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SUBMITTED ELECTRONICALLY

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

Re: Concept Release on Harmonization of Securities Offering Exemptions (Release No. 33-10649; File No. S7-08-19)

Dear Ms. Countryman:

Ropes & Gray LLP is pleased to submit this letter in response to Release No. 33-10649 (the "Concept Release"), in which the Securities and Exchange Commission (the "Commission") has requested comment on ways to simplify, harmonize and improve the exempt offering framework to promote capital formation and expand investment opportunities while maintaining appropriate investor protections.

Ropes & Gray has one of the largest and most sophisticated registered funds and private investment funds practices, advising both fund sponsors and investors. Our clients include the advisers and independent directors of many of the largest and best-known registered funds in the world. Our firm represents all facets of the asset management industry worldwide, including registered funds (and their advisers and directors), private equity fund sponsors, hedge fund sponsors, credit funds, funds of funds, and other types of products, as well as institutional investors. The comments expressed herein reflect the views of our firm, particularly as practitioners with many years of experience in providing legal counsel within these overlapping asset management sectors.

We commend the Commission's willingness to explore ways to expand the scope of investment opportunities available to retail investors, including opportunities for investment in private funds. For many years, direct access to unregistered investment vehicles, such as private equity funds, venture capital funds and hedge funds, has been limited to a handful of wealthy individual and institutional investors who meet existing regulatory proxies for investor "sophistication." These limitations effectively deny to the vast majority of American investors the opportunity to participate in an increasingly important market for capital formation. As capital raising in the private markets has outpaced capital raising in the public markets in recent years, the set of investment opportunities available to retail investors has correspondingly decreased.

We acknowledge the important investor protection considerations that have formed the basis for existing regulatory limitations on direct retail access to private investment funds. At the same

time, however, we believe that the economic benefits of exposure to private funds, which include diversification and returns that are less correlated with public markets, should be made available to retail investors indirectly through registered investment vehicles. We believe that retail access to private funds through a registered vehicle can be accomplished in ways that maintain appropriate investor protections. Accordingly, we offer some observations on ways to expand retail access to private funds indirectly through registered funds.

Introduction

Earlier this year, Chairman Clayton observed that in 2018, more capital was raised in the private markets than in the public markets, and that "Main Street" investors currently have no effective access to investments in private capital offerings. We agree with Chairman Clayton that these market structure changes have resulted in a shrinking universe of investment opportunities for "Main Street" investors who do not meet existing regulatory proxies for "sophistication." There is also a direct link between expansion of investment opportunities for retail investors and retirement savers, on one hand, and access to investment capital for private companies and small businesses, on the other hand. The Concept Release recognizes the importance of the exempt offering framework to the capital raising efforts of small- and medium-sized businesses.

These market structure changes, together with the looming retirement crisis and basic fairness to retail investors and retirement savers, call for changes to the exempt offering framework to "level the playing field" for retail investors. The Concept Release recognizes the important role of pooled investment vehicles in the exempt offering framework. At the same time, important investor protection considerations and operational considerations may weigh against unlimited direct retail access to private funds.[1] For these reasons, retail exposure to private funds through a registered investment vehicle has a number of advantages.

A registered fund of private funds would be a closed-end fund registered under the Investment Company Act of 1940 (the "1940 Act"),[2] and its shares would be offered to the public in a registered offering under the Securities Act of 1933 (the "Securities Act"). Like all registered funds, a registered fund of private funds would have a board of directors, a majority of whom would not be "interested persons," as defined in Section 2(a)(19) of the 1940 Act, and would be subject to the disclosure and periodic reporting requirements under the 1940 Act, as well as the same 1940 Act restrictions applicable to all registered closed-end funds.

In our view, retail access to private funds through a registered vehicle strikes an appropriate balance among the Commission's stated goals of protecting investors, maintaining fair, orderly and

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[1] For example, many private fund sponsors may be unable or unwilling to process capital calls from and distributions to large numbers of retail investors.

