MANAGED FUNDS ASSOCIATION

AIMA

September 24, 2019

Via Electronic Submission: rule-comments@sec.gov

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SEC Concept Release on Harmonization of Securities Offering Exemptions

Dear Ms. Countryman:

Managed Funds Association[1] ("MFA") and the Alternative Investment Management Association[2] ("AIMA") (collectively, the "Associations") appreciate the opportunity to provide comments to the Securities and Exchange Commission (the "SEC" or "Commission") in response to the SEC Concept Release on Harmonization of Securities Offering Exemptions (the "Concept Release"). We commend the SEC for undertaking a thorough review of possible ways to simplify, harmonize and improve the exempt offering framework to promote capital formation and expand investment opportunities while maintaining appropriate investor protections.

We believe that the existing exempt offering framework functions well in many respects and we encourage the SEC to avoid any changes that would disrupt use of existing exemptions from registration.

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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 over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

2 AIMA is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council ("ACC") to help firms focused in the private credit and direct lending space. The ACC currently represents over 100 members that manage $350 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

In particular, the current framework under Rule 506 of Regulation D is generally working well and we recommend that the SEC not propose substantive changes to those rules. We continue to support efforts to update and enhance the definition of "accredited investor" and better align the various sophistication thresholds in the federal securities laws. We also believe the definition of "knowledgeable employee" should be updated to align the interests of adviser employees and private fund investors. Finally, as the Commission considers recommendations potentially expanding the ability of registered investment funds to invest in exempt offerings, we believe the SEC should amend the rules and positions of its staff applicable to registered funds rather than seeking changes to the exempt offering framework. We provide additional discussion of each of these recommendations below.

I. Private Placement Exemption and Rule 506 of Regulation D

As noted in the Concept Release, Rule 506 offerings have accounted for a significant amount of new capital compared to other exempt securities offerings and even registered offerings. We believe this data demonstrates that, for many issuers and sophisticated investors, the existing framework under Rule 506 of Regulation D appropriately addresses both capital formation and investor protection considerations. Accordingly, while we appreciate the goals underlying the SEC's request for comment on Rule 506 of Regulation D, we do not recommend changes to Rule 506 of Regulation D because the existing framework serves issuers and investors well.

In particular, we would not recommend changes to the terms and conditions specific to Rule 506(c) offerings. For a number of years following enactment of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") and the SEC's adoption of rules to implement the JOBS Act, issuers did not raise a significant amount of capital in Rule 506(c) offerings.[3] As noted in the Concept Release, regulatory uncertainty caused by the SEC's issuance of proposed amendments to Regulation D at the same time the SEC adopted Rule 506(c) has been previously identified as a possible explanation for the relatively low level of Rule 506(c) offerings.[4] We believe concerns about the legal uncertainty and costs the proposed amendments would impose on private fund managers deterred issuers from conducting Rule 506(c) offerings.

The SEC's data, which is consistent with anecdotal evidence from members, indicates that some issuers have just recently started to rely on Rule 506(c) to raise capital. We believe that any changes that limit the ability of issuers to rely on Rule 506(c), even proposed changes, would have a chilling effect on the use of Rule 506(c) offerings. We are unaware of any investor protection concerns or other policy issues in connection with Rule 506(c) offerings that require changes to the existing Rule 506(c) offering exemption. Given the lack of investor protection concerns and the likelihood that any changes to Rule 506(c) could once again have a chilling effect on the use of Rule 506(c) offerings, we encourage the SEC not to recommend changes to the terms and conditions of Rule 506(c) offerings.

II. Definition of Accredited Investor

The definition of "accredited investor" is an important standard for investors in private funds, and we commend the SEC for its review of potential methods to update and enhance the standard in the Concept

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3 Concept Release, at 20.

4 Concept Release, at 81.

Release. Consistent with our prior letters on this subject, we encourage the SEC to maintain in the definition of accredited investor clear, objective standards based on the income and net worth of an investor.[5]

These objective standards are necessary to provide certainty to an issuer that an individual is an accredited investor, and consequently that an exempt offering will be conducted in compliance with Regulation D. In adopting Regulation D, the SEC carefully reviewed the existing regulatory framework and appropriately determined that issuers need to be able to rely on objective standards in conducting exempt offerings. As a result of these bright-line standards, Regulation D has been successful in promoting capital formation and protecting investors, and private issuers, including hedge funds, continue to depend on the legal certainty of quantitative, objective standards based on financial thresholds.

