BlackRock

September 24, 2019

Submitted via electronic filing: https://www.sec.gov/rules/concept.shtml

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

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

Dear Ms. Countryman:

This letter responds to the request of the Securities and Exchange Commission (the "Commission") for comments on its concept release[1] relating to the exempt offering framework under the Securities Act of 1933 (the "Securities Act"). BlackRock, Inc. (together with its affiliates, "BlackRock")[2] agrees with the Commission's observation that issuers and investors could benefit from a framework that is more consistent and less complex. As invited by the Concept Release, BlackRock is pleased to provide its suggestions on ways to harmonize, simplify and improve the exempt offering framework to expand investment opportunities and promote capital formation. While the Concept Release covers a wide range of issues relating to exempt offerings, we comment only on those matters where we believe BlackRock's expertise and experience is most relevant.

We believe that the expansion of investment opportunities to include exempt offerings is important for investors to achieve their savings goals, including saving for retirement. As noted in the Concept Release, exempt offerings can provide both greater appreciation opportunities and diversification. Increasing access either directly or through funds can be accomplished while maintaining investor protection — a core tenet of our markets.

Definition of Accredited Investor

The Concept Release requests comments on a broad range of questions regarding the definition of "accredited investor."[3] As the Concept Release notes, the definition is a central component of several exemptions from registration, and is premised on the view that accredited investors are those persons whose financial sophistication and ability to

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1 SEC, Concept Release on Harmonization of Securities Offering, 84 FR 30460 (Jun. 18, 2019), available at https://www.sec.gov/rules/