Comments to SEC Concept Release

Re File Number S7-08-19

We are a group of lawyers who regularly represent startup and early stage companies in exempt offerings. We are pleased to submit these comments.

***First and foremost, whatever we do, let's not make the rules worse for issuers and investors.***

While we have some suggestions on how to improve the 506(b) offering rules, as well as some of the other rules, we also want to highlight the general concern about rule changes, and the concern that even well-intentioned changes may make it harder for startup and early stage companies to raise capital. Already, with the rules we currently have, it is difficult for early stage and startup companies to raise capital. We don't need to make it any harder for such an important and vibrant part of our economy to raise capital.

In other words, we should not deprecate the utility of the rules as they exist now for the sake of harmonization.

**Non-accredited Investors**

To us it is no surprise that all-accredited, or accredited investor-only, Rule 506(b) offerings dominate the exempt offering landscape. The design of the all-accredited investor Rule 506(b) offering is perfect for early stage and startup companies, which frequently do not have the resources to incur much (if any) expense before confirming investor interest in a securities offering.

It seems that most of the difficulties or troubles, if you want to call them that, in the current exempt-offering rule set arise when we start talking about offerings that allow non-accredited investors to participate.

Many companies would like to accept investment from non-accredited investors but do not have the funds to comply with the myriad of rules that come into play if you want to accept investments from non-accredited investors. If an already cash-poor company has to incur a major expense to prepare a robust disclosure document (such as an in Rule 506(b) offering with even one non-accredited investor), or have their financial statements put in GAAP format (such as in a Reg CF offering) or even worse have their financial statements audited (again, in a Rule 506(b) offering with even just one non-accredited investor) or make pre-filings with securities regulators (such as in a Reg CF offering), many companies will either not be able to use those exemptions because they don't have the resources to comply, or they will intentionally choose not to accept investment from non-accredited investors because it is not practical to do so.

Indeed, in many cases, the cost of these requirements dwarfs the actual value of potential unaccredited investment. It is not uncommon, for example, for a non-accredited investor to want to invest $5,000 or $10,000 in a venture, but legal and accounting fees for accepting the investment can eat up much or even all of the proceeds. Once you look at the math, the

complexity of the requirements, the legal and accounting fees involved, etc., it just doesn’t make practical sense.

Instead, these companies will typically just decide to raise funding from accredited investors only under Rule 506(b).

To the extent that the SEC wants to create new exemptions that will actually be used, rather than lie fallow, they should follow the Rule 506(b) format — no specific disclosure requirements; no intermediaries required; no audited or GAAP financial statements; no SEC or state filings until after taking funds; and federal preemption of any additional state-level requirements. This is the formula for a useful exemption. This, and a definition of an eligible investor that is reasonable and does not make the pool of investors such a small segment of the population it is impossible to raise any money at all.

***Definition of Accredited Investor***

We do not think that the accredited investor financial thresholds should adjust upward with inflation over time. In our view, this would be an abdication of regulatory responsibility and administrative purpose, putting the definition on auto-pilot, rather than carefully, and from time to time, evaluating how the definition is working and making appropriate adjustments as indicated by what is going on in the marketplace at that time. We think that the SEC should take a careful, not automatic, approach, and from time to time, perhaps every 4 years is the right cadence (but maybe 10 years is better), survey the financing landscape and evaluate how the definition is working. In our experience it is still difficult for early stage companies to raise capital due to lack of access to high net-worth or high net-income individuals qualifying as accredited investors (which is especially problematic once you move away from urban tech centers), and many promising startups die on the vine because they can't raise capital. As it turns out, this is the segment of our economy, new companies, that create almost all of America's new jobs, thus it is imperative that we make sure an environment exists in which these companies can survive.

The Commission may want to consider creating a simple securities law exemption which would allow anyone to buy securities, regardless of accredited investor status, if the funds went into an account which could only be used to pay the wages of employees. To avoid conflicts of interest, the exemption could apply only to wages paid to employees who were not the founders and promoters or their relatives. The social good of jobs is part of the reason capital formation is so important.

