Rule 501(a) of the Regulation D safe harbor. For example, they may obtain certain certifications via subscription agreements and questionnaires from prospective investors that the investor is properly qualified. They may also have developed the requisite reasonable belief from their or their affiliates' experience in previous business dealings with the investors or by other documentation completed by the investor. In addition, they may employ other methods depending on the facts and

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[16] *See* Rule 2a51-1(g)(2).

[17] If, however, the Commission chooses not to harmonize the definition of joint investments with Rule 2a-51-1, we encourage it to eliminate any immaterial differences in the two pending proposals' definitions. This approach will provide some consistency among Regulation D offerings.

[18] Proposing Release at 38. Rule 501(a) states that, "[a]ccredited investor shall mean any person who comes within any of the following categories, or who the issuer *reasonably believes* comes within any of the following categories, at the time of the sale of the securities to that person…." (emphasis added).

circumstances of the particular offering. Thus, creating a safe harbor to satisfy this obligation is unnecessary. In addition, a proscriptive list of requirements may create additional unnecessary burdens for fund issuers and their advisers.

5. A Fiduciary Adviser Exemption from Accredited Natural Person Standard Should Be Adopted

We take this opportunity to strongly reiterate the request in our March 9 Letter that the Commission adopt a fiduciary representative exception to the accredited natural person standard for investors who hire an SEC-registered investment adviser. The Commission's proposed accredited natural person standard is designed to provide assurance that an investor has a "level of knowledge and financial sophistication and the ability to bear the economic risk" of an investment in a Section 3(c)(1) fund, as demonstrated by the investor's investment experience and net worth or income.[19] We believe that the retention of a registered investment adviser is an appropriate proxy for an investor's own investment experience and satisfies the Commission's goals. In fact, the Commission appears to be seeking the type of investment experience possessed by advisers by adding an investment-based eligibility standard for natural persons in Section 3(c)(1) funds.[20] Accordingly, we urge the Commission to except from the accredited natural person standard investors whose Section 3(c)(1) fund investments are made by the SEC-registered investment advisers they retain, as fiduciaries, to manage their assets on a discretionary basis.[21]

As we stated in our March 9 Letter, an investment adviser is a registered investment professional that stands in a special relationship of trust and confidence with, and therefore is a fiduciary to, its clients.[22] As a fiduciary, an SEC-registered investment adviser's duty of care, loyalty, honesty, and good faith to act in the best interests of its clients provides substantial protections for its clients, including those invested in Section

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[19] Accredited Natural Person Proposal at 18-19.

[20] Thus, for these purposes, we propose this exception for the Accredited Natural Person Proposal and not with respect to the current requirements for accredited investors under Regulation D.

[21] Advisers managing assets on a discretionary basis have the authority to make investment decisions on behalf of their clients. Such advisers may discuss potential private fund investments with their clients before making the investment, and clients will sign the subscription agreement and other documents as appropriate. In so doing, clients may acknowledge that the adviser is their representative during the course of the purchase of a fund investment. *See, e.g.*, Securities Act Rule 501(h)(3) (requirements for purchaser representative). A "purchaser representative" is a similar concept to the fiduciary exception we propose. The Commission has stated that purchaser representatives may in fact be investment advisers. *See Interpretive Release on Regulation D,* SEC Release No. 33-6455, 1983 WL 409415 (Mar. 3, 1983) at 7, n.24 (citing SEC no-action letters *Winstead, McGuire, Sechrest & Trimble* (pub. avail. Feb. 21 and Mar. 25, 1975) and *re Kenisa Oil Company* (pub. avail. May 6, 1982)).

[22] *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92, 201 (1963).

3(c)(1) funds. The Commission's concern about these investors should be alleviated by the fact that investment advisers are obligated to place their clients' interests above their own. The Commission should acknowledge this protection and adopt this exemption.

Conclusion

We appreciate the opportunity to provide our views on these important issues. Please do not hesitate to contact the undersigned if the Commission or its staff has any questions or if we may provide any additional information regarding these matters.

