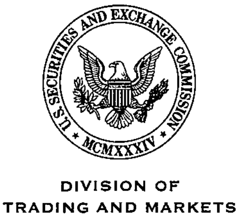

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

DIVISION OF
TRADING AND MARKETS

March 26, 2013

W. Hardy Callcott, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Re: FundersClub Inc. and FundersClub Management LLC

Dear Mr. Callcott:

In your letter dated March 22, 2013, on behalf of FundersClub Inc. ("FundersClub") and FundersClub Management LLC ("FC Management"), you request assurance from the staff of the Division of Trading and Markets (the "Staff") that it will not recommend enforcement action to the U.S. Securities and Exchange Commission (the "SEC" or "Commission") under Section 15(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") against FundersClub and FC Management if they were to engage in the activities described in your letter without registering as a broker or dealer in accordance with Section 15(b) of the Exchange Act.

Based on your letter, we understand the facts to be as follows:

FundersClub is a Delaware corporation, and venture capital fund adviser that solely advises venture capital funds as defined in Rule 203(l)-(1) under the Investment Advisers Act of 1940. FundersClub also operates the www.thefundersclub.com website.

FC Management, a wholly owned subsidiary of FundersClub, is a Delaware limited liability company and is also a venture capital fund adviser. You state that FC Management manages a series of Delaware limited liability company investment funds, each of which is formed for the purpose of investing in the securities of one or more start-up companies. You indicate that FundersClub and FC Management collectively identify and perform due diligence on start-up companies for which FC Management may wish to form investment funds. Once FC Management decides to invest in a start-up company, it enters into a non-binding agreement with that company setting a target amount of capital for which FC Management will invest. FundersClub then posts information provided by the start-up company on www.thefundersclub.com. Such information is available online only to FundersClub members, all of whom must be accredited investors as defined in Rule 501 of Regulation D.

FundersClub members may submit non-binding indications of interest in an investment fund offered on its website in accordance with Rule 506. When interest in an investment fund reaches sufficient level to fund the target amount originally agreed upon between FundersClub and the start-up company (or if the company agrees to increase the target level of capital), FundersClub closes the indication of interest process. FundersClub then reconfirms investors' interest and accredited investor status, and negotiates the final terms of the investment fund's

investment with the start-up company. Until the investment fund closes, FundersClub confirms that the members can withdraw their indications of interest without penalty at any time.

When a definitive agreement is reached with the start-up company, FC Management then signs the limited liability company investment fund agreements with the investors and closes the transaction. Investors provide funds for their investments in the investment fund directly or indirectly to a custody account subject to Investment Advisers Act Rule 206(4)-2 at a custodian bank or trust company.

You indicate FC Management exercises any management rights negotiated with the start-up company and provides the start-up company with strategic and networking assistance. FC Management also has the ability, subject to the terms of its agreement with the start-up company and applicable federal and state securities laws, to vote the investment fund's shares in any matter requiring a vote of the start-up company's shareholders. Moreover, FC Management retains the ability to offer or sell its securities in the start-up company in the secondary market, back to the start-up company or to other existing investors; to decide on any tender offer; and to decide on the dissolution of the investment fund. Investors in the investment fund are not record or beneficial shareholders of the start-up company, and do not have the ability to vote shares in the start-up company, exercise management rights, or dispose of shares in the start-up company held by the investment fund.

You indicate that the money invested by the investors and funded to the custody account of the investment fund may include an administrative fee, the size of which is disclosed to fund investors at the time of fund formation. You state this administrative fee is used to defray actual out-of-pocket costs of the investment fund, such as legal costs for fund formation, state filing fees for the investment fund, bank custody fees for the investment fund, and tax reporting costs for the investment fund.

Although the money invested by the investors may include administrative fees, you represent that FundersClub and FC Management currently do not receive any compensation.[1] You represent that FundersClub and FC Management intend to be compensated in connection with their role in organizing and managing the investment funds at an anticipated rate of 20% or less of the profits of the investment fund, but never exceeding 30%.

