October 18, 2019

Via Electronic Submission (www.sec.gov)

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

Re: Concept Release on Harmonization of Securities Offering Exemptions, SEC Rel. No. 33-10649, File No. S7-08-19

Dear Ms. Countryman:

The Investment Adviser Association ("IAA")[1] appreciates the opportunity to comment on the Securities and Exchange Commission's ("Commission's" or "SEC's") concept release on harmonization of securities offering exemptions.[2] The purpose of the Concept Release is to seek input on whether, in light of the increased activity in the exempt markets, the current exempt offering framework works effectively to "provide access to capital for a variety of issuers, particularly small issuers, and access to investment opportunities for a variety of investors while maintaining investor protections."[3] We are pleased that the Commission is soliciting input on the important issue of investor access to the exempt markets and believe it is appropriate for the Commission to consider expanding such access, consistent with ensuring investor protection.

Our comments are limited to the following: (i) the definition of "accredited investor" in Regulation D under the Securities Act of 1933, as amended ("Securities Act"); (ii) the definition of "qualified institutional buyer" ("QIB") in Rule 144A under the Securities Act; (iii) the scope of "general solicitation" and "general advertising" in Regulation D under the Securities Act; and (iv) the ability of investors to invest in closed-end registered investment companies ("closed-end funds") that invest in privately offered alternative investments.

[1] The IAA is a not-for-profit association dedicated to advancing the interests of SEC-registered investment advisers. The IAA's member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information please visit our website: www.investmentadviser.org.

[2] *Concept Release on Harmonization of Securities Offering Exemptions*, SEC Rel. No. 34-86129 (June 18, 2019), 84 FR 30460 (June 26, 2019) ("Concept Release"), available at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13255.pdf.

[3] *Id.* at 30467.

I. Recommendations

We make the following recommendations:

A. The Commission should amend the accredited investor definition in Rule 501 under Regulation D to include: (i) the discretionary clients of SEC-registered investment advisers; (ii) "knowledgeable employees" of private funds, as defined in Rule 3c-5 under the Investment Company Act of 1940, as amended ("Investment Company Act"); (iii) "qualified purchasers," as defined in Section 2(a)(51) of the Investment Company Act; (iv) "qualified clients," as defined in Rule 205-3 under the Investment Advisers Act of 1940, as amended ("Advisers Act"); (v) Investment Company Act Section 3(c)(7) funds; and (vi) SEC-registered advisers and their knowledgeable personnel investing on their own behalf.

B. The Commission should expand opportunities for investors to participate in resale transactions under Rule 144A.

C. The Commission should clarify that communications not intended for public consumption do not violate the general solicitation or general advertising prohibitions under Regulation D.

D. The Commission should expand the ability of investors to invest in closed-end funds that invest in exempt offerings.

II. Discussion

A. The Commission Should Amend the Accredited Investor Definition to Expand the Pool of Sophisticated Investors Able to Invest in Regulation D Offerings.

1. Background.

Generally, investors, whether individuals or entities, are not permitted to invest in exempt offerings unless they are accredited investors, as defined in Rule 501 of Regulation D. To be an accredited investor, an individual must meet specified financial thresholds based on income or net worth such that the individual is presumed to be sufficiently sophisticated so as not to require the protections of registration under the Securities Act.[4] In addition, only those types of entities named in the rule, such as banks, broker-dealers, insurance companies, and registered investment companies, are considered accredited investors. Employee benefit plans under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") are accredited investors if they

[4] *See* SEC Staff Report on the Review of the Definition of "Accredited Investor" (Dec. 18, 2015) ("2015 Staff Report"), available at https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf.

are represented by an SEC-registered investment adviser acting as a fiduciary,[5] but the adviser itself and its knowledgeable personnel are not considered accredited investors when they invest on a discretionary basis on behalf of other types of clients or on their own behalf.

Under Rule 506(b) of Regulation D, issuers may sell securities to an unlimited number of accredited investors, as long as (i) there is no general solicitation or general advertising to market the securities, and (ii) securities are sold to no more than 35 non-accredited investors that, alone or with a purchaser representative, must have sufficient knowledge and financial experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment.[6] Under Rule 506(c), issuers may use general solicitation under Rule 506, as long as (i) all the purchasers of the securities are accredited investors, and (ii) the issuer takes reasonable steps to verify that the purchasers are accredited investors.[7]

The Commission seeks comment on whether it should consider rule changes that will help make exempt offerings more accessible to a broader group of individuals and investors other than those that currently qualify as accredited investors.[8] We believe that it should. In our view, the goal of providing investment exposure to exempt offerings to retail and institutional investors as part of an asset allocation strategy (whether for retirement or other investment purposes) is an important one. Consistent with the recommendation in the 2017 U.S. Treasury Report,[9] we believe it is important to provide additional opportunities for a wider range of investors to participate in the potential growth presented by private offerings, while maintaining investor protection. As outlined below, we believe that the Commission should expand the category of accredited investors and confirm explicitly that certain similarly situated investors are also accredited investors.

