American Bankers Association
Building Success. Together.

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[redacted]

Via Electronic Submission

September 24, 2019

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: SEC Concept Release on Harmonization of Securities Offering Exemptions. File No. S7-08-19; 84 Fed. Reg. 30460 (June 26, 2019).

Dear Ms. Countryman:

The American Bankers Association[1] (ABA) appreciates this opportunity to comment on the Securities and Exchange Commission's (Commission) Concept Release. The Concept Release solicits comments on exemptions from registration for the offer and sale of securities under the Securities Act of 1933[2] (1933 Act). Through this review, the Commission seeks to identify ways to simplify, harmonize, and improve the exemption framework in order to promote investment opportunities, while keeping in place appropriate investor protections. The Release discusses a variety of registration exemptions, including those for securities restricted to sophisticated or "accredited" investors, as well as safe harbors for the resale of restricted securities to qualified institutional buyers under 17 CFR 230.144A (Rule 144A).

ABA is writing on behalf of its member banks, savings associations, and trust companies (collectively, "banks") that sponsor and maintain collective investment funds for their fiduciary clients. Some of the provisions under Rule 144A unnecessarily limit the ability of these bank-maintained funds to invest in securities offered and sold pursuant to registration exemptions that rely upon a purchaser's status as a qualified institutional buyer (QIB), thereby restricting investor access to certain investment strategies.

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[1] The American Bankers Association is the voice of the nation's $18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard more than $14 trillion in deposits, and extend more than $10 trillion in loans. ABA members collectively maintain over $4 trillion in collective investment funds on behalf of their fiduciary clients.
[2] 15 U.S.C. 77a *et seq.*

As part of the effort to improve and harmonize the exemption framework, we urge the Commission to modernize through formal rulemaking the QIB definition as discussed below. The changes requested would eliminate the substantial inconsistencies and potential for confusion present under the current structure of Rule 144A. Specifically, ABA urges the Commission to amend Rule 144A(a)(1)(i)(F) as follows: (1) remove the reference to H.R. 10 plans; and (2) expand the definition to include common trust funds, as described below. In addition, we ask that the Commission expand the availability of the "family of investment companies test" found in Rule 144A(a)(1)(iv) to bank collective investment funds.

Background on Bank Collective Investment Funds

Collective investment funds (CIFs) are pooled investment vehicles a bank may establish for the collective investments of its fiduciary clients. There are two general types of CIFs: (1) collective investment trusts (CITs) for the investment of assets of employee benefit trusts, and (2) common trust funds (CTFs) for the investment of assets held by the bank as trustee or other designated fiduciary capacity. CITs are treated as pass-through entities under Internal Revenue Service (IRS) Revenue Ruling 81-100, as amended, and are excepted from the definition of "investment company" under Section 3(c)(11) of the Investment Company Act of 1940, as amended (1940 Act). CTFs are tax-exempt under Internal Revenue Code section 584 and are excepted from the definition of "investment company" under Section 3(c)(3) of the 1940 Act. Interests in CITs and CTFs are exempted securities pursuant to the provisions of Section 3(a)(2) of the 1933 Act.

QIB Status for Bank CITs Unnecessarily Limited

In 1990, the Commission issued Rule 144A, which provides a non-exclusive safe harbor exemption from the registration requirements of the 1933 Act for resales of restricted securities to QIBs. Rule 144A(a)(1)(i)(F) specifies a number of categories of institutional investors eligible to meet the QIB designation subject to owning or investing on a discretionary basis at least $100 million in securities of unaffiliated issuers. The following category is included for bank CITs:

> Any trust fund whose trustee is a bank or trust company and whose participants are exclusively plans of the types identified in paragraph (a)(1)(i) (D) or (E) of this section, except trust funds that include as participants individual retirement accounts or H.R. 10 plans.

Many bank CITs meet this definition and take advantage of this safe harbor to purchase an assortment of Rule 144A securities from sellers who rely upon the Rule. However, because of the limitation in the last clause of the definition, a CIT may not meet the QIB definition if it allows certain types of otherwise eligible investors, in particular H.R. 10 plans (also known as "Keogh plans" [3]), to participate in the CIT.

The Commission added bank CITs to the list of potential QIBs in a 1992 amendment to Rule 144A. However, when doing so, the Commission did not elaborate upon its rationale for excluding Keogh plan investors from otherwise QIB-qualified CITs. The proposing release for the 1992 amendment suggests that the Commission intended to exclude retirement plans maintained for the benefit of individuals, which explains the exclusion of individual retirement accounts. The exclusion of all Keogh plans, on the other hand, fails to recognize that many Keogh plans resemble, in size and sophistication, the pension plans that typically participate in CITs. In fact, as noted below, some Keogh plans may themselves qualify as QIBs.

Moreover, exclusion of all Keogh plans has created a substantial inconsistency with other provisions of the federal securities laws. In particular, Rule 180 under the 1933 Act specifies that interests in CITS issued to Keogh plans, which meet the "sophistication" criteria of the Rule, are exempt from registration under Section 5 of that Act.[4] After the adoption of Rule 180 in 1981, many bank CITS routinely accepted investments from Keogh plans, which qualified under the Rule. However, the current language of Rule 144A has effectively limited the ability of Keogh plans to invest in a full range of CITS as intended by the adoption of Rule 180.

