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

September 23, 2013

VIA EMAIL

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

Re: Proposed Amendments to Regulation D, Form D and Rule 156 (File No. S7-06-13)

Dear Ms. Murphy:

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "SEC" or "Commission") in response to its proposed amendments (the "Proposed Amendments") to Regulation D, Form D and Rule 156[2] under the Securities Act of 1933 (the "Securities Act"). As indicated in the proposing release, the Proposed Amendments are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise in connection with permitting issuers to engage in general solicitation under new Rule 506(c).

The SEC recently adopted amendments to Regulation D, as mandated by the Jumpstart Our Business Startups Act (the "JOBS Act"), to repeal the ban on "general solicitation" in certain private placements. MFA believes these amendments will significantly benefit investors and businesses seeking capital, including hedge funds. MFA and its members support the Commission's efforts to maintain appropriate oversight of market practices and achieve its

[1] 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] 78 Fed. Reg. 44806.

mandate of promoting capital formation and protecting investors.[3] We are concerned, however, that certain aspects of the Proposed Amendments may undermine these benefits, as many of the proposed rule changes likely will discourage companies from availing themselves of the expanded capital-raising freedoms contemplated by the JOBS Act.[4] This view is based in part on the severity of the proposed penalties, even for inadvertent filing errors. Moreover, while several of the proposed amendments appear innocuous on their face, we expect they actually will create significant burdens for issuers in light of the continuing difficulty of determining whether certain common practices constitute "general solicitation" in the first place. These burdens will limit capital formation, harm prospective investors by reducing or eliminating the increased transparency and public availability of information that the JOBS Act was intended to promote, and potentially harm existing private fund investors by disrupting the ongoing operations of funds that are penalized for non-compliance.

As a result of these concerns, we believe that the Commission should make a number of changes to the Proposed Amendments, and we offer the following comments, as more fully described in this letter:

- The advance Form D filing requirement imposes an unnecessary burden on issuers seeking to access the private capital markets and should be eliminated.

- The requirement to file a closing Form D amendment is not workable for hedge funds or other issuers that engage in continuous offerings, for which it often will be difficult to determine when a given offering terminates.

- The proposed changes to Items 3, 14, and 17 of Form D would require additional information not appropriate for public disclosure in a Form D.

- The automatic one-year disqualification from relying on Rule 506 for future offerings by an issuer (and its successor and affiliates) is an onerous and disproportional penalty for failure to timely file Form D, especially in light of the continuing

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3 MFA and its members have taken affirmative steps to educate potential investors about hedge funds and help them distinguish legitimate managers from fraudsters, an example of which can be found here: "Hedge Fund Due Diligence: Resources to Help Investors Better Understand Their Investment Options in this Asset Class," July 2013, available at https://www.managedfunds.org/wp-content/uploads/2013/07/MFA_HF_DueDiligence_07-2013_FINAL.pdf.

4 *See* November 30, 2012 comment letter from Senator John Thune, the sponsor of the predecessor bill to Title II of the JOBS Act, and ten other Senators, including nine co-sponsors of the predecessor bill. We believe this letter shows that Congress made a specific policy decision regarding the appropriate investor protection measures to be added to Rule 506 in light of its decision to direct the Commission to remove the ban on general advertising or general solicitation. The Proposed Amendments would undermine the balance Congress determined, without evidence that such balance is inappropriate or insufficient.

uncertainty surrounding what activities constitute general solicitation. Such disqualification also could adversely impact existing private fund investors.

- Expanding the application of Rule 156 to private funds is unnecessary and creates the potential for regulatory uncertainty, as all future guidance under that Rule will need to account for the important distinctions between private funds, on the one hand, and registered investment companies, on the other.

- The requirement to submit all written general solicitation materials to the Commission is unnecessary and inappropriate for private funds managed by SEC-registered investment advisers that already retain such materials in their required books and records, and provide them to the Commission upon request.

Regulatory Oversight of Hedge Funds

Hedge funds differ from many issuers (*e.g.*, operating companies) that rely on Regulation D to access the private capital markets in that hedge fund managers are already subject to comprehensive regulation under the Investment Advisers Act of 1940 (the "Advisers Act") as well as the Advisers Act rules and guidance issued by the SEC thereunder.[5] Private fund managers also are subject to examination by the SEC.[6] The materials available to the SEC's staff (the "Staff") include required records under the SEC's books and records rule,[7] which obligates advisers to maintain records of their activities and make such records available to the SEC upon request. Hedge fund managers are subject to periodic inspections and examinations by staff of the Office of Compliance Inspections and Examinations ("OCIE"), which are designed to ensure that managers are in compliance with the Advisers Act and other securities laws.

Under this existing authority, the Staff has access to substantial amounts of information about an adviser and the private funds it manages, including performance information and

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5 Hedge funds also are subject to other federal securities laws, such as certain reporting provisions of the Securities Exchange Act of 1934.

6 The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), and the SEC's regulatory implementation of it, have significantly increased oversight of the hedge fund industry. Certain managers of private funds with less than $150 million of assets under management are not required to register with the SEC, but must file a portion of Form ADV and comply with reporting, recordkeeping and other obligations, and are subject to the SEC's examination authority. Such managers also may be required to register with state securities regulators. State regulated advisers typically are subject to rules under state securities laws that are substantively similar to many of the rules under the Advisers Act.

