



*Via Electronic Mail*

October 8, 2019

Vanessa A. Countryman  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: SEC Concept Release on Harmonization of Securities Offering Exemptions  
File No. S7-08-19 (June 26, 2019)

Dear Ms. Countryman:

We appreciate this opportunity to comment on the Securities and Exchange Commission's (the "**Commission**") Concept Release on Harmonization of Securities Offering Exemptions (the "**Release**"). The Release includes a request for comment on regulatory restrictions that we believe have had the effect of limiting retail investment in, and access to, alternative investment programs. The Commission acknowledged in the Release that while accredited investors may be able to obtain exposure to such programs through exempt offerings in pooled investment vehicles, similar opportunities are typically limited or nonexistent for many retail investors. We support the Commission's efforts to consider the rule changes noted in the Release that we believe would meaningfully benefit investors that are currently unable, or limited in their ability, to invest in alternative investment programs due to existing regulatory impediments.

Founded in 2011, Artivest Holdings, Inc. ("**Artivest**") has developed a leading automated digital alternative investment platform for hedge funds, private equity and debt, real assets and other alternative funds. Artivest uses online communications, proprietary technology and a seamless web-based approach to transparency in order to offer financial advisers and high net worth



investors access to alternative investment strategies. Artinvest serves thousands of clients and provides access to premier global investment firms that manage strategies across multiple alternative investment programs. Advisers and suitable investors, who meet applicable accreditation standards, are given the opportunity to learn about the investment managers and strategies offered on Artinvest's platform and, if they so choose, to allocate assets to a manager for a particular strategy. Artinvest enables advisers and qualified investors to access, evaluate and invest in private alternative investment programs. Accordingly, the issues raised by the Release are of particular interest to Artinvest as it strives to provide a broader investor base with an automated investment platform that allows for increased market efficiency and greater investor access.

In a speech to the Economic Club of New York in September 2019, Commission Chairman Jay Clayton said that *"twenty-five years ago, the public markets dominated the private markets in virtually every measure. Today, in many measures, the private markets outpace the public markets, including in aggregate size."* Chairman Clayton described the lack of more public offerings and the inability of the 'Main Street' investing public to access private markets as a *"growing concern"* and expressed a desire to expand opportunities for such investors to participate in private markets. Chairman Clayton said he wants the Commission to take a *"fresh look"* at initiatives to expand access to the private markets, while at the same time providing *"appropriate investor protections."*

We agree with the Chairman's remarks and believe the Commission should modify its rules in the following areas in order to enable appropriate broader investor participation in alternative investment programs.

### **Accredited Investor Definition**

Given the importance of the accredited investor definition in the securities laws and particularly for exempt offerings, we believe that the definition should maintain the current net worth and



net income thresholds for natural persons, since these provide objective and well-understood criteria.

However, we believe that the Commission should consider expanding the definition to include persons who meet enumerated objective criteria indicative of financial sophistication consistent with our prior comment letter to the Commission.<sup>1</sup> This category should include all individuals regardless of net worth or income (i) with certain current valid licenses or professional designations (including any individual that has passed the Series 7, Series 65, Series 66, or Series 82 examination, is a certified public accountant (CPA), chartered financial analyst (CFA), chartered alternative investment analyst (CAIA), certified management accountant (CMA), a control person of a registered investment adviser (RIA), a registered representative (RR), or has a certified investment management analyst (CIMA) designation); (ii) who are advised by such professionals in connection with making the investment; (iii) with financial professional credentials (including those with an MBA from an accredited institution); (iv) who are considered “knowledgeable employees” [as defined in Rule 3c-5 under the Investment Company Act of 1940, as amended (the “**Investment Company Act**”)] of a private fund; or (v) who have a certain minimum amount of investable capital and can, therefore, bear the risk of loss. The Commission might also consider imposing a percentage of either net worth or liquid assets as an investment limitation (e.g., an investor cannot invest more than 10% of the investor’s documented net worth into certain types of products). We also support permitting not just spouses, as is currently the case, but also spousal equivalents (domestic partners and significant others) to pool their finances for the purpose of qualifying as accredited investors as it would expand opportunities to invest in securities offerings to more households.

With respect to legal entities, we believe that the accredited investor definition should be expanded to allow any legal entity with investments in excess of \$5 million to qualify as an accredited investor. We support this change as entities, regardless of form (partnership,

---

<sup>1</sup> For reference, please see our comment letter, dated September 19, 2013, relating to the Commission’s proposal to amend Regulation D (File No. S7-06-13).



limited liability company or corporate), with such investments are likely to be sophisticated enough to protect themselves from the risks of the investment and presumably able to withstand the potential loss of a particular investment.

We also strongly support indexing any financial thresholds included in the final definition to inflation. Periodic adjustments of this type avoid unnecessary uncertainty associated with an abrupt and sizeable adjustment to compensate for many years of inflation. In that regard, if such indexing is adopted, we believe that adjustments to the financial thresholds should take place on a fixed forward-looking schedule so that both issuers and investors alike can properly prepare for adjustments.

