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VIA E-MAIL: rule-comments@sec.gov

Ms. Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets
File Number S7-05-20

Dear Ms. Countryman:

We are grateful for the opportunity to comment on the above-captioned release (the "Proposing Release") of the Securities and Exchange Commission (the "Commission") proposing revisions to certain aspects of the exempt offering framework. We agree with the Commission that the proposed revisions would simplify, harmonize and improve the exempt offering framework and would thereby promote capital formation while preserving investor protections.

In response to the Commission's specific requests for comment, we are providing for consideration by the Commission our suggestions for ways in which the proposed revisions could be further improved. These suggestions relate to certain aspects of the proposed harmonized integration rules and proposed changes to Regulation S.

Capitalized terms used and not otherwise defined in this letter have the meanings assigned to them in the Proposing Release.

Integration

We commend the Commission and its staff for the thoughtful and comprehensive proposal to harmonize, streamline and modernize the rules and guidance regarding integration among different exempt offerings and between exempt offerings and registered offerings. In particular, we support

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the proposed concept of a uniform 30-day integration safe harbor and share the Commission's belief that in today's information dissemination and consumption environment, a 30-day time frame is sufficient to mitigate concerns that an exempt offering may condition the market for a subsequent registered offering or undermine the protections of a subsequent exempt offering. We therefore agree that a 30-day cooling-off period is appropriate today. We believe, however, that certain of the additional conditions to reliance on the 30-day safe harbor that the Proposing Release contains add complexity to the application of the safe harbor, but are not necessary for investor protection. We respectfully recommend that these additional conditions, as described in this letter, not be adopted.

The following chart summarizes, in simplified form, the conditions applicable under the Proposing Release to the proposed integration safe harbor in Rule 152(b) depending on the type of prior offering and subsequent offering involved:

Integration Safe Harbors

	Subsequent Offering		
Prior Offering	***Registered***	***Exempt, permits general solicitation***	***Exempt, does not permit general solicitation***
Registered	n/a	No conditions	More than 30 days after termination or completion of prior offering and Purchasers (i) were not solicited through general solicitation or (ii) established a substantive prior relationship with the issuer
Exempt, permits general solicitation	Prior offering made only to QIBs and IAIs or More than 30 days after termination or completion of prior offering		
Exempt, does not permit general solicitation	No conditions		

Subsequent Exempt Offering Without General Solicitation

The general principle of integration in proposed Rule 152(a), which builds on the Commission's prior integration guidance from 2007, provides that exempt offerings for which general solicitation is not permitted will not be integrated with other offerings if the issuer has a reasonable belief that one of two alternative conditions is satisfied: either that the purchasers in the exempt offering were not solicited through the use of general solicitation, or that the purchasers in the exempt offering had a pre-existing substantive relationship with the issuer (or person acting on the issuer's behalf).

Proposed Rule 152(b)(1) provides a safe harbor for any kind of subsequent offering made under an exemption for which general solicitation is not permitted only if more than 30 days have passed after the termination of the prior offering and if one of two alternative conditions is satisfied. These

are either that the purchasers in the subsequent offerings were not solicited through the use of general solicitation (the non-solicitation condition) or that the purchasers in the subsequent offering had established a substantive relationship with the issuer prior to the commencement of the subsequent offering (the pre-existing relationship condition).

If one of those alternative conditions were satisfied, the issuer would by definition have already satisfied the requirements of the general principle of integration in Rule 152(a), so it would not need to satisfy the 30-day period. In fact, as proposed, these non-solicitation and pre-existing relationship conditions to the availability of the 30-day safe harbor are stricter than the corresponding requirements in the general principle of integration. Under the general principle of integration, there is no integration if an issuer has a "reasonable belief" regarding the satisfaction of the corresponding conditions. The non-solicitation and pre-existing relationship conditions to the 30-day safe harbor do not have a similar reasonable belief standard. Also, the general principle of integration permits the pre-existing relationship requirement to be satisfied through a pre-existing relationship with a person acting on the issuer's behalf (such as a financial intermediary), while the corresponding condition in the 30-day safe harbor requires that the pre-existing relationship be with the issuer itself.

