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July 27, 2020

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

Re: Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets; Release Nos. 33-10763; 34-88321; File No. S7-05-20

Dear Ms. Countryman:

This letter is submitted on behalf of the Federal Regulation of Securities Committee, the Private Equity and Venture Capital Committee, and the Commercial Finance Committee (the "Committees" or "we") of the Business Law Section of the American Bar Association (the "ABA") with respect to the above-referenced proposing release (the "Proposing Release") issued by the Securities and Exchange Commission (the "Commission") proposing amendments to various rules that provide exemptions from the registration requirements under the Securities Act of 1933, as amended (the "Securities Act").

The comments set forth in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and should not be construed as representing the policy of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law nor does it necessarily reflect the views of all members of the Committees.

Overview

The Committees commend the efforts of the Commission to continue to address aspects of the exempt offering framework to facilitate capital formation, expand investment opportunities and improve access to capital markets, and we thank the Commission for this opportunity to comment. We agree with the Commission's view that many of the proposed amendments would generally:

- facilitate capital formation while preserving and in some cases enhancing investor protections; and
- simplify, harmonize and improve the current exempt offering framework.

We have the following specific comments in respect of the Proposing Release. Consistent with the Proposing Release, we refer to both general solicitation and general advertising as they relate to an offer of securities as "general solicitation."

A. Integration.

We support the Commission's proposal to develop a comprehensive integration framework by making the approach to integration in the more recently adopted or amended exemptions generally applicable to all exempt offerings. We also believe that the proposed structure of the new rules, with the general principle of integration set forth in paragraph (a) of Rule 152 and specific safe harbors set forth in paragraph (b) of Rule 152, would add clarity, reduce complexity and provide greater confidence to issuers in planning and choosing their capital raising options.

A.1 *General Principle of Integration.*

The Commission is proposing to codify the general principle of integration based upon the "facts and circumstances" analysis that originated in the Commission's guidance in the 2007 Regulation D Proposing Release,[1] accompanied by two applications of the principle set forth in proposed Rule 152(a)(1) and Rule 152(a)(2). Proposed Rule 152(a)(1) would specify the integration principle for exempt offerings that do not permit general solicitation. As stated in the Proposing Release, an issuer would be able to conduct these offerings without integration concerns if the issuer has a reasonable belief, based on the facts and circumstances, that the purchasers in each exempt offering were not solicited through the use of general solicitation, or that such purchasers established a substantive relationship with the issuer (or person acting on the issuer's behalf) prior to the commencement of the offering.

We have the following recommendations to further clarify proposed Rule 152(a)(1):

- The requirements of Rule 152(a)(1)(i) and (ii), as proposed by the Commission, would be tested for "each exempt offering." We recommend that both of these clauses refer instead to "*such* exempt offering." This change would make it clear that the language refers to the exempt offering for which general solicitation is not permitted that is then being tested. Since these Rule 152(a)(1) tests are intended to apply only to exempt offerings for which general solicitation is not permitted, but may be used in the context of concurrent or successive offerings with one exempt offering permitting general solicitation (such as Rule 506(c)) and the other prohibiting general solicitation (such as Rule 506(b)), the use of "such" would confirm the intended meaning and may avoid potential confusion.

- Unlike the terms "termination or completion," the term "commencement" of the offering is not defined in the proposed rules. As experience in other areas of the securities laws has shown, determining the meaning of "commencement" of an offering can cause great uncertainty. Moreover, it is unclear how this requirement

[1] Revisions of Limited Offering Exemptions in Regulation D, Release No. 33-8828 (Aug. 3, 2007), at Section II.C.

would be applied to continuous offerings. We recommend that the application of proposed Rule 152(a)(1) be tied to the particular purchaser. An issuer should be able to rely on Rule 152(a)(1) if the issuer has a reasonable belief, based on the facts and circumstances, that each purchaser (rather than "purchasers") in such exempt offering (rather than "each exempt offering") either (i) was not solicited through the use of general solicitation in connection with the offerings not permitting general solicitation that are being analyzed or (ii) established a substantive relationship with the issuer before the offer was made (rather than "commenced") to that purchaser.

