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September 24, 2019

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Concept Release on Harmonization of Securities Offering Exemptions, File No. S7-08-19

Dear Ms. Countryman:

Teachers Insurance and Annuity Association of America ("TIAA") appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC" or the "Commission") concept release (the "Concept Release")[1] soliciting comments on potential changes to several exemptions from registration under the Securities Act of 1933 (the "Securities Act"). We applaud the SEC for its willingness to examine and consider potential improvements to the current regulatory framework governing exempt offerings, particularly given the growth of private markets over the last decade. Specifically, we support the SEC's efforts to expand retail investors' access to private offerings. While we believe that retail investors should be able to benefit from the potential rewards of investing in exempt offerings, their access to these investments must be expanded thoughtfully to ensure that important investor protections are not eroded. An ideal way to achieve this balance is to enhance the ability of registered funds to invest in exempt offerings. In this letter, we recommend several changes to the current regulatory framework that would expand the ability of closed-end funds ("CEFs") to invest in private funds. This approach would provide retail investors greater opportunities to obtain exposure to the private markets through professionally managed CEFs, while still allowing them to benefit from the regulatory safeguards that apply to registered funds.

I. About TIAA

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over our century-long history, TIAA's

[1] *Concept Release on Harmonization of Securities Offering Exemptions*, SEC Release Nos. 33-10649; 34-86129; IA-5256; IC-33512, 84 Fed. Reg. 30460 (June 26, 2019), *available at:* https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13255.pdf.

mission has always been to aid and strengthen the institutions, retirement plan participants, and retail customers we serve and to provide financial products that meet their needs. Our investment model and long-term approach aim to benefit the five million individual customers we serve across more than 15,000 institutions.[2]

To carry out this mission, we have evolved to include a range of financial services, including asset management and retail services. TIAA's wholly-owned asset management subsidiary Nuveen, LLC ("Nuveen") is comprised of investment advisers that collectively manage over $1 trillion in assets, including in the Nuveen and TIAA-CREF registered fund complexes and in private funds and structured vehicles.[3] Nuveen is the leading sponsor of CEFs in the United States based on total assets under management and number of funds,[4] and as such, we have a particular interest in those aspects of the Concept Release that may impact CEFs, as discussed in more detail below.

II. The SEC should permit CEFs to invest more than 15% of their net assets in private funds without limiting sales to accredited investors.

In Question 114 of the Concept Release, the Commission asks whether there are (i) any regulatory provisions or practices that discourage participation by registered investment companies and business development companies ("BDCs") in exempt offerings, and (ii) any existing regulatory provisions or practices applicable to CEFs and BDCs that discourage the introduction of investment products that focus on issuers seeking capital at key stages of their growth cycle.[5] We echo the views expressed in the comment letter submitted by the Investment Company Institute ("ICI") in response to the Concept Release that certain SEC Staff positions place inappropriate limits on the ability of CEFs to invest in exempt offerings. We would urge the SEC to eliminate such Staff positions so that CEFs – and their retail investors – can benefit from an expanded ability to invest in exempt offerings.

Specifically, we understand that in connection with its review of CEF registration statements, the Staff of the SEC's Division of Investment Management has taken the position that a CEF is limited from investing more than 15% of its assets in private funds unless the CEF restricts sales of its own shares to persons who qualify as "accredited investors," regardless of whether the CEF is conducting an offering registered under the

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2 Participant data are as of June 30, 2019.

3 Asset data are as of June 30, 2019.

4 As of September 17, 2019, Nuveen sponsored 75 closed-end funds with aggregate managed assets of $61.3 billion.

5 84 Fed. Reg. at 30516.

Securities Act. This position is not mandated by the Investment Company Act of 1940 (the "Investment Company Act") or the rules and regulations thereunder and does not logically follow from the investor qualification standards for private offerings and private funds. The policy rationale for this position has only been articulated in connection with Staff's review of registration statements and has never been expressed as part of a formal rulemaking process or disseminated through a public pronouncement or interpretive guidance. Nevertheless, Staff has refused to declare effective the registration statements of CEFs that do not comply with this informal position, leaving CEFs with little opportunity to clarify or question Staff on the issue without jeopardizing the status of their offerings.

