No. 11-954

IN THE

Supreme Court of the United States

BULLDOG INVESTORS GENERAL PARTNERSHIP; OPPORTUNITY PARTNERS, L.P.; FULL VALUE PARTNERS, L.P.; OPPORTUNITY INCOME PLUS FUND, L.P.; KIMBALL & WINTHROP, INC.; FULL VALUE ADVISORS, LLC; SPAR ADVISORS, LLC; PHILLIP GOLDSTEIN; STEVEN SAMUELS; ANDREW DAKOS; AND RAJEEV DAS,

Petitioners,

v.

SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR PETITIONERS

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G St. N.W.
Suite 500
Washington, D.C. 20005
(202) 652-4511
jmassey@masseygail.com

LAURENCE H. TRIBE
Counsel of Record
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-1767
tribe@law.harvard.edu

Dated: April 16, 2012

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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REPLY BRIEF FOR PETITIONERS

Respondent William F. Galvin, Secretary of the Commonwealth (the Secretary), has filed a Brief in Opposition (BIO) contending that review is unnecessary in light of recent federal legislation narrowing the state's broad prophylactic ban on speech. BIO 3-6. To the contrary, the Jumpstart Our Business Startups Act (JOBS Act), Pub. L. 112-106, in no way reduces the need for plenary review on the first Question Presented and simply confirms that the state regulation at issue cannot possibly qualify as narrowly tailored to an important governmental interest.

Nor does the new law affect the second Question Presented regarding Internet personal jurisdiction. The Court should grant review to address the conflict among the lower courts on the issue and to make clear that a state may not exercise jurisdiction over an out-of-state party that maintains a website accessible to the general public and responds in an entirely truthful email to an inquiry initiated by a resident of the forum state – a response that does not lead to an economic transaction, much less causes any harm.

The amicus brief filed by the Cato Institute, *et al.*, attests to the broad national significance of this case. This Court's review is amply warranted.

I. THIS COURT SHOULD GRANT REVIEW OF THE IMPORTANT FIRST AMENDMENT QUESTIONS PRESENTED BY THE STATE'S BAN ON SPEECH.

A. Recent Federal Legislation Makes This Court's Review More Appropriate, Not Less.

The Secretary contends that the JOBS Act "resolves the issue underlying this case" because "Bulldog's main target in this case has been a *federal* regulation." BIO 3 (quoting title in part; emphasis in original). The Secretary is incorrect. As the Massachusetts Supreme Judicial Court (SJC) recognized, Bulldog has always challenged the constitutionality of Massachusetts regulations, under which it was punished with administrative penalties, including a $25,000 fine, and may be punished in the future. Pet. App. 14a.

Thus, the Secretary ultimately acknowledges that the JOBS Act does not moot this case. BIO 6 n.3. *See also Edgar v. MITE Corp.*, 457 U.S. 624, 630 & n.5 (1982) (possibility that party might be exposed to administrative penalties prevents case from being moot); *National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 393 n.4 (1976) (change in law does not moot case where administrative assessments were imposed under previous regulation).

In fact, while the Secretary suggests that Bulldog will be permitted to speak going forward under the JOBS Act, he simultaneously states that he intends to retain his harsh order, BIO 6 n.3, and will not exercise his power to modify or vacate his broad injunction or rescind the fine. The fact that

the Secretary will not consider altering his order confirms that he does not see this matter as moot.

The Secretary contends that the SEC should be a party to any proceeding that might have an impact on the federal counterpart to the Massachusetts law. BIO 28-29. That is an argument for requesting the views of the Solicitor General or inviting the United States to participate as an amicus, not for denying certiorari.

The Secretary's spin on the JOBS Act is that Congress, in adopting it, has changed its focus from protecting investors to jobs creation without affecting the validity of the SJC's analysis. BIO 10-11. That won't wash. The JOBS Act demonstrates that the political branches on the federal level have concluded that relaxing the ban on general solicitation will not harm investors. The Secretary sent a letter to Members of Congress urging them not to enact the JOBS Act (citing this very case to support his argument), and Congress rejected the Secretary's position. Supp. Pet. App. 1sa-9sa.

The Presidential Statement regarding the Act provides:

> The JOBS Act is a product of bipartisan cooperation, with the President and Congress working together to promote American entrepreneurship and innovation while maintaining important protections for American investors. It will help growing businesses access financing while maintaining investor protections . . . .[1]

[1] http://www.whitehouse.gov/the-press-office/2012/04/05/president-obama-sign-jumpstart-our-business-startups-jobs-act.