2. <u>The Commission Should Consider Alternative Measures of Sophistication for Investors</u>.

With respect to individual investors, we agree that in order to maintain investor protection a certain level of investment sophistication should be required as a threshold for investing in the exempt markets. We supported the recommendations in the 2015 Staff Report

[5] Rule 501(a) of Regulation D.

[6] Concept Release at 30480.

[7] *Id.*

[8] *Id.* at 30469, Question 11.

[9] A Financial System That Creates Economic Opportunities: Capital Markets, U.S. Dept. of the Treasury (Oct. 2017) ("2017 Treasury Report") at 44, available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

that the Commission create methods of accreditation in addition to financial thresholds,[10] since alternative methods of accreditation may be even more indicative of sophistication than income and net worth. As we have commented in the past and discuss below, there are several ways that the Commission could amend the definition of accredited investor that would expand access for retail investors to the exempt markets, provide clarity for market participants, promote the supply of capital in the private offering market, and provide appropriate investor protection.

a) *The Commission Should Include as Accredited Investors Both Individual and Entity Discretionary Account Clients of SEC-Registered Investment Advisers.*

The Commission asks whether it should permit an investor, whether a natural person or an entity, that is advised by a registered financial professional to be considered an accredited investor.[11] We strongly believe that it should, and we are pleased that the Commission has requested comment on an approach whereby a natural person or entity could qualify as an accredited investor if that person or entity has retained the services of a registered financial professional such as an SEC-registered investment adviser to act as a fiduciary on a discretionary basis in managing that person's or entity's investments.[12] The IAA has long supported this approach.[13]

The accredited investor standard is designed, in part, to provide assurance that an investor has a threshold level of sophistication sufficient to presume that the investor has the capacity to understand the nature of a private placement and the wherewithal to evaluate the merits and manage the risk of the investment. We believe that an SEC-registered investment adviser with discretionary authority over an investor's investments acts as a proxy for the investor's own sophistication and investment experience and therefore satisfies the Commission's goal of ensuring that the investor is adequately protected and able to bear the economic risk of these investments.[14]

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[10] *See* 2015 Staff Report at 7-8.

[11] *See* Concept Release at 30474, 30478, citing the 2017 Treasury Report and noting the recommendation that the accredited investor definition could be broadened to include an investor who is advised on the merits of making a Regulation D investment by a fiduciary, such as an SEC-registered investment adviser.

[12] Concept Release at 30478, Question 27.

[13] *See* Letter from the IAA to the SEC re: SEC Report on the Review of the Definition of "Accredited Investor" (June 29, 2016) ("IAA 2016 Letter"), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/160629cmnt.pdf. *See also*, Letters to the SEC from the IAA, dated Sept. 23, 2013 and Mar. 9, 2007, available on the IAA's website at https://www.investmentadviser.org/publications/comment-letters.

[14] IAA 2016 Letter.

In managing assets on a discretionary basis, advisers have the authority to make investment decisions on behalf of their clients. The fiduciary duty under the Advisers Act requires that an adviser make these investment decisions in their clients' best interest and only after assessing the client's sophistication, reaching an understanding of the client's investment objectives and risk tolerance, conducting a reasonable investigation into the investment, and ultimately making a recommendation that is suitable for the particular client.[15] As part of the fiduciary duty to act in the best interest of its client, an adviser's reasonable investigation into the investment means the adviser must sufficiently understand the investment and not base its advice on materially inaccurate or incomplete information.[16] Indeed, the Commission appears to recognize that an adviser's experience and its duty of care act as a proxy for a client's sophistication when it notes, that, "[f]or example, it might be consistent with an adviser's fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with relatively higher fees and significantly less liquidity as compared with a fund that invests in publicly-traded companies if the private equity fund was in the client's best interest because it provided exposure to an asset class that was appropriate in the context of the client's overall portfolio."[17]

We thus recommend that the Commission consider retention by an investor – whether an individual or an entity – of an SEC-registered investment adviser to provide discretionary investment advice as qualifying that investor as an accredited investor with respect to such advice.[18]

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[15] *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 FR 33669, 33672-33674 (July 12, 2019) ("Fiduciary Duty Interpretation"), available at https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf.