We think that the effect of indexing the thresholds to inflation would be, over time, a reduced pool of accredited investors, with considerable harmful effects on the ability of early stage and startup companies to raise capital. It is easy to underestimate the impact of inflation indexing. Just to give one example, if the Form 1099 $600 reporting threshold had been set to inflation when it was adopted, it would be over $5,000 right now. An unintended consequence of setting the investor qualifications thresholds to adjust with inflation would be, we think, to slowly, over time, reduce the pool of people eligible to invest in the exempt market.

We believe that the Commission ought to expand the definition of accredited investor to increase the number of people eligible to invest. We like the SEC's suggestion, in the release, on page 56, that investors could opt-in to accredited investor status by acknowledging the risks of the investment (as long as this doesn't mean a company has to provide public offering level disclosure documents first). We also like the idea that persons could take a test and qualify as an accredited investor. If an investor is willing to take the risk, knowing full well in advance a company is running an experiment that will likely fail, why not allow that in a free society? (The same approach could be taken with non-accredited investors, but limiting their overall investment in non-registered securities to something along the Title III limitations, without any additional disclosures, or intermediary, or pre-filing, and federal preemption).

We also believe that the Commission ought to study geographical disparities in income and net worth, and reconsider re-allowing equity in a primary residence to count toward the $1,000,000 net worth standard. This Dodd-Frank revision was a reactionary response to the last recession and we do not think it is well thought out.

We appreciate the table the Commission offered to summarize various responses to staff recommendations on the accredited investor definition. Please find a summary of our thoughts below:

- *Leave the current income and net worth thresholds in place, subject to investment limits* – We support leaving the current income and net worth thresholds in place, but we do not support investment limits except for non-accredited investors, as discussed above.
- *Add new inflation-adjusted income and net worth thresholds that are not subject to investment limits* – As stated above, we do not believe that setting the thresholds to adjust to inflation makes sense or is consistent with the Commission's ongoing regulatory responsibilities.
- *Permit individuals with a minimum amount of investments to qualify* – We would support this as it would presumably broaden the number of people who qualify as accredited investors.
- *Permit individuals with certain professional credentials to qualify* - We think this would be a good idea.
- *Permit individuals with experience investing in exempt offerings to qualify as accredited investors* – We think this is a good idea.
- *Permit knowledgeable employees of private funds to qualify for investments in their employer's funds* - We think this is a good idea.
- *Index all thresholds for inflation on going-forward basis* – We do not think this is a good idea, for reasons already stated.
- *Permit spousal equivalents to pool their finances for the purposes of qualifying.* Yes, we believe this would be a good idea.
- *Permit all entities with investments in excess of $5 million to qualify as accredited investors.* Yes, we think this would be a good idea.
- *Permit an issuer's investors that meet and continue to meet the current definition to be grandfathered in with respect to future offerings of the issuer's securities* – We think this is a good idea.

- *Permit individuals who pass an accredited investor examination to qualify*– We support this idea.

We believe that the definition of accredited investor should also be expanded to cover American Indian tribal governments. In this regard, we concur in the comments of the National Congress of American Indians (https://www.sec.gov/comments/57-18-07/571807-63.pdf)

***Allow Non-Accredited To Participate In All Exempt Offerings, Subject to Annual Individual Investor Limitations, With No Intermediaries***

Based on our experience, there are a significant number of people who are excluded, we believe unfairly, from the exempt offering market place because of the current rule set. In our experience, issuers, in almost all cases, exclude non-accredited investors from their offerings entirely to avoid incurring the additional expense and hassle of allowing them to participate. Almost all of the time it just does not make financial sense for the issuer to allow non-accredited investors to participate. The expense of the disclosure requirements for taking investment from even one non-accredited investor under 506(b) dissuades almost every company from going down this route.

