Institute for Portfolio Alternatives

June 25, 2020

VIA ELECTRONIC DELIVERY

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

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

Dear Ms. Countryman:

The Institute for Portfolio Alternatives ("IPA") is pleased to submit this letter in response to the request by the U.S. Securities and Exchange Commission (the "Commission") for comments regarding the above-referenced rulemaking proposal (the "Proposal"). The IPA commends the Commission for continuing to propose solutions to improve the consistency, accessibility, and effectiveness of the exempt offering framework, while maintaining investor protections.

For over 30 years the IPA has raised awareness of portfolio diversifying investment products among stakeholders and market participants, including investment professionals, policymakers and the investing public. We support increased access to investment strategies with low correlation to the equity markets, including net asset value real estate investment trusts ("REITs"), lifecycle REITs, business development companies, interval funds and direct participation programs. IPA member firms support individual investor access to a wide variety of asset classes that have historically been available only to institutional investors. These investment products have been held in the accounts of more than 3 million individual investors. With over $135 billion in capital investments, they remain a critical component of an effectively balanced investment portfolio and serve an essential capital formation function for national, state and local economies. Through advocacy and industry-leading education, the IPA is committed to ensuring that all investors have access to real assets and the opportunity to effectively balance and diversify their investment portfolios.

The IPA appreciates the Commission's consideration of public comments and submits the following.

Integration

1. The IPA supports the Commission's proposal to create one broadly applicable rule to clarify the ability of issuers to engage in contemporaneous or close-in-time transactions under independent exemptions or pursuant to an effective registration statement. We believe consistency and clarity on the Commission's prior statements and guidance is important for market participants.

2. The Proposal has identified an Integration Principle which includes a "General Principle of Integration." The General Principle of Integration provides that offerings not covered by a safe harbor will not be integrated if, based on the particular facts and circumstances, the issuer can demonstrate that an exemption from registration is available for each offering. The Proposal indicates that proposed Rule 152(a)(2) would codify the ability to engage in a concurrent offering that allows general solicitation and one that prohibits general solicitation (such as Rule 506(b) and Rule 506(c)). The problem is that both the Proposal (second paragraph under "Integration with Exempt Offering for which General Solicitation is not Permitted") and proposed Rule 152(a)(1) state that the issuer must have a reasonable belief, based on the facts and circumstances, that the purchasers in "each" exempt offering were not solicited through the use of general solicitation. The language should be revised so that it is clear that the requirement is not applicable to "each exempt offering" but to "each exempt offering that prohibits the use of general solicitation." Without this change, the general solicitation provisions of Rule 506(c) are unavailable in concurrent offerings.

3. The issuer is required to have, based on the facts and circumstances, a reasonable belief that the investors in a Rule 506(b) offering were not solicited through the use of general solicitation. The issuer should be able to satisfy this requirement through a certification from the investor that the investor did not become aware of the potential Rule 506(b) investment through a general solicitation.

4. There is also a concern if an issuer generally solicits investors in a Rule 506(c) offering and then subsequently engages in a Rule 506(b) offering. The Commission should make it clear that, if investors were solicited through general solicitation in a prior Rule 506(c) offering, a subsequent sale to such investors in a later Rule 506(b) offering would not be viewed as a general solicitation for the later Rule 506(b) offering as long as there is at least a 30-day period from the termination of the Rule 506(c) offering until the beginning of the subsequent Rule 506(b) offering. The rule as currently drafted would address the integration concern, but not the general solicitation concern.

5. We agree that there should be a modification to Regulation S to modify the definition of "directed selling efforts" to allow an issuer to make a concurrent Regulation S offering offshore and a Rule 506(c) offering in the United States. Otherwise, Rule 506(c) becomes useless where there is a concurrent Regulation S offering.