A.2 ***Integration Safe Harbors.***

We support the codification of integration safe harbors that would simplify the integration analysis and harmonize the integration framework for both exempt and registered offerings, as contemplated by proposed Rule 152(b). We have the following comments on proposed Rule 152(b):

- Proposed Rule 152(b)(1) addresses offerings made more than 30 calendar days before "any other" offering, or more than 30 calendar days after the termination or completion of "any other" offering. As proposed, the rule creates the ambiguity that both periods—the 30-day period before and the 30-day period after each offering—have to be free of offers in all cases. We think the intention is rather that this provision would be applied separately to *each* other offering potentially subject to integration, on an individualized basis, with a 30-day separation required between each pair of offerings relying on this provision. There are several ways to cure that ambiguity, through notes to the rule or through accompanying interpretive guidance. The clearest way, in the Committees' view, would be to have separate sentences or clauses for each scenario.

- In proposed Rule 152(b)(1), we would make the same changes as discussed above for proposed Rule 152(a)(1), in terms of tying the application of the proposed rule to each particular purchaser.

- We support the codification, in proposed Rule 152(b)(2), of the Commission's guidance in the 1990 Regulation S Adopting Release that "[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act."[2] In addition to eliminating the note to Rule 502(a), the Commission should consider conforming existing Rule 500(g) to clarify that the Rule provides specific guidance in addition to, and not a concept separate from, the general integration rules in Rule 152—for example, by cross-referencing Rule 152(b)(2) in Rule 500(g).

- Proposed Rule 152(b)(3) provides a safe harbor for registered offerings made subsequent to terminated or completed offerings, with certain conditions for registered offerings following terminated or completed offerings permitting general

[2] Offshore Offers and Sales, Release No. 33-6863 (April 24, 1990), at Section III.C.1.

solicitation. We recommend that the Commission drop these additional conditions, as they serve no real practical purpose. In these situations, investors in the registered offering will have the benefit of the liability provisions set forth in Section 11 and Section 12(a)(2) of the Securities Act. The 30-day cooling-off period contemplated by the proposed rule reflects an apparent concern about use (or perhaps misuse) of general solicitation. We expect that Section 12(a)(2) would generally apply to a general solicitation nominally associated with an uncompleted exempt offering but in fact used to solicit interest in a subsequent registered offering—meaning that market participants are unlikely to attempt that gambit, but investors would nonetheless be protected if they did. On the other hand, investors in the registered offering will get the disclosure and liability benefits of registration, and so the rules should encourage use of registration to the maximum extent possible. An effective 30-day cooling off period undercuts that objective. We note in addition that this cooling-off period would be more restrictive than existing Rule 152. If the Commission does not follow our suggestion in this regard, then we would suggest, as a drafting matter, that clause (b)(3)(ii) be clarified, to refer to "a terminated or completed offering for which general solicitation is permitted *in which sales are made* only to" the specified institutional investors.

A.3 ***Replacing the Five-Factor Test.***

In light of the proposed amendments contemplated by the Proposing Release, we support the Commission's proposal to eliminate the five-factor test of integration, currently set forth in Rule 502(a), and to include the integration safe harbors discussed above in Section A.2.

B. General Solicitation and Offering Communications.

B.1 ***Solicitations of Interest/Testing-the-Waters.***

Rule 163B, which the Commission adopted in September 2019, extended the "test-the-waters" accommodation previously available only to emerging growth companies to allow all issuers and those authorized to act on their behalf to gauge market interest in a registered offering through discussions with qualified institutional buyers ("QIB(s)") and institutional accredited investors ("IAI(s)") prior to, or following, the filing of a registration statement. Rule 255 of Regulation A, which served as the basis for proposed Rule 241, permits issuers to "test-the-waters" with, or solicit interest in a potential offering from, the general public either before or after the filing of the offering statement. We generally support the Commission's proposal to allow issuers to use generic solicitation of interest materials more widely than under existing rules, but have the following specific comments:

- Rule 241, as proposed, would not be available once the issuer has made a "determination" as to the exemption under which the proposed offering will be conducted. We believe strongly that this condition is both unnecessary and impracticable, and so should be dropped from the proposed rule. Issuers and their advisors, as they embark on test-the-waters exercises, typically have expectations as to which exemption or exemptions they might ultimately use, and the Commission (including through its rules) should be encouraging thoughtful exploration of that

topic. The proposed condition seems calculated to generate the opposite effect, putting a premium on ignorance (or feigned ignorance). The determination of whether and when an issuer has made a determination to proceed with a specific exemption would be entirely subjective and, in many cases, that question would be difficult to answer. The need to determine an issuer's subjective intent and to identify the time of the decision would introduce uncertainty to the application of the rule. In particular, this condition would seem to require counsel giving a no-registration opinion on an exempt offering following a use of the proposed rule to assess whether, at the time of any previous generic solicitation, a determination to use a specific exemption had already been made. Counsel's assessment will of course be subject to review with the benefit of hindsight, adding to the problem. All of these issues can only reduce the utility to issuers of the proposed rule. Nor do we perceive any investor protection benefit flowing from inclusion of the proposed condition. To clarify and simplify the rule, we believe issuers should be able to elect to comply with proposed Rule 241 for so long as no offering statement under Regulation A or Form C has been filed.

- If general solicitation is used to "test the waters," the Proposing Release makes clear that the issuer may rely on the integration safe harbor in proposed Rule 152(b)(1) to conduct an offering for which general solicitation is not permitted (such as under Rule 506(b)) if it waits 30 days following termination of the generic solicitation. However, even after the 30-day period, that exempt offering could not be made to offerees that were solicited by means of the test-the-waters general solicitation. We think that the Commission should eliminate the limitation that the exempt offering could not be made to offerees that were solicited by means of the test-the-waters general solicitation. Instead, we recommend allowing the 30-day safe harbor to operate and provide the separation without further requirements. If the Commission takes a different view, this limitation should not be left open-ended, but rather should be reduced to a specific period of time, such as the 90-day period used to avoid sequential serial Rule 506(b) offerings each month to non-accredited investors by the proposed amendments to Rule 506(b)(2)(i).

In addition, we think the Commission should take the adoption of these rule changes as an opportunity to address in a general way what is permissible "test the waters" activity in all of the various contexts in which it is permitted, including under Rule 163B. A "test the waters" process adds complexity that needs to be carefully considered and played out in connection with each offering, and so such guidance would prove most useful. We believe that if an issuer tests the waters either before or after filing a registration statement or while a shelf registration statement is pending, or in connection with a proposed exempt offering, the issuer should be able to proceed with a registered offering or choose (without a waiting period) to conduct an exempt offering so long as the exempt offering satisfies the applicable requirements for the exemption used. For example, if an issuer tests the waters with QIBs or IAIs, it should be clear that it would be able to conduct a PIPE transaction, including in reliance upon either Rule 506(b) or Rule 506(c), with some of those investors with which it tested the waters.

A note to each of the test the waters rules making this clear would be useful. An organized review of the Commission's views on these and similar questions would be most welcome.

B.2 *Demo Days.*

We support the Commission's proposal to adopt Rule 148, which would provide that certain "demo day" communications would not be deemed general solicitation. We would suggest, however, that the Commission clarify the following aspects with respect to the amendments:

- We recommend that the Commission clarify that proposed Rule 148 is a "safe harbor," that compliance is voluntary, that attempted compliance does not act as an exclusive election and that the issuer also may claim the availability of other bases to avoid characterization of its communications as general solicitation, such that, for example, discussions at the event that take place in accordance with existing guidance of the Commission (such as "one-on-one" discussions with investors with whom the issuer has established a pre-existing relationship) are not restricted by the proposed rule. Consistent with the Commission's practice, this could be accomplished through notes to the rule or through accompanying interpretive guidance.

- The term "information regarding an offering" in paragraph (c) of proposed Rule 148 is unclear and potentially subject to restrictive interpretations. We recommend that the Commission clarify, perhaps in a proviso at the end of paragraph (c), that the content limitations in the rule do not relate to or prevent communication of factual business information (as defined in Rule 169). We believe this approach would confirm the Rule's intended meaning.

C. Regulation S.

C.1 *Proposed Rule 902(c)(3)(ix).*

We support the Commission's proposal to codify, in Rule 902(c)(3)(ix), that activity undertaken in connection with offers and sales under an exemption from registration involving general solicitation should not be considered "directed selling efforts," but the proviso that such activity is not undertaken "for the purpose of conditioning the market in the United States" raises a number of issues and should be eliminated:

- It is the issuer's burden to establish its entitlement to an exemption, and requiring the issuer to prove a negative (a negative intent, specifically) would impose a significant incremental burden, and risk, on the issuer, as well as on other offering participants who would apparently need to make a corresponding determination of the "purpose" behind various issuer communications. Counsel giving "no-registration" opinions would apparently face a similar need to make such determinations. In our view, retaining a "not for the purpose" requirement in this context would undercut the utility of the exemptions permitting general solicitation, and doing so is not necessary to address the "conditioning-the-market concerns" cited in the Proposing Release.

