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September 21, 2015

Melissa A. Harke, Esq.
Branch Chief
Chief Counsel's Office
Division of Investment Management
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Venture Capital Fund Advisers Exemption

Dear Ms. Harke:

We represent a wide variety of asset management firms, including a number of firms that structure their businesses and operations so as to rely on the Securities and Exchange Commission's so-called "Venture Capital Fund Advisers Exemption," which exempts those firms from registration as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"). We are writing to identify for the Commission's staff what we believe are unintended consequences arising out of the application of the literal language of the exemption to transactions that are, and long have been, commonplace within the venture capital industry. We submit that the application of that language could effectively preclude venture capital fund managers from causing their funds to engage in those transactions, which would be inconsistent with the Commission's intention, in adopting the exemption, of enabling a manager of funds to operate outside of the scope of the Advisers Act when those funds invest in a manner consistent "with what . . . Congress understood venture capital funds to be, as reflected in the legislative materials, including the testimony Congress received [in connection with the legislation that became the Dodd-Frank Wall Street Reform and Consumer Protection Act]."[1]

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1 *See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*, Advisers Act Release No. 3,222 (June 22, 2011), 76 Fed. Reg. 39,646, at 39,648 (July 6, 2011) ("Release 3,222").

Setting the Legal Context

Section 203(l) of the Advisers Act provides that a person meeting the Advisers Act's definition of "investment adviser" is nonetheless exempt from registering as an investment adviser under the Act if the person acts as an investment adviser solely to one or more "venture capital funds." The Venture Capital Fund Advisers Exemption, Rule 203(l)-1 under the Advisers Act (the "Rule"), implements Section 203(l)[2] by defining a "venture capital fund" as a "private fund"[3] that (1) represents to investors and potential investors that it pursues a venture capital strategy; (2) immediately after the acquisition of any asset, other than "qualifying investments" or short-term holdings, holds no more than 20 percent of the amount of the fund's aggregate capital contributions and uncalled committed capital in assets (other than short-term holdings) that are not qualifying investments ("Non-Qualifying Investments"), valued at cost or fair value, consistently applied by the fund; (3) does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage in excess of 15 percent of the fund's aggregate capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage is for a term specified in the Rule; (4) only issues securities, the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities but may entitle holders to receive distributions made to all holders pro rata; and (5) is not registered under the Investment Company Act of 1940 (the "1940 Act") and has not elected to be treated as a business development company pursuant to the 1940 Act.[4]

Under the Rule, a "qualifying investment" is defined as, among other things, an equity security issued by a "qualifying portfolio company" that has been acquired directly by a private fund from the qualifying portfolio company.[5] Under Rule 203(l)-1(c)(4), a "qualifying portfolio company" is in turn defined to mean any "company"[6] that:

i. At the time of any investment by the private fund, is not reporting or foreign traded and does not control, is not controlled by or under common control with another company, directly or indirectly, that is reporting or foreign traded;

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2 Section 203(l) provides, among other things, that "[n]ot later than [one year after the section's enactment, the] Commission shall issue final rules to define the term 'venture capital fund' for purposes of [the section]."

3 The Rule contains no definition of the term "private fund." In adopting the Rule, the Commission indicated that the term is to be defined by reference to Section 202(a)(29) of the Advisers Act. *See* Release 3,222, 76 Fed. Reg. at 39,646 n.8. Under Section 202(a)(29), a "private fund" is "an issuer that would be an investment company, as defined in Section 3 of the [Investment Company Act of 1940], but for Section 3(c)(1) or 3(c)(7) of that Act."

4 *See* Advisers Act Rule 203(l)-1(a).

5 *See* Advisers Act Rule 203(l)-1(c)(3)(i).

6 A "company" is defined for these purposes as "a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code, or similar official, or any liquidating agent for any of the foregoing, in his capacity as such." *See* Section 202(a)(5) of the Advisers Act.

ii. Does not borrow or issue debt obligations in connection with the private fund's investment in [the] company and distribute to the private fund the proceeds of [the] borrowing or issuance in exchange for the private fund's investment; and

iii. Is not an investment company, a private fund, an issuer that would be an investment company but for the exemption provided by [Rule 3a-7 under the 1940 Act], or a "commodity pool."[7]

A "commodity pool" for these purposes is defined by reference to Section 1a of the Commodity Exchange Act of 1974 (the "CEA").[8] "Reporting," under the Rule, means, with respect to a company, that the company is subject to the reporting requirements under Section 13 or Section 15(d) of the Securities Exchange Act of 1934, and "foreign traded" means, with respect to a company, that the company has a security listed or traded on any exchange or organized market operating in a foreign jurisdiction.[9] The Rule contains no definition of "control," which appears to reflect a decision on the Commission's part that the Rule needed no express definition of the term.[10] The term is defined in the Advisers Act to mean "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company."[11] The Commission and the staff have indicated in the past that the investment adviser to a pooled entity can, at least under some circumstances, be deemed to control the entity for purposes of the Advisers Act.[12] The Commission has also suggested that an entity that holds more than 25 percent of the outstanding

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7 *See* Advisers Act Rule 203(l)-1(c)(4).

