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

June 26, 2012

VIA EMAIL

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

Re: Request for Comments on Regulatory Initiatives Under the Jumpstart Our Business Startups Act

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 advance of its regulatory implementation of the Jumpstart Our Business Startups Act (the "JOBS Act"). We are writing as a follow-up to our previous letter[2] to provide additional recommendations regarding the implementation of Section 201(a)(1).[3]

Section 201(a)(1) directs the SEC to include in its rule a requirement that an issuer take reasonable steps to verify that purchasers of securities offered and sold under revised Rule 506 are accredited investors. In our previous letter, we explained that hedge fund managers have long implemented procedures to ensure that funds meet the requirements in Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940, which include investor qualification standards. In general, each potential hedge fund investor must complete a subscription document provided by the fund's manager that provides a detailed description of, among other things, the qualification

[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, North and South America, and all other regions where MFA members are market participants.

[2] Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, SEC (May 4, 2012), available at: https://www.managedfunds.org/wp-content/uploads/2012/05/MFA_Comments_on_JOBSAct_05-04-2012.pdf.

[3] Section 201(a)(1) instructs the SEC to revise Rule 506 of Regulation D under the Securities Act of 1933 to eliminate the prohibition against general solicitation or general advertising for offers and sales of securities made pursuant to Rule 506, provided that all purchasers are accredited investors.

standards that a purchaser must meet under the federal securities laws. These procedures have functioned effectively for private fund managers and investors, and we believe these methods would meet the standards under Regulation D and Section 201.

We nevertheless recognize that Section 201 does not specify the types of reasonable steps to verify investors that may be appropriate, and we understand the SEC is considering imposing additional requirements on issuers. If the SEC determines that issuers that rely on revised Rule 506 must take additional steps to verify investors, it is crucial that such steps can be effectuated by investors and issuers in a practical, efficient manner that avoids undermining the clear intent of the JOBS Act to modernize private offerings and enhance capital formation.

The primary method for verification should continue to be a certification by the investor, which should be supplemented by appropriate, additional evidence.

First, we suggest that the SEC look to its own rules that provide a straightforward approach to investor verification. Rule 205-3 under the Investment Advisers Act of 1940 defines a "qualified client" as an investor whom the issuer reasonably believes has a net worth of more than $2,000,000, or an investor who has at least $1,000,000 under the management of the adviser.[4] Under this standard, an investor who has assets under management with an adviser that are at least half of the value of the net worth threshold is deemed to meet the qualification requirement.

The SEC may wish to consider adopting an equivalent approach under revised Rule 506. An issuer should be deemed to have taken reasonable steps to verify that a purchaser is an accredited investor if the investor certifies that it qualifies as an accredited investor, and a natural person investor has at least $500,000 under management with the issuer, or an entity investor has at least $2,500,000 under management with the issuer.[5] In other words, an issuer should be permitted to treat as an accredited investor an investor who certifies to that effect and has the funds to invest at least 50% of the required net worth or total assets, as applicable, in the accredited investor standard.

Second, in the case of an investor who does not meet this minimum investment level, an issuer should be deemed to comply with Rule 506 if the investor submits a certification that it qualifies as an accredited investor, and also provides some type of additional third-party evidence. The SEC should publish a non-exclusive list of the types of additional evidence that an investor could provide for these purposes, which should include:

(i) Bank or brokerage statement(s) indicating that the investor has at least $1 million (for individuals) or $5 million (for entities) in assets;

[4] In 2011, the SEC amended the definition of qualified client in Rule 205-3 by raising the required assets under management from $750,000 to $1 million, and increasing the required net worth threshold from $1.5 million to $2 million. The amendments maintained the existing ratio between the thresholds. Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205-3 under the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3236 (July 12, 2011).

[5] If in the future the SEC reviews and adjusts upward the net worth threshold for an accredited investor, it should proportionately adjust the assets under management threshold.

(ii) Audited financial statements (if the investor is an entity);

(iii) A copy of the primary summary pages of the investor's most recent tax return that contain basic information and signatures, or a copy of the investor's W-2 indicating that the investor meets the minimum income level; or

(iv) A statement of an independent third-party professional (*e.g.*, banker, certified public accountant, lawyer, entity chief financial officer, etc.) that the professional believes, after due inquiry, that the investor meets the definition of accredited investor.[6]

The rule should make clear that the evidence need not be created for, nor specifically addressed to, the issuer or fund manager; for example, a recent bank statement or letter from a certified public accountant should be sufficient. The rule should also clearly indicate that the list is non-exclusive, and explain that an issuer may equally satisfy the verification requirement by obtaining one of the documents included in the list, or another type of similar third-party evidence. Requiring an issuer to obtain only certain materials would be unworkable in practice due to the wide range of investors that participate in private offerings, and the differences in their ability and willingness to provide certain types of information.

We believe the approach described above would best fulfill the verification requirement while achieving Congress's primary objective in removing the general solicitation and advertising restriction – to enhance capital formation, facilitate the flow of information in a manner consistent with investor protection, and increase transparency of issuers conducting private offerings, including private funds. MFA believes that such an approach would constitute "taking reasonable steps to verify that the purchasers of securities are accredited investors," as Section 201 of the JOBS Act requires. Such a proposal would avoid overly restrictive procedures that would have the effect of thwarting the purposes of Title II of the JOBS Act. Unduly restrictive procedures effectively would apply a strict liability standard to an issuer seeking to rely on Rule 506, which Title II clearly rejects. Moreover, we believe that if an investor provides reasonable evidence indicating that it is an accredited investor, an issuer should not be liable for an investor that makes false statements and seeks intentionally to evade the law. Imposing a rule that is unworkable for issuers conducting private offerings will prevent them from engaging in general solicitation and advertising, thereby defeating the clear intent of Congress and eliminating the substantial public policy benefits that will flow from Section 201.

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[6] The statement from the third-party professional must be based on its reasonable belief. It would generally not be possible for a third-party professional to certify that an investor qualifies as an accredited investor, and in particular that the investor has a minimum net worth.

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 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 L. Schapiro
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes
The Honorable Daniel M. Gallagher

Meredith Cross, Director, Division of Corporation Finance
Eileen Rominger, Director, Division of Investment Management