MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

March 22, 2013

VIA EMAIL

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

Re: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings

Dear Ms. Murphy:

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide additional comments to the Securities and Exchange Commission (the "SEC" or "Commission") in response to its proposal to implement Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act").[2] As the SEC continues its consideration of the final rule, we would like to provide our perspective on the recommendations submitted by the SEC's Investor Advisory Committee ("IAC"). In our view, certain of these suggestions are consistent with the SEC's rule proposal and could be addressed in connection with or soon after implementation of the JOBS Act.[3] This letter follows our prior comments to the proposal.[4]

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[1] The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and all other regions where MFA members are market participants.

[2] Section 201(a)(1) instructs the SEC to revise Rule 506 of Regulation D under the Securities Act of 1933 to eliminate the prohibition against general solicitation or general advertising for offers and sales of securities made pursuant to Rule 506, provided that all purchasers are accredited investors.

[3] Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Lift the Ban on General Solicitation and Advertising in Rule 506 Offerings: Efficiently Balancing Investor Protection, Capital Formation and Market Integrity, available at http://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-general-solicitation-advertising-recommendations.pdf ("IAC Recommendations").

[4] Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, SEC (Sept. 28, 2012), available at: https://www.managedfunds.org/wp-content/uploads/2012/09/MFA-Comments-on-JOBS-Act-9-28-12.pdf ("MFA September Letter"); Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, SEC (June 26, 2012), available at: https://www.managedfunds.org/wp-content/uploads/2012/06/MFA-Comments-on-JOBS-Act-6-26-12.pdf ("MFA June Letter"); Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, SEC (May 4, 2012),

As we have previously explained, we believe the amendments to Rule 506 of Regulation D in the JOBS Act will have beneficial effects for investors, businesses seeking capital, regulators and the hedge fund industry. In particular, eliminating the ban on general solicitation will reduce legal uncertainty, facilitate capital formation, and increase transparency of the hedge fund industry, while enhancing investor protections and ensuring that only sophisticated investors are able to purchase interests in private funds.[5] MFA has consistently opposed any policies that could lead to a "retailization" of traditional hedge fund products, and we continue to maintain our longstanding position in support of proposals that would ensure that the qualification requirements of investors in hedge funds appropriately limit the sale of hedge funds only to sophisticated investors.[6] Following implementation of the JOBS Act, investments in hedge funds will continue to be restricted to sophisticated individuals and institutions.

In general, while we have recommended certain changes to the SEC's proposal to implement the JOBS Act by setting out a facts and circumstances test for investor verification, we believe it is an effective approach, and will enable issuers to implement appropriate measures to meet the requirements of Section 201.[7] An overly prescriptive approach to verification would undermine the clear intent of the JOBS Act to modernize private offerings and enhance capital formation.

Outlined below are our specific comments on the IAC Recommendations. Please note that our comments relate only to private offerings conducted by hedge funds, and the effects of the recommendations on such offerings.[8]

Recommendation 1 – Require all issuers intending to rely on the new JOBS Act general solicitation exemption to file with the Commission either a new "Form GS" or a revised version of Form D. Filing the form should be a precondition for claiming the exemption.

We generally support the filing of Form D being made a condition to relying on Regulation D, provided that an issuer that filed the Form in good faith but with inadvertent technical errors in the Form would have sufficient opportunity to cure its mistake while maintaining its reliance on Regulation D. Consistent with Recommendation 4, discussed below, we believe the SEC should make clear that current Rule 508 applies with respect to any requirement to file, and the contents of, Form D. Rule 508 preserves an issuer's reliance on Regulation D in the case of a failure to comply with a term or condition of Rule 506 if, among other things, the issuer has made a good faith and

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available at: https://www.managedfunds.org/wp-content/uploads/2012/05/MFA_Comments_on_JOBSAct_05-04-2012.pdf.

[5] For a complete discussion of these effects, *see* Rulemaking Petition from Richard H. Baker, President and CEO, MFA, to Elizabeth Murphy, Secretary, SEC (Jan. 9, 2012), available at: http://www.sec.gov/rules/petitions/2012/petn4-643.pdf.