8 *See* Section 205(a)(29) of the Advisers Act. The CEA defines a "commodity pool" as "any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any (1) commodity for future delivery, security futures product, or swap; (2) agreement, contract, or transaction described in Section 2(c)(2)(C)(i) or 2(c)(2)(D)(i) [of the CEA]; (3) commodity option authorized under Section 4c [of the CEA]; or (4) leverage transaction authorized under Section 19 [of the CEA]." *See* Section 1a(10)(A) of the CEA.

9 *See* Advisers Act Rule 203(l)-1(c)(5).

10 The Commission requested comment when proposing the Rule on whether the Rule should include guidance regarding the definition of "control." *See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*, Advisers Act Release No. 3,111 (Nov. 19, 2010), 75 Fed. Reg. 77,190, at 77,201 (Dec. 10, 2010). When adopting the Rule, no such guidance was included. *See* Release 3,222.

11 Section 202(a)(12) of the Advisers Act.

12 *See, e.g.*, Investment Company Mergers, 1940 Act Release No. 25,259 (Nov. 8, 2001), 66 Fed. Reg. 57,602, at 57,603 n.11 (Nov. 15, 2001) ("The determination of whether . . . funds are under common control [of an investment adviser] turns on whether the adviser . . . control[s] the funds, which depends on the relevant facts and circumstances."); Fund Trust, SEC No-Action Letter (May 26, 1987) (indicating that "[i]nvestment companies [registered under the 1940 Act] with a common investment adviser are not necessarily under 'common control'" within the meaning of the 1940 Act, but noting that "the nature of the advisory relationship has been considered to carry with it a strong indication of control").

voting securities of a second entity can be presumed to control the second entity within the meaning of the Advisers Act.[13]

The Rule's definition of a "qualifying portfolio company" in effect enables a "venture capital fund," as defined in the Rule, to hold up to 20 percent of its aggregate capital contributions and uncalled committed capital in assets that are not consistent with those generally held by a fund engaged in a venture capital strategy.[14] When adopting the Rule, the Commission noted with respect to this 20 percent threshold, which the Commission termed the "non-qualifying basket," that:

> [d]efining a venture capital fund to include funds engaged in some amount of non-qualifying investment activity provides advisers to venture capital funds with greater investment flexibility, while precluding an adviser relying on the exemption from altering the character of the fund's investments to such extent that the fund could no longer be viewed as a venture capital fund within the intended scope of the exemption.[15]

The intended scope of the Rule, according to the Commission, is generally to enable a manager that advises solely venture capital funds, as Congress understood those funds to operate in practice at the time Congress adopted Section 203(l) of the Advisers Act, to provide advisory services outside the scope of the Advisers Act.[16]

Unintended Consequences in Applying the Terms of the Rule

In advising clients that seek to rely on the Rule, we have identified what we believe are unintended consequences in applying the literal terms and conditions of the Rule. Those consequences are best illustrated when considering representative examples of transactions that we and our clients submit are commonplace in the venture capital industry and completely consistent with the underlying purpose of a venture capital fund as recognized now and at the time Section 203(l) was enacted by Congress. Two such examples are set out below:

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13 See, for example, Form ADV under the Advisers Act, which provides that a person is presumed to control a corporation if the person has the power to vote 25 percent or more of a class of the corporation's voting securities. *See* Form ADV: Glossary.

14 *See* Release 3,222, 76 Fed. Reg. at 39,650; *see also* Advisers Act Rule 203(l)-1(a)(2).

15 Release 3,222, 76 Fed. Reg. at 39,650.

16 See Release 3,222, 76 Fed. Reg. at 39,648, in which the Commission indicated that the Rule defines "the term venture capital fund in accordance with what [the Commission] believed Congress understood venture capital funds to be, as reflected in the legislative materials, including the testimony Congress received [in connection with the legislation containing what became Section 203(l) of the Advisers Act]."

Example 1: Investment in a Qualifying Portfolio Company Becoming a Public Company

The first example of a factual situation that leads to a result we believe is inconsistent with the underlying purpose of the Rule, a diagram of which is set out in an appendix to this letter (the "Appendix") as "Example 1," is a case that starts with a private fund whose manager is seeking to rely on the Rule ("Relying Manager 1") making an investment in a qualifying portfolio company, as defined in the Rule, that is not a "reporting or foreign traded" company for purposes of the Rule at the time of investment (the "Non-Reporting Company"). If the investment initially, or combined with a follow-on investment, causes the fund ("Relying Fund 1") to have control over the Non-Reporting Company within the meaning of the Rule, Relying Manager 1 in such a case could, under the Commission and the staff's positions described above with respect to "control" within the meaning of the Advisers Act, be deemed to have indirect control of the Non-Reporting Company by virtue of Relying Manager 1's being considered as controlling Relying Fund 1.

