MANAGED FUNDS ASSOCIATION

July 5, 2007

VIA ELECTRONIC MAIL:
rule-comments@sec.gov

Attention: Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Semiannual Regulatory Agenda; File Number S7-07-07

Ladies and Gentlemen:

Managed Funds Association ("MFA") appreciates the opportunity to make this submission of comments to the Securities and Exchange Commission (the "Commission" or "SEC") on its semiannual regulatory agenda, provided in Release No. 33-8783 (the "Release").

MFA is the voice of the global alternative investment industry. Our members include professionals in hedge funds, funds of funds and managed futures funds. Established in 1991, MFA is the primary source of information for policymakers and the media and the leading advocate for sound business practices and industry growth. MFA members represent the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the over $1.5 trillion invested in absolute return strategies.

Regulatory Agenda

Our members have a strong and vested interest in the Commission's current and future rule proposals concerning hedge funds and other alternative investment vehicles. We commend the Commission for its efforts in modernizing securities regulation along with the rapidly evolving technological and business developments in the securities industry. We believe that many of the developments have made current securities regulation outdated and that Commission review is needed to update, simplify and clarify securities regulation as it applies today.

A. Private Offering "Manner of Offering" Reform

We urge the Commission to review and modernize the requirements applicable to private offerings that are not subject to the Securities Act registration requirements. Specifically, we hope the Commission will reconsider the "manner of offering" or "general solicitation, general advertising" restrictions under Rule 502 of Regulation D. We believe that the ban on general solicitation and advertising in private offerings no longer makes sense with modern practices and communications technology, and urge the Commission to add this matter to its regulatory agenda.

The "manner of offering" restrictions of Rule 502(c) have long been a matter both of subjective judgment and lack of clarity.[1] The SEC no-action letters on the subject of what constitutes a permissible "manner of offering" in a private placement have emphasized the need of the issuer or the selling agent to have a "pre-existing substantive relationship" with the offeree.[2] This begs the question of how a private issuer or a selling agent could contact any new clients for possible private placement investments, especially as the SEC no-action letters commented that it was not possible to establish any such pre-existing substantive relationship in the course of or in anticipation of a private offering.[3] Interpreted literally, it is not possible to comply with this requirement in the context of an open-ended, continuous offering; even the most conservative investment firms have settled for allowing solicitation to begin after an investor has been a client for six months, even if the client relationship began after the offering in question.

"Hedge fund" directories came on to the scene in the early 1990s. What level of participation in the production of these publications caused the information included to be "ascribed" to the funds included in the directories was a matter of ongoing debate. Paying to be included in the directory seemed to be a bad fact, as did cooperating in its publication, but if the funds did not cooperate in the publication, the information included in such directories would almost certainly be wrong and the users of such directories thereby misled with respect to the non-cooperating funds. Hedge fund directories have since flourished (*e.g.*, InfoVest, MAR and HFR), but without real clarity as to their legal status. The Staff was consulted, in person, by representatives of the Klitzberg group — which printed the first such directory — but declined to give definite guidance. In the case of the *Glenwood Investment Company* no-action letter submission on the subject of such directories, the Staff deliberated for a year only to inform the submitters that the Staff would not respond.[4]

The advent of the Internet — a major technological advance in terms of the distribution of financial information — has materially increased the need of the private investment industry for guidance in this area of law. In the wake of the *Lamp Technologies, Inc.* no-action letter,[5] which was itself strictly limited, any number of intermediary — as well as issuer-sponsored — websites have been spawned. Are such websites 502(c) compliant? So far no opinion has been given on this point. The Staff has, on a number of occasions, suggested that it would address these issues, but such guidance has not been forthcoming.

The history of 502(c) suggests that if the legal, administrative and technological resources which have been devoted to attempting to determine the appropriate scope of 502(c) over the last 25 years have not been able to do so, it is likely that the issue itself has no good solution. The line between general and private solicitation may be inherently unclear (in practice, if not in theory). The uncertainty of 502(c) is in harsh contrast to the potentially catastrophic consequences of failing to comply. Perhaps in no other area of securities law does breach of a single legal principle have such drastic consequences. A domestic Private Investment Vehicle

