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

June 20, 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 comments to the Securities and Exchange Commission (the "SEC" or "Commission") as it implements Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act"). We submit this letter in response to comments we believe may create a misimpression about practices within the hedge fund industry and the extensive regulatory framework that applies to hedge fund managers following Congress's enactment of the Dodd-Frank Act.[2] MFA views the Fund Democracy-Consumer Federation Letter ("FD-CFA Letter") as an unfortunate stereotyping of the hedge fund industry. Its descriptions are largely inaccurate and out of date. Rather than try to respond to each mischaracterization, MFA takes this opportunity to address these issues more broadly.

[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] Letter from Mercer Bullard, Fund Democracy, Inc., and Barbara Roper, Consumer Federation of America (May 15, 2013), available at: http://www.sec.gov/comments/s7-07-12/s70712-253.pdf .

For our views on the SEC's proposal to implement Section 201(a), please see our prior comments. Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, SEC (Mar. 22, 2013), available at: http://www.sec.gov/comments/s7-07-12/s70712-237.pdf; Letter from Stuart J. Kaswell to Elizabeth Murphy (Sept. 28, 2012), available at: https://www.managedfunds.org/wp-content/uploads/2012/09/MFA-Comments-on-JOBS-Act-9-28-12.pdf; Letter from Stuart J. Kaswell to Elizabeth Murphy (June 26, 2012), available at: https://www.managedfunds.org/wp-content/uploads/2012/06/MFA-Comments-on-JOBS-Act-6-26-12.pdf; Letter from Stuart J. Kaswell to Elizabeth Murphy (May 4, 2012), available at: https://www.managedfunds.org/wp-content/uploads/2012/05/MFA_Comments_on_JOBSAct_05-04-2012.pdf.

The Dodd-Frank Act, and the SEC's regulatory implementation of it, have fundamentally strengthened oversight of the hedge fund industry.[3] Hedge fund managers must now register with the SEC or with state securities regulators as investment advisers, and are subject to the Investment Advisers Act of 1940 (the "Advisers Act"), which applies broadly to a manager's investment activities and relationship with clients.[4] The SEC directly oversees hedge fund managers through periodic inspections and examinations by staff of the Office of Compliance Inspections and Examinations ("OCIE"), which ensure that managers are in compliance with the Advisers Act and other securities laws.[5] During inspections, the SEC staff has access to substantial amounts of information about the adviser and private funds it manages, including performance information and solicitation materials used by a manager on behalf of a private fund. 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 data include, among other things, monthly performance information of hedge funds, which the SEC uses in conducting examinations of private fund managers, as well as to inform its rulemaking.

These reforms significantly enhance the ability of regulators to prevent, detect and punish manipulative conduct.[6] They also impose substantial new responsibilities on hedge fund managers. Accordingly, we believe that the references in the FD-CFA Letter to the lack of hedge fund regulation dating back over ten years are not helpful to the Commission in the context of this rulemaking. The Commission and its staff undertook an enormous effort to propose, adopt, and interpret the numerous rules necessary to implement these statutory requirements. The FD-CFA Letter ignores these extraordinary efforts by Congress, the Commission, and its staff.

In light of the fundamental reforms described above, we are disappointed to read comments that not only recommend that the SEC staff implement Section 201 of the JOBS Act in a manner that discriminates against a particular type of issuer, *i.e.*, private funds and their affiliated managers, but refer to a regulatory framework for the industry that no longer exists. Section 201 of the JOBS Act reflects a clear policy determination by Congress to enhance capital formation while providing in the

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[3] Hedge fund managers were, and remain, subject to many regulatory requirements prior to Congress's enactment of the Dodd-Frank Act. For example, managers are subject to the broad anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder, and Section 206 of the Advisers Act.

[4] 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 may also 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.

[5] State registered advisers typically are subject to oversight and examination by the applicable state securities regulator.

[6] MFA has consistently supported the regulatory framework that the Dodd-Frank Act imposes on the hedge fund industry. *See e.g.*, Testimony of the Honorable Richard H. Baker, President and CEO, MFA, before the Committee on Financial Services, U.S. House of Representatives (Oct. 29, 2009), available at: http://www.managedfunds.org/downloads/MFA%20testimony%20October%206%20final.pdf; Testimony of Stuart J. Kaswell, General Counsel, MFA, before the Committee on Financial Services, U.S. House of Representatives (Oct. 7, 2009), available at: http://www.managedfunds.org/downloads/MFA%20Testimony%2010-07-09%20FINAL.pdf.

statute the appropriate investor protection measures that should accompany the removal of the ban on general solicitation, and the SEC should adopt implementing rules in accordance with this direction.