[2] Unlike a registered open-end investment company, a registered closed-end fund does not need to satisfy redemption requests and is not subject to the 15% limitation on "illiquid investments" imposed by Rule 22e-4 under the 1940 Act. Accordingly, a registered closed-end structure is better suited to an investment strategy that involves significant exposure to illiquid private funds.

efficient markets, and facilitating capital formation, although we acknowledge that there may be other investment structures that also meet these goals. Accordingly, our comments focus on the portion of the Concept Release that discusses opportunities for pooled investment vehicles to provide retail investors with access to exempt offerings. Specifically, we believe the Commission should consider the following regulatory changes:

1. Reverse the Commission staff (the "Staff") position limiting sales of registered funds of private funds to accredited investors.
2. Permit exchange listing of registered funds of private funds.
3. Permit registered feeder fund structures.
4. Relax liquidity requirements for target date retirement funds.
5. Permit exemptive relief from Section 17(a) of the 1940 Act for registered funds of affiliated private funds.

We discuss each of these changes below.

<u>Reverse Staff Position Limiting Sales of Registered Funds of Private Funds to Accredited Investors</u>

Currently, the Staff will declare registration statements of registered closed-end funds that invest more than 15% of their assets in private funds effective only if sales are limited to accredited investors. We encourage the Commission to reverse this position. The Concept Release recognizes that there are benefits to investing through a pooled investment vehicle, including "the ability to have an interest in a diversified portfolio that can reduce risk relative to the risk of holding a security of a single issuer." For many years, however, the Staff has taken the position that securities issued by a registered closed-end fund that invests more than 15% of its assets in private funds can be sold only to accredited investors. The Staff position effectively blocks retail investors who do not qualify as accredited investors – the vast majority of Americans – from investing indirectly in private funds through a registered vehicle.[3]

We believe the Staff's position unfairly restricts retail access to private fund investments without meaningfully contributing to the Commission's investor protection goals. The 1940 Act's underlying philosophy is that investors should know what investments they are buying and that, at the same time, sponsors of registered funds are free to offer the public any type of investment they choose, provided that all material facts are disclosed.[4] This is consistent with the full disclosure

[3] Approximately 87% of U.S. households currently do not qualify as accredited investors. *See* Concept Release at 36.

[4] Tamar Frankel & Arthur B. Laby, REGULATION OF MONEY MANAGERS; MUTUAL FUNDS AND ADVISERS § 19.01 (3rd. ed. 2015) (last updated Apr. 2019). *See also* Hearings on S. 3580 Before a Subcomm. of the Sen. Comm. on Banking and Commerce, 76th Cong., 3d Sess., at 44 (1940) (statement of Robert Healy, Chairman of the Commission):

> The bill does not attempt to tell investment trusts that they can or cannot engage in this or that activity. There is not the slightest conscious effort to circumscribe or restrict the initiative or the enterprise of managers. The bill does not attempt to say to the investment trust, "You cannot make this or that kind of investment." It does attempt to

philosophy of all the federal securities laws,[5] which was adopted in place of a "merit review" by the Commission of the investment quality of a security.[6]

The Staff's position is not published or memorialized in any regulation or Commission guidance, and has instead been communicated to closed-end fund registrants during the registration comment process.[7] We are not aware of any articulated legal basis for the Staff's position. Although the Staff position may be predicated on an argument that non-accredited investors would not be eligible to invest directly in the underlying private funds held by a registered fund of funds,[8] we believe that the interposition of a registered vehicle and a registered investment adviser between non-accredited investors and such underlying private funds makes a significant difference.

Investment through a registered fund would afford non-accredited investors with the protections of the 1940 Act and the Securities Act. A registered closed-end fund would be managed by a registered investment adviser with a fiduciary duty and a business motivation to act in the fund's best interest, and would be overseen by a board of directors (a majority of whom would be independent). In addition, as with every publicly offered registered closed-end fund, the civil liability provisions of Sections 11 and 12(a)(2) of the Securities Act would apply to the registration statement and prospectus by which the closed-end fund offers its shares to the public.