### **Harmonization**

#### ***Investor Verification***

Rule 506(c) permits issuers to engage in general solicitation provided that all purchasers in the offering are accredited investors and the issuer takes reasonable steps to verify each purchaser's accredited investor status. Rule 506(c) provides a principles-based method for verification of accredited investor status as well as a non-exclusive list of verification methods. While there is no safe harbor available for those who rely on these enumerated methods, the vast majority of market participants who choose to engage in general solicitation insist on verifying accreditation status based on the list rather than taking a principles-based approach. Since the enumerated methods have turned out to be unduly onerous while at the same time market participants have chosen to primarily rely upon such methods, compliance with the verification requirement has limited the practical utility of the Rule 506(c) exemption. As such, we encourage the Commission to expressly endorse the guidance on Rule 506(c) verification provided by The Securities Industry and Financial Markets Association (SIFMA) in order to provide certainty to issuers, investors, broker-dealers, investment advisers and others on appropriate verification methods permissible for compliance with the requirements.



### ***Private Placements of Continuously Offered Funds***

We further recommend that the Commission confirm for industry participants that a waiting period is not required before interests in a private fund may be offered and sold by an issuer (or its financial adviser or agent) that has, or whose agent has, a newly formed relationship with a prospective investor. Subscriptions for interests in private funds are made on an ongoing basis and it is impractical and unnecessary from an investor protection perspective to insist upon a waiting period following establishment of a substantive relationship, assuming the other requirements of Rule 506 are met and the prospective investor has already been verified to be an accredited investor, before an investor is allowed access to a fund investment opportunity. Individuals with an established relationship (regardless of the length of time) should be given an opportunity to be introduced to, and access, any Rule 506 securities offering, including those that commenced prior to the date such relationship was established. We believe that a flexible approach is warranted in light of the broad concept of what constitutes an “offering” under the securities laws.

### **Integration**

Rule 502(a) of Regulation D provides a safe harbor from integration for all offers and sales that take place at least six months before the start of, or six months after the termination or completion of, another Regulation D offering. Under Rule 502(a), issuers have comfort that if they cease offerings for at least six months, then there would be no integration between their multiple private offerings. This six month “cooling off” period does not differentiate between intentional general solicitation activity, such as that under Rule 506(c) or other capital raising sales practices.

We agree with prior Commission releases that have proposed a shorter cooling off period in part to offer issuers greater flexibility. The six-month delay has had the effect of inhibiting companies, especially smaller and mid-sized companies, from efficiently raising capital. We recommend that the Commission shorten the six-month period to 60 to 90 days. Such a change



would allow companies to raise capital at least once every couple of months or fiscal quarter without fear of integration. Shortening the integration safe harbor period has the added benefit of promoting investor access and aiding the development of private markets, especially secondary markets.

The Release also recognizes the important role of pooled investment vehicles in the exempt offering framework. Investing through a pooled investment fund can offer a host of benefits to investors. Unfortunately, access to private equity funds, venture capital funds and hedge funds has largely been limited to institutional and high net worth investors. We believe that the economic benefits of exposure to private funds should be made available to retail investors indirectly through pooled investment vehicles. As such, we ask that the Commission's Staff confirm that there is no integration of securities offerings made by affiliated entities in a typical pooled investment fund structure. A feeder fund is an investment vehicle, often a limited partnership, that pools capital commitments of investors and invests or "feeds" such capital into an umbrella fund, often called a master fund, which directs and oversees all investments held in the master fund's portfolio. This structure is commonly used by private equity funds or hedge funds to pool investment capital. The Commission should clarify that the securities registration exemption that is utilized by the feeder fund does not need to be the same as the exemption utilized by its master fund and that the securities offerings of the feeder fund and its master fund should be considered separate offerings for integration purposes.

### **Pooled Investment Funds**

We believe that retail access to private funds through registered investment vehicles can be accomplished in ways that maintain appropriate investor protections. A registered fund of private funds would be a closed-end fund registered under the Investment Company Act and its shares would be offered to the public in a registered offering under the Securities Act of 1933, as amended (the "**Securities Act**"). We believe that the regulatory protections that currently exist under the Investment Company Act and the Securities Act are sufficient to enable retail



investors to invest safely in registered funds that primarily invest in alternative investment programs. These protections include oversight of the fund by an independent board of directors or trustees, restrictions on leverage and conflicts of interest, and the disclosure requirements applicable to a registered investment fund that makes filings under a Registration Statement on Form N-2. Disclosure regarding the risks of investing in alternative investment programs, including risks associated with the timing and uncertainty of returns from such programs, is already required by Form N-2. Form N-2 also requires disclosure of the aggregate fees paid by a registered closed-end fund to underlying private funds. The Investment Company Act already mandates a framework for valuation and reporting of a registered fund's investments that include interests in private funds [these rules have been utilized by business development companies ("BDCs"), which are not subject to accredited investor restrictions]. In addition, given that fund offerings would be registered with the Commission, and subsequent to their registered offerings, these funds would be subject to ongoing reporting requirements, Rule 10b-5 under the Securities Exchange Act of 1934, as amended, would impose liability for an untrue statement of material fact or an omission to state a material fact necessary in order to make the statements made under the circumstances under which they were made not misleading. Such liability would offer retail investors a further measure of assurance that registered funds that invest in alternative investment programs accurately disclose any specific risks of doing so. Offerings made by these funds are also subject to FINRA Rule 5110, which imposes fixed lifetime caps on sales compensation and distribution fees (another important protection that we believe should remain in place).