Consistent with the goal of providing objective, bright-line standards, we support the SEC staff recommendation to revise Rule 501(a)(3) of Regulation D to permit any entity meeting the financial threshold to qualify as an accredited investor. Although the SEC staff has previously provided favorable guidance with respect to treatment of certain additional entity types as accredited investors (limited liability companies and certain governmental units), providing that any entity meeting the requisite financial threshold can qualify as an accredited investor could reduce uncertainty and legal costs and promote more efficient private capital formation.[6]

We also strongly support the existing aspects of the definition that provide that an accredited investor includes a person who meets one of the listed qualification methods, or who an issuer reasonably believes meets one of the qualification methods, at the time of the sale of the securities to the person.[7] These aspects of the definition provide issuers with substantial legal certainty when conducting an exempt offering, as they are able to determine that a person is an accredited investor at the time of investment in an exempt offering by having a reasonable belief that a person is an accredited investor.

With respect to the recommended increases to the income and net worth thresholds for individuals, we continue to support efforts to increase investor qualification standards for private fund investors over time, with a view to ensuring that only sophisticated investors with the financial wherewithal to understand and evaluate the investments meet the accredited investor definition, or other applicable sophisticated investor test under the federal securities laws.[8] Specifically, we support the recommendations noted in the Concept Release from the SEC Staff Report on the Review of the Definition of Accredited Investor (the "SEC Staff Report")[9] to amend the income and net worth thresholds in the accredited investor definition to

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5 Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, MFA, to Brent J. Fields, Secretary, SEC (June 16, 2016), available at: https://www.managedfunds.org/wp-content/uploads/2016/06/MFA-Comments-on-SEC-Accredited-Investor-Study.pdf.

6 Alternatively, the SEC could consider expanding the list of enumerated entities that may qualify as accredited investors to include, for example, limited liability companies, Indian tribes, labor unions, governmental bodies, and other entities with substantially similar legal attributes.

7 Rule 501(a) of Regulation D.

8 MFA supported the Commission's proposal to amend the definition of accredited investor, pursuant to Section 413 of the Dodd-Frank Act, to exclude the value of a natural person's primary residence for purposes of determining the net worth of a natural person. MFA also supported the Commission's proposal in July 2011 to implement Section 418 of the Dodd-Frank Act by raising the qualification thresholds for an individual in the definition of "qualified client," increasing the required assets under management from $750,000 to $1 million and the required net worth from $1.5 million to $2 million.

9 SEC Staff Report on the Review of the Definition of Accredited Investor (Dec. 18, 2015), available at: https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf.

account for the effect of inflation, which would help to ensure that the thresholds have not been diluted over time. Similarly, we support indexing the thresholds for inflation. These thresholds should remain independent qualification methods under the definition of accredited investor and should not include investment limitations or other qualitative conditions that would introduce uncertainty for an issuer seeking to confirm the status of an investor.

We believe the current net worth and income standards work well; however, if the SEC were to potentially adopt alternative accredited investor standards, it is critical that the Commission: (1) maintain the net worth and income standards in addition to any alternative standards; (2) provide a clear method for an issuer to verify that any alternative standards have been satisfied; and (3) confirm that any investors who qualify under such alternative standards are considered to be sophisticated investors and are not treated as retail investors under the federal securities laws.

We strongly support the recommendation in the SEC Staff Report to permit "knowledgeable employees" of private fund managers, as defined in Rule 3c-5 under the Investment Company Act of 1940, as amended (the "Investment Company Act"), to qualify as accredited investors for investments in private funds managed by their employers.[10] We agree with the conclusions in the SEC Staff Report that such knowledgeable employees have meaningful investing experience and/or sufficient access to information necessary to make informed investment decisions about the offerings by private funds managed by their employers. In addition, investments by knowledgeable employees are beneficial for private fund investors in that they further align the interests of adviser employees and fund investors.

