SUBMITTED ELECTRONICALLY

September 23, 2013

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

Re: Amendments to Regulation D, Form D and Rule 156 under the Securities Act (File No. S7-06-13)

Dear Ms. Murphy:

The Private Equity Growth Capital Council (the "PEGCC") appreciates the opportunity to comment on the proposed amendments (the "Proposed Amendments") to Regulation D, Form D and Rule 156 under the Securities Act of 1933, as amended (the "Securities Act").[1] The PEGCC is an advocacy, communications and research organization established to develop, analyze and distribute information about the private equity and growth capital investment industry and its contributions to the national and global economy. Established in 2007, and formerly known as the Private Equity Council, the PEGCC is based in Washington, D.C. The PEGCC members are the world's leading private equity and growth capital firms united by their commitment to growing and strengthening the businesses in which they invest.

The Proposing Release states that the Proposed Amendments reflect the concern of the Securities and Exchange Commission (the "SEC") that the recent adoption of Rule 506(c) of Regulation D may result in a significant change in the manner in which certain offerings exempt from

[1] SEC Release Nos. 33-9416; 34-69960; IC-30595; File No. S7-06-13 (the "Proposing Release").

registration under the Securities Act are made. For example, in the Proposing Release, the SEC noted a concern for "an increase in unlawful sales of securities to non-accredited investors."[2]

The PEGCC agrees that the SEC should monitor changes that result from the adopting of Rule 506(c) in an effective manner so that it may determine whether further changes are necessary and, more importantly, pursue fraudulent activity. However, it should do so using its current tools and should not upset the carefully calibrated balance reflected in Section 201(a)(1) of The Jumpstart Our Business Startups Act (the "JOBS Act") that is now incorporated into Rule 506(c)(2)(ii).[3] The legislative history of the JOBS Act is clear that Congress intended to reduce the barriers to raising new capital, while also recognizing that this objective should be balanced

[2] *See* Proposing Release at 7. However, one of the conditions of the new exemption is that sales may not be made to investors who are not accredited investors.

[3] This balance in Section 201(a)(1) of the JOBS Act between ease of capital formation and investor protection was endorsed by multiple members of Congress from both parties. 157 Cong. Rec. H7293 (Nov. 3, 2011) (statement of Rep. Jackson Lee) ("Before us is a measure that will allow companies to more easily raise capital by removing restrictions on general solicitation and advertising for certain private securities. It fairly balances the need to ease capital formation to spur job creation, with a provision to better protect investors by putting greater responsibility on the issuer….This has created the balance we need to ease restrictions on capital formation with protecting investors from fraud."); 157 Cong. Rec. H7282 (Nov. 3, 2011) (statement of Rep. Polis) ("Democrats have added a critical provision requiring that issuers verify that an investor is actually eligible to purchase the offer in securities, and the change ensures there's a balance between the need to use restrictions on capital formation and protecting investors from fraud and making sure we don't get in the way of State regulation, as well."); 157 Cong. Rec. H7291 (Nov. 3, 2011) (statement of Rep. Maloney) ("This bill before us today would end this contradiction by removing the restrictions on general solicitation and advertising for certain private securities offerings. It will help companies attract potential investors and raise the capital that they need to be successful. This bill accomplishes this task in a balanced way….Now, with this bill, we will have additional safeguards in place to make sure that investors are qualified and that these financial transactions are safer."); 157 Cong. Rec. H7290 (Nov. 3, 2011) (statement of Rep. Waters) ("As you know, accredited investors are individuals, companies, or organizations that generally have the sophistication needed to make complex financial decisions. These folks are thought to need less protection than average retail investors…. An amendment I offered in subcommittee, which was accepted, directs the SEC to write rules requiring issuers to verify that purchasers are accredited investors. I think this will substantially improve the potential fraud issues identified by the State regulators."); 157 Cong. Rec. H7293 (Nov. 3, 2011) (statement of Rep. Stivers) ("This legislation will allow entrepreneurs to advertise their investment opportunity to accredited investors and to solicit investment without being subject to costly and burdensome regulations. This exemption would only apply to general solicitations or advertising if the buyers are accredited investors, those people that have $1 million net worth or an income above $200,000. This leaves protections in place for those who may be less sophisticated investors.")

by requiring greater assurances that purchasers in offerings that involved a general solicitation were limited to accredited investors, as defined in Regulation D.[4] Congress could have authorized the SEC to impose additional conditions on such offerings, but chose not to.

The Proposed Amendments would upset the Congressionally-mandated balance and severely restrict the ability of issuers to utilize the new Congressionally-mandated exemption. In fact, the Proposed Amendments would make it more burdensome to make a private offering *without* a general solicitation.[5] If the Proposed Amendments are adopted, it would be more difficult to raise capital under Regulation D than it was before the JOBS Act was enacted.

