September 24, 2019

Via E-mail

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

Email: *rule-comments@sec.gov*

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

Dear Acting Secretary Countryman:

Voya Financial, Inc.[1] is pleased to submit comments to the Securities and Exchange Commission (the "Commission") on the above-referenced concept release (the "Concept Release"), which solicits comment on opportunities to modernize and improve existing offering exemptions under the Securities Act of 1933 (the "Act").

We focus our comments on an aspect of the Concept Release on which we believe we offer unique insight given our position as one of the largest retirement recordkeepers and service providers in the United States.[2] Specifically, we address the Commission's request for comment on whether investors that are not "*accredited investors*" under the current definition should be allowed "to invest in pooled investment funds, such as private funds under Section 3(c)(1) under the Investment Company Act, if these investors are…limited to making the investment out of retirement or other similarly federally-regulated accounts…."[3] The Commission also asks whether there are "other regulatory regimes, such as ERISA, that may affect the ability of certain classes of investors to invest in exempt offerings."[4]

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[1] Voya Financial, Inc. (NYSE: VOYA), helps Americans plan, invest and protect their savings so they can get ready to retire better. Serving the financial needs of approximately 13.8 million individual and institutional customers in the United States, Voya is a Fortune 500 company with a vision to be America's Retirement Company®. For more information, visit voya.com.

[2] We are also a member of, and support the positions expressed in, a separate comment letter submitted by the Defined Contribution Alternatives Association on September 9, 2019 (the "DCALTA Letter").

[3] Concept Release at 58.

[4] Concept Release at 60. References in this letter to "ERISA" are to the Employee Retirement Income Security Act of 1974, as amended, and references to the "Investment Company Act" are to the Investment Company Act of 1940, as amended.

The Concept Release acknowledges a fundamental investor access problem: as the regulations surrounding public offerings and public company reporting have become more complex, an increasing share of new capital raising has taken place in the private market. As a result, investors who have no or limited access to private markets miss investment opportunities available to larger investors.

At the same time, we recognize that limiting private offerings to wealthy or sophisticated investors can serve an important investor protection function. Small investors often lack the tools available to wealthy investors and institutions, so, for example, Rule 501(a)(1) of Regulation D defines "*accredited investor*" in a way that limits their participation in a large portion of the capital markets.[5]

However, this protective restriction[6] also keeps most participants in the $8.2 trillion[7] defined contribution retirement market from investing in private securities offerings.[8] And, in turn, this means that investments that are appropriate for many such investors, with benefits that can include enhanced returns and diversification of risk, are unavailable to them. As noted in the DCALTA Letter, research indicates that (1) investment returns are consistently higher for portfolios that incorporate U.S. buyout and venture capital funds, (2) risk is considerably lower for portfolios that include U.S. buyout funds and (3) Sharpe Ratios (risk-adjusted returns) are consistently higher for portfolios with U.S. buyout funds and a combination of U.S. buyout and venture capital funds.[9]

We believe that, where a fiduciary is already actively involved in selecting the investments made available to retirement plan participants, the existing definition of "*accredited investor*" is unduly restrictive. In the ERISA context, plan fiduciaries are subject to a very high

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[5] The Concept Release notes that offerings conducted under Rule 506 of Regulation D are now larger than amounts raised in the registered market. "In 2018, the amount raised by Rule 506 offerings, $1.5 trillion, was larger than the $1.4 trillion raised in registered offerings." Concept Release at 78.

[6] There are other laws and rules that limit retirement plan participants' access to private capital markets that are outside the scope of the Concept Release. For example, regulations under ERISA exempt assets held inside of funds registered under the Investment Company Act from the definition of "*plan assets*", but do not generally exempt assets held in private funds. See 29 C.F.R. 2510.3-101(a)(2). We encourage lawmakers and regulators to also consider addressing those structural barriers, but because the Concept Release seeks input on the narrower topic of private offering exemptions under the Act we do not address those other topics here.

[7] Investment Company Institute, Retirement Assets Total $29.1 trillion in First Quarter 2019 (June 19, 2019). As of March 31, 2019, of $29.1 trillion dollars in U.S. retirement assets, $8.2 trillion were held in defined contribution plans. This letter identifies an issue relating to defined contribution plans, so other retirement savings vehicles (e.g., defined benefit plans and individual retirement accounts) are excluded from the size of the relevant market.

[8] We exclude, for purpose of this discussion, enrollments in defined contribution retirement plans that are exempt under Section 3(a)(2) of the Act (as distinguished from offerings of securities made available as underlying investments through such plans), as well as investments in collective trust funds that represent purpose-built plan investment vehicles. While these technically are examples of offerings made available to retail plan investors that are exempt under the Act, we do not believe they raise the same issues we identify in this letter – namely, that plan investors lack opportunities to invest in private offerings being made available more broadly in the market.

[9] DCALTA Letter at 2.

fiduciary standard in selecting plan investments, and ERISA includes meaningful disclosure standards independent of, and in addition to, the Act's disclosure regime.[10] Retirement plan participants are therefore in a meaningfully different (and more protected) situation than individual retail investors.

We therefore encourage the Commission to consider modifying the definition of "*accredited investor*" under Rule 501(a)(1) under the Act to make private offerings more readily available to retirement plan participants who benefit from fiduciary oversight under ERISA or a similar state or federal fiduciary standard. We believe this could be accomplished by deleting the final clause of Rule 501(a)(1) ("or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors") and either (i) adding language affirmatively stating that, with respect to any investment through a plan governed by ERISA or a comparable fiduciary standard, the plan, and not any individual plan participant, will be deemed to be the investor or (ii) adding, as a new category of "*accredited investor*", any participant in a plan governed by ERISA or a comparable fiduciary standard, to the extent such participant makes investment decisions relating to plan assets.

A more limited approach that would be less helpful in solving the issue we have identified, but would nevertheless offer some incremental clarity in this area, would be to provide guidance similar to existing guidance by the staff of the Division of Investment Management with respect to retirement plan investments in private funds.[11] Such guidance could confirm that, in the circumstances described in existing no-action relief under the Investment Company Act,[12] the plan is a single "*accredited investor*" within the meaning of Rule 501(a)(1) of Regulation D.

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[10] See, e.g., 29 CFR § 2550.404a-5.

[11] See, e.g., The H.E.B. Investment and Retirement Plan, SEC No-Action Letter (May 18, 2001) (confirming that the staff of the Division of Investment Management would not recommend enforcement where plan assets are invested in funds relying on Section 3(c)(7) of the Investment Company Act and the plan, rather than individual participants, is treated as the purchaser of investment interests, provided several strict limitations on plan participant involvement in the investment decision are satisfied); Standish, Ayer & Wood, Inc. Stable Value Group Trust, SEC No-Action Letter (Dec. 28, 1995) (similar, but with regard to funds relying on Section 3(c)(1) of the Investment Company Act). As noted in the DCALTA Letter, the restrictions set forth in these no-action letters pose operational challenges that have made it challenging to offer private fund investments to defined contribution plan investors. We also encourage the Commission to reconsider these restrictions in the context of Sections 3(c)(1) and 3(c)(7) of the Investment Company Act, but that is beyond the scope of the Concept Release, and therefore not fully addressed here.

[12] See Id.

We appreciate the opportunity to comment on the Concept Release and thank the Commission for undertaking this important initiative.

Very truly yours,

Charles Nelson
Chief Executive Officer, Retirement