We understand that the 30-day safe harbor and the other proposed safe harbors are intended to be non-exclusive, which would allow an issuer to always rely on the general principle of integration where the terms of the safe harbor are too restrictive or not applicable to the facts and circumstances. However, we are concerned that market participants will, as we have seen with other non-exclusive safe harbors, demand compliance with the safe harbor, which will leave the general principle only used as a last resort. We are of the view that if the issuer has a reasonable belief, based on the facts and circumstances, that purchasers in an exempt offering for which general solicitation is not permitted were either not solicited through general solicitation or had a pre-existing relationship with the issuer or person acting on its behalf, it should be able to rely on the general principle without having to wait 30 calendar days from the termination of the prior offering. This is consistent with the 2007 integration guidance and with the other statements in the Proposing Release.

We also believe that subsequent exempt offerings made in reliance on an exemption that does not permit general solicitation, and in compliance with the 30-calendar day cooling-off period of the corresponding safe harbor, should not have to also comply with independent non-solicitation and pre-existing relationship conditions to have the benefit of a safe harbor. An issuer would still need to comply with the exemption relied upon in connection with the subsequent offering, but not as part of the integration analysis. As the Commission stated in the Proposing Release, it is likely that "the effects of any offers made more than 30 days prior to or after the commencement of another offering would be sufficiently diluted by intervening market developments so as to render an integration analysis unnecessary."[1] We respectfully suggest that it would be consistent with that position to eliminate the non-solicitation and pre-existing relationship conditions to the 30-

[1] Proposing Release at 39.

day safe harbor for exempt offerings without general solicitation. That could be accomplished simply be deleting the proviso at the end of proposed Rule 152(b)(1).

Shelf Registration Statements

In order to rely on the 30-day safe harbor, the subsequent offering must have been made more than 30 days after the termination or completion of the prior offering. For purposes of the 30-day safe harbor, a registered offering would be deemed terminated or completed upon: (i) the withdrawal of the registration statement once approved by the Commission under Rule 477, (ii) the filing of an amendment to the registration statement indicating that the offering has been terminated or completed and the deregistering of any unsold securities if required, (iii) entry of a Commission order under Rule 479 declaring the abandonment of the registration statement, or (iv) the expiration of the three-year life of a shelf registration statement under Rule 415(a)(5). Implicit in that definition is also that for purposes of the 30-day safe harbor a registered offering is deemed commenced with the filing of the registration statement.

We are concerned that this definition of when a registered offering will be deemed commenced and when it will be deemed terminated or completed will make the 30-day safe harbor effectively unavailable for the large number of public companies with shelf registration statements. In the past three years, 3,697 Form S-3 registration statements were filed by domestic issuers and 405 Form F-3 registration statements by foreign private issuers.[2] Shelf registration is a critical part of capital formation for seasoned public companies because it affords access to funding in the public markets on short notice while maintaining necessary investor protections.

In order to take advantage of the 30-day safe harbor in connection with exempt offerings that do not permit general solicitation, issuers with an effective shelf registration statement would need first to terminate their shelf registration statement and then wait 30 days prior to commencing offering activities for the exempt offering. Companies that are engaged in such an exempt offering would also need to postpone the filing of new shelf registration statements in order to keep the safe harbor available. For a number of reasons, this would be impracticable. Terminating an existing shelf registration statement would risk confusing the market with unintended signals and, in the case of primary shelf registration statements for non-WKSI issuers, would also deprive the issuer of the ready access to public market funding that shelf registration affords. The issuer may also be contractually required to file or maintain these shelf registration statements, such as in the case of resale registration statements filed pursuant to registration rights granted to security holders or in the case of registration statements covering the exercise of outstanding warrants or the conversion of convertible or exchangeable securities where Section 3(a)(9) is not available.