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say, "If you regularly make this or that kind of an investment you must make disclosure and obtain your stockholders' consent to this fundamental business; you must wear the label appropriate to your business; and you must conform to the type of regulation that is most appropriate for your kind of a company."

[5] *See* Louis Loss, Joel Seligman & Troy Paredes, I SECURITIES REGULATION § 1.A (6th ed. 2018) ("Loss Seligman") ("[T]here is the recurrent theme throughout these statutes of disclosure, again disclosure, and still more disclosure."). *See also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) ("A fundamental purpose, common to [the federal securities] statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry."); *Lorenzo v. SEC*, 587 U.S. __, 139 S. Ct. 1094, 1103 (2019) (same).

[6] Loss Seligman at § 1.G; Manuel F. Cohen, *Federal Legislation Affecting the Public Offering of Securities*, 28 GEO. WASH. L. REV. 119, 127-128 (1959). *See* James Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959) (account of the transition, in the adoption of the Securities Act, to a disclosure standard). Indeed, Section 23 of the Securities Act makes it a criminal offense to represent that the Commission had passed on the merits of, or given approval to, a security.

[7] In the Concept Release, the Commission stated its "understanding" that "all closed-end funds that invest primarily in private funds are offered only to investors who meet certain wealth requirements (*e.g.*, the tests for accredited investor)," but did not identify how closed-end funds came to adopt this practice or refer specifically to the 15% limitation.

[8] The Concept Release states that "the possibility of offering closed-end funds that make significant investments in private funds to retail investors has historically raised staff concerns under the Investment Company Act, insofar as these investors could not invest directly in private funds." Concept Release at 186. If that is the justification, however, it is applied selectively. For example, many high yield funds invest significant portions of their assets in Rule 144A securities, notwithstanding the fact that retail investors in the funds are not "qualified institutional buyers" eligible to purchase Rule 144A securities.

Investment through a registered fund would also mitigate concerns relating to the potential for fraud or abuse by "bad actors." Retail investment in a registered fund of private funds would involve determinations by two separate fiduciaries – the registered fund's adviser and the private fund's adviser. Retail investors in a registered fund would have the benefit of a professional manager with fiduciary duties to the fund, and the investment adviser managing an underlying private fund would provide a second layer of protection to retail investors. A professional manager of a registered fund evaluating a potential private fund investment would be well positioned to decide whether an underlying private fund presents an attractive risk/reward and performance-to-cost opportunity. In addition, further fiduciary oversight may be present if the registered fund of private funds is offered on an advisory platform or a defined contribution (*e.g.*, 401(k)) retirement plan investment menu.

Moreover, the existing disclosure, valuation and other requirements applicable to registered closed-end funds under the 1940 Act are adequate to address the risks and issues presented by investments in private funds. In fact, these requirements already apply to existing registered funds of private funds, such that these funds (and their boards and advisers) have already worked through these issues. For example, a registered closed-end fund of private funds is required to have a prospectus that discloses material information regarding the specific risks of investing in private funds.[9] Form N-2 also requires disclosure of the aggregate fees paid by a registered closed-end fund to underlying private funds.[10] Although investors pay fees at both levels of a registered fund of private funds, products with two levels of fees already exist in the market. Concerns about fee levels are addressed through disclosure and the annual contract renewal process under Section 15 of the 1940 Act.

Similarly, the 1940 Act mandates a framework for valuation and reporting of a registered fund's investments that is sufficiently broad to address investments in private funds.[11] For many years, this framework has been utilized by business development companies, which do not have

[9] Form N-2 is the disclosure form that the Commission has prescribed for closed-end investment companies to use when registering under the 1940 Act and when registering their securities under the Securities Act. Form N-2 requires disclosure of material information about a registered closed-end fund, including the principal risk factors associated with an investment in the fund, as well as certain undertakings by the fund (*i.e.,* agreements as a condition to effectiveness of the fund's registration statement). For example, Form N-2 requires a description of the types of securities in which a registered closed-end fund will principally invest, as well as the principal risk factors associated with an investment in the fund.

