

MEMO# 27553

September 10, 2013

Draft ICI Letter on Proposed Measures Relating to General Solicitation and Advertising for Private Funds

[27553]

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TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 16-13
INVESTMENT ADVISERS COMMITTEE No. 4-13
SEC RULES COMMITTEE No. 35-13
SMALL FUNDS COMMITTEE No. 19-13 RE: DRAFT ICI LETTER ON PROPOSED MEASURES
RELATING TO GENERAL SOLICITATION AND ADVERTISING FOR PRIVATE FUNDS

As you know, the Securities and Exchange Commission recently amended Rule 506 of Regulation D to eliminate the long-standing ban on general solicitation and advertising in private securities offerings under that rule, pursuant to a statutory mandate enacted as part of the JOBS Act. [\[1\]](#) At the same time, the Commission proposed measures intended to enhance its ability to monitor Rule 506 offerings and to address concerns that may arise in connection with permitting issuers in these private placements to engage in general solicitation and general advertising. [\[2\]](#)

Attached is a draft ICI letter in response, which reiterates many of the points made in ICI's earlier letters relating to this rulemaking. More specifically, in the draft letter:

- We express disappointment in the Commission's approach, suggesting that the investor protection measures should have been included as part of the rulemaking from the outset.
- We strongly support the proposal to require that all issuers include prominent legends in written general solicitation materials, particularly the additional legend for private funds to the effect that the securities offered are not subject to the protections of the Investment Company Act. Noting that the reference to the Investment Company Act may be too esoteric for many investors, the letter also recommends that the legend distinguish the private fund from a mutual fund and highlight the fact that the lack of protection under the Act presents additional risks.
- We support requiring additional disclosures for private funds that advertise performance, but argue that more is necessary to alleviate the potential for misleading performance claims. We reiterate our recommendation that the Commission should craft a rule similar in concept to Rule 482 under the Securities Act

of 1933 that standardizes the calculation and presentation of performance information by private funds. [3]

- We strongly support the extension of Rule 156 under the Securities Act to private funds.
- We support proposed Rule 510T, which if adopted would require submission of written general solicitation materials to the Commission for a two-year trial period, but we express disappointment in its limited nature. As a longer term measure, we recommend that FINRA be directed to require the filing and review of private fund advertisements. As a more immediate measure, we recommend that the Commission implement an easy way for the public to highlight questionable advertisements for the Staff's review.
- We recommend that the Commission modernize the definition of "accredited investor" to ensure that it continues to identify a universe of individual investors that can fend for themselves and do not need the protections of the securities laws. We suggest that this could be done either by replacing the income and net worth tests with a threshold test of demonstrated investment experience or by significantly increasing the income and net worth thresholds.

Comments are due to the Commission on September 23. Accordingly, please provide any comments on the draft letter to me at rcg@ici.org or 202/371-5430 by the close of business on Monday, September 16.

Robert C. Grohowski
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Securities Regulation - Investment Companies

[Attachment](#)

endnotes

[1] The Jumpstart Our Business Startups Act (the "JOBS Act") was enacted by Congress last year. See Memorandum No. 26174, dated May 22, 2012.

[2] See Amendments to Regulation D, Form D and Rule 156 under the Securities Act, Release Nos. 33-9416, 34-69960, and IC-30595 (July 10, 2013), available at <http://www.sec.gov/rules/proposed/2013/33-9416.pdf>. For a summary of the actions taken by the Commission on July 10 and background on ICI's positions related to this rulemaking, see [Memorandum](#) No. 27370, dated July 12, 2013.

[3] The letter makes it clear that we are not advocating for a wholesale extension of Rule 482 to private funds, but rather a new rule specifically tailored to private funds that would foster the ability to compare those funds' competing performance claims.