October 5, 2012

U.S Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy
Secretary

Re: Release No. 33-9354 (the "***Release***")
File No. S7-07-12

Dear Ms. Murphy:

The Investment Program Association ("***IPA***")[1] respectfully submits this letter in response to the request for public comment by the Securities and Exchange Commission ("***SEC***") on the Release (Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings). The proposed rules are required pursuant to Section 201(a)(2) of the Jumpstart Our Business Startups Act ("***Section 201(a)(2)***" and "***JOBS Act***", respectively).

## Background

Title II, Section 201(a) of the JOBS Act directs the SEC to amend its rules promulgated pursuant to Section 230.506 of Title 17 Code of Federal Regulations ("***Title 17***"), to permit general solicitation and general advertising provided that all purchasers of the securities are accredited investors. Further, such rules are to require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the SEC. The proposing release is to effectuate this latter requirement of the JOBS Act.

## Summary of IPA's Position

The IPA commends the SEC in the approach taken in its proposing release.

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[1] Formed in 1985, the IPA provides 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.

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We believe that the SEC has advanced a balanced and well reasoned "facts and circumstances" methodology to issuer verification taking into account the myriad views of regulators, issuers, and practitioners alike.[2] Further, the proposing release sets forth a sufficient framework and provides adequate tools to ensure a rational balance between investor protection and capital formation. This is in keeping with Congress' clear directive that issuers be given the ability to communicate freely to attract capital while obligating them to take reasonable steps to ensure that general solicitation and general advertising are not used to sell securities to those who are not qualified to participate in such offerings[3].

We also appreciate the SEC's expressed views regarding general solicitation and general advertising within the confines of Regulation S as well as the implications of the proposed rule pursuant to Section 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940, and we encourage the SEC to reiterate its position in the final release.

Lastly, it is of paramount importance to be mindful that:

- The JOBS Act does not limit Section 10b-5 promulgated under Section 10 of the Exchange Act;
- The JOBS Act does not limit Section 17(a) of the Securities Act;
- The JOBS Act does not change state securities ("Blue Sky") rules relating to fraud; and,
- The JOBS Act does not change the status of hedge fund managers, which continue to be subject to the anti-fraud provisions of the Investment Advisers Act.

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2 The IPA observes that several pre-rulemaking comment letters received by the SEC spoke to the issue of accredited investor definitional criteria. We respectfully believe that this rulemaking procedure is neither the time or the place for the SEC to respond to such commentary because: (i) it would be outside the Congressional mandate currently before the SEC under the JOBS Act, and (ii) the Dodd-Frank Act (enacted July 21, 2010) previously established the procedure and timing for the SEC's consideration of the matter. *See,* Sections 413(b) and 415 of the Dodd-Frank Act.

3 Further, the IPA supports the preservation of existing Rule 506(b) for Rule 506 offerings without the use of general solicitation or general advertising. Issuers should be free to choose not to engage in general solicitation and rely on Rule 506(b) to sell to accredited and non-accredited investors meeting Rule 506(b) requirements. By preserving the original Rule 506, legislative intent to expand access to capital for private issuers will be advanced.

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After giving effect to the foregoing and after adoption of the proposed rule, if the SEC were to become aware of systemic industry problems in the utilization or implementation of the Rule, the SEC retains the continuing power and authority to immediately effect curative changes to the Rule designed to support investor protection while advancing the clear Congressional directives enunciated in the JOBS Act.[4]

**IPA Commentary**

The IPA proposes three broad areas for SEC consideration:

- Areas of further clarification and guidance;
- Areas in which states have either expressed a particular opinion or in which state laws may result in conflict with the stated intention of the JOBS Act; and,
- Further guidance.

**Need for Clarification**

*Timing and Frequency of Verification.*

Currently, accredited investors self-certify their financial standing for accredited status (via Subscription Agreements, Purchaser Questionnaires, etc.) coupled with due diligence as to such status performed by industry (e.g., by FINRA member firms, registered investment advisors, etc.) each time securities are purchased. The IPA supports the continuance of this practice.