SEC Oversight of Hedge Fund Managers' Use of Performance Information

Some commentators have recommended that the SEC adopt a specific methodology for hedge fund performance information used in solicitation materials following implementation of the JOBS Act. We believe that the longstanding SEC anti-fraud rules governing the use of performance information for investment advisers, including hedge fund managers, ensure that hedge fund managers report accurate information.

The use of performance information by hedge fund managers is subject to the anti-fraud provisions of the federal securities laws, which prohibit performance claims used in solicitation materials from misleading investors.[7] In addition, hedge fund managers are subject to Section 206(4) of the Advisers Act, which prohibits an investment adviser from engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. Communications by hedge fund managers are also subject to more specific restrictions in Rule 206(4)-8 under the Advisers Act.[8]

We also wish to offer some comments in response to a study on hedge fund performance reporting that suggests such information is frequently inaccurate.[9] In the study, the authors examine hedge fund performance data reported by certain database service providers, and assert that such public disclosure is a channel that hedge funds can use to market themselves to potential new investors. The study and its conclusions appear to be based on this premise – that performance information in hedge fund databases is communicated by hedge fund managers to the databases, and that revisions to the information also come from restatements of the data by managers.

In the experience of our members, which include the majority of the world's largest hedge fund managers, many hedge fund managers do not report performance information to these databases or other third-party aggregators. In our view, this creates a question as to the sources of the information reported by databases, and the potential reasons that databases may subsequently revise the information. Based on our understanding, databases may often obtain the information from sources other than managers and these sources may have incomplete or preliminary information. For example, it is a relatively common practice for hedge fund managers to provide initial estimates of performance information to investors on a monthly basis, often at the request of investors, and in doing so clearly indicate to investors that the information is preliminary and may be subsequently revised. Managers may calculate final performance information that differs from initial estimates for a variety of reasons, such as incorporating ultimate fee amounts into net performance calculations,

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[7] *E.g.*, Section 17(a) of the Securities Act of 1933; Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

[8] 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.

[9] Andrew J. Patton, Tarun Ramadorai and Michael Streatfield, *Change You Can Believe In? Hedge Fund Data Revisions*, (Mar. 22, 2013), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934543. The FD-CFA Letter cites this study at page 3.

tabulating late-billed expenses, or adjusting preliminary valuations of illiquid portfolio assets following a year-end audit.[10]

In our experience, it therefore is not appropriate to suggest, as the study seems to, that these revisions of preliminary numbers indicate a pervasive unreliability in hedge fund reporting. Instead, any conclusions should be based on a careful, case-by-case analysis of first-hand evidence of the accuracy of a manager's reporting and any subsequent revision. The study in question does not appear to perform this type of analysis.

There is, however, a straightforward solution to the uncertainty surrounding the reporting of hedge fund performance information – upon implementation of Section 201, hedge fund managers will be able to report accurate performance information to database providers or otherwise disclose the information. We strongly believe that such increased transparency is an important step in allowing a wider audience to learn about the industry, which will have beneficial effects for investors, regulators and the industry.

Additional Comments

We believe that the authors of the FD-CFA Letter are motivated by sincere public policy concerns. Nonetheless, we do not believe that it is appropriate for the Commission to defer to such arguments in this setting. Congress knowingly enacted Title II of the JOBS Act to eliminate the ban on general solicitation with regard to certain Regulation D offerings, including with respect to offerings made by private funds.[11] Section 201(a) directs the Commission to adopt rules requiring "the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission." The JOBS Act does not direct the Commission to re-evaluate the wisdom of this policy decision, nor does it direct the Commission to undertake a comprehensive review of the broader regulatory framework for private funds. Chairman White has indicated her intention to complete this rulemaking with alacrity.[12] In accordance with our prior comments,[13] we respectfully urge the Commission to adopt the proposed rules promptly.

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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

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[10] Hedge funds often invest in securities that are not liquid, and therefore valuing such securities is more challenging than obtaining the closing price on the New York Stock Exchange. Accordingly, hedge fund managers may provide interim estimates of prices (identified as such) and subsequently provide more definitive valuations of such securities. Such procedures constitute a diligent effort to inform investors and provide accurate information, rather any type of nefarious behavior.

[11] *See e.g.*, Letter from the Honorable John Thune and the Honorable Pat Toomey, United States Senate, to the Honorable Mary Jo White, Chairman, SEC (May 13, 2013), regarding the JOBS Act, available at: http://www.sec.gov/comments/s7-07-12/s70712-255.pdf.

[12] Testimony of Mary Jo White, Nominee for Chair of the U.S. Securities and Exchange Commission, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Mar. 12, 2013), available at: http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=619e5603-c2c8-4085-98c6-0014ce29bde7.

[13] *See* note 2, *supra*.

provide further information, please 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 Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Troy A. Paredes, Commissioner

Keith Higgins, Director, Division of Corporation Finance
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