In the context of shelf registration, tying the start of the 30-day cooling-off period to the termination of the registration statement would be burdensome for issuers and would not provide any incremental protections for investors. In our experience, companies routinely file and maintain shelf registration statements to have the flexibility to access the public market quickly depending

[2] Based on data from Lexis Securities Mosaic at the end of May 2020. These numbers exclude amendments.

on funding needs and favorable market conditions or to comply with contractual obligations. The mere filing or existence of a shelf registration statement, without any actual offering activity, is unlikely to meaningfully condition the market for a subsequent exempt offering.

We therefore respectfully suggest that in the case of shelf registration statements on Forms S-3 or F-3, the relevant registered offering be deemed commenced with the commencement of public efforts to sell the issuer's securities and be deemed terminated or completed when the distribution of the registered securities has been completed or public efforts to sell the issuer's securities in the proposed registered offering have been abandoned. We believe the Commission should consider the following in connection with when an offering has been commenced, completed or abandoned:

- The commencement of those public selling efforts could be determined, in the case of underwritten offerings, by the public filing of the preliminary prospectus supplement or the issuance of a related press release, and in the case of at-the-market offerings, the public filing of the related prospectus. We do not believe that confidential communications with QIBs or IAIs, including those that would qualify for Rule 163B, should be considered public selling efforts for this purpose.

- The completion of the distribution could be determined, for example, by reference to the completion of the distribution within the meaning of Regulation M under the Exchange Act.

- The abandonment of public selling efforts could be documented by the filing of a Current Report on Form 8-K or the issuance of a widely disseminated press release informing the market about the termination of that particular takedown under the shelf. We do not believe, however, that this should be an absolute requirement. The important fact for this purpose should be that the issuer has ceased public activities in furtherance of the proposed registered offering through a determination made by management and/or its Board, which is evidenced by actions that reflect that decision.

In addition, we believe that resale registration statements and prospectus supplements allowing continuous sales by selling stockholders through brokers and dealers without special selling efforts or methods should never be integrated with a subsequent exempt offering. The same should be true for registration statements and prospectus supplements covering the exercise of outstanding warrants or the conversion of convertible or exchangeable securities.

We would also recommend that the final rules or the adopting release make it clear that the mere filing or existence of a shelf registration statement on Forms S-3 or F-3 would not be deemed to constitute the commencement or continuation of a registered offering that would preclude reliance on the 30-day safe harbor for exempt offerings.

Proposed Changes to Regulation S

We welcome the proposed codification of the long-standing Commission position that offshore offerings made in compliance with Regulation S will not be integrated with registered domestic offerings or exempt domestic offerings. We believe that including this in the text of the rule will enhance legal certainty and promote more efficient capital raising. We are concerned, however, about the proposed changes to Regulation S itself, as well as the accompanying Commission interpretive statement in the Proposing Release about the treatment of general solicitation as directed selling efforts. If these changes to Regulation S are adopted, they could have wide-ranging negative implications for capital formation, and if the interpretive statement is affirmed, it would represent a significant break with long-standing Commission guidance and practice. Overall, we do not believe there is a compelling investor protection-focused need for these changes, and we respectfully submit that the Commission reconsider their adoption and clarify the intended meaning of the interpretive statement.

Wide-Ranging Implications of Proposed Textual Changes

The proposed textual changes to Regulation S carve out from the definition of "directed selling efforts" any offering activity in exempt offerings that involves general solicitation or general advertising, but only as long as such activity is not undertaken for the purpose of conditioning the U.S. market for the securities being offered in the offshore offering.[3] Reliance on this carve-out would not only require the issuer and the distributors to demonstrate that the general solicitation was not undertaken for the "purpose" of conditioning the U.S. market for the securities placed offshore—a burden that may be difficult to meet because it would require evidence of intent—but it would also impose a new six-month distribution compliance period for those securities sold outside the United States. This would be a distribution compliance period that applies regardless of the level of U.S. market interest in the issuer's securities and the corresponding issuer category under Regulation S.