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1 The Staff notes that FundersClub's and FC Management's current activities appear to comply with Section 201 of the Jumpstart Our Businesses Act of 2012 ("JOBS Act") in part because they and each person associated with them receive no compensation (or the promise of future compensation) in connection with the purchase or sale of securities. *See also Frequently Asked Questions About the Exemption from Broker-Dealer Registration in Title II of the JOBS Act* (Feb. 5, 2013), http://www.sec.gov/divisions/marketreg/exemption-broker-dealer-registration-jobs-act-faq.htm. However, once FundersClub, FC Management or persons associated with them receive compensation or the promise of future compensation, as described in their incoming letter, they will no longer be able to rely on Section 201 of the JOBS Act.

Response:

Based on the facts and representations set forth in your letter, and without necessarily agreeing with your conclusions and analysis, the Staff will not recommend enforcement action to the Commission under Section 15(a)(1) of the Exchange Act if FundersClub and FC Management engage in the proposed activities described in your letter without registering as broker-dealers with the Commission pursuant to Section 15(b) of the Exchange Act.

In taking this position, we note in particular your representations that:

- FundersClub and FC Management are advisers solely to venture capital funds as defined in Rule 203(l)-(1) under the Investment Advisers Act of 1940.
- FC Management manages investment funds, which are venture capital funds as defined by Rule 203(l)-1 under the Investment Advisers Act of 1940. FC Management's management services include: exercising any rights negotiated with the start-up company; providing the start-up company with strategic advice and networking assistance; voting investment fund shares; offering or selling its securities in the start-up company; deciding on any tender offers; and winding up the investment funds.
- FundersClub and FC Management receive compensation (*i.e.*, carried interest) for their services, the nature of which are traditional advisory and consulting services, and not transaction-based compensation.
- The officers, directors and employees of FundersClub and FC Management personally do not receive transaction-based compensation for their efforts in raising investments for the investment funds.
- The amount and terms of any compensation to be paid to FundersClub and FC Management by any investment fund, as well as the amount of any administrative fee to be used to reimburse third-party expenses of any investment fund, are fully and fairly disclosed to investors in the investment fund at the time the interests in the investment fund are offered.
- None of the administrative fees is paid to FundersClub, FC Management, or any of their affiliates or principals.
- Any portion of the administrative fee remaining in the custody account at the time a fund is wound up will be distributed to investors along with the other assets of the fund.
- Neither FundersClub nor FC Management is able to withdraw any deposited funds from the custody account for its own use, and while an investor's funds will pass through an escrow account or similar account established for the benefit of the investor, the only permitted withdrawals from such account are either to an investment fund's custody account to purchase fund interests for the investor or back to the investor if a proposed investment fund does not close.[2]

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[2] FundersClub and FC Management also represent that they could decide to move the assets of an investment fund from a custody account, custodian bank or trust company to a custody account at another custodian bank or trust company during the life of the fund. In addition, FC Management will authorize third-party disbursements from the administrative fee, but none of those disbursements may be made to FC Management, FundersClub, their affiliates, or individuals affiliated with FC Management or FundersClub.

- Neither FundersClub nor FC Management, nor any principal, employee, board member, controlling shareholder or other persons associated with FundersClub or FC Management, are subject to a statutory disqualification as defined in Section 3(a)(39) of the Securities Exchange Act of 1934.

This position is based strictly on the facts and representations you have made in your letter, and any different facts or representations might require a different response. This position is subject to modification or revocation at any time the Staff determines that such modification or revocation is consistent with the public interest or the protection of investors. Furthermore, this response only expresses the Staff's position on enforcement action only and does not purport to express any legal conclusions on the questions presented. The Staff expresses no view with respect to any other questions that the proposed activities may raise, including the applicability of any other federal or state laws, or self-regulatory organization rules.

If you have any questions regarding this letter, please call Joseph Furey, Assistant Chief Counsel; Timothy White, Special Counsel; or me at (202) 551-5550.

Sincerely,

David W. Blass
Chief Counsel

We express no views as to whether this arrangement would deem FundersClub and FC Management to have custody under Rule 206(4)-2 under the Investment Advisers Act of 1940.

W. Hardy Callcott
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hardy.callcott@bingham.com

March 22, 2013

David W. Blass
Chief Counsel
Division of Trading & Markets
U.S. Securities and Exchange Commission
100 F. St. NW
Washington DC 20549

Re: No-Action Letter Request of FundersClub, Inc.