We think the rules should be revised to allow non-accredited investors to participate in all exempt offerings, subject to non-accredited individual investor limitations such as those found in Title III of the JOBS Act, without an intermediary, and without any disclosure other than what would be required to sell the securities to only accredited investors. We think this should be a uniform allowance in all exempt offerings which preempts state law (if there is no preemption the exemption simply won't be used). Again, suppose a company wants to take $5,000 from a founder's non-accredited brother— shouldn't that be allowed with no additional disclosure as long as the $5,000 was an amount proportionate to the brothers annual income or net worth, per JOBS Act Title III limits? We live in a free country. If the brother is willing to sign a piece of paper acknowledging the company is essentially an experiment worth a high likelihood of failure, why shouldn't that be allowed?

When we put together the Washington crowdfunding exemption, we required investors sign a simple statement, on a separate page, in which they acknowledged they were very likely to lose their money. If you can lose your money gambling in Vegas, why not in startup land, as long as you acknowledge and agree in advance that you are investing in a highly speculative venture?

Similarly, we think that in offerings designed for non-accredited investors, such as Title III of the JOBS Act, where there are individual investor limitations, those individual limitations ought ***not*** to apply to accredited investors. And this principle should be uniform across all exempt offerings. We think this would result in substantial "harmonization."

We think these two principles would do a lot to harmonize the exempt offering rule set, and would not degrade the utility of the current rules.

***The Form D Filing System Needs To Be Revisited and Modernized***

We think that the SEC ought to consider the impact and practical effect of the wide spread reporting in the press of Form D filings. The current system of EDGAR filings in 506(b) offerings results in large number of what are supposed to be "private offerings" being written about in the press — a result that upends the idea that these offerings are in fact "private" offerings. The Form D has to be filed within 15 days of first sale, but most offerings are ongoing, meaning the filing of the Form D, along with press coverage, makes the offerings not really private at all. The short filing due date and the press coverage lead many companies, especially in tech hubs like Silicon Valley, to intentionally decide ***not*** to file Forms D in an attempt to (i) avoid the press coverage and (ii) not unintentionally violate any general solicitation rules by responding in the wrong way to the media's request for comments (a lot of companies get caught off guard by media calls and then the press reports the company is raising money, potentially moving the company inadvertently from a Rule 506(b) offering to a Rule 506(c) offering.). The current practice, public filings for "private" exemption offerings, whether intentionally or not, discourages compliance with the filing requirement. This is an awkward side effect and the rules ought to be fixed. We believe that the Commission should make Rule 506(b) filings entirely private filings or at minimum allow for filings to be made after a financing round is officially closed. It is none of the public's business which "private" companies are raising money in "private offerings." The Form D is meant to be a notice to regulators. It doesn't have to be publicly filed to accomplish this end.

We believe that companies ought be given more time to file Forms D (15 days is a very short time frame; even the IRS gives you 30 days to file 83(b) elections) and the federal law ought to make clear that failure to filing is **not** a condition to the exemption at either the federal or the state level. We have received countless panicked phone calls from clients who have inadvertently missed the 15-day deadline and now think the SEC is going unwind their entire offering. A small amount of guidance on this topic could alleviate a lot of unnecessary stress in an already stressful space.

We would suggest companies be given 60 or even 75 days or even 90 days after the closing of their offerings to file the Form D.

In addition, in this day and age, when companies can file a Form D with the SEC and have it written about in the paper the next day, why is it necessary that companies make filings in each state where their investors reside? If the regulators want to know who is raising money in their states, they can simply subscribe to news updates like the journalists do. Or in a private federal filing system receive updates for capital raises in their jurisdiction. Thus, we think the SEC should blot out the state filing requirements through federal preemption.