In addition, the Proposed Amendments appear to mark the beginning of a trend to subject private funds to the same type of regulation as retail mutual funds. For example, the Proposed Amendments would require offering materials to be filed in advance with the SEC under certain circumstances, require boilerplate disclosures in certain offering documents and impose restrictions on the use of performance information. The Commission also requests comment on a variety of even more prescriptive amendments, particularly with respect to performance disclosure.

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[4] 158 Cong. Rec. S181 (Jan. 31, 2012) (statement of Sen. Thune) (The purpose of removing the restriction on general solicitations is to make "it less costly, less difficult for our small businesses and entrepreneurs to get access to capital so they can create jobs and get the economy growing again"); H. Rep. No. 2940 (October 31, 2011) at 2 ("allow companies greater access to accredited investors and to new sources of capital to grow and create jobs, without putting less sophisticated investors at risk").

[5] For example, the Proposed Amendments also impose additional requirements on offerings that rely on Rule 506(b) by requiring an additional Form D filing, requiring that additional information be reported on Form D and by imposing a new disqualification requirement on an issuer if it does not make a timely Form D filing.

The PEGCC believes that this approach is unnecessary and inappropriate, particularly with respect to private equity funds. Investors in the typical private equity fund must be "qualified clients"[6] or "qualified purchasers."[7] There is no need to provide these investors with the type of standardized disclosures that are applicable to retail mutual funds. In fact, such an approach could increase the likelihood that investors will conclude that private equity funds are subject to the same type of oversight as retail mutual funds. We do not believe that this can be the SEC's intention, particularly given the content of certain of the proposed disclosures.

We, therefore, request that the SEC reconsider the necessity of the Proposed Amendments, both individually and as a group. Our specific comments on certain of the Proposed Amendments are below.

I. Advance Filing of Form D and Submission of General Solicitation Materials

A. *Advance Filing of Form D*

The Proposed Amendments would require an issuer relying on Rule 506(c) to file an initial Form D (the "Advance Form D") 15 calendar days in advance of conducting any general solicitation activities. Such a requirement would place significant burdens on issuers. It would impose an

6 Under Rule 205-3(d)(1) under the Investment Advisers Act of 1940 (the "Advisers Act"), a person who invests in a private fund that relies on Section 3(c)(1) of the Investment Company Act of 1940 (the "Investment Company Act") and that pays carried interest must be a qualified client. A natural person may be a "qualified client" if his or her net worth exceeds $2 million (excluding the value of the primary residence and associated indebtedness).

7 We believe that most private equity funds rely on Section 3(c)(7) under the Investment Company Act, which requires that all persons who acquire securities issued by the fund (other than "knowledgeable employees" of the fund sponsor) be qualified purchasers. A natural person may be a "qualified purchaser" if he or she owns $5 million or more in investments. Section 2(a)(51)(A)(i).

artificial "cooling-off" period from the date the Advance Form D is filed until the date when the issuer may begin the general solicitation. This "cooling-off" period will restrict the ability of issuers to raise capital quickly and, in effect, make a general solicitation under Rule 506(c) unavailable as a practical matter where the issuer needs to raise capital in a time period shorter than the "cooling-off" period.

Congress determined that only two new restrictions should be imposed on an issuer that avails itself of the new exemption: (i) that all purchasers in the offering must be accredited investors and (ii) that the issuer must take reasonable steps to verify that each purchaser is an accredited investor.[8] Adding a new pre-filing condition is simply not what Congress had in mind.

In addition, an issuer that inadvertently engages in a general solicitation (*e.g.*, making a comment to a reporter) would be unable to comply with the new requirement.[9] This risk is exacerbated by the fact that the types of communications that might constitute "general solicitations" are not well defined.[10] Moreover, as discussed below, the SEC is proposing to adopt a new, severe disqualification provision that would bar an issuer and its affiliates from making offerings under Regulation D if the Form D is not filed on a timely basis. As a consequence, issuers may find it necessary to make "defensive" Advance Form D filings to assure that they do not inadvertently

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[8] *See supra* notes 3 and 4 (summarizing the relevant legislative history).

[9] *See*, *e.g.*, Greene et al., U.S. Regulation of the International Securities and Derivatives Markets (last updated Dec. 2012) at § 1.04 (discussing "foot faults" in a Rule 506 offering).

[10] *See*, *e.g.*, Final Report of the Advisory Committee on Smaller Public Companies to the U.S. Securities and Exchange Commission (Apr. 23, 2006) (*hereinafter* "Final Report of the Advisory Committee on Smaller Public Companies"), *available at* http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf (noting that with respect to determining if a general solicitation has occurred, "[f]ew bright-line tests exist, and issuers are required to make highly subjective determinations concerning whether their actions might be construed as impermissible.")

violate proposed Rule 503(a). This would impose an unnecessary burden on issuers and on the administrative resources of the SEC. It may also provide the SEC with a misleading picture of how many issuers are actually conducting general solicitations.