Dear Mr. Blass:

On behalf of our client, FundersClub Inc. ("FC Inc.") and FundersClub Management LLC ("FC Management") (collectively, the "Firm"), we respectfully request your assurance that the staff of the Division of Trading and Markets (the "Staff") of the U.S. Securities and Exchange Commission (the "SEC" or "Commission") would not recommend enforcement action under Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act") against FC Inc. and FC Management if FC Inc. and FC Management were to engage in the activities described below without registering as a broker or dealer under Section 15 of the Exchange Act.

Description of the Firm and its Current Activities

FC Inc. is a Delaware corporation which operates the www.thefundersclub.com web portal. FC Management is a Delaware limited liability company which is a wholly owned subsidiary of FC Inc. FC Management in turn is the manager of a series of Delaware limited liability company investment funds, each of which is formed for the purpose, as explained further below, of investing in the securities of one or more start-up companies.[1]

FC Inc. has an online process for qualifying potential investors (who thereby become "members" of FundersClub) in its limited liability company investment funds as accredited investors under Regulation D. The limited liability company interests are offered under Rule 506 of Regulation D. FC Inc. and FC Management collectively identify and perform due diligence on start-up companies for which FC Management may wish to form investment funds. Once they have identified such a company, FC Management enters into a non-binding term-sheet agreement with that company on a

[1] The majority of the investment funds formed by the Firm have been for the purpose of investing in the securities of a single start-up company. The Firm recently closed an investment fund that will invest in the securities of multiple start-up companies.

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target amount of capital which a limited liability investment fund managed by FC Management would invest in that company. FC Inc. then posts information about that start-up company, provided by the start-up company, on its thefundersclub.com website. The name of and information about a start-up company is available online only to FundersClub members who have already been qualified as accredited investors.[2] FC Inc. makes available the investment fund which will invest in that company for its members to offer non-binding indications of interest. FC Inc. provides those members who express indications of interest in an investment fund with standardized legal documentation through which they will invest in that investment fund. When an investment fund reaches indications of interest sufficient to fund the target amount originally agreed upon between FC Inc. and the start-up company (or if the company agrees to increase the target level of capital), then FC Inc. closes the indication of interest process. FC Inc. then reconfirms the indication of interest with each member who has offered the indication of interest and reconfirms the accredited investor status of each of those members. Simultaneously, FC Inc. negotiates the final terms of the investment fund's investment with the start-up company. That negotiation may include the management rights that FC Management will have in the start-up company after the completion of the investment fund's investment in the start-up company. The start-up companies are not required to use standardized documents as a condition of obtaining an investment from an investment fund. FC Inc. and FC Management will not negotiate the terms of the issuance of any securities for or on behalf of any third parties.

FC Inc. obtains signed agreements from the members who had provided non-binding indications of interest concerning that investment fund, but until the investment fund closes (as discussed below), the members can withdraw their indications of interest without penalty at any time. When FC Management has reached a definitive agreement with the start-up company on the terms of the investment by the investment fund, FC Management then signs the limited liability company agreements with the investors and closes the transaction. Investors in an investment fund provide funds for their investment in the investment fund directly or indirectly to a custody account subject to Investment Advisers Act Rule 206(4)-2 at a custodian bank or trust company.[3] The custodian bank or trust company serves as custodian for the life of the investment fund.[4] The custodian

[2] For a multi-company investment fund, not all of the start-up companies will be known at the time the Firm solicits indications of interest in the investment fund.

[3] An investor's funds may pass through an escrow or similar account established for the benefit of the investor; however, the only permitted withdrawals from the escrow account are either to an investment fund's custody account to purchase fund interests for the investor, or (if a proposed investment fund does not close) to return those funds to the investor. Neither FC Inc. nor FC Management are able to withdraw any of these funds for its own use.

