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September 17, 2019

VIA ELECTRONIC SUBMISSION

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

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

Dear Ms. Countryman:

We at Wyrick Robbins Yates & Ponton LLP appreciate the opportunity to comment on the Concept Release on Harmonization of Securities Offering Exemptions (the "Concept Release") issued by the U.S. Securities and Exchange Commission (the "Commission") on June 18, 2019. For your information, we are an approximately 90-attorney law firm located in Raleigh, North Carolina. We represent both public and private companies across a diverse set of industries in their capital-raising activities, including both registered and exempt offerings of securities. In addition to issuer representation, we regularly represent venture capital firms, private investment funds, and angel investors in their investment activities, as well as investment banking firms engaged in financial advisory and securities underwriting activities. While the Concept Release touches on a wide range of issues that are of importance to our clients, this letter addresses only a few of the questions raised in the section of the Concept Release entitled "Private Placement Exemption and Rule 506 of Regulation D."[1] Each of the numbered questions that are addressed in our comments are set forth in bold typeface below.

36. Are the current information requirements in Rule 506(b) appropriate or should they be modified? . . . . Should we consider eliminating or scaling the information requirements depending on the characteristics of the non-accredited investors participating in the offering, such as if all non-accredited investors are advised by a financial professional or a purchaser representative? Should the information requirements vary if the non-accredited investors can only invest a limited amount or if they invest alongside a lead accredited investor on the same terms as the lead investor?

We believe it would be appropriate to re-examine the informational requirements for Rule 506(b) offerings in which non-accredited investors participate and to scale, or eliminate,

[1] Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33-10649 (June 18, 2019) ("Concept Release"), *available* at https://www.sec.gov/rules/concept/2019/33-10649.pdf, at pg. 60.

such requirements in certain circumstances. In the first instance, the most common reasons we see for the desire to include one or more non-accredited investors in an offering are that the issuer wants to offer the opportunity to employees who do not otherwise qualify as an executive officer of the issuer or another participating accredited investor desires to have a family member (or a related trust) participate that does not qualify as an accredited investor on its own merits.[2] The fact of the matter is that when a non-accredited investor participates in a Rule 506(b) offering it is almost always because of a preexisting relationship with the issuer itself or a relationship to another accredited investor that views the investment as an attractive opportunity. In our view, such non-accredited investors rely more on these relationships than any disclosure document in determining whether to invest, and we question whether the lengthy private placement memorandums used in offerings in which non-accredited investors participate actually provide a tangible benefit.[3]

Subject to certain qualifications, we think there is merit to the idea of eliminating information requirements in offerings involving non-accredited investors where there is a lead investor or investors. In our experience, it is very common in private offerings for one or two lead accredited investors to lead the diligence process. As sophisticated investors, they can "fend for themselves" in terms of conducting diligence on the issuer, establishing pricing, requesting financial data, or other information from the issuer. While each investor ultimately makes its own investment decision, the non-lead accredited investors defer to the lead investor to a large extent.[4] While we recognize why the Commission states the non-accredited investor would invest "...on the same terms as the lead investor," the Commission would need to establish safe harbors that would not be viewed as participating on different terms. Often, the lead investor, who will incur both external and internal expenses associated with the diligence process, is provided warrant coverage or is entitled to expense reimbursement from the issuer up to a certain amount, which would not generally be offered to other participating investors.[5]

40. Are issuers hesitant to rely on Rule 506(c), as suggested by the data on amounts raised under that exemption as compared to other exemptions? If so, why? Has the adoption of Rule 506(c) enabled issuers to reach a greater number of potential investors and/or

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[2] With respect to employees, it would seem they would be starting from an information advantage, in terms of knowledge of the issuer. With some potential investment limits tied to a non-accredited, employee-investor's income level, we think it would not raise significant investor protection concerns to include them as "accredited investors" or otherwise not count such investor as a purchaser in a Rule 506(b) offering that would trigger the informational requirements in Rule 502(b). With respect to "family" investors, it is our experience that the investment decision is often being made by an accredited investor, but for estate-planning reasons the securities may be purchased by a trust or registered in the name of a relative.