7 Rule 204-2 under the Advisers Act.

solicitation materials[8] used by a manager on behalf of a private fund. In addition, managers complete and update Form ADV and regularly submit on Form PF an extensive amount of proprietary information about their businesses and the funds they manage. Form PF includes monthly performance information on hedge funds, which the SEC uses in conducting examinations of private fund managers, as well as to inform its rulemaking.[9]

We believe many of the Proposed Amendments are duplicative and unnecessary in light of the existing regulatory oversight of, and the information already available to the Commission regarding, the private funds advised by SEC-registered advisers and their activities. Moreover, given that the triggering event for several of the obligations in the Proposing Amendments is the occurrence of a "general solicitation," the Proposed Amendments will resuscitate all of the difficult interpretive issues surrounding what constitutes a general solicitation – issues that, we respectfully submit, the JOBS Act was intended to ameliorate. We discuss our specific recommendations with respect to the Proposed Amendments below.

Advance Form D; Form D Amendments

Advance Form D

The Commission has proposed to amend Rule 503 to require issuers that intend to engage in a general solicitation to file a Form D fifteen (15) calendar days in advance of commencing a general solicitation (an "Advance Form D").

While we support the Commission's effort to study the impact of general solicitation on the Regulation D market, it is unclear to us how a pre-filing requirement facilitates this objective. Form D is an information-gathering tool for the Commission whether filed before or after the initiation of an offering. As the Commission indicated in the proposing release, the Commission

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8 Rule 204-2(a)(11) requires advisors to maintain "[a] copy 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 . . . ."

9 We note for example that the Staff has documented the extensive additional information at its disposal as a result of the Commission's new requirements:

> [A]s a result of registration and reporting reforms introduced by, or tangential to, Dodd-Frank, we now have a more complete picture of the hedge fund universe, including insight into (for starters) the number of advisers and funds, the different types of funds, the strategies that they employ, and the makeup of their investor base . . .

Remarks of Norm Champ, Director of the Division of Investment Management, PLI Hedge Fund Management Conference, September 12, 2013, available at http://www.sec.gov/News/Speech/Detail/Speech/1370539802997#.Ujoep_DD-vE (citations omitted). *See also* further discussion "How We Can Use the New Information." *Id*.

does not anticipate that its Staff will review each Advance Form D filing as it is being made.[10] If Form D, as proposed to be modified by the Commission, were filed within 15 days after the date of first sale, in accordance with the longstanding requirements of Regulation D, the Commission would have access to the same market information. We do not believe the Form D filing deadline needs modification in order to ensure that the Staff has access to market information.

Requiring an Advance Form D would impose a 15-day waiting period for issuers that want to avail themselves of the benefits of the JOBS Act (*i.e.*, engaging in a general solicitation). This is inconsistent with the JOBS Act's intent of making it easier for companies to access the private capital markets, and may impair the ability of issuers to raise capital when market conditions are most advantageous. We believe the costs to issuers and the markets outweigh the benefits of requiring an Advance Form D and respectfully suggest that the Advance Form D filing requirement also will not promote efficiency, competition and capital formation as required by Section 2(b) of the Securities Act.

In addition, uncertainty often remains regarding what activities do and do not constitute general solicitation. In our experience, reasonable minds may differ on what constitutes a general solicitation – even in certain relatively common circumstances. Requiring an Advance Form D filing in connection with a general solicitation adds further consequences to the uncertainty regarding general solicitation given that, as proposed, an inadvertent failure to file the Advance Form D can prevent an issuer from conducting new private offerings under Rule 506 (and not just 506(c)) for a one-year period. We note also the Commission's acknowledgement in the proposing release that issuers may choose to file an Advance Form D as a protective measure before deciding whether to engage in a general solicitation. We suggest this will result in a substantial amount of premature and possibly meaningless Advance Form D filings, which will lessen the efficacy to the Commission of this information gathering tool. Moreover, given the other requirements the Proposed Amendments would impose on issuers conducting Rule 506(c) offerings, even a prophylactic filing would not fully resolve an issuer's uncertainty as to its other ongoing obligations (for example, the obligation to file written general solicitation materials with the Commission). Accordingly, before any change of this type is adopted, we suggest that the Commission should undertake additional cost-benefit analysis to compare the estimated market and other compliance costs to issuers against the stated benefit of information gathering, to determine whether the costs imposed on issuers are appropriate in light of the benefits. As part of that analysis, we believe the Commission should consider whether the Advance Form D requirement would enhance its oversight capabilities beyond the scope of information already available to it with respect to private funds.

[10] 78 Fed. Reg. at 44811.