[4] The Firm could decide to move the assets of an investment fund from a custody account one custodian bank or trust company to a custody account at another custodian bank or trust company during the life of the fund.

bank or trust company provides periodic statements for the investment fund directly to each of the fund investors, or indirectly through a fund administrator. FC Inc. and FC Management do not handle customer funds or securities for the investment funds or the investors in the investment funds.[5] An investment fund's investment in a start-up company is funded directly from the custodian bank or trust company account to the account specified by the start-up company. An investment fund does not borrow in excess of 15 percent of its aggregate capital commitments and any such borrowings are for non-renewable terms of no more than 120 days, as defined in Investment Advisers Act Rule 203(l)-1. An investment fund does not hold more than 20 percent of its aggregate capital commitments in assets (other than short-term holdings) that are not qualified investments, also as defined in Investment Advisers Act Rule 203(l)-1.[6] Investors in an investment fund do not have any right to withdraw, redeem, or require the repurchase of their fund interests, but are entitled to receive distributions made to all fund investors on a pro rata basis.

FC Management manages the investment funds of which it is the manager. FC Management exercises any management rights negotiated with the start-up company (for example advisory board status, rights to review books and records, access to board materials, and/or access to management). FC Management also provides the start-up company with assistance in the form of strategic advice and networking assistance, such as introductions to potential clients, suppliers, and employees.[7] FC Management has the ability to vote the investment fund's shares in any matter requiring a vote of the start-up company's shareholders. FC Management has the ability, subject to the terms of its agreement with the start-up company and applicable federal and state securities laws, to offer or sell its securities in the start-up company in the secondary market (if such a market exists or develops), or to offer or sell those securities back to the start-up company or to other existing investors in the start-up company. If the start-up company is the subject of a tender offer, FC Management has the right to decide whether or not to tender the shares owned by the investment fund. FC Management has the ability to decide that the fund's investment in the start-up company has become worthless and to wind up the affairs of the investment fund and dissolve the investment fund. Investors in

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[5] As discussed further below, the money raised by an investment fund may include an administrative fee. The amount of the administrative fee will be maintained in the custody account until disbursed to a third party. While FC Management will authorize the third-party disbursements from the administrative fee, none of those disbursements may be made to FC Management, FC Inc., their affiliates, or individuals affiliated with FC Management or FC Inc.

[6] At the time an investment fund is closed, it calls all of the capital committed by its investors, so that an operating investment fund would not ever have uncalled capital commitments.

[7] However, FC Management would not provide investment advice to the start-up company, either with respect to the decision to accept an investment from an investment fund sponsored by the Firm, or otherwise.

the investment fund will not be record or beneficial shareholders of the start-up company, will not have the ability to vote shares in the start-up company, exercise management rights, or dispose of shares in the start-up company.

FC Inc. and FC Management does not receive any compensation, from the start-up companies, from the investment funds, or from the investors in the investment funds, in connection with their activities.[8] The officers, directors and employees of FC Inc. and FC Management personally do not receive transaction-based compensation for their efforts in raising investments for the investment funds. The money invested by the investors and funded to the custody account of the investment fund may include an administration fee, the size of which will be disclosed to fund investors at the time of fund formation. This administration fee is used to defray actual out-of-pocket costs of the investment fund, such as legal costs for fund formation, state filing fees for the investment fund, bank custody fees for the investment fund, and tax reporting costs for the investment fund. None of the administration fees is paid to FC Inc., FC Management, or any of their affiliates or principals. Any portion of the administrative fee remaining in the custody account at the time a fund is wound up will be distributed to investors along with the other assets of the fund. FC Inc., FC Management and its principals do not provide investment advice or investment recommendations to the start-up companies, or to the investors or prospective investors in the investment funds.[9] Neither FC Inc. nor FC Management, nor any principal, employee, board member, controlling shareholder or other person associated with FC Inc. or FC Management, are subject to a statutory disqualification as defined in Section 3(a)(39) of the Securities Exchange Act of 1934. FC Inc. and FC Management believe that their current operations are within the exemption from the definition of a "broker" or "dealer" subject to registration under Section 15(a)(1) of the Exchange Act contained in Title II, Section 201(c) of the Jumpstart Our Business Startups Act or JOBS Act.[10]

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[8] FC Inc. is considering whether to make co-investments in the investment funds alongside the other investors in those investment funds, so as to align its interests with the investment fund shareholders; if it does so, it will do so on the same terms as the other shareholders, and it will make full disclosure of the nature and size of its investment to those other shareholders before the closing of the investment fund.

[9] As discussed above, after making an investment, FC Management does provide strategic advice to the start-up companies on their operations and management, as opposed to investment advice.

