WILLKIE FARR & GALLAGHER LLP

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CLIENT MEMORANDUM

Willkie Farr & Gallagher Works with SEC Staff to Clarify the Operation of the Investment Advisers Act's Venture Capital Fund Advisers Exemption

October 6, 2015

Willkie, on behalf of its venture capital clients, has been working over the course of this year with the staff of the Securities and Exchange Commission to clarify the operation of the so-called "venture capital fund advisers exemption," which exempts certain of those clients from registration under the Investment Advisers Act of 1940. Willkie's efforts were reflected in a letter to the staff of the SEC's Division of Investment Management dated September 21, 2015 in which Willkie identified what appears to be an inadvertent flaw in the language of Rule 203(l)-1 under the Advisers Act, which implements the venture capital fund advisers exemption provided for in Section 203(l) of the Advisers Act.[1] In particular, Willkie asserted that the language of the Rule could on its face be read to effectively prevent a venture capital fund adviser seeking to rely on the exemption from causing a venture capital fund it advises to make certain types of investments in portfolio companies that are, and long have been, commonplace within the venture capital industry.[2] As Willkie also asserted in its letter, precluding a venture capital fund from engaging in these kinds of investments "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].'"

In its response letter to Willkie, also dated September 21, 2015, the Division of Investment Management's staff acknowledged that the "application of the literal wording of [the aspect of the Rule outlined in Willkie's letter] may have unintended consequences" and suggested that the result of interpreting the Rule as written is inconsistent with the underlying purpose of the Rule.[3] The staff's letter continues by setting out a "no-action" position intended to deal with the problem identified by Willkie. Had the staff not taken this position, the usefulness of the exemption to many, if not most, of the investment advisers seeking to rely on the Rule would have been significantly diminished.

If you would like to discuss any aspect of the Willkie letter, Section 203(l) and/or Rule 203(l)-1, please contact Barry P. Barbash (202-303-1201, bbarbash@willkie.com), Gordon R. Caplan (212-728-8266, gcaplan@willkie.com), Timothy A. Kahn (202-303-1133, tkahn@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

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1 *See* Willkie Farr & Gallagher, Incoming Letter (Sept. 21, 2015); available here.

2 Willkie's letter appends two examples, referred to and acknowledged in the staff's response letter to Willkie, of such investments. *See id.* at A-1.

3 *See* Willkie Farr & Gallagher, SEC No-Action Letter (Sept. 21, 2015); available here.