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September 24, 2019

***Via Email***

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

RE: Release Nos. 33-10649, 34-86129, IA 5256, IC-33512
File No. S7-08-19

Dear Ms. Countryman:

The undersigned appreciates the opportunity to comment on the above-referenced release (the "Release") and recognizes the significant amount of staff time and effort required to produce a comprehensive survey of current exempt offerings available under the Securities Act of 1933, as amended (the "1933 Act"). Recognition also should be accorded to the recent significant efforts undertaken by the U.S. Securities & Exchange Commission (the "SEC") to make various provisions of the 1933 Act more investor friendly, such as adoption of SEC Rule 147A and harmonization of "bad actor" provisions in exempt offerings.

My comments are based upon almost 40 years' experience as a securities practitioner, securities regulator and legal academic.[1] The views expressed herein are my own and do not constitute the views or positions of the law firm with which I am or have been associated or any client thereof, any academic institution with which I am or have been associated or any governmental or non-governmental organization with which I have been associated.

## I. <u>Disclosure is the Heart of the Matter</u>

As indicated in the Release, transactions which are exempt from registration under the 1933 Act are those that have been determined not to require the filing, review and delivery of information required for an offering registered under the 1933 Act and the rules, regulations and policies adopted thereunder and as to which no restrictions on the number or type of investors generally are imposed.[2]

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[1] Partner, Bybel Rutledge LLP; Visiting Professor of Securities Law, BPP University Law School (London); Tutor, School of Finance and Management, University of London (UK); former Adjunct Faculty at Widener Commonwealth University School of Law and The Dickinson School of Law of the Pennsylvania State University; and former general counsel, Pennsylvania Securities Commission.

[2] 15 USC 77e.

Although the variety of financial products have multiplied over the years and methods of distribution of securities have gone from paper to digital, the raison d'etre for creating exemptions from registration under the 1933 Act remains, and should remain, constant. Specifically, what terms and conditions should exist that justify the absence of delivery of a prospectus containing the information otherwise required in a registered offering?

In context of Regulation D, the SEC has not mandated specific disclosures except with respect to the 35 persons who may purchase securities in a Rule 506(b) offering who are not accredited investors as defined in SEC Rule 501("Accredited Investors")[3] but who, either alone or with a purchaser representative, have such knowledge and experience in financial and business matters that the person is capable of evaluating the merits and risks of the prospective investment ("Sophisticated Investors").[4]

It is presumed that the SEC did not apply the disclosure requirements of Rule 502(b)(2)[5] to Rule 504[6] offerings in that such offerings generally would be subject to registration at the state level and to disclosure requirements similar to those applicable to SEC-registered offerings or are being sold only to Accredited Investors under state exemptions for offerings made solely to Accredited Investors.[7] Conversely, Sections 4(6) and 4A of the 1933 Act and Regulation Crowdfunding (collectively, "Regulation CF") and Regulation A contain specific disclosures that must be made to prospective investors but are less than otherwise would be required in a registered offering.[8]

Although the SEC and states receive copies of Form D for offerings made under Rule 506(b) and (c), neither regulator reviews disclosure being provided to prospective investors. Prior to the effectiveness of the preemptive provisions of Section 18 of the 1933 Act,[9] the states performed this function. Subsequently, the SEC permitted the Financial Industry Regulatory Authority ("FINRA") to require the filing of disclosure documents for offerings in which a FINRA member would receive compensation in connection with certain exempt offerings.[10]

Although the 1933 Act views disclosure as the centerpiece of investor protection, small business issuers may view preparation and delivery of a disclosure document to potential investors as an impediment to capital formation. I subscribe to the view that investments are sold, not purchased. Entrepreneurs are selling investors a vision of a new product or service and delivery of a document that describes the inherent risks of the investment often are seen by issuers as an unnecessary speed bump or roadblock to consummation of a successful sale of securities and raising of capital.

[3] 17 CFR 230.501(a).
[4] 17 CR 230.506(b)(2)(ii).
[5] 17 CFR 230.502(b).
[6] 17 CFR 230.504.
[7] Model Accredited Investor Exemption adopted by the North American Securities Administrators Association, Inc. ("NASAA") (April 27, 1997).
[8] 15 USC 77d(a)(6) and 77d-1; 17 CFR 227.100 *et seq.*
[9] 15 USC 77r.
[10] FINRA Rule 5123.

Small business issuers constantly query me why they need to pay a lawyer to draft a disclosure document that they believe no prospective investor will read. My consistent response has been that the anti-fraud provisions of the federal and state securities laws place an affirmative obligation on the issuer to disclose all material information relevant to the offering. Furthermore, delivery of written disclosure provides the issuer with a defense to subsequent allegations of fraud by an investor who wants to disclaim the investment risks previously and freely undertaken. While the former argument usually is viewed by issuers as an impediment to capital formation, the latter argument generally receives grudging recognition.

The foregoing is not surprising as many entrepreneurs may be unaware of the existence of the 1933 Act, let alone the specific provisions thereof, and that an investment in their enterprise may constitute a "security" subject to the provisions of the 1933 Act.

Another concern is that, although investors may find an exempt offering attractive and worthy of participation, they may not appreciate (or appreciate fully) the illiquid nature of the investment and lack of any public market for the securities. Prospective investors frequently ask issuers how they can redeem their investment and issuers often ask how they can include redemption provisions in their offering materials to provide prospective investors with a potential path to exiting the investment.

Heretofore, the SEC has appreciated the need to balance the concerns expressed above and has addressed them by adopting exemptions that focus on (1) a maximum permitted offering amount, (2) number of permitted investors in the offering, (3) types of investors permitted in the offering and (4) maximum amount of securities to be purchased by an investor in the offering. To prevent a public distribution of unregistered securities by use of certain exemptions, the SEC also has imposed a restriction on resales of the securities purchased in exempt transactions.[11]

Rule 504 represents a maximum offering amount. Rule 506(b) represents both a limitation on types of investors and permitted investors. Rule 506(c) represents a limitation on the type of investors. Regulation CF represents both a maximum offering amount and a limitation on the maximum amount of securities purchased. Tier 2 of Regulation A represents a maximum offering amount as well as type of investor or limitation on the maximum amount of securities purchased. In addition to these restrictions, Regulation CF and Regulation A also imposed certain mandated disclosures to prospective investors.