***General Solicitation / General Advertising Rules***

We believe the SEC should revise the rules on general solicitation and general advertising to make it clear that general solicitation or general advertising does not mean pitching a business idea at a local event, even an event to which the public in general was invited — as long as the pitch is not an express solicitation of investment, telecast to the entire world over the Internet, and there is otherwise no advertising in the media about sales of securities. The rules on general solicitation or general advertising have created a lot of trouble and anxiety for companies. So-called "pitch" events for startup companies are common throughout the United States. These "pitches" are usually pitches of business ideas, and are often put together by organizations trying to improve their local communities and foster innovation and collaboration. The SEC's rules on general solicitation and general advertising, combined with the 506(c) verification requirement, set up a situation where offerings that were historically thought of as private suddenly threaten to become public offerings. General advertising or general solicitation should be defined as intentionally using media such as the Internet or newspapers to advertise sales of securities. It should not include local or community events at which business ideas are pitched or companies are showcased. Or inadvertently replying to a reporter in the wrong way.

***Crowdfunding***

We believe issuers should be able to solicit and confirm investor interest before filing the Form C. Not allowing an issuer to gauge interest in their contemplated Title III crowdfunding before spending a bunch of money in legal and accounting fees substantially crimps the number of companies who will undertake these efforts. Very early stage companies are frequently unable to spend any resources filing a Form C because they do not have the funds to do so. The all accredited Rule 506(b) offering is so popular because (i) you can gauge investor interest before spending a bunch of money on legal and other fees, (ii) no regulator has to pre-approve the offering, (iii) you can file the Form D after you raise the money, and (iv) federal preemption prevents states from screwing the process up by attempting to insert themselves. Exempt offerings should all follow this framework.

We believe we should raise the Title III cap to $5 million from non-accredited investors and allow accredited investors to invest any amount of money in those offerings. This would prevent companies from having to set up and administer, for example, side-by-side Title III and 506(b) or 506(c) offerings at the same time, which can be unclear and complex from a compliance perspective.

**Answers to Selected Questions**

Aside from these general conceptual comments, our comments on specific questions are found below.

**Question 1**. *Does the existing exempt offering framework offer appropriate options for different types of issuers to raise capital at key stages of their business cycle?*

With respect to startup and early stage companies that would like to raise capital from both accredited and non-accredited investors, the current framework does not work very well.

Startups and early stage companies frequently do not have the resources to do things like, put their financial statement in GAAP format, or have them audited, or even the expense of going through an intermediary and filing a Form C before they can even confirm investor interest.

This is why most early stage and startup companies pursue a Rule 506(b) offering by soliciting and confirming accredited investor interest first, before incurring hardly any legal fees, with a short, one page term sheet summarizing the terms of the securities to be sold, along with a pitch deck or executive summary, and maybe a use of proceeds schedule. Once investor interest is confirmed, then formal legal documents are prepared. The beauty of this approach is very little has been spent on legal fees before investor interest is confirmed. Once investor commitment is confirmed, with the knowledge that funds will be invested which will enable the payment of legal fees, issuers then proceed to prepare final investment paperwork, accept funds, and file Forms D. This is why Rule 506(b) is so popular and used so heavily. It is practical, and unencumbered by the various and sundry additional requirements that you find in almost all of the other exemptions.

But Rule 506(b) is glorious and practical only so long as you are raising money from only accredited investors. If you want to raise money from non-accredited investors, even one, then substantial fees and expenses must be incurred. This is why companies, in our experience, rarely go down this path.

**Question 2**: "[S]hould we retain our current exempt offering framework as it is? Are there burdens imposed by the rules that can be lifted while still providing adequate investor protection?"

We believe that the all-accredited investor Rule 506(b) offering should generally be retained in its current format, but we would encourage the Commission to clean up the general solicitation and general advertising rules (as discussed above).

