March 9, 2007

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F. Street N.E.
Washington D.C. 20549-9303

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

Dear Ms. Morris:

The following comments are submitted by the Private Equity Council regarding proposed rules 509 and 216 under the Securities Act of 1933 (the "Securities Act"), which are intended to provide additional investor protections with respect to private offerings of securities issued by pooled investment vehicles (excluding "venture capital funds") that are exempt from the definition of investment company under section 3(a) of the Investment Company Act of 1940 (the "Company Act") by reason of section 3(c)(1) thereof ("pooled vehicles").

The Private Equity Council is a newly formed trade association representing the nation's leading private equity firms. The purpose of the Private Equity Council is, among other things, to promote a broader understanding and appreciation of the nature and benefits of the international private equity industry and to advocate on behalf of the nation's leading private equity firms before U.S. and international regulatory and legislative bodies. The Private Equity Council's current members include: Apollo Advisors, Bain Capital, The Blackstone Group, The Carlyle Group, Hellman & Friedman, Kohlberg, Kravis & Roberts, Madison Dearborn Partners, Providence Equity Partners, Silver Lake Group, Thomas H. Lee Partners, and the Texas Pacific Group.

The Commission has asked whether employees of pooled vehicles or their investment advisors and affiliates (collectively, "pool employees") should be subject to the heightened "accredited natural person" standard set forth in the proposed rules 509 and 216. We do not believe they should. Accordingly, we request that the proposed rules be revised to provide an exemption for pool employees from the newly proposed "accredited natural person" standard, and that pool employees instead continue to be subject to the existing "accredited investor" standard in rule 501(a) of the Securities Act. Such an approach would not only protect investors, but also enable pool employees who qualify as "accredited investors" to continue to invest in their employers' pooled investment funds and meaningfully participate in the growth and success of the businesses they help build. Further, providing an exception for pool employees from the heightened "accredited natural person" standard is consistent with the Commission's prior rulemaking practices and the public policy concerns regarding the "retailization" of hedge funds and other private funds that are the genesis of the Commission's desire for reform.

It is well-established that the Commission has on prior occasions provided separate treatment or made special accommodations for employees of the fund sponsors with respect to securities offerings to such employees. Rule 701 of the Securities Act provides a safe harbor and excludes from the registration requirements of the Securities Act offerings by certain issuers to its employees (among others) in certain

circumstances. Although these investments by pool employees will often not meet the requirements of rule 701, they often allow a significant employee benefit by offering reduced or no management fees or carried interest. As discussed below in more detail, these opportunities serve not only as a meaningful employee benefit tool, but also as a means by which to further align the interests of pool employees with those of third party investors.

Further, section 3(a)(2) of the definition of "investment securities" in the Company Act excludes securities issued by "employees' securities companies," and section 6(b) of the Company Act grants the Commission the authority to exempt such companies from the provisions of the Company Act to the extent that such exemption is consistent with the protection of investors. Today, section 6(b) companies are common at larger firms with investment management arms, despite the significant legal and administrative costs associated with organizing such companies. They afford a broad group of employees throughout an employer's various business units the opportunity to invest in employer-sponsored funds. By allowing firm employees to participate in proprietary investment programs, these programs have made the firms sponsoring such programs more competitive in today's marketplace. By investing their own money in employer-sponsored funds, the fortunes of pool employees are more closely tied to those of their employers and third party investors. In addition, we note that a failure to create this exception may lead to a substantial increase in 6(b) exemptive applications by these employers, since a section 6(b) company is not technically exempt under section 3(c)(1), which we believe would entail a use of limited Commission resources that would not be in the best interests of investors overall.[1]

In addition, in 1996 the Commission implemented the National Securities Markets Improvement Act of 1996 with several related rules that made important accommodations and exceptions for employees. The Commission introduced the defined term "knowledgeable employee" as well as certain rules that permit knowledgeable employees (as defined in rule 3c-5 of the Company Act) to invest in private investment vehicles that are exempt from the definition of investment company under section 3(a) of the Company Act by reason of section 3(c)(7) (without having to satisfy the "qualified purchaser" standard) and section 3(c)(1) (without counting towards the 100-person limit). We believe that the Commission should extend the logic of the knowledgeable employee rule to allow pool employees to invest in pool vehicles (in that regard we suggest that any director, advisory board member or person serving in a similar capacity as provided in rule 3c-5(a)(4)(i) under the Company Act of the fund advisor that qualifies as a "knowledgeable employee" should be deemed to be a pool employee and therefore only be required to meet the "accredited investor" standard as well).

We urge the Commission to continue to provide appropriate exceptions for pool employees and to recognize both the greater sophistication of pool employees who qualify as "accredited investors"[2] (as compared to all "accredited investors" generally) and the importance that employee investment programs play in fostering employee ownership and aligning interests. We believe that with respect to pool employees, the existing "accredited investor" standard is effective in ensuring that pool employees have the knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of an investment in a pooled vehicle, given their inherent knowledge, relationship and access

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[1] The Commission has also granted exceptions from the registration requirements of section 12(g) of the Securities Exchange Act of 1934 for these employees' securities companies, further evidencing the Commission's historical policies supporting a different treatment of employees in this area. See Citigroup Employees' Securities Company, SEC No Action Letter (Nov. 20, 2001). See also, J.P. Morgan Chase & Co., SEC No Action Letter (June 26, 2002).