[3] In offerings solely to accredited investors, the more common disclosure document is a slide presentation, which, by its nature, provides for a more straight-forward, plain language presentation than a lengthy offering circular or private placement memorandum. Particularly for issuers with audited financial statements and notes to financials, a scaled down disclosure presentation often reflects a more useful investor information tool and is limited to more material information surrounding the issuer and offering.

[4] In addition to the comfort from the participation of the lead investor, the non-lead investors often benefit from the representations and warranties of the issuer in the negotiated securities purchase agreement.

[5] Some other common terms that a lead investor may receive, and not made available to other investors, are registration rights, board representation, and/or certain informational rights. The Commission would need to provide concrete guidance on which of these items a lead investor could receive without the other investors being considered to have invested on "different" terms.

increased their access to sources of capital? Are there changes we should consider to encourage capital formation under Rule 506(c), consistent with the protection of investors?

We do believe that both issuers and their legal counsel are hesitant to rely on Rule 506(c). For purposes of example only, our law firm's banking and financial institutions group has been issuer's counsel on more than a dozen private placements since 2014 for various issuers where the issuer was a non-SEC reporting bank holding company. In not a single one of these private offerings did the issuer, following consultation with counsel and/or their placement agent, elect to proceed with an offering under Rule 506(c); rather, Rule 506(b) was the preferred subsection of Regulation D under which the private offering was structured. This decision had nothing to do with the desire to include non-accredited investors, as most of the issuers already elect to proceed on a "solely accredited investor basis" due to the cost and expenses associated with the information requirements in Rule 502(b).[6]

We believe the Concept Release correctly identifies one of the primary deterrents to an issuer's use of Rule 506(c), which is the requirement that the issuer "...*shall* take reasonable steps to verify that purchasers of securities sold in any offering under paragraph (c)" of Rule 506 are accredited investors.[7] The Concept Release states that there may "be concerns about the added burden or appropriate levels of verification of the accredited investor status of all purchasers and possible investor privacy concerns."[8] The Concept Release cites a 2017 study[9] that the verification compliance requirement "...could chill the interests of many significant investors who have understandable reluctance to share their tax returns, brokerage statements, and other confidential financial information with issuers' management and attorneys."[10]

Our experience tells us that sophisticated funds and/or high net-worth angel investors are very much reluctant to share sensitive financial information, whether about themselves or their limited partners. Issuers are often reluctant to ask for such information as well, particularly where the net worth of the prospective investor is not in material doubt. One of the problematic features of Rule 506(c) is that once an issuer has determined to take advantage of its flexibility to more broadly solicit investors, it cannot revert to Rule 506(b) if there is push-back or other issues associated with the verification requirement. You cannot put the prohibition on general solicitation or general advertising in Rule 506(b) offerings "back in the box" once an issuer elects to go down that path with a Rule 506(c) offering.

Issuers and legal counsel like "bright line" rules or safe-harbors, as they clearly set parameters for the field of play. While Rule 506(c) provides a non-exhaustive list of methods for verifying that a natural person is an accredited investor and, if such method, or methods, are

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[6] *See, also*, Concept Release, at pg. 79 (stating that non-accredited investors were reported as participating in only approximately 6% of Rule 506(b) offerings in each of 2015, 2016, 2017, and 2018).
[7] This affirmative obligation to verify creates an additional compliance risk, not present in a Rule 506(b) offering. To qualify as an "accredited investor" under Rule 506(b) (and, therefore, be excluded from the 35-purchaser count), the person only need to come within the definition of accredited investor in Rule 501(a) or, in the alternative, the issuer must have a "reasonable belief" that the person comes within one of the categories of accredited investors.
[8] *See* Concept Release, at pgs. 80-81.
[9] *Id.* at pg. 80, FN 267 (citing Manning G. Warren (2017), The Regulatory Vortex for Private Placements, Securities Regulation Law Journal, Vol. 45, Issue 9).
[10] *See id* at pg. 80-81.

used, the issuer will be "deemed" to have taken reasonable steps to verify, all such verification requirements require the person to share sensitive financial information either with the issuer directly or a third party (such as an accountant, licensed attorney, or registered broker-dealer).[11] Investors have become accustomed in the private placement market to being able to participate in a private offering without having to jump through the hoops of this additional verification requirement. Issuers, their counsel, and their licensed placement agents rightly are cautious about potentially adding an additional offering requirement that some investors may resist, despite the obvious benefits that being able to solicit investors generally may provide.

