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October 5, 2012

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

Re: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings; File No. S7-07-12

Dear Ms. Murphy:

The Independent Directors Council<sup>1</sup> appreciates the opportunity to comment on the SEC's proposal to eliminate the prohibitions against general solicitations and general advertising, as it would apply to privately offered funds, such as hedge funds.<sup>2</sup> Directors of registered funds (including mutual funds, closed-end funds, exchange-traded funds, and unit investment trusts)—whose primary responsibility is to look after the interests of their fund's shareholders—have a keen interest in policy issues affecting fund investors. We recognize that the Commission's proposal implements Section 201(a) of the Jumpstart Our Business Startups Act. We are disappointed, however, that the Commission determined to propose the "more narrow mandate," as Chairman Schapiro described it,<sup>3</sup> and not to consider additional investor protections at this time.

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<sup>1</sup> IDC serves the fund independent director community by advancing the education, communication, and policy positions of fund independent directors, and promoting public understanding of their role. IDC's activities are led by a Governing Council of independent directors of Investment Company Institute member funds. ICI is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds, and unit investment trusts. Members of ICI manage total assets of \$13.5 trillion and serve over 90 million shareholders, and there are approximately 1,900 independent directors of ICI-member funds. The views expressed by IDC in this letter do not purport to reflect the views of all fund independent directors.

<sup>2</sup> *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, SEC Release No. 33-9354 (August 29, 2012) (available at <http://www.sec.gov/rules/proposed/2012/33-9354.pdf>).

<sup>3</sup> See Opening Statement at the SEC Open Meeting by Chairman Mary L. Schapiro, U.S. Securities and Exchange Commission (August 29, 2012) (available at <http://www.sec.gov/news/speech/2012/spch082912mls.htm>).

The Commission previously heard from commenters who voiced concerns about the potential for investor confusion that private fund advertising could create.<sup>4</sup> We share those concerns. We appreciate that Commissioner Aguilar raised questions in this regard in his separate request for comment, and urge the Commission to consider these issues before adopting the amendments.<sup>5</sup>

The Commission's proposal would allow private funds to advertise publicly, without any restrictions as to content. We are concerned that, without such restrictions, private fund advertisements could be confused with registered fund advertisements, and that registered fund investors will not appreciate or have a basis for evaluating their differences. As discussed below, we urge the Commission to impose content restrictions on private funds similar to those required of registered funds. At a minimum, the Commission should prohibit private funds from advertising performance until it can address these investor protection concerns.

Under the Commission's proposal, private funds would be permitted to advertise performance information that is not subject to any standardized methodologies. In contrast, registered funds are subject to specific calculation methodologies for current yield, tax equivalent yield, average annual total return, and after tax return, among other things.<sup>6</sup> Registered funds also must include a legend disclosing that the performance data quoted represents past performance and that past performance does not guarantee future results.<sup>7</sup> These and other requirements assist investors in comparing fund performance and understanding the relevance of that information. Investors viewing mutual fund advertisements and private fund advertisements may see wide variations in performance information, without any explanation or way to understand the bases for the differences. In addition, terms with prescribed meaning in registered fund disclosures, such as "yield" and "after-tax total return" might be used in private fund advertisements, but with different meanings, causing further potential confusion.

Under the Commission's proposal, private funds also would not be required to include a legend or other disclosure to mitigate potential investor confusion, as was suggested by other commenters.<sup>8</sup>

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<sup>4</sup> See e.g., Letter from Paul Schott Stevens, President and CEO, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, regarding Comments on SEC Regulatory Initiatives Under Title II of the JOBS Act (May 21, 2012) (available at <http://www.sec.gov/comments/jobs-title-ii/jobstitleii-13.pdf>) ("ICI Letter").

<sup>5</sup> See Statement by Commissioner Luis A. Aguilar, *Increasing the Vulnerability of Investors* (August 29, 2012) (available at <http://www.sec.gov/news/speech/2012/spch082912laa.htm>).

<sup>6</sup> Rule 482 under the Securities Act of 1933.

<sup>7</sup> *Id.*

<sup>8</sup> See e.g., ICI Letter, *supra* n. 4; see also Letter from Mercer Bullard, President and Founder, Fund Democracy, Inc., et. al to Elizabeth M. Murphy, Secretary, SEC regarding JOBS Act Rulemaking: Title II (August 16, 2012) (available at <http://www.sec.gov/comments/jobs-title-ii/jobstitleii-60.pdf>).

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We believe that a private fund should be required to disclose that it is not registered with the Commission and should not be confused with a registered fund, such as a mutual fund. Other disclosures designed to inform investors that private funds are not subject to the disclosure and transparency requirements of mutual funds also may be warranted.

We believe that content restrictions and other investor protection provisions, such as a review of advertisements by a regulator, for private funds could mitigate not only potential investor confusion but also the risks of misleading advertisements by private funds. Misleading advertisements in one part of the market can affect investor confidence and cause harm in other parts of the market. This connection is particularly acute for private funds and registered funds, as investors may not appreciate the differences between their regulatory frameworks and the many investor protections offered by registered funds. We are very concerned that investors could associate misleading advertisements in the private fund space with registered funds.

Accordingly, in order to mitigate potential investor confusion as well as misleading advertisements, IDC believes the Commission should require private funds to comply with advertising rules and restrictions similar to those imposed on registered funds and to inform investors, in clear disclosures, of the important differences between private funds and registered funds.

If you have any questions, please contact me at (202) 326-5824 or [amy@ici.org](mailto:amy@ici.org).

Sincerely,



Amy B.R. Lancellotta  
Managing Director

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  
Norm Champ, Director, Division of Investment Management