Form D Amendments

We similarly do not think the proposal to require filing of a closing Form D amendment within 30 calendar days after termination of a Rule 506 offering makes sense in the context of hedge fund offerings managed by SEC-registered investment advisers. Hedge funds often engage in continuous – but not necessarily regular – offerings. Because of the nature of this capital raising activity, there may be uncertainty regarding when an offering terminates. For example, when an issuer's fund raising activities have slowed or are on hiatus but the issuer intends to continue to seek to raise capital, we believe the issuer has not terminated its offering. Similarly, if an issuer intends to solicit or accept new investments only to replace capital as it is redeemed – on a timeline that is thus effectively controlled by investors rather than the issuer – we believe the offering should be deemed ongoing. We recommend that the Commission eliminate this requirement for hedge funds and other private funds managed by SEC-registered investment advisers. However, if adopted, it is essential to clarify that an offering terminates upon the issuer's determination to cease seeking to raise capital under a current Rule 506 offering, and the Commission should not infer the date the issuer made such determination from the date of the last sale of securities or the last distribution of offering materials.

In addition, with respect to the existing annual amendment requirement, and in response to the Commission's request for comment in this area, we do not believe the Commission should require issuers conducting a continuous or ongoing offering pursuant to Rule 506(c) to amend their Form D filings more frequently than on an annual basis, other than as currently provided in Rule 503(a). Annual amendments in conjunction with the original Form D should provide the Commission with sufficient information about an offering for its monitoring efforts, especially when combined with the other fact-gathering avenues available to the Commission with respect to private funds – including Forms ADV and PF and the required records maintained under the books-and-records rule. Also, a more frequent filing period would increase the risk that an issuer inadvertently would miss a filing deadline while providing the Commission with little, if any, additional information that is useful.[11]

Consequences of Non-Compliance with Form D Filing Requirements

We support the Commission's determination under the proposed amendments to Rule 507 not to make Form D compliance a condition to Rule 506 with respect to a current offering. Loss of the Regulation D exemption for a current offering because of a failure to file or amend Form D would expose issuers to significant legal risk, potentially including liability under Section 5 of the Securities Act. We believe this outcome would be inconsistent with the JOBS Act, frustrate capital-raising activities, and create uncertainty for issuers and investors.

[11] The Commission also should consider technical and conforming changes to existing Rule 503(a)(3)(ii) to expand the list of exceptions (information that does not trigger a requirement to file an amendment) to include the additional information proposed to be required in Form D.

We appreciate that some information on Form D would be useful to the Commission in its effort to monitor the private offering market in light of the use of general solicitation in Rule 506(c) offerings, and we generally support the Commission's efforts to incentivize issuers to make Form D filings in a timely manner. Nevertheless, we believe an automatic one-year disqualification from relying on Rule 506 for future offerings is a disproportionate penalty for an issuer that fails to file a Form D or an amendment on time (or for other errors in its Form D filings) and would expose issuers (particularly private funds) and investors to significant legal and financial risk that would harm capital-raising and undermine the purpose of the JOBS Act. In this regard, we note that when the Commission amended Regulation D in 1989 to eliminate Form D filings as a condition of Rules 504, 505, and 506 compliance, the Commission noted the significant cost savings for issuers that would be achieved without compromising investor protection.[12] The Commission also noted the inequitable result of a minor, technical deviation from the Form D requirements resulting in a loss of a Regulation D exemption and creating a rescission right for all investors. We believe an issuer's (and its affiliates') loss of access to the private capital markets is a similarly inequitable result for failure to file a Form D, and that the cost to issuers and investors remains significantly greater when compared to the benefit from increasing the incentive for issuers to timely file a Form D. In addition, as a result of the registration of hedge fund managers with the SEC and their filing of Form ADV and Form PF, the Commission has significantly more information about hedge fund managers than it did when it eliminated Form D filings as a condition to Regulation D. We do not believe, therefore, that the Commission has articulated a policy basis for departing from its own prior interpretation regarding the relative importance of Form D filings or its interpretation of the inequitable result of disqualification for minor, technical deviations.

Moreover, we believe that the proposed automatic one-year disqualification would impose even greater costs on private funds which, unlike other issuers, do not have the option of turning to the public markets for capital. This also could have unintended negative consequences for funds' existing investors. Private funds are required to satisfy investors' requests for withdrawals of capital. It is common practice for funds faced with the prospect of investor withdrawals to seek additional capital so that they are not forced to sell their holdings on a compressed timeframe and/or at distressed prices, thus avoiding harm to all investors in the fund. Depriving a private fund that has failed to comply with its Form D requirements of the ability to replace departing capital would result in potentially severe consequences for investors in such a fund and thus seems directly at odds with the investor-protection mandate of the JOBS Act. Under the Proposed Amendments, this could occur when a disqualified fund has ceased raising capital, and determines at a later date to resume raising capital in a new offering.

In addition, the extension of the automatic disqualification to failures by an issuer's predecessor or affiliates will have particularly onerous consequences for private funds.

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[12] *See* Release No. 33-6812.

Individual issuers in a fund complex are often under common control. These funds may be affiliates, and an inadvertent failure by one fund to timely file, or amend, a Form D could prevent all of its affiliated funds from commencing new Rule 506 offerings to raise capital. This would harm not just the fund sponsors but also the fund investors.