The Commission has made clear that, if the Non-Reporting Company in Example 1 was subsequently to conduct a public offering in the United States or abroad and become a "reporting or foreign traded" company within the meaning of the Rule (the "Qualifying Reporting Company"), the Qualifying Reporting Company would continue to be a "qualifying investment" of Relying Fund 1 for purposes of the Rule.[17] Relying Fund 1's holding a direct controlling interest in, and Relying Manager 1's holding an indirect controlling interest in, the Qualifying Reporting Company in Example 1, notwithstanding that the interest would continue to be a qualifying investment, would, however, have a detrimental effect on other potential holdings of Relying Fund 1 for purposes of the Rule. The detrimental effect would arise in connection with, for instance, Relying Fund 1's making an investment in a portfolio company meeting the definition of a qualifying portfolio company that provided Relying Fund 1 with control over the portfolio company (the "Second Portfolio Company"). Upon the making of that investment, the Qualifying Reporting Company and the Second Portfolio Company could be seen as under the direct common control of Relying Fund 1 and the indirect common control of Relying Manager 1. Any follow-on investment Relying Manager 1 thereafter caused Relying Fund 1 to make in the Second Portfolio Company would appear under the literal terms of the Rule to be a Non-Qualifying Investment by virtue of the Second Portfolio Company's being a company under common control with the Qualifying Reporting Company.[18]

We note that the same result would occur if a second venture capital fund managed by Relying Manager 1 (the "Second Relying Fund") made a controlling investment in a portfolio company (the "Second Portfolio Company") that, considered by itself, would be a qualifying portfolio company for purposes of the Rule. In such a case, a diagram of which is set out in the Appendix as "Example 1 Follow-Up," the Second Portfolio Company, after the controlling investment was made, would become

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17 *See* Rule 203(l)-1(c)(4) (defining a "qualifying portfolio company" as any company that "[*a*]*t the time of any investment by the private fund*, is not reporting or foreign traded . . .") (emphasis added); *see also* Release 3,222, 76 Fed. Reg. at 39,655 ("a venture capital fund may continue to treat as a qualifying investment any previously directly acquired equity security of a portfolio company that subsequently becomes a reporting company").

18 *See supra* note 7 and accompanying text.

a Non-Qualifying Investment of the Second Relying Fund by virtue of the Qualifying Reporting Company and the Second Portfolio Company's being under the indirect common control of Relying Manager 1.

Example 2: Investment in a Controlled Portfolio Company

A second example of what we believe is an unintended result under the literal terms of the Rule, a diagram of which is set out in the Appendix as "Example 2," starts with a second manager seeking to rely on the Rule ("Relying Manager 2") causing a private fund that it advises ("Relying Fund 2") to make an investment in a portfolio company (the "Portfolio Company"). The Portfolio Company was, at the time of investment, a company under common control with a reporting or foreign traded company (the "Reporting Company") because of direct controlling interests held by a fund (the "Fund") that is advised by a manager that is not an "advisory affiliate"[19] of Relying Manager 2 or a similar entity[20] that is not an "advisory affiliate" of Relying Manager 2 and the manager or similar entity is, or is not, a manager seeking to rely on the Rule (the "Unaffiliated Manager"). In such a case, an investment by Relying Fund 2 in the Portfolio Company, a company under common control with the Reporting Company, would appear to be a Non-Qualifying Investment not only with respect to Relying Fund 2, but also any private fund advised by any other firm seeking to rely on the Rule. We note that the same result would occur if Relying Manager 2 caused Relying Fund 2 to make an investment in any portfolio company that is under the indirect control of the Unaffiliated Manager, a diagram of which is set out in the Appendix as "Example 2 Follow-Up."

Discussion

We submit that the results illustrated in Example 1, Example 1 Follow-Up, Example 2 and Example 2 Follow-Up (collectively, the "Examples") set out above are quite inconsistent with the Commission's intent in adopting the terms of the Rule. The Commission appears to have concluded that Congress believed, in adopting Section 203(l) of the Advisers Act, that venture capital funds typically have less "interconnectedness" than other private funds with the public markets and that the lower level of connection with the public markets justifies a venture capital fund adviser's being able to operate outside the scope of the Advisers Act.[21] In what appears to be an attempt to ensure that a venture capital fund, for purposes of the Rule, is not connected with the public markets, the Commission defined a qualifying portfolio company to exclude, among others, a reporting company.