The benefits of the Advance Form D requirement seem speculative and illusory. For example, the Proposing Release states that requiring a pre-offer filing will permit the SEC to review filings for offerings that were unsuccessful and thereby allow the SEC "to determine which issuers are facing challenges raising capital under Rule 506(c) and whether further steps by the SEC are needed to facilitate issuers' ability to raise capital under Rule 506(c)."[11] We suspect that issuers and others will advise the SEC whether further steps are needed to facilitate the use of Rule 506(c); an advance filing requirement is not necessary to accomplish this objective.[12] Moreover the current Form D filings provide data relating to the presence of "bad actors" and other "red flags" in a timely fashion (within 15 calendar days of the first sale) that allow both the SEC and state regulators to address concerns that they may have with respect to an offering.

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[11] Proposing Release at 22 – 23.

[12] It is also questionable whether monitoring failed Rule 506(c) offerings (*i.e.*, offers with sales) is a good method to judge issues relating to private capital-raising. As noted above, the incentives created by an advance filing requirement mean that many issuers will file Advance Form Ds even when they do not intend to engage in a general solicitation and even where they are uncertain if they would like to engage in a formal offering. Advance Form D will also only cover a narrow segment of private capital-raising (*e.g.*, it does not include failed Rule 506(b) offerings). Advance Form D will not provide information on offerings that, while ultimately "successful" (*i.e.*, there is an ultimate sale of securities) may reflect a smaller amount of capital raised than anticipated. Finally, it is not clear that there is a correlation between number of "failed" offerings and issues raising capital—a "hot" market may have more "failed" offerings whereas a "cold" market may scare off an issuer from even making an offering (or filing Advance Form D). Thus, the utility of using Advance Form D as a means of measuring private capital-raising seems questionable.

B. *Submission of General Solicitation Materials to SEC*

Proposed Rule 510T would require the filing of written general solicitation materials no later than the date of first use. As with the proposed Advance Form D filing, this requirement would impose unnecessary burdens on issuers without any demonstrable benefits to investors.

In addition, in the case of private equity fund sponsors, this burden is duplicative. The SEC has ready access to such solicitation materials through its examination program of investment advisers registered under the Advisers Act.[13] Thus, in the case of private equity funds, the SEC already has the tools necessary to assess market practices relating to a Rule 506(c) solicitation. If the SEC adopts the proposed rule, it should not apply to general solicitation materials for private equity funds managed by registered investment advisers or other investment advisers subject to SEC examination.

If the SEC adopts the proposed filing requirement, it should also provide absolute clarity as to the types of written materials that would constitute written general solicitation materials subject to the filing requirement, particularly since failure to comply with the proposed rule could result in the issuer and its affiliates being disqualified from using Regulation D under proposed Rule 507(d).

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[13] Most other fund sponsors would likely be "exempt reporting advisers" that rely on exemptions from registration under Section 203(l) or 203(m) of the Advisers Act. The SEC has noted that it has the authority to examine the books and records of such advisers. In addition, the states could directly regulate many exempt reporting advisers.

The Proposing Release defines general solicitation materials as any "written communication that constitutes a general solicitation in any offering conducted in reliance on Rule 506(c)."[14] It is unclear whether this means that such materials only include those materials that are generally made available to the public, such as an advertisement in a newspaper, or whether the term includes any materials that are provided to investors in connection with an offering that involves a general solicitation. The rule should make it clear that general solicitation materials only include materials that are made available to the public and not materials that are provided on a confidential basis to prospective investors (even if such investors were initially contacted through a general solicitation or advertisement). Clarifying this point may substantially reduce the burdens imposed by Proposed Amendments.

The burdens imposed by the proposed rule (as well as Rule 509, discussed below) could also be reduced by excluding the following type of documents from the filing requirement (to the extent that they are deemed to be general solicitation materials):

- Materials posted on the issuer's website. Issuers may update their websites on a daily basis. It may be difficult to differentiate between the portions of the website that could constitute a general solicitation from the portions that do not. Requiring an issuer to file screen shots of the changes to its website on the same day as such changes are made would be burdensome and unnecessary.

- Materials maintained in electronic data rooms designed to facilitate investor due diligence. These data rooms are generally made available to investors that have

[14] Proposing Release at 12.

expressed an interest in the issuer and have agreed to maintain the confidentiality of such information. Thus, such information should not be viewed as general solicitation materials. Rule 510T, if adopted, should explicitly provide that the content of such a data room does not have to be filed with the SEC.

- E-mails or other written communications with investors with whom the issuer does not have a pre-existing, substantive relationship. Under certain circumstances, these materials could be viewed as constituting general solicitation materials. Filing such communications with the SEC would be time consuming for issuers, potentially tax the SEC's filing systems and provide the SEC with personal information concerning prospective investors.

- Articles in newspapers, magazines or other publications that include interviews with management of the issuer or contain information about the offering. Under no circumstances should an issuer be required to file with the SEC a newspaper article or other third-party publication. The issuer is not in a position to control the timing or content of such publications.