We do not believe the Commission sufficiently considered the impact of automatically disqualifying future offerings by issuers as a result of a failure by such issuer, an affiliate or a predecessor to timely file a Form D. In its economic analysis, the Commission noted that for those issuers that submit their Form D filings in a timely manner, the potential for disqualification would pose little additional risk. However, under the Commission's proposal, such compliant issuers would be exposed to an additional and significant risk of potential disqualification that would result from a failure by an affiliate to timely file a Form D. The Commission did not consider this risk and its associated costs. We also question whether the Commission fully appreciated the potential costs imposed in situations when it is ambiguous whether the activity that triggered the Form D filing requirement actually constituted a general solicitation (and especially the continuing costs, in legal fees, associated with attempting to make that determination correctly). While the Commission noted that the costs to issuers can be mitigated by the one-time cure provision provided in proposed Rule 507(b)(1) and the ability to seek a waiver, we believe additional analysis and data are needed to fully consider and estimate the cost of having to seek a waiver and the extent to which the cure provision would mitigate issuers' costs, given that issuers must discover and resolve any deficiency within 30 days for the cure provision to be of any use. As the Commission acknowledged in the proposing release, the loss of access to Rule 506 offerings by issuers and their successors and affiliates would be costly and could impair their competitiveness if they are unable to secure alternative sources of capital without incurring additional cost (which, as discussed above, may not be feasible for private funds). The costs to issuers far outweigh the benefits of increased compliance with Form D filing requirements, particularly when we believe Form D filing compliance can be increased in other ways.

We also believe that the proposal is inconsistent with the JOBS Act. Congress enacted the JOBS Act to increase capital formation by decreasing regulatory requirements. The Commission's proposal runs counter to this goal: it restricts access to the capital markets because of a technical filing requirement that is unrelated to the protection of investors, as the Commission itself previously determined. We have found no support in the legislative history of the JOBS Act to cause the Commission to so markedly change the penalties for failure to file, or amend, what is essentially an information gathering tool. In our view, any disqualification from the use of Regulation D is appropriate only in instances where investor protection is implicated and not as a penalty for a technical violation of an information gathering requirement.

We recommend that, instead of an automatic disqualification, the Commission retain the discretion to impose a penalty based on the particular facts and circumstances of the relevant violation. These penalties may include a potential suspension period from relying on Regulation D in a private offering, or a suspension for an issuer but not its affiliates.[13] The full scope of remedies available to the Commission for a violation of the Securities Act[14] or other filing violations (*e.g.*, Form 13F and Schedule 13D), such as censure, cease-and-desist orders and fines, are available to the Commission for a Form D filing violation, without a presumptive disqualification. We believe that the potential for the Commission to impose penalties will serve as a meaningful incentive to issuers to comply with the Form D filing requirements, while at the same time ensuring that a technical violation of the Form D filing requirements will not serve to prevent an issuer or its affiliates from accessing the private capital markets. At a minimum, before imposing an automatic disqualification for a failure to comply with the Form D requirements, the Commission should determine if an intermediate approach, like the flexible approach we propose, serves to increase the percentage of issuers filing Forms D. The Commission should analyze data on compliance with Form D filing requirements and, thereafter, determine if further changes are needed. We believe this approach would properly incentivize issuers to comply with the Form D filing requirements without creating an unnecessarily rigid penalty system which could have far-reaching negative effects on our capital markets.

Inadvertent General Solicitation

In connection with the proposal to require the filing of an Advance Form D, we note the Commission recognized the possibility that a communication could be disseminated beyond the intended audience without the issuer's knowledge or authorization.[15] The proposed amendments to Regulation D, however, do not provide a mechanism for issuers that begin a Rule 506(b) offering to proceed under Rule 506(c) in the event that the offering becomes the subject of an inadvertent solicitation. The proposed rules are also unclear as to whether any such change would have the effect of delaying the subsequent Rule 506(c) offering, given the proposed 15-day advance filing requirement.

In response to the Commission's request for comment in this area and in the event that the Commission adopts the proposed Advance Form D filing requirement despite our recommendations above, we suggest that the Commission include a new provision that provides a mechanism for issuers to cure an inadvertent general solicitation. We recommend that issuers

[13] Of course, the Commission could (and should) maintain the flexibility to extend the bar to affiliates when the affiliated entities were created for the purpose of evading the consequences of the bar of a given issuer.

[14] Section 8A (cease and desist authority); Section 20 (civil actions) of the Securities Act. *See also* the Securities Enforcement and Penny Stock Reform Act of 1990, P.L. No 101-429.

[15] Given the fact-specific nature of general solicitation and the inherent uncertainty about whether a particular communication falls into that category, it is often the case that even intentional communications that were initially thought, in good faith, not to be problematic can, in hindsight, raise questions about general solicitation. We think that the Commission should consider these communications to be inadvertent for this purpose.

conducting a Rule 506(b) offering be permitted to cure an inadvertent general solicitation by filing or amending a Form D (*i.e.*, to provide that the issuer is conducting the offering under Rule 506(c)) within 45 days after becoming aware of such communication. This proposed cure period would provide sufficient time for an issuer to consider whether such communication was in fact a general solicitation and the implications of filing a Form D under Rule 506(c), for example, the need to implement reasonable efforts to verify the accredited investor status of purchasers. For this cure mechanism to function properly, we recommend that offers and sales of securities that occurred prior to the issuer becoming aware of the inadvertent general solicitation should remain exempt under Rule 506(b), while any subsequent offers and sales would be subject to the requirements and conditions of Rule 506(c), including the requirement for the issuer to take reasonable steps to verify the accredited investor status of the purchasers. This new cure mechanism would also provide that the issuer would not have to put its offering on hold for any period of time after amending its Form D. In addition, the use of this new cure provision should not be exclusive; the issuer would not be deemed to have conceded that the communication in question was in fact a general solicitation, and therefore the issuer would not be excluded from later claiming compliance with Rule 506(b) or Section 4(a)(2) of the Securities Act, depending on the circumstances. We believe this new cure mechanism best reflects the intent of the JOBS Act to reduce the burden on issuers seeking to raise capital without sacrificing investor protection.

