September 24, 2019

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

Dear Ms Countryman,

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

CompliGlobe Ltd. is pleased to provide the Commission and the SEC Staff with its comments on the Securities Offering Exemptions Concept Release.[1] In considering the excellent work and proposals prepared by the SEC Staff, our comments reflect the writer's experience gained in more than 37 years in the industry as a regulator, industry participant and consultant, including involvement with U.S., non-U.S. and cross-border private placements and registered offerings of securities and experience gained in the U.S., UK, EU and Asian markets.

At the outset, we note that the current regulatory regime, in place since the Securities Act of 1933 ("Securities Act"), is robust and generally not in need of change. The Securities Act and the other three main federal securities laws set forth a framework that has withstood the test of time.

The keystone of the federal securities laws is "truth in disclosure". The operative provisions for issuers in the Securities Act and for investment companies in the Investment Company Act of 1940 ("1940 Act") mandate full and fair disclosure of material facts to permit investors to make informed decisions.[2] By the same token, as noted by Congress when it enacted the Securities Act (and as noted by the Commission in the *Concept Release*), there are situations where the need to register or the benefits of registration are "too remote".[3] It is by operation of the later that Congress provided for exemptions from registration for offerings of securities – "private placements", operating on the theory that sophisticated investors do not need the benefits of disclosure and can fend for themselves. These are policed by the antifraud provisions of the federal securities laws.

Our federal securities regime is shaped by laws and rules that establish line-item disclosure requirements and a standard of materiality for issuers of securities in public offerings. It is not, save for certain provisions of the Investment Advisers Act of 1940 ("Advisers Act") and the rules thereunder, principles based. The drafters of the Securities Act went to great lengths to fashion a regime of truth in disclosure by setting out clear, objective line-item disclosure requirements and a materiality standard, and generations of Commissioners and SEC Staff have kept fidelity with these.

[1] "Concept Release on Harmonization of Securities Offering Exemptions", Securities Act Release 33-10649, 84 F.R. 30460 ("*Concept Release*").
[2] *Concept Release* note 3, 84 F.R. at 30460, citing "*See, e.g.,* Commissioner Francis M. Wheat, Disclosure to Investors—A Reappraisal of Federal Administrative Policies under the '33 and '34 Acts (Mar. 1969)."
[3] *Concept Release* note 4.

Any approach that fosters principles-based disclosure would result in less disclosure, cause confusion for investors, hinder the review of registration statements and continuing obligations disclosure documents and make it more difficult to enforce the federal securities laws, and for these reasons we caution against it.

Truth in disclosure depends upon information: clear requirements established by line-item disclosures and a standard of materiality with respect to what is disclosed, how, by whom and to what type of investor. Recent speeches by Commissioners have touched upon the role of information and disclosure. To the writer and many others, full and fair disclosure means just that. Disclosure is the lifeblood of our markets, the "oxygen" by which securities are offered, sold and resold, markets made, brokers operate, mutual funds invest, SEC registered investment advisers ("RIAs") act for their clients in the discharge of their fiduciary duties (unlike brokers that, as market intermediaries, are not true fiduciaries) and exchanges operate. Curtail the oxygen supply and it becomes difficult to breathe. By the same token, restrict information, qualify it by oversimplification, make disclosures principles-based, limit it to the public markets only or place the emphasis on form disclosure over information content and the markets and investors suffer. A retail investor is just as likely to bring an action to recover for fraudulent, materially misleading or incomplete disclosure in a registration statement as is the Commission; so, too, will an institutional investor sue for bad disclosure in a private placement offering memorandum ("PPM").

We observe that any proposals emerging from this *Concept Release* and other Commission proposals must ensure that there is no curtailment of information or the line-item/materiality basis by which issuers draft, file and disseminate the offering and disclosure documents upon which investors rely. There should not be any restrictions for disclosures in PPMs Given the opportunity, if I were a Commissioner my vote would be for enhanced full and fair disclosure for both information and financial statement disclosure and for accountability for anything that fell short of this standard.

As times change, the need for updating becomes acute. We agree with the Commission that the architecture of the private placement framework needs modernization. While the Commission has called for comment, it likewise opens the door to re-examine the way securities are offered and sold in private placements and are resold – by this, we mean types of investors and brokerage.

<u>Internationalization</u>

Internationalization plays a role in this consultation. Private placements are not merely U.S. centric. Certain rules and regulations under the federal securities laws envisage cross-border activity and recognize non-U.S. activity with U.S. implications such as Regulation S, the U.S./Canadian MJDS and Rule 15a-6 under the Securities Exchange Act of 1934 ("Exchange Act"). Non-U.S. issuers use Regulation D to sell securities in private placements to U.S. investors, often QIBs, and some go on register the securities for exchange listing and trading. Non-U.S. issuers offer ADRs. U.S. issuers sell their securities to U.S. and non-U.S. investors in Section 5 registered public offerings and private placements and use Regulation S for non-U.S. offerings of securities.