The House Report on the Act concludes that the measure will encourage investment "without compromising core investor protections or disclosures."[2] Thus, the JOBS Act is at odds with the justifications for the state ban on speech advanced by the Secretary in this Court.

At the same time, the JOBS Act does not fully redress the violations of the free speech rights of Bulldog and other hedge funds. Under previous law, an issuer relying on SEC Regulation D could offer or sell only to "[a]ccredited investors"[3] and to no more than thirty-five nonaccredited investors who have "such knowledge and experience in financial and business matters that [they are] capable of evaluating the merits and risks of the prospective investment." 17 C.F.R. §§ 230.501(e), 230.506(b)(2) (2010). The JOBS Act ends the ban on general solicitation or advertising in Regulation D offerings, but only if all the purchasers are accredited investors.[4] If a "sophisticated" but unaccredited investor makes a purchase, the fund could still be punished for engaging in general solicitation, even if the speech involved entails merely operating a

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[2] H.R. Rep. No. 112-406, available at http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp112w7Wus&r_n=hr406.112&dbname=cp112&hd_count=2&item=2&sel=DOC&.

[3] An "[a]ccredited investor" is defined to include, among others, banks, insurance companies, registered investment companies, registered broker-dealers, and natural persons with an individual net worth exceeding $1 million or with annual income exceeding $200,000. 17 C.F.R. § 230.501(a) (2010).

[4] The Secretary acknowledges this impact on free speech by noting that "Bulldog will be able to do what it has been seeking to do" "*provided that it shows compliance with the exemptions' other requirements.*" BIO 3 (emphasis added).

website. The right of free speech at issue here therefore remains incomplete even after the JOBS Act.

Hence, even if the Massachusetts regulations were to be changed to mirror federal law as amended by the JOBS Act, this Court's review would still be warranted to address the important First Amendment question presented.

B. The State's Orwellian Attempt To Label Its Ban On Speech A "Disclosure Rule" Warrants Review.

This Court's review is necessary to clarify the category of laws that are eligible for the "reasonable relationship" test of *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). The need for this Court's review is underscored by the Secretary's continued attempt to recast the state ban on speech as a "disclosure rule." BIO 9, 15, 18. In fact, the state law at issue is the *opposite* of a disclosure requirement – it flatly suppresses truthful speech in which consumers and non-consumers have an important interest, and it denies the public and press access to information published by issuers of unregistered securities, unless the speaker registers and subjects itself to an onerous licensing regime. Even the SJC did not say that the speech ban by itself was a disclosure requirement. Rather, the SJC opined that "the prohibition on speech at issue in this case is *incorporated into* a disclosure regime." Pet. App. 28a (italics added).

In every case cited by the Secretary supporting the application of *Zauderer*, the question was

whether a commercial speaker was required to disclose particular facts to a commercial audience. None of the cases cited involved the kind of registration or licensing scheme at stake here.

The Secretary suggests that registration is a trivial impediment to the freedom of speech, analogizing it to the requirement in *Zauderer* that a lawyer may not say in an ad that no fees will be charged unless the client prevails, without disclosing that the client would still be responsible for possibly substantial ancillary costs. BIO 18-19. According to the Secretary, "[a]ny restriction here is thus not 'outright' and 'flat,' but instead conditional and contingent, because one can 'disclose it away' at any time." BIO 17.

That argument ignores the elaborate and expensive nature of the registration scheme for hedge funds. The ban on speech does not disappear simply because a fund makes a disclosure or two. Rather, registration costs hundreds of thousands or even millions of dollars, subjects registrants (and their substantial shareholders) to ongoing burdensome filing requirements, and entails a plethora of other costly restrictions, many of which are not related to disclosure at all (such as the tender offer and proxy rules). The courts below acknowledged "the substantial costs" of registration. Pet. App. 37a (quoting the Superior Court). Congress and the President, in enacting the JOBS Act, recognized that the costs of registration pose a significant impediment to raising capital for smaller companies.

In *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), this Court invalidated a

licensing requirement for professional fundraisers as an unconstitutional burden on the freedom of speech. *Id.* at 801. The registration requirement for hedge funds is significantly more onerous.