Required Legends on Written General Solicitation Materials

Our comments on the Commission's proposal to include mandatory legends in written general solicitation materials should be viewed in the context of the existing disclosure regime for private funds.[16] Private fund managers are subject to extensive anti-fraud provisions of the federal securities laws that ensure that any performance claims used in any 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 Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder, private fund managers are subject to the anti-fraud provisions of the Advisers Act. 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)-8.[17] In addition to these limitations, the Staff has issued no-action and interpretive guidance that impose

[16] MFA believes that requiring issuers in private placements to undertake certain disclosures is inconsistent with the existing framework of Regulation D. The Commission does not stipulate the content or form of disclosures that issuers making private offerings may make to sophisticated investors.

[17] Rule 206(4)-8 prohibits a private fund manager from making any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in a fund.

further conditions and restrictions on the form and content of advertising materials, including specific limitations on how managers may present performance information.

Unlike public offerings, only sophisticated and high-net-worth individuals and institutions are permitted to purchase interests in private offerings, including those conducted by private funds. In the context of private fund offerings, 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.

We believe the legends required under proposed Rule 509 would be better suited for financial products marketed to retail investors.[18] We do not believe the proposed legends would provide meaningful additional protection to investors, but rather would introduce an additional burden on issuers, given the wide range of types of written communication that may be used by an issuer and the uncertainty as to whether certain types of written communications would be deemed a public advertisement or general solicitation. The required legends may cause an issuer to favor a particular form of solicitation, such as private placement memoranda, over other more accessible forms, which would undermine the intent of the JOBS Act to modernize and facilitate private offerings and to ease the burden on issuers seeking to raise capital. In certain cases, the required legends may be longer than the substance of a short written communication itself, arguably detracting from the information being communicated to potential investors.

We respectfully urge the Commission to reconsider the proposal to require these legends as prescribed in the proposed Rule 509. We note that a mandate of the JOBS Act was to eliminate the ban on general solicitation with respect to Regulation D offerings without requiring additional restrictions on such offerings beyond those specifically included by Congress (*i.e.*, verifying accredited investor status, and limiting sales only to accredited investors). We do not believe that requiring the inclusion of mandatory legends on written general solicitation materials will promote efficiency, competition and capital formation in the manner contemplated by the JOBS Act.

If the Commission retains some or all portions of proposed Rule 509, we recommend that the Commission limit the written general solicitation materials to which Rule 509 applies, so that issuers can more easily monitor their compliance with proposed Rule 509 and the filing requirement under proposed Rule 510T, further discussed below. This will avoid imposing a disproportional burden on issuers compared to the added benefit, if any, of including generic legends on all written materials. For example, issuers should not be burdened with the task of coordinating the inclusion of required legends on written communications that have not been

[18] We do not believe that general solicitation materials, which may be seen by non-accredited investors who cannot invest, should be subject to a legending requirement similar to that for retail financial products in which they can invest.

prepared by the issuer or its agent, such as a television broadcast or a news article referencing a quote from the issuer. We recommend the Commission clarify that only written offering materials prepared by an issuer (or anyone acting directly on its behalf) in connection with an offering for circulation to prospective investors in a general solicitation, such as private placement memoranda, pitch books and other similar marketing materials, be required to include the prescribed legends. These materials would not include regular reporting materials for, and other communications with, existing investors or materials prepared individually for specific prospective investors.

Additional Content Requirements of Form D

We recognize the Commission's need to gather information to monitor the developments in the Rule 506 market after the effectiveness of Rule 506(c), and we generally support the proposed content amendments to Form D with a few specific exceptions:

- Proposed Item 3 of Form D would require, when the issuer is conducting a Rule 506(c) offering, disclosure of the name and address of any person who directly or indirectly controls the issuer. To the extent that, in the context of a private fund, this requirement is interpreted to include the private fund's significant investors, we do not believe that public disclosure of such information is appropriate. Such a requirement would raise privacy concerns while not meaningfully adding to the information the Commission already has regarding private funds (or is available in accordance with the books-and-records rule). In addition, if the control person disclosure requirement covers a fund's manager and/or investment adviser, such information is already available to the Commission on Form ADV.

- Proposed Item 14 of Form D would include a table requiring information on the number of accredited investors and non-accredited investors that have purchased in a Rule 506 offering, whether they are natural persons or legal entities and the amount raised by each type of investor. We believe that disclosure of the amount raised by each category of investors in a private fund offering should not be made in a publicly accessible document such as a Form D because such information is potentially sensitive information among private funds who do not disclose the make-up of their investor base. We also believe, in the case of private funds, that the Commission already has access to similar information through Questions 15 and 16 of Form PF.[19]

[19] Question 15 of Form PF requires information on the approximate percentage of the reporting fund's equity that is owned by the five beneficial owners having the largest equity interests. Question 16 of Form PF requires information on the approximate percentage of the reporting fund's equity that is beneficially owned by various types of investors, including natural persons and institutions.

