September 24, 2019

Via email (rule-comments@sec.gov)

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Attention: Vanessa A. Countryman, Secretary

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

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is submitting this letter in response to the invitation of the Securities and Exchange Commission (the "Commission") for public comment on registration exemptions under the Securities Act of 1933 (the "Securities Act") and how they can be simplified, harmonized, and improved to expand investment opportunities while maintaining sufficient protection for investors, as set forth in the Commission's Concept Release File No. S7-08-19 (the "Release"). Specifically, this letter focuses on four of the topics the Commission highlighted in the Release: (1) the definition of "accredited investor" ("AI"); (2) Rule 506 under the Securities Act; (3) the integration doctrine; and (4) the rules governing secondary trading. In addition, the letter addresses certain topics the Commission raised with respect to asset management and private funds.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. With offices in New York and Washington, DC, SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA).

1. AI Definition

SIFMA appreciates that the Commission is receptive to changing the definition of AI to make the private capital markets accessible to a broader investor base. We generally defer to the Commission's judgment with respect to the qualifications an individual must meet to qualify as an AI. Importantly, however, we urge the Commission to ensure that any revised qualification(s) be clear, simple, and easy to evaluate. In this particular area, we believe bright-line tests are beneficial in reducing legal costs and evidentiary burdens for issuers and investors and ensuring trades can be made in a timely and efficient manner. Factors such as education (*e.g.*, appropriate majors or degrees) or investment sophistication level that require circumstantial considerations or subjective judgment calls should either be avoided or written to include a clear and unambiguous list of qualifying factors. On the other hand, certain professional qualifications based on examinations and maintenance of professional status should be sufficient – among others we believe should qualify are those with Certified Public Accountant or Chartered Financial Analyst status, as well as those registered as investment advisers with the Commission or with state authorities.

We would also urge the Commission to consider, in connection with making revisions to the AI definition, harmonizing certain of the qualifications across the AI, qualified purchaser ("QP") and qualified institutional buyer ("QIB") definitions. First, the AI definition should include a qualification for anyone who separately would meet the QP test. Second, the AI definition should be expanded so that Rule 501(a)(3) applies to "any person, other than a natural person or an entity formed for the specific purpose of acquiring the securities offered," rather than to only certain enumerated entities, which would eliminate existing confusion about the qualifications of certain entities such as sovereigns, native tribes, and municipalities. A corresponding change also should be made to the list of entities that qualify as QIBs under Rule 144A(a)(1)(i).

Lastly, if the Commission ultimately determines to adopt any changes to the AI definition, we urge the Commission to "grandfather" AIs vis-a-vis their existing investments in specific issuers – *i.e.*, an existing investor in Issuer A based on today's test should be able to purchase Issuer A securities in the future regardless of whether the investor meets the qualifications set forth in any new test.

2. Rule 506

SIFMA respectfully proposes that the Commission consider eliminating the prohibition on general solicitation and general advertising ("GSGA") in Rule 506 for all offerings under the

Rule, maintaining the distinction between 506(b) and 506(c) only with respect to the information and other additional requirements to be met if an offering includes sales to non-AIs. If the purpose of the AI definition is to ensure that investors have the requisite financial sophistication to make the ultimate decision to purchase a security, and information and purchaser representative requirements and limitations on the number of non-AI sales otherwise provide protection for non-AIs, the nature of any offeree to whom the security ultimately is not sold should not be relevant. We would also propose to eliminate the express AI verification requirement in Rule 506(c)(2)(ii), which we understand from the market and from the Release has proven burdensome and complicated to comply with, resulting in lower than expected reliance on Rule 506(c) by issuers. We believe the intent behind Rule 506(c), namely to broaden access to capital for issuers by permitting GSGA, is still important in today's markets, and our proposed changes would effectuate that intent.