The emergence and development of the internet, social media, electronic messaging, computing and IT enhancements and cross-border trading and clearance have brought about benefits, but impediments remain. These include separate regimes for brokers and RIAs, not permitting RIAs to engage in limited purpose brokerage and offer for sale the securities of the private funds they advise (see our comments below), not modernizing key rules to handle internationalization (examples are Rule 15a-6 and the books and records retention rules for RIAs and brokers). RIAs cannot take client orders to buy or sell securities or offer for sale the securities of the private funds that they advise. Subject to conditions, a broker can engage in limited advisory activities if these remain incidental

and not have to become an RIA. An RIA cannot engage in limited brokerage activities. This is not the case in many non-U.S. jurisdictions. Likewise, making a broker a fiduciary for its incidental advisory activities is not a means to better serve the best interests of investors, as it confuses the very investors that are, as the Commission points out, in need of proper financial advice.

The policies and goals of the federal securities laws are valid. With full and fair disclosure, these are to foster capital formation, protect investors, ensure fair and orderly markets, and provide for enforcement action when these are not satisfied. These should *never* change – but as markets evolve, the means by which these are brought about in laws, rules and regulation need updating to remain relevant. Keep the structure but change the effect.

In particular, we ask that the Commission consider a proposal to review the activities of RIAs and Private Fund Advisers ("ERAs"), particularly non-U.S. RIAs with U.S. person[4] clients and non-U.S. ERAs with U.S. persons invested in the private funds they advise, to remove the impediments that prevent them from being able to offer in private placements the securities of the private funds that they advise. These non-U.S. RIAs and non-U.S. ERAs can do this internationally but cannot do this in the United States. We submitted to the Chairman's office a blueprint article[5] on the issues facing RIAs, particularly non-U.S. RIAs. This includes proposals to equalize U.S. regulatory requirements applicable to non-U.S. RIAs with home country laws, rules and regulations, and we incorporate that blueprint article into these comments as part of our public comment.

Comments

Our comments do not respond to each question set forth in the Concept Release. Instead, we make specific points and recommendations. Some of these may be actioned by the Commission or by the SEC Staff pursuant to delegated authority. Others, going to provisions in the federal securities laws, require Congressional action. We will be happy to provide an outline of specific changes to laws, rules and regulations.

Public offerings and private placements

The passage of time, market and technological developments and Congressional, Commission and SEC Staff action have resulted in multiple and inconsistent securities offering exemptions and the means by which securities are offered and sold in public (Securities Act Section 5 registered) offerings. In addition to the capital raising exemptions cited in the *Concept Release*,[6] there are multiple means by which securities may be offered in a public offering. Both need to be harmonized, as well as key defined terms (see our comments below). We recommend the following.

1. Section 5 of the Securities Act can be amended by clarifying that there is one means to achieve a public offering – by filing a registration statement thereunder and having it declared effective by the SEC Staff. The current types of public offerings and levels of issuers (unseasoned issuers, seasoned issuers and WKSIs, three types of accelerated filers) should be harmonized into a single regime for issuers and filers with levels of disclosure dictated by the size and type of issuer and the information required to be disclosed and in the market.
2. XBRL provides a format to file, review, download and analyze financial data. We believe that it is time for the Commission to issue a concept release to achieve the goals of the 21st Century Disclosure Initiative – information over form. IT, systems, internet and computer enhancements

[4] As defined in Rule 902 of Regulation S under the Securities Act.
[5] "Could/Should an Investment Adviser be a Broker-Dealer?" ("*IA BD Discussion Draft*"), Discussion Draft dated February 20, 2019.
[6] *Concept Release*, Table 1, 84 F.R. 30462 and 30463.

since 2008 would permit an issuer to upload and update one or more blocks of disclosure into "topics" that would track the disclosure requirements of existing forms such as S-1, S-3, F-1 and F-3, 20-F and 10-K, and Regulation S-K. Investors, analysts, brokers, RIAs and others would download disclosures in a "form" or in one or more blocks of data. An issuer would be required to keep its disclosures – not its forms – current and materially correct. The SEC Staff could review disclosures in one block, multiple blocks or in forms, reducing costs and enhancing and speeding up the processing of registration statements and continuing obligation filings.

For private placements, we have the following recommendations. It is noted that most offerings of securities are by private placements and are largely self-underwritten.