Non-Accredited Investors also may participate in intrastate offerings made in reliance on Section 3(a)(11) of the 1933 Act and Rules 147 and 147A.[12] Depending on the circumstances, these offerings may be required to be registered under a state's securities law or could be exempt from registration. Although Table 1 to the Release may suggest otherwise, there generally is no limitation on the amount of an offering made under Section 3(a)(11) that also is registered under the qualification provisions of a state's securities law.[13]

[11] 17 CFR 230.502(d); 17 CFR 230.144(d).

[12] 15 USC 77c(11); 17 CFR 230.147; 17 CFR 230.147A.

[13] Release, p. 11.

If the SEC would determine to extend the universe of persons eligible to participate in exempt offerings, I would urge the SEC to continue its current philosophy of mandating the types of disclosures which issuers relying on those exemptions must provide to prospective investors. As a practitioner, it is much easier to convince an issuer to prepare a disclosure document when you can point to a regulatory requirement rather than your professional recommendation to prepare a disclosure document based on the anti-fraud provisions of the federal securities laws. This approach also may reduce the potential for fraudulent offerings where disclosures may be non-existent, materially misleading or materially incomplete.

## II. **Request for General Comments** (#1-19)

1. The existing exempt offering framework is the culmination of many years of thoughtful releases by the SEC and responsive comments thereto by issuers, their advisors and other regulatory organizations. Establishment of exempt offerings either by rule or legislation, or both, are subject to extensive public comment by parties which may have diverse perspectives and the resulting final statute or regulation often reflects compromises of these perspectives which, over an accumulation of years, may not necessarily reflect a framework that might have been designed if one had the luxury of starting with a clean sheet of paper. Such is our democratic process and the result are regulations which are finely balanced between the demands of investor protection and the needs of legitimate capital formation.

2. There are several aspects of the current exempt offering regime that I believe can be improved but I do not believe that a complete "rewrite," whether described as "harmonization" or otherwise, is warranted as it would delay adoption of some significant improvements to the existing exempt offering regime and not necessarily result, after an anticipated lengthy drafting and comment process, in a regime that is better than what exists today. While the goal of the SEC should be to facilitate capital formation, it should not do so at the expense of essential investor protections which, under the federal securities laws, is the accessibility of material disclosures to prospective investors.

3. Securities regulation, by definition, is complex. Under the 1933 Act, it essentially consists of a universal mandate that all offers and sales be registered unless exempt.[14] By necessity, all relevant considerations by the SEC to derogate from this requirement likely will result in very detailed regulations. The SEC must create regulations that will accomplish the purpose of allowing certain offerings to go forward without the costs of a full registration while simultaneously ensuring that bad actors do not "game" the system and that exempt offerings are not otherwise abused by inadvertently creating a conduit for a public distribution of unregistered securities.

[14] 15 USC 77e.

I would suggest that, for years, Rule 504 served as a federal "micro exemption" as to which there are no SEC-mandated disclosures requirements for offerings of $1 million or less. The SEC recently raised the offering amount limitation from $1 million to $5 million.[15]

4. It is unrealistic to expect business people to be familiar with the universe of federal securities regulation, even if they are well educated. Therefore, the primary goal in drafting regulations needs to be achieving the specific regulatory goals even at the risk of creating a complex regulation. That said, the SEC always should try to make the regulation as easy to understand as possible and provide mechanisms whereby issuers can "fall into" the provisions of the exemption if they operate in the ordinary course of business.

5. Section 5(c) of the 1933 Act requiring the filing of a registration statement with the SEC applies to "offers to sell" and "offers to buy" and the anti-fraud provisions of Section 12 and Section 17 of the 1933 address "offers or sales." [16] Both legally and historically, the SEC has regulated offers and only has de-regulated offers on a selective basis and only to achieve a specified regulatory goal.[17] As indicated earlier, I am of the belief that securities are sold, not purchased and, in this context, information provided in an offer, whether complete, incomplete or utterly false, often is what is relied upon by prospective investors in making a decision to purchase the security.

   Therefore, any de-regulation of offers should be accompanied by corresponding investor protection measures, such as limiting the amount at risk. This was the SEC's approach in Regulation CF and Tier 2 of Regulation A.[18] However, such an approach may require issuers to contact more potential investors to raise the total offering amount.

6. There seems to be a current line of thought that small, main street investors, are losing out on investing in start-up businesses that may be the next "big" thing, whether they be technology-focused companies, facilitators of the "gig" economy or purveyors of cryptocurrencies or blockchain applications. While some may think this line of thought novel, it is merely a recycling of what was the mantra in the middle to late 1990s which argued that small investors should be encouraged to invest in internet companies, fast food/casual dining franchise concepts and companies engaged in all things wireless.

   Investing in start-up companies is extremely risky. According to the U.S. Bureau of Labor Statistics, approximately 20% of small businesses fail in their first year and 50-55% fail to reach their fifth year.[19]. Investors with limited savings and high demands on

[15] SEC Release No. 33-10238 (October 26, 2016).
[16] 15 USC 77e(c); 77*l*; 77q.
[17] 17 CFR 230.255 permitting solicitations of interest under Regulation A.
[18] 17 CFR 227.100 *et seq.*; 17 CFR 230.251 *et seq.*
[19] www.bls.gov/bdm/entrepreneurship/bdm_chart3.htm

current disposable income for food, shelter, and recurring expenses are not fiscally positioned to accept unlimited investment risk. The SEC recognized this when it limited the amount an individual could invest in an offering made in reliance on Regulation CF and Tier 2 of Regulation A.[20]

Those who can sustain loss of their entire investment, whether as an "angel" investor or through a pooled investment vehicle such as a venture capital fund, are better positioned not only to provide the capital needed by start-up and small businesses but, through their ability to conduct substantive due diligence, select those companies with the best business plans to be allocated capital. The risk profile of an individual investor and those of a pooled investment vehicle are radically different and one should not be substituted for the other.

7. Methods of communication invoke issues relating to regulation of offers, use of general advertising and general solicitation and delivery of material disclosures. Historically, the SEC has embraced new communications technologies in the delivery of mandated disclosures if appropriate investor protection safeguards are met.[21] Therefore, the method of communication is not the issue but whether, in context of an exempt offering, it should be used to communicate offers.

8. The SEC has adopted regulations and staff of the SEC Division of Corporation Finance have provided regulatory guidance on how an issuer may legally transition from one exemption to another.[22] Should the SEC adopt additional rules relating to exempt offerings, this issue should be addressed in the rule or as regulatory guidance in the accompanying adopting release.