[6] *See* Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, Securities and Exchange Commission (July 8, 2011), available at: http://www.managedfunds.org/wp-content/uploads/2011/09/MFA-Comments-on-Qualified-Client-Proposal.pdf; Letter from Richard H. Baker, President and CEO, MFA, to Elizabeth Murphy, Secretary, SEC (Mar. 11, 2011), available at: http://www.managedfunds.org/wp-content/uploads/2011/06/3.11.11-MFA-Letter-on-Accredited-Investor.pdf.

[7] *See* MFA September Letter.

[8] A hedge fund is a type of private fund issuer that would be an investment company, as defined in Section 3 of the Investment Company Act of 1940, but for Section 3(c)(1) or Section 3(c)(7) of that Act.

reasonable attempt to comply with all applicable terms and conditions, and an inadvertent and immaterial error was insignificant to the offering as a whole. Upon notice of such an error, a fund manager or issuer should be provided a reasonable period of time to file a corrected Form D.

A mandatory filing requirement that omitted such a provision and penalized even minor, technical errors by precluding the issuer from relying on Regulation D would expose issuers and investors to significant legal risk that would harm capital-raising and investor confidence. Under such a requirement, a private fund or other issuer that submitted a Form D with inadvertent technical errors could be subject to rescission rights by investors that could lead to dissolution of the fund and substantial losses to investors. It is important to note that such errors could result from mistaken information provided by an investor which the issuer reasonably believes is correct. Such an outcome would impair the ability of issuers to rely on Regulation D and undermine the intent of the JOBS Act to facilitate private offerings. It would also provide no tangible benefits to investors, nor would it enhance the SEC's ability to oversee the process.

Under current Rule 503, an issuer relying on Rule 506 must file its Form D with the SEC for each new offering within 15 calendar days after the first sale of securities. We believe this timeframe affords appropriate notice to regulators of a new offering under Regulation D, while providing a reasonable period for an issuer to prepare and submit the Form, and we support the Commission's decision not to adjust this period in its rulemaking proposal. For the reasons described above, Rule 508 should apply with respect to compliance with the 15-day deadline, so that an issuer that unintentionally delays a filing beyond the deadline would not be precluded from relying on Regulation D. A penalty that prevented such an issuer from relying on Regulation D would be particularly unworkable for hedge funds, which generally conduct continuous offerings that permit investors to subscribe and redeem interests on a periodic basis. An issuer that inadvertently filed the Form within a reasonable period after the deadline should be subject to an appropriate penalty that would permit the issuer to continue reliance on Regulation D.

With regard to the suggested additional information on Form D,[9] we note that most private fund managers are required to be registered with the SEC as investment advisers. As registered advisers, private fund managers must publicly file Form ADV, which the SEC has expanded to include substantial information about the manager and the private funds it manages. Registered advisers, therefore, should be permitted to comply with any information requirement on Form D by providing a reference to their publicly available Form ADV applicable to the private fund. Similarly, state-registered investment advisers also should be permitted to comply with any information requirement by providing a reference to any publicly available information filed with their state regulator.

MFA believes that the current Form D includes appropriate information regarding the identity of the issuer and a factual description of the offerings, such as identifying the industry group of the issuer. MFA is concerned about the IAC's recommendation that the SEC amend the Form to

[9] IAC Recommendation 1 notes:

> The form should request simple information regarding the identity of the entity seeking to rely on the exemption, the control persons of that entity (together with their addresses, telephone and contact information), counsel representing the entity (if any), the entity's accountants or auditors (if any), the amount sought to be raised, a brief description of the entity's general solicitation plans, and a brief description of the entity's proposed business and use of proceeds.

require a "brief description of the entity's proposed business and use of proceeds." As the Commission is of course aware, the private placement regime under the Securities Act of 1933 ("Securities Act") is based upon the premise that sophisticated investors do not need the SEC to mandate the type of information that they should receive.[10] By definition, all investors in the Regulation D offering should be accredited investors, capable of determining the information they require to make an investment decision. Section 201 of the JOBS Act does not make any changes to the private placement regime that would condition relief from the ban on general solicitation on a requirement to make certain public disclosures, and such a requirement would be inconsistent with the eighty-year history of the Securities Act. Accordingly, we respectfully urge the Commission to reject suggestions to mandate disclosures in this context as inconsistent with the well-established system of private placements.