- Materials that are provided to fewer than 100 persons or persons who the issuer reasonably expects are "accredited investors." A limited dissemination of this type is

unlikely to provide the SEC with much insight as to the manner in which broader general solicitations may impact the marketing of Rule 506(c) offerings.[15]

Finally, if the filing of written general solicitation materials is required, we believe that the burden on issuers should be reduced by allowing the issuer to file such materials 30 days after publication rather than on the same day as publication. Extending the period between the first usage and the filing requirement is important for two purposes. First, it would significantly reduce the compliance burden by eliminating the need for a near constant filing of materials during an offering where materials are continuously being updated. Second, it would provide flexibility for the filing of materials relating to an inadvertent general solicitation, where the issuer may not immediately recognize that a general solicitation has occurred.

II. Disqualification Provisions

A. *General*

Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act required the SEC to adopt rules that disqualify securities offerings involving certain "felons and other 'bad actors'" from reliance on Rule 506 of Regulation D. The SEC adopted such a rule (Rule 506(d)) on the same day as it approved issuing the Proposed Amendments.[16]

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15 *See*, *e.g.*, Advisory Committee on Smaller Public Companies, *supra* note 10, at 76 (distinguishing between a general solicitation through mass media and a general solicitation involving a social function attended by 50 prospective purchasers).

16 Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings, SEC Release Nos. 33-9414 (Jul. 10, 2013).

The SEC is now proposing disqualification provisions that go far beyond the provision mandated by Congress. Rather than focusing on so-called bad actors, the Proposed Amendments would disqualify issuers who failed to meet the technical filing requirements and new, somewhat ambiguous disclosure requirements. The SEC is issuing these proposals in the absence of any experience with new Rule 506(d) or significant efforts on its part to enforce Rule 503.[17] We note that Rule 506(d) is proving difficult to implement and appears to be overly broad in certain respects, particularly its treatment of "affiliated issuers" and owners of 20% or more of a private fund's voting securities. We understand that the SEC's Division of Investment Management is currently considering these issues.[18] Given these issues, it seems premature to propose a wholly-new disqualification regime.

While the proposed change appears to be primarily designed to allow the SEC to monitor the use of Rule 506(c), it does so by imposing significant adverse consequences on issuers that avail themselves of the new exemption or Rule 506(b).[19] We believe that a new disqualification provision is an inappropriate, and overly blunt, instrument to achieve this objective.

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17 *See* Proposing Release at note 84 (noting that the SEC has brought few enforcement actions relating to violations of Rule 503).

18 *See* Norm Champ, Director, Division of Investment Management, Current SEC Priorities Regarding Hedge Fund Managers, speech at PLI Hedge Fund Management Conference (Sept. 12, 2013), *available at* . http://www.sec.gov/News/Speech/Detail/Speech/1370539802997.

19 *See* Proposing Release at 49 – 50 ("We believe it is appropriate to strengthen the incentives for issuers to comply with Rule 503, which would make it more likely that the [SEC] will obtain Form D data *that provides a more complete perspective on Rule 506(c) offerings* and the Rule 506 marketplace as a whole . . . .") (emphasis added).

B. *Rule 507(a)*

Rule 507(a) would disqualify an issuer from relying on, among other provisions of Regulation D, Rule 506, if the issuer, or any of its predecessors or affiliates, have been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminarily or permanently enjoining such person for failure to comply with Rule 509 (the new disclosure requirements) or Rule 510T.

Putting aside the flaws of both proposed Rules, we believe that failure to comply with the provisions of these Rules, some of which are highly technical in nature, should not be a basis for disqualifying an issuer from being able to rely on Rule 506. The effect would be to permanently disqualify an issuer from engaging in any Regulation D offering (not just an offering that involves a general solicitation) based on its failure (or the failure of a predecessor or affiliate) to file general solicitation materials with the SEC under Rule 510T or include the required legends on written general solicitation materials (see below). With respect to Rule 510T, this is a disproportionate response for failing to comply with a temporary rule that is merely designed to provide the SEC with information. (The disqualification would outlive the proposed effectiveness of Rule 510T.) A disqualification for failing to comply with Rule 509 is also inappropriate, particularly in the absence of fraud or other misconduct that would trigger a disqualification under the Congressionally-mandated disqualification provision in the new Rule 506(d).

C. *Rule 507(b)*

Rule 507(b) would disqualify an issuer from relying on Rule 506 for one year for future offerings if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with all of the Form D filing requirements in a Rule 506 offering.

The new disqualification provision in Rule 507(b) is a disproportionate response to a failure to file a Form D. The Proposing Release provides little data (beyond the analysis of the SEC's Division of Economic and Risk Analysis) as to how widespread non-compliance with Rule 503 has been or the impact that non-compliance has had on the SEC's regulatory program or those of the states.

The new disqualification requirement will subject issuers to significant uncertainties in assessing whether they can rely on Regulation D.