If the Commission would like to make the Rule 506(b) exemption even better it could: (i) allow some level of non-accredited investor participation without any specific information requirements thrown in (perhaps, for example, allowing non-accredited investor to invest up to the Title III limits, without an intermediary); or (ii) do away with the Form D filing requirement entirely, or allowing it to be made 60 or 90 days after the final closing.

We do not believe the Commission should degrade or deprecate the Rule 506(b) offering by doing such things as setting the accredited investors thresholds to adjust with inflation.

If the SEC would like to see more Rule 506(c) offerings, it ought to do away with the verification requirement, or substantially ease it — perhaps by just allowing investors to go on

the SEC web site and aver to the government that they are accredited.

**Question 4**: Are the exemptions themselves too complex? Can issuers understand their options and effectively choose the one best suited to their needs? Do any exemptions present pitfalls for small business, especially for issuers that may be unfamiliar with the general concepts underlying the federal securities laws?

Yes—some of the exemptions themselves are too complex.

As mentioned elsewhere in this letter, some people unfamiliar with the rules mistakenly believe that they can do a Rule 506(b) offering with up to 35 non-accredited investors, having read the rule — but having failed to see the cross references to the specific disclosure requirements. The rules ought to be written in plain English, in a manner that can easily be understood by the uninitiated.

The rules on general solicitation and general advertising are confusingly written — and this is probably because they were written in a different time — before the Internet — before Rule 506(c). We have seen companies file Forms D, receive phone calls from the press, and then discuss their offering with members of the press—and then have the press write publicly about how the company is raising money. This is a trap set by the current rules. Form D filings in "private" offerings ought to be filed privately with the SEC or not have to to be filed at all, in this day and age of constant Internet reporting.

**Question 5**. "In light of the fact that some exemptions impose limited or no restrictions at the time of the offer, should we revise our exemptions across the board to focus considerably on investor protections at the time of sale rather than at the offering? If our exemptions focused on investor protections at the time of sale rather than at the time of offer, should offers be deregulated altogether?

Yes, we believe that focusing on the sale, rather than the offer, would be a healthy and welcome change that change that would significantly improve the exempt offering rule set.

**Question 10**: "Which conditions or requirements are most or least effective at protecting investors in exempt offerings?"

We think it is safe to say that the filing of the Form D provides no investor protection whatsoever. The Commission ought to consider deleting the filing requirement entirely, or pursuing some other, less onerous means of informing state and federal regulators that capital has been raised in an exempt offering.

**Question 11:** *"[S]hould we consider rule changes that will help make exempt offerings more accessible to a broader group of retail investors than those who currently qualify as accredited investors? If so, what type of changes should we consider? For example, should we expand the*

*definition of accredited investor to take into account characteristics other than an individual's wealth? Should we allow investors, after receiving disclosure about the risks, to opt into accredited status? Should we amend the existing exemption or adopt new exemptions to accommodate some form of non-accredited investor participation such that these exemptions may be more attractive to, or more widely used by, issuers?*

In general, most of the companies we work with avoid taking any investment at all from non-accredited persons because to do so requires incurring substantial legal and accounting expenses. In a Rule 506(b) offering, if you want to take funds from even one non-accredited investor, your disclosure obligations do not scale—they skyrocket. You walk off a cliff. You go from basically, observer of the anti-fraud rules to public offering level disclosure by taking in even just 1 non-accredited investor. This doesn't make sense in our view.

We have met many founders and issuers are confused about the SEC's rules regarding accepting investments from non-accredited investors. We would recommend that the Commission re-write these rules so that would be easier to understand for a non-regulatory lawyer. Many companies will see the rule regarding taking funds from up to 35 non-accredited investors, but not understand or appreciate the cross-references and the substantial additional disclosures required from taking investment from even one non-accredited investors. The rules are not written in a way that is easy for most people to understand. We would encourage the SEC to be a little more up front about the cost and complexity of accepting funds from non-accredited investors. We would suggest a rule change that makes the burdens of taking funds from non-accredited investors abundantly clear. The rules ought talk upfront and in plain English about the burdens. Perhaps a Q&A or FAQ format would be a good idea.