Sincerely,

Monique S. Botkin

Monique S. Botkin
Senior Counsel

cc: Hon. Christopher Cox
Hon. Paul S. Atkins
Hon. Annette L. Nazareth
Hon. Kathleen L. Casey

Mr. John W. White, Director, Division of Corporation Finance
Mr. Andrew J. Donohue, Director, Division of Investment Management
Mr. Douglas J. Scheidt, Chief Counsel, Division of Investment Management
Mr. Robert E. Plaze, Associate Director, Division of Investment Management

Attachment

March 9, 2007

Via Electronic Filing

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

Re: Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles (Release No. 33-8766; IA-2576; File No. S7-25-06)

Dear Ms. Morris:

The Investment Adviser Association[1] appreciates the opportunity to comment on the Commission's proposed anti-fraud rules applicable to advisers to certain pooled investment vehicles, including hedge funds, and proposed rules to increase the financial eligibility requirements for accredited investors in certain private investment vehicles.[2] The latter proposal would establish a new category of accredited investors called "accredited natural persons," which would require ownership of at least $2.5 million in "investments" in order to invest in certain Section 3(c)(1) funds.[3]

The IAA commends the Commission and its staff for addressing these important investor protection issues and supports the Commission's efforts to implement rules to protect investors in certain pooled vehicles from fraudulent conduct.[4] We agree that it is

[1] The Investment Adviser Association (formerly the Investment Counsel Association of America) is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937, the Association's current membership consists of about 500 firms that collectively manage in excess of $8 trillion in assets for a wide variety of individual and institutional clients. For more information, please visit our web site: www.investmentadviser.org.

[2] *See Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles*, SEC Release No. 33-8766; IA-2576; File No. S7-25-06 (Dec. 27, 2006) (Proposing Release or Proposal), available at http://www.sec.gov/rules/proposed/2006/33-8766.pdf, as published in 72 Fed. Reg. 400 (Jan. 4, 2007).

[3] Section 3(c)(1) funds are offered privately to 100 or fewer beneficial owners. We refer in our letter to Section 3(c)(1) funds generally. However, the Commission has proposed an exclusion from the new standard for investors in "venture capital funds," as defined in the Proposal. *See* Proposing Release at 30-33.

[4] Indeed, we supported the Commission's previous rulemaking to require investment advisers to hedge funds to register under the Investment Advisers Act of 1940, which would have provided important

critical for the Commission to retain its ability to bring enforcement actions against advisers that defraud hedge fund investors. We also support the Commission's efforts to modernize the 25-year old accredited investor standards under the Securities Act of 1933 to ensure that investors in certain private offerings are financially sophisticated enough to understand and bear the economic risk of those investments. A number of modifications are necessary, however, to ensure the proposals appropriately achieve the Commission's goals.

With respect to the proposed "accredited natural person" standard, we respectfully request that the Commission:

- Adopt a fiduciary representative exception to the accredited natural person standard for investors who hire an SEC-registered investment adviser;[5]
- Modify several provisions of the proposed accredited natural person standard, including: (a) conform the proposed accredited natural person standard to that of existing requirements for "qualified clients" under Rule 205-3 of the Advisers Act, or otherwise adjust the current accredited investor standard; (b) conform the definition of "investments" to the definition applicable to investor eligibility for Section 3(c)(7) funds;[6] and (c) eliminate the automatic indexing requirement of the proposed new standard;
- "Grandfather" future capital commitments of current investors in existing Section 3(c)(1) funds affected by the proposed rules;
- Add "knowledgeable employees" of Section 3(c)(1) funds and their advisers to the definition of accredited natural person; and
- Allow sufficient time for compliance with the proposed accredited natural person rules.

With respect to the proposed anti-fraud rule, we respectfully request that the Commission clarify that the proposed rule does not create any new liability under the Advisers Act for an investment adviser to an investment company.

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investor protections. *See* Letter from David G. Tittsworth, Executive Director and Caroline Schaefer, Associate General Counsel to Jonathan G. Katz, U.S. Securities and Exchange Commission (Sept. 14, 2004); *Registration Under the Advisers Act of Certain Hedge Fund Advisers*, SEC Release No. IA-2266, File No. S7-30-04 (Dec. 4, 2004) ("Hedge Fund Adviser Registration Rule")).

[5] The Commission may wish to consider whether other fiduciary exceptions are appropriate.

[6] Section 3(c)(7) funds are offered privately to "qualified purchasers," as defined under the Investment Company Act.