Moreover, even if the state's ban on speech could be described as a "disclosure rule," this Court should grant review to decide whether the *Zauderer* test applies where the speech in question is conceded not to be misleading. The Secretary acknowledges that this Court has never applied *Zauderer* in such a context, BIO 12 ("the government goals advanced in each case were solely deception-related"), but he contends that the First, Second, Sixth, and D.C. Circuits have all expanded *Zauderer* to encompass disclosure requirements even where preventing deception is not the government's rationale for the mandated disclosure. BIO 13-15. Conspicuously, the Seventh and Eleventh Circuits have *not* applied *Zauderer* to such disclosure rules. Pet. 19.

The *sub silentio* expansion of *Zauderer* by some lower courts is a reason *in favor of* certiorari, not against it. The Secretary does not deny that this Court's decision in *Zauderer* was squarely focused on the governmental interest in preventing deception. 471 U.S. at 651-52. This Court recently reiterated the importance of that interest: "[t]he State nowhere contends that detailing is false or misleading within the meaning of this Court's First Amendment precedents." *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2672 (2011). To the extent some circuits but not others are applying the watered-down "reasonable relationship" standard of review to burdensome disclosure requirements that trench on First Amendment interests, this Court should grant certiorari. The Secretary's grounds for expanding

Zauderer (BIO 16-17) are merits arguments that only serve to bolster the need for certiorari.

C. This Court Should Grant Review To Address The SJC's Holdings With Respect To The *Central Hudson* Test.

The Secretary predictably describes the SJC's conflict with *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), as "fact-bound" questions. BIO 8. It does not. This case presents an ideal vehicle to apply the basic premises of the commercial speech doctrine to securities-related speech – a category of speech that the Petition shows has largely escaped this Court's attention. Pet. 25-29. Just as this Court used *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976), as a vehicle to reject the "highly paternalistic approach" that consumers should be "kept in ignorance," *id.* at 769-70, and *Edenfield v. Fane*, 507 U.S. 761 (1993), to reiterate that "[b]road prophylactic rules in the area of free expression are suspect," *id.* at 777 (citation and internal quotation marks omitted), this Court should grant review here to establish that *Central Hudson* applies with full force to securities-related speech. The Secretary's claim that the SJC "agreed with" Bulldog on this point (BIO 32) is belied by the SJC's holding, which paid lip service to the First Amendment but upheld an audience-based censorship regime (in which only wealthy members of the public are allowed to receive Bulldog's speech), relying on sheer speculation to satisfy the requirements of *Central Hudson*.

D. The Question Presented Is Not Based On "Mistaken Legal Premises."

The Secretary contends that the first Question Presented is based on "mistaken legal premises." BIO 21 (quoting heading). The Secretary is incorrect.

The Secretary first contends that Bulldog assumes that "federal law would preempt any state regulation of the sale of Bulldog's underlying securities." BIO 21. Bulldog makes no such assumption. Rather, Bulldog simply notes the SJC's acknowledgement that federal law precludes the state from directly achieving the goal of preventing the sale of unregistered securities, Pet. App. 40a n.19, which helps to underscore the pretextual nature of the Secretary's justifications for the ban on speech.

Next, the Secretary denies that the state maintains a "rich readers only" rule. BIO 24. However, the effect of the state law is exactly that. Bulldog is permitted to communicate with accredited and financially sophisticated investors who certify themselves as such, and with investors with whom Bulldog has a prior relationship so that it is aware of their financial situation. The *only* people to whom Bulldog is *not* permitted to supply the information in question are the very people who cannot act on it to buy securities, because Bulldog does not sell to them.

The Secretary also notes a separate Massachusetts exemption for "Internet Offers" (which he acknowledges is fraught with uncertainty), but that provision does not preclude certiorari. The Secretary admits that the hearing officer ruled that the provision did not apply here,

and that decision was affirmed in the proceedings below. BIO 30.

II. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THE PERSONAL JURISDICTION REQUIREMENTS FOR INTERNET "MINIMUM CONTACTS."

A. This Court Has Jurisdiction To Review The Second Question Presented.

The Secretary insists that the SJC's decision on the Fourteenth Amendment jurisdictional issue "became final" in 2010 and that the SJC in this case did not simply adopt the view of its prior decision on that issue. BIO 33. Even if the Secretary's argument were an accurate description of the decision below (which Bulldog denies), it would not affect this Court's jurisdiction to review the second Question Presented.

