



**Hedge Fund Association Ltd**  
2875 NE 191<sup>st</sup> Street, Suite 900  
Aventura, FL 33180  
USA

Tel: 305-935-7296  
Fax: 202-478-1999  
Email: [info@thehfa.org](mailto:info@thehfa.org)  
Website: [theHFA.org](http://theHFA.org)

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September 13, 2012

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

Comments on SEC Proposed Rule Eliminating the Prohibition against General Solicitation and General Advertising in Rule 506

Ms. Murphy:

The HFA applauds the Security and Exchange Commission's (the "Commission") proposed rule eliminating the prohibition on general solicitation and advertising adopted at its open meeting on August 29, 2012 in connection with the Jumpstart Our Business Startups Act (the "JOBS Act"). The proposed rule will modernize the securities laws without compromising investor protections embodied in the current securities law regime. It is the HFA's belief that the proposed rule will: (a) increase transparency and understanding of the hedge fund industry by the general public, (b) facilitate efficiency in capital formation and reduce administrative costs by allowing investors to more easily obtain information about private funds, and (c) encourage competition in the industry by allowing small and mid-sized funds to compete with larger funds in their marketing efforts. All of the foregoing will obviously help create jobs in the U.S., as was originally intended by the JOBS Act legislation. We also applaud the Commission's decision to allow funds foregoing the option to generally solicit to continue to make offers and sales on a private basis without the enhanced verification requirements imposed by the proposed rule.

In regard to the "reasonable steps" standard imposed on issuers in connection with their duty to verify whether an investor is accredited, we commend the Commission in developing a flexible standard that takes the totality of the facts and circumstances of any given offering into account. We note that the Commission specifically elected to permit each Issuer of a security sold pursuant to a general solicitation under the JOBS Act be able to verify an investor's accreditation and we believe that will engender greater capital formation pursuant to Regulation D.

However, we would respectfully recommend that the Commission also adopt a more definitive "safe harbor" standard within the rule to help private issuers manage the process of verifying an investor's accreditation. For example, we believe the following safe harbor language would make sense:

"If an issuer (or its investor relations administrator) receives a signed subscription/investment agreement (whether received physically or electronically) from an investor, where the investor unequivocally affirms that he is an accredited investor (with a detailed description of the reason why included in the same document), this fact pattern alone will serve to meet a "safe harbor" whereby the Commission would agree that the issuer has met its initial burden of taking "reasonable steps" to verify whether an investor is accredited under this rule."

We believe that adding such a "safe harbor" to the proposed rule would be more in line with the original intent of the JOBS Act – which was to help increase jobs in the U.S. by simplifying the process for private companies to raise money from investors. Unfortunately, leaving the rule open without any such safe

harbor may, in fact, serve to hinder the original intent of the law by creating administrative burdens and uncertainties for private issuers who intend to comply with the new rule but are not positive whether they have done so due to the lack of a definitive safe harbor. Furthermore, the implementation of a safe harbor that goes beyond what is suggested above may prove to not only be an administrative burden on the private issuers, but also serve as a deterrent to investors who might be loathe to share confidential information with private issuers.

In its release, the SEC requested further input from the public regarding the proposed rule over a 30-day comment period, following publication in the Federal Register. The HFA and its Regulatory and Governmental Advisory Board will continue to review the proposal and engage with the SEC and policy makers over the coming months. However, we would also ask that the agency coordinate with the Commodity Futures Trading Commission (CFTC) to ensure that any new rules are harmonized with the Commodity Exchange Act (CEA).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mitch Ackles".

**Mitch Ackles**  
President, Hedge Fund Association

A handwritten signature in black ink, appearing to read "Richard Heller".

**Richard Heller**  
Chairman, Regulatory & Government Advisory Board,  
Hedge Fund Association



## Hedge Fund Association Asks SEC for Clear Rules on Verifying Investor Accreditation

*Industry Trade Organization Asks for Provision in JOBS Act Rules to Limit Fund Managers' Liability Should They Take Reasonable, Pre-Defined Steps to Confirm Whether Investors are Accredited*

NEW YORK – September 13, 2012 – [The Hedge Fund Association](#), (the HFA), an international not-for-profit organization representing investors, hedge funds and service providers, today asked the Securities and Exchange Commission (SEC) in a comment letter to specifically tell private fund managers what they will need to do to safely verify whether investors are accredited, should they want to advertise after the rules in the Jump Start Our Business Start-ups Act (JOBS Act) are finalized. The HFA also praised the entire proposed rule to lift the hedge fund advertising ban as a significant step to modernize securities laws that maintains the investor protections available under the current system. At the same time, they encouraged the regulator to coordinate with the Commodity Futures Trading Commission (CFTC) to harmonize any new rules with the Commodity Exchange Act (CEA).

While the organization lauded the good intent of the SEC's proposed standards for verifying investor accreditation, they pointed out that their end result might go against the original intent of the JOBS Act; to increase employment by making it simpler for private companies to raise money from investors. As the proposed regulations ask for managers only to take "reasonable steps" without defining which steps are sufficient, they could create administrative burdens and uncertainties for private issuers who intend to comply but cannot ever be positive whether they have done so.

"The SEC's pragmatism is notable in its 'reasonable steps' standard, but managers need to know that what they are doing is legal before they will take advantage of new opportunities given by this law," said Richard Heller, chairman of the HFA's Regulatory and Government Advisory Board and author of the letter on behalf of the HFA.

According to the HFA, the SEC should define a "safe harbor," or a provision within the regulation which will eliminate managers' liability under the law in connection with verifying investor accreditation should they perform those activities within certain defined standards. Ideally, says the group, in order to comply it should be sufficient for an asset manager to receive a signed subscription agreement from an investor in which that person unequivocally affirms that he or she is an accredited investor. This agreement should also include a detailed description of the reason why the investor made that claim. Implementing a more restrictive "safe harbor" provision than this, the group warns, could create administrative burdens for private securities issuers and deter privacy-conscious investors.

"At the same time as lack of legal clarity can cripple businesses with uncertainty, clear laws which demand too much of investors and issuers can dampen the interest in allocating capital to private companies while greatly adding to fund managers' operating expenses," said Mitch Ackles, President of the Hedge Fund Association. "In drafting final regulations, we ask the SEC to keep this in mind and to remember the original intent behind JOBS Act – to invigorate the economy," he added.

To download a copy of the HFA's comment letter to the SEC, please [click here](#).

### **About The Hedge Fund Association**

The Hedge Fund Association ([theHFA.org](#)) is an international not-for-profit organization made up of hedge funds, funds of funds, family offices, high net worth individuals and service providers. In the U.S., the HFA has chapters in the Northeast, Southeast, Midwest and on the West Coast. Internationally, the HFA has expanded to include chapters in Europe, Asia, Latin America, and the Cayman Islands. HFA works on behalf of the entire hedge fund industry, including over 9,500 hedge funds in the U.S. and abroad which collectively manage more than \$2 trillion in assets, as well as sophisticated investors and industry service providers.

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### **Media Contact:**

Mitch Ackles  
Hedge Fund PR  
(646) 657-9230  
[Mitch@HedgeFundPR.net](mailto:Mitch@HedgeFundPR.net)