A. Proposed Accredited Natural Person Standard for 3(c)(1) Funds

The Commission has proposed that investors in Section 3(c)(1) funds must: (1) meet the current accredited investor standards of having: (a) a net worth, or joint net worth with the person's spouse, exceeding $1 million at the time of purchase; or (b) individual income exceeding $200,000 (or joint income with the person's spouse of $300,000) in each of the most recent two years and an expectation of reaching the same income level in the year of investment;[7] *and* (2) own, individually, or jointly with that person's spouse, not less than $2.5 million (as adjusted for inflation) in "investments."[8] While we support the Commission's reassessment of the financial eligibility standards, we propose an important exception and several modifications as discussed below.

1. Accredited Investors Who Hire a Registered Investment Adviser Should be Excepted from the Proposed Accredited Natural Person Standard

The Commission's proposed accredited natural person standard is designed to provide assurance that an investor has a "level of knowledge and financial sophistication and the ability to bear the economic risk" of an investment in a Section 3(c)(1) fund, as demonstrated by the investor's investment experience and net worth or income.[9] We are concerned, however, that the rules as proposed will prevent investments in these funds by a large class of investors who are financially sophisticated enough to hire an investment adviser registered with the Commission to manage their assets on a discretionary basis.[10] We believe that the retention of a registered investment adviser is an appropriate proxy for an investor's own investment experience and satisfies the Commission's goals. In fact, the Commission appears to be seeking the type of investment experience possessed by advisers by adding an investment-based eligibility standard for natural persons in Section 3(c)(1) funds.[11] Accordingly, we propose that the Commission except from the accredited natural person standard investors whose Section 3(c)(1) fund investments are made by the SEC-registered investment advisers they retain, as fiduciaries, to manage their assets on a discretionary basis.[12]

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[7] *See* Securities Act Rules 215(e),(f) and Rules 501(a)(5),(a)(6).

[8] Proposed Securities Act Rules 215(e),(f), 216, 501(a)(5), (a)(6), 509.

[9] Proposing Release at 18-19.

[10] The Commission has long treated accredited investors meeting the requirements under the Securities Act as sufficiently sophisticated to be able to make their own investment decisions. Certainly, such accredited investors are sophisticated enough to choose an investment adviser to make investment decisions for them.

[11] Thus, we propose this exception for the Commission's proposal to adopt an accredited natural person standard and not with respect to the current requirements for accredited investors under Regulation D.

[12] Advisers managing assets on a discretionary basis have the authority to make investment decisions on behalf of their clients. Such advisers may discuss potential private fund investments with their clients before making the investment, and clients will sign the subscription agreement and other documents as

The Commission's concern about these investors should be alleviated by the fact that SEC-registered investment advisers are obligated to place their clients' interests above their own. An investment adviser stands in a special relationship of trust and confidence with, and therefore is a fiduciary to, its clients.[13] As a fiduciary, an investment adviser has an affirmative duty of care, loyalty, honesty, and good faith to act in the best interests of its clients. The parameters of an investment adviser's duty depend on the scope of the advisory relationship and generally include: the duty at all times to place the interests of clients first; the duty to have a reasonable basis for its investment advice; the duty to make investment decisions consistent with any mutually agreed upon client objectives, strategies, policies, guidelines, and restrictions; the duty to treat clients fairly; and the duty to make full and fair disclosure to clients of all material facts about the advisory relationship, particularly regarding conflicts of interest.[14] These obligations of SEC-registered investment advisers provide substantial protections for their clients, including those invested in Section 3(c)(1) funds.[15]

Specifically, in the course of their duties, investment advisers conduct research and due diligence on certain hedge funds, private equity funds, and venture capital funds, among others, on behalf of their investors before making an investment in such fund for their clients. The recommendations or investments are vetted by advisers after satisfying their duties to make investment decisions in the best interest of their clients. In addition, advisers are required to understand the complexities and risks of any investment vehicle in which they invest their clients' assets. This unique relationship should satisfy the Commission that these investors are appropriately protected and able to accept the risk of those investments.

A similar concept, one of a "purchaser representative," is found in Regulation D under the Securities Act.[16] A purchaser representative is required to have such

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appropriate. In so doing, clients may acknowledge that the adviser is their representative during the course of the purchase of a fund investment. *See, e.g.*, Securities Act Rule 501(h)(3) (requirements for purchaser representative).