We believe it would be a good idea to allow non-accredited investors to participate in a wider range of securities offerings without triggering public offering level disclosures, the presence of intermediaries, GAAP or audited statements, state level review, etc. Capital, like water, finds the easiest path and ignores inhospitable ground entirely.

We would encourage the SEC to allow non-accredited persons to invest in any 506(b) offering as long as the total amount invested by the person met individual investor limitations that the SEC thought were appropriate—such as the same limitations found in Title III of the JOBS Act, without an intermediary, any specific disclosures, etc.

**Question 14**. *Should the availability of any exemptions be conditioned on the involvement of a registered intermediary, such as a registered funding portal or broker-dealer in crowdfunding offerings, particularly where the offering is open to retail investors who may not qualify as accredited investors?*

If the SEC truly wants to allow non-accredited investors, subject to individual investor limitations such as those found in Title III, to participate more broadly in exempt offerings, it should not require the offerings to go through intermediaries. We would expect that if

intermediaries were required, such as in the Title III context, the exemptions would be underutilized.

The trouble with Title III is a self-selection problem. Many of the best investment opportunities will not go through a Title III process because simply they don't have to in order to raise the funds. Accredited Investors will have discovered them through their professional networks long before the thought of crowdfunding is even entertained by the company. Pre-existing access to investment opportunities coupled with the rising costs of preparing the Form C are more than enough for most of the best investment opportunities to bypass Title III entirely.

Thus, if this is the only practical way non-accredited investors can invest in exempt offerings, they will be left out and also left with a less diverse and arguably poorer grouping of investment opportunities to choose from. Investor protection ought to be thought of from the opportunity to diversify investment perspective. The ability to invest in a wider range of investment opportunities is a form of investor protection.

**Question 17**: *Should we consider rule changes that would allow non-accredited investors to participate in exempt offerings of all types, subject to conditions such as a limit on the size of the offering, a limit on the amount each non-accredited investor could invest in each offering, across all offerings, or across all offerings of a certain type, a decision by the investor—after receiving disclosure about the risks—to opt into the offering, and/or specific disclosure requirements?*

We think that allowing non-accredited investors to invest up to the Title III limits without the involvement of any intermediary, any pre-filing, no specific information requirements, would be a healthy and significantly harmonizing improvement in the overall rule set—as long as it did not deprecate existing Rule 506(b).

**Question 18**: *Should we move one or more current exemptions into a single regulation, such as currently provided by Regulation D with respect to the exemptions under Rules 506(b), 506(c), and 504? Would a new single set of exemptions be overly complicated and obscure any possible benefits of coordination and harmonization?*

We think the benefits of attempting to combine a bunch of disparate exemptions in one rule set would probably result in a more complex, even less understandable rule set.

**Question 20**: *Should we change the definition of accredited investor or retain the current definition?*

We would encourage the Commission, whatever it does, to not make the definition narrower, or set it to become narrower over time by fixing it to adjust with inflation.

**Question 22**: *Should we revise the accredited investor definition to allow individuals to qualify as accredited investors based on other measures of sophistication?*

Yes, we believe the SEC should expand the pool of people who qualify as accredited investors.

We think allowing people to take a test is a good idea.

We think allowing people to opt-in after acknowledging the risks of an investment is a good idea.

We think allowing people to self-certify on the SEC's web site would be a good idea.

Please see our specific comments on the other possible routes of qualification the Commission proposed above.

**Question 32**: *[S]hould we revise the Rule 12g-1 to permit issuers to determine accredited investor status at the time of the last sale of securities to the respective purchase, rather than the last day of its most recent fiscal year?*

Yes, we would recommend the Commission make that change, for ease to the issuer and to build in some practicality and reasonableness into the rule set. If the investor was an accredited investor at the time of the investment, it should not matter if they later do not qualify. They already made their investment.