General Solicitation and Offering Communication

6. In general, we believe the provisions that prohibit general solicitation in an exempt offering are archaic and no longer serve their original purpose. There have been significant changes since Regulation D was enacted and the methods for implementing an exempt offering should correspondingly change. We believe investor protections can be built into securities offerings in a variety of ways without regulating how the investor became aware of the offering. These proposals are further discussed below.

7. We applaud the addition of the methods of communication that were included in the Proposal. However, as a result of the prohibition against general solicitation, the real issue is not the method of communication but the type of information that can be provided. For example, how much information can be included on a website before it is an offer of securities? The C&DIs (Question 256.24 and

Question 256.25) provide that you can advertise certain issuer information. However, it is unclear how far that communication can go. Can you indicate that you sell securities on your website? Can you place a list of the properties you acquired through prior securities offerings on your website? Can you list your completed offerings? Can you list your prior performance? We believe the issue that needs to be focused on is the "what" can be disclosed as supposed to the "how" it is disclosed. This is extremely important given the "bad actor" provisions included under Regulation D and Regulation A. If there is an inadvertent general solicitation, either by the issuer or a broker-dealer, and the issuer can no longer rely on an exemption, the issuer could be viewed as selling securities without an exemption (see, for example, KCD Financial Inc. (Release No. 80340) where it was determined that the issuer did not qualify for an exemption because it generally solicited investors even though it could demonstrate that none of the investors were originated through the general solicitation). As a result, the issuer could easily become subject to an enforcement action and subsequently, the bad actor provisions. This could eliminate a sponsor from the marketplace as a result of an inadvertent general solicitation. Further clarification on where this line is drawn or, the elimination of the prohibition on general solicitation, would eliminate these potential "foot faults."

8. We do not believe the solicitation of interest provision is beneficial. We believe providing information without indicating what kind of offering is to follow further blurs the lines between what is acceptable for a Rule 506(b) offering and what constitutes general solicitation. Putting people into further uncertainty does not seem beneficial. We do believe this proposal would work if there was no prohibition against general solicitation.

9. It would be helpful if the Commission could clarify the application of the contemplation rule when general solicitation is used by a broker-dealer or a platform to obtain investors. Under the contemplation provisions, investors cannot participate in an offering in which the broker-dealer or platform was participating prior to the time a substantive relationship was established with the investor. However, as a result of the many methods of reaching potential investors, there appears to be uncertainty in the marketplace as to whether the rule still exists, especially for the platforms.

Regulation A

10. The IPA strongly supports the Commission's proposal to increase the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million and increase the maximum offering amount for secondary sales under Tier 2 of Regulation A from $15 million to $22.5 million. However, we encourage the Commission to further raise the offering limit under Tier 2 of Regulation A to $100 million. This is a meaningful change for companies in industries where the business is focused on the acquisition of investments with significant purchase prices, such as commercial real estate. Increasing the threshold to $100 million also allows greater economies of scale with respect to the time and money it takes to make a Commission filing and complete the required audit (which can be as high as $250,000 whether a company is raising $50 million or $100 million). The Commission may wonder why there should be an increase if many of the Regulation A offerings failed to raise or offer the full amount allowed under Regulation A. The challenge with many real estate funds and other business sectors with significant upfront costs is the lack of economies of scale at the $50 million threshold and therefore

there is little reason to utilize Regulation A. As a condition to utilizing this higher limit, the Commission could consider including additional investor protections such as requiring that investors use the services of a registered broker-dealer or investment adviser intermediary and include more disclosures than those currently required in the Form 1-A. The IPA also encourages the Commission to index the Regulation A offering thresholds to inflation in order to more accurately reflect the economics of the future.