9. The raison d'etre for exempt offerings remains constant – under the conditions of the exemption, information that otherwise would be required to be given in context of an offering registered with the SEC is not required. Facilitating a company remaining private longer or foregoing a registered offering should not factor into any justification for creating exemptions from registration. Micro-managing the progress of companies, which progress may be affected by business considerations rather than regulatory issues, should not be the province of government. Government should let markets forces in a capitalistic, free enterprise system make those decisions.

10. My views on certain changes will be detailed under the relevant sections of the Release.

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[20] *Id.*

[21] *See* SEC Release No. 33-10506 (June 5, 2018); SEC Release No. 34-42728 (April 28, 2000); SEC Release No. 33-7233 (October 6, 1995).

[22] *E.g.* CD&I Question 260.12.

11. In assessing the amount of capital raised through exempt offerings, it would have been useful if the Release had contained a table which showed the number of filings and the total amount of capital sought to be raised in reliance upon each exemption listed in Item 6 of SEC Form D. Of particular interest would be the percentage of all capital raised which was raised by issuers relying upon Section 3(c)(1) and 3 (c)(7) of the Investment Company Act of 1940 which indicates capital raised by private pooled investment vehicles which generally are geared toward institutional rather than retail investors.

Comments on the definition of Accredited Investors will be addressed under that section of the Release.

12. The approach taken by Congress in adopting an exemption for crowdfunding offerings in the Jump Start Our Business Startups Act of 2012 (the "JOBS Act")[23] and the SEC in its Regulation Crowdfunding is most appropriate by requiring a maximum specified dollar amount of the investment or a percentage of net worth or annual income based on the investor's overall annual income or net worth.[24] Furthermore, the registered broker-dealer or funding portal participating in a crowdfunding offering is responsible for verifying the permitted investment amount.[25]

13. Exempt offerings are rooted in the notion that the information otherwise available to an investor in a registered offering is not required under the terms and conditions of the exemption. Of course, this does not mean that no information is required as the issuer remains subject to the anti-fraud provisions of the federal securities laws and any disclosure mandated by the terms and conditions of the specific exemption.

With respect to certain exemptions, the SEC has not required any specific disclosures whereas it has with respect to other exemptions. Whether or not to mandate disclosures and the content of any mandated disclosure must be determined and scaled in context of the regulatory objective of the exemption.

14. Only Regulation CF requires involvement of a registered financial intermediary.[26] As a general matter, involvement of a financial intermediary in an exempt offering is viewed as a positive for investor protection. However, the liability associated with a financial intermediary participating in an exempt offering usually does not justify the remuneration which may be received as result of such participation.

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[23] Pub. L. 112-106, 126 Stat. 306 (April 5, 2012).
[24] 15 USC 77d(a)(6)(B).
[25] 15 USC 77d-1(8).
[26] 15 USC 77d-1.

In addition, FINRA Notice to Members 10-22 applies to financial intermediaries participating in Regulation D offerings and outlines due diligence obligations of FINRA members with respect to investor suitability and communications with investors.[27] As a result of this notice, FINRA members participating in Regulation D offerings often engage a third party due diligence firm to provide a due diligence report on the offering in order to satisfy FINRA that it has adequately complied with guidance given in the notice. However, obtaining a third party due diligence may result in approximately $30,000 to $50,000 in additional transaction costs which is borne by the issuer and passed on to investors.

Is there any statistical evidence available which demonstrates that due diligence reports prepared by entities that are not otherwise regulated to a FINRA member firm has resulted in enhanced investor protection which justifies the additional costs borne by issuers and eventually by investors? Furthermore, is there any widely accepted standard by which these entities analyze Regulation D offerings?

In view of the fact that participation in many exempt offerings is not financially rewarding for registered financial intermediaries and the additional costs which issuers must bear for a FINRA member to obtain a third party due diligence report, the SEC generally should not make this a requirement of the availability of any exemption.

15. It is difficult to respond to this particular request without knowing what qualifications a person must have to be a "lead investor," what responsibilities such person would have and what, if any, liability such person may have under the federal securities laws. Would this person need to be registered in some capacity with FINRA?

16. I think the SEC has done this and is reflected in the currently existing exempt offering regime.

17. The only exemption which mandates that all investors be Accredited Investors is Rule 506(c) and, presumably, this due to the fact that this exemption permits the use of general advertising and general solicitation, subject only to the anti-fraud provisions of the federal securities laws.

18. SEC exemptions generally are organized under the statutory provisions under which they are authorized and to which substantive provisions apply to all exemptions adopted under that statutory provision. This makes eminent sense, is helpful to practitioners and has absolutely no bearing on facilitating capital formation or providing investor protection.

[27] FINRA Notice to Members 10-22, "Obligations of Broker-dealers to Conduct Reasonable Investigations in Regulation D Offerings," (April 2010).

19. I commend staff of the SEC Division of Corporation Finance in publishing helpful CD&Is and the Office of Small Business Policy in responding to individual queries.

## III. Accredited Investors (#20-32)

Persons meeting the definition of Accredited Investors have long been recognized by the SEC and state securities regulators as being eligible to participate in offerings that should not be subjected to the information requirements otherwise required with respect to registered offerings.

Originally, individuals could qualify as Accredited Investors if they (1) have a net worth, or joint net worth with spouse, in excess of $1 million or (2) had an income in excess of $200,000 in each of the two most recent years or joint income with the individual's spouse, in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.[28]

Three developments have significantly affected the Accredited Investor definition since its inception in 1982. The first is the passage of time. Using an online calculator, $1 million in 2019 dollars equals $374,154 in 1982 dollars and, conversely, $1 million in 1982 dollars equals $2,672,691 in 2019 dollars. Similarly, $200,000 in 2019 dollars equals $74,830 in 1982 dollars and $200,000 in 1982 dollars equals $534,538 in 2019 dollars. Both measurements indicated that many more individuals in 2019 qualify as Accredited Investors than upon inception of Regulation D. Therefore, the passage of time and inflation alone have expanded the number of individuals eligible to participate in exempt offerings as Accredited Investors.

The second development has been the rise of defined contribution plans and individual retirement accounts in lieu of defined benefit retirement plans. These plans provide for systematic savings by individuals and, in some cases, matching funds contributed by employers. Although these pools of savings may be used toward the $1 million net worth requirement, these individuals also are vulnerable to significant volatility in the market value of the underlying investments in their retirement portfolio and lack of diversification if a significant amount of the retirement portfolio consists of shares of their employer.