[10] We recognize that because FC Inc. and FC Management are already engaging in the activities described in this letter, the SEC Staff as a matter of policy cannot provide no-action relief to those current activities, and we are not requesting the SEC Staff to provide any views on the Firm's opinion that its current activities are within the Title II Section 201 exemption from broker-dealer status.

Proposed Activities of the Firm

As discussed above FC Inc. and FC Management currently do not receive any compensation for their activities in organizing and managing the investment funds. FC Inc. and FC Management propose that, in connection with future investment funds, FC Management would earn "carried interest" in connection with its role in organizing and managing the investment funds. To be more specific, upon the liquidation of such a fund, the proceeds of the fund would be disbursed as follows: (1) first, any remaining out-of-pocket third-party expenses of the investment fund, to the extent not already paid out of the administrative fee, would be paid; (2) second, the capital contributions of each of the investors in the investment fund would be repaid; and then (3) third, any remaining profits of the investment fund would be distributed on a pro-rata basis, with a percentage to be paid on a pro-rata basis to the investors who had made capital contributions to the investment fund, and the remaining percentage to be paid to FC Management, Inc. in return for its role in organizing and managing the investment fund. The amount of this "carried interest" to be earned by FC Management would be disclosed to all investors in the fund at the time of the organization of the fund. We anticipate that amount of carried interest in most cases would be 20% or less of the profits of the investment fund, but in no event would the amount of carried interest exceed 30%. FC Inc. and FC Management would not receive any additional annual management fee in addition to the carried interest. This fact distinguishes the compensation contemplated by FC Inc. and FC Management from that received by many venture capital fund advisers (as discussed further below), which typically receive an annual management fee (typically 2% of the value of the fund) in addition to carried interest (typically 20% of the value of any profits of the fund) (collectively, a fee structure often referred to as "2 and 20"). FC Inc. and FC Management request that the Staff grant the no-action relief to permit FC Management to charge carried interest on its investment funds without requiring the Firm to register as a broker-dealer pursuant to Section 15 of the Exchange Act.

Analysis

Under Section 3(a)(4) of the Exchange Act, a person is a broker (and therefore generally must register with the Commission under Section 15(a)(1) of the Exchange Act) if the person satisfies a two-prong test of being (i) "engaged in the business" of (ii) "effecting transactions" in securities.[11] To satisfy this test, a person must be ***both*** effecting securities transactions ***and*** engaged in the business of doing so in order to trigger broker-dealer registration under the Exchange Act. Whether a person is acting as a broker and should be registered as such is a question of fact and is dependent on the particular facts and circumstances of each situation.[12] The SEC Staff has, however, delineated various

[11] *See, e.g.*, David A. Lipton, BROKER-DEALER REGULATION, § 1.5, at 1 (West 2005). We do not separately address the definition of "dealer" under Section 3(a)(5) of the Exchange Act here because we do not believe the activities of the Firm could reasonably be interpreted to raise a question of "dealer" status.

[12] *See* SEC No-Action Letter, *Jack Rosenfield* (pub. avail. Oct. 16, 1981).

factors that might indicate that a person is "engaged in the business" and whether a person is "effecting transactions" in securities. These factors include, among many others, receiving transaction-related compensation,[13] holding oneself out as a broker,[14] or handling customer funds and securities.[15] Any one or more of these factors could give rise to a conclusion that a person is "engaged in the business" or are "effecting transactions" in securities.[16] However, there is no bright-line test for this determination, but rather one must weigh the combination of factors presented in each case.

The breadth and flexibility of the definition of a "broker" has sometimes led to questions whether an investment adviser must register as a "broker". In a series of no-action letters, the SEC Staff has recognized that when an investment adviser advises an investment fund and receives investment adviser-style compensation (rather than transaction-based compensation) for doing so, it is not necessary for the investment adviser also to register as a broker-dealer.[17] It appears that a factor in the SEC Staff's decisions in these situations has been the fact that Congress has created a regulatory scheme specifically tailored for investment advisers in the Investment Advisers Act of 1940 and implemented by the SEC in the rules promulgated under that Act, and that imposing broker-dealer regulation on investment advisers who advise investment funds would be unnecessary and redundant as a policy matter. Congress further refined the regulation of investment advisers in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010) ("Dodd-Frank Act"). In Title IV, Section 403 of the Dodd-Frank Act, Congress required most private fund investment advisers to register with the SEC or the applicable state. However, in Title IV, Section 407 of the Dodd-Frank Act, Congress exempted "venture capital fund advisers" from this registration requirement. In Investment Advisers Act Rule 203(l)-1, the SEC defined "venture capital fund" for the purposes of the venture capital fund adviser exemption.[18] We believe it would be

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[13] *See, e.g.*, SEC No-Action Letter, *Mike Bantuveris* (pub. avail. Oct. 23, 1975).