11. We encourage the Commission to allow issuers to continue advertising after qualification of the Regulation A offering subject to a legend requirement, as is available during the period prior to qualification. In other words, prior to qualification, issuers can utilize multiple types of marketing communications provided certain disclosures are included with the communication, including, upon filing with the Commission, disclosure regarding where to obtain a preliminary offering circular. However, immediately following qualification with the Commission, the ability of the issuer to market the offering is restricted to those methods that can be preceded or accompanied by an offering circular, essentially foreclosing the ability to market through print/radio/television and restricting other types of communications only to those that can be accompanied by an offering circular. We believe that issuers should be allowed to continue to use the same advertising methods after qualification with the Commission as it used prior to qualification (i.e., providing marketing materials that include a legend disclosing where to obtain an offering circular).

12. We note that issuers conducting a Regulation A offering are not permitted to use a tombstone (following the guidance of Rule 134) to market the offering post-qualification. We request that if the Commission does not relax the advertising restrictions for Regulation A offerings to permit post-qualification advertising that is not preceded or accompanied by an offering circular as requested above, then the Commission should extend the tombstone exemption to Regulation A offerings.

13. We agree with the Commission's proposal to allow Regulation A issuers to make previously non-public documents available to the public on EDGAR.

Rule 506(b)

14. The IPA believes that Rule 506(b) should be modified to allow general solicitation given the significant advances in technology, consumers' communication preferences through email, the Internet and social media, and firms' modern-day business practices. We acknowledge that general solicitation and advertising is incompatible with the Section 4(a)(2) private placement exemption. Thus, we suggest regulatory modifications to implement this change.

15. We support the proposed changes to the financial information that must be provided to non-accredited investors in Rule 506(b) to align with the financial information that issuers must provide to investors in a Regulation A offering. We believe that these changes support the policy goal of providing the same investment opportunities to non-accredited investors that are provided to accredited investors. The financial information provided to non-accredited investors in an offering pursuant to Regulation A provides appropriate investor protections without the burdensome requirements of a traditional registered offering under Form S-1. Although we believe that this will improve symmetry, we are

uncertain if non-accreditor investors will benefit from this change. Will such financing information really assist a non-accredited investor in making an investment decision regarding the advisability of such an offering? We believe that there are superior ways to protect non-accredited investors and we propose the following two alternatives:

The first way to protect non-accredited investors would be to require non-accredited investors to work with a "purchaser representative" who is either a registered broker-dealer or investment adviser and required to act in the investor's best interest. By instituting the "purchaser representative" provision of Rule 506(b)(2)(ii), the Commission could simultaneously shift regulatory burdens from the private issuer to the purchaser representative. We propose that there would be no economic limitations on the amount of investment by the non-accredited investor in such case because the purchaser representative would be required to determine the amount of investment that is appropriate for the investor and whether the investment is in the customer's best interest.

Second, we believe that in order to provide access to and protection for non-accredited investors, the prohibition against general solicitation should be eliminated and non-accredited investors should be subject to an economic limitation similar to those in a Regulation A or Regulation Crowdfunding offering. If a non-accredited investor invested without a purchaser representative, such non-accredited investor would be limited as to how much could be invested in any one Regulation D offering. Currently, a non-accredited investor can put all of their available funds into one Regulation D offering regardless of the level of risk.

Rule 506(c)

16. The IPA appreciates that the Jumpstart Our Business Startups Act of 2012 ("JOBS Act") required that the Commission promulgate rules requiring the issuer, in a Rule 506(c) offering, to take reasonable steps to verify that purchasers are accredited investors. We believe that there are a number of factors that have led to underuse of Rule 506(c). For example, Rule 506(c) imposes heightened obligations on issuers compared to other Regulation D exemptions. Unlike Rule 506(b), an issuer is required to go beyond just a reasonable belief of an investor's accredited investor status as required by Rule 501(a). Requiring an issuer to take "reasonable steps to verify" the accredited investor status of each investor imposes serious consequences on issuers for failing to meet this burden of proof. An issuer that does not meet the "reasonableness" standard will not qualify for the Rule 506(c) exemption, nor any other exemption—including Rule 506(b), which relies on the Section 4(a)(2) exemption that prohibits general solicitation. Without an available exemption, an issuer will have violated Section 5 of the Securities Act of 1933, as amended, which requires registration in the absence of an exemption, as well as bad actor provisions.