**Question 45**. *What other changes to Rule 506 should we consider when harmonizing our exempt offering rules? For example, should we amend Rule 503 to provide a deadline to file the Form D other than the current requirement to file the Form D no later than 15 calendar days after the first sale of securities in the offering?*

Yes, we believe 15 calendar days is too short of a deadline. We would recommend 60 or 75 days. Or even 90 days. If the SEC is not going to move to an entirety private Rule 506(b) filing regime it ought to allow the Form D filings to be made post closing the final investment and completely abandon the hard time limit.

We would also recommend the SEC make it clear to states that a late filing of a Form D does not cost an issuer the exemption at either the federal level or the state level.

**Question 45**. *Is the Form D information useful to investors?*

The Form D is at best only marginally helpful to investors, which isn't or should be not surprising, given the fact that the Form D is not required to be provided to investors at all, and does not have to be filed until after acceptance of funds. Perhaps it would be helpful if the Form D had a legend on it which said in all caps — THIS IS NOT AN INVESTOR DISCLOSURE DOCUMENT; IT IS A NOTICE TO REGULATORS.

As stated previously, we are not fans of the Form D in general. We think the filing deadline is too quick. We don't think in "private" offerings it ought to be publicly filed. Nor do we think it should be "improved" or turned into an investor disclosure document. If anything, the SEC ought to reduce the length of the form and require less information to be put on it or remove it from the regulatory scheme entirely. Or at least stamp the document to make it clear the purpose of it is a notice to regulators; to avoid it being confused with an investor disclosure document.

If the only purpose of the Form D is to put regulators on notice of a financing, then it would make sense to us to make its filing a private affair. As we have described in this letter, its public filing causes nothing but problems for companies, seemingly for no reason if it is a notice to regulators only (if it is a notice to regulators only, it need not be a public filing to accomplish this objective). We would suggest making its filing private, or eliminating it entirely.

***Regulation Crowdfunding***

**Question 79**. *Should we limit the ongoing reporting obligations to actual investors (rather than the general public) and scale the disclosure requirements to reduce costs?*

We would recommend that ongoing reporting obligations be limited to actual investors.

**Question 80**. *Should we retain Regulation Crowdfunding as it it is?*

We would recommend you allow "accredited investors" to invest any amount of money in a Title III offering, without regard to the individual investor caps. We would also recommend that the total amount raised be increased to $5 million.

As mentioned in this letter, raising the limit to $5M would allow companies to escape having to set up and administer side-by-side Title III and 506 offerings. In particular, we have seen companies interested in conducting concurrent Title III and 506(c) offerings in order to take advantage of Title III's access to non-accredited investors, and 506(c)'s general solicitation and lack of fundraising cap. However, issues with investor segregation with Title III's advertising restrictions make this much more difficult in practice.

**Question 88:** *As generally recommended by the 2016 and 2017 Small Business Forums, should we allow issuers to test the waters or engage in general solicitation or advertising prior to filing a Form C?*

We would recommend that the SEC allow issuers to test the waters before filing a Form C. One of the primary problems very early stage issuers face is how to front the cost for a securities issuance they don't know if they can sell. The reason Rule 506(b) offerings are so popular is that very little expense has to be incurred prior to confirming interest.

***Micro Offerings***

**Question 93**. *Should we add a micro-offering exemption or micro-loan exemption?*

We believe that the adoption of a micro offering exemption could substantially improve the exempt offering ecosystem, provided it was practical and easy to use, and did not require upfront much if any expenditures by early stage and startup companies before investor interest is confirmed.

One of the problems with many of the exemptions that are targeted toward allowing non-accredited investor participation is that they require companies, before confirmation of investor interest, to do things such as (i) file forms and pay fees with the SEC or state securities regulators, (ii) draft the definitive financing documents; (iii) pay to have the issuer's financial statements put in GAAP format, (iv) pay an intermediary, (v) pay lawyers, etc.

