William J. Williams, Jr.
[redacted]

September 25, 2019

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

Re: Concept Release on Harmonization of Securities Offering Exemptions (File Number S7-08-19)

Dear Ms. Countryman:

I am writing in response to the SEC's request for comments on the exemptions of securities offerings from the registration requirements of the Securities Act of 1933.

The existing rules, which were adopted over time in response to various initiatives (including from Congress and the SEC), are something of a hodgepodge without analytical consistency:

- Under Rule 506 exemption is available to issuers but not affiliates and other non-issuer persons, and sales are effectively limited to "accredited investors". Under Rule 144A the exemption is not available to issuers but is available to affiliates, and sales are limited to "qualified institutional buyers" (QIBs).

- Under Rule 506 (in the case of sales to "accredited investors" only) no information is required to be delivered, whereas under Rule 144A holders of securities of some issuers are entitled to receive minimal

information from the issuer.

- Under Rule 506(b) general solicitation is prohibited, whereas under Rule 506(c) it is permitted.

- Fungibility is irrelevant under Rule 506, may require aggregation under Rule 144 and is disqualifying under Rule 144A.

- The position of affiliates is not entirely clear under all the rules.

Even experienced securities lawyers may not know the sources of the ground rules they apply and may not always agree on the application of the law in this area. And lawyers with little to no experience in the area have a difficult time.

I believe that harmonizing the separate rules into two or three parallel rules is not practicable or useful. Consolidating them into a single simpler rule is the preferable approach.

Accordingly, I propose that the SEC adopt a new consolidated and simplified version of Rules 506, 144 and 144A. The proposed rule (the "Rule") would supplement but, at least initially, not replace Rule 506(b) and (c), Rule 144A or the provisions of Rule 144 relating to "restricted securities".

Section 28 of the '33 Act, added in 1996 (after some of the exemptions were originally adopted), authorizes the SEC to exempt sales by issuers beyond the limits of Section 4(a)(2) and sales by others beyond the limits of Section 4(a)(1) or (3), if necessary, and to deregulate offers.[1]

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[1] When Regulation D was originally adopted (before the SEC was given exemptive authority), the concept of "general solicitation" was incorporated to buttress the position that Rule 506 was an interpretation of then § 4(2) (now § 4(a)(2)).

Proposed New Rule

1. Eligible Sellers. The new Rule would be available for sales of securities by:

- Issuers.
  - Query: How to treat investment funds and pooled investment vehicles not registered under the '40 Act. See "3. Sale to Eligible Purchasers" below.
- Affiliates (control persons) of issuers.
- Sellers of securities acquired, directly or indirectly, from an issuer and its affiliates in an unregistered transaction or chain of unregistered transactions.

2. Eligible Securities. The new Rule would apply to debt and equity securities, subject to the following:

- Convertible securities (convertible without payment into other securities of the same issuer) would be covered, but warrants or options exercisable for cash would not be.
- Fungibility with securities traded in a market would be irrelevant. But purchasers should not be permitted, directly or indirectly, to hedge their positions (by short sales, derivative transactions or otherwise) through sales of the same class of security or other similar securities into the public marketplaces. "Indirectly" would encompass transactions with counterparties that then sell those securities into the public marketplace.

3. Sale to Eligible Purchasers

- Sale must be to a person who is, or is reasonably believed by seller or agent to be, an "eligible purchaser" (as defined).

- No position is taken here on how "eligible purchaser" should be defined.

- As to institutional purchasers, presumably the SEC would start with a combination of the institutions listed in the statutes and rules administered by it[2] and determine whether other classes of institutions should be added.

- As to retail purchasers, presumably the SEC would start with its study of "accredited investors" mandated by the Dodd-Frank Act. The following are considerations that might be taken into account:

    - Net income, net assets, net investment assets – as in the current definition of "accredited investors" or with increased thresholds to mitigate effects of intervening inflation.

    - In some countries, purchases exceeding specified thresholds are exempted.

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[2] *See* Secs. Act § 2(a)(15); Secs. Act Rule 215; Secs. Act Rule 501(a); Secs. Act Rule 144A(a)(1); Secs. Act § 4(a)(7); Inv. Co. Act § 2(a)(51); Inv. Co. Act Rule 2a51-1. *See also* Uniform Securities Act § 202 (2005). Consider looking at what the Canadian provinces do in this area.

  - Perhaps investment funds and pooled investment vehicles meeting ’40 Act-light requirements could be sold to a broader class of retail purchasers. Such requirements could include use of a registered investment advisor, limitations on conflict of interest and related party transactions and disclosures.

  - Add persons in employment relationship with issuer?