The Secretary does not deny that Bulldog pressed the Fourteenth Amendment jurisdictional issue below, and the SJC's decision acknowledges that fact. Pet. App. 4a n.4; *see also* BIO App. 22b-23b (letter to the SJC by the Secretary addressing the personal jurisdiction issue). Even if Bulldog could have sought review of the issue in the prior proceeding in 2010, it has preserved its right to seek review of the federal question now, because it raised the issue in the SJC below in this case. The "pressed or pass on" rule "operates (as it is phrased) in the disjunctive." *United States v. Williams*, 504 U.S. 36, 41 (1992). A federal question is properly before this Court so long as it was either pressed or passed on below. *See, e.g.*, *McGoldrick v. Compagnie Generale*,

309 U.S. 430, 435-36 (1940); *State Farm Mutual Insurance Co. v. Duel*, 324 U.S. 154, 160 (1945).

The Secretary contends that the SJC's decision on the jurisdictional issue rested on res judicata rather than adoption of the prior 2010 decision, or a simple unwillingness to address the Fourteenth Amendment issue. BIO 33. The Secretary further maintains that "Massachusetts claim-preclusion principles provided an independent state-law basis for rejecting the personal-jurisdiction claim the second time around." BIO 33. However, the record of the two cases is different. For example, the instant case includes the stipulation that Bulldog's communication did not concern the unlawful sale of unregistered securities, while the 2010 appeal lacked such a stipulation. The SJC did not cite any Massachusetts claim-preclusion cases or principles in its decision. Pet. App. 4a n.4.

Nor can the Secretary's position be squared with *Michigan v. Long*, 463 U.S. 1032 (1983), which established a presumption in favor of Supreme Court review unless the state court indicates, "clearly and expressly" by "a plain statement in its judgment or opinion," that its decision rests solely on state law. *Id.* at 1041. The Massachusetts decision contains no such "plain statement."

B. This Case Is An Ideal Vehicle To Address The Issue of Internet "Minimum Contacts."

The Secretary admits that "personal-jurisdiction issues related to the Internet are in reality varied and complex, as the smorgasbord of cases cited by Bulldog well demonstrates." BIO 34. This Court's guidance is necessary to bring order to this chaos,

which has resulted in a crazy-quilt of lower court decisions applying different legal standards and reaching conflicting results. Pet. 31-37. The Secretary barely acknowledges the kaleidoscope of cases, the recognition of circuit conflicts, and the call for this Court's intervention. The Secretary does not cite *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780, 2793-94 (2011), where Justice Breyer, joined in a concurring opinion by Justice Alito, indicated the need for the Court to address the question. Nor does the Secretary address the plight of companies doing business on the Web, which cannot predict when and where they will be haled into remote jurisdictions based on the most tenuous connections.

The Secretary contends that the instant case is distinctive, because it involves not simply a "website standing alone, but instead . . . the combination of the website and the Hickey email." BIO 35. But the Secretary ignores the multitude of cases cited in the Petition that involve websites *plus* further online communications between the parties, including emails. Pet. 33 (citing *Metcalf v. Lawson*, 802 A.2d 1221, 1227 (N.H. 2002)), 34-36 (citing numerous cases). The SJC's extension of personal jurisdiction in this case cannot be reconciled with these authorities.

The Secretary contends that the SJC's jurisdictional ruling was correct. BIO 35-36. But that is not an argument against review. If the Secretary believes that a single email responding to an inquiry initiated from within the forum state containing no information specific to that state, let alone harming any resident, is sufficient for jurisdiction, then the Secretary should support

certiorari so that this Court may announce that rule as the governing national standard. In fact, the jurisdictional contacts here are much less substantial than those deemed constitutionally inadequate in *Nicastro*. *See* 131 S.Ct. at 2791 (plurality) (defendant company did not engage in conduct purposefully directed at New Jersey even though its products ended up in that state and allegedly caused injury there because "at no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws").

Given the conflict and confusion in the lower courts with respect to Internet "minimum contacts," this Court's review is necessary to establish greater uniformity and certainty in this important area.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G St. N.W.
Suite 500
Washington, D.C. 20005
(202) 652-4511
jmassey@masseygail.com

LAURENCE H. TRIBE
Counsel of Record
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-1767
tribe@law.harvard.edu

Dated: April 16, 2012

SUPPLEMENTAL APPENDIX

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The Commonwealth of Massachusetts
Secretary of the Commonwealth
State House, Boston, Massachusetts 02133

October 2, 2011

The Honorable Spencer Bachus
Chairman
House Financial Services Committee
Washington, DC 20515

The Honorable Barney Frank
Ranking Member
House Financial Services Committee
Washington, DC 20515

The Honorable Scott Garrett
Chairman
Capital Markets and Government-
Sponsored Enterprises Subcommittee
Washington, DC 20515

The Honorable Maxine Waters
Ranking Member
Capital Markets and Government-
Sponsored Enterprises Subcommittee
Washington, DC 20515