[14] *See, e.g.*, SEC No-Action Letter, *Joseph McCulley* (pub. avail. Sept. 1, 1972).

[15] *See generally* Exch. Act. Rel. No. 44291 (May 11, 2001), 66 Fed. Reg. 27760, 27772-73 (May 18, 2001) (Interim final rules regarding bank broker-dealer activities under the Gramm-Leach-Bliley Act "push-out" provisions).

[16] *Id.*

[17] *See, e.g.*, SEC No-Action Letter, *Federalist Management Corporation* (pub. avail. April 8, 1971); SEC No-Action Letter, *Invescap of Florida, Inc.* (pub. avail. Mar. 28, 1975); SEC No-Action Letter, *First Atlantic Investment Advisory Corp.* (pub. avail. Mar. 22, 1974); SEC No-Action Letter, *F.A. Spina & Co.* (pub. avail. Mar. 5, 1983); SEC No-Action Letter, *Kirr, Marbach & Company* (pub. avail. Feb. 6, 1977); and SEC No-Action Letter, *McGovern Advisory Group, Inc.* (pub. avail. Sep. 8, 1984) (collectively, the "Investment Adviser Letters").

[18] It is important to note that a venture capital fund adviser, although exempt from registration as an investment adviser, is not exempt from regulation. Venture capital fund investment advisers are subject to recordkeeping requirements. Venture capital fund advisers are also subject to reporting requirements as exempt reporting advisers under Rule 204-4, either to the state in which they are domiciled, or to the SEC, depending on their level of assets under management. Finally, venture capital fund advisers are subject to the anti-fraud provisions of

contrary to the intent of Congress and the SEC in adopting the "venture capital fund adviser" exemption to investment adviser registration to require a venture capital fund adviser to undertake the costs and burdens of registering as a broker-dealer.

FC Inc. and FC Management satisfy the definition of "venture capital fund adviser" set forth in Section 203(l) of the Investment Advisers Act, and the investment funds satisfy the definition of "venture capital fund" set forth in Rule 203(l)-1. As discussed above, FC Inc. and FC Management hold themselves out as venture capital fund advisers. FC Inc. and FC Management engage in the traditional activities of venture capital fund advisers, including negotiating and exercising management rights with the companies in which the funds invest, and providing assistance to the portfolio companies of the investment funds in terms of advice about issues such as possible customers, suppliers and employees. As discussed above, the investment funds do not utilize impermissible leverage under Rule 203(l)-1 and do not invest impermissible amounts in non-qualifying assets under Rule 203(l)-1. The investment funds do not grant fund investors any right to withdraw, redeem, or require the repurchase of their fund interests. Rather, investors are only entitled to receive distributions made to all fund investors on a pro rata basis. FC Inc. and FC Management desire to be compensated through carried interest which they would only receive if the investment fund is successful. Carried interest is a traditional venture capital fund adviser type of compensation. As the SEC Staff concluded in the Investment Adviser Letters discussed above, under similar circumstances, there is no policy rational that should require an investment adviser receiving typical investment adviser-style compensation to register as a broker-dealer. In these circumstances, it would frustrate the intent of Congress and the Commission, when they recognized the important role that venture capital fund advisers play in providing capital for start-up businesses, to require a venture capital fund adviser to register as a broker-dealer.