In the alternative, SIFMA suggests that Rule 508, which currently provides that any violation of the conditions relating to GSGA is deemed significant to a Regulation D offering, should be revised to provide that non-intentional conduct that would otherwise be GSGA not be automatically deemed significant. For example, SIFMA believes the Commission should make clear that a non-intentional disclosure, even one made publicly, that is limited to information of the kind that could be included in a Rule 134 notice would not be deemed to be significant. This change would mean that such non-intentional GSGA would no longer render the safe harbor provided by Rule 506(b) automatically unavailable, which would avoid the unnecessarily punitive result of an issuer being forced to delay an offering due to inadvertent conduct. Exemptions or remediation options for so-called "foot faults" are not unprecedented in other rules and regulations governing offerings and public company disclosure. For example, Regulation FD requires public companies to promptly file any subject, but non-intentional, disclosures after they are made; it does not impose liability for those "late" formal disclosures. Our proposal to accommodate foot faults would not be inconsistent with the holding in *KCD Financial Inc.*, where the Commission found that the issuer had engaged in intentional and ongoing GSGA.

Additionally, we suggest revising Form D to delete the agent commission disclosure requirement entirely or to require including it only if the commission is greater than the level permitted by FINRA for public offering compensation under FINRA Rule 5110. There is concern in the market that this disclosure requirement involves competitively sensitive information, thus deterring reliance on Rule 506, and is generally not material to an investment decision.

3. Integration

We believe the integration doctrine should be clarified to more clearly address circumstances where multiple offerings should be considered to be a single one.

This can be accomplished by dividing the analysis into two prongs – concurrent or proximate offerings that involve GSGA, and those that do not. Examples of the latter are those in which there are numerical or geographic limitations, such as under Rule 506(b), where the number of non-AI purchasers is limited, or under Rule 147 under the Securities Act, where the geographic focus of an offering is limited to a single state. In those instances, the existing five factor test should be referenced to determine separation of the offerings, but the existing six-month cooling off period should be reduced to 30 days (as further discussed below).

If GSGA is involved (for example, in a public offering, Rule 506(c) offering, or Rule 144A offering) in one of the proximate offerings while the other relies on an exemption from registration prohibiting GSGA, we would propose that the six-month cooling off period be reduced to 30 days, and we would separately propose that notwithstanding integration as determined by the five factor test, the offering for which GSGA would otherwise be prohibited would not lose its exempt status if either of two conditions is met -- (i) where the company or its placement agent has a substantive pre-existing relationship with all offerees in the offering for which GSGA would otherwise be prohibited, or (ii) where all offerees in such offering are institutional accredited investors (IAIs).

We believe a 30-day cooling off period is appropriate in today's marketplace given issuers' need to be able to raise capital quickly (and frequently) combined with investor expectation that offerings can and will be able to move quickly and efficiently. We also do not believe there is any material reason why an abandoned offering should be treated differently than a completed offering. Moving to a 30-day safe harbor would be consistent with Rule 155 in that regard.

4. Secondary Market Trading

There is currently little formal Commission guidance available to give investors comfort that private resales of securities do not violate Section 5 of the Securities Act, other than in Section 4(a)(7) of the Securities Act and Rule 144A under the Securities Act. While Section 4(a)(7) was an attempt by Congress to codify the well-known practice in the market of conducting private resales essentially following the same guidance applicable to private primary offerings (known in the market as "4(a)(1½) trades"), in practice it has proven too burdensome and, accordingly, is infrequently used. We suggest that the Commission revisit Section 4(a)(7) and, through its exemptive authority, issue practical guidance to make it more likely to be used without detracting from the investor protection it was meant to provide. We believe the following changes in particular would make the exemption more widely used:

- Eliminate the requirement that the class of security have been outstanding for at least 90 days.
- Eliminate the prohibition on GSGA, or at a minimum provide for an exception from the GSGA prohibition for inadvertent foot faults, as suggested above in the context of Rule 506.
- For non-reporting issuers, eliminate the information requirement and instead require information to be delivered by an issuer only upon request.

We also would suggest the Commission consider reducing the holding period under Rule 144 to 90 days for reporting companies and six months for non-reporting companies. We believe shortening the holding period under Rule 144 would reduce the cost of raising capital in exempt offerings. The Commission has noted that the holding period is intended to provide "a reasonable indication that an investor has assumed the economic risk of investment in the securities to be resold under Rule 144."[2] Given the increase in the pace and volatility of the capital markets since the current holding periods were adopted in 2007, we believe a holding period of 90 days for reporting companies and six months for non-reporting companies is sufficient to show that the investor has assumed the economic risk of the investment.