- *A lack of clarity as to when the disqualification is triggered*. There may be circumstances when the need to file a Form D is not clear particularly with respect to other-than-annual amendments[20] and, as noted above, Advance Form D. Thus, in the absence of a judgment, order or other disciplinary action, an issuer may not be aware that it is not entitled to rely on Regulation D.

- *Monitoring Burdens.* Issuers will have considerable difficulty monitoring the compliance by affiliates and predecessors with the Form D filing requirements, particularly with respect to the Advance Form D filing requirement and the filing of other-than-annual

[20] *See* Proposing Release at 33 (discussing the non-specific filing deadlines of Form D).

amendments. While the SEC acknowledges the significant issues stemming from uncertainty for issuers and purchasers if Form D filing was a condition of offering exemption in Rule 506,[21] the SEC does not appear to consider that the proposed disqualification provision in Rule 507 transfers this uncertainty to future offerings by the issuer, its affiliates and its predecessors.

We recommend that the SEC maintain the current approach with respect to violations of Rule 503. Under appropriate circumstances, the SEC should bring enforcement actions against delinquent Form D filers and dedicate appropriate resources to doing so. The threat of such a disciplinary action should provide issuers with sufficient incentive to meet their obligations under the federal securities laws.

If proposed Rule 507(b) is adopted, it should be limited to those situations where an issuer has failed to file any Form D with respect to an offering. (Thus, the failure to file an Advance Form D, if required, or amendments to Form D would not, by themselves, constitute a basis for disqualification). We also believe that if the proposed amendment is adopted, the look-back period should be reduced to six months and disqualification should apply only to the issuer and not to affiliates of the issuer. Even this shortened look-back period would provide a sufficient incentive for issuers to file Form Ds on a timely basis. Finally, in light of the uncertainty concerning the types of communications that might constitute "general solicitations," the PEGCC believes that the SEC at a minimum should provide issuers with sufficient flexibility to

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[21] *See* Proposing Release at 50 – 51 ("If compliance with Rule 503 were reinstated as a condition to Rule 506, then non-compliance at any stage of an offering could result in the entire offering being held to violate Section 5 of the Securities Act and applicable state securities laws.")

comply with Regulation D and the related Form D filing requirements, including a sufficiently robust cure period that recognizes that certain potential "general solicitation" activities may not be discovered promptly after they occur.

III. Content Requirements and Performance Disclosure

A. *General*

Proposed Rule 509 would impose a number of content requirements on general solicitation materials. Rule 509 appears to be based on the flawed premise that the disclosures provided by the private funds in their marketing materials should be "similar to certain disclosures required by Rule 482 under the Securities Act for advertisements and other sales materials of registered investment companies."[22] There is a fundamental distinction between offerings of mutual funds (which rely on Rule 482) and private equity funds. Mutual funds are offered in public offerings to retail investors who do not have to meet any financial threshold requirement to invest in the fund. Substantially all private equity funds are sold in private offerings to highly sophisticated qualified purchasers, qualified clients or accredited investors.[23] The fact that a private equity fund may choose to engage in a general solicitation does not alter this fundamental characteristic.

Second, these requirements are particularly unnecessary for private equity funds. As discussed below, private equity fund sponsors have extensive experience in developing marketing materials

[22] Proposing Release at 67.

[23] See *supra* notes 6 and 7 and the accompanying text. The SEC may want to consider a more tailored proposal that is limited to offerings by private equity funds that rely on Section 3(c)(1) and may involve sales to accredited investors who are not qualified purchasers. However, we question whether such a tailored proposal is even necessary since investors in such funds will likely be limited to qualified clients and employees of the fund sponsor.

informed both by their duties as investment advisers and SEC guidance. Additional requirements do not seem to be necessary.

Finally, if the proposed Rule is adopted, it could impose boilerplate disclosure requirements on any number of communications by private equity funds to prospective investors. The disclosures would be required in "any written communication that constitutes a general solicitation or general advertising." As discussed above, the Proposing Release provides little if any guidance on the types of communication that would fall into this category. As discussed in Section I.B, the SEC should adopt a definition of written general solicitation materials that focuses on materials that are provided to a large number of people, some of whom could be non-accredited investors.

B. *Performance-Related Disclosures*

Rule 509(c) would require any written general solicitation materials of a private equity fund that include performance data to include a number of standard legends including that past performance does not guarantee future results and that the private equity fund is not required by law to follow any standard methodology when calculating and representing performance data.

As a general matter, we do not believe that additional specific requirements are necessary with respect to performance presentations. Private equity fund sponsors already are subject to the anti-fraud provisions of the federal securities laws and the Advisers Act, including Rule 206(4)-8, which, among other things, prohibits misleading statements to investors and prospective investors. The SEC has used these provisions to aggressively pursue misleading performance

claims by private fund sponsors.[24] Based on this experience, there does not appear to be any need to impose additional detailed requirements on private equity fund sponsors.