[2] "Accredited investor" is defined in rule 501(a) of the Securities Act as a natural person with individual or joint net worth in excess of $1 million or with individual income in excess of $200,000 or joint income in excess of $300,000 in each of the two most recent years and who has a reasonable expectation of reaching the same income level in the year of investment.

regarding the sponsor of the fund. Pool employees who currently qualify as "accredited investors" should, by virtue of their special relationship, access and knowledge with respect to the pooled vehicle and their sufficient ability to bear the financial risks associated with an investment therein, be recognized to possess the necessary level of sophistication for purposes of the federal securities laws and therefore be permitted to continue to invest in employer-sponsored funds.

The Commission notes in the release that in 2003 approximately 8.47% of U.S. households qualified for "accredited investor" status under its current definition. This remains a reasonable standard; one that is not necessarily met among the universe of pool employees. With respect to those employees who qualify as "accredited investors", the concerns which are the genesis of the Commission's desire for reform (i.e., the threatened broad "retailization" of the investing public's access to private funds) are not applicable. We believe that continuing to apply this existing standard will strike a needed balance between protecting investors and preserving an important tool for recruiting, rewarding and retaining valuable employees.

The ability of pool employees to invest in pooled vehicles sponsored by their employers is also important to the way in which most pooled vehicles currently structure employee benefit arrangements. Many of these programs include favorable financing for pool employees, sometimes on a non-recourse basis (in whole or in part), often do not require fees or carried interest or permit investment on favorable terms vis-à-vis the sponsor. Across the Private Equity Council's member firms, it is also common for a significant portion of qualified pool employees to participate in co-investment programs sponsored by their employers. To the extent pool employees have personal investments at stake in employer-sponsored investment funds, through co-investment programs or otherwise, the result is an alignment of interests of pool employees with those of third party investors. In addition, in today's competitive job market, the availability of such investment opportunities is often a deciding factor in attracting and retaining talented pool employees.[3] To the extent the proposed reforms are adopted, there will likely be a significant drop in the number of pool employees who are eligible to participate in such opportunities. In addition to adversely affecting the ability of private equity firms to attract talented pool employees, this may also result in a migration of talented pool employees who qualify as "knowledgeable employees" to vehicles that are structured to accept employee capital as section 3(c)(7) funds (or funds which are otherwise able to accommodate investments by non-accredited investors because of the manner in which they are offered) and perhaps to other employers that are not investment companies and so can offer securities in the employer to any of their employees under rule 701 of the Securities Act.[4] We urge the Commission to recognize the importance of providing meaningful investment opportunities for pool employees and continue to permit pool employees to invest in employer-sponsored funds so long as they qualify as "accredited investors" (of course, those pool employees who are not "knowledgeable employees" will continue to count towards the 100 holder limit under section 3(c)(1) of the Company Act).

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[3] See, e.g., Private Equity International, Human Capital in Private Equity (Jan. 2007) (noting, among other things, the importance of co-investment programs in the context of fostering appropriate long-term incentives and alignment of interests in response to investors increasingly requiring that fund professionals have personal stakes in the outcome of private equity investments.)

[4] Even under the existing rules, there is a dichotomy, which we believe is difficult to defend, between the ability of a private investment company to issue securities only to those employees who meet the "accredited investor" definition and the ability of other companies without registration to issue securities to any employees under rule 701 of the Securities Act (subject to certain aggregate offering limitations). The proposed changes would only further exacerbate this distinction, even though pool employees who invest in pooled vehicles frequently have a better understanding of merits and risks related to such investment.

The Commission has also requested comment on whether there are sufficient alternatives available to permit pool employees who are not "accredited natural persons" to nonetheless participate in their employers' private investment funds under other circumstances. We strongly believe that, to the extent the heightened "accredited natural person" standard would preclude pool employees from investing in their employers' pooled vehicles, such alternatives (i.e., relying on rule 506, section 4(2) or rule 701 of the Securities Act) would often not be available as a practical matter and in any event would be unduly burdensome and costly and would limit the scope and manner in which pooled vehicles could offer investment opportunities to pool employees. First, there are significant legal and administrative costs associated with utilizing rule 506 for non-accredited investors because funds offering interests thereunder are required to provide non-accredited investors with disclosure documents that are generally the same as those used in registered offerings (such offering materials are not typically prepared by private fund sponsors). Second, pooled vehicles relying on rule 506 are limited to 35 non-accredited investors, so in addition to cost and administrative issues, there are also issues of capacity and whether utilizing rule 506 will permit a particular fund to accommodate all of its non-accredited employees. To the extent that pooled vehicles are not able to utilize the "safe harbor" provisions of rule 506 and are forced to rely on section 4(2) to accommodate their non-accredited investor employees, there is the added uncertainty since such an offering does not fall within the rule 506 safe harbor. Rule 701 does not apply to investment companies and may only be used to effect securities offerings to employees and similar persons pursuant to written compensatory benefit plans or similar contractual arrangements, which is generally not the case with respect to pool employees investing in employer-sponsored funds. Contractual income sharing arrangements are not a practical or effective substitute for allowing pool employees to invest in their employer's funds because such contractual arrangements do not provide the same beneficial dividend and capital gains treatment on qualifying transactions and, as discussed above, they do not generate the same alignment of interests (i.e., because no invested capital of the pool employee is at risk) and added benefits to all investors that are created by allowing pool employees to invest directly in the pooled vehicles for which they work.

For the reasons discussed above, we believe that the proposed "accredited natural person" standard set forth in the proposed rules 509 and 216 should not be adopted with respect to pool employees and that pool employees should continue to be subject only to the existing "accredited investor" standard in rule 501(a) of the Securities Act.

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