Recommendation 2 – Require that all solicitation material prepared or disseminated by or on behalf of the issuer that is being disseminated to the public through a general solicitation or advertising campaign in reliance on the new exemption be furnished to the Commission. The materials furnished to the Commission should be made available for prompt public view.

Requiring managers to regularly submit materials to the SEC in connection with a general solicitation would be unnecessary in light of existing oversight and examination methods. As SEC-registered investment advisers, private fund managers are subject to the SEC's books and records rule, Rule 204-2 under the Investment Advisers Act of 1940 (the "Advisers Act"), which requires advisers to maintain records of their activities and make such records available to the SEC upon request. Solicitation materials used by a registered private fund manager in a general solicitation or advertising would be subject to Rule 204-2, so that a manager would need to maintain the materials for at least five years and make them available to the SEC.[11] As a result, the Commission would have access to solicitation materials used by private fund managers, and SEC staff could request such materials from managers in its discretion.

Further, the SEC's Office of Compliance Inspections and Examinations ("OCIE"), regularly conducts inspections and examinations of private fund managers and other registered investment advisers. These inspections and examinations include presence exams for newly registered managers, periodic risk-based inspections of managers based on quantitative analyses of data provided to the SEC on Form PF and other filings, and broad sweep examinations focused on particular areas of interest or concern. During these inspections, the SEC staff generally does review solicitation materials used by a private fund manager on behalf of a fund. These inspections are an appropriate and effective method to examine solicitation materials, whereas a requirement for issuers to file solicitation material with the SEC would inundate the staff with an excessive amount of information that would overburden the staff's limited resources.

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[10] *See e.g.*, Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6389 (Mar. 8, 1982), 47 FR 11251 (Mar. 16, 1982) at n. 20 (explaining that if an issuer sells securities only to accredited investors, Regulation D does not mandate any specific disclosure. In response to comments addressing the question of whether in offerings only to accredited investors, issuers should be required to deliver specific disclosure documents to accredited investors who are natural persons, the Commission determined that it is neither necessary nor appropriate to make distinctions of this type within the class of accredited investor.)

[11] *See* Rule 204-2(a)(11), which applies to copies of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons (other than persons connected with such investment adviser).

As further described below, solicitation and advertising materials used by all private fund managers are subject to numerous anti-fraud provisions in the federal securities laws, including Section 206 of the Advisers Act, Rule 206(4)-1 and Rule 206(4)-8 under the Advisers Act, Section 17(a) of the Securities Act, and Section 10 of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder. The SEC staff is well-positioned to use its inspections and examinations authority and its authority under the books and records rule to ensure that advertising and solicitation materials used by private fund managers comply with all applicable provisions of the securities laws.

A filing requirement would conflict with the long-standing framework of the federal securities laws, under which private offerings are not subject to the disclosure requirements applicable to public offerings. Unlike public offerings, only sophisticated individuals and institutions with the financial wherewithal to understand and evaluate investments are permitted to purchase interests in private offerings, including those conducted by private funds. These sophisticated investors typically perform extensive due diligence prior to investing with a particular manager, either themselves or through a consultant or other adviser, which includes reviewing and evaluating the substantial information about a fund and its manager contained in the fund's offering materials. This framework should be maintained following implementation of the JOBS Act, as only accredited investors will be permitted to invest in private offerings conducted through general solicitation.

A requirement to file solicitation material would also impose a burden on managers, who would need to determine whether an activity would be considered solicitation material that must be submitted to the SEC. Following implementation of the JOBS Act, there will continue to be substantial uncertainty among issuers in identifying what may constitute general solicitation activity.

If the Commission were to adopt a requirement for issuers to submit solicitation and advertising materials, we believe the Commission should make clear that a private fund would be deemed to comply with this requirement as long as the fund's SEC-registered adviser maintains such required records in accordance with the Advisers Act recordkeeping rules, or similar state rules with respect to state-registered advisers.