- Proposed Item 17 of Form D would require issuers to provide, with respect to Rule 506 offerings, the number of purchasers who qualified as accredited investors on the basis of each of the following four categories: (1) income, (2) net worth, (3) status as a director, executive officer or general partner of the issuer or its general partner, or (4) other basis. Similar to the proposed changes to Item 14, we believe the detail required by this item compromises sensitive information which is not appropriate for a publicly accessible document and that it would not be appropriate to impose additional disclosure requirements for Rule 506(b) offerings that do not currently exist.

Submission of Written General Solicitation Materials to the SEC

We appreciate the Commission's goal of collecting information about offerings conducted under new Rule 506(c) to evaluate effectively the development of market practices in offerings where the issuer engages in a general solicitation. However, we believe requiring private fund managers to regularly submit materials to the SEC in connection with a general solicitation is unnecessary in light of existing oversight and examination methods.

As noted above, larger hedge fund managers must register with the SEC, and are subject to the Advisers Act, and as SEC-registered investment advisers, private fund managers are subject to the SEC's books and records rule, Rule 204-2 under the Advisers Act. 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 upon request.[20]

Also as noted above, registered hedge fund managers are subject to periodic inspections and examinations by OCIE staff, during which the Staff has access to substantial amounts of information about the adviser and private funds it manages. In addition, managers regularly submit on Form PF an extensive amount of proprietary information about their businesses and the funds they manage to the SEC and other regulators. These inspections are an appropriate and effective method to examine solicitation materials and information about the manager and its funds, whereas a requirement for issuers to file solicitation material with the SEC would inundate the Staff with information, a significant portion of which will not provide much, if any, additional or useful information to the Staff, and overburden the Staff's limited resources.

A filing requirement would conflict with the long-standing framework of the federal securities laws, under which private offerings are not subject to the filing requirements applicable to public offerings. A requirement to file general solicitation material also would

[20] *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).

impose a burden on managers, who would need to determine whether an activity would be considered general solicitation material that must be submitted to the SEC, and when any modification of a given writing was substantive enough to require re-filing. Even after Rule 506(c) comes into effect, there will continue to be substantial uncertainty among issuers in identifying what may constitute general solicitation activity. The costs to issuers of complying with the proposed Rule 510T may be substantial, given the broad range of materials that may be deemed written general solicitation materials, and especially if such materials change or are updated during the course of an offering. In outlining the cost-benefit analysis in the proposing release, the Commission highlights that filing of written general solicitation materials would serve as a deterrent against misleading advertising and having access to such material could help regulators evaluate market practices. However, as noted above, even without the proposed filing requirement, private funds are subject to the extensive anti-fraud provisions of the federal securities laws, and the Commission would have access to the written general solicitation materials upon request.

If the Commission were to adopt a requirement for issuers to submit solicitation and advertising materials under the proposed Rule 510T, 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 investment adviser maintains such required records in accordance with the Advisers Act recordkeeping rules. This is appropriate for the above reasons as well as the Commission's acknowledgement in the proposing release that, to the extent the written general solicitation materials change or are updated during the course of an offering, the submission of these materials multiple times could create an increased burden for issuers.

Application of Interpretative Guidance of Rule 156 to Private Funds

Rule 156 is an interpretative rule that identifies considerations for determining whether sales literature used by investment companies registered under the Investment Company Act of 1940 (the "1940 Act") is materially misleading in violation of the anti-fraud provisions of the Securities Act and the Exchange Act. The Commission adopted Rule 156 for registered investment companies. In addition, the Commission and the Staff have strictly limited interpretive guidance under Rule 156 to investment companies that target retail investors.[21] We

[21] *See e.g.*, SEC No Action Letter, T. Rowe Price Investment Services, Inc., 1995 WL 536032 (September 8, 1995) (discussing Rule 156 in the context of variable annuity contract sales materials), SEC No Action Letter, Pacific Mutual Life Insurance Company, 1990 WL 286907 (August 31, 1990) (discussing Rule 156 in the context of variable life illustrations), SEC No Action Letter, Variable Annuity and Variable Life Registrants, 1992 WL 435700 (discussing Rule 156 in the context of variable life annuity registration statements); SEC No Action Letter, General Guidance to Variable Annuity, Variable Life, 1995 WL 815824 (November 3, 1995) (discussing Rule 156 in the context of variable life annuity registration statements); SEC No Action Letter, Franklin Group of Funds, 1987 WL 107626 (January 27, 1987) (discussing Rule 156 in the context of materials filed under the 1940 Act).

believe the Commission's proposal to expand the guidance contained in Rule 156 to the sales literature of private funds is unnecessary and ill-advised.