For a micro offering to make sense, it needs to allow issuers to confirm investor interest on a term sheet before incurring any substantial expenses.

We represent hundreds of startup and early stage companies, and for the most part these companies do not have the resources to pay much, if any, upfront fees to conduct an of offering.

In other words, if the new micro exemption requires the expenditure of several thousand dollars in legal and accounting fees (by requiring GAAP financials, for example) before the issuer can even see if there is an interest in the offering from the investor side, you will find, I am afraid, that the new exemption will not be used.

The reason, in our experience, that Rule 506(b) offerings are so popular is that issuers can test the market with a very simple 1 page term sheet (such as the publicly available Series Seed Term Sheet), and once interest is confirmed — then expend legal fees to prepare the definitive financing documents, close on the funds, pay the legal fees, and file the Forms D with the SEC and states in which investors are resident.

In other words, it is critical for early stage companies to first be able to confirm interest, before incurring substantial legal fees.

Re the parameters of such exemption, we would recommend the parameters include both individual investor investment limitation amounts, and aggregate offering amounts during any 12-month period.

Additionally, we should look to our neighbors to the north in Canada who have a securities law exemption for "close" family, friends and business associates, allowing an issuer to sell securities to family members, closer personal friends, and close business associates of the issuer's (or its affiliate's) directors, executive officers and "control persons."

**Question 94**. *Should there be la limitation on the type of securities that may be offered under such an exemption?*

We do not believe that the SEC should limit the type of securities that may be offered in a micro exemption.

**Question 95**. *What would be the appropriate aggregate offering limit for such an exemption?*

We think something on the order of $250,000 or $500,000 would be appropriate. Most early stage companies are trying to test an idea, and this is an appropriate amount of capital to enable early stage companies to confirm whether they have in fact discovered a feasible business opportunity.

**Question 99**. *Should we require the offering to take place through a registered intermediary, such as broker-dealer or funding portal?*

We think that if you required this, you would find that startups and very early stage companies would not be able to use the exemption, or would not use the exemption, because it would require the incurrence of substantial fees before confirmation of investor interest in the offering.

**Question 101**. *Should the securities sold in the transaction be considered a "covered security" such that the issuer would not be required to register or qualify the offering with state securities regulators?*

We would say, absolutely, yes. The reason the 506 exemptions are so popular is because of the federal preemption.

If you create a micro offering exemption without federal preemption, we think what you will discover is that no one will use it, and the time and effort of creating it would have been wasted, creating another exemption no one uses.

**Question 102**. *Should there be issuer eligibility requirements, such as bad actor disqualification provisions or exclusion of investment companies or non-U.S. issuers?*

No.

**Pooled Investment Vehicles**

We believe that the SEC should consider, when determining how difficult to make it to put together a pooled investment together, that pooled investment vehicles are one way to achieve diversification in the exempt market place. Diversification is a form of investor protection. The regulatory burdens of forming a polled investment vehicle are too high. You

We think it should be easier to form funds of just accredited investors in which the adviser earns fees and carry, without the advisor having to be a registered as an advisor or even an exempt reporting advisor.

We believe the exempt reporting scheme is flawed and ought to be repealed in its entirety.

The definition of equity security should be revised. We do not believe the SEC made the right decision when it rejected the idea of accepting a broader definition of "equity security" for purposes of the venture fund investment adviser exemption. We believe the venture fund adviser exemption should be expanded such that if funds are being invested into companies in the form of revenue loans, or shared earnings agreements, or royalty agreements — that those investments are considered equity security for purposes of the venture fund investment adviser exemption.

**Resale Exemptions**

We believe the utility of the Section 4(a)(7) resale exemption would be vastly improved if the prohibition on general solicitation and general advertising in the rule was removed.

Sincerely,

Joe Wallin

James Graves

Zach Haveman

Danny Neuman

Bryant Smick