The third development affecting the definition of Accredited Investors was the enactment of Section 413 the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). It required the SEC to amend the net worth test to exclude the value of the individual's principal residence. This recognized the fact that simply owning a home in certain geographic areas of the United States could qualify a person as an Accredited Investor based upon the net worth standard. Section 413 of Dodd-Frank also required the SEC to review the definition of Accredited Investor every four years.[29]

Arguments have raged for decades over the Accredited Investor definition. Small businesses think it too restrictive, even if inflation has increased the absolute number of individuals who qualify as Accredited Investors, and profess that they don't know any

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[28] SEC Release No. 33-6389 (March 8, 1982).

[29] *E.g.* SEC Report on the Review of the Definition of "Accredited Investor" (December 18, 2015).

Accredited Investors or how to contact them (which also may invoke issues relating to any applicable prohibition on use of general solicitation and general advertising). Others think the Accredited Investor standard should be increased to account for intervening inflation.

Since there appears to be little appetite for reducing (or increasing) the numerical test for qualifying as an Accredited Investor which, it could be argued, already has occurred by the passage of time, the only remaining avenue to expanding the definition of an Accredited Investor is to identify additional categories of persons where the issuer should not be required to provide such persons with specific disclosures. This appears to have been the approach of the SEC Task Force on Accredited Investor definition.[30]

20. Those individuals and entities currently included in the definition of Accredited Investor appear to encompass the panoply of persons who would be disposed to investing in offerings of illiquid securities.

21. Based on the above general commentary, the current definition for individuals should not be changed but consideration should be given to indexing it to inflation.

22. Responses to the request for comment are as follows:

    a. *Permit individuals with a minimum amount of investments to qualify as Accredited Investors*. It is unclear whether this is suggesting that a person who already has purchased a minimum amount of investments should be deemed to qualify as an Accredited Investor or if a minimum, but significant, investment in a particular exempt offering should serve as a means of qualifying the purchaser as an Accredited Investor. With respect to the former interpretation, please see the response to Item 22(c) below. With respect to the latter interpretation, the SEC noted in the adopting release for Rule 506(c) that "a purchaser's ability to meet a high minimum investment amount could be a relevant factor to the issuer's evaluation of the type of steps that would be reasonable to take in order to verify that purchaser's status as an accredited investor." [31]

       In this regard, the SEC may deem a person who is able to meet a high minimum investment ( a minimum investment of $250,000 to $500,000 is not uncommon in certain pooled investment vehicles) to be an Accredited Investor. This logic, however, might be viewed as circuitous since a person who can make a high minimum cash investment likely may qualify as an Accredited Investor under the current definition.

[30] *Id.*

[31] SEC Release No. 33-9415 (July 10, 2013), p. 34.

b. *Permit individuals with certain professional credentials to qualify as Accredited Investors.* This proposal raises several issues. What professional credential is sufficiently robust in context of understanding investments to justify qualification of the holder as an Accredited Investor? Who determines what credential and what issuing organization is similarly sufficient? One might think a Masters of Business Administration ("MBA") may be sufficient but all MBAs, even if conferred by accredited institutions, are not created equal. A person who receives a MBA focused on information technology may not have taken any courses related to corporate finance or enterprise organization.

Will anyone with a MBA degree be deemed an Accredited Investor or must the person have a minimum grade point average? How would such degrees or grade point averages be verified? Due to privacy laws or internal policies, many educational institutions will not confirm either without a manually signed consent from the former student. Therefore, the breadth and types of educational degrees, the difficulty in determining that the underlying coursework prepared the individual for investing and problems relating to verification mean that this is not an avenue that should be pursued.[32]

On the other hand, easily verifiable qualifications, such as an associated person of a FINRA member who has taken and passed the Series 7 examination, may be a credential that may be considered as a qualification for being an Accredited Investor. However, should an associated person of a FINRA member who has taken and passed the Series 7 with a pass rate of 70 be treated the same as an individual who received a pass rate of 80? The same rationale may apply to investment adviser representatives of SEC or state-registered investment advisers who have successfully completed the Series 65 or Series 66 examination.

c. *Permit individuals with experience investing in exempt offerings to qualify as Accredited Investors.* This is a concept worthy of further exploration in that issuers could require prospective investors to list the exempt offerings in which they previously invested and the amount of the investment. Assuming the other issuers filed Form D, the current issuer could verify that the prior offerings existed by checking for relevant Form D filings on EDGAR.

Assuming, for instance, that a collective investment in exempt offerings in the principal amount of $500,000 in the past five years was required to qualify as an Accredited Investor, this may have the effect of turning a Sophisticated Investor in a Rule 506(b) offering into an Accredited Investor which seems to be entirely reasonable. If a person becomes an Accredited Investor in that manner, would he be an Accredited Investor with respect to all other exempt offerings (eg Tier 2 of

[32] As a personal anecdote, a sibling of mine has two masters' degrees and I still must help her balance her checkbook.

Regulation A) and, if so, would that status be time limited or conditioned on continued investments in other exempt offerings? My view is that once qualified as an Accredited Investor, that status should not change.

*d.* *Permit knowledgeable employees of private funds to qualify as Accredited Investors for investments in their employer's funds.* Although this makes sense, determining which employees would qualify is important and the line should be drawn in a manner similar to the definition of investment adviser representative set forth in Section 102(16) of the Uniform Securities Act (2002)[33] to ensure that those employees who will qualify as Accredited Investors will have sufficient knowledge about the private fund.

*e.* *Permit individuals who pass an Accredited Investor examination to qualify as Accredited Investors.* This is certainly an option worthy of further consideration. If, for example, the SEC would designate associated persons of FINRA members who have passed the Series 7 examination with a specific minimum score as Accredited Investors, the same test (or variant thereof) could be administered through the same testing infrastructure to persons who seek to become qualified as an Accredited Investor but who would not be an associated person of a FINRA member. This would avoid creating a whole new exam and examination infrastructure which, by definition, would need to be capable of nationwide administration.

*f.* *Permit individuals, after receiving disclosure about the risks, to opt into being Accredited Investors.* This does not appear to be practical. Under the anti-fraud provisions of the federal securities laws, should not all investors receive material information about the risks of a proposed investment? Why should disclosure be limited to risks? Under current exemptions, such as Regulation CF and Regulation A, delivery of specified information does not automatically elevate investors in those offerings to Accredited Investor status.

