U.S. Securities and Exchange Commission
100 F Street, N.E.
Room 3650
Washington, D.C. 20549-3628
Attn: Elizabeth Murphy

Re: Section 926 of the Dodd-Frank Act

Dear Ms. Murphy:

On behalf of the Investment Program Association ("***IPA***")[1] this letter is respectfully submitted in order to provide guidance to the Securities and Exchange Commission ("***SEC***") relating to Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 ("***Section 926***" and "***Dodd-Frank Act***" respectively).

Background.

Section 926 of the Dodd-Frank Act requires the SEC to issue a rule no later than July 21, 2011 "for the disqualification of offerings and sales of securities made under section 230.506 of title 17, Code of Federal Regulations (the "***Disqualification Rule***"). Under Section 926, the SEC is required to include provisions in the Disqualification Rule substantially similar to the disqualifications contained in Securities Act of 1933 Act (the "1933 Act"), Rule 262 (part of Regulation A under the 1933 Act) ("***Rule 262***"). Further, the Disqualification Rule must disqualify offerings by a person "subject to a final order" of a state securities regulator, a state agency supervising or examining banks, savings associations or credit unions, a state insurance commission, a state authority that supervises or examines banks, savings associations, or credit unions, a state insurance commission or the National Credit Union Administration. Such order would fall into the Disqualification Rule if the order: (a) bars the person from (I) association with an entity

[1] The IPA was formed in 1985 to provide the direct investment industry with effective national leadership, and today is the leading advocate for the inclusion of direct investments in a diversified investment portfolio. IPA members include direct investment product sponsors, FINRA member broker-dealer firms, and direct investment service providers.

P.O. Box 480
Ellicott City, MD 21041-0480
(212) 812-9799
www.theipaonline.org

regulated by such governmental agency, (II) engaging in the business of securities, insurance, or banking, or (III) engaging in savings association or credit union activities; or (b) "constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within the 10 year period ending on the date of the filing of the offer or sale. Finally, the Disqualification Rule must disqualify an offering by a person who "has been convicted of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the" SEC.

IPA Commentary.

The IPA believes there are five broad areas, discussed below, to be considered:

- "persons" who could potentially trigger disqualification,
- the need for waiver authority,
- the meaning of a "final order,"
- defining the scope of "fraudulent, manipulative, or deceptive conduct", and
- the need to define the types of felonies or misdemeanors "in connection with the purchase or sale of any security" in order to form the basis of disqualification.

PERSONS TO BE COVERED, THEREBY TRIGGERING THE DISQUALIFICATION RULE

Rule 262 disqualifies offerings from utilizing the Regulation A exemption if the "issuer, any or its predecessors or any affiliated issuer… any director, officer or general partner of the issuer, beneficial owner of 10 percent or more of any class of its equity securities, any promoter of the issuer presently connected with it in any capacity, any underwriter of the securities to be offered, or any partner, director or officer of any such underwriter" that is or has been subject to any proceeding or to an order (within 5 years prior to filing an offering statement), or has been convicted within 10 years prior to the filing an offering statement "of any felony or misdemeanor in connection with the purchase or sale of any

security, involving the making of a false filing with the" SEC "or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, or investment adviser."

An issue for the SEC to consider is whether the Disqualification Rule will be written in a way to apply to fewer persons or the same number of persons currently disqualified or more persons than those enumerated in Rule 262. In formulating its definitions, it is important for the SEC to understand that there may be instances in which an individual associated with either an issuer or underwriter (thus falling within the scope of the enumerated disqualifications) may not be involved with, or stand to profit from an offering conducted pursuant to Rule 506; therefore, we respectfully request that the SEC consider whether the broad brush of Rule 262 is necessary in the Disqualification Rule. It should be noted that the Dodd-Frank Act requires the Disqualification Rule to be "substantially similar to," but need not be *identical* to Rule 262.[2]

PRESERVATION OF WAIVER AUTHORITY

The preamble to Rule 262 states that "upon a showing of good cause and without prejudice to any other action" by the SEC, the SEC has the authority under the Rule to waive any applicable disqualification. The IPA recommends that the Disqualification Rule contain similar waiver authority, as well as a mechanism in which to consider such waivers. The nature of a Rule 506 offering makes the adoption of such a mechanism important from both a timing perspective as well as from the perspective of an issuer in a Rule 506 offering, receiving timely notice of its ability to access the private capital markets.