Recommendation 3 – Adopt a safe harbor that provides clear and enforceable standards for verification, as opposed to reasonable belief, of accredited investor status, including standards to promote reliance on reliable third parties, such as broker-dealers, banks, and licensed accountants.

We commend the SEC for proposing a framework to implement Section 201 that permits issuers to use a variety of methods to verify the status of purchasers. We believe the proposed facts and circumstances analysis fulfills the SEC's statutory mandate to determine the methods that an issuer should use in taking steps to verify the status of investors, and provides appropriate protection for investors. A one-size-fits-all approach to verification would be inappropriate for the many different types of institutions and individuals who will seek to invest in offerings conducted pursuant to new Rule 506(c).

We continue to encourage the SEC to provide issuers with additional legal certainty when an investment amount is sufficiently high and the purchaser certifies that it is in fact an accredited investor. As we have previously recommend to the SEC, we believe the SEC should adopt a safe

harbor that would deem an issuer to have complied with the verification requirement if a purchaser provides certifications that it is an accredited investor and has not obtained financing specifically related to the transaction, and meets a certain minimum investment level that the SEC determines based on a prescribed threshold. We have also previously recommended what we believe are appropriate minimum investment levels, based in part on the approach to investor qualification in the definition of "qualified client" in Rule 205-3 under the Advisers Act.[12]

In the case of an investor who does not meet the minimum investment level established by the Commission, an issuer should be deemed to comply with the verification standard in Rule 506 if the investor submits a certification that it qualifies as an accredited investor, and also provides some type of additional third-party evidence. The SEC could publish a non-exclusive list of the types of additional evidence that an issuer could rely on for these purposes.[13] The rule should indicate that the list is non-exclusive, and explain that an issuer may equally satisfy the verification requirement by obtaining one of the documents included in the list, another type of similar third-party evidence, or through any other reasonable process. Requiring an issuer to obtain only certain materials would be unworkable in practice due to the wide range of investors that participate in private offerings, and the differences in their ability and willingness to provide certain types of information.

Recommendation 4 – The filing of Form D should be made a condition for relying on the Regulation D exemption. In implementing this recommendation, which is intended to encourage broad compliance with the filing requirement, the Committee encourages the Commission also to consider incorporating measures to ensure that it does not impose undue penalties for inadvertent violations by small, unsophisticated issuers.

Please see our response to Recommendation 1. As explained above, the filing of Form D could be made a condition for relying on Regulation D as long as an issuer that filed the Form in good faith but with technical errors is provided a sufficient opportunity to correct its error while maintaining its reliance on Regulation D. Upon identification of the error, a fund manager should be provided a reasonable period of time to file an amended Form. It is important that such opportunity to correct inadvertent violations be available to all types of issuers that conduct private offerings in reliance on Regulation D.

Recommendation 5 – The Commission should take steps to ensure that any performance claims in materials used as part of general solicitations are based on appropriate performance reporting standards.

Private fund managers are already subject to extensive anti-fraud provisions of the federal securities laws that ensure that any performance claims used in general solicitation materials are appropriate and not misleading to investors. In addition to the broad anti-fraud provisions of the securities laws, which include Section 17(a) of the Securities Act, and Section 10 of the Exchange Act and Rule 10b-5 thereunder, private fund managers are subject to the anti-fraud provisions of the

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[12] *See* MFA September Letter. We appreciate that the proposing release indicates that an issuer conducting an offering with a high minimum investment may not need to take additional verification steps, other than to confirm that the investment is not being financed by the issuer or by a third party. 77 Fed. Reg. at 54469.

[13] *See* MFA June Letter.

Advisers Act.[14] Section 206(4) of the Advisers Act prohibits an investment adviser from engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. Communications by private fund managers are subject to rules adopted under Section 206(4), including Rule 206(4)-1 and Rule 206(4)-8.