23. Given the demands on disposable income for housing, food, saving for children's college education and investors' retirement and ongoing living expenses, this suggestion should not be applicable to the annual income component of the Accredited Investor definition. With respect to the net worth component, perhaps a lower net worth might be justifiable if, in addition to excluding the investor's principal residence, it also would exclude all retirement-related savings, such as assets in a qualified retirement plan under the Internal Revenue Code of 1986, as amended (the "Code"), a defined benefit plan and individual retirement accounts ("IRAs") (similar to the UK approach discussed in the response to Item 26), and require all assets to be readily marketable. This would result in identifying assets that could be placed at risk without fear of loss of home or retirement or college

[33] www.law.upenn.edu/bll/ulc/securities/2002final.htm.

education savings. Consideration also could be given to limiting the amount of net worth that could be invested in any one exempt offering.

24. Probably. The advantage often cited for expanding the pool of Accredited Investors is that issuers are unable to find enough investors who meet the current definition. However, even if the definition is revised to expand the pool of Accredited Investors, such as registered financial intermediaries or knowledgeable employees of private funds or individuals with a lower net worth (exclusive of principal residence and retirement assets), there is no assurance that there will be a corresponding increase in the number of persons interested in investing in any particular exempt offering. If an issuer cannot present an offering with a coherent business plan and appropriate use of proceeds, expanding the pool of Accredited Investors is not going to result automatically in attracting investors to such an offering.

25. Please see responses to #20-24

26. The SEC does the same with respect to Accredited Investors purchasing under Rule 506(b) or 506(c). The UK Financial Conduct Regulatory Authority ("FCA") maintains a regime whereby certain individuals may receive communications concerning non-mainstream pooled investments which roughly translates into the U.S. concept of pooled investment vehicle. However, this regime is applicable only where a financial intermediary authorized by the FCA is advising as to the investment.

    The UK model contains three categories of investors. A "high net worth investor" is a person who (i) has an annual income of GBP 100,000 or more (exclusive of any withdrawal from pension savings unless drawn in retirement) or (ii) has a net worth of GBP 250,000 (exclusive of primary residence and any funds received on a loan secured by a primary residence, rights under a qualifying contract of insurance, benefits payable upon termination of service, death or retirement and withdrawal from pension savings except if drawn in retirement). In addition, the individual must execute an acknowledgement that such investment may result in a significant risk of losing all the money or property invested.[34]

    A "certified sophisticated investor" is an individual who has a written certificate signed within the last 36 months by a FCA authorized firm confirming that the individual has been assessed by that firm as sufficiently knowledge to understand the risks associated with engaging in investment activity in non-mainstream pooled investments and who has executed an acknowledgement that such investment may result in a significant risk of losing all the money or property invested.[35]

[34] FCA Conduct of Business Sourcebook 4.12.6.

[35] FCA Conduct of Business Sourcebook 4.12.7.

A "self-certified sophisticated investor" is an individual who has signed a statement within the last twelve (12) months acknowledging that such investment may result in a significant risk of losing all of the money or property invested and is (i) a member of a network or syndicate of business angels and have been so for at least the last six (6) months; (ii) an individual that has made more than one investment in an unlisted company within the past two (2) years; (iii) an individual working in a professional capacity in the private equity sector or in the provision of finance of small and medium enterprises or (iv) an individual who currently or within the past two (2) years has been a director of a company with an annual turnover of GBP 1 million.[36]

The UK "high net worth investor" category uses an income and net worth component similar to the Accredited Investor standard but, in addition to excluding the primary residence, also excludes retirement savings, contracts of insurance and other benefits to which the individual may be entitled. If the SEC would adopt a similar definition, to qualify as an Accredited Investor, an individual would have to have a net worth of $310,000 (at current exchange rates) which could not include the value of the primary residence or any assets held in a qualified retirement plan under the Code, defined benefit plan or IRA.

A UK "certified sophisticated investor" is similar to the verification provisions relating to Accredited Investors in Rule 506(c) offerings except that the assessment by the financial intermediary is one of knowledge of non-mainstream pooled investments versus meeting the numerical standards embodied in the qualification of an individual as an Accredited Investor. This concept also embodies ongoing assessment every three years. My intuition is that financial intermediaries in the U.S. would rather confirm the existence of numerical qualifications rather than conduct a subjective assessment of an individual's knowledge of investments in exempt offerings.

The UK "self-certified sophisticated investor" seeks to answer the question asked by the SEC of whether there exist other non-numerical qualifications whereby individuals could be eligible for Accredited Investor status. Except for individuals who are licensed securities professionals, the SEC may be hesitant to adopt a similar approach since it has appeared to reject the concept of self-certification of Accredited Investors.[37]

27. No. The SEC, quite appropriately, has determined that this is no substitute for the protections afforded by the 1933 Act for registered offerings. In light of new SEC Regulation Best Interest ("Regulation BI")[38] where broker-dealers (including associated persons) are required to go beyond their current suitability obligations and make only those recommendations which are in the best interests of the client, is it even possible for

[36] FCA Conduct of Business Sourcebook 4.12.8.

[37] *See* SEC Release No. 33-9415 (July 10, 2013), p. 41.

[38] SEC Release No. 34-86031 (June 5, 2019).

a broker-dealer to recommend that a client purchase an illiquid security in an exempt offering unless such person is, at least, an Accredited Investor?

Even if a broker-dealer or an associated person could recommend that a non-Accredited Investor participate in an exempt offering in full compliance with Regulation BI, it is a fact, however regrettable, that some associated persons place clients in offerings that turn out to be Ponzi schemes and where FINRA has continued to permit these individuals to remain in the securities business after serving a modest license suspension.[39] Should the SEC consider this option, it should prohibit persons who have any disciplinary, customer arbitration or customer complaint history on their Central Registration Depository record from advising an individual for the purpose of qualifying him as an Accredited Investor.

28. Any limitation on an investor's investment in an exempt offering would not alter the views expressed in the response set forth in #27.

29. See responses to #27 and #28 as to why the SEC should not consider this option at all.

30. In a crowdfunding offering, the financial intermediary is responsible for verifying the applicable investment limitation[40] but, in a Tier 2 Regulation A offering, this responsibility lies with the issuer.[41] The SEC's experience with the enforcement of the investment limitations applicable in Tier 2 Regulation A offerings should inform it with respect to the question posed.