Re: H.R. 2930 – "Entrepreneur Access to Capital Act of 2011"
H.R. 2940 -- "Access to Capital for Job Creators Act of 2011"

Dear Chairman Bachus, Ranking Member Frank, Subcommittee Chairman Garrett, and Subcommittee Ranking Member Waters:

I am writing in my capacity as chief securities regulator for Massachusetts to oppose H.R. 2930, the Entrepreneur Access to Capital Act of 2011 and H.R. 2940, the Access to Capital for Job Creators Act of 2011. Both of these bills, as currently drafted, would undermine or remove crucial investor protections that safeguard both investors and the securities market from fraud and manipulation. I urge you to oppose them as well.

As a regulator, I am cognizant of the need to balance investor protection with the needs of businesses to raise capital. However, I urge the Subcommittee and the Committee in their deliberations to take into account the recent and ongoing crises in the financial markets. These crises are directly attributable [*sic*] failures by issuers and sellers of high-risk securities to fully disclose the conflicts of interests and risks related to those securities. Proposals like these, which would radically deregulate the existing system of investor protection laws, will not be a remedy for the current weak economy. Instead, such proposals will put more investors at risk and undermine confidence in the markets in a time of uncertainty.

Entrepreneur Access to Capital Act of 2011 (H.R. 2920)

H.R. 2930 would create a new exemption for crowdfunding offerings, which have principally been made over the Internet. The proposed exemption is

tied to high financial thresholds, permitting a total offering amount up to $5 million and maximum commitment per investor up to $10,000 (not to exceed 10% of the investor's annual income). The bill provides that offers under this exemption would be federal "covered securities" under the '33 Act, for which state registration and review would be preempted.

The new exemption proposed in H.R. 2930 would permit large unregistered public offerings. Fraudulent or unsound offerings sold under this proposed exemption could have a serious detrimental impact on the markets. Similarly, allowing investors to invest up to $10,000 in a crowdfunded offering has the potential to expose individual investors to catastrophic financial harm. We note that typical U.S. households have accumulated only modest savings,[1] so a loss of $10,000 or 10% of an investor's annual income will in many cases be financially crippling.

The parameters of the exemption proposed in this bill extend radically beyond what the advocates of crowdfunding requested in a 2010 regulatory petition to the SEC for a crowdfunding exemption rule.[2] The crowdfunding concept is appealing to

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[1] According to the Employee Benefits Research Institute's 2009 Retirement Confidence Survey, 53% of workers in the U.S. have less than $25,000 in total savings and investments. http://www.ebri.org/files/FS-03_RCS09_Saving.FINAL.pdf.

[2] Public Petition for Rulemaking to the Securities and Exchange Commission: Sustainable Economies Law Center, Petition 4-605, July 1, 2010 (Petition for a crowdfunding exemption from securities regulation for offerings up to

many because it would allow smaller scale enterprises, particularly creative enterprises, to attract grassroots support from a broad base of investors, each of whom would put in a limited amount of capital. The Internet and websites like Kickstarter have made it feasible for such enterprises and their potential backers to find each other in sufficient numbers to finance new projects.

The offering size and the investment amount permitted under H.R. 2930 are so large that the bill goes beyond crowdfunding as that term has typically been understood. Because the exemption permitted under H.R. 2930 is substantially deregulated, we can expect the sponsors of fraudulent penny stock and private placement offerings to be attracted to, and to take full advantage of, this new exemption.

We urge that instead of adopting such a sweeping crowdfunding bill, the Congress should allow the SEC to consider and create a crowdfunding exemption by rule. Such an exemption could be designed to meet the needs of the grass roots entrepreneurs, *and* to include safeguards and limits that will make the exemption unattractive to fraud operators. We believe that the SEC has the knowledge and expertise to create a properly tailored rule that would address such factors as maximum offering size, investment amount, potential investor qualification, general disclosure requirements, risk disclosure, and potential liquidity of these securities. The states would be able to have meaningful input into the SEC's rule adoption process by providing

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$100,000 with $100 maximum per investor). http://www.sec.gov/rules/petitions/2010/petn4-605.pdf.

comments and entering into a dialog with the Commission about the best way to construct the exemption.

Access to Capital for Job Creators Act of 2011 (H.R. 2940)

H.R. 2940 would direct the SEC to remove from Rule 506 of Regulation D the current prohibition on the use of general solicitation in non-public offerings under that rule. The ban on general solicitation reflects the requirement in Section 4(2) of the Securities Act of 1933 that transactions not involving a public offering may be exempt from the securities registration requirement.