[10] Item 3 of Form N-2 requires a registered closed-end fund to disclose the fees that investors will indirectly bear as a result of investments in any underlying private funds.

[11] For many years, registered funds (including registered funds of private funds) have made investments in difficult-to-value assets. The 1940 Act mandates the framework to determine the fair value of those assets, rather than prohibiting registered funds from holding difficult-to-value assets altogether.

accredited investor restrictions and invest primarily or exclusively in difficult-to-value securities, as well as by existing registered funds of private funds.[12]

Finally, investment through a registered vehicle advised by a professional manager would make it easier for smaller investors to build a diversified portfolio of private fund investments by relying on professional management to perform the requisite due diligence and portfolio construction, which are some of the traditional benefits that registered investment companies have offered to retail investors for nearly 80 years.

For all of these reasons, we believe that investment through a registered fund of private funds is meaningfully different from investment directly in private funds. Retail access to private funds through a registered vehicle can be accomplished in ways that maintain appropriate investor protections, and we believe that all investors, including non-accredited investors, should have access to these opportunities.

Permit Exchange Listing of Registered Funds of Private Funds

We believe that exchange listing would be an important source of liquidity for retail investors holding shares of registered funds of private funds. As noted above, a registered closed-end structure is better suited to an investment strategy that involves significant exposure to illiquid private funds. Although closed-end structures are inherently less liquid than open-end funds, concerns about the liquidity of an investment in a registered closed-end fund could be significantly mitigated by the development of a secondary market for trading in the registered fund's shares. Greater liquidity could also make this model more attractive for "defined contribution" retirement plans under current law.

Despite the clear benefit to investors of an active secondary market, the Staff has informally taken the position that a national securities exchange cannot list shares of a registered closed-end fund that exceeds the 15% limit on investments in Section 3(c)(7) funds. Currently, U.S. stock exchanges will not adopt listing standards without permission from the Commission. Although we do not believe that any special listing requirements would need to apply to a registered closed-end fund that invests more than 15% of its assets in private funds, to the extent U.S. stock exchanges view such listing standards as necessary, we encourage the Commission to approve any changes to generic listing standards required by the exchanges to list these products for trading.

We note that listing standards for registered funds of hedge funds were proposed in 2008 but were not adopted.[13] The 2008 proposed listing standards had two features that would have been potentially problematic. First, the proposed standards would have required a registered fund of hedge funds to calculate its net asset value at least weekly (possibly creating a need for underlying private funds to provide weekly valuations as well). Second, the proposed standards would have

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[12] Like registered closed-end funds, business development companies may be listed for trading on a national securities exchange, or may provide limited liquidity to investors through periodic tender offers.

[13] *See Notice of Filing of Proposed Rule Change Relating to Closed-End Fund of Hedge Fund Listing Requirements*, Rel. No. 34-58067 (June 20, 2008).

required the registered fund of hedge funds to contractually agree to disseminate publicly any material information that an underlying hedge fund made available to its investors (including in cases where the private fund considered such information to be confidential).

Absent the ability to list shares for trading on a national securities exchange, a registered fund of private funds could still be organized and operated as a non-traded closed-end fund that provides limited liquidity to its investors through periodic repurchase offers pursuant to Rule 23c-3 under the 1940 Act (an "interval fund") or tender offers pursuant to Rule 13e-4 under the Securities Exchange Act of 1934 (a "tender offer fund"). However, the limited liquidity provided by these unlisted structures would likely be less than the liquidity provided by an active secondary market for trading in the fund's shares. For these reasons, we encourage the Commission to consider allowing U.S. stock exchanges to list registered funds of private funds under their generic listing standards, or to permit U.S. stock exchanges to adopt specific listing standards for such funds.