As a general matter, we would also encourage the Commission to consider methods to facilitate the development and penetration of secondary market trading platforms. As private companies increasingly have larger numbers of investors than in the past, and companies stay private longer, facilitating secondary market trading of restricted securities and securities that are not registered under Section 12 of the Securities Exchange Act of 1934, as amended, assists these companies' ability to raise capital. At the same time, we do not believe increasing secondary market liquidity is likely to significantly cannibalize the public market, as liquidity in the public resale market is likely to remain materially greater than for such securities.

Additionally, we would suggest that the Commission consider amending Rule 144A(a)(1)(iv) to allow investment vehicles that are not registered under the Investment Company Act of 1940 (the "ICA") to benefit from the ability, currently available only to registered investment

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[2] Revisions to Rules 144 and 145, 72 Fed. Reg. 71546, 71549 (Dec. 17, 2007).

companies, to aggregate the amount of securities owned with other investment vehicles that have the same investment adviser.

5. Asset Management and Private Funds

As the Commission noted in the Release, pooled investment vehicles can provide an important source of capital and allow retail investors to gain diversified exposure to growth stage issuers and private funds. SIFMA encourages the Commission to consider revisions to the regulatory regime applicable to closed-end funds registered under the ICA that would facilitate investments in private companies – allowing those companies to access a vast pool of capital and allowing retail investors to gain exposure to private companies while continuing to benefit from robust investor protections under the ICA. In particular, we believe the following changes to the regulation of closed-end funds would help achieve those objectives:

- Eliminate the restriction on offerings to retail investors by closed-end funds that invest 15% or more of their assets in private funds. The Commission staff, through comment letters on registration statements filed by closed-end funds, has limited offerings of such funds to accredited investors.[3] That restriction is not found in the ICA or rules adopted by the Commission, and the rationale for adopting it has not been publicly disclosed by the Commission staff. Similar restrictions have generally not been imposed on funds that invest in exempt offerings of issuers that are not private funds.

  Allowing retail investors to invest in closed-end funds that make significant investments in private funds would permit retail investors to gain exposure to those private funds, while benefiting from the liquidity (through an exchange listing or periodic repurchase offers) typically provided by closed-end funds and selection and oversight of their exposure to private funds by the board of and adviser to the registered closed-end fund.

- Amend Rule 35d-1 under the ICA to allow closed-end funds that focus their portfolio on private funds to reflect that focus in their name, even if less than 80% of the value of their assets is comprised of investments in private funds. The illiquid nature of private funds will, in many cases, make it prudent for closed-end funds focused on that sector to limit their investments in it to less than 80% of their assets in order to maintain liquidity

[3] Wildermuth Endowment Strategy Fund, SEC Comment Letter (Oct. 11, 2013); Cross Shore Discovery Fund, SEC Comment Response Letter (Sept. 17, 2015); Resource Real Estate Diversified Income Fund, SEC Comment Letter (Oct. 19, 2012); Oxford Lane Capital Corp., SEC Comment Response Letter (Aug. 17, 2015).

for repurchase offers or further investments. However, it remains important for the name of a fund focused on private funds to reflect that in order to avoid investor confusion. We suggest that, at a minimum, the 80% threshold be reduced to 65% (which would be consistent with the staff's position prior to the adoption of Rule 35d-1 under the ICA), but believe offering even greater flexibility in this regard, reducing the threshold to 50%, would further facilitate the ability of investment advisers to develop and manage closed-end funds designed to allow retail investors to gain diversified exposure to growth stage issuers and private funds, without creating confusion among those investors about the objectives of those funds.

- Allow funds to satisfy the requirements of Section 8(b)(1)(E) of the ICA through disclosure stating that the closed-end fund may fluctuate between concentrated and not concentrated and may change the industry in which it is concentrated as a result of distributions made by private funds that the closed-end fund has invested in. A closed-end fund that invests in private funds may have significant changes in the composition of its portfolio when private funds it has invested in have liquidity events or reach the end of their life. Absent such relief, closed-end funds focused on investments in private funds may need to repeatedly seek shareholder approval under Section 13(a)(3) of the ICA – which may make it impractical for closed-end funds to invest a significant portion of their portfolio in certain types of private funds.

- Adopt relief from the restrictions of Section 12(d)(1)(A) of the ICA to allow exchange-traded funds ("ETFs") to invest in unaffiliated closed-end funds in excess of the thresholds set out in that section. We believe many wealth management platforms only allow investors with at least $200,000 in assets to invest in closed-end funds. However, ETFs are generally available to retail investors. As a result, allowing ETFs to make investments in closed-end funds that invest in private funds in excess of the thresholds set out in Section 12(d)(1)(A) of the ICA would increase the ability of retail investors to gain access to that asset class.