These changes to Regulation S could have wide-ranging negative implications for capital formation that affect both domestic and foreign issuers. We see this most starkly in the Rule 144A market. In our experience, most offerings conducted under Rule 144A include a concurrent offshore placement under Regulation S. If offers that rely on the JOBS Act-instituted communication flexibility for Rule 144A offerings are presumed to constitute directed selling efforts that trigger a six-month distribution compliance period, the changes to Regulation S are tantamount to denying issuers the benefits of that flexibility. Issuers wanting to rely on the greater communication flexibility afforded by the JOBS Act in their exempt capital raising in the United States would in many cases have to forego the concurrent offshore offering. Imposing a distribution compliance period is often not practicable because it prevents the new securities being issued in the offering from being fungible with the existing public float in the home market for the duration of the period.

[3] Proposed Rule 902(c)(3)(ix).

We are also not aware of abuses seeking to circumvent the registration requirements of the Securities Act through directed selling efforts to U.S. retail investors to generate interest for offshore offerings under the guise of general solicitation activities for an exempt domestic offering. In our experience with offerings by foreign issuers, the communication liberalization for exempt domestic offerings introduced by the JOBS Act has primarily been a welcome relief from concerns about "foot faults" created by inadvertent communications to non-QIB investors.

Equating General Solicitation With Directed Selling Efforts

The Proposing Release explains the proposed changes to Regulation S as being motivated by potential "uncertainty among market participants about whether it is possible to conduct concurrent Regulation S and Rule 506(c) offerings." The release mentions that this is the case "particularly when the offerings are conducted using the internet," and notes uncertainty about "how to comply with the requirement that separate offering materials be used in each offering."[4]

The Proposing Release goes on to state that the "general solicitation activity would likely be deemed directed selling efforts" under the current definition of that term in Regulation S.[5] The absence of directed selling efforts is a condition to the availability of Regulation S for all categories of issuers. The conclusion that general solicitation is likely to be deemed directed selling efforts effectively precludes combining an exempt offering that permits general solicitation with a contemporaneous offshore offering under Regulation S and undermines a fundamental pillar of current capital formation practice.

We have not experienced significant uncertainty in determining the absence or presence of directed selling efforts in connection with exempt offerings permitting general solicitation. We believe that equating general solicitation with directed selling efforts would, if affirmed, represent a significant departure from long-standing Commission guidance and practice. We also respectfully submit that equating general solicitation with directed selling efforts misapplies existing Commission positions and long-established practice. We base these views on the following considerations:

- In our experience, complying with the prohibition against directed selling efforts in connection with an offshore offering while also taking advantage of the communication flexibility afforded by the JOBS Act for a concurrent exempt domestic offering has not posed problems or a lack of certainty for market participants. Issuers and their advisers need to analyze whether communications in the United States and any other activity in connection with the exempt offering constitute directed selling efforts for the offshore offering. Decades of experience with Regulation S and existing interpretive guidance from the Commission[6] has helped inform the analyses made in this regard. We recognize that

[4] Proposing Release at 47-48.

[5] Proposing Release at 48 (quotation marks omitted).

[6] Release No. 33-7516, Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transaction or Advertise Investment Services Offshore (March 23, 1998).

there may be instances where these analyses become more challenging, such as for securities where internet-based marketing is more prevalent. However, we do not believe that this is representative for the capital markets at large or can justify the negative consequences that the adoption of such an interpretive position could trigger for the majority of corporate issuers.

