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

RE: File Number S7-08-19
Harmonization of Securities Offering Exemptions

Dear Ms. Countryman:

Hamilton & Associates Law Group, a boutique securities law firm in Boca Raton, Florida, would like to take this opportunity to comment on the Commission's concept release on the harmonization of offering exemptions. This is a particularly important issue because small businesses create a majority of the jobs in the nation, and those jobs are endangered if small businesses are unable to access capital. According to the U.S. Census Bureau, American Business is "Overwhelmingly Small Business." According to data from the Census, there were 5.6 million employer firms in the United States in 2016 and Employer Firms with fewer than 500 workers, 100 workers and 20 workers accounted for 99.7, 98.2 and 89 percent of those businesses, respectively.

It is vitally important that exempt offerings be suited to the needs of many different kinds of companies, and that these offerings be readily understandable to issuers and investors alike.

Nearly all small companies have something in common: the need to raise money to enable growth. Recognizing the importance of small businesses to job creation, Congress created the Jumpstart Our Business Startups Act of 2012. The JOBS Act sought to make capital formation easier, and to that end it mandated the modification of the Securities Act in important ways. This resulted in the creation of a new exemption, Regulation Crowdfunding. It also modified Regulation D to allow advertising and general solicitation under Rule 506(c), and significantly altered Regulation A, creating a two-tiered exemption with the second tier allowing issuers to raise up to $50 million in a 12 month period.

The Commission is right to be concerned as to whether issuers with the greatest interest in successfully launching exempt offerings fully understand the range of possible exemptions, and are thus in a position to choose the type of offering to best suit their own needs. There most certainly appears to be a need for greater clarity. Many readers of the concept release may be surprised to learn that in 2018, $1.4 trillion was raised in registered offerings, while more than double that amount—$2.9 trillion—was raised through exempt offerings. Those numbers are all the more impressive given that these numbers do not take into account the fact that most exemptions were not available to registrants.

Accredited Investors

Currently, only "accredited" investors have access to some types of exempt offerings and other opportunities that are not available to non-accredited investors. The concept of accredited investors, and the preference shown for them, is particularly important in Regulation D and Regulation A offerings. Entities of various kinds—venture capitalists, private equity firms, and more—are considered to be accredited investors. For Regulation D, an individual may be considered an accredited investor if:

- their income exceeds $200,000 in each of the two most recent years (or $300,000 in joint income with a person's spouse) and they reasonably expect to reach the same income level in the current year, or

- their net worth exceeds $1 million (individually or jointly with a spouse), excluding the value of their primary residence.

Does that really make sense? The intent of this, presumably, is to ensure that no one should be driven from his only home as a result of an investment gone wrong, but in reality that outcome seems highly unlikely. As a practical matter, this would require both a very large mortgage taken out on a home, which was the sole residence and home, worth millions and a calamitous foreclosure. In addition, the unfortunate investor would have to lose whatever income he had enjoyed before driven to financial ruin. Accredited investors are supposed to be "sophisticated." This term is not defined precisely by the SEC, but whatever else it might mean, financial sophistication no doubt precludes such a scenario like the one just described.

A more realistic consideration is one raised by other commenters: that wealth doesn't guarantee financial knowledge or ability. Some young investors with good schooling and the will to learn may be better suited to buying into private placements than their well-to-do grandparents, especially if the companies involved in the offerings that interest them are engaged in new technologies or developing markets. There is no correlation between financial worth and financial sophistication.

The financially sophisticated with limited financial worth are eligible for a kind of consolation prize in Regulation D, Rule 506(b) offerings, which may include up to 35 "sophisticated but non-accredited" investors. Why 35? The number seems arbitrary, and so does the concept. If it's safe, or even desirable, for 35 non-accredited investors to participate in an offering, why not more? Rule 506(c), which permits advertising and general solicitation, is stricter, by allowing no non-accredited investors whatsoever. Moreover, the issuer must "take reasonable steps" to verify that purchasers are in fact worth as much as they claim. The SEC has in the past suggested some ways that that could be done, but these suggestions are vague and unhelpful. The truth is that some prospective buyers of private placements have long been untruthful, if not willfully deceptive, about their accredited investor status. There is little reason to think this will change, and issuers shouldn't be forced to carry the burden of being private investigators in order to protect what in many cases is a life's dream.

Regulation A provides one of the oldest exempt offering structures available. Created in 1936, it was rarely used in modern times until the JOBS Act mandated its overhaul. It has rules governing investments by non-accredited investors, but these are more flexible than those that regulate Regulation D offerings. Tier 1 Regulation A offerings, which can be used to raise up to $20 million in a 12-month period, have no limit on the number of non-accredited participants; Tier 2 offerings, which are capped at $50 million, subject non-accredited investors to limits based on annual income and net worth, unless the company's securities will be listed on a national exchange in the near future. That seems better than simply prohibiting non-accredited investors from purchasing securities in an offering. Protection, if that is the intent, is more likely to be achieved by limiting the amount of money individual investors can put at risk than by limiting the number of investors in a venture.