Permit Registered Feeder Fund Structures

We also encourage the Commission to consider permitting wealth managers and other intermediaries to organize "feeder" funds registered under both the 1940 Act and the Securities Act that invest substantially all of their assets in a single unaffiliated private fund. A registered "feeder" fund structure would enable intermediaries to offer access to private funds to their existing customers who do not meet the qualified purchaser or accredited investor standards. Many feeder funds currently exist in the marketplace, and intermediaries have organized feeders into hundreds of private funds; however, these feeder funds are currently available only to customers who are qualified purchasers. With additional regulatory relief, they could also be offered to investors who are not qualified purchasers or accredited investors. Accordingly, we encourage the Commission to consider the following regulatory changes to permit registered feeder fund structures.

First, relief from Rule 2a51-3 under the 1940 Act would be required to permit a fund "formed for the specific purpose" of acquiring securities offered by a Section 3(c)(7) fund to count as a single qualified purchaser (*i.e.*, no "look through" to the beneficial owners). Such relief would be made available only to registered feeder funds, such that retail investors would benefit from the protections of the 1940 Act and the involvement of a third-party investment adviser at the feeder fund level. Such relief could also be conditioned on, for example, the feeder fund's adviser making an affirmative decision, after appropriate diligence and review, to invest in the underlying private fund, and/or requiring the majority of the underlying fund's committed capital to come from non-retail investors. Second, sales of securities issued by a registered feeder fund would require relief from the definition of "distributor" in Rule 140 under the Securities Act.[14] In addition, for a

[14] Rule 140 provides that "[a] person, the chief part of whose business consists of the purchase of the securities of one issuer . . . and the sale of its own securities . . . to furnish the proceeds with which to acquire the securities of such issuer . . . , is to be regarded as engaged in the distribution of the securities of such issuer . . . within the meaning of Section 2(11) of the Act." It is likely that many underlying private fund sponsors would be disinclined to have a feeder fund be

registered feeder fund to be offered to retail investors, the Staff would need to discard its position limiting sales of registered funds that invest more than 15% of their assets in private funds to accredited investors. Finally, for a registered feeder fund to list its shares on a national securities exchange, the Commission would need to allow listing under the exchange's generic listing standards, or permit U.S. stock exchanges to adopt specific listing standards for registered feeder funds.

A registered feeder fund would have many of the same advantages as a registered fund of funds model. As discussed above, investment through a registered fund would give retail investors the protections of the 1940 Act and the Securities Act, including oversight of the fund and its manager by an independent board of directors. A registered feeder fund would also provide better liquidity relative to the underlying private fund, particularly if the registered fund's shares could be listed for trading on a national securities exchange. Accordingly, we encourage the Commission to consider regulatory changes to allow the offering of registered feeder fund structures to retail investors.

Relax Liquidity Requirements for Target Date Retirement Funds

The Concept Release contemplates the possibility of one or more "retirement only" exemptions to expand retail investment in private funds. For example, the Concept Release notes that target date retirement funds that have a target retirement date significantly far into the future are designed for investors with longer holding periods and, therefore, may be better aligned with the limited liquidity of securities acquired in exempt offerings.[15] Most target date retirement funds are organized as registered open-end funds, and are therefore subject to Rule 22e-4 under the 1940 Act, which prohibits open-end funds from investing more than 15% of their net assets in illiquid investments. This effectively limits the extent to which a target date retirement fund may invest in private funds and other private companies in exempt offerings, which are typically considered to be illiquid for purposes of Rule 22e-4.

We encourage the Commission to consider additional flexibility for target date retirement funds to hold illiquid investments in amounts that exceed the 15% limitation under Rule 22e-4. Because target date retirement funds are designed for retirement savings, the holding period of many such investments tends to be longer than that of other open-end mutual funds. For this reason, the need for target date retirement funds to maintain liquid assets available to satisfy redemption requests is correspondingly reduced. In addition, through the normal operation of a target date fund's glide path, illiquid investments would likely be held in greater amounts earlier in a retirement saver's investing life, and the account would move to a higher percentage of more liquid assets as the heightened liquidity needs presented by retirement approach.

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treated as a distributor. For example, such treatment could require the underlying private fund to sign the feeder fund's registration statement.

[15] *See* Concept Release at 184.