31. I am not sufficiently informed about ERISA to comment.

32. The status of Accredited Investor should be determined at the time of sale to such person and the issuer should be able to retain that person's Accredited Investor status in its calculation as of the last day of its most recent fiscal year for purposes of Rule 12g-1.

## IV. <u>Private Placement Exemption and Rule 506 of SEC Regulation D</u> (#33-46)

33. It is helpful to segregate those rules which permit general advertising and general solicitation (eg Rule 506(c)) and those that do not (eg Rule 506(b)) and therefore, I would not recommend any change.

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[39] SEC Litigation Release No. 2007-172 announced "SEC Charges 26 Defendants in $428 Million Securities Fraud that Targeted Senior Citizens and Retirement Savings" (September 5, 2007) and the following associated persons of FINRA members collectively sold over $1 million of Universal Lease Programs in this fraudulent scheme for which they received suspensions ranging from three (3) months to twelve months (12): Kelley Lee Flaherty (CRD #3138115) (FINRA Case #2008012498701); Ronald Laverne Kersey (CRD #2392393)(FINRA Case #2009020142501); Rodney Brian Moss (CRD #2627266)(FINRA Case #2009016709012); Gregory Lee Oldham (CRD #3247565) (FINRA Case #2007008935001) and Gregory Earl Hafen (CRD #4312542) (FINRA Case #2008015795401).

[40] 15 USC 77d-1(8).

[41] 17 CFR 230.251(d)(2)(C).

34. I view Rule 506(b) and Rule 506(c) as being part of one exemption under Rule 506 so my view is that these exemptions already have been combined. For example, the bad actor provisions of Rule 506(d) apply equally to an offering made in reliance upon subsection (b) or (c) thereof.

35. Yes. As documented by the Release, although the percentage is small, my experience is that issuers absolutely want the flexibility (even if never exercised) to sell a security in a Rule 506(b) offering to a Sophisticated Investor. Usually, these Sophisticated Investors are knowledgeable persons within the issuer's organization or are known to the issuer as being well-educated or expert in a particular industry, such commercial real estate development.

36. For non-Accredited Investors who may purchase securities in offerings by issuers that are not subject to the reporting requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), I suggest that the disclosure information requirements set forth in Form 1-A should be sufficient to ensure appropriate levels of investor protection.

37. The definition of "general solicitation and general advertising" in Regulation D[42] and the interpretive advice provided in various SEC releases and in staff CD&Is have provided a comprehensive understanding of what constitutes general solicitation and general advertising.

38. Based upon decades of permitting Accredited Investors to purchase any amount of securities deemed appropriate by the issuer in a Rule 506 offering, there appears to be no evidence to support an argument that investor protection concerns now require placing limitations on purchases by Accredited Investors in Rule 506(b) or (c) offerings.

39. Again, I believe Rule 506 has worked well in the past with no mandated disclosure requirements for Accredited Investors and providing that any information provided only to Accredited Investors also must be provided to non-Accredited Investors in the offering.

40. Yes. Prior to the adoption of Rule 506(c), issuers were comfortable with the "reasonable belief" standard for determining whether a person qualified as an Accredited Investor and many issuers use investor questionnaires to elicit information upon which to base a reasonable belief. In the JOBS Act, which required the SEC to adopt Rule 506(c), also mandates that issuers take reasonable steps to verify that the purchasers in a Rule 506(c) offering are Accredited Investors.[43]

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[42] 17 CFR 230.502(c).

[43] Supra Note 23.

In its adopting release on Rule 506(c), the SEC helpfully provided several non-exclusive examples of what it viewed as reasonable steps an issuer might take to verify that an individual was an Accredited Investor.[44] This included providing federal tax information, personal financial information (eg bank statements, brokerage statements, certificates of deposits, tax assessments and appraisals by independent third parties) or written confirmation by registered broker-dealer, SEC-registered investment adviser, licensed attorney or certified public accountant that they had taken reasonable steps to verify that the purchaser is an Accredited Investor.

Issuers advise me that they avoid using Rule 506(c) based upon the verification requirement in that (1) prospective individual investors do not want to disclose their entire federal income tax information (which could be voluminous based on investments in their own or other privately-held companies) or personal financial information and (2) the identified professionals who may confirm an individual's status as an Accredited Investor require the individual to meet with them and review their entire financial history and individual investors are extremely hesitant to incur the substantial professional fees charged for this service.

In my opinion, based upon discussions with issuers, the "verification" standard is the main reason they do not consider undertaking Rule 506(c) offerings. Therefore, if the "verification" standard was changed to the "reasonable belief" standard applicable to the determination of Accredited Investors in Rule 506(b) offerings,[45] issuers may be more inclined to use Rule 506(c).

The recent increase in the offering limitation in Rule 504 and the ability under Rule 504(b)(iii) for issuers to engage in general advertising and general solicitation as permitted under State AI Exemptions if all sales are made to persons that the issuer, pursuant to the State AI Exemption, reasonably believes qualifies as an Accredited Investor may be a means whereby a small business issuer may be able to engage in a certain level of general solicitation and general advertising in connection with an offering to Accredited Investors across several jurisdictions (provided each jurisdiction has adopted a State AI Exemption) without meeting the verification standard in Rule 506(c). However, this does not help issuers who need to raise larger amounts of capital which usually is the case in real estate-related offerings.

Another change to Rule 506(c) that would be helpful would be to extend the status of an Accredited Investor in a Rule 506(b) offering to a Rule 506(c) offering where the Rule 506(c) issuer is an affiliate of the issuer in the Rule 506(b) offering. This would permit Accredited Investors in previous Rule 506(b) offerings to be qualified as Accredited Investors in a Rule 506(c) offering by a new issuer that was controlled by, or under

[44] SEC Release 33-9415 (July 10, 2013), pgs. 36-38.

[45] 17 CFR 230.501(a).

common control with, an entity that controlled the issuer in the Rule 506(b) offering. Real estate offerings are a prime example of where this change would be useful without diminishing investor protection.