  - Add sophisticated investors? Perhaps with a limitation on percentage of assets invested?

  - Add persons who, with eligible investment advisers, have requisite sophistication. See Rule 506(b). Perhaps with a limitation on percentage of assets invested?

- Under the new Rule, no limit on number of purchasers. See Reg. D and Rule 144A.

- Pre-existing relationship of purchaser with issuer would be irrelevant.

- Each sale/purchase stands and is judged on its own.

- A bad sale (e.g., sale to ineligible purchaser or resale not permitted) does not taint good sales.

4. Information

Note: Control persons frequently are without ability to affect an issuer's disclosure and may be subject to confidentiality restrictions that preclude their making disclosures. Absent contractual rights, persons other than the issuer have no ability to affect an issuer's disclosures. Under Reg. D, sales exclusively to "accredited investors" are not subject to any disclosure requirements.

- In the case of sales of securities of a reporting issuer by the issuer, the issuer should be required to advise purchasers [that – whether?] it is current in its reporting requirements, including Form 8-Ks, under the '34 Act. There should be no other information requirements.

- In the case of sales of securities of a non-reporting issuer by the issuer, the issuer should be required to advise purchasers whether it has one or more websites or other locations that the issuer maintains to communicate financial statements and other general information to investors generally, and a link to, or description of how to access, the information. There should be no other information requirement.

- In the case of securities sold by any person other than the issuer or a control person, there would be no information requirements. Instead, consideration could be given to requiring non-reporting issuers to provide limited information as required by Rule 144A. Or information requirements could be differentiated on the basis of whether an "eligible purchaser" is institutional or retail.

- In the case of investment funds and pooled investment vehicles, there should be some disclosure relating to the investment advisor and the rules governing the fund.

5. Limitation on Resales

- Restricted periods – duration of limitations:

  - issuers – unlimited

  - control persons – as long as control relationship exists

  - securities of non-reporting issuer – 6 or 12 months from last purchase from issuer or control person

  - securities of reporting issuer – 3 or 6 months from last purchase from issuer or control person

- Rule 144 remains available for sales by affiliates (control persons) into public markets.

- The Rule should state that during restricted periods, the holder may resell restricted securities in accordance with the new Rule, Rule 144 or Rule 144A, in an offering and sale registered under the ’33 Act or outside the United States under Reg. S.

  - In the case of sales or resales to a retail purchaser during the restricted period for the security, it could be required that the seller give notice to the retail purchaser that the security is a “restricted

security" and that it may be resold in the manner indicated in the preceding bullet point.

- The Rule should state that after the restricted period (except for issuers and affiliates (control persons)), the holder may sell without registration or compliance with specific exemptions.

- No investment intent or representation is required.

- Under the Rule, no minimum holding period is required.

- Under the Rule, no legend or lock-up is required. As in Rule 144A, eligible purchasers would be trusted to police themselves.

6. Manner of Offering and Offerees

- No limitation on manner of offering – general solicitation and advertising are permitted. This is consistent with Rule 506(c).

- No eligibility requirements for offerees. Offerees who do not purchase are not harmed.

7. Integration

- No requirement of integration of offerings.

- Exemption is sale-by-sale. The proposed exemption under the Rule is not based on Section 4(a)(2) of the '33 Act – that is, on whether there is or is not a "public

offering", but rather on the qualifications of the prospective purchasers as not requiring protection of the Act. So, the question is not whether two or more concurrent or successive private offerings should be regarded as one registrable public offering or whether an attempted private offering side-by-side with a registered offering should be treated as one offering, with all securities required to be registered.

- Eligible purchaser in a good transaction under the Rule should not get a windfall (the benefit of rescission or damages) because of a failure of someone else to comply with some requirement of the Rule vis-à-vis another purchaser.

8. Other Considerations

- Antifraud provisions would apply to all sales.

- It should be recognized that if the new Rule proves to be popular, it could limit interest in registering and further delay IPOs.

- When registration of shares is required under Sections 12(b) and 12(g) of the '34 Act becomes more important – need to fix definition of "beneficial ownership".

- Reg. S – amend "directed selling efforts" to exclude offers, sales and general solicitation under new Rule.

- Impact on Rule 3c-7 exemption from the '40 Act for limited offerings not involving "public offerings"?

- Securities offered and sold under the Rule should not be subject to state securities registration requirements. This could be effected by the SEC's designating purchasers under the Rule as "qualified purchasers" for purposes of Section 18(b)(3) of the '33 Act.

Very truly yours,

William J. Williams, Jr.[3]

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[3] Many of the above ideas have been contributed, knowingly or unknowingly, by lawyers with long experience in advising on the Federal securities laws.