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[1] For "manner of offering" issues in general, see David B.H. Martin, Jr., and L. Keith Parsons, *The Pre-existing Relationship Doctrine under Regulation D: A Rule Without a Reason*, 45 WASH. & LEE L. REV. 1031 (1988); Patrick Daugherty, *Rethinking the Ban on General Solicitation*, 38 EMORY L.J. 67 (1989).
[2] *See, e.g.*, *Bateman, Eichler, Hill Richards, Inc.* (pub. avail. Dec. 3, 1985); *E.F. Hutton Co.* (pub. avail. Dec. 3, 1985); *IPONET* (pub. avail. July 26, 1996); *Lamp Technologies* (pub. avail. May 29, 1997) ("*Lamp*").
[3] *See id.*
[4] *Glenwood Investment Corp.* (pub. avail. Aug. 10, 1994).
[5] *Lamp*, *supra* note 2.

that violates 502(c) has no alternative but to dissolve — with the sponsor being held responsible for granting rescission to all investors.

The SEC Staff proposed in 2003 that the 502(c) limitation be eliminated for offerings made only to "qualified purchasers."[6] The Staff rationale continues to be compelling:

> We question whether the restrictions on general solicitation for private placement offerings of interests in funds relying on Section 3(c)(7) of the Investment Company Act should be retained. Unlike a Section 3(c)(1) fund, a Section 3(c)(7) fund can be sold to an unlimited number of investors, so long as they are "qualified purchasers." There seems to be little compelling policy justification for prohibiting general solicitation or general advertising in private placement offerings of Section 3(c)(7) funds that are sold only to qualified purchasers.
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> The staff would be reluctant to ease or eliminate the prohibition on general solicitation for hedge funds or other funds that use the accredited investor standard as their minimum investor criteria. We believe that such an arrangement could increase the level of risk of investment interest by less wealthy investors. On the other hand, permitting funds, including hedge funds, that limit their investors to a higher standard (e.g., "qualified purchasers") to engage in a general solicitation could facilitate capital formation without raising significant investor protection concerns.[7]

The "manner of offering" restrictions are intended to ensure that only "suitable offerees" are solicited for private placements.[8] The ability to contact persons whom Congress has deemed presumptively suitable (*i.e.,* "Qualified Purchasers") should not be restricted by the "pre-existing substantive relationship" concept. 502(c) has always been but a means to the end of limiting solicitation to suitable offerees; limiting offerees to be "Qualified Purchasers" assures this result.

The SEC itself has commented that it "had never required that a pre-existing relationship exist in all cases in order to comply with 502(c)." This statement is consistent with an approach in which "pre-existing substantive relationships" would not be required for solicitation in situations in which the offerees are presumptively suitable. Whereas what constitutes a "public" rather than a "private solicitation" is inevitably and inherently unclear, it is clear that Qualified Purchasers do not need the protections of 502(c).

In addition to clarifying what are acceptable private placement practices, another regulatory advantage that would be gained by eliminating "Qualified Purchaser-only" offerings from the restrictions of 502(c) would be to clearly distinguish these offerings from those made to other investors. This has been a distinction which the Staff appears to have been anxious to make. For example, when Section 3(c)(7) of the Company Act was under debate in Congress, a proposal was made not to make separate 3(c)(7) funds, but rather simply not to count "Qualified

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[6] *Implications of the Growth of Hedge Funds*, Staff Report to the United States Securities Exchange Commission, September 2003 (the "Hedge Fund Report").
[7] *Id. at* 100-101.
[8] *See, e.g.,* SEC Release No. 33-285 (Jan. 24, 1935).

Purchasers" in a 3(c)(1) fund toward the 100 person statutory limit. The Staff rejected this proposal because it was concerned that "Qualified Purchasers" should not be commingled with other investors, as the former would receive preferential treatment in the event that a fund had difficulties. By relaxing 502(c) with respect to offerings to "Qualified Purchasers" only, the Staff would draw a clear distinction between Private Investment Vehicle offerings to Qualified Purchasers and offerings to less suitable investors.

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MFA appreciates the opportunity to comment on the Commission's semiannual regulatory agenda. We support the Commission's efforts toward creating a better investing environment for both investors and businesses, and thus, urge the Commission to review and modernize the "manner of offering" rules with respect to private offerings. We would be pleased to meet with the Commission or Staff to discuss our comments

Respectfully submitted,

John G. Gaine
President

CC: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins Commissioner
The Hon. Roel C. Campos
The Hon. Annette L. Nazareth
The Hon. Kathleen L. Casey
John White, Director
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