1. Streamline and harmonize the multiple types of private placements that are discussed in the *Concept Release* and illustrated in Table 1. Section 3 of the Securities Act should contain provisions for exempt securities, not exempt offerings. Section 4 would treat exempt transactions, including private placements. Definitions here and elsewhere as appropriate would move to one section of one law and other sections of the federal securities laws and rules and regulations thereunder would cite to them. Under this, the Commission would adopt one regulation (rules) for intrastate private placements and, separately, an enhanced Regulation D to cover all other private placements. The SEC Staff would be authorized to act by delegated authority to grant exemptions and issue no-action letters and interpretations.
2. Eliminate the multiple and duplicative definitions that complicate private placements and rules that are involved in private placements and trading – accredited investors, qualified purchasers, qualified investors, QIBs, major U.S. institutional investors and U.S. institutional investors.[7] Amend the relevant federal securities laws and the rules and regulations thereunder to simplify types of investors and keep the definitions in one place.

    - Keep the current definition of accredited investor but change its focus to individuals and high net worth individuals and their trusts away from institutions and provide a means to permit the Commission to update the definition when and as required.
    - Consolidate the definitions of qualified purchaser, qualified investor, QIB, major U.S. institutional investor and U.S. institutional investor into a single new definition, "institutional investor". This new definition would exclude accredited investors (as proposed above) and would include legal entities such as companies, LLCs, LLPs, LPs and institutional trusts, as well as RIAs and ERAs with respect to their clients for whom they exercise discretion.

      There would be three types of purchasers for private placements – non-accredited investors (maximum of 35, save for crowdfunding), accredited investors and institutional investors. In all instances, investors would self-certify their status upon purchase and then annually. When evidence would be introduced that the certification was in doubt or not correct, the issuer would be free to require additional information to clarify the status or be able to compulsorily redeem the investor.

3. If it is the case that the Commission wishes to harmonize securities offering exemptions, it must consider not only the private placement of securities of traditional issuers such as industrial companies but also private funds. We recommend that the Commission modernize the scope

[7] We have submitted to the Chairman's office a chart comparing each of the terms accredited investor, qualified purchaser, qualified investor, QIB, major U.S. institutional investor and U.S. institutional investor and the components of each. This illustrates how one of these types of investors may engage in an offering or an activity involving securities but a larger institution in another defined term cannot. Regulatory simplification requires that these terms be updated and harmonized into, as we suggest, the three proposed definitions. We incorporate that chart into these comments as part of our public comment.

and application of the Exchange Act Section 3(a)(4) definition of "broker" and, as necessary, the attendant broker registration requirements (and exemptions from registration) to permit an RIA or an ERA to offer in a private placement the securities of the private funds that they advise, particularly non-U.S. RIAs and non-U.S. ERAs. By way of background, a private placement of securities involves four federal securities laws – not to mention other laws involving tax and related matters.

- The securities must satisfy an exemption from registration under the Securities Act.
- When offering the securities of a private fund, the fund itself must not be deemed to be an investment company under an exemption in the 1940 Act.
- The seller of the securities must, absent an exemption or exception, register as a broker.
- If a private fund is involved, the investment adviser (or sub-adviser) involved must establish an exemption, ERA, or become an RIA – it cannot sell the securities of the private fund.

An offering of the securities of a private fund also involves multitude of rules and definitions. This complexity increases costs, complicates documents, requires multiple parties and complicated PPMs and subscription documents. If it is the case that the Commission wishes to harmonize securities offering exemptions, it must change how these four laws and the rules and regulations thereunder, and key definitions, come into operation.

This could be achieved by amending Exchange Act Rule 3a4-1 or providing a class exemption under that rule to permit RIAs and ERAs to offer for sale the securities of the funds that they advise.[8] Also, by streamlining the types of eligible investors as we note above, discussed in our blueprint article *IA BD Discussion Draft*, it would simplify and harmonize the rules and regulations involved, streamlining the offering process.

4. Resales of restricted securities are made in compliance with Rule 144 and, for QIBs, Rule 144A. The writer's experience with Rule 144 dates to 1982-1985 when he pre-cleared Rule 144 resales for a major U.S. broker's international system. In our experience, the current rules are operative and, other than changing "QIB" to "institutional investor", not in need of change.

<u>Conclusion</u>

In issuing this *Concept Release*, the Commission is taking an important step to harmonize securities offering exemptions. It is the time not only to achieve this but to remove other impediments to harmonize these exemptions. The relevant laws and rules must be simplified with clear standards. Definitions must be streamlined. Rules such as Exchange Act Rule 15a-6 need amending. RIAs and ERAs should be able to offer in private placement the securities of the private funds they advise. This can be achieved by amending Exchange Act Rule 3a4-1 or granting the request for no-action relief. We are happy to meet with the Commissioners or the SEC Staff to discuss our comments.

For and on behalf of CompliGlobe Ltd.,

Mark Berman
Founder and CEO

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[8] A request for no-action relief under Rule 3a4-1 to permit RIAs and ERAs to offer the securities of the private funds that they advised was submitted to the SEC Staff.