However, the IPA recommends that the SEC clarify whether the proposed facts and circumstances approach alters current above-described industry practice of self-certification at the time of sale - the IPA assumes not. The IPA further recommends that the SEC clarify that the proposed facts and circumstances approach does not necessarily require more frequent verification in the self-certification situation described herein. Absent credible evidence that self-certification, based on reasonable verification, has been inadequate, requiring an issuer to take steps that will potentially deter or "chill" [5]

[4] The IPA supports the check the box approach to Form D for Rule 506(c) offerings on the presumption that issuers retain the right, currently available under law, to conduct offerings pursuant to other available exemptions and that issuers are not estopped from later claiming the Rule 506(c) exemption via an amended Form D.

accredited investors from investing would be contrary to express Congressional intent to make it easier for Rule 506 issuers to identify accredited investors without significantly undermining investor protection.

*Books and Records.*

An additional item for clarification is the necessity of an issuer books and records retention obligation. The IPA believes that records retention would be similarly subject to the overriding facts and circumstances standard.

*Transitional Guidance.*

The IPA is concerned about those offering which will straddle the effective date of the final rule. As to such offerings, we would appreciate guidance from the SEC regarding the treatment of such offerings in which closings have occurred where non-accredited investors were able to participate before the effective date, but would be prohibited from doing so post effective date. We suggest that such transitional guidance take the form of either an interpretive release, or a series of FAQs.

**Potential Blue Sky Concerns**

*Investor Misrepresentation and the Issuer's Loss of Exemption.*

Some commentators have suggested that an offering in which an investor has misrepresented itself as accredited, even after the issuer has engaged in "reasonable steps to verify" should result in the loss of the exemption for the entire offering. This rather draconian result:

(i) Completely ignores the fact that Rule 502(c) continues to apply to such offerings, and

(ii) Penalizes issuers who have complied with the law (i.e., taken reasonable steps to verify), and

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5 Several pre-comment letters advocated the imposition of "under penalty of perjury" certifications, or third-party (e.g., independent accountant or legal counsel) certifications for the proposed investor, and some went so far as to maintain the position that continued self-certification as to one's financial standing to satisfy accredited status was unacceptable and only "documented" (e.g., tax returns, financial statements, etc.) would suffice the "reasonably verify" requirement.

(iii) Penalizes all valid accredited investors who have purchased the securities of an issuer by putting the offering at risk of rescission.

In real industry terms, the resulting uncertainty injected into each offering by this suggestion will chill, impede, and impair the ability to access private capital through private offerings conducted pursuant to Regulation D, Rule 506(B) ('***Rule 506***"). This result is directly contrary to stated Congressional intent.

We respectfully recommend that a more appropriate solution to the investor misrepresentation circumstance is for the rule to provide that a valid Rule 506 offering must either demonstrate that:

(a) The issuer has complied with the law [i.e., the issuer took reasonable steps to verify], or

(b) All investors in the offering are, by definition, accredited investors.

This solves two problems: First, an issuer is compliant if it can demonstrate that it took reasonable steps to verify, even though one or more investor(s) misrepresented their status. Second, even if the steps taken by an issuer, broker-dealer, or investment adviser are determined, in retrospect, to have been non-compliant (i.e., reasonable steps to verify were not undertaken), then the offering nevertheless will not be tainted so long as all investors are, in fact, accredited.

**Further Guidance**

The IPA highlights for the SEC that an additional verification process in Rule 506 offerings can be accomplished by adding a new category to the definition of accredited investor - knowledgeable employees. Knowledgeable employees are uniquely situated so as to have access to sufficient information regarding the issuer and its securities to a degree, if not better than, all other accredited investors. To exclude them appears to be an oversight.

The "bad actor" disqualifiers of Section 926 of the Dodd-Frank Act are currently pending SEC action. In that matter, the IPA proposes an issuer carve-out such that the failure of an issuer to take reasonable steps to verify would not, in and of itself, constitute a disqualifying "bad act" under Section 926. Additionally, in circumstances in which the issuer is the victim of investor misrepresentation (intentionally or negligent) as to accredited status, "bad actor" disqualification status should not be ascribed to the issuer

(or sponsor). In summary, an issuer (or sponsor) should not be subject to "bad actor" disqualification resulting from the unforeseen acts of others.

In conclusion, the IPA appreciates the opportunity to comment upon the proposing release, and we thank the SEC staff for its hard work and dedication to investor protection while simultaneously advancing Congress' intent in the arenas of access to private capital and job growth in America.

Respectfully submitted,

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