The Proposed Amendments would also require that performance information "be as of the most recent practicable date considering the type of private fund and the media through which the data will be conveyed."[25] This concept appears to have borrowed from Rule 482 under the Securities Act which, as noted above, is designed to standardize performance presentations for retail mutual funds that are constantly updating their performance since they are always marketing.[26] Private equity fund sponsors may only update the performance of their funds on a quarterly, semi-annual or annual basis, depending on the frequency with which they provide information to their investors. Updating performance calculations more frequently would impose significant costs on private equity fund sponsors.

The Proposing Release attempts to address this point by noting that the SEC intends "current performance data to mean as of the last date on which the private fund customarily determined the valuation of its portfolio securities" and that it does "not expect a private fund to value its portfolio for the sole purpose of providing updated current performance under proposed Rule

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[24] *See*, *e.g.*, In the Matter of Oppenheimer Asset Management Inc. and Oppenheimer Alternative Investment Management, LLC, SEC Release Nos. 33-9390; IA-3566 (Mar. 11, 2013) (alleging, among other things, that the Respondents disseminated marketing materials to prospective investors and quarterly reports to existing investors that contained material misrepresentations and omissions concerning Respondents' valuation policies and the performance of a fund of funds managed by the Respondents).

[25] Proposing Release at 68.

[26] *See* Rule 482(g)(requiring that "[a]ll performance data contained in any advertisement must be as of the most recent practicable date considering the type of investment company and the media through which the data will be conveyed…").

509."[27] This intention should be expressly stated in the Rule. The Rule should make clear that current performance data would mean the last date as of which the private equity fund customarily determines the valuation of its portfolio securities for purposes of preparing regular reports for existing investors in the applicable funds. This change would reflect the SEC's intent and add clarity to what might otherwise be an ambiguous requirement.

We also do not believe that specific performance-related disclosures should be required in all general solicitation materials containing performance data. As noted above, we are concerned about the wide range of materials that could be characterized as general solicitation materials. Many of these communications are informal in nature and, therefore, it may be difficult to confirm that all such communications include the necessary boiler plate disclosures.

C. *Other Disclosure Issues*

Rule 509 would also require all issuers relying on Rule 506(c) to include certain standard disclosures on written general solicitation materials.

We do not believe that the legends required in the proposed new Rule 509 should be required on all written general solicitation materials so long as they are included in the principal offering document provided to all investors prior to any sale (*e.g.*, a private placement memorandum). Investors in private equity funds are accustomed to receiving marketing materials and more informal communications that have fewer disclosures that are specifically tailored to make that specific communication not misleading, while the private placement memorandum includes a

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[27] Proposing Release at fn. 118.

full list of disclosures and disclaimers, which, as a general matter, covers the same substance of the disclosures under consideration in new Rule 509. As noted above, requiring more boiler plate disclosures in all communications may make it difficult to identify for investors which such disclosures are material to the particular communication.

We also note that most written communications with investors include a clear disclaimer that states that the communication is not an offer of securities and refers specifically to the private placement memorandum or other offering document. While we do not support requiring such a disclosure on all communications, we believe that the sophisticated investors in private equity funds are sufficiently informed of the need to carefully examine the private placement memorandum and the disclosures contained therein.

Because of the wide range of potential written general solicitation materials, the sophisticated investors and the anti-fraud principles already applicable, it is not be necessary to include specific requirements for the legends (*e.g.*, type size, type style, location and proximity). Similarly, adding a requirement that the legends and disclosure be "presented in any manner reasonably calculated to draw investor attention" would simply add an additional confusing standard that is unnecessary in this context.

If, however, there is a requirement to include these legends, as discussed in Section I.B above, the SEC should narrow the types of written general solicitation materials to which it should be applied. As noted above, we believe that it should be sufficient that a private placement memorandum or similar offering document include the legends.

D. *Solicitation of Comment on Manner and Content Restrictions for Private Funds*

The Proposing Release also solicited a comment on a number of possible manner and content restrictions for private funds, particularly relating to the use of performance data.

We do not believe that the SEC should impose more specific content requirements on performance data (*e.g.*, data for a specific period or updated on specific intervals). As discussed above, market forces driven by highly sophisticated investors and anti-fraud provisions provide private equity fund sponsors with the incentive to make sure that their performance data is up-to-date and not misleading. For similar reasons, we do not believe that standardized performance reporting would be helpful in the private equity fund space given the wide variety of private equity fund categories (*e.g.*, buy-out, distressed, venture, infrastructure, etc.) and the different methodologies for calculating their performance. Private equity fund sponsors have a strong economic incentive to report performance in a format that investors are accustomed to (and in many instances request). Private equity fund sponsors also have a strong incentive to provide performance that is not misleading since they are subject to the applicable anti-fraud provisions of the federal securities laws.

We do not believe that there should be any requirement that the performance information be audited. We believe that such a requirement would run counter to the SEC's desire for private fund sponsors to use the most recent performance data, since it would effectively require the sponsor to only use the most recent audited annual performance data and not more recent unaudited quarterly performance data where available.