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[19] An "advisory affiliate" is defined for these purposes as: "(1) all of [the manager's] officers, partners, or directors (or any person performing similar functions); (2) all persons directly or indirectly controlling or controlled by [the manager]; and (3) all of [the manager's] current employees (other than employees performing only clerical, administrative, support or similar functions)." *See* Form ADV: Glossary.

[20] Such an entity might be, for instance, a family office that is excluded from the definition of "investment adviser" by virtue of Section 202(a)(11)(G) of the Advisers Act.

[21] *See* Release 3,222, 76 Fed. Reg. at 39,656 ("Congressional testimony asserted that these funds may be less connected with the public markets and may involve less potential for systemic risk. This appears to be a key consideration by Congress that led to the enactment of the venture capital exemption.").

The Commission appears to have determined to also exclude from the definition of qualifying portfolio company those companies that control, are controlled by, or under common control with, a reporting company in seeking to limit holdings by venture capital funds in companies that directly or indirectly invest in, are directly or indirectly invested in by, or are otherwise related to, a public company.[22]

As suggested in the discussion of Example 1 above, the Commission, even though generally excluding companies that control, are controlled by, or under common control with, a reporting company from the definition of a qualifying portfolio company, drafted the Rule so as to enable a venture capital fund to treat an investment in a portfolio company that becomes a reporting company as a qualifying investment. The Commission has indicated that such treatment is designed to afford a manager seeking to rely on the Rule "sufficient flexibility to exercise [the manager's] business judgment on the appropriate time to dispose of portfolio company investments"[23] and to ensure that a venture capital fund is not put in a "position of having to dispose of securities of a qualifying portfolio company that subsequently becomes a reporting company."[24]

It seems illogical in light of the policy goals underlying the Rule to provide for a venture capital fund's continuing to treat a qualifying portfolio company that becomes a reporting company--the Qualifying Reporting Company in Example 1 above--as a qualifying portfolio company, while deeming a company that has all of the requisite attributes of a qualifying portfolio company--the Second Portfolio Company in Example 1 above--to no longer have that status simply because of Relying Fund 1's direct controlling interest, or Relying Manager 1's indirect controlling interest, in the Qualifying Reporting Company. In such a case, the Second Portfolio Company would seem no more connected with the public market than it was prior to the Qualifying Reporting Company's becoming a reporting or foreign traded company. Treating a follow-on investment by Relying Fund 1 in the Second Portfolio Company as a Non-Qualifying Investment seems an unintended result, as the follow-on investment is being made in a portfolio company that is an appropriate holding of, and consistent with the goals of, a traditional venture capital fund. Nor would the follow-on investment appear to change the character of Relying Fund 1.[25]

We submit that deeming as a Non-Qualifying Investment a follow-on investment by a private fund, whose manager is seeking to rely on the Rule, in a qualifying portfolio company that is under common control with a reporting or foreign traded company that is a qualifying portfolio company of the fund and/or the fund's manager (the "Common Controlled Company") is not only inconsistent with the policy goals of the Rule, but it also could potentially significantly constrain the operations of the manager in advising the fund. It is quite consistent with the operations of a traditional venture capital

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22 *See id.*

23 *See* Release 3,222, 76 Fed. Reg. at 39,657.

24 *See id.*

25 The Commission has noted in this regard that the Rule's definition of venture capital fund is generally not intended to operate so as to "foreclose" a manager from causing such a fund to participate in "investment opportunities that would benefit investors" in the fund without "chang[ing] the character of the venture capital fund." *See* Release 3,222, 76 Fed. Reg. at 39,649.

fund for the fund to assume and maintain a controlling investment position in multiple portfolio companies.[26] As a result, it would not be atypical for a venture capital fund to have multiple Common Controlled Companies. If the Rule is interpreted to have the effect described above with respect to Example 1 and Example 1 Follow-Up, then such a venture capital fund's follow-on investment in each Common Controlled Company would be a Non-Qualifying Investment. Such a result would seem inconsistent with the Commission's recognition generally of the importance of follow-on investments in the venture capital business[27] and far more detrimental than the Commission would seem to have contemplated in adopting the Rule.