CLARIFICATION OF THE TERM "FINAL ORDER"

[2] Rule 262 has not been amended since August 13, 1992, and the manner and methods of various offerings have changed in the last 19 years; therefore, a fresh approach, and not blind adherence, to dated regulation appears to be in order.

The IPA suggests that a "final order" should be an order issued in a proceeding where the respondent was afforded due process rights to contest and appeal the order through all available administrative and judicial channels. Our concern is that *ex parte* orders entered with no opportunity to contest or appeal should not be the basis for disqualification under the Disqualification Rule. Please note that "final order" under Section 926 of the Dodd-Frank Act includes only "final orders" issued in administrative proceedings; therefore, a similar order issued in a judicial proceeding would not result in disqualification.

FRAUDULENT, MANIPULATIVE, OR DECEPTIVE CONDUCT

Disqualification predicated on a violation of law or regulation prohibiting "fraudulent, manipulative, or deceptive conduct," must be clarified to encompass serious violations of law, rather than technical or administrative violations that are deemed "fraudulent, manipulative, or deceptive," by statute, rule, or regulation. For example, Section 352(1) of the New York General Business Law (*See*, Article 23-A of the General Business Law, New York's Blue Sky laws, known generally as the "***Martin Act***") states that any and all violations of Article 23-A "are hereby declared to be and are hereinafter referred to as a fraudulent practice or fraudulent practices." This would make a placement agent's past failure to file a "Further State Notice," as required under Section 359-e(8) of the Martin Act, for an unrelated offering "fraudulent" by definition. We believe that this technical or administrative violation is not the type of activity that Congress intended to stop with the Disqualification Rule or Section 926 of the Dodd-Frank Act.

CLARIFICATION IS NEEDED REGARDING TYPES OF FELONIES AND MISDEMEANORS

The Disqualification Rule must enumerate the types of felonies or misdemeanors "in connection with the purchase or sale of any security" in order to form the basis of disqualification. Several Blue Sky laws permit minor violations of the statute, rules, and regulations to be criminally prosecuted as misdemeanors or felonies. This means that aggressive state securities regulators or prosecutors could pursue a panoply of other violations within a Blue Sky law resulting in either a conviction or plea bargain for a single misdemeanor for a minor record keeping violation. An example can be found in the Martin Act. Specifically, Martin Act, Section 359-g(2) provides that, unless provided

elsewhere, a person violating the Martin Act "shall be guilty of a misdemeanor, except where otherwise provided herein, punishable by a fine of not more than five hundred dollars, or imprisonment for not more than one year or both." It is possible that the Disqualification Rule could bar a Rule 506 offering because a proposed placement agent pled guilty to a misdemeanor count of failing to administratively file a "Further State Notice" for a previous offering, simply to reduce the time and expense of defending itself at trial. The result would be a ten year bar from being able to conduct a Rule 506 offering because of an administrative technicality. The IPA respectfully submits that disqualifications for criminal convictions ought to be premised on serious violations of law, not trivial matters than may be prosecutable as either misdemeanors or felonies.

In conclusion, the IPA appreciates the opportunity to provide what it believes to be important observations which, if taken into consideration when drafting the Disqualification Rule, will create a Rule that keeps nefarious bad actors from conducting offerings pursuant to Rule 506, while still permitting persons who have made technical, but non-fraudulent violations to continue to avail themselves of Rule 506 for capital raising purposes. Prohibiting persons who fall into the Disqualification Rule by virtue of an administrative or technical violation from raising capital in the private placement market for ten years would severely curtail small business capital formation and provide a significant hardship for many. The IPA welcomes the opportunity to discuss these matters with SEC staff and stands ready to participate in the collaborative effort required for the drafting of the Disqualification Rule as required by the Dodd-Frank Act.

Respectfully submitted,

Jack L. Hollander
Chairman, IPA Executive Committee

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