Rule 206(4)-1 places significant limitations on the manner in which SEC-registered advisers, including private fund managers, may advertise to potential clients. In addition to these limitations, the SEC staff has issued extensive no-action and interpretive guidance over decades that impose further conditions and restrictions on the form and content of advertising materials, including specific limitations on how managers may present performance information.[15]

In addition to this regulatory framework, many hedge fund managers prepare performance information based on a uniform set of guidelines known as the Global Investment Performance Standards ("GIPS") in response to demands from institutional investors. During inspections and examinations, the SEC staff regularly reviews claims by managers that presentations of performance information are in compliance with GIPS, and ensures that such claims are based on appropriate policies and procedures. We believe this approach is effective and meets the needs of hedge fund managers and sophisticated investors.

In our view, the existing regulatory framework and industry practice result in managers providing investors with reliable performance information in a format that is useful to their investment decisions, and we believe this recommendation would best be adopted through compliance with existing rules and industry standards.[16]

Recommendation 6 – The Commission should amend the natural persons prong of the definition of accredited investor to better reflect a population that has the financial sophistication to analyze the risks in private offerings and/or the wealth to withstand potential losses.

Only sophisticated investors may purchase interests in hedge funds, including those that in the future are offered and sold in reliance on revised Rule 506. Hedge funds that rely on Section 3(c)(7) of the Investment Company Act of 1940 may only sell interests to "qualified purchasers," which include individuals with at least $5 million in investments, and institutions with at least $25 million in investments.[17] Hedge funds that rely on Section 3(c)(1) and conduct offerings pursuant to revised Rule 506 will only be permitted to sell interests to "accredited investors," and funds of this type managed by SEC-registered advisers generally only sell interests to "qualified clients," as defined in Rule 205-3 under the Advisers Act.

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[14] All issuers are subject to the general anti-fraud provisions of the Securities Act and the Exchange Act in connection with the offering and sale of securities.

[15] *See e.g., Clover Capital Management, Inc.* (Oct. 28, 1996) (indicating that performance presentations should, among other things, disclose the effect of material economic conditions on the results; reflect the deduction of advisory fees, brokerage or other fees and expenses; disclose whether the results reflect the reinvestment of dividends; disclose material differences between a fund's results and relevant indices; and disclose material conditions, objectives or investment strategies used to obtain the results).

[16] We nevertheless would support an effort by the SEC following its adoption of the pending JOBS Act rules to review and update the existing no-action guidance under Rule 206(4)-1.

[17] Investment Company Act Section 2(a)(51).

In July 2011, pursuant to Section 418 of the Dodd-Frank Act, the SEC raised the qualification thresholds for an individual in the definition of qualified client, increasing the required assets under management from $750,000 to $1 million, and the required net worth from $1.5 million to $2 million.[18] The Dodd-Frank Act also strengthened the "accredited investor" standard by excluding the value of a primary residence from an investor's net worth, instructing the Commission to review the net worth threshold and consider whether to increase the standard above the existing level of $1 million after a specified time period, and permitting the SEC to undertake a broad review of the definition of "accredited investor" for the protection of investors, in the public interest, and in light of the economy.[19]

MFA has consistently supported these efforts to adjust qualification standards over time, which ensure that only sophisticated investors with the financial wherewithal to understand and evaluate the investments are able to purchase interests in private funds.[20] We therefore fully support and look forward to the SEC's upcoming review of the accredited investor definition.

To the extent the above recommendation suggests that the SEC consider incorporating a qualitative standard into the definition of accredited investor, we would remind the Commission that Regulation D was adopted in response to widespread uncertainty among issuers seeking to conduct private offerings in accordance with the qualitative requirements of then-Section 4(2) of the Securities Act.[21] We believe the SEC's approach in the definition of accredited investor to provide

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[18] Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205-3 under the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3236 (July 12, 2011). The SEC also excluded the value of an individual's primary residence from the net worth calculation, and will adjust such amounts to account for inflation every five years. Investment Adviser Performance Compensation, Investment Advisers Act Release No. 3372 (Feb. 15, 2012).

[19] Section 413 of the Dodd-Frank Act.

[20] *See* Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, SEC (July 8, 2011), available at: http://www.managedfunds.org/wp-content/uploads/2011/09/MFA-Comments-on-Qualified-Client-Proposal.pdf; Letter from Richard H. Baker, President and CEO, MFA, to Elizabeth Murphy, Secretary, SEC (Mar. 11, 2011), available at: http://www.managedfunds.org/wp-content/uploads/2011/06/3.11.11-MFA-Letter-on-Accredited-Investor.pdf.