Example 2 above makes clear that the detrimental effect of the Rule's being read to provide that an investment by Relying Fund 2 in an entity that would be a qualifying portfolio company, if it was not under the common control of the Unaffiliated Manager with a Reporting Company (an "Unaffiliated Common Controlled Company"), is a Non-Qualifying Investment extends to any manager seeking to rely on the Rule whose fund invests, or funds invest, in an Unaffiliated Common Controlled Company. Reading the Rule as having that effect would necessitate Relying Manager 2's taking into account investments made by funds managed by any Unaffiliated Manager in seeking to meet the terms and conditions of the Rule even though such Unaffiliated Common Controlled Company would seem no more connected with the public market than the Common Controlled Company. Imposing such an obligation on Relying Manager 2 would subject the manager to an administrative burden that would seem inconsistent with the Commission's goal in adopting the Rule of not unduly constraining the operations of venture capital funds. We note in our experience that Relying Manager 2 would often be unaware of the Reporting Company or the status, if any, of the Reporting Company in the qualifying or non-qualifying basket of the Unaffiliated Manager.

We note that the Commission addressed an issue arguably resembling that raised by the Examples above when adopting the Rule. In particular, commenters on the Rule, when first proposed, identified a case in which an adviser to a private fund was controlled or became controlled by a reporting company.[28] The commenters read the proposed Rule as leading to the conclusion that, if the adviser relied on the exemption, then any investment in a portfolio company controlled by the private fund was a Non-Qualifying Investment for purposes of the Rule and questioned the appropriateness of

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26 "Most venture-capital firms are . . . responsible for managing several pools of capital" and "the capital [of each pool of capital] is invested in new ventures." *See* William A. Sahlman, *The Structure and Governance of Venture-Capital Organizations*, 27 J. of Fin. Econ. 473, 488 (1990). Each investment is in turn "structured so [the venture capital firm] can keep firm control." *See id.* at 506-09.

27 *See* Release 3,222, 76 Fed. Reg. at 39,658 (noting that a distinguishing feature of venture capital funds is direct capital investment in portfolio companies for the purpose of facilitating expansion, and citing testimony received by Congress and the Commission's own research suggesting that venture capital funds provide "successive tranches of investments (*i.e.*, 'follow-on' investments) [when portfolio companies reach] agreed-upon milestones" generally with the goal of financing the expansion of the companies).

28 *See* Release 3,222, 76 Fed. Reg. at 39,656 n.160.

that result.[29] The Commission made no change in the Rule in response to the commenters' concerns, suggesting that the non-qualifying basket provided sufficient relief to address those concerns.[30]

In our view, the case raised by the commenters on the Rule, as proposed, is significantly different from those reflected in the Examples. The commenters' case, on the one hand, involves a situation in which a private fund's portfolio company is indirectly controlled by a reporting company. Under those facts, the portfolio company can be seen as having a substantial level of connection with a reporting company. In the Examples, on the other hand, the reporting company and the other portfolio company are connected only by virtue of being in the portfolio of the same fund or in the portfolios of funds managed by the same adviser. We submit that the degree of connectedness in those cases is much more attenuated than in the situations cited in the letters of the commenters on the Rule as proposed and should lead to a different conclusion from that arrived at by the Commission in response to those letters. We also submit that the case cited by the commenters involves a fact pattern--an adviser's being controlled by a public company--that is far less likely to occur than the fact patterns described in the Examples.

Requested Interpretation

We believe that the unintended consequences arising out of the application of the literal terms of the Rule could be avoided if the Rule were interpreted to allow a manager meeting all the requirements of the Rule--except that it treats a portfolio company that fails to meet the definition of "qualifying portfolio company" solely by reason of the circumstances set out in the Examples as a qualifying portfolio company--to rely on the Rule. In our view, such an interpretation would answer the concerns raised by the Examples while at the same time being consistent with the Commission's policy goals in adopting the Rule.

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Should you or any other member of the staff want to discuss any aspect of this letter or seek any additional information related to the matters discussed above, please contact me or my associate, Timothy A. Kahn, at (202) 303-1000.

Very truly yours,

Barry Barbash

Barry P. Barbash

cc: Vanessa M. Meeks, Esq.
Timothy A. Kahn, Esq.