Regulation D

Regulation D, Rule 506(b) and 506(c) offerings are the most popular exempt offerings, and the ones that raise the most money overall. Both allow offerings of unlimited amounts in a 12-month period, but only 506(c), whose creation was mandated by the JOBS act, permits solicitation. We question whether it is necessary to break Rule 506 into two parts. If the intent of this concept release is to "streamline" as well as to "harmonize" the exempt offering framework, why not streamline and harmonize Rule 506, as well? The solicitation provision should remain, and a single, unified solution should be found to resolve the accredited investor problem. Our preferred solution would be to allow at least some non-accredited investors to participate in Rule 506 offerings.

Rule 504 caps offerings at $5 million. It's frequently used by private companies wishing to sell small amounts of stock to "friends and family," often with a view to going public in the future. In another part of the concept release, the Commission makes clear that it is concerned that very small companies, principally brand new startups, aren't getting the minimal funding they need, and floats the idea of a "micro-offering" or "micro-loan" exemption that would permit startups to raise amounts less than $250,000. Perhaps Rule 504 slightly modified and then brought to the attention of very small companies, could meet this need.

Regulation A

Since its metamorphosis into the two-tiered Regulation A+, as it was called when it debuted a few years ago, Regulation A has been slowly catching fire. Very slowly: between June 2015 and December 2018, 359 offering statements were filed for Tier 1 and Tier 2 offerings, and 277 of them were eventually qualified by the Commission. But only 132 of the issuers reported raising any money at all.

The Commission has found that many issuers who filed Regulation A offering statements had in the past made use of Regulation D, suggesting that, as the SEC hoped, some companies are transitioning from simpler to more complex methods of raising capital, with an eye to eventual registration. Regulation D requires only that the issuer file a Form D, a simple one-page document. Regulation A issuing statements and prospectuses must be filed with EDGAR. Tier 1 issuers are required to file two years of unaudited financial statements. Tier 2 issuers are required to file 2 years of audited financial statements and must also file annual, semi-annual, and current reports. The increased complexity of the reporting regime for Regulation A issuers is intended as a stepping stone to registration.

One of the most attractive features of both types of Regulation A offerings is that issuers can "test the waters" to gauge investor interest before and after the offering statement is filed. That can help management decide whether the time is right for raising capital. This is an opportunity that might be extended to issuers engaged in Rule 506 placements and, for that matter, in Regulation CF offerings.

Regulation of Crowdfunding

The much-ballyhooed Regulation Crowdfunding was, like the revised Regulation A, mandated by the JOBS Act, and became effective in May 2016. It seems not to have been particularly well-received in most parts of the country, though enthusiasm may be building. We see an obvious problem with Regulation CF: the fact that the most that can be raised in any 12 month period is $1.07 million. Similarly, interested buyers are limited in the amount they can invest. The paperwork required of the issuer is complicated, and the offering itself must be conducted through an online platform. The platform needs to be either a broker-dealer or a crowdfunding portal registered with the SEC. The intermediary that runs the platform must provide information about the issuer at its website, and it must also, according to some who've complained, communicate frequently with the Financial Industry Regulatory Authority ("FINRA"). Needless to say, the intermediaries charge fees, which can be prohibitive for the tiny companies most likely to seek equity crowdfunding. Issuers can't even engage in advertising or general solicitation, except to refer potential investors to the intermediary's platform, using a brief notice that includes only cursory information about the company and the offering.

We believe all of that needs some reform. One suggestion would be that the limit on the size of offerings should be raised; if nothing else, in the case of a successful offering, the high costs of hiring a crowdfunding portal would be to some extent offset. Yet according to the concept release, one intermediary working in the crowdfunding space said most offerings are well below the $1.07 maximum, and another reported that few potential issuers were interested in raising more than a mere $107,000. On the other hand, if the limit were raised, issuers that had previously dismissed Regulation CF might be more likely to consider its potential.

If the reporting regime for issuers were simplified, greater interest would be shown, especially by the very small companies most likely to be attracted to crowdfunding. Exactly what changes should be made, and whether the offering size limit should be raised, warrants further study, given that Regulation CF is so new. But it does seem reasonable to allow issuers considering a Regulation CF offering to "test the waters" as issuers of Regulation A offerings are allowed to do.

Thank you for your consideration of our comments. We hope the new rules eventually proposed will benefit small issuers, private and public, and potential investors as well.

Sincerely,

Brenda Hamilton, Esq.
For the Firm