[21] *See e.g.,* Remarks of the Honorable Ray Garrett, Jr., Chairman, SEC, before the Colorado Bar Association, April 30, 1974:

> Over the past few years, the uncertainty surrounding the availability of the [private placement] exemption has increased, partly, it must be admitted, as a result of judicial pronouncements resulting from understandable efforts to protect investors, and partly, perhaps, because of the growing complexity of financing arrangements in this country coupled with the present difficulties attending the raising of capital. This unhealthy, and potentially costly, uncertainty, to which the Commission made notable contributions, led the Commission to consider the adoption of a rule establishing, to the extent feasible, some objective standards for complying with the private placement exemption.

available at: http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1974_0430_GarrettColoradoT.pdf.

See also Campbell, *The Wreck of Regulation D: The Unintended (and Bad) Outcomes for the SEC's Crown Jewell Exemptions,* Ohio State Entrepreneurial Business Law Journal, 288 (2012) at n. 22, available at: http://moritzlaw.osu.edu/students/groups/oseblj/files/2013/01/7-Campbell.pdf. The Commission adopted forerunners to Regulation D in an effort to provide certainty that would allow issuers and investors to engage in private placements with a degree of certainty. Returning to such qualitative standards would force issuers and investors to return to the uncertainties and ambiguities that vexed the private placement markets for generations.

issuers and investors with definitive financial thresholds has worked well, and we encourage the Commission to maintain this approach as it reviews the definition of accredited investor.

Recommendation 7 – In conjunction with the rulemaking to lift the ban on general solicitation and advertising, we recommend adoption of the "bad actors" rule proposed in May 2011, and already past the statutory deadline for adoption.

Firms and persons that violate the securities laws harm not only their own investors and clients, but also undermine confidence in the financial services industry and capital markets as a whole. Accordingly, MFA strongly supports appropriate penalties and bars for persons in the securities industry who engage in inappropriate conduct.[22] Further, we agree with the recommendation that the Commission should adopt the "bad actor" rule required by Section 926 of the Dodd-Frank Act in conjunction with finalizing the rule to eliminate the ban on general solicitations. As discussed at length in MFA's August 2011 comment letter, we urge the SEC to avoid a retroactive application of the final rule with respect to firms that entered into settlement agreements with regulators prior to enactment of the Dodd-Frank Act.

Because Section 926 does not contain a clear expression of intent to include regulatory orders entered into prior to enactment of the Dodd-Frank Act, we believe that the SEC has authority to decide not to include such orders within the scope of the new disqualification rule.

We encourage the SEC to exclude prior negotiated settlements from the scope of the new rule to avoid creating unnecessary uncertainty for market participants who conduct private offerings in reliance on Rule 506. Retroactive application of the new rule to prior negotiated settlements would disrupt the expectations of market participants who previously settled enforcement actions on the understanding that they would be able to engage in Rule 506 offerings would following their settlement.

We also urge the SEC to clarify that application of the bad actor rule will be limited to those violations that involve violations of scienter-based laws or regulations or are otherwise plainly identified as implicating a prohibition against "fraudulent, manipulative, or deceptive conduct" as those terms are commonly understood. We believe that a scienter-based limitation on this provision would appropriately capture the type of conduct intended to disqualify firms under Section 926 without unintentionally disqualifying firms that are subject to orders because of technical or other non-fraudulent conduct.

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[22] *See* Letter from Richard H. Baker, President and CEO, MFA, to Elizabeth Murphy, Secretary, SEC (Aug. 12, 2011), available at: http://www.managedfunds.org/wp-content/uploads/2011/09/MFA-Letter-on-Bad-Actor-Disqualification.pdf.

MFA appreciates the opportunity to provide comments to the Commission regarding implementation of the JOBS Act. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Matthew Newell, Associate General Counsel, or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director,
General Counsel

Cc: The Honorable Elisse B. Walter, Chairman
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner

Lona Nallengara, Acting Director, Division of Corporation Finance
Norman Champ, Director, Division of Investment Management