No Policy Reason for Excluding Keogh Plan Investors in QIB-Qualified CITs

In today's markets, certain investment opportunities are not available to the general investing public, but they are offered and sold only by financial intermediaries to QIBs as restricted securities in reliance upon Rule 144A. For example, Rule 144A offered securities are common investments in both investment grade and high yield credit markets. Because of the Commission's treatment of bank CITs as QIBs, Keogh plans are in essence shut out of any CIT

[3] The term "Keogh plan" does not have a specific definition, but it is generally thought to refer to qualified retirement plans for self-employed individuals for their own benefit and for their employees.
[4] 17 CFR 230.180, *Exemption from registration of interests and participations issued in connection with certain H.R. 10 plans*.

that must invest in Rule 144A securities to meet its investment objective, for example a fund that is benchmarked to an index that includes Rule 144A securities.

In practice, this regulatory limitation prevents banks from allowing Keogh plans to invest in their CITs even if the trusts do not hold Rule 144A securities, because the banks need to preserve the ability to invest the CIT's assets in Rule 144A securities. In such instances, the banks do not want to be in a position where they must force a Keogh plan to redeem its interest in a CIT if the bank determines that it is in the best interest of participants in that CIT to invest in Rule 144A securities.

These restrictions on otherwise qualified retirement plans do not support any public policy when ultimately the bank, acting in its capacity as trustee of the CIT, is the sophisticated fiduciary with full investment discretion and is making the decisions to invest in restricted securities. Similarly, there is no apparent rationale for why the Commission has allowed under Rule 144A(a)(1)(i)(E) that certain Keogh plans may *themselves* qualify as QIBs and invest directly in restricted securities, even though they cannot do so through a QIB-qualified CIT maintained by a bank.[5] We therefore urge the Commission to amend the definition of QIB to remove the reference to Keogh plans at the end of the definition in Rule 144A(a)(1)(i)(F).[6]

The Commission Should Expand QIB Status to CTFs

Bank-maintained CTFs likewise should be eligible to qualify as QIBs. The Commission in its 1992 proposed amendment states the following rationale for not allowing CTFs to qualify as QIBs:

> Common trusts are not limited to the participation of pension and employee benefit plans or other institutional forms…. This type of commingled trust is used for the collective administration and investment of assets contributed by the bank acting as trustee or in another fiduciary capacity for an existing trust arrangement. As was previously mentioned, beneficiaries of the subordinate trusts or other fiduciary arrangements participating in a common trust could include individuals.[7]

[5] See 17 CFR 230.144A(a)(1)(i)(E), which reads: "Any employee benefit plan within the meaning of title I of the Employee Retirement Income Security Act of 1974."
[6] We note that most CITs would continue to admit only Rule 180 qualified Keogh plans in order to maintain the exemption from registering interests in the CIT under the 1933 Act.
[7] 57 FR 32458.

The rationale for excluding CTFs does not acknowledge the fact that the bank has investment discretion both as trustee of the trusts that participate in the CTF (i.e., to manage the assets of those participating trusts according to their respective investment guidelines) and as trustee of the CTF to manage the assets of the CTF. Nor does the rationale acknowledge that the bank is also a highly regulated sophisticated investor. The bank and its fiduciary activities, such as maintaining CTFs, are subject to extensive regulation and periodic examination by the Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, and/or state banking regulators. These regulations address conflicts of interest, investment management policies and procedures, as well as other aspects of the bank's business.

Given the level of regulation and examination, we urge the Commission to expand the definition in Rule 144A(a)(1)(i)(F) to include CTFs. By doing so, the Commission would be recognizing that a bank with investment discretion over both a CTF and each of the trusts that participates in the CTF will act with the level of sophistication no less than what a registered investment adviser employs when managing a registered investment company and investing in similar securities.

The Commission Should Expand "Family of Investment Companies" Test to CITs and CTFs

The Commission should allow bank CITs and CTFs to qualify as QIBs using the "family of investment companies" test that is made available to registered investment companies (RIC) under Rule 144A(a)(1)(iv). Under this test, a family of RICs that has a total of $100 million in assets under management may qualify as a QIB regardless of the type of investors in the RIC.

A family of bank-maintained CIFs may employ the same management structure as that of a RIC family, whereby the CIF trustee is the sponsoring bank and the assets are held legally by the bank in its capacity as trustee of each fund in a suite. Given that the bank maintaining these funds typically meets the QIB definition under Rule144A(a)(1)(vi), the Commission should acknowledge that the banks are sophisticated enough to take advantage of the *Family of Investment Companies* test.

This "family" approach for registered investment companies allows even newly-launched mutual funds with less than $100 million in assets to buy 144A securities. New bank funds, on the other hand, are prevented from buying Rule 144A securities until the fund has $100 million in assets, or until the fund can make a representation that all of its investors are qualified institutional buyers (the "QIB of QIBs" exemption). The same argument in favor of treating new mutual funds as part of a family of RICs also applies to bank-maintained CIFs. No reasonable public policy is advanced by placing CITs and CTFs managed by sophisticated and highly regulated banks at a competitive disadvantage to mutual funds similarly managed by sophisticated and highly regulated registered investment advisers.

Conclusion

ABA appreciates this opportunity to provide comments to the Commission during its inquiry into securities offering exemptions. We strongly urge the Commission to consider modernizing the rules governing Rule 144A securities to allow bank-maintained CITs and CTFs to invest their fiduciary clients in the manner noted above.

Sincerely,

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