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October 9, 2007

Via E-Mail
rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Nancy M. Morris
Secretary

Re: File Number S7-18-07

Dear Secretary Morris:

We respectfully submit the following comments on the proposed rules of the Commission in Release No. 33-8828; IC 27922 (the "Release"). Katten Muchin Rosenman LLP is a full service law firm with a substantial number of clients who would be affected by adoption of the rules proposed in the Release.

Proposed Rules 216 and 509.

In Release No. 33-8766 issued in December 2006 (the "Private Pooled Investment Vehicle Release"), the Commission proposed creating a new category of accredited investor (an "Accredited Natural Person") for use in connection with offers and sales to natural persons of securities issued by private investment vehicles that rely on Section 3(c)(1) of the Investment Company Act for exclusion from the definition of an investment company ("3(c)(1) Funds"). In addition to satisfying the current income or net worth tests under Rule 501(a), proposed Rule 509 would require that natural persons investing in 3(c)(1) Funds also own at least $2.5 million of "investments".

In the Release the Commission requested comments on whether the previously proposed definition of Accredited Natural Person should be revised to include the alternative income standard used in proposed Rule 507 relating to Large Accredited Investors. Applying the definition in proposed Rule 507 would result in an individual being an Accredited Natural Person under proposed Rule 509 if he had $400,000 of income (or $600,000 jointly with a spouse). The Commission also requested comment whether use of this alternative standard would address some of the concerns noted by those who previously submitted comments on the Private Pooled Investment Vehicle Release.

In our comment letter dated March 9, 2007, a copy of which is attached, we opposed adoption of the Accredited Natural Person standard on the grounds that (i) no factual support exists, and none was proffered by the Commission, to support the Commission's conclusion that 3(c)(1) Funds pose greater risks than other private investment vehicles or that the Accredited Natural Person standard ensures a level of investor sophistication better equipped to understand and bear any such risks, and (ii) the rule constituted an impermissible attempt by the Commission to graft onto Section 3(c)(1) of the Investment Company Act a sophistication standard that Congress did not see fit to impose. Bifurcating the accredited investor standards under the Securities Act in the manner proposed therefore arbitrarily alters the statutory standards applicable to 3(c)(1) Funds.

Although relaxing the Accredited Natural Person standard by importing the income test from the proposed definition of "Large Accredited Investor" would mitigate slightly the deleterious impact of the rule on 3(c)(1) Funds, it does not address the fundamental flaws referred to above and the rule would have no greater legitimacy under any factual or legal analysis. We maintain the position articulated in our March 9, 2007 comment letter.

Relaxation of the Ban on General Solicitation or General Advertising.

Proposed Rule 507 would create a new exemption from the registration provisions of the Securities Act for offers and sales of securities to Large Accredited Investors and would permit limited advertising of these offerings. As proposed, this exemption would be adopted under Section 28 of the Securities Act, and not as rulemaking related to Section 4(2). The Commission indicates that as a result, 3(c)(1) Funds and pooled investment vehicles relying on Section 3(c)(7) of the Investment Company Act ("3(c)(7) Funds" and, together with 3(c)(1) Funds, "Private Funds") could not take advantage of the rule because they are prohibited under the Investment Company Act from making a public offering of their securities and typically rely on Section 4(2) and Rule 506 to satisfy this requirement.

We agree that limited advertising should be permitted in offerings to highly sophisticated investors. However, consistent with our comment with regard to proposed Rule 509 above, we see no basis for precluding Private Funds from taking advantage of this rule and do not think that the limited advertising proposed to be allowed in such offerings should preclude them from being considered private placements under Section 4(2) of the Securities Act.

We also do not see a need to limit arbitrarily the description of the issuer contained in permitted advertising materials to 25 words. A more principles-based approach to the content of the advertising would be preferable.