The predecessor to Rule 156 was the Commission's Statement of Policy governing investment company sales literature (the "Statement of Policy"), which the Commission initially adopted in 1950 and provided guidance on the use, form and content of sales literature used in the sale of investment company shares that, in the opinion of the Commission, may violate the Securities Act and the 1940 Act based on its review of the then-current practices.[22] The Commission withdrew the Statement of Policy in March 1979 and proposed Rule 156 as a replacement.[23] In the 1979 adopting release for Rule 156, the Commission noted that Rule 156 was an interpretive rule intended to highlight general areas which, based on the Commission's regulatory experience with investment company sales literature, had proven to be particularly susceptible to misleading statements while limiting the extent to which government regulations intrude on investment company marketing decisions.[24] However, in proposing amendments to Rule 156, the Commission appears not to have engaged in any similar review of private funds sales literature to identify any problem areas where additional guidance would be needed for offerings to sophisticated investors, nor considered the impact such proposed amendments would have on private funds that are already subject to an existing regulatory regime. We note also that, while the Commission indicated that the adoption of Rule 506(c) was the impetus for the proposed amendments to Rule 156, the proposed Rule 156 amendments would apply to all private fund issuers, even those that do not engage in general solicitation.[25] The Commission has

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[22] 15 Fed. Reg. 5468.

[23] 44 Fed. Reg. 16935.

[24] The Commission's adopting release for Rule 156 was entitled "Mutual Fund Sales Literature Interpretive Rule," reflecting that the interpretative guidance contained in Rule 156 was intended and written for mutual funds. *See* Securities Act Release No. 6140 (October 26, 1979).

[25] In addition, in June 2010, the Commission proposed additional amendments to Rule 156 to provide guidance regarding statements in marketing materials for target date retirement funds, investments which enable investors to hold a diversified portfolio of assets that is rebalanced automatically among asset classes over time without the need for each investor to rebalance his or own portfolio repeatedly, and other investment companies. In the SEC Release No. 33-9126 (Investment Company Advertising: Target Date Retirement Fund Names and Marketing), the Commission proposed to amend Rule 156 by adding the following paragraph (b)(4):

(4) A statement suggesting securities of an investment company are an appropriate investment could be misleading because of:

(i) The emphasis it places on a single factor (such as an investor's age or tax bracket) as the basis for determining that the investment is appropriate; or

(ii) Representations, whether express or implied, that investing in the securities is a simple investment plan or requires little or no monitoring by the investor.

Target date funds have become more prevalent in retail investors' retirement portfolios, including 401(k) plans, and such target date fund rulemaking further indicates that the guidance in Rule 156 was intended for investment provided no basis for, and asserted no benefits that would flow from, attempting to regulate both mutual funds and private funds in the same way with a single rule. Further, the Commission has not explained why sales literature directed to sophisticated investors that previously did not need to be included within the scope of Rule 156 should now be covered. In fact, this approach is inconsistent with the approach that the Staff of the Division of Investment Management is taking in its review of the existing advertising rules under the Advisers Act, where we understand that the Staff is considering bifurcating such advertising rules between managers of private funds and managers of retail clients, acknowledging that applying the same rules to all managers may not be appropriate. In addition, combining the guidance of Rule 156 for private funds and mutual funds will further complicate future no-action guidance under the Rule, where guidance for one industry may not be appropriately applied to the other.

As noted above, private funds are subject to the extensive anti-fraud provisions of the federal securities laws. In the proposing release, the Commission pointed to this existing regulatory regime in stating that the Commission believes the proposed amendments to Rule 156 would not impose significant compliance costs on private funds. However, we believe that given the existing regulatory regime, and the absence of any identified areas indicating benefit from the application of Rule 156, the proposed amendments to Rule 156 would impose uncertainty as to how the rule and the related interpretive guidance that have developed over the years solely in the context of mutual funds would apply in the private funds context, resulting in an additional and unnecessary layer of regulatory burden on the private funds, without providing any meaningful guidance or increased investor protection. In this regard, from a cost-benefit analysis, we believe the proposed amendments to Rule 156 impose additional compliance costs to issuers without providing any benefit. To the extent future reviews of private fund practices identify particular issues, it may then, and only then, be appropriate for the Commission to consider a bifurcated approach involving specific guidance for private funds, similar to the approach being taken with the advertising rules under the Advisers Act.

Additional Manner and Content Restrictions for Private Funds

We agree with the Commission's view that the anti-fraud provisions of the federal securities laws and the requirement that purchasers of a private fund offered under Rule 506(c) be accredited investors provide a level of investor protection. Similarly, we agree with the Commission's determination not to propose any additional prohibition or restriction on the use of performance data by private funds.[26] As discussed above, private fund issuers are already

companies targeting retail investors. The Commission has indicated that, if the amendments to Rule 156 proposed in the target date fund rulemaking are adopted, it anticipates making such amendments applicable to sales literature of private funds as well. Such expansion of the application of Rule 156 would not be appropriate for the same reasons as stated above.

[26] 78 Fed. Reg. at 44827.

subject to extensive anti-fraud provisions. Also, the sophisticated individual and institutional investors in private funds typically request additional materials to complement the information provided by a private fund issuer in connection with their due diligence review of a potential investment – additional content restrictions may impede such investors' ability to obtain the requested information in the desired format.