Similarly, we recommend that the SEC further harmonize the existing sophisticated investor tests under the federal securities laws by including "qualified purchasers," as defined in Section 2(a)(51) of the Investment Company Act, as accredited investors, and by amending the definition of "qualified client" under the Investment Advisers Act of 1940, as amended (the "Advisers Act") to include accredited investors. These changes would simplify the existing mismatch in standards for private fund investors without raising investor protection concerns. In particular, these changes would maintain existing financial thresholds (as they may be amended) and continue to ensure that only sophisticated investors are able to invest in private funds.[11]

III. Definition of "Knowledgeable Employee"

Permitting "knowledgeable employees" of an investment adviser, as defined in Rule 3c-5 under the Investment Company Act, to invest in that adviser's private investment funds helps promote alignment of interest between the adviser's employees and the fund's investors. While the SEC staff has provided useful guidance to the industry through no-action letters regarding the scope of the knowledgeable employee definition,[12] we believe Rule 3c-5 unnecessarily limits the scope of adviser employees who may qualify as knowledgeable employees, as there are senior adviser employees who may not be covered under the current

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[10] We also note that a trust should qualify as an accredited investor if the grantor and trustee or person responsible for making the investment decision are knowledgeable employees. This accommodates common estate planning strategies for knowledgeable employees.

[11] If, as we recommend in this letter, the income and net worth thresholds are adjusted to account for the effect of inflation, the increased thresholds for the definition of accredited investor would be comparable to the existing thresholds for the definition of qualified client.

[12] Response of the Investment Adviser Regulation Office and Chief Counsel's Office, Division of Investment Management, SEC (Feb. 6, 2014), available at: https://www.sec.gov/divisions/investment/noaction/2014/managed-funds-association-020614.htm.

SEC staff guidance. Allowing senior adviser employees to invest in private funds managed by their employers would align the interests of those employees with those of investors.

Accordingly, we encourage the Commission to consider revising the definition of knowledgeable employee in Rule 3c-5 to better align the interests of senior adviser employees and investors in private investment funds. One approach we encourage the Commission to consider is to expand the definition of knowledgeable employee to include any employee of the adviser who is an "accredited investor," as defined in Rule 501 of Regulation D.[13] We would welcome the opportunity to discuss with the Commission or its staff this approach or other approaches to expand the knowledgeable employee definition to include a broader range of senior adviser employees.

IV. Pooled Investment Funds

We agree with the Commission's observations that investing through a pooled investment fund offers benefits to investors, including the ability to have an interest in a professionally managed diversified portfolio that can reduce risk relative to the risk of holding a security of a single issuer. With respect to sophisticated investors, we believe that the current exempt offering framework appropriately meets the objectives both of private funds and their investors. We would not recommend any course of action that would impose on private funds or their sophisticated investors a revised regulatory framework that increases the regulatory burden and ultimately the cost of capital for private funds and their investors.

We have consistently supported the longstanding exempt offering framework that distinguishes such offerings to sophisticated investors from offerings to retail investors.[14] To the extent the SEC recommends expanding opportunities for retail investors or registered investment funds to invest in exempt offerings, we encourage the Commission to implement such recommendations as a supplement to the existing exempt offering framework, to ensure that issuers and investors can choose to continue using existing rules that work for their business and investment needs. Further, any changes to expand the ability of registered investment companies to invest in exempt offerings should amend the rules applicable to registered funds rather than the rules applicable to exempt offerings. Set out below for the Commission's consideration is a discussion of potential ways to implement several of the concepts on which the Commission has requested comment, which we believe could achieve an appropriate balance between encouraging capital formation and investor access to exempt offerings, on the one hand, and preventing unnecessary increases to the regulatory burdens and cost of capital for private funds, on the other hand.

One potential area of review relates to the SEC staff's current position that only accredited investors may invest in registered closed-end funds that invest more than 15% of their assets in private funds. We understand that the Committee on Capital Markets Regulation[15] and other market participants have recommended that the SEC change this position of its staff to allow investors that do not qualify as accredited investors to invest in registered closed-end funds that invest more than 15% of their assets in

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[13] To the extent the SEC adopts MFA's prior recommendation that the definition of "accredited investor" include a "knowledgeable employee", the definition of "knowledgeable employee" could include any employee of the adviser who meets one or more of the qualifications as an accredited investor other than as a knowledgeable employee.