41. From my experience, the major areas of fraud in the Rule 506 market were the lack of a bad actor disqualification applicable to Rule 506 offerings, which was not rectified until Congress took action by enacting Dodd-Frank, and the additional exclusion of the principal residence of an individual investor from the net worth calculation. Of course, this does not mean that fraud in the Rule 506 market has been, or ever will be, entirely eradicated as the SEC's recent enforcement actions with respect to Robert Shapiro, Woodbridge Group of Companies, LLC and its affiliates attests.[46]

42. Please see response to #40.

43. Please see response to #40.

44. Please see response to #40.

45. Please see response to #40. The current filing requirement does not appear to have imposed any hardship and states are increasingly accepting electronic filings of copies of Form D although some states still assert that they have authority to impose penalties for late filing of copies of Form D which may lack substantiation under the National Securities Markets Improvement Act of 1996.[47]

46. It is my belief that practitioners will advise clients to file a Form D even if they also believe an exemption is available under the statutory provisions of Section 4(a)(2) as the exemptions provided by that section and Rule 506(b) and (c) are not mutually exclusive.

## V, <u>Regulation A</u> (#47-64)

Regulation A appears to strike the right regulatory balance and is working as expected. If there is data available, it would be helpful to know in how many jurisdictions Tier 1 issuers are offering their securities and if experience confirms the SEC's initial view that these offerings likely would be located within a single state or region.[48] Such data would inform the SEC as to whether the Tier 1 regulatory regime is working as anticipated. From the Release, it appears that this might be the case based upon the location of the issuers.

With respect to any intermediary that is in the business of facilitating Regulation A offerings, it would seem that those persons would meet the definition of broker under the

[46] SEC Litigation Release 2017-235, "SEC Charges Operators of $1.2 Billion Ponzi Scheme Targeting Main Street Investors," (December 21, 2017).
[47] Pub. L. 104-290 (October 11, 1996).
[48] SEC Release 33-9741 (March 25, 2015), p. 226.

Exchange Act and be required to register with the SEC and FINRA, particularly if they receive transaction-based compensation.

## V. **Rule 504** (#65-70)

Please see response to #40.

Rule 504 is not duplicative of Tier 1 because, under Rule 504, there is no mandated disclosure as a condition of the exemption as there is with Form 1-A and Rule 504 can provide a federal exemption for offerings made solely to Accredited Investors in various state jurisdictions in reliance on their respective State AI Exemptions which permit use of certain types of general advertising and general solicitation.

## VI. **Intrastate Offerings** (#71-78)

Availability of the intrastate exemption is useful for issuers in more populous state jurisdictions that have a critical mass of investors. For example, small companies, including smaller Exchange Act companies, can use the intrastate exemption to offer dividend reinvestment programs to shareholders who reside in a single state. Recent adoption of revisions to Rule 147 and new Rule 147A has increased the viability of this exemption by revising the resale restriction and permitting offers to be received in other state jurisdictions if all sales are made in the same jurisdiction.

## VII. **Regulation Crowdfunding** (#79-92)

79. To respond to this comment, it would be helpful to have data detailing the average transactional costs incurred by an issuer relying on Regulation CF. In my view, the amount of transactional costs incurred to comply with Regulation CF for a maximum offering of $1 million acts as a deterrent to using Regulation CF. In particular, the costs of obtaining reviewed or audited financial statements present a heavy financial burden on issuers.

80. I believe that, in order to be more useful, the dollar limitation should be raised to account for the substantial transactional costs that issuers must incur to comply with Regulation CF and, in connection therewith, the reviewed and audited financial statement requirement should be revised correspondingly.

81. Although some fraud may have occurred in connection with an offering made under Regulation CF, I am unaware of any publicity in this regard. Perhaps, the SEC Division of Enforcement or Trading and Markets may provide information on this subject.

82. Any dollar limitation is arbitrary but I suggest that dollar limitations should relate to the level at which investor protection concerns would require reviewed or audited financial statements. Currently, audited financial statements are required for offerings of more

than \$500,000 (except for the first offering made under Regulation CF).[49] This is too low an offering amount for an issuer to justify paying for an audit. It is not outside the realm of possibility that the cost of attorneys, auditors and the financial intermediary could represent 10-20% of a \$500,000 capital raise. This also might account for 75% of issuers filing under Regulation CF receiving proceeds of \$250,000 or less.[50]

I would suggest extending the reviewed financial statement provision to any offering that exceeds \$107,000 but does not exceed \$1 million. This generally comports with the financial statement requirements which were adopted by state securities regulators under NASAA's Small Corporate Offering Registration regime.[51] Offerings that anticipate proceeds over \$1 million may be more able to recoup the cost of providing audited financial statements.

83. I don't see any overlap between Regulation CF and Rule 504, principally because Regulation CF mandates the use of a registered broker-dealer or registered funding portal to participate in the offering and all communications among investors, the financial intermediary and the issuer must be electronic. Rule 504 has no similar requirement.

84. The issue with permitting non-U.S. issuers to rely on Regulation CF is whether an investor effectively can seek civil redress afforded by the federal securities laws and whether that is even economically feasible given the amount of investment permitted by Regulation CF. Although the SEC could require a non-U.S. issuer to file a consent to service of process, that would not necessarily obviate the foregoing concerns.

85. No comment.

86. Please see response to #82.

87. Accredited Investors should not be subject to any dollar limitation.

88. No.

89. No. The basic premise underlying the exemption in Regulation CF is that a registered broker-dealer or funding portal will be participating in the offering. That would include keeping books and records with respect to all communications concerning the offering to ensure that information not authorized by the issuer or that which is materially misleading or materially deficient is not disseminated.

90. No comment.

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[49] 15 USC 77d-1(b)(1)(D)(iii); 17 CFR 227.201(t)(3).

[50] Release, p. 155.

[51] NASAA Small Company Offering Registration Statement of Policy (April 28, 1996).

91. The cited recommendations of the 2017 and 2018 Small Business Fora appear to be reasonable, provided there is disclosure to prospective investors of the characteristics of the securities which the financial intermediary is receiving as compensation and, with respect to co-investing, that such investment is on the same terms and conditions as other investors in the offering. With respect to receipt by the financial intermediary of the issuer's securities for compensation, the SEC should evaluate whether investor protection requires that those securities represent an equity interest in the issuer (and hence, confidence in its business plan and willing to share in the same risks as investors) versus debt securities which would result in adding to the issuer's ongoing financial obligations.

92. Please see response to #40.

## VIII. Micro-Offerings (#93-103)

From an investor protection perspective, the offerings and issuers described in this section of the Release pose the most risk of loss and risk of inadequate disclosure because the issuer most likely would lack the financial resources to retain knowledgeable securities counsel. Therefore, these offerings may be suitable only for Accredited Investors.