- We also disagree with the assessment that general solicitation activity for exempt domestic offerings would likely constitute directed selling efforts that would preclude reliance on Regulation S for concurrent offshore offerings. This would represent a significant departure from prior Commission statements and practice. In its 1990 adopting release for Regulation S, the Commission made it clear that legitimate selling activities carried out in the United States in connection with a registered or exempt offering would not constitute directed selling efforts with respect to a concurrent offshore placement under Regulation S.[7] While general solicitation was then not permitted under Rule 506 or Rule 144A, registered offerings themselves of course have always involved a broad solicitation of the investing public in the United States that has never been viewed as, in and of itself, affecting the availability of Regulation S for concurrent offshore offers and sales.[8]

  The Commission reaffirmed this long-standing position in response to questions raised in connection with the JOBS Act's mandate to permit the use of general solicitation in transactions under Rules 506 and 144A. Those questions related to how general solicitation would affect the availability of Regulation S for concurrent offerings outside the United States, including whether the then newly permitted offering activities under Rules 506(c) and 144A would constitute directed selling efforts. The Commission responded that concurrent offshore offerings under Regulation S would not be integrated with domestic unregistered offerings conducted in compliance with Rule 506 or Rule 144A also following the JOBS Act-mandated amendments.[9] While that statement was not expressly framed as an interpretation of the term "directed selling efforts," the context in which it was made indicated that it was intended to reassure market participants that the general solicitation for a Rule 506(c) or Rule 144A offering would not affect the availability of Regulation S for concurrent offshore transactions.

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[7] Release No. 33-6863, Offshore Offers and Sales (April 24, 1990), text accompanying n.64.

[8] Since the adoption of Securities Offering Reform in 2005, such permitted broad solicitation for registered offerings is no longer limited to oral communications, limited content press releases and the distribution of the statutory prospectus. Other written materials may now also be used as free writing prospectuses as long as they do not conflict with the prospectus and are legended and filed as required.

[9] Release No. 33-9415, Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings (July 10, 2013), text accompanying n.174 through 177. A similar statement was already included in the proposing release for the JOBS Act-mandated changes to Rule 506 and Rule 144A. See Release No. 33-9354 (August 29, 2012) at n.97 through 106 (including, among other things, discussion of comments with respect to the definition of directed selling efforts).

- We view general solicitation as a separate and distinct concept that should not simply be equated with directed selling efforts and *vice versa*. Whether activity undertaken under cover of general solicitation for an exempt domestic transaction should be recharacterized as directed selling efforts for securities offered and sold offshore depends on the facts and circumstances. Marketing activities for a domestic offering that make it clear that only qualifying U.S. investors can participate should not be deemed "undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities [being offered offshore]."[10] If, however, it is really the foreign offering that is being marketed to U.S. investors through these activities (for example, if the offering materials were to contain information about how U.S. investors could obtain the securities offshore), that could change the analysis. In assessing the conditioning effect that communications can reasonably be expected to have on the U.S. market for the securities being offered offshore, it also seems appropriate to take into account the level of U.S. market interest in the issuer's securities and the flowback and other restrictions imposed by the various categories of Regulation S.

We believe that an interpretive position that appears to equate general solicitation with directed selling efforts would, if affirmed or not clarified, have negative implications for capital formation similar to those associated with the proposed textual changes to Regulation S discussed above. Even if the proposed textual changes were not adopted, but the Commission affirmed (or failed to clarify) this interpretive position, it would leave issuers facing a similar choice between utilizing the communication flexibility under the JOBS Act and retaining the availability of the Regulation S safe harbor.

Conclusion With Respect to Regulation S

We therefore respectfully submit that the proposed textual changes to Regulation S not be adopted and that the Commission clarify its interpretive position regarding the differences between general solicitation and directed selling efforts along the lines of the discussion above.

If the Commission continues to feel the need for regulatory action in this area, we respectfully submit that any of the proposed changes to Regulation S and the related interpretive position be expressly limited to transactions where the domestic exempt offering is governed by Rule 506(c) and that they not encompass transactions under Rule 144A or otherwise limited to QIB purchasers.

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[10] Rule 902(c)(1).

We welcome the opportunity to discuss our comments as well as to answer any questions the Commission or it staff may have in connection with this letter. Any questions may be directed to Richard Alsop, Harald Halbhuber, Lona Nallengara or Antonia Stolper of Shearman & Sterling LLP at [redacted].

Very truly yours,

Shearman & Sterling LLP