We recognize that the Commission is somewhat confined in what it can do with respect to the chilling-effect of the verification requirement on Rule 506(c) offerings due to the language of the Jobs Act.[12] The Commission, however, could greatly increase the utility of Rule 506(c) with a fairly straightforward addition to the list of permissible verification methods in Rule 506(c)(2)(ii) under which an issuer will be "deemed to take reasonable steps to verify" that a natural person is an accredited investor ("Safe Harbor Verification Method"). The proposed additional Safe-Harbor Verification Method would be relevant solely with offerings where the issuer has set a sufficiently high minimum investment amount. The proposed addition would read something like the following:

> (D) With respect to an offering where the minimum investment amount from any purchaser is $25,000 or more, obtaining a written representation or certification, whether in a subscription agreement, purchase agreement, investor questionnaire, or otherwise, from the purchaser that (1) the purchaser meets the definition of accredited investor in Rule 501(a) and (2) the purchaser's cash investment in the offering is not being financed by a third party.

The addition of this verification method is in line with past commentary the Commission has provided regarding what might constitute "reasonable steps to verify." In the Commission's 2013 final adopting release on Rule 506(c), the Commission stated:

> ...[T]he more likely it appears that a purchaser qualifies as an accredited investor, the fewer steps the issuer would have to take to verify accredited investor status, and vice versa. For example, if the terms of the offering require a high minimum investment amount and a purchaser is able to meet those terms, then the likelihood of that purchaser satisfying the definition of accredited investor may be sufficiently high such that, absent any facts that indicate that the purchaser is not an accredited investor, it may be reasonable for the issuer to take fewer steps to verify *or, in certain cases, no additional steps to verify* accredited investor status other than to confirm that the purchaser's cash investment is not being financed by a third party.[13]

The addition of this bright-line Safe Harbor Verification Method would provide additional certainty to issuers that elected to utilize general solicitation or advertising at the

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[11] *See* Rule 506(c)(2)(ii)(A)-(C).

[12] Section 201(a) of the Jumpstart Our Business Startups Act, or Jobs Act, provides that the Commission's rules "shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission."

[13] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-9415 (Jul. 10, 2013) [78 FR 44771 (Jul. 24, 2013)] ("Rule 506(c) Adopting Release"), at pg 44778.

outset of the offering, so long as they held to their minimum investment amount[14] and met the verification method's other requirements. This would also not create additional expense associated with Rule 506(c) offerings, which is another drawback if an issuer uses a third party to verify accredited investor status under Rule 506(c)(2)(ii)(C).

We do believe that adding this additional Safe-Harbor Verification Method would increase the likelihood that issuers would utilize Rule 506(c), and, as a result, allow issuers to reach a greater number of potential investors via general solicitation and advertising. It would also increase small issuers' access to sources of capital to the extent it results in a higher utilization rate of Rule 506(c) offerings and its permissible use of general solicitation and advertising.

Thank you for considering our comments. If you have any questions or need additional information, please contact me at (919) 781-4000.

Sincerely,

WYRICK ROBBINS YATES & PONTON LLP

Stuart M. Rigot, Esq.

[14] We believe the twenty-five thousand dollar minimum investment amount is a reasonable amount. For a prospective investor who had $200,000 in annual income, this would represent 12.5% of the investor's taxable income. It would seem unlikely that an investor with less earning capacity would be able to come up with the liquid assets to make such an investment. *See, also*, Comment Letter on Concept Release, Rick A. Flemming, Investor Advocate, Office of the Investor Advocate, U.S. Securities and Exchange Commission (Jul. 11, 2019) (citing that households in the 25th-50th percentiles of net worth have a median value of financial assets of only $10,000 and even the 50th-75th percentile still only hold a median of $62,100 in financial assets).