Preliminary Note 2 to Regulation S already prohibits a plan or scheme to evade the registration provisions of the Securities Act.

- If the Commission takes a different view, and determines to retain some sort of "not for the purpose" test in this context, we suggest that it consider following the approach taken in the note to paragraph (a)(1) of Rule 135e, by setting forth in a note to the Rule or in other guidance, rather than in a proviso, language to the effect that the safe harbor only applies if there is an intent to make a bona fide offering offshore.

C.2 *Proposed Rule 906.*

We strongly urge the Commission not to adopt Rule 906, as proposed, for the following reasons:

- Regulation S, with its Preliminary Note 2, and current practice thereunder, strike an appropriate balance between "conditioning-the-market" concerns, on one hand, and efficient and effective capital-raising, on the other. Proposed Rule 902(c)(3)(ix) would only reinforce this conclusion. And each of the offering exemptions permitting general solicitation itself reflects a policy judgment as to the balance of these considerations. Adding proposed Rule 906 to this mix would, in our view, undermine that balance. In light of the existing regulatory framework, there is simply no need for a further mechanism to address "conditioning-the-market" concerns in this context.

- Rule 906, as proposed, is inconsistent in particular with existing Rule 500(g), the note to Rule 502(a), the "no integration" guidance previously given by the Commission and relied on by market participants, as well as now well-established market practice thereunder. Since the adoption of Rule 506(c), it has been understood by market participants that an offering under Rule 506(c), or another registration exemption permitting general solicitation, is not to be "integrated" with a concurrent offering of the same securities under Regulation S, and that permitted general solicitation activities undertaken in this context do not constitute prohibited directed selling efforts. Procedures governing the resales of securities originally sold under Regulation S have been determined by the appropriately graduating degrees of restrictions imposed by the three categories of Regulation S, as well as by Rule 905 causing the securities sold under Regulation S to be deemed to be restricted securities in the circumstances where that rule applies. While proposed Rule 152(b)(2) and Rule 902(c)(3)(ix)—if modified as we suggest above—would codify existing guidance and provide greater certainty, adding proposed Rule 906 to this mix would result in substantial, and we submit unnecessary, disruptive change to existing market practice.

- Proposed Rule 906 would introduce, for compliance purposes, a new category of security, apparently requiring a new set of compliance procedures to implement the substantive strictures of the new Rule. Unlike Rule 905, securities subject to Rule 906 would apparently not be "restricted securities" under Rule 144; rather, they would be subject to a new type of resale restriction that has no counterpart under existing rules or practice. It does not appear that the question of whether the resale is made in the

United States or offshore is relevant to the analysis, precluding the ability to make an offshore resale under Rule 904 (or, for affiliates, Rule 903) of Regulation S without having to determine whether the purchaser is a U.S. person, or purchasing for the account or benefit of a U.S. person. This effectively precludes the ability to resell a Rule 906 security on an exchange or market outside the United States, where the identity of the counterparty is unknown. Moreover, proposed Rule 906 also appears to disallow resales of the securities under conventional registration exemptions such as the so-called "Section 4(1½)" exemption, unless the purchaser is a QIB or IAI.

- While proposed Rule 906 would thus appear to introduce new uncertainties for offerings to which it applied, we suppose that one approach that market participants might adopt would be to treat Rule 906 securities as "restricted securities" under Rule 144, an approach that would be substantially more restrictive than the Commission seems to intend. Alternatives to this overly restrictive approach by market participants would appear to include: (i) an approach that developed compliance mechanisms to trace and track which securities were subject to Rule 906 restrictions, and until what date (perhaps developing new procedures for distinguishing legends or separate CUSIP identifiers); or (ii) the adoption of a new form of legend, different from the conventional "restricted securities" legend, to identify securities subject to Rule 906 restrictions. Unless securities subject to Rule 906 were legended or identified with a distinguishing CUSIP number, foreign institutions that acquired Regulation S securities would apparently need to restrict all market trading in securities of the same class for six months from the date of the last purchase of any security of the same class under Regulation S, so as not to unknowingly effect a sale of a security subject to Rule 906 to a U.S. person that is the trade counterparty. This could lead to the unintended consequence of making all securities of the same class less attractive to foreign investors, putting issuers at a competitive disadvantage in raising capital offshore if they have chosen to take advantage of registration exemptions permitting general solicitation in their U.S. capital raising activities. On the other hand, if a new form of Rule 906 legend were introduced, market participants would need to develop practices and procedures to distinguish the types of resale restrictions associated with that legend from the conventional Rule 144 restricted security legend, and to ensure the ability to remove that legend swiftly, so as not to delay settlement, in connection with a permitted resale to an eligible purchaser during the six-month restriction period, or in connection with any resale taking place after that period.