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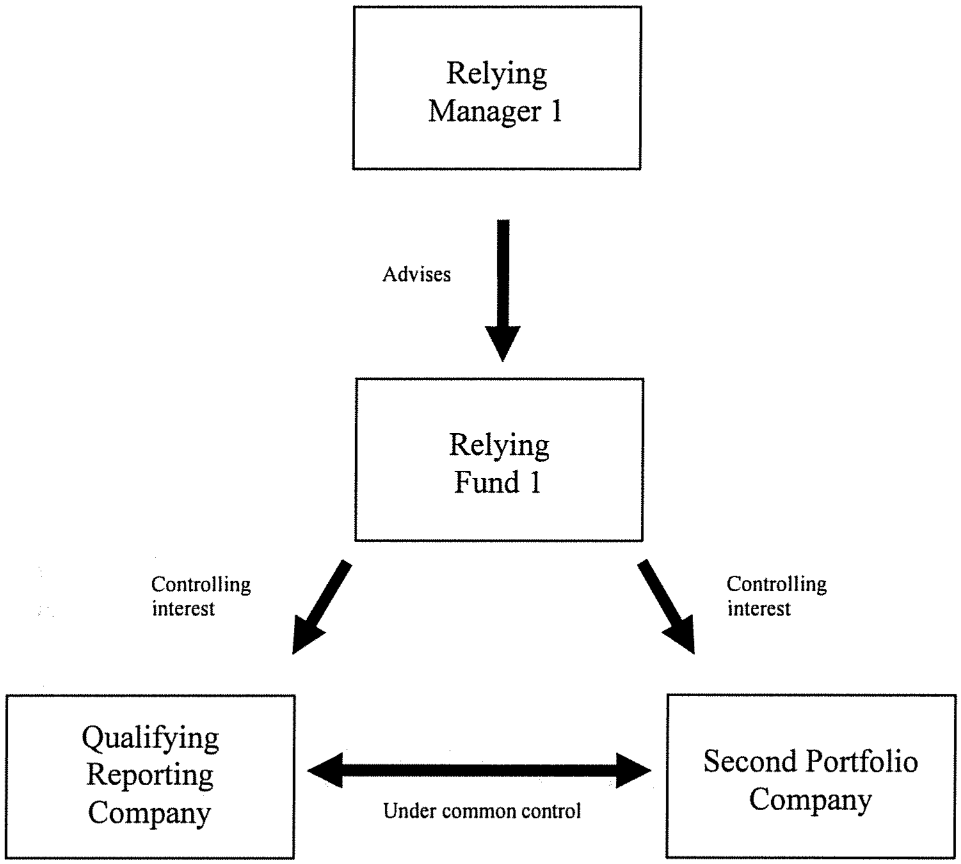
29 The commenters suggested that the investment was a Non-Qualifying Investment by virtue of being an investment in a company under the indirect control of the public company. *See* Comment Letter of Berkeley Center for Law, Business and the Economy (Feb. 1, 2011); Comment Letter of Dechert LLP (Jan. 24, 2011).

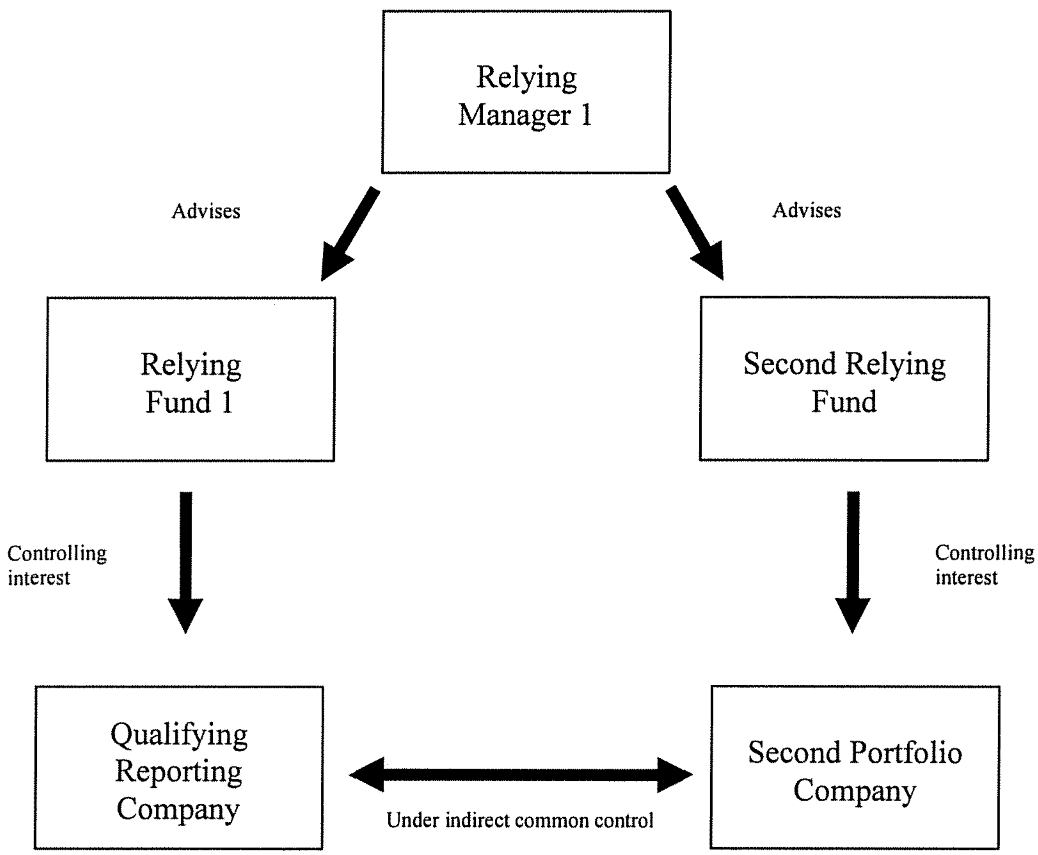
30 *See* Release 3,222, 76 Fed. Reg. at 39,656.

