CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

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September 24, 2019

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

Re: **Concept Release on Harmonization of Securities Offering Exemptions**
17 CFR Parts 210, 227, 230, 239, 240, 249, 270, 274 and 275;
Release Nos 33-10649; 34-86129; IA-5256; IC-33512; RIN 3235-AM27
File No. S7-08-19

Dear Ms. Countryman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("CCMC") CCMC appreciates the opportunity to comment on the concept release and request for comment issued by the Securities and Exchange Commission (the "SEC" or "Commission") on June 18, 2019, entitled "Concept Release on Harmonization of Securities Offering Exemptions" (the "Concept Release").

The Chamber once again commends the Commission for its ongoing efforts to review existing regulations that affect capital formation in the United States. As we have repeatedly noted, this issue is especially important in light of the declining number of public companies—in the past 20 years, the number of US public companies has been cut in half. While our comments here focus primarily on improvements to the regulatory environment surrounding private placements, a vibrant public marketplace is a necessary component of a robust capital-raising ecosystem.

Companies of all sizes, and especially early-stage businesses, need a mix of capital sources to meet both short-term and long-term growth needs. Both Congress and the Commission have long recognized that in many instances, an exemption from the registration requirements under the securities laws can be an appropriate

mechanism for businesses looking to raise capital where there is no practical need for registration or the public benefits from registration are too remote. The ostensible purpose of our private offering framework has been to provide exemptions for businesses that want to seek public financing, but may not be prepared to bear the full costs of an initial public offering (IPO).

The current private offering regime under the Securities Act was conceived at a time when, for most early-stage companies, sources of private capital were limited. In years past, the expectation was that any issuer that could not finance its operations through ongoing sales or the incurrence of debt would necessarily turn to the public capital markets at some point in time. Now, many companies are able to raise much greater amounts of equity capital in the private markets.

Additionally, with the vast expansion of private equity, far more companies are choosing to remain in private hands indefinitely. The IPO is no longer the desired outcome for many emerging growth companies, and their venture capital owners are content to see a strategic sale as an appropriate (and often less risky) exit.

From one perspective, these developments are welcome. They reflect a thriving economy and provide far greater optionality both to capital-seeking entities and the ultimate providers of capital. Still, while privately-held "unicorns" have become more common, many private companies will never reach billion-dollar valuations and struggle to raise even modest amounts of funds. And with many companies choosing to remain privately-held for longer periods of time, the opportunity for Main Street investors to participate in those companies has decreased. The challenge in constructing a modern private placement system is to accommodate capital seekers of varying sizes and needs.

As the Commission recognized in the Concept Release, the private placement regime under the Securities Act is a patchwork of regulatory exemptions and market practices that have developed over many decades in response to statutory provisions, case law, economic developments, periodic acts of Congress and a gradual evolution of the Commission's thinking about each of these things. Were the Commission to start today from a blank slate, we suspect the landscape for private placements would look far different. Nevertheless, we believe targeting reforms to the existing system is preferable to a complete reimagination of that system from square one.

To strengthen and modernize the current exempt offering regime, we urge the Commission to take the following actions:

- The Commission should expand the definition of "accredited investor".
- The Commission should provide greater clarity around the concept of "general solicitation," particularly in respect of "demo days" and other publicity events involving privately-held businesses.
- The Commission should clarify the circumstances around which two or more otherwise unrelated securities offerings will be integrated into a single offering for purposes of the federal securities laws.
- The Commission should liberalize Rule 144 to encourage secondary trading.
- The Commission should expand the parameters of Regulation Crowdfunding to encourage broader use of this offering technique.

Discussion

A. Definition of Accredited Investor

The CCMC has long recognized the need for strong public and private capital markets, and the private offering market, particularly under Regulation D, has long been an attractive vehicle for businesses to raise capital. Both Congress and the SEC have taken steps over the years, and particularly since the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"), to expand or create new exemptions from registration in order to promote capital formation and expand investment opportunities, while maintaining investor protections. While the CCMC has supported these efforts, we believe there are significant barriers that have prevented these efforts from fully achieving their intended purpose.

As a case in point, not only are fewer companies going public, but the companies that do are typically doing so much later in their lifecycle. When companies go public at a relatively mature age, many of the early stage returns generated by those businesses accrue to those investors who are allowed to invest in private offerings. Qualifying as an accredited investor is significant because accredited

investors may participate in private investment opportunities that are generally not available to investors who do not qualify as an accredited investor.

The current accredited investor definition relies only on financial criteria like income and net worth, without taking into account an investor's education, experience and expertise. Specifically, the current definition allows only those with $1 million in net worth or $200,000 in annual income (or $300,000 in joint income with a spouse) to be deemed accredited. In other words, only relatively affluent people are afforded the opportunity to invest in private offerings.

These arbitrary thresholds have the effect of being both under-inclusive and over-inclusive at the same time: They allow someone who inherited a fortune—but has no concept of financial markets—to invest in private offerings, but they won't allow someone with a Ph.D. in economics or finance to invest if their net worth and income happen to be below the thresholds. This outcome makes little sense to us, and it has the effect of contributing to disparities in income and wealth across our country.