[13] *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92, 201 (1963).

[14] *Id.; see also In re Arleen Hughes*, SEC Release No. 34-4048 (Feb. 18, 1948); IAA Standards of Practice, as amended February 28, 2006, available at: http://www.icaa.org/html/sop.html.

[15] In addition, SEC-registered advisers are subject to Commission inspections and examinations under the Advisers Act. They are also obligated to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act, review those policies and procedures annually, and designate a chief compliance officer to be responsible for administering the policies and procedures. *See* Rule 206(4)-7; *Compliance Programs of Investment Companies and Investment Advisers*, SEC Release Nos. IA-2204; IC-26299; File No. S7-03-03 (Dec. 17, 2003).

[16] Securities Act Rule 501(h). The Commission has stated that purchaser representatives may in fact be investment advisers. *See Interpretive Release on Regulation D*, SEC Release No. 33-6455, 1983 WL

knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the prospective investment.[17] Likewise, a registered investment adviser has knowledge and experience in financial and business matters and is capable of evaluating, and does evaluate, the merits and risks of prospective investments in Section 3(c)(1) funds for its clients.[18]

Indeed, the Commission acknowledges in the Proposing Release that a similar category of natural person investors does not need the protection of a higher accredited investor standard:

> [N]atural persons may have indirect exposure to private pools as a result of their participation in pension plans and investment in certain pooled investment vehicles that invest in private pools. Such plans and vehicles are generally administered by entities of plan fiduciaries and registered investment professionals. *This protection is not present in the case of natural persons who seek to invest in 3(c)(1) Pools outside of the structure of such pension plans and pooled investment vehicles.*[19] (emphasis added.)

We respectfully submit that a natural person's retention of a registered investment adviser provides the same level of protection as the pooled vehicle's retention of a plan fiduciary or "registered investment professional" cited with approval by the Commission.[20] Many natural persons have in fact retained registered investment advisers to make investments on their behalf, including in Section 3(c)(1) funds. Accordingly, the Commission should acknowledge this protection and adopt an exemption to the accredited natural person standard for natural person investors who hire an investment adviser registered with the Commission to manage their accounts on a discretionary basis.

409415 (Mar. 3, 1983) at 7, n. 24 (citing SEC no-action letters *Winstead, McGuire, Sechrest & Trimble* (pub. avail. Feb. 21 and Mar. 25, 1975) and *re Kenisa Oil Company* (pub. avail. May 6, 1982)).

[17] Securities Act Rule 501(h)(2).

[18] In addition, a purchaser representative is obligated to disclose to the purchaser in writing any material relationship between himself or his affiliates and the issuer or its affiliates that then exists or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship. Securities Act Rule 501(h)(4). Similarly, a registered investment adviser is required to make disclosures regarding material conflicts of interest it has in relation to its position for the accredited investor.

[19] Proposing Release at 18.

[20] *See also* President's Working Group on Financial Markets, *Agreement Among PWG and U.S. Agency Principals on Principles and Guidelines Regarding Private Pools of Capital*, at section 5 (Feb. 22, 2007), which noted that fiduciaries that manage pension funds, fund-of-funds, or other similar pooled investment vehicles "have a duty under applicable law to act in the best interest of the beneficiaries. They have an ongoing responsibility to perform due diligence to ensure that their investment decisions are prudent and conform to sound practices for fiduciaries." Advisers, as fiduciaries, provide the same level of protection and similar functions with respect to their clients' investments.

2. The $2.5 Million Investments Threshold Should Be Modified

a. The Standard is Not an Appropriate Proxy for Financial Sophistication

The Commission has proposed that an accredited natural person must have $2.5 million in "investments," excluding personal residences, in order to invest in Section 3(c)(1) funds. We are concerned that this threshold may be higher than is necessary to achieve the Commission's goals and may have negative collateral consequences. One of the keys to reducing portfolio risk is diversification within and across asset classes. Many natural persons today, including clients of registered investment advisers, seek a variety of alternative investments, including hedge funds, private equity funds, and venture capital funds, as vehicles to greater diversify their portfolios. The Commission's approach seems to overlook the fact that certain investors and clients of investment advisers can afford to have – and choose to have – relatively illiquid investments in a segment of their portfolio. Thus, the proposed threshold may negatively affect responsible portfolio diversification. In addition, reducing the pool of available investors so significantly may unduly limit the creation of potential new funds while providing a competitive advantage to larger, existing pooled vehicles over smaller funds. For these reasons, we offer an alternative to the proposed $2.5 million in investments discussed below.