Currently, the Commission's Staff will declare registration statements of registered closed-end funds that invest more than 15% of their assets in private funds effective only if sales are limited to accredited investors. We recommend that this position be set aside as it effectively blocks the vast majority of Americans from investing in a registered investment vehicle. The presence of a registered investment vehicle and a registered investment adviser should provide sufficient protection to retail investors. If the registration requirements (as to either funds or



advisers) are deemed insufficient then the Commission's Staff should pursue updating such requirements instead of precluding non-accredited investor participation.

In particular, we believe tender offer and interval funds would be ideal fund options for retail investors in alternative investment programs. These increasingly popular fund structures are registered under the Investment Company Act and subject to the rigorous Investment Company Act legal framework, which would be consistent with the Commission's investor protection objectives. Tender offer funds are not subject to the portfolio liquidity requirements under Rule 23c-3 and have the flexibility to conduct repurchase offers subject to the discretion of their board of directors or trustees. As a result, instead of maintaining a portion of their assets in more liquid securities, tender offer funds can liquidate assets based on participation levels at the expiration of a particular repurchase offer.

Several such registered funds that primarily invest in private equity funds already exist in the market today. However, the Commission only permits such funds to register under the Investment Company Act so long as their securities offerings are limited to accredited investors that make a substantial minimum initial investment in the fund (\$25,000) or qualify under other financial suitability standards imposed by the Commission. We recommend removing these limits on investor participation as they inherently exclude retail investors from pooling capital to access such registered funds. The Commission should not impose an accredited investor standard, minimum investment threshold or any other suitability standard on a registered fund's investors.

### ***Qualified Client***

We also encourage the Commission to revise the definition of "qualified client" under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"), to include accredited investors. Private fund managers typically are compensated with a management fee based on a percentage of the assets under management (often 1.5% to 2.0%) and an incentive or performance fee based on the capital appreciation of the value of the fund's holdings (often



20% of the appreciation). However, private fund managers are currently prohibited from charging incentive or performance-based fees under the Advisers Act to investors who are not “qualified clients” as defined in Rule 205-3 of the Advisers Act. On the other hand, the Commission’s rules do allow BDCs that are publicly-traded to utilize a similar incentive or performance-based fee structure without a requirement to limit their securities offerings to qualified clients or even to accredited investors. Unlike a publicly-traded BDC, a typical private fund will make a private offering of its securities under Regulation D, charge incentive or performance-based fees and qualify as exempt under the Investment Company Act. As such, these private funds will already need to limit their securities offerings to accredited investors. Limiting the same fund to qualified clients (after it is already limited to accredited investors) does not appear to serve a practical purpose and results in unnecessary administrative costs for the fund and its adviser. We suggest either eliminating the incentive/performance fee limitation under the Advisers Act entirely as it is inconsistent with certain existing retail investment vehicles (such as BDCs) or at least conforming the accredited investor and qualified client definitions.

#### **Rule 144**

As noted in the Release, purchasers in a Section 4(a)(2) offering (the most common type of exempt offering) receive restricted securities. Holders of such restricted securities may only resell them into the market by registering the resale transaction or relying on a valid exemption from registration, such as Rule 144’s safe harbor. Rule 144 allows the resale of restricted securities if a number of conditions are met, including holding the securities for six months (for public reporting issuers) or one year (for private issuers). The purpose of Rule 144’s hold period is to provide objective criteria for determining that the person selling securities to the public has not acquired the securities from the issuer for distribution. The holding period should not be any longer than is necessary or impose any unnecessary costs or restrictions on capital formation. We believe a shorter hold period still provides a reasonable indication that an investor has assumed the economic risk of investment in the securities to be resold under Rule



144. As such, we recommend shortening the hold period under Rule 144(d)(1)(i) from six months to three months and the hold period under Rule 144(d)(1)(ii) from one year to six months. We believe this change will help facilitate liquidity for investors and also allow companies to raise capital more easily and less expensively. By making private offerings of securities more attractive, companies may be able to avoid certain types of costly financings that involve the issuance of extremely dilutive convertible securities.

\* \* \*

For the above reasons, we encourage the Commission to approach this process with an emphasis on eliminating regulatory inefficiencies in the capital raising process in the alternative investment market as it relates to the retail investor community. We appreciate the opportunity to comment on the Release and would be pleased to meet with the Commission's Staff to discuss these issues or to answer any questions. If you have any questions regarding the foregoing, feel free to contact Anna Pinedo at Mayer Brown LLP at [REDACTED] or me at [REDACTED]. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kamal Jafarnia'.

Kamal Jafarnia  
**Artivest Holdings, Inc.**

Cc: Anna Pinedo, Mayer Brown LLP