[16] *Id.* at 33674.

[17] *Id.*

[18] The Commission specifically asks whether it should consider making changes to permit "investment advisory services, including robo-advisers, that are focused on retirement savings [and that] seek to include a limited amount of exposure to securities from exempt offerings as part of a diversified retirement portfolio that they recommend to retail investors." Concept Release at 30517, Question 122. As noted above, we believe that it is important to provide investment exposure to exempt offerings for retail investors as part of an asset allocation strategy under appropriate circumstances (whether for retirement or other investment purposes). Digital advisers, like advisers that provide services through a more traditional medium, are fiduciaries subject to the same duty of care when making recommendations to all their clients. Thus, the provision of advice through a digital platform should not be dispositive.

b) *The Commission Should Include as Accredited Investors Knowledgeable Employees of Private Funds or General Partners of Private Funds.*

The Commission seeks comment on whether knowledgeable employees of private funds or the general partners of private funds could qualify as accredited investors based on criteria other than income and net worth.[19] We believe that they should so qualify.

The 2015 Staff Report recommended that the Commission include knowledgeable employees as accredited investors based on the definition of that term in Investment Company Act Rule 3c-5.[20] The report noted that a private fund's knowledgeable employees "likely have meaningful investing experience and sufficient access to the information necessary to make informed investment decisions about the fund's offerings."[21] We agree. In our view, knowledgeable employees are sufficiently sophisticated to be able to fend for themselves in the analysis of private fund offerings. Further, we are not aware of any suggestion that a knowledgeable employee has claimed to be disadvantaged by a private fund that he or she has invested in. Accordingly, we recommend that the Commission include knowledgeable employees of a private fund or of a private fund's general partner (or limited liability company or other similar vehicle) as accredited investors, using the same definition as that used in Rule 3c-5.

c) *The Commission Should Confirm Explicitly that Accredited Investors Include the Categories of Qualified Purchasers and Qualified Clients, as well as Section 3(c)(7) Funds.*

The Commission seeks comment on whether it should define accredited investor to specifically include a qualified purchaser, as defined under Section 2(a)(51) of the Investment

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[19] Concept Release at 30478, Question 22.

[20] A "knowledgeable employee" of a Section 3(c)(1) or 3(c)(7) fund includes: (i) a natural person who is an executive officer, director, trustee, general partner, advisory board member, or person serving in a similar capacity, of such fund or of an affiliated management person of the fund; or (ii) an employee of the fund or an affiliated management person of the fund (other than an employee performing solely clerical, secretarial or administrative functions with regard to the company or its investments) who, in connection with his or her regular functions or duties, participates in the investment activities of the fund or investment companies, the investment activities of which are managed by the affiliated management person of the fund, provided that the employee has been performing such functions and duties for or on behalf of the fund or the affiliated management person of the fund, or substantially similar functions or duties for or on behalf of another fund for at least 12 months. *See also*, Managed Funds Association, SEC Staff No-Action Letter (Feb. 6, 2014), available at https://www.sec.gov/divisions/investment/noaction/2014/managed-funds-association-020614.htm (relief for a "filing adviser" and affiliated "relying advisers," operating as part of a single advisory business filing a single Form ADV, providing that a knowledgeable employee of the filing adviser or any of its affiliated relying advisers may be deemed a knowledgeable employee with respect to any 3(c)(1) or 3(c)(7) fund managed by the filing adviser or its affiliated relying advisers).

[21] 2015 Staff Report at 65.

Company Act, as a less costly approach for regulating offerings of Section 3(c)(7) funds.[22] Private funds offered under Section 3(c)(7) must be sold to qualified purchasers, *i.e.*, individuals with at least $5 million in investments, and institutions with at least $25 million in investments. Currently, a trust that is a qualified purchaser may not meet the accredited investor definition. Given that these financial thresholds are higher than those required to be an accredited investor, we believe that the Commission should make clear that qualified purchasers are included in the accredited investor definition.

The Commission also seeks comment on whether Section 3(c)(7) funds themselves should qualify as accredited investors.[23] While investors in Section 3(c)(7) funds reach the financial thresholds required to be accredited investors, the funds themselves are not accredited investors since they are not among the entities specifically named under the Regulation D definition. We recommend that the Commission expressly include Section 3(c)(7) funds in the definition of accredited investor because a Section 3(c)(7) fund should be considered sophisticated enough by virtue of the sophistication of its investors to invest itself in the exempt markets as an accredited investor.