We also support the Commission's determination not to propose standard calculation methodologies for performance of private funds.[27] Private fund strategies differ and include a wide variety of U.S. and non-U.S. securities, commodities and derivatives, investments in portfolio companies and/or investments in other funds, in each case, with varying degrees of liquidity. A private fund's offering documents, supplementary due diligence materials and performance disclosures are crafted to reflect the unique strategies and investments of each fund.[28] We believe it would not be appropriate to impose standard methodologies to calculate the performance of private funds. To the extent the Commission is considering proposals on standard performance calculation methodologies, we believe the Commission's review of such proposals should be done in conjunction with a review of the advertising rules under the Advisers Act generally, which we understand the Staff has indicated an intention to undertake.

Definition of Accredited Investor

We continue to look forward to the Commission's upcoming review of the accredited investor definition. As mentioned above, only sophisticated investors may purchases interests in hedge funds, including those that are offered and sold in reliance on Rule 506(c). Hedge funds that rely on Section 3(c)(7) of the 1940 Act 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.[29] Hedge funds that rely on Section 3(c)(1) and conduct offerings pursuant to 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. MFA supported the Commission's proposal in July 2011 to implement Section 418 of the Dodd-Frank Act by raising 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

[27] 78 Fed. Reg. at 44827.

[28] While certain hedge fund managers report performance based on uniform guidelines known as the Global Investment Performance Standards ("GIPS"), a majority of hedge funds do not, as GIPS is not appropriately applied to all fund strategies. The most important consideration is that investors are provided performance data that is accurate. Therefore, fund managers need to retain the flexibility to present performance data in the manner that fairly and accurately reflects the information in light of the relevant conditions and objectives of a fund.

[29] Section 2(a)(51) of the 1940 Act.

$1.5 million to $2 million.[30] MFA continues to support efforts to increase investor 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.[31]

We further encourage the Commission to consider greater harmonization of the various sophisticated investor tests under the federal securities laws. We note, for example, that the definition of "accredited investor" does not include "qualified purchasers" or "knowledgeable employees," as defined under Section 2(a)(51) of the 1940 Act and Rule 3c-5 thereunder, respectively, which can create a mismatch in terms of eligible investors for a fund relying on Section 3(c)(7) of the 1940 Act. In addition, the definition of "qualified client" in Rule 205-3 under the Advisers Act does not necessarily include persons who are accredited investors, even though the thresholds for those two standards are converging.[32] We believe that persons deemed knowledgeable employees for 1940 Act purposes should be deemed sufficiently sophisticated to be deemed accredited investors with respect to the same investment fund(s) for which they are eligible to invest under the 1940 Act.[33] We also believe that, given the fact that the "qualified purchaser" test under the 1940 Act generally sets higher thresholds than does the "accredited investor" test, the definition of "accredited investor" should be amended specifically to include any person who meets the definition of "qualified purchaser" in Section 2(a)(51) of the 1940 Act. Finally, we encourage the SEC to amend the definition of "qualified client" under the Advisers Act to include "accredited investors." We believe this harmonization would remove unnecessary complexity with respect to the relevant standards for investors in private funds, without raising investor protection concerns.

[30] *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.

[31] *See* Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, SEC (March 22, 2013), available at: https://www.managedfunds.org/wp-content/uploads/2013/03/MFA-Comments-on-JOBS-Act-Implementation-3-22-13.pdf.

[32] We also note that many hedge fund managers also are subject to rules issued by the Commodity Futures Trading Commission (the "CFTC"). The CFTC has similar qualification thresholds to those under the federal securities laws, though there are differences that could lead to mismatches for investors in funds that are both private funds and commodity pools. CFTC rules define a "qualified eligible person" to include, among others, a person who owns securities (including pool participations) of issuers not affiliated with such person and other investments with an aggregate market value of at least $2,000,000. We encourage the SEC, as part of the broader harmonization project with the CFTC, to work with the CFTC to harmonize SEC and CFTC standards.

[33] To the extent the SEC does not amend the definition of "accredited investor" to include "knowledgeable employees" with respect to relevant investment funds, we encourage the SEC to provide guidance that a private fund may conduct an offering to knowledgeable employees simultaneously with an offering to other investors without integrating those two offerings for purposes of Regulation D.

To the extent the Commission is considering incorporating a qualitative standard into the definition of accredited investor, for example, regarding financial sophistication, 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.[34] We believe the Commission's approach in the definition of accredited investor to provide 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.

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[34] *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.

MFA respectfully suggests that the Proposed Amendments will undermine Congress's goal of facilitating the capital formation process for Reg. D offering, making the benefits of Section 201 of the JOBS Act illusory. We believe prudent issuers will decline to avail themselves of the benefits of the JOBS Act because the regulatory risks of error will be unacceptably high. Accordingly, we urge the Commission to postpone adoption of these additional rules, at least until it has meaningful experience with the JOBS Act. Only then will the Commission have the necessary record to determine whether further regulatory changes are necessary to accomplish the goals that Congress so clearly established.

MFA appreciates the opportunity to provide comments to the Commission regarding the Proposed Amendments. 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 Mary Jo White, Chairman
The Honorable Kara M. Stein, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Michael S. Piwowar, Commissioner

Keith Higgins, Director, Division of Corporation Finance
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