IV. Information Provided on Form D

A. *New Form D Content*

The Proposed Amendments include a number of amendments to Form D that will significantly expand the disclosure on Form D including, among other things, increased disclosure of control persons of the issuer, of purchasers of the issuer's securities, the types of general solicitation used or to be used in the offering and the methods used to verify accredited investor status.

As a general matter, we do not believe that additional requirements should be imposed on private equity funds managed by registered investment advisers or investment advisers that are subject to SEC examination. The SEC already receives a significant amount of information concerning such funds, their investment advisers and the investment advisers' control persons through Form ADV (which is available to the public).[28] Imposing additional filing burdens through Form D would not provide the public or regulators with information that is not readily available to the SEC and other regulators through the SEC website.

If the SEC does impose these additional requirements on private equity funds, it should modify them as follows:

- Item 3: The SEC should clarify that a "control person" does not include a limited partner of the issuer who is not affiliated with the general partner or sponsor of the issuer. There

[28] Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, SEC Release No. IA-3308 (Oct. 31, 2011) (adopting Form PF); Rules Implementing Amendments to the Investment Advisers Act of 1940, SEC Release IA-3221 (Jun. 22, 2011) (adopting amendments to Form ADV requiring increased disclosure regarding private funds).

may be circumstances where a small number of investors may be admitted early in the fund's life, which could raise the question of whether their large economic interest provides them with effective "control" over the issuer.[29] We also note that extensive information on control persons of a private equity fund sponsor who is a registered investment adviser or an exempt reporting adviser is already included on Schedules A and B to Part 1A of Form ADV. Therefore, it may ease compliance burdens on such sponsors and ensure accurate disclosures to investors and regulators if the Form D permitted a reference to this section of Form ADV.

- Item 21: An issuer that relies on Rule 506(c) should not be required to disclose the types of general solicitation materials used or to be used. As discussed above, the types of materials that might be viewed as a general solicitation are unclear. The proposal would also impose an additional disclosure condition on general solicitations not mandated by Congress.

- Item 22: An issuer relying on Rule 506(c) should not be required to disclose the methods that it uses to verify that purchasers are accredited investors on Form D. The proposal would impose yet another burden on the use of Rule 506(c) that is not contemplated by the JOBS Act. For example, the issuer would have to specify the types of documentation provided by purchasers or third parties. Even though this information will be available to

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[29] Under existing SEC guidance, a limited partner may be considered to control the partnership even in the absence of voting rights if the limited partner holds an economic interest that gives it the power to exercise a controlling influence over the partnership. Standish Equity Invs., Inc. SEC No-Action Letter (Dec. 15, 1993); Rogers, Casey & Assocs., Inc., SEC No-Action Letter (June 16, 1989); McKinsey & Co., SEC No-Action Letter (Feb. 17, 1989); MMC Fund L.P., SEC No-Action Letter (Mar. 31, 1989); Devonshire Capital Corp., SEC No-Action Letter (Feb. 15, 1976); L. Marvin Moorehead, SEC No-Action Letter (Mar. 1, 1975).

the issuer, the process of compiling and summarizing it for purposes of Form D will increase the costs of relying on Rule 506(c), undercutting the purpose of the JOBS Act. It also seems at odds with the "facts and circumstances" approach that the SEC appropriately took in adopting the verification provisions in Rule 506(c)(3). The flexible approach contemplated by the rule would now be informed by the rigid "check-the-box" categorizations in proposed Item 22.

B. *Form D Filing Requirements*

The Proposed Amendments would amend Rule 503 to require the filing of a final amendment to Form D within 30 calendar days after the termination of any offering conducted in reliance on Rule 506.

We object to the proposed final amendment requirement. It imposes yet another burden on issuers that rely on Regulation D. The value of the additional information that it provides is unclear, particularly in light of the current requirements to amend Form D filings. As discussed above, the JOBS Act reflects Congress's intent to reduce the burdens imposed by Rule 506. The SEC should further effectuate this intent and instead focus on *reducing* the burdens of filing Form D. For example, the SEC should consider reducing the number of amendments of Form D that are required. We believe that a closing amendment would make sense only if the requirement to make periodic amendments is eliminated. The filing burdens on issuers would be reduced (and the risks of minor filing errors and potential disqualification would also be lower); however, the SEC and state regulators would still receive substantially the same information.

The SEC requested comment on whether a closing amendment should be a condition of Rule 506. It should not be. Otherwise, an issuer could lose an exemption for the entire offering at issue, creating a large amount of uncertainty for both issuers and purchasers. The SEC has recognized the significant issues with this type of uncertainty in its discussion of why it did not make Form D filing generally a condition of Rule 506.[30]

The SEC also requested comment whether it should provide a more detailed explanation of what constitutes the termination of the offering. We do not think that such guidance is necessary. This is a facts and circumstances determination best left to the issuer's judgment. We are concerned that providing additional specific guidelines could make it more difficult for issuers to comply with Form D. There seems to be little to gain for either investors or regulators by being more specific given, as noted above, the marginal value of the closing amendment.