We also recommend that the Commission expressly add a qualified client, as defined in Rule 205-3 under the Advisers Act,[24] to the definition of accredited investor to make clear that all qualified clients are accredited investors, even though not all accredited investors are qualified clients. We believe that including both qualified purchasers and qualified clients as accredited investors would significantly improve the exempt offering process and ease the complexity of issuers' diligence without reducing investor protections.

d) *SEC-Registered Investment Advisers and their Knowledgeable Personnel Should be Included in the Definition of Accredited Investor When they Invest on their own Behalf.*

It does not make sense that entities and individuals that are considered qualified to recommend Regulation D investments to others are not considered sophisticated enough to participate in such investments on their own behalf. We thus recommend that the Commission

[22] Concept Release at 30517, Question 126.

[23] *Id.*, Question 125.

[24] A qualified client has a $2.1 million net worth, excluding the value of a primary residence, or $1 million in assets under management with an investment adviser. We also believe the Commission should include additional sophisticated institutional entity investors as accredited investors by adding a catch-all category of highly sophisticated investors that do not otherwise meet the accredited investor definition. Most of these types of investors are non-U.S. institutions, such as an Australian superannuation fund or Japanese farm cooperative, while others, such as the Navajo Nation, are based in the United States. We understand that, without assurances that these investors are considered sufficiently sophisticated to invest in the exempt markets, they may be hesitant to provide accredited investor representations under Regulation D.

also amend the accredited investor definition to include SEC-registered investment advisers and their knowledgeable personnel so that they may purchase Regulation D offerings on their own behalf. Knowledgeable personnel of investment advisers would include those categories of persons described as "knowledgeable employees" under Investment Company Act Rule 3c-5, discussed above, except that they would not need to be employees of Section 3(c)(1) or 3(c)(7) funds. Investment adviser personnel falling into any of these categories should be presumed to have the sophistication necessary to be able to invest in exempt offerings on their own behalf.

B. The Commission Should Expand the Opportunity to Invest in Rule 144A Offerings.

The Concept Release seeks input on whether the Commission should consider rule changes that in certain cases would allow for more flexibility with regard to resales of securities originally purchased in a transaction exempt from registration.[25] In 1990, the Commission created a safe harbor under Rule 144A under the Securities Act for resales of securities by persons other than issuers to QIBs.[26] A QIB includes certain types of entities, acting for their own account or the account of other QIBs, that in the aggregate own and invest on a discretionary basis at least $100 million in securities of issuers unaffiliated with the QIB.

The Commission recognizes in the Concept Release that while Rule 144A is available solely for resale transactions, market participants use it to facilitate capital-raising by issuers through a two-step process.[27] The first step is a primary offering on an exempt basis to one or more financial intermediaries, often in reliance on Section 4(a)(2) of the Securities Act. The second step is a resale to QIBs pursuant to Rule 144A.

As part of the effort to harmonize the securities offering exemptions and consistent with comments we have made in the past, we encourage the Commission to engage in a retrospective review of the QIB definition to rationalize the categories of sophisticated investors that should be included.[28] We urge the Commission to consider expanding the definition of QIB in several ways.

First, we note that because Rule 144A was written from a U.S. perspective, it does not but should include many non-U.S. entities that would be QIBs if they were in the United States

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[25] Concept Release at 30464.

[26] *Id.*

[27] Concept Release at 30466.

[28] *See, e.g.*, Letter from Karen Barr, President and CEO, IAA to the Honorable Walter J. ("Jay") Clayton, SEC Chairman, re: Regulation of Registered Investment Advisers (May 10, 2017) at 12, available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/170510cmnt.pdf.

(*e.g.*, sovereign wealth funds and non-U.S. pension funds). Even when such non-U.S. investors may participate in the issuer's securities through a Regulation S offering, where available, they may prefer making an investment in the QIB tranche for liquidity or other reasons. We thus recommend that the Commission consider expanding Rule 144A to treat non-U.S. entities similarly to U.S. entities for purposes of determining whether they qualify as QIBs.[29] In addition, currently only U.S. registered investment companies ("RICs") are permitted to aggregate funds in the same fund family for purposes of the QIB threshold. In our view, the same logic that permits aggregation in the RIC context should be extended to similar investment funds and fund families established under non-U.S. law – they too should be presumed to have sufficient sophistication to be treated as QIBs.