The requirement that non-public offerings must be sold without general solicitation is sound and appropriate policy, because it upholds the requirements under U.S. securities laws that public securities offerings must be registered, and that investors in public offerings must receive a prospectus. The current general solicitation ban creates a clear demarcation between private placements (which must be offered in a non-public manner) and registered public offerings.

The Massachusetts Supreme Judicial Court recently rendered a unanimous decision in a case that challenged the ban on general solicitation in private placements based on arguments that the ban violated a hedge fund's free speech rights.[3] In *Bulldog Investors v. Secretary of the Commonwealth*, the Court unanimously upheld the

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[3] *Bulldog Investors General Partnership & others v. Secretary of the Commonwealth*, Mass. SJC-10756, Sept. 22, 2011.

validity of a ban on the [*sic*] general solicitation, since the hedge fund at issue was selling its securities pursuant to an exemption from securities regulation for non-public offerings.

In *Bulldog*, the Supreme Judicial Court quoted and adopted language from the trial court's decision that specifically addressed how the ban on general solicitation in private placements upholds the statutory system requiring the registration of public offerings:

"*'The ban on general advertising of unregistered securities ... provides a powerful incentive for issuers to register, despite the substantial costs of doing so, thereby maximizing the benefits of the registration system to the public as a whole; ... it is vital to the effectiveness of the registration system.'*"

"*We adopt these findings [of the trial court, quoted above] and agree that the public filing of a registration statement provides the best assurance that investors in publicly offered securities will make decisions based on full and accurate information.* We also consider compelling the expert's conclusion that *the registration system's ability to promote well-informed markets would be compromised if unregistered securities could be widely advertised using incomplete information selected by the issuer.*" (emphasis added)

H.R. 2940 proposes to place limits on Rule 506 offerings only at the point of sale, by limiting sales only to accredited investors. This approach would allow issuers and promoters of Rule 506 offerings to disseminate distortive publicity to the market to generate investor interest in their offerings.

Because the bill provides no regulatory oversight over how those offerings are publicized, it will create a Wild West environment where the worst sales practices will flourish. We have already seen this type of hype in the sale of hot IPOs and penny stock offerings, and we reasonably foresee that, if this bill is adopted, such public hype will extend to offerings that previously had been structured as private placements.

The ban on general solicitation in private placements protects both investors and markets. Cases and textbooks are replete with examples of stock promoters that have drummed up demand for their offerings through publicity, widely circulated rumors, and aggressive marketing. Because securities are complex and intangible property, retail investors are especially vulnerable to such publicity and hype.

The system of registration and full, fair disclosure has been the first line of defense against fraud under the U.S. securities laws. This registration system also provides for regulatory oversight over offerings, and provides investors with the right to recover their losses from fraudulent offerings. These protections should be upheld and reinforced.

The Court in *Bulldog* clearly addressed the fundamental policy considerations raised by Bulldog Investors' court challenge to the long-established rules for private placements:

"Finally, we recognize that a measure of judicial restraint is appropriate where a court is asked to intrude on a system of securities regulation that has

served the nation and this Commonwealth well since 1933, and to cut a stitch in the patchwork of regulatory enforcement that risks its unraveling and predictably will diminish its effectiveness. If any reminder was needed, the financial collapse in the autumn of 2008 that led to our persistent recession illustrates the extent to which unregulated and poorly regulated securities have the potential to become "financial weapons of mass destruction." The Great Derivatives Smackdown, Forbes, May 9, 2003, quoting Warren Buffett's Annual Letter to Shareholder of Berkshire Hathaway (March 8, 2003).

Since 2008, we have seen financial markets go into freefall, and we are now living through a time of extreme market uncertainty. Many investors and savers, in the exercise of caution, have simply left the markets. Now is not the time to radically undercut the securities laws that made the U.S. securities markets the envy of the world for many decades. Instead, we should be working to support the fundamental purposes of the securities laws: to protect markets and market participants through registration and disclosure. I urge the Committee and Subcommittee to protect U.S. markets and investors by rejecting H.R. 2930 and H.R. 2940 as they are now constituted.

Thank you for this opportunity to address these vitally important issues. Please contact me or Bryan J. Lantagne, Director of the Massachusetts Securities Division at (617) 727-3548 if you have questions or I can assist in any way.

Sincerely,

William F. Galvin
Secretary of the Commonwealth
Commonwealth of Massachusetts