The CCMC supports expanding the definition of an accredited investor by allowing those with relevant education or work expertise to invest in private offerings, regardless of income or net worth. For example, the CCMC supports creating additional methods of accreditation other than financial criteria, such as permitting individuals with certain professional credentials, prior experience investing in exempt offerings or who pass an accredited investor examination to qualify as accredited investors.

Among entities, the requirement under Rules 501(a)(3) and (a)(7) that an investment vehicle is "not formed for the specific purpose of acquiring the securities offered" is inconsistent with the contemporary practice of organizing a special-purpose investment vehicle to accommodate tax, governance, financial or other objectives of co-investors. Accordingly, we urge the Commission to reconsider this limitation as well.

In addition to providing more American households with greater opportunities to build wealth, expanding the definition of an accredited investor would expand the pool of capital available to private businesses. The CCMC, however, does not support increasing the existing monetary thresholds for accredited investors. Increasing the individual income and net worth thresholds would shrink the number

of households that qualify as accredited investors, as well as the pool of capital available to private businesses. Doing so seems counterproductive to us, and would not enhance the ability of Main Street investors to participate in early stage investing.

B. General Solicitation for Offerings Under Regulation D

The SEC's ban on general solicitation and general advertising is one of the largest impediments for companies seeking to raise capital through private offerings. Tittle II of the JOBS Act sought to address this barrier by eliminating the ban on general solicitation, with the stipulation that those who ultimately purchase the securities be deemed "accredited investors." Although the SEC, through its adoption of Rule 506(c), created a new exemption from registration which allows issuers to use general solicitation in their securities offerings, to qualify for this exemption, issuers must take reasonable steps to verify that all investors in such offerings are accredited investors. In practice, the enhanced accredited investor verification requirements have discouraged many issuers from taking advantage of Rule 506(c), and issuers continue to rely primarily on the Rule 506(b) exemption, which continues to prohibit general solicitation.

Determining what activities constitute general solicitation or general advertising has been an area of uncertainty for years. The SEC has not explicitly defined the terms "general solicitation" or "general advertising" and instead analyzes the facts on a case-by-case basis. Over the years, the SEC Staff has attempted to provide guidance on what specific activities constitute a general solicitation or general advertising through a patchwork of no-action letters and interpretive guidance; however, the Staff's guidance has been inconsistent at times and still leaves open a number of compliance uncertainties.

A clear understanding of what activities constitute general solicitation is crucial to a business seeking to rely on Rule 506(b). If an issuer inadvertently engages in communication that the SEC later determines to constitute general solicitation or general advertising, the issuer will not be able to rely on the exemption from registration and may find itself subject to an SEC enforcement action for an unregistered offer and sale of securities. Both issuers and investors would benefit from more clarity on the SEC's definition of general solicitation.

Congress has recognized this issue in recent years in the context of angel investing and has considered several bills, such as the Helping Angels Lead Our Startups Act (or "HALOS Act"), that would help startup businesses attract investors by clarifying the definition of "general solicitation" under Title II of the JOBS Act. When finalizing rules to implement Title II of the JOBS Act, the SEC regrettably put in place provisions that would effectively prohibit certain types of communications between startups and angel investors, who are a critical source of capital in the economy.

We believe the SEC should clarify that startups and angel investors are permitted to participate in "demo days" or other publicity events in which companies serially present to audiences that may include potential investors but for which no specific investment solicitation is made. No matter their size, allowing companies greater opportunities to engage with investors or potential investors generally leads to positive outcomes. Much like the expansion of the "testing the waters" provisions for public companies that the SEC is now considering, providing clarity around "demo days" and similar events would open up communication channels between investors and businesses looking to grow. This is consistent with the original intent of the JOBS Act and would help innovative companies expand and hire new employees.

In sum, the CCMC believes that clarifying the definition of general solicitation or general advertising could provide more certainty to both issuers and investors, help startup businesses attract investors and eliminate unnecessary barriers to the provision of information in support of greater capital formation.

C. Integration

The SEC's integration doctrine stands as another barrier to companies seeking to raise capital, particularly small businesses whose capital needs often change. Under the doctrine, the SEC can retroactively determine that multiple offerings should be integrated into a single one, which could result in an offering no longer being eligible under an exemption upon which an earlier offering relied. In such a case, investors in that offering could rescind their purchases. Certainty as to an issuer's eligibility for an exemption from registration is critical to businesses seeking to raise capital.

In recent years, the SEC has provided greater clarify as to the scope of the integration doctrine in the context of concurrent exempt offerings involving Regulation A, Regulation Crowdfunding, Rule 147 or Rule 147A, as well as certain specific transactions, such as offshore offerings under Regulation S. However, with respect to Regulation D, the SEC has on balance continued to use a version of the five-factor analysis.

The CCMC believes that the SEC's current approach to integration is unnecessarily complex, and both issuers and investors would benefit from more clarity as to the scope of the integration doctrine, particularly in the context of Regulation D. We support the SEC articulating one integration doctrine that would apply to all exempt offerings along the lines of the analysis articulated in connection with Regulation A and Rules 147 and 147A.