In traditional broker-dealer terms, carried interest of the sort proposed here should not be considered transaction-based compensation. FC Inc. and FC Management would not receive any compensation at all in connection with raising the capital for an investment fund. FC Inc. and FC Management only will receive compensation at the time the investment fund makes distributions to its investors. If an investment fund does not fully repay all of its expenses and fully return all of its capital contributions to the fund investors, then FC Inc. and FC Management would not receive any compensation at all. Only if an investment fund makes a profit beyond the capital contributions, as a result of the efforts of FC Inc. and FC Management in creating and managing the fund and, by their efforts, adding value to the portfolio company held by the investment fund, would FC Inc. and FC Management receive any compensation at all. In this way, the financial interests of FC Inc. and FC Management are fully aligned with the interests of the investors in the investment funds: FC Inc. and FC Management only receive compensation if they are successful in creating value for the fund investors. This is

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the Investment Advisers Act, including Rule 206(4)-8 concerning their communications with fund investors and prospective fund investors.

traditional investment adviser-style compensation, and the SEC Staff should not consider it to constitute transaction-based compensation.

Further, although as currently constituted, some of the Firm's investment funds invest only in the securities of a single start-up company, in these circumstances, the investment funds should not be considered as an indirect method of distributing the securities of the underlying start-up company.[19] As discussed above, FC Management exercises any management rights negotiated with the start-up company (for example advisory board status, rights to review books and records, access to board materials, and/or access to management). FC Management has the ability to vote the investment fund's shares in any matter requiring a vote of the start-up company's shareholders. FC Management has the ability, subject to the terms of its agreement with the start-up company and applicable federal and state securities laws, to offer or sell its securities in the start-up company in the secondary market (if such a market exists or develops), or to offer or sell those securities back to the start-up company or to other existing investors in the start-up company. If the start-up company is the subject of a tender offer, FC Management has the right to decide whether or not to tender the shares owned by the investment fund. FC Management has the ability to decide that the fund's investment in the start-up company has become worthless and to wind up the affairs of the investment fund and dissolve the investment fund. Investors in the investment fund will not be record or beneficial shareholders of the start-up company, will not have the ability to vote shares in the start-up company, exercise management rights, or dispose of shares in the start-up company. And investors in an investment fund do not have any right to withdraw, redeem, or require the repurchase of their fund interests. In short, investors in a single-security investment fund receive a different security with very different rights from a shareholder in the start-up company, and investors in an investment fund are dependent on the efforts of FC Inc. and FC Management to obtain a positive return on their investment.

Moreover, as discussed above, FC Inc. and FC Management at no time possess investor funds or securities; the assets of the investment funds are held in custody accounts subject to Investment Advisers Act Rule 206(4)-2. Further, FC Inc. and FC Management do not hold themselves out as brokers. We believe that under the various factors set forth by the SEC Staff, FC Inc. and FC Management do not meet the tests of being (i) "engaged in the business" of (ii) "effecting transactions" in securities so as to require broker-dealer registration. Rather, FC Inc. and FC Management are venture capital fund advisers, and that regulatory scheme is how Congress and the SEC intended that they be regulated.

Requested Relief

The Firm requests that the Staff grant the requested no-action relief to permit FC Inc. and FC Management to receive carried interest on its investment funds without requiring FC Inc. or FC Management to register as broker-dealers pursuant to Section 15 of the

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[19] As noted above, the Firm recently closed its first multi-company venture capital fund.

Exchange Act, provided that: (1) FC Inc. and FC Management do not receive any direct or indirect compensation from the investment funds, the investors in the investment funds, or the start-up companies in which the investment funds invest, other than carried interest (as discussed above); (2) the amount and terms of any carried interest to be paid to FC Inc. and FC Management by any investment fund, as well as the amount of any administrative fee to be used to reimburse third-party expenses of any investment fund, are fully and fairly disclosed to investors in the investment fund at the time the interests in the investment fund are offered; (3) FC Inc. and FC Management do not obtain possession of investor funds or securities, and the assets of the investment funds are maintained in custody accounts in compliance with Rule 206(4)-2 prior to the distribution of fund assets to investors; (4) the investment funds qualify as venture capital funds under Rule 203(l)-1; and (5) neither FC Inc. nor FC Management, nor any principal, employee, board member, controlling shareholder or other person associated with FC Inc. or FC Management, are subject to a statutory disqualification as defined in Section 3(a)(39) of the Securities Exchange Act of 1934.

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If you have any questions regarding this request, please do not hesitate to contact me at 415-393-2310.

Respectfully submitted,

W. Hardy Callcott