Furthermore, Staff has not always articulated or applied this position in a consistent manner. When commenting on CEF registration statements, Staff has variously referenced a 15% limitation on CEFs investing in "private funds," "hedge funds and private equity funds," "private funds employing hedging strategies," or "investment funds excluded from the definition of investment company by Section 3(c)(1) or 3(c)(7) of the Investment Company Act." Recently, an SEC commissioner warned about exactly this type of scenario, noting that "guidance – due to a lack of transparency and accountability – may have turned into a body of secret law. This secret law, as a practical matter, binds market participants like law does but is immune from judicial – and even Commission – review."[6] The Staff policy regarding CEF investments in private funds raises precisely the concerns identified in those remarks, as "it is not subject to processes to ensure that it conforms to [the SEC's] legislative authority; it is impossible to determine whether it applies to all similarly situated parties equally; and it is insulated from effective oversight or review, whether by the Commission or the courts."[7]

Not only does this Staff position lack any statutory support, we also believe it is unnecessary to ensure investor protection. Under the Investment Company Act, CEFs are already subject to a robust regulatory regime governing their operations and disclosure of material information to investors. That regulatory regime permits CEFs to invest in other types of securities that retail investors cannot directly access (*e.g.*, private company investments, 144A securities, derivatives, repurchase agreements), and the SEC has not deemed it necessary to place additional restrictions on the percentage of net assets a CEF can devote to these investments. Moreover, unlike open-end mutual funds, which are permitted to invest no more than 15% of net assets in

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[6] Commissioner Hester M. Peirce, *Secret Garden: Remarks at SEC Speaks 2019, Washington, D.C.* (Apr. 8, 2019), *available at*: https://www.sec.gov/news/speech/peirce-secret-garden-sec-speaks-040819.

[7] *Id.*

illiquid investments,[8] CEFs are subject to no such restriction.[9] As a result, CEFs are the only pooled investment vehicles through which retail investors can gain significant access to illiquid private funds in which they are unable to invest directly.

Investments in private funds, like investments in private operating companies, can provide retail investors with more diversified and potentially return-enhancing investment exposure. The benefits of obtaining this diversified exposure, and the suitability of CEFs as a vehicle through which to do so, have been acknowledged by the SEC and Congress.[10] As such, we believe that CEF investments in private funds should be treated no differently than other CEF investments in private companies. We recommend that the SEC eliminate any Staff positions that limit the percentage of net assets CEFs can invest in private funds without imposing investor qualification requirements. Doing so will expand retail investors' access to private markets via investment in registered funds that are subject to the Investment Company Act's rigorous regulatory framework. At the very least, if the Commission decides to retain non-statutory restrictions on CEF investments in private funds, it should do so in a way that is more transparent and uniform – *i.e.*, via the formal rulemaking process, including a public comment period.

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[8] Rule 22e-4(b)(1)(iv) under the Investment Company Act.

[9] *See Investment Company Liquidity Risk Management Programs*, SEC Release No. 33-10233; IC-32315, 81 Fed. Reg. 82142, 82157 (Oct. 13, 2016), *available at*: https://www.govinfo.gov/content/pkg/FR-2016-11-18/pdf/2016-25348.pdf ("As discussed in detail in the Proposing Release, closed-end funds' liquidity needs are different from those of open-end funds, because closed-end funds generally do not issue redeemable securities and are not subject to sections 22(c) and 22(e) of the Investment Company Act. . . . Commenters uniformly agreed that closed-end funds should be excluded from the scope of rule 22e–4 and we continue to believe that closed-end funds…should be excluded from the rule's scope.").

[10] *See* 84 Fed. Reg. at 30512 ("Retail investors who seek a broadly diversified investment portfolio could benefit from the exposure to issuers making exempt offerings, as these securities may have returns that are less correlated to the public markets. . . .Some types of registered investment companies, such as closed-end funds, are better suited to holding less liquid securities obtained in exempt offerings because they are not redeemable and therefore are not subject to the same rules on liquidity risk management as open-end funds."). *See also* Report of the House Committee on Financial Services to Accompany H.R. 4279, H.R. Rep. No. 115-517, at 2 (2018) ("[Closed-end funds] can enhance income and cash flow, which is particularly important for retirees, and can maximize after-tax efficiency by investing in municipal securities or other tax-free investments. They also improve diversification by investing in specialized asset classes. Moreover, like mutual funds and other registered funds, closed-end funds help promote job creation, research and development, and economic growth by serving as a long-term source of capital for operating companies.").