We encourage the Commission to consider amending Rule 22e-4 to permit a target date retirement fund with a strategy that includes investing in private funds to exceed the 15% limit in accordance with a liquidity risk management program approved by the fund's board. This additional flexibility could improve retirement savings for retail investors by providing such investors with the benefits of indirect access to private funds, which include diversification and returns that are relatively less correlated with traditional asset classes, through a vehicle specifically managed for the benefit of retirement plan investors.[16]

Section 17(a) Relief for Registered Funds of Affiliated Private Funds

We encourage the Commission to consider relief from Section 17(a) of the 1940 Act to permit registered closed-end funds to invest in affiliated private funds. In general, Section 17(a) prohibits an affiliated person (or an affiliated person of such a person) of a registered fund, acting as principal, from engaging in transactions (including purchases and sales of securities or other property) with the registered fund. Section 17(a) effectively prevents the formation of registered closed-end funds that invest in private funds advised by the registered fund's adviser.

Although a registered fund of *unaffiliated* private funds can be organized and offered without the need for relief from Section 17(a), as interpreted by the Commission, we believe retail investors and their financial advisers should be permitted to select registered products in which the registered fund of funds and some or all of the underlying private funds are managed by the same manager or affiliated managers. Such funds could invest primarily in affiliated private funds, or could invest in one or more affiliated funds as part of a broader investment strategy.

We note that the Commission (or Congress) has permitted registered funds of affiliated funds in other contexts. For example, registered funds can invest in affiliated registered funds pursuant to Section 12(d)(1)(G) of the 1940 Act, as well as in affiliated unregistered money market funds pursuant to Rule 12d1-1 under the 1940 Act. In addition, registered funds that invest primarily in a "family" of private funds (*i.e.*, private funds with a single sponsor) already exist. To the extent that the Commission has concerns about conflicts of interest, these concerns could be addressed through other mechanisms, such as the involvement of the registered fund's board of directors and/or enhanced disclosure in the registered fund's prospectus. Allowing registered funds of affiliated private funds could also introduce competition into the market (which is generally good for investors) and could potentially lower fees for investors to the extent the registered funds choose to charge reduced fees for assets invested in affiliated funds.

Harmonize with the Department of Labor

Employer-sponsored defined contribution (*e.g.* 401(k)) plan fiduciaries largely avoid offering private funds as part of the participant investment choices, despite the prevalence of these

[16] In addition to the regulatory changes described above, the offering of registered feeder funds (and any registered closed-end funds, for that matter) would be facilitated by allowing closed-end investment companies to offer new funds as series of an existing registrant, similar to how many open-end funds operate. See, for example, Rule 18f-2, which is applicable only to open-end investment companies.

funds in defined benefit plans operated by fiduciaries, who are held to the same standard of care. This is because private funds' limited liquidity and relatively high fees (as compared to index funds, for example) create fiduciary litigation risk. Studies suggest that, over the last 25 to 30 years, access to private market investments is contributing to the relative outperformance of defined benefit plans over defined contribution plans.[17]

We believe that, with some clarifications to the existing regulatory framework, including existing fiduciary safe harbors and the duty of plan fiduciaries to look at more than just fees, the U.S. Department of Labor (the "DOL") can take big steps towards expanding 401(k) plan access to private funds investments, which should, in turn, help level the playing field for plan participants in defined benefit plans and 401(k) plans and facilitate greater retirement savings.

Accordingly, we recommend that the Commission work with the DOL to expand retail investor access to private funds through defined contribution retirement plans.

Technical Suggestions

Finally, we would like to take this opportunity to suggest changes of a more technical nature that could facilitate retail investor access to private companies and capital formation.