C. *Modernization of Form D*

Finally, we encourage the SEC to consider modernizing Form D to reduce the compliance burdens on private equity funds. As noted above, private equity fund sponsors already provide extensive information on Form ADV and Form PF, including information regarding their control persons on Schedules A and B to Part 1A of Form ADV and their private equity funds on Section 7.B.(1) of Schedule D of Form ADV.

In addition, the SEC should revise Form D and the related filing requirements to permit certain affiliated issuers to file consolidated Form Ds. For example, we believe that funds in a parallel

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[30] *See supra* note 21.

fund structure or funds in a master-feeder structure should be permitted to file a consolidated Form D.[31] In this scenario, the SEC and state regulators would receive all of the relevant information on a single filing (making it easier to understand the true scope of the offering), while also reducing the compliance burdens on issuers.

V. Rule 156

The SEC has proposed to amend Rule 156 under the Securities Act to extend its applicability to private funds. It is unclear why the SEC believes that private fund sponsors need additional guidance on developing sales literature that is not fraudulent or misleading.

Rule 156 was adopted in 1979 in response to the SEC's withdrawal of its Statement of Policy on registered investment company sales literature.[32] It was designed to "provide some guidance to persons who wish to determine whether sales literature is misleading."[33] The Rule was based on the SEC's "history of regulation of this subject matter" and was intended to "give some indication of what the problem areas are."[34] Thus, it was designed to provide guidance to mutual

[31] The SEC has previously recognized the value of permitting consolidated reporting of parallel fund structures and master-feeder structures on Form PF. Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, SEC Release No. IA-3308 (Oct. 31, 2011) at 109 – 111.

[32] Mutual Fund Sales Literature Interpretive Rule, SEC Release Nos. IC-10915; 34-16299; 33-6140 (Oct. 26, 1979) ("Rule 156 Adopting Release"); Investment Company Sales Literature Interpretive Rule, SEC Release Nos. IC-10621; 34-15621; 33-6034 (Mar. 8, 1979) ("Rule 156 Proposing Release").

[33] Rule 156 Proposing Release at fn. 4 and the accompanying text.

[34] Rule 156 Proposing Release at fn. 4 – 5 and the accompanying paragraph.

fund sponsors as they transitioned from an environment in which the SEC provided highly detailed guidance on, and review of, mutual fund marketing materials.[35]

The Proposing Release states that the amendment is being proposed because the SEC believes that "it is important for private fund advisers to consider the Commission's views on the applicability of the antifraud provisions to their sales literature."[36] We believe that private equity fund sponsors constantly consider their obligations with respect to marketing materials and the SEC has made it clear that they are required to do so.[37] For example, in adopting Rule 206(4)-7 under the Advisers Act, the SEC made clear that an adviser's compliance policies and procedures, at a minimum, should address among other things "[t]he accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements."[38] Perhaps more tellingly, in adopting Rule 206(4)-8, which specifically focused on the obligations of private fund sponsors, the SEC concluded that the clarity of the anti-fraud provisions made it unnecessary to provide further guidance:

> Some commenters questioned the scope of the rule, arguing that the Commission should define fraud. . . . The terms material false statements or omissions and "acts, practices, and courses of

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[35] *See* Rule 156 Adopting Release (discussing reasons for withdrawal of Statement of Policy on investment company sales literature that was originally issued on August 11, 1950).

[36] Proposing Release at 12.

[37] The Proposing Release states that "some commenters . . . requested that the Commission clarify whether the interpretive guidance in Rule 156 also applies to private funds." Proposing Release at fn. 137 and the accompanying text. Neither of these commenters are private fund sponsors.

[38] Compliance Programs of Investment Companies and Investment Advisers, SEC Release No. IA-2204, IC-26299 (Dec. 17, 2003) (Adopting Release) at fn. 17 – 22 and the accompanying text.

> business as are fraudulent, deceptive, or manipulative" encompass the well-developed body of law under the antifraud provisions of the federal securities laws. The legal authorities identifying the types of acts, practices, and courses of business that are fraudulent, deceptive, or manipulative under the federal securities laws are numerous, and we believe that the conduct prohibited by rule 206(4)-8 is sufficiently clear and well understood.[39]

In light of this clarity, there seems little need for this amendment—particularly to a rule that is wholly interpretative in nature. We are concerned that the amendment may lead regulators and investors to equate private equity funds offered to sophisticated investors with retail mutual funds. Rather, the SEC should be emphasizing that the two types of investment vehicles are significantly different.

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[39] Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, SEC Release No. IA-2628 (Aug. 3, 2007) (Adopting Release) (citations omitted) at 5.

The PEGCC appreciates the SEC's consideration of this letter and is available to discuss any questions that the SEC may have.

Respectfully submitted,

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