- If proposed Rule 906 were adopted, offshore purchasers in Regulation S transactions would be acquiring securities that in some cases would be subject to the six-month Rule 906 prohibition against resales to U.S. persons (other than QIBs and IAIs), and in other cases they would not be. The liquidity of the securities being purchased by the offshore investor would turn on the question of whether or not the issuer happened to undertake activity in connection with offers or sales under a Securities Act registration exemption that involved general solicitation. We do not see how this difference in treatment of foreign investors is justified by any compelling investor protection or other policy considerations. For example, consider the situation of an issuer that intends to complete a domestic offering under Rule 506(b) concurrently

with an offshore offering under Category 1 of Regulation S. If, after the closing of the offering, it comes to light that the issuer inadvertently engaged in conduct that constituted general solicitation during the offering, then U.S. investors may be entitled to rescission claims on the basis that the issuer violated Section 5 of the Securities Act, unless the issuer could demonstrate that the conditions of Rule 506(c) were satisfied, including compliance with its accredited investor verification requirements. However, from the perspective of the offshore purchaser, learning of the issuer's "foot fault" in engaging in general solicitation would mean that it finds itself holding securities subject to a six-month Rule 906 resale restriction, when it thought that it was acquiring, and paying the appropriate value for, fully liquid securities. Further, if the offshore purchaser had already resold any of the securities without complying with the Rule 906 restrictions before learning that they were subject to Rule 906, the offshore purchaser would have already violated the Securities Act through no fault of its own.

We respectfully submit that proposed Rule 906 is, in effect, something of a solution in search of a problem. Proposed Rule 906 is intended to serve as an investor protection mechanism, protecting U.S. non-institutional investors by prohibiting the original Regulation S purchasers from reselling any of the securities subject to Rule 906 to any U.S. person that is not a QIB or an IAI for six months. We submit that, in practical terms, any investor protection benefit would be substantially outweighed by the new and complex compliance burdens that would be imposed on any Regulation S offering conducted in conjunction with a permitted exempt offering involving general solicitation in the U.S. As a result, if proposed Rule 906 were adopted, the use of the existing offering exemptions permitting general solicitation would likely be discouraged.

D. Rule 506(c) Verification Requirements.

The Committees support the Commission's approach to reaffirm and update the existing regulatory framework with respect to the "principles-based" method for verification. In particular, we agree that the Commission should maintain the definition of accredited investor and have clear, objective standards based on the income and net worth of an investor. These objective standards provide certainty to issuers that leads to an efficient process for identifying qualified investors and thus reduces regulatory costs. These objective standards also are necessary to provide certainty to an issuer that an individual is an accredited investor, and, consequently, that a private offering will be conducted in compliance with Rule 506(c) of Regulation D. The historic bright-line standards have contributed to Regulation D's being successful in promoting capital formation and protecting investors, and private issuers continue to depend on the legal certainty of quantitative, objective standards based on financial thresholds.

We also strongly support the addition of a new item to the non-exclusive list in Rule 506(c) that would allow an issuer to establish that an investor for which the issuer previously took reasonable steps to verify as an accredited investor remains an accredited investor as of the time of a subsequent sale so long as the investor provides a written representation to that effect and the issuer is not aware of information to the contrary. This will simplify the verification process, in particular for continuing offerings or seasoned exempt issuers.

The Commission should also explicitly confirm that this and all of the other specified means of verification are available to be relied upon in making determinations under Section 12(g) of the Securities Exchange Act of 1934, as amended, where the practical need for this certainty is, if anything, even greater.