Second, we urge the Commission to expand the QIB definition to permit advisers' discretionary clients to invest in Rule 144A offerings in certain circumstances. We understand from our members that more and more issuers are opting to rely on the Rule 144A two-step process described above for issuance of their fixed income securities, rather than going through the more expensive and burdensome public offering process. For instance, as of November 2018, Rule 144A bonds represented about half of the outstanding bonds in the U.S. high yield market.[30] As a result of this substantial shift from public to private offerings of bonds, investors that are not QIBs are now considerably more limited in their ability to access the bond markets. Indeed, these investors are now often virtually frozen out of an entire asset class, as issuers or groups of issuers have become accustomed to using the more expeditious and convenient (and now widely accepted) Rule 144A offering process to access the capital markets. Investment advisers representing such investors on a discretionary basis are thus finding it hard if not impossible to find fixed income instruments for their clients that do not qualify as QIBs.[31] By contrast, RICs, which are sold primarily to retail investors, are eligible to invest in Rule 144A securities. This

[29] For example, Rule 144A(a)(1)(H) could be amended to remove the requirement that a business trust be "similar" to a Massachusetts business trust. We do not believe there is a compelling reason to exclude a non-U.S. trust from the QIB definition where it meets the rule's current investment threshold simply because an issuer cannot definitively conclude that any particular foreign trust is "similar" to a Massachusetts business trust. Alternatively, the Commission could provide guidance as to what constitutes a "similar" business trust or other "similar" structure to a U.S. entity that is able to qualify as a QIB.

[30] *See "144As" – A Large But Often Misunderstood Segment of the High Yield Bond Market*, DDJ Capital Management, LLC – Vol. 5 Issue 4 at 4-5 (Nov. 2018), available at https://www.ddjcap.com/wp-content/uploads/ddj-opportunistic-high-yield-fund-comm-20181123.pdf (citing Barclays). We understand from members that actively invest in the bond markets on behalf of clients that the percentage of Rule 144A offerings of new issues in the United States, as a percentage of the number of issues in the high yield market, increased from approximately 23% in 2010 to approximately 50% by September 2018 (and it is reportedly higher as of year-to-date 2019). We also understand that in some industries, such as the building materials space, the vast majority of bond offerings – as many as 26 out of 30 – are offered in reliance on the intermediary offering and Rule 144A.

[31] For example, SEC-registered investment advisers may wish to buy bonds in secondary market transactions for their municipality or other separately managed account clients but cannot do so because the municipalities or other clients are not QIBs.

puts advisory accounts, including separately managed accounts and other accounts that are not RICs, at an unfair and illogical disadvantage.

To make the bond markets more accessible and help alleviate this irrational result, we recommend that the Commission apply the same analysis and reasoning to the QIB definition as we suggest above for the accredited investor definition. Specifically, investors that receive discretionary investment advice from qualifying SEC-registered advisers should be considered QIBs for purposes of investing in fixed income instruments that are relying on the Rule 144A safe harbor, even if they do not fall into any of the categories of entities described in the QIB definition. To qualify, the investment adviser must manage in the aggregate in excess of $100 million in securities of issuers that are not affiliated with the adviser or the client on behalf of which the adviser is making the investment.

Finally, we recommend that the Commission harmonize the treatment of collective investment trusts ("CITs") and registered funds for purposes of their qualification as QIBs. CITs are investment vehicles that are similar to RICs but are administered by bank trusts under the supervision of the Office of the Comptroller of the Currency and are available only to qualified retirement plans. CITs may include retirement plans covering self-employed individuals (*e.g.*, H.R. 10 or Keogh plans). Currently, if a CIT includes a self-employed plan, the CIT is not eligible to be a QIB, even if the plan itself meets the required investment threshold for QIBs. Conversely, a family of registered funds with an aggregate of $100 million can qualify as a QIB even if investors in any of the funds in the fund family include self-employed plans. We see no policy reason why CITs should not face the same qualification test as RICs and thus recommend that CITs that include a self-employed plan should be treated the same as registered funds and be able to be QIBs if the plan meets the requisite $100 million threshold.

C. The Commission Should Clarify that Communications Not Intended for Public Consumption Do Not Violate the "General Solicitation" or "General Advertising" Prohibition under Regulation D.