b. The Standard Should be Harmonized with the "Qualified Client" Standard under Advisers Act Rule 205-3

As an alternative to the proposal, we believe the Commission should consider harmonizing the accredited natural person standard with that of the $1.5 million net worth requirement applicable to "qualified clients" of an adviser that charges performance fees under Advisers Act Rule 205-3.[21]

We note that the proposed rules are designed to address a regulatory gap caused by the court's invalidation in *Goldstein v. SEC* of the Commission's rule requiring registration of certain hedge fund advisers.[22] Because virtually all hedge funds charge performance fees, that rule would have, in effect, required hedge fund investors to have $1.5 million in net worth by virtue of compliance with Rule 205-3. Thus, we suggest harmonizing the accredited natural person standard with the qualified client standard of $1.5 million net worth. This approach would also have the benefit of avoiding the

[21] Advisers Act Rule 205-3(d)(1). Qualified clients include natural persons who immediately after entering into the advisory contract have at least $750,000 under the management of the investment adviser or have a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $1.5 million at the time the contract is entered into. *See* Proposing Release at 25, n. 61.

[22] *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006) (vacating and remanding Hedge Fund Adviser Registration Rule).

creation of yet another standard for eligibility in the securities laws – *i.e.*, adding "accredited natural person" to "accredited investor" under the Securities Act, "qualified client" under Advisers Act Rule 203-5, "qualified purchaser" under Investment Company Act Section 3(c)(7), "qualified institutional buyer" under Securities Act Rule 144A, and "qualified eligible persons" under CFTC Rule 4.7. The application of these differing standards is burdensome and complicated from a compliance standpoint.

Alternatively, if the Commission determines not to adopt the qualified client standard, the Commission should instead increase the thresholds of the current accredited investor standard under Securities Act rules, or increase the current accredited investor standard by excluding investors' personal residences in the net worth calculation.[23] This may be the simplest and easiest method to implement administratively and would achieve the Commission's goals.

c. "Joint Investments" Should Receive the Same Treatment as in Investment Company Act Rule 2a51-1

For purposes of the accredited natural person standard, the Commission proposes to treat investments of a natural person owned jointly with a spouse, or that are part of a shared community interest, differently than the treatment of such investments under Investment Company Act Rule 2a51-1 for Section 3(c)(7) funds. Specifically, the Commission proposes that for purposes of determining whether a natural person, acting on that person's own behalf (and not jointly with a spouse), should be able to qualify as an accredited natural person, the person's investments should include only *a portion* of the amount of any investments owned jointly, or of any investments which ownership is shared, with the person's spouse.[24]

In contrast, Rule 2a51-1 for Section 3(c)(7) funds permits all of such investments, rather than a portion, to be included in the determination of whether a natural person is a "qualified purchaser."[25] In determining whether a natural person is a qualified purchaser under Rule 2a51-1, the person may include investments held jointly with the person's spouse or any investments in which the natural person shares with his or her spouse a

[23] The Commission may coordinate these changes with any other amendments to Regulation D that the Division of Corporation Finance may be considering.

[24] The proposed rules provide that the investments of a natural person seeking to make an investment in a Section 3(c)(1) fund on his or her own behalf may include *only 50 percent* of the following: (a) any of the person's investments held jointly with that person's spouse; and (b) any investments in which the person shares a community property or similar shared ownership interest with that person's spouse. *See* Proposing Release at 28; Proposed Securities Act Rules 216(c)(4), 509(c)(4).

[25] *See* Proposing Release at 27-28.

community property or similar shared ownership interest.[26] In fact, the Commission stated in the release adopting Rule 2a51-1 that it "believes that th[e] approach [adopted] will simplify the determination of whether spouses making a joint investment are qualified purchasers." The Commission provides no rationale for this different treatment of joint investments for the accredited natural person standard.

Further, the proposal would require investors and/or fund sponsors to make determinations about the legal characterizations of the assets of an investor based on the requirements of his or her state of residence, including whether or not an asset is considered community property. This complex requirement would likely lead to inconsistent application, which would not serve to further the Commission's goals. Instead, we believe that the "bright line" test in Rule 2a51-1 should be adopted to assess the ownership of "investments" of an accredited natural person.

d. An Automatic Inflation Adjustment is Inconsistent with Section 3(c)(7)

The Commission has proposed to adopt a rule that would automatically index the $2.5 million for the amount of investments that a person would be required to own under the proposed definition of accredited natural person.[27] We prefer the Commission refrain from requiring automatic indexing for inflation, which may be more complicated and difficult to monitor than an absolute number as currently proposed. In addition, the Commission has not required indexing of the $5 million in investments that natural persons must own to be qualified purchasers eligible to invest in Section 3(c)(7) funds. We believe the Commission should retain the flexibility to reassess the "accredited natural person" criteria periodically and adjust it as necessary for inflation, market conditions, and other relevant factors.

3. Current Section 3(c)(1) Fund Investors Should be "Grandfathered" for Future Investments in the Fund

We understand the proposed rules would permit current accredited investors who would not meet the new accredited natural person standard to retain their existing investments in Section 3(c)(1) funds.[28] We request confirmation of our understanding in the final rules and the adopting release.

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[26] Investment Company Act Rule 2a51-1(g)(2). *See Privately Offered Investment Companies*, SEC Release No. IC-22597, File No. S7-30-96 (Apr. 3, 1997) at 34-35.

[27] *See* Proposing Release at pp. 23-24.

[28] *See* Proposing Release at 25. If our interpretation is incorrect, we strongly believe current investors should be grandfathered from application of the new accredited natural person standard and not required to divest their current holdings. We believe it would be unfair to current investors in Section 3(c)(1) funds and disruptive to the markets generally to require investors who do not meet the proposed accredited natural person standard to be required to dispose of their interests in the funds. In addition, the Commission's former rule requiring hedge fund advisers to register with the Commission would have

In addition, we urge the Commission to permit current investors in Section 3(c)(1) funds to continue to make future investments in these funds. In some instances, this is necessary to facilitate investors' investment or contractual obligations. Additional investments in these funds may be needed or desired to allow for the continuation of a long-standing investment plan or to implement an investor's periodic reallocation and rebalancing of his or her portfolio. In addition, certain closed-end Section 3(c)(1) funds have contractually obligated their investors to make capital commitments over the life of the fund. We also respectfully submit that it is a matter of fundamental fairness to permit future investments in the same fund for individuals who relied on existing and legitimate rules at the time of their initial investment.

4. Knowledgeable Employees Should Be Included in the Definition of Accredited Natural Persons

The rules as proposed may have the effect of precluding an employee of a Section 3(c)(1) fund or the fund's adviser from investing in the fund if he or she does not meet the accredited natural person standard, despite the fact that the employee may meet the definition of a "knowledgeable employee" as defined in Investment Company Act Rule 3c-5.[29] We believe the Commission should add to the list of accredited natural persons "knowledgeable employees" of Section 3(c)(1) funds and their advisers, as that term is defined in Rule 3c-5.[30]

The proposal, if adopted, would result in an unusual outcome whereby a knowledgeable employee may invest in a Section 3(c)(7) fund, which requires an investor to have $5 million in investments, but not invest in a Section 3(c)(1) fund, which would have a proposed threshold of $2.5 million in investments. Moreover, investors, and particularly institutional investors, expect employees of sponsors of Section 3(c)(1) funds to invest alongside the investor with a capital commitment demonstrating the sponsor and employees' dedication to the fund's success. In addition, these funds are often utilized to establish new investment products, and employees at advisers and sponsors are key participants in that process, frequently being the primary sources of seed capital for start-

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amended Advisers Act Rule 205-3 to permit hedge fund advisers to charge performance fees to funds existing at the time of the adoption of the rule that had non-qualified investors, thereby "grandfathering" the current investors in the hedge funds at the time of the rule's adoption. *See* Hedge Fund Adviser Registration Rule, *supra* n. 4.

[29] Under Investment Company Act Rule 3c-5, knowledgeable employees are excluded from the 100-beneficial owner limit for Section 3(c)(1) funds and are excluded from the requirement that only qualified purchasers own Section 3(c)(7) funds.

[30] The Commission may also wish to take this opportunity to consider exempting "knowledgeable employees" from the current accredited investor standards under Regulation D for Section 3(c)(1) and 3(c)(7) funds. Individuals who participate in the investment activities of these private funds would have a substantial understanding of the fund, its structure, and its risks such that the "knowledgeable employee" standard may serve as a substitute for the current accredited investor standard.

up funds. Finally, with the adoption of Investment Company Act Section 3(c)(7), the Congress directed the Commission to draft rules permitting knowledgeable employees to invest in Section 3(c)(1) funds without being counted toward the 100-beneficial owner limit. Clearly, such a concept should apply to these proposed standards. Accordingly, we urge the Commission to add "knowledgeable employees" of a Section 3(c)(1) fund, or adviser of the fund, to the list of accredited natural persons.

5. A Compliance Date of One Year Should Be Adopted

The proposed rules present a significantly different method for assessing eligibility for investors in Section 3(c)(1) funds. If the Commission chooses not to permit grandfathering of current investors so that they may remain invested and make future contributions, Section 3(c)(1) funds and their sponsors will need to determine whether the funds can continue operations without this same large pool of available investors and whether their current investors will be eligible to continue to invest in the funds. In this regard, funds and their sponsors will need to obtain representations about the investments owned by the investor and his or her spouse, including whether the investments are held jointly. Even if current investors are grandfathered, funds will need to revise their subscription documents and processes to incorporate the new accredited natural person standard. Accordingly, in order to comply with the proposed requirements to evaluate investor eligibility, we believe advisers or sponsors to Section 3(c)(1) funds would likely need a one-year compliance date from the effective date of the rule.

B. Proposed Anti-Fraud Rule for Advisers to Pooled Investment Vehicles

Proposed anti-fraud Rule 206(4)-8(a)(1) provides that an adviser to a "pooled investment vehicle" will commit a fraudulent act if it makes any untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle. Proposed Rule 206(4)-8(a)(2) makes it a fraudulent act to otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle. A "pooled investment vehicle" is defined to mean any investment company as defined in Section 3(a) of the Investment Company Act or any Section 3(c)(1) or Section 3(c)(7) fund.

We strongly support the Commission's goal of deterring and punishing conduct that defrauds investors or prospective investors in hedge funds and other similar funds but believe the Commission's objectives are best served by a more targeted approach. We are concerned that the proposed anti-fraud rule is duplicative of enforcement remedies currently available under Section 34(b) of the Investment Company Act for an investment adviser to an investment company. The Commission acknowledges that it believes, "as a general matter, most advisers that advise registered investment companies will, to a large extent, communicate with investors and prospective investors in those

funds through documents that are already subject to section 34(b)." The proposed rule is also duplicative of remedies under Advisers Act Sections 206(1) and 206(2) and Securities Act Section 17(a).[31] Duplication is unnecessary and could result in differing or inconsistent interpretations and enforcement practices. Thus, we request that the Commission better target its approach and remove from the definition of "pooled investment vehicle" an investment company defined in Section 3(a) of the Investment Company Act.

Alternatively, we request that the Commission clarify in the adopting release that the proposed rule does not create any new liability for investment advisers to investment companies not already provided for in Advisers Act Sections 206(1) or 206(2) or Investment Company Act Section 34(b).

Conclusion

We commend the Commission for seeking to protect investors in hedge funds. In so doing, the Commission should adopt a fiduciary adviser exemption from the proposed accredited natural person standard and our other recommended enhancements to the proposals.

We appreciate the opportunity to provide our views on these important issues. Please do not hesitate to contact the undersigned if the Commission or its staff has any questions or if we may provide any additional information regarding these matters.

Sincerely,

Karen L. Barr
General Counsel

Monique S. Botkin
Counsel

cc: Hon. Christopher Cox
Hon. Paul S. Atkins
Hon. Roel C. Campos
Hon. Annette L. Nazareth
Hon. Kathleen L. Casey

Mr. Andrew J. Donohue, Director, Division of Investment Management
Mr. Robert E. Plaze, Associate Director, Division of Investment Management
Mr. Douglas J. Scheidt, Chief Counsel, Division of Investment Management

[31] Indeed, we submit that, notwithstanding the *Goldstein* decision, the Commission has sufficient enforcement authority with respect to misconduct by investment advisers registered under the Advisers Act.