If the SEC were to consider a separate exemption from micro-offerings, it should (1) include a bad actor disqualification, (2) permit a modest maximum offering amount suitable for a start-up business such as $250,000, (3) limit purchasers to Accredited Investors only, (4) impose a resale restriction similar to Rule 506, (5) limit availability of the exemption to U.S. issuers, (6) impose a notice filing requirement to track use of the exemption and (7) require some basic disclosure and a written acknowledgement by the investor that he or she may lose, and can afford to lose, the entire investment and that there is no market for the securities.

The issue of general solicitation and general advertising is important to these issuers for two reasons. First, they may have no idea who is or is not an Accredited Investor and second, their prior use of email and social media already may have constituted general advertising or general solicitation. In recognition of these realities, some form of general advertising and general solicitation should be permitted which could be consistent with the State AI Exemption and Rule 504(b)(iii).

Similarly, it cannot be expected that such issuers would have the financial resources to engage securities counsel to create a disclosure document. Therefore, if the SEC would adopt an exemption for micro-offerings, it should specify the type of disclosure that must be given to prospective investors as a condition of the availability of the exemption which may be similar to the disclosure required by Regulation CF.

## IX. Pooled Investment Funds (#111-129)

Pooled investment funds ("PIFs") generally are organized to invest in a wide range of products, asset classes and businesses. To respond to the request for comment, it would be useful if data were available as to the amount or instance of investment by PIFs in exempt offerings.

I am not aware that PIFs are a significant source of funds for issuers that rely upon exempt offerings to sell their securities to investors who are not pre-determined by the issuer. PIFs that invest in start-up or development stage companies usually do so in negotiated transactions that are exempt from SEC registration. However, these transactions and terms of purchase generally are not available to other than pre-determined PIFs and these transactions may occur in a similar manner over time through several rounds of financing (which also may discover the value of the issuer). To the extent that the issuer can raise the needed capital in this manner from one or more PIFs, it likely will eschew any broader-based offering, even if an exemption was available.

The sums of investable cash that have been available to PIFs explains how and why many emerging companies have been able to remain private for such prolonged periods and there is little government should or could do to make these high risk investments available to main street investors, particularly as it has been shown that private funding rounds have accorded valuations which were not sustainable in the public market after the issuer's initial public offering.[52] Furthermore, Accredited Investors generally have access to these investment opportunities through Rule 506 offerings formed to co-invest with the PIFs.

## X. Secondary Trading

130. Generally, issuers that rely upon exemptions are not focused on secondary trading in their securities and, for reasons of the cost of compliance, would want to avoid becoming subject to the reporting requirements of the Exchange Act.

131. Please see response to #131.

132. As previously stated, there is concern that do not adequately appreciate the concept of illiquidity, particularly if the investment does not turn out as they expected or intervening events require them to look for monetization of assets. A concern with potentially reducing the holding period to six (6) months could result in issuers suggesting or unintentionally misrepresenting that that investors may be able to resell the security within a short period of time without emphasizing the low likelihood that any ready purchasers would exist or, if they did exist, the likelihood that they would only pay an amount that would represent a significant discount to the original purchase price.

    Students of SEC history will recall that the holding period for non-affiliates of non-Exchange Act issuers used to be two (2) years and was reduced to one (1) year in 1997.[53] If the holding period for non-affiliates of non-Exchange Act issuers periodically is reduced by 50% from two years to one year and then from one (1) year

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[52] https://qz.com/1618597/uber-falls-to-lowest-valuation-since-july-2015-two-days-after-ipo. In a May 2016 funding round, Uber was valued at $66 billion. On May 13, 2019, after its initial public offering on May 10, 2019, Uber's market capitalization was $61 billion even though, prior to its initial public offering, private investors were valuing Uber at $72 billion.

[53] SEC Release No. 33-7390 (February 20, 1997).

to six (6) months, it will only be a matter of time when it will be proposed to be reduced from six (6) months to three (3) months and so on.

The SEC must consider at what point is it satisfied that the holding period applicable to sales of securities pursuant to an exemption from registration mitigates against the exempt offering becoming a conduit for a public distribution of securities without the investor protections afforded by a registered offering. Section 4(a)(7) of the 1933 Act recently was added as a separate exemption (rather than a safe harbor) which determined that a three (3) month holding period was sufficient under certain specific circumstances, including the limitation of resales to Accredited Investors.[54]

133. Rule 144 is a safe harbor from the definition of "underwriter" that otherwise would make the exemption is Section 4(a)(1) unavailable.[55] Therefore, if a purchaser of securities complies with Rule 144, the purchaser may engage in transactions exempt from registration under Section 4(a)(1). One of the requirements of Rule 144 is compliance with the requisite holding period for securities sold pursuant to certain exemptions from registration. Affiliates of issuers continue to be subject to certain provisions of Rule 144.

If a purchaser is unable to comply with Rule 144, it most likely is because the purchaser has not met the applicable holding period or the purchaser is an affiliate of the issuer and other provisions of Rule 144 prevent the affiliate from effecting a transaction exempt under Section 4(a)(1). Again, the SEC must consider any expansion of safe harbors under Section 4(a)(1) in context of whether it would promote issuers to use exempt offerings as a conduit for a public distribution of securities without the investor protections afforded by a registered offering.[56]

134. If the SEC would expand the definition of Accredited Investor, the resale provisions of Section 4(a)(7) generally would be available assuming compliance with all other conditions of that exemption.

135. The exemption in Section 4(a)(7) has facilitated certain resale transactions. Whether sellers are making the required information available to the purchaser is unknown. Generally, issuers in exempt offerings will not commit to making such information available but most likely would provide such information upon request to facilitate an orderly transfer of securities as, in many exempt offerings, the issuer must approve the transfer of any security purchased in the offering.

136. I think the current arrangements are appropriate.

137. No comment.

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[54] Pub. L. 114-94 (2015); 15 USC 77(d)(a)(7).

[55] 15 USC 77d(a)(1).

[56] *Supra* note 54.

138. Although measures to promote liquidity in an organized manner generally are to be encouraged, the question becomes what would constitute a venture exchange, what rules would it adopt, what size issuer would qualify, who would have regulatory and examination authority, how would trades be displayed, settled and reported and how would the exchange be compensated? Altogether, this is a heavy "lift" without knowing the scope and nature of the market and sustainability of such a business model.

I very much appreciate the opportunity to provide comments on the questions posed by the Release.

Very truly yours,

G. Philip Rutledge

G. Philip Rutledge, Partner