Example 1



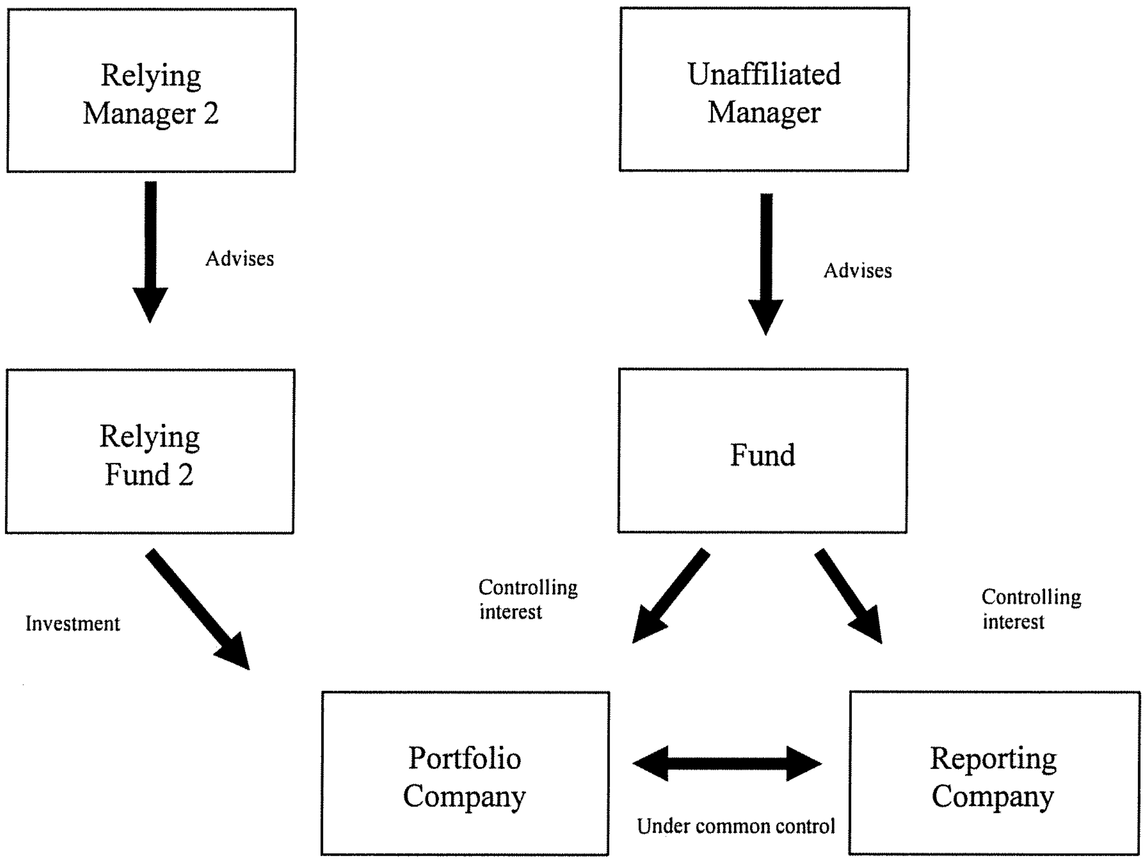
If a manager that is seeking to rely on the Rule ("Relying Manager 1") and/or a fund that Relying Manager 1 advises ("Relying Fund 1") is deemed to have control of: (1) a portfolio company that initially meets the Rule's definition of a "qualifying portfolio company" with respect to Relying Fund 1 but that later becomes a reporting or foreign traded company (the "Qualifying Reporting Company"); and (2) a second portfolio company (the "Second Portfolio Company"), then the Second Portfolio Company would appear to be a Non-Qualifying Investment by virtue of the Second Portfolio Company's being a company under common control with the Qualifying Reporting Company.