Clarification of Rule 2a51-3 for parallel 3(c)(1) and 3(c)(7) funds. Section 3(c)(7)(E) of the 1940 Act provides that parallel Section 3(c)(1) and Section 3(c)(7) vehicles will not be integrated for purposes of determining compliance with those sections. We note that sponsors of Section 3(c)(7) funds often organize parallel Section 3(c)(1) funds in reliance on Section 3(c)(7)(E) for the purpose of permitting "friends and family" who are not qualified purchasers to participate in the Section 3(c)(7) fund's investment strategy. Rule 2a51-3 under the 1940 Act currently provides that a company will not be deemed to be a qualified purchaser if it was formed for the specific purpose of acquiring the securities offered by a company excluded from the definition of investment company by Section 3(c)(7) unless each beneficial owner of the company's securities is a qualified purchaser. We encourage the Commission to consider amending Rule 2a51-3 to clarify that the "look through" requirement does not apply to a fund organized solely to pool the investments of parallel Section 3(c)(1) and Section 3(c)(7) vehicles.

Elective interval fund status. The Concept Release requests comment on several issues relating to the operation of interval funds. The Concept Release notes that the Commission does "not believe these funds currently are used extensively as a means to provide capital to smaller issuers in exempt offerings," which may suggest that the Commission believes these fund structures are currently underutilized as vehicles to provide non-accredited investors with access to private issuers. We believe that the current requirements of Rule 23c-3 under the 1940 Act with respect to periodic repurchase offers may be preventing more widespread use of interval funds as vehicles for providing non-accredited investors with exposure to investments in private funds.

[17] *See* Partners Group, *Adding private markets to DC pension plan portfolios – a case study* (Jan. 2017) *available at* https://www.partnersgroup.com/fileadmin/user_upload/Documents/Research_PDF/20170123_Adding_private_markets_to_DC_pension_plan_portfolios.pdf.

Under existing Rule 23c-3, an interval fund must complete its first repurchase offer within two years of the effective date of the fund's registration statement. Many private funds, however, have significantly longer investment periods (*e.g.*, five to seven years) before they begin returning capital to their investors. The longer-term nature of private fund strategies is misaligned with the requirement under Rule 23c-3 that interval funds begin making repurchase offers within two years. In order to comply with Rule 23c-3, for example, an interval fund would be required to begin making repurchase offers before a significant portion of its capital commitments to the underlying private funds have been called. This could force an interval fund to artificially limit its capital commitments to its underlying private funds, and/or exit private fund investments prematurely in order to fund repurchase requests, which would negatively impact the interval fund's performance.

We believe these concerns could be addressed by providing additional flexibility for interval funds to commence repurchase offers after the completion of the fund's initial ramp up period of investment operations. We note that the length of an interval fund's initial ramp-up period will depend on the nature of its investment strategy, and these periods may differ across interval funds that employ different strategies. Accordingly, we encourage the Commission to consider amending Rule 23c-3 under the 1940 Act so that a registered close-end fund can "elect" to become an interval fund at a future time. A registered closed-end fund could "elect" interval fund status, for example, by adopting a fundamental policy to conduct periodic repurchase offers after it has ramped up investment operations.

<u>Special situation investment companies</u>. We encourage the Commission to amend Rule 3a-1 to remove the reference to "special situation investment company" in Rule 3a-1(b). In 1940 Act Release No. IC-10937 (Nov. 13, 1979), the Commission stated that a "special situation investment company" – defined as a company that secures control of another company primarily for purposes of making a profit on the sale of the controlled company's securities – is an investment company. In contrast, the Commission stated that a "holding company," which "generally secures control of other companies primarily for the purpose of engaging in the other companies' line of business," is not an investment company,

In practice, it is difficult to distinguish between the two types of companies, leading to confusion among registrants and investors as to the availability of Rule 3a-1. In addition, it is not clear what investor protection or other concerns are addressed by the distinction. Because the holding company structure is another avenue for allowing retail investors to invest indirectly in private companies, and for private companies to indirectly access the capital markets, we believe that providing more certainty as to the availability of Rule 3a-1 will support the Commission's goals embodied in the Concept Release. This certainty can be provided by removing the reference to "special situation investment companies" in Rule 3a-1(b) and allowing registrants to rely on the numerical and other tests included in the rule.

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We appreciate the opportunity to comment on the Concept Release and would be pleased to answer any questions you may have regarding our comments.

Respectfully submitted,

Ropes & Gray LLP

Ropes & Gray LLP