17. Verification of the status of natural persons also imposes practical difficulties, including privacy concerns associated with requiring the disclosure of personal financial information. With an increasing sensitivity to privacy in our country, investors are understandably reluctant to provide this information to third parties. It can also be more difficult for issuers to obtain information about a person's assets and liabilities than their annual income. In addition, as addressed above, the "reasonableness" of the steps taken to verify is susceptible to challenge long after the investment and capital raise. This raises

concerns of potential rescission or other serious consequences for the issuer and/or the financial professional or intermediary that verified accreditation status.

18. We believe that the Commission can encourage greater use of the Rule 506(c) exemption through the clarification and changes addressed below.

    First, we suggest that the Commission consider alternative and more flexible methods of verification that do not raise privacy concerns for individuals. For example, we strongly support the Commission's proposal to add an additional method of verification that would allow an issuer to establish that a previously verified investor remains an accredited investor as of the time of sale, so long as the investor provides the issuer a written representation to that effect and the issuer is not aware of information to the contrary. We agree that this new method would reduce the cost and burden of verification for issuers that may opt to engage in more than one Rule 506(c) offering over time and will alleviate investors' privacy concerns when they seek to participate in subsequent offerings.

    Second, we encourage the Commission to revisit the non-exclusive list of verification methods and provide additional means to verify status. We suggest that the Commission provide for an annual net worth certification process rather than the prior three-month period. We strongly believe that the Commission should consider self-certification as a reasonable method to establish and verify accredited investor status. If an additional step for self-certification is viewed as necessary and provides commensurate investor benefit, then we believe a short form questionnaire and follow-up contact with the investor through electronic or other means should provide the additional confirmation necessary to meet the statutory verification requirement.

    Third, for both issuers and intermediaries, we strongly encourage the Commission to reaffirm and provide clarity on the Commission's prior guidance that the non-exclusive list is not prescriptive, and that a range of verification methods not enumerated in the rule may qualify as "reasonable." We agree that this additional information will encourage more issuers to rely on verification methods tailored to their specific facts and circumstances.

    Fourth, we encourage the Commission to include a reasonable belief standard consistent with 501(a) to the Rule 506(c) verification requirement. As stated above, the reasonable belief standard is an important protection if an investor claims incorrectly, either intentionally or inadvertently, to be an accredited investor. It alleviates uncertainty and reluctance to rely on the rule in light of its strict application.

    Fifth, many of the broker-dealers and registered investment advisers have taken the position that the safe harbors are a 2-part test for a broker-dealer or investment adviser. There is a belief that not only do they have to verify that the investor is accredited in their capacity as broker-dealers or investment advisers but they also have to have the client comply with the asset or income test as well. Although we believe that the safe harbor includes six separate verification methods, we believe that it would be beneficial if the Commission could confirm this position.

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Bad Actor Harmonization

19. The IPA supports the Commission's harmonization of bad actor disqualification provisions in Regulation D, Regulation A, and Regulation Crowdfunding. We encourage the Commission to coordinate those changes with the Financial Industry Regulatory Authority, and state regulators, to encourage consistency and transparency. The current model is dysfunctional. Trying to determine whether a person or entity is a bad actor given all of the state and federal regulatory agencies is impossible. We believe there should be one centralized database, through BrokerCheck or otherwise, where firms and the public can research and review bad actor determinations. The statute should be revised to require the regulatory agencies to notify the central database when a person or entity is determined to be a bad actor.

If the IPA may be of any assistance, please do not hesitate to contact me or Anya Coverman, IPA's Senior Vice President, Government Affairs and General Counsel, at [redacted].

Sincerely,

Anthony Chereso
President & CEO, Institute for Portfolio Alternatives