In addition, the CCMC supports shortening the integration safe harbor in Rule 502(a) of Regulation D from six months to 30 days. In the electronic information age in which we now live, the six-month period is an eternity. It unnecessarily impairs capital formation and restricts businesses, particularly small businesses whose capital needs often change, from raising the capital needed for growth. Shortening the six-month integration safe harbor will provide additional flexibility to businesses looking to raise capital, while still providing sufficient investor protections.

D. Secondary Trading

The CCMC shares the SEC's view that secondary market liquidity for investors is integral to capital formation in the primary offering market.

Again, in the electronic information age, information disseminates far more quickly than in decades past, and investors are accustomed to much shorter turnaround times. The CCMC therefore believes that amending Rule 144 to shorten the holding period from six months for reporting companies or one year for non-reporting companies, to three months or six months, respectively, will improve secondary market liquidity and promote capital formation, while providing sufficient investor protections.

E. Crowdfunding

While companies or individuals have "crowdfunded" monetary contributions from a large number of people for years, the JOBS Act provided—for the first time—the legal framework for equity crowdfunding under the federal securities laws. Over the last decade, crowdfunding—which involves a large number of individuals investing relatively small amounts of money in companies—has become a popular tool for everything from movie financing to startup capital raising. Unfortunately, complexities with the statute as well as implementation by the SEC added some unnecessary hurdles and red tape to equity crowdfunding, diminishing its potential as a mainstream way for businesses to find investors.

The CCMC believes that Regulation Crowdfunding imposes a number of requirements that obviate the intent of the JOBS Act, impose unnecessary costs for businesses and fail to provide investors with decision-useful information. These burdensome requirements, along with arbitrary limitations on how much can be raised and the amount an individual can invest, have no doubt dampened the utility of undergoing a crowdfunding offering and limited the potential of crowdfunding in the United States. It has therefore become evident that in order for Regulation Crowdfunding to become a viable option for many businesses to use, the issues surrounding the exemption thresholds must be addressed.

First, the CCMC supports raising the issuer offering limit from $1.07 million in a 12-month period to at least $5 million in a 12-month period. Although many of the offerings under Regulation Crowdfunding to date have raised less than the existing offering limit, the low upper limit discourages many issuers and thus renders Regulation Crowdfunding useless for many companies that would otherwise be interested in using it. Raising the offering limit will make Regulation Crowdfunding more attractive to small issuers, opening up another funding channel for businesses that need capital most.

Additionally, the CCMC supports raising the limit that individual investors are able to invest in Regulation Crowdfunding offerings over a 12-month period from the current limits. Moreover, the CCMC continues to be concerned that the disclosure requirements of Regulation Crowdfunding fail to provide the decision-useful information needed by crowd-funders and place unnecessary burdens on businesses

contrary to the intent of the JOBS Act.[1] These requirements are particularly burdensome given the low offering limit allowed under Regulation Crowdfunding. The CCMC supports paring down the disclosure requirements under Regulation Crowdfunding, particularly with respect to the U.S. GAAP financial statement requirements.

The CCMC believes that requiring businesses that use crowdfunding to use U.S. GAAP accounting in disseminating financial reports and information to potential investors may not always be necessary for the needs of investors in small businesses. Many financial information users for private companies have different needs and uses of financial information than public company users. Indeed, private company financial statement users may only be interested in cash flow, or may not be interested in financial statements at all, since investors may be more interested in the success of a certain product or idea that led to the formation of the company in the first place.

So, while accounting should have GAAP as a foundation, the standards and needs of private company users will be much different and require tailored accounting standards to meet those needs. This would require private companies to use pared down GAAP standards or exempt them from standards irrelevant to their financial statement users. The CCMC supports sensible accommodations to the accounting standards to better fit the needs of small businesses and their investors, while relieving businesses of unnecessary costs and burdens.

Of course, we are sensitive to the concern that greater investment opportunities for retail investors comes with the risk of greater financial losses. But the securities markets have never been a risk-free proposition, and Congress long ago made the policy decision that the Commission would not have the power of merit regulation. Gatekeepers, such as registered crowdfunding portals, serve an important function in the protection of investors. Furthermore, instead of limiting investor opportunity, we believe the Commission can best protect investors by devoting sufficient enforcement resources to policing the crowdfunding marketplace to ensure it remains free of fraudsters and scammers.

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[1] *See, e.g.,* Comment letter dated February 3, 2014, available at https://centerforcap.wpengine.com/wp-content/uploads/2014/02/2014-2.3-Crowdfunding-Comment-Letter.pdf.

Conclusion

The CCMC again applauds the Commission for its ongoing commitment to review existing regulations that impact capital formation in the United States. The Concept Release is consistent with the Chamber's longstanding effort to examine how SEC regulatory burdens may diminish access to capital and to remove those barriers when costs outweigh benefits. The CCMC is confident that a careful reassessment of the SEC's framework for private offerings will help open up funding channels for businesses that need capital and create opportunities for low and middle-income American families to build wealth, while maintaining important investor protections. We appreciate your consideration of these comments, and we stand ready to discuss them further with the Commissioners or Staff at your convenience.

Sincerely,

Tom Quaadman

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