Example 1 Follow-Up



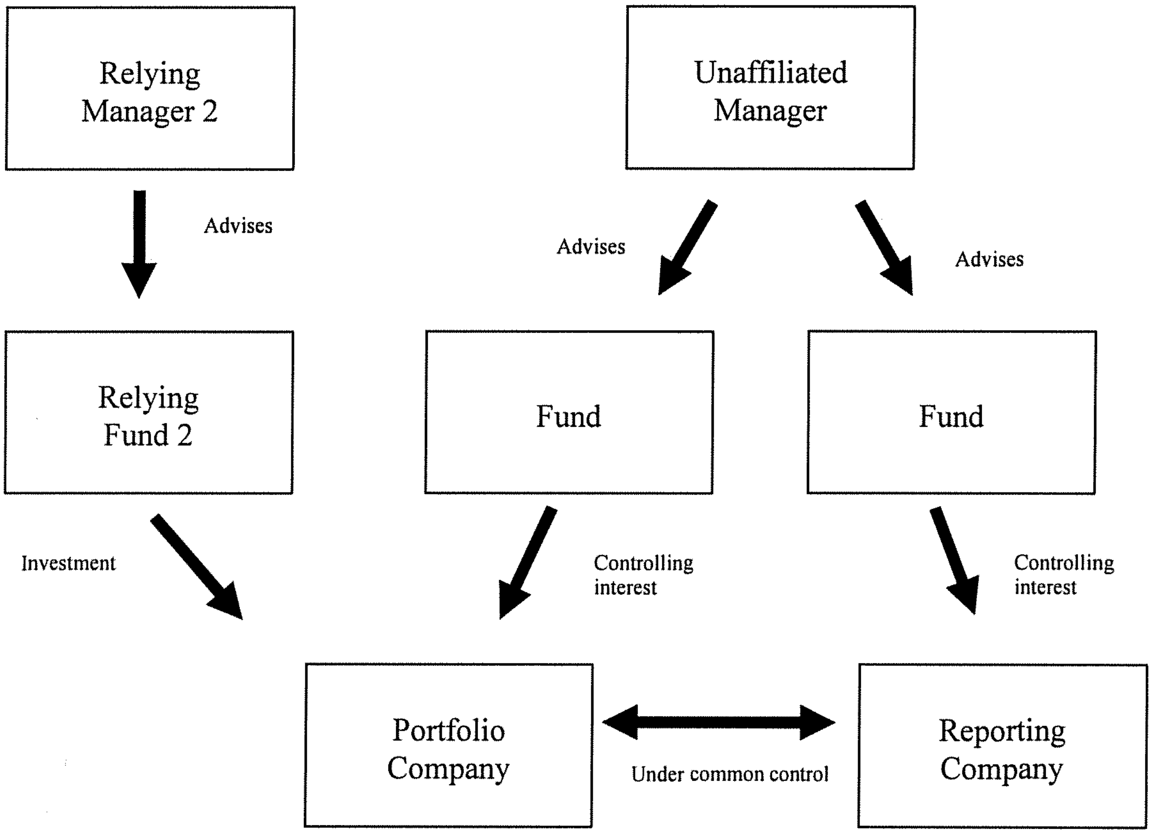
If a manager that is seeking to rely on the Rule ("Relying Manager 1") is deemed to have indirect control of: (1) a portfolio company that initially meets the Rule's definition of a "qualifying portfolio company" with respect to Relying Fund 1 but later becomes a reporting or foreign traded company (the "Qualifying Reporting Company"); and (2) a second portfolio company (the "Second Portfolio Company"), then the Second Portfolio Company would appear to be a Non-Qualifying Investment by virtue of the Qualifying Reporting Company and the Second Portfolio Company's being under the indirect common control of Relying Manager 1.

Example 2



If a manager seeking to rely on the Rule ("Relying Manager 2") causes a private fund that it advises ("Relying Fund 2") to make an investment in a portfolio company (the "Portfolio Company") when the Portfolio Company was, at the time of investment, a company under common control with a reporting or foreign traded company (the "Reporting Company") because of direct controlling interests held by a fund (the "Fund") that is advised by a manager that is not an "advisory affiliate" of Relying Manager 2 or a similar entity that is not an "advisory affiliate" of Relying Manager 2 and the manager or similar entity is, or is not, a manager seeking to rely on the Rule (the "Unaffiliated Manager"), then the Portfolio Company would appear to be a Non-Qualifying Investment for Relying Manager 2 and any other fund with a manager that is seeking to rely on the Rule by virtue of the Portfolio Company's being a company under common control with the Reporting Company.

Example 2 Follow-Up



If a manager seeking to rely on the Rule ("Relying Manager 2") causes a private fund that it advises ("Relying Fund 2") to make an investment in a portfolio company (the "Portfolio Company") when the Portfolio Company was, at the time of investment, a company under indirect common control with a reporting or foreign traded company (the "Reporting Company") because of controlling interests indirectly held by a manager that is not an "advisory affiliate" of Relying Manager 2 or a similar entity that is not an "advisory affiliate" of Relying Manager 2 and the manager or similar entity is, or is not, a manager seeking to rely on the Rule (the "Unaffiliated Manager"), then the Portfolio Company would appear to be a Non-Qualifying Investment for Relying Manager 2 and any other fund with a manager that is seeking to rely on the Rule by virtue of the Portfolio Company's being a company under common control with the Reporting Company.