III. The SEC should allow CEFs that invest in private funds to list on public exchanges.

Question 129 of the Concept Release addresses another issue of importance to CEFs, asking whether the Commission should consider any changes to its rules to encourage the establishment or improvement of secondary trading opportunities for CEFs and BDCs, and if so, what changes should be considered.[11] We understand that the Staff of the SEC's Division of Trading & Markets has instructed securities exchanges to refuse to list shares of CEFs that invest in private funds. This position is not subject to any percentage limitation, and effectively operates as an outright prohibition on investment in private funds by listed CEFs. Similar to the discussion above, this Staff position has been imposed without first undergoing a formal rulemaking process. And in the absence of a formal rulemaking, the implementation of this Staff position has been haphazard. While a securities exchange may inform newly listed CEFs of this position in the listing application process, no public pronouncement or interpretive guidance has been issued to existing listed CEFs. Nor has clear and consistent guidance regarding the types of investments to which this guidance applies been provided.

Exchange listing is a key method by which CEFs provide their investors with liquidity. Permitting listing by CEFs that invest in private funds would undoubtedly attract greater retail investor interest in these CEFs, thus furthering the SEC's ultimate goal of expanding retail investor access to private markets. Moreover, publicly listed CEFs are subject to exchange rules, which offer an additional layer of investor protection over and above the rules that apply to CEFs under the Investment Company Act. Although current CEF listing standards do not explicitly prohibit CEFs that invest in exempt offerings from listing on public exchanges, we urge the SEC to eliminate the informal Staff position prohibiting such listings and to support and approve new exchange listing standards for CEFs that invest in private funds in a way that does not unduly burden such CEFs relative to those CEFs that invest in other types of private issuers.

IV. The SEC should reconfirm that a CEF will be deemed to "control" a fund only if facts and circumstances support the existence of a control relationship.

Section 2(a)(9) of the Investment Company Act defines the term "control" as "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company."[12] Under this definition, any person who beneficially owns more than

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[11] 84 Fed. Reg. at 30517.

[12] 15 U.S.C. § 80a-2(a)(9).

25% of the voting securities of a company, either directly or through one or more controlled companies, shall be presumed to control the company."[13] This is a rebuttable presumption, however, and the SEC has previously stated that regardless of the ownership percentage, a determination of control between two entities should depend on the facts and circumstances of that particular situation.[14]

As discussed above, TIAA supports the elimination of SEC Staff positions that prevent CEFs from investing more than 15% of their net assets in private funds without also restricting sales to accredited investors. Eliminating these restrictions would permit CEFs to invest more substantially in private funds, providing CEFs and retail investors with a type of investment exposure not otherwise readily available to them. We are concerned, however, that CEFs that acquire significant ownership interests in private funds could be deemed to "control" those funds under the Investment Company Act definition, even if their ownership interests give them little to no *actual* control over the funds' governance.

For example, limited partnership ("LP") interests in private funds usually qualify as "voting securities" for purposes of the Investment Company Act (as they do under certain other regulatory regimes) – although LP interests generally come with relatively limited governance rights. It would be impractical and inappropriate to subject a CEF holding a greater than 25% LP interest in a private fund to the legal and compliance requirements that are triggered when the minimum threshold for "control" is surpassed, given that the CEF would have little ability to participate in the fund's governance. Even where a CEF holds a 100% LP interest in a private fund (when providing initial seed capital or serving as an anchor investor for the fund, for example), the facts and circumstances of that arrangement may not indicate the existence of a control relationship. As such, we respectfully request that the SEC reconfirm that a CEF that owns a greater than 25% interest in a private fund will not be deemed to control the fund if facts and circumstances do not support the existence of a control relationship.

V. Conclusion

TIAA appreciates the Commission's focus on this important topic, and the opportunity to comment on the issues raised in the Concept Release. We believe that the recommendations discussed in this letter, if followed by the SEC, would improve the regulatory framework governing exempt offerings and expand retail investor access to the private market, while also maintaining important investor protections. We appreciate

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[13] *Id.*

[14] *Exemption of Transactions by Investment Companies with Certain Affiliated Persons*, SEC Release No. IC-10698, 44 Fed. Reg. 29908 (May 23, 1979) at n.2, *available at*: http://cdn.loc.gov/service/ll/fedreg/fr044/fr044101/fr044101.pdf.

the Commission's consideration of our comments and welcome the opportunity to engage further on any aspect of the foregoing.

Sincerely,

Christopher Rohrbacher