E. Offering and Investment Limits.

We generally support the Commission's proposal to increase the offering and investment limits established under Regulation A, Regulation Crowdfunding, and Rule 504 of Regulation D as outlined in the Proposing Release. We also strongly support the Commission's proposal to harmonize these exemptions with each other in order to enhance investor access and issuers' ability to raise capital through these markets.

Specifically, we support the Commission's proposal to increase the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million, rather than to $100 million, and agree that deploying an incremental approach to threshold increases is warranted since there is no concrete evidence available to establish that an increase of the threshold to a higher amount will expand the number of issuers that elect to raise capital through Tier 2 offerings. We would expect that issuers seeking to conduct public offerings in amounts in excess of $50 million will carefully weigh the use of Regulation A against the more conventional routes (public offerings and now direct listings), particularly when issuers seek to raise substantial amounts of capital. Precedent, prestige of the public offering, and the customary use of investment bankers to help solicit support for the offerings will likely mean that a typical registered offering will continue to be the route most frequently used for offerings of relatively larger size.. Furthermore, since secondary trading in securities offered under Tier 1 of Regulation A continues to be a practical issue, we recommend that the Commission reconsider whether "covered securities" status under Section 18 of the Securities Act should be extended to securities offered under Tier 1 of Regulation A.

We support the Commission's proposal to increase the maximum offering amount under Rule 504 of Regulation D from $5 million to $10 million in order to increase access to capital by allowing issuers from communities and regions that do not have direct access to private equity and venture capital to more easily raise money from friends, supporters and local investors. The increase will also allow a company to raise capital more quickly by not having to wait the rolling twelve month period to offer and sell securities between Rule 504 offerings. In addition, because Rule 504 offerings will remain subject to applicable federal and state securities requirements, including the antifraud provisions, it is reasonable to expect that an increase in the Rule 504 offering amount will not meaningfully decrease investor protection or incentivize bad actors to enter the marketplace.

We similarly support the Commission's proposal not to adjust or increase Regulation Crowdfunding's financial statement requirements, and the Commission's proposal to amend the Regulation Crowdfunding calculation method for the investment limits for non-accredited investors to allow these investors to rely on the "greater of," rather than on the "lesser of," their annual income or net worth, which would permit individuals who would otherwise not be able to participate in a private placement to invest in new ventures in a more meaningful way. We are

not commenting on the proposed increase in the crowdfunding offering amount limit because we believe the Commission should be satisfied that the crowdfunding requirements are being complied with at the existing limit before increasing that limit. Furthermore, we urge that if the Commission determines to increase the limit above the statutory limit, it make clear expressly the basis of its authority to do so, as well as the status of any securities issued under the increased amount limit under state blue sky securities laws, such as the status of these securities as "covered securities" under Section 18 of the Securities Act.

F. Eligibility Restrictions.

F.1 *Eligible Issuers under Regulation Crowdfunding and Regulation A.*

We support the Commission's proposal to amend Regulation Crowdfunding to permit the use of certain special purpose vehicles to facilitate investing in Regulation Crowdfunding issuers, and support the Commission's proposal to limit the securities eligible to be sold under Regulation Crowdfunding.

In particular, we support the Commission's proposal to create a new exclusion under the Investment Company Act of 1940, as amended (the "Investment Company Act") for limited-purpose vehicles ("crowdfunding vehicles") that function solely as conduits to invest in businesses raising capital through the vehicle under Regulation Crowdfunding. We believe that such crowdfunding vehicles will be helpful in accomplishing the Commission's stated goals of helping issuers manage the potentially large number of direct investors that result from an offering under Regulation Crowdfunding and will also provide smaller investors with more leverage in negotiating better terms and protections.

We note that the Commission seeks to define a *crowdfunding issuer* as "a company that seeks to raise capital *as a co-issuer in an offering with a crowdfunding vehicle that complies with* all of the requirements under Section 4(a)(6) of the Securities Act and Regulation Crowdfunding." This definition is ambiguous, since it is unclear as drafted whether the offering or the crowdfunding vehicle is required to comply with all of the requirements of the referenced regulations. We recommend re-drafting the definition as follows in order to clearly specify that the crowdfunding issuer is acting as a co-issuer with a crowdfunding vehicle, and that it is the offering that needs to be compliant with the referenced regulations:

- "a company that seeks to raise capital *as a co-issuer with a crowdfunding vehicle in an offering that complies with* all of the requirements under Section 4(a)(6) of the Securities Act and Regulation Crowdfunding"

In addition, as we have previously recommended to the Commission,[3] we think the Commission should take the adoption of these rule changes as an opportunity to make Regulation A available to "business development companies" ("BDCs") as defined in Section 2(a)(48) of the Investment Company Act. This might provide an easier path to market for such companies and encourage the formation of more BDCs. Again, it would seem that relatively

[3] See our comment letter, dated October 16, 2019, to Concept Release on Harmonization of Securities Offering Exemptions, Release Nos. 33-10649, 34-86129, IA-5256, IC-33512 (avail. June 18, 2019).

modest changes to Regulation A could be made to permit its use by BDCs, which would be consistent with recommendations of participants in the Commission's Small Business Forum in 2014, 2015 and 2016.

F.2 ***Eligible Securities under Regulation Crowdfunding.***

We agree with the Commission's proposal to limit the types of securities that may be offered and sold in reliance on Regulation Crowdfunding to equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities. We share the Commission's concerns that non-traditional securities can create confusion for retail investors and can potentially jeopardize the reputation of the Regulation Crowdfunding market.

In addition, we are of the view that tokens, tokenized securities and other forms of digital assets should not be included as eligible securities under Regulation Crowdfunding at this time, due to the continued regulatory uncertainty that exists with respect to these technologies and the risks that they could pose to investors and issuers in domestic and international markets. Certain tokenized securities and digital assets are not consistently or uniformly regulated in some non-U.S. jurisdictions, which could allow issuers to take advantage of regulatory arbitrage opportunities that can pose unique risks and have potentially negative consequences for unsophisticated retail investors.

Tokenized securities and other forms of digital assets also implicate risks that are not typically associated with traditional debt or equity securities, which could make it harder for retail investors to assess their suitability for investment. For instance, tokenized securities often involve a bundle of contractual rights to profits or distributions that are custom designed to fit the issuer's unique business model. These rights differ from traditional equity and debt securities and can create heightened risk for retail investors.

We believe that excluding tokenized securities or other digital assets from Regulation Crowdfunding is unlikely to have a significant impact on the offering and sale of tokenized securities or digital assets. The use of Regulation Crowdfunding has not gained widespread adoption within the tokenized securities or the broader digital asset industries in recent years for a variety of reasons, including (1) the requirement under Regulation Crowdfunding that an issuer be a domestic entity, (2) the limited amount of capital that can be raised under Regulation Crowdfunding, and (3) the disclosure requirements associated with Regulation Crowdfunding.[4] Regulation D, Regulation S and other exemptions remain available for digital asset offerings, and in our experience have been the predominant exemptions under which digital asset projects have raised funds over the past few years.

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[4] See, e.g., Patricia H. Lee, *Crowdfunding Capital in the Age of Blockchain-Based Tokens*, 92 St John's Law Review 833 (2018).

F.3. ***Investment Limits under Regulation Crowdfunding.***

We support the removal of investment limits for accredited investors in offerings conducted under Regulation Crowdfunding if the accredited investors receive the "total package of investor protections" provided for investors in Regulation A Tier 2 offerings.

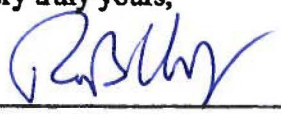
G. **Regulation D Disclosure.**

We agree with the Commission's proposal to harmonize financial statement disclosure requirements for offerings made under Rule 506(b) with those made under Regulation A Tier 2. There is no meaningful reason to distinguish between the two, and we believe that the disclosure requirements of Regulation A provide adequate information upon which a non-accredited investor can make an informed investment decision.

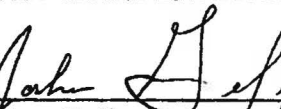
* * *

The Committees appreciate the opportunity to comment on the Proposing Release and respectfully request that the Commission consider the recommendations set forth above. We are available to meet and discuss these matters and to respond to any questions.

Very truly yours,



Robert E. Buckholz
Chair, Federal Regulation of Securities Committee
ABA Business Law Section



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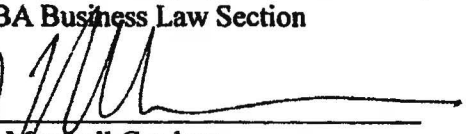

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