[14] Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, MFA, to Elizabeth M. Murphy, Secretary, SEC (Mar. 22, 2013), available at: https://www.managedfunds.org/wp-content/uploads/2013/03/MFA-Comments-on-JOBS-Act-Implementation-3-22-13.pdf

[15] Committee on Capital Markets Regulation, Expanding Opportunities for Investors and Retirees: Private Equity (Nov. 2018), at 38-41, available at: https://www.capmktsreg.org/wp-content/uploads/2018/10/Private-Equity-Report-FINAL-1.pdf.

private funds. This change would provide investors that do not qualify as accredited investors with indirect access to exempt offerings, including those made by private funds, which presents investors with the potential advantages of diversification and possibly superior returns. At the same time, investors in registered closed-end funds receive the protections provided by comprehensive regulation of such funds under the Investment Company Act, including the requirement to have oversight by independent directors, and such funds are also subject to extensive disclosure and reporting requirements under the federal securities laws, regarding, among other things, their investment objectives and policies, investments, fees and expenses. In addition, registered closed-end funds are required to be advised by an investment adviser registered under the Advisers Act. The SEC could further promote protection of investors by requiring that: (1) closed-end funds be subject to a diversification test at the time a new investment is made (*e.g.*, where no investment accounts for more than a specified percentage of the closed-end fund's net assets); (2) investment advisers to such closed-end funds are not permitted to delegate any of their duties under the Advisers Act to the underlying private fund advisers and the advisers to such closed-end funds, and not the underlying private fund advisers, retain overall responsibility for the closed-end funds' regulatory compliance.

Another proposal raised in the Concept Release, which has been previously recommended by the U.S. Department of Treasury,[16] is to ease restrictions on interval funds operating in reliance on Rule 23c-3 under the Investment Company Act in order to promote increased formation of such funds. Because of their limited redemption rights, interval funds can more easily invest in less liquid securities, including those issued by private companies in exempt offerings. More flexible provisions governing interval funds (such as permitting an interval fund to determine the length of its periodic interval) might encourage the formation of interval funds that invest in exempt offerings by smaller public companies and private companies, including private funds, in a manner that would promote capital formation and expand investor access to such offerings and the potential advantages of such investments. We believe this proposal is consistent with the appropriate protection of investors because interval funds are registered closed-end funds, which are subject to the comprehensive regulatory framework previously described.

We also understand that certain market participants have recommended that the SEC provide target date funds with additional flexibility to hold securities purchased in exempt offerings in their portfolios. As noted in the Concept Release, for "funds with target dates significantly far into the future, the intended holding period may be better aligned with the limited liquidity of securities from exempt offerings relative to other types of open-end funds where the intended investor holding period may be shorter."[17] If the SEC were to take steps to enable such target date funds to seek greater exposure to exempt offerings, participation in such offerings may become more accessible to a broader group of investors. For example, the SEC could consider increasing the limit on investments in illiquid securities from 15 percent for target date funds proportionate to the period of time until the target date, in recognition of their relatively stable investor bases. The SEC could also consider adopting an exemptive rule permitting such funds a longer period than the seven days specified for the payment of redemption proceeds in Section 22(e) of the Investment Company Act in special circumstances, such as when a target date fund is faced with an extraordinarily high level of redemptions calculated by reference to the higher illiquid securities limit. As noted in the Concept Release, nearly all target date funds are registered open-end funds, which are subject to comprehensive regulation and extensive disclosure and reporting requirements as discussed above.

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[16] U.S. Department of Treasury, A Financial System That Creates Economic Opportunities – Capital Markets (Oct. 2017), at 37, available at: https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

[17] Concept Release, at 184.

We appreciate the opportunity to provide these comments, and we look forward to continuing to provide what we hope will be useful and constructive comments on future Commission rulemakings. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Ben Allensworth (ballensworth@managedfunds.org) or Matthew Newell (mnewell@managedfunds.org) at MFA, or Jennifer Wood (jwood@aima.org) at AIMA.

Respectfully submitted,

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