In general, issuers may not rely on an exemption from registration of their offering if they engage in general solicitation or general advertising. While Rule 502(c) under Regulation D provides examples of these terms – including advertisements published in newspapers and magazines, communications broadcast over television and radio, and seminars where attendees have been invited by general solicitation or general advertising – they are not defined.[32] The Commission recognizes in the Concept Release that the use of social media and other forms of communication result in information about exempt securities that is far more readily available to potential investors and the general public and at a lower cost than in the past and it seeks comment on whether it should amend Regulation D to clarify or define these terms.[33] It also asks

[32] Concept Release at 30480.

[33] Concept Release at 30486, Question 37.

whether it should consider amending the definition or adding an example clarifying whether participation in a "demo-day" or similar event should be considered general solicitation.[34]

We believe the Commission should provide more clarity and specificity around the terms general solicitation and general advertising and should clarify that limited communications designed for consumption by a non-public audience (such as institutional publications or institutionally-focused consultant databases), or participation in a "demo day" or similar event, would not be considered general solicitation or general advertising. We also urge the Commission to clarify that, where the issuer has clear and robust polices and procedures reasonably designed to (i) ensure a sale of an investment to qualified investors only, and (ii) avoid what would be deemed a general solicitation or general advertisement, it will not become ineligible to rely on Regulation D where minimal access to the general public occurs inadvertently.[35]

Fund issuers and their fund sponsors expend enormous resources, time, and costs to assess and track that no general solicitation or general advertising has occurred under the current standard, but inadvertent foot faults still happen. We believe that the rule should provide that, where these inadvertent – and benign – situations result in the press or media becoming aware of a Rule 506(b) offering, the exemption may still be available.[36] These situations could happen, for example, as a result of communications made to restricted audiences or a sponsor's response to requests from consultants for an institutionally-dedicated database, or even where the sponsor is simply clarifying errors about an exempt offering. Thus, a general solicitation or general advertising may be deemed to have occurred even where there has been no objective intent to engage in a sale. We suggest that the Commission make clear that, as long as an issuer has and follows policies and procedures as described above, certain activity not intended to result in a sale will not be viewed as a general solicitation or general advertising.

D. The Commission Should Expand Access to Exempt Offerings for Retail Investors through Registered Investment Funds.

The Commission seeks feedback on the ability of retail investors who are not accredited investors to obtain exposure to exempt offerings through a RIC or business development company.[37] Retail investors, regardless of their level of sophistication, currently may invest in

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[34] *Id.*

[35] We also believe that the general solicitation and general advertisement restrictions are not necessary in connection with Section 3(c)(7) funds, where all investors are required to be qualified purchasers.

[36] The Commission could consider changes to Rule 508 to address situations of non-intentional, limited disclosure that is not intended to result in a sale so that such disclosure, without more, will not disqualify an issuer from reliance on Rule 506(b).

[37] Concept Release at 30515.

open-end funds that invest in exempt offerings consistent with the funds' liquidity requirements.[38] However, the ability of a retail investor to invest in a private fund offering through a closed-end fund product depends on the investor's status as an accredited investor, qualified purchaser, or qualified client.[39] Currently, the staff in the Division of Investment Management takes the position, when approving the effectiveness of the registration of "all closed-end funds that invest primarily in private funds," that the funds may be offered only to accredited investors and must "require significant minimum initial investments."[40] Thus, closed-end funds that invest in exempt offerings may not be offered to retail investors who are not themselves qualified to invest in such offerings.[41]

The Commission seeks comment on the current approval process for closed-end funds invested in private funds to offer their shares to retail investors.[42] We recommend that the Commission expand the ability of closed-end funds to invest in alternative exempt private funds so that retail investors can participate in the benefits of portfolio diversification and growth provided by these investments, where appropriate.

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[38] The Commission notes, for example, that target date funds' current exposure to exempt offerings is through other open-end funds, including ETFs, which allows them to obtain exposures to different types of asset classes while retaining appropriate liquidity required under the Investment Company Act.

[39] Concept Release at 30515.

[40] *Id.* at 30516.

[41] *Id.* at 30515.

[42] *Id.* at 30516, Question 115 (asking (a) whether restrictions should be placed on the ability of such funds to invest in private equity funds, hedge funds, or other private funds, and (b) if these funds are open to non-accredited investors, whether: (i) there should be a maximum percentage of assets that these funds can invest in private funds; or (ii) they should be required to diversify their investments across a minimum number of private funds).

We appreciate your consideration of our comments on these important matters. Please contact me or Monique Botkin, Associate General Counsel, at [redacted] with any questions or if you would like additional information.

Respectfully,

/s/

Gail C. Bernstein
General Counsel

cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner

Dalia Blass, Director, Division of Investment Management
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