- Require closed-end funds that focus on investing in private funds to publish their net asset value daily. That would provide investors with a reliable and current valuation to look to when considering transacting in closed-end funds.

- Codify the exemptive relief granted to a number of closed-end funds allowing them to issue multiple classes of shares and to impose asset-based distribution and/or service fees, early withdrawal charges, and early repurchase fees.[4] We believe the codification of the exemptive relief allowing closed-end funds to adopt a multi-class system would enhance shareholder options. Under a multi-class system, an investor can choose the method of purchasing shares that is most beneficial given the amount of his or her purchase, the length of time the investor expects to hold his or her shares and other relevant circumstances. The proposed arrangements would permit a closed-end fund to facilitate both the distribution of its securities and provide investors with a broader choice of shareholder services. Insofar as the exemptive relief permits the imposition of early withdrawal charges and early repurchase fees that are not otherwise available under the ICA, the ability to impose such charges and fees is particularly valuable in the context of interval funds that invest in illiquid asset classes, such as many securities issued in exempt offerings, to mitigate the costs borne by all shareholders of those funds if some shareholders move their money quickly in and out of the fund and to deter shareholders from doing so.

- Consider alternatives for satisfying the "market quotation" requirement of Rule 17a-7 under the ICA. As the Commission has noted, cross-trades may be a useful liquidity risk management tool and can benefit both funds that are party to a transaction.[5] However, Rule 17a-7 is currently unavailable for securities for which market quotations are not "readily available," which is often the case for securities issued in exempt offerings. We believe there are workable alternatives that would allow for cross-trades of securities for which no market quotation is readily available while protecting investors from abusive transactions among affiliated entities. Those alternatives include (1) the independent price obtained by the private issuer when it engages in an offering to third-party investors, or (2) a valuation determination provided by an independent expert.

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[4] *See* The Relative Value Fund, et al., Investment Co. Rel. No. 32884 (Oct. 26, 2017) (Notice) and Investment Co. Rel. No. 32904 (Nov. 21, 2017) (Order); ABS Long/Short Strategies Fund, et al., Investment Co. Rel. No. 32090 (Apr. 21, 2016) (Notice) and Investment Co. Rel. No. 32116 (May 18, 2016) (Order); Wildermuth Endowment Strategy Fund, Investment Co. Rel. No. 31896 (Nov. 5, 2015) (Notice) and Investment Co. Rel. No. 31922 (Dec. 1, 2015) (Order); Griffin Institutional Access Real Estate Fund, et al., Investment Co. Rel. No. 31509 (Mar. 23, 2015) (Notice) and Investment Co. Rel. No. 31559 (Apr. 20, 2015) (Order); and Versus Capital Multi-Manager Real Estate Income Fund LLC, et al., Investment Co. Rel. No. 30103 (June 14, 2012) (Notice) and Investment Co. Rel. No. 30133 (July 10, 2012) (Order).

[5] Investment Company Liquidity Risk Management Programs, 81 Fed. Reg. 82142 (Nov. 18, 2016).

Finally, we urge the Commission to amend Rule 3c-5 under the ICA to make the use of Sections 3(c)(1) and 3(c)(7) of the ICA more viable for sponsors. In particular, we suggest amending Rule 3c-5 to exclude (1) “qualified purchasers” when determining the number of beneficial owners of a Section 3(c)(1) company, and (2) up to 100 persons that are not qualified purchasers or “knowledgeable employees” when determining whether the outstanding securities of a Section 3(c)(7) company are beneficially owned exclusively by qualified purchasers. Given the current non-integration position in Section 3(c)(7)(E), which permits side-by-side 3(c)(1) and 3(c)(7) funds that have the same investment policy, this change would simply allow one single fund to have the same investors currently permitted to exist in two funds contemporaneously.

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If you have any questions regarding SIFMA’s views or require additional information, please do not hesitate to contact the undersigned at 202-962-7300, or our counsel on this matter, Leslie N. Silverman and Andrea M. Basham of Cleary Gottlieb Steen & Hamilton LLP, at 212-225-2000.

Very truly yours,

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