In response to your question as to whether breaches of the prohibition on general solicitation should continue to automatically be considered "significant" for purposes of Rule 508, we note that there is great uncertainty regarding what activities constitute "general solicitation" and "general advertising" as used in Rule 502(c). Issuers that are complying in good faith with the requirements for a Rule 506 offering may nevertheless be put in situations that are unclear. Even without general solicitation, for example, the media may learn of a significant private offering and pursue the issuer for information regarding the offering. It would be helpful to have further guidance on the parameters of what constitutes a "general solicitation" or "general advertising." Further, we do not believe that it would harm investors or increase violative behavior to allow issuers who engage in what is later considered to be "general solicitation" or "general advertising" to have the ability to assert that such conduct should be excused on reliance on Rule 508. Therefore we are in favor of deleting the words "paragraph (c) of Rule 502," from Rule 508(a)(2).

Modification of Accredited Investor Definition in Rule 501(a).

We agree with the Commission's proposal to expand the types of entities that qualify as accredited investors under Rule 501(a). An investor should not be precluded from qualifying as an "accredited investor" merely because the rules do not contemplate the form of association that an investor has chosen to use. In order to allow more flexibility with regard to the manner of association, a more principles-based definition, or one with a catch-all category such as "or any organized group of persons whether incorporated or not" as used in the definition of "company" under the Investment Company Act, may be preferable.

We also believe that "qualified purchasers" as defined under the Investment Company Act and "knowledgeable employees" who are permitted to invest in a 3(c)(7) Fund should also be included in the definition of "accredited investors." This would eliminate the anomalous situation that currently exists whereby "knowledgeable employees" and certain trusts that meet the "qualified purchaser" standard do not meet the purportedly lower standard of "accredited investor." It would also operate as a *de facto* cap on the effect of any inflation adjustments until such time as Congress were to determine to change the "qualified purchaser" standard through legislation.

Further, we think that if the Commission adds an "asset" or "investments" standard as an alternative, such standard should be consistent with other similar standards. Adopting similar, but slightly differing, standards leads to complications in the regulatory system and makes the US markets less competitive overall. If an "investments" test is adopted, whether in Rule 501(a), Rule 507 or Rule 509, we urge that the Commission adopt the definitions of investments, and particularly, "joint investments," used under Section 2(a)(51) of the Investment Company Act. Using the same definitions, although with differing dollar thresholds, will also make compliance

by issuers easier and increase the comprehension of the standards among investors. Many issuers in private placements confirm their understanding of an investor's qualifications by asking the investor to complete a questionnaire. If consistent standards are adopted, an issuer would, based on information provided by an investor in response to a uniform questionnaire, be able to determine if such investor were (a) not accredited, (b) an "accredited investor", (c) a "large accredited investor" (d) a "qualified client" (where applicable) or (e) a "qualified purchaser" (where applicable). A proliferation of differing standards purportedly defining the same thing -- sophistication of investors -- does not promote the general public interest.

Integration Safe Harbor of Rule 502(a).

We agree that the Commission's proposal to shorten the integration safe harbor provided in rule Rule 502(a) will greatly improve the ability of small businesses to raise capital.

Bad Actor Provisions

We believe that the provisions of proposed Rule 502 that would result in the automatic application of the disqualification provisions whenever there has been an "adjudication" or "determination" by any federal or state regulator that a person violated enumerated federal or state laws, is currently under a "cease and desist order" or is "suspended" from membership in exchanges or self regulatory organizations, are overly broad and onerous to issuers hoping to rely on Regulation D in making private offerings. Our concerns are that these provisions will discourage settlements and force issuers or other persons undergoing investigation to adjudicate all allegations to a final determination by a court. In most settlements, regulators make a "determination" that a violation of securities laws has occurred. The party to the settlement may be amenable to such finding as part of the total settlement arrangement and as a way to avoid further cost and disruption of its business, even if it disagrees with the determination. By adopting such a broad standard, the Commission may increase the consequences of such settlements to the point that more parties will determine to incur the additional cost of vigorously defending against enforcement actions rather than settling.

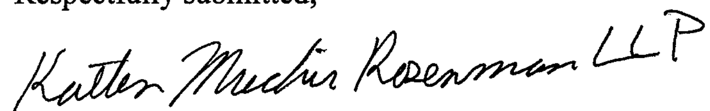
Accordingly, we feel that Rule 502(e)(1)(iii) should not be adopted, but if it is, should apply only where there has been a final, non-appealable judgment by a court of competent jurisdiction that a violation of the laws specified has occurred. This is particularly the case in respect of persons who entered into settlements prior to adoption of this proposed rule and who might not have done so had they weighed the business and economic costs of not being eligible to use Regulation D for five years against the economic costs of going to trial. Thus, should Rule 502(e)(1)(iii) be adopted in its current form, it should not apply to acts for which a settlement was entered into prior to the date of the adoption of the Rule or to offerings commenced prior to the adoption of the rule.

In addition, these provisions would cover the conduct of any person who beneficially owns 20% or more of a class of the issuer's securities. Persons who own 20% or even more of a class of an issuer's securities, however, may merely be passive investors in such issuer and may have no control over the issuer. We do not disagree with the notion that it may be appropriate to include control persons in the lists of persons to whom Rule 502(e) would apply if adopted in modified form, but it should not be mechanically applied at a specified percentage of ownership and should never apply to a merely passive investor, irrespective of its percentage interest. We note that Section 2(a)(9) of the Investment Company Act establishes a threshold for "control" at 25% ownership of voting securities of an issuer, but even that level of ownership establishes only a rebuttable presumption of control.

Finally, the types of circumstances in which Rule 502(e)(1) would not apply are not clear. For example, if a rogue trader that is an executive officer of an issuer engages in an illegal trading practice and is temporarily enjoined from such conduct, would Rule 502(e)(1)(iv), on its face, prevent the issuer from relying on Regulation D even if the issuer had procedures to discover the conduct, did discover it and took immediate action with respect to the rouge trader and had itself notified the self regulatory agency or regulatory body of the conduct and the actions taken? If so, is this the type of circumstances in which the Commission would determine that Rule 502(e)(1) would not apply pursuant to Rule 502(e)(2)? We seek further clarification as to the applicability and scope of the proposed Rule.

We thank you for this opportunity to comment.

Respectfully submitted,



Katten Muchin Rosenman LLP
Financial Services Group

Attachment

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March 9, 2007

Via E-Mail
rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attention: Nancy M Morris, Secretary

Re: File Number S7-25-06.

Dear Secretary Morris:

We respectfully submit the following comments on the proposed rules of the Commission in Release No. 33-8766. Katten Muchin Rosenman LLP is a full service law firm with a substantial number of clients who would fit the definition of "private investment vehicle" included in proposed Rules 509 and 216 under the Securities Act of 1933 (the "33 Act").

We would in particular like to comment on the Commission's proposed Rules 509 and 216 under the 33 Act. These rules would add an additional requirement for a natural person to qualify as an "accredited investor" in offerings by certain private investment vehicles ("3(c)(1) Funds") that are deemed not to be "investment companies" by virtue of Section 3(c)(1) of the Investment Company Act of 1940 (the "Company Act").

"Accredited Natural Person." We believe that proposed Rules 509 and 216 are misguided, are not in the public interest and should not be adopted in any form. Inherent in the proposed rulemaking is the notion that 3(c)(1) Funds are by definition riskier and more difficult to understand than other forms of private investment. However, the Commission has not offered any factual support for these propositions.

There can be no generalization as to the risks or sophistication of the investment strategies followed by 3(c)(1) Funds. For example, a 3(c)(1) Fund may invest long only, with no leverage or use of derivatives and charge no performance fee. It may be an investment club, such as the Beardstown Ladies, whose members pool their money for investment. There are 3(c)(1) Funds with very high volatility and others with low volatility and varying Sharpe and

Sortino ratios[1]. Some 3(c)(1) Funds may offer monthly or quarterly liquidity, while some may offer no liquidity at all. In fact, "venture capital funds," which the Commission has excluded from the application of the proposed rule, may be much riskier and less transparent than many of the 3(c)(1) Funds to which the new "accredited natural person" standard would apply and may require more sophistication on the part of the investor to understand. The Commission has offered no factual support for distinguishing "venture capital funds" as defined in the proposed rules from other 3(c)(1) Funds or for distinguishing 3(c)(1) Funds from other private placements.

The Commission's stated concern that 3(c)(1) Funds require a higher level of investor sophistication serves as the basis for the "investments" tests proposed for "accredited natural persons." However, natural persons are free to engage in a variety of risky investment practices with no test of financial acumen or wherewithal. Any person may open a brokerage account and trade in "penny stocks," mutual funds with poor performance, a broad stock index or a sector index. Investors with much less than $1,000,000 in net worth can open margin accounts, engage in short sales and sell options that could expose them to significant risk of loss. Investors can also purchase real estate with no down payment and obtain variable rate or negative amortization mortgages. There are many potentially high-risk investments that are not 3(c)(1) Funds and yet they are available to natural person investors who do not meet any financial criteria. Many 3(c)(1) Funds offer a means of diversifying a portfolio and reducing overall risk. It is the purview of Congress and not the Commission to make such a radical change to the regulatory framework.

The "accredited investor" standard was originally adopted by the Commission to be a proxy for financial sophistication and ability to bear losses that would provide a clear safe harbor and regulatory certainty. If the Commission is going to adopt different proxies for different levels of financial sophistication required for different investments, such distinctions should be based on factual correlations that the standards indeed provide the requisite sophistication and evidence that the securities to which they apply actually require such sophistication. Any such evidence is lacking in the case of proposed Rules 509 and 216 and, because of the wide diversity of funds brought under one umbrella by the Commission in proposing to apply these rules to all 3(c)(1) Funds, we do not believe such evidence is likely to be developed.

Section 3(c)(1) provides a mechanism for addressing regulatory issues. It in no way defines the business of the many and varied vehicles that seek to resolve such issues through reliance on the section. The Commission's proposal to distinguish private investment vehicles that rely on Section 3(c)(1) from any other form of private investment for purposes of the 33 Act therefore appears arbitrary.

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1 Sharpe ratio and Sortino ratio are two of the measures often used in portfolio management to measure risk-adjusted returns on an investment.

Even if there were such evidence, there should also be evidence that the proposed standards are a reasonable proxy for financial sophistication. The Commission has not offered any evidence that the proposed "investments" requirement are a reasonable proxy for the ability to understand a 3(c)(1) Fund.

We question whether the proposed rulemaking is consistent with the legislative intent of Congress in adopting Sections 3(c)(1) and 3(c)(7) under the Company Act. Section 3(c)(1) has been in the statute since its original adoption in 1940[2]. Congress determined in 1996 that in addition to the existing exclusion for vehicles with 100 or fewer beneficial owners (without regard to sophistication), it should, in fact, add a separate exclusion for vehicles that are offered only to sophisticated investors. Congress added the Section 3(c)(7) exclusion for vehicles offered in private placements to "Qualified Purchasers." At the time of adoption of Section 3(c)(7), Congress could have modified Section 3(c)(1) to include a sophistication standard, but did not. The proposed bifurcation of the accredited investor standards under the 33 Act appear to be an attempt by the Commission to use its rulemaking authority under the 33 Act to override the express provisions adopted by Congress in the Company Act.

For all of the foregoing reasons, we do not believe it appropriate to adopt different standards for private placements of securities in 3(c)(1) Funds from the standards for other types of private investments.

We thank you for this opportunity to comment.

Respectfully submitted,

Katten Muchin Rosenman LLP
Financial Services Group

2 Although there have been amendments to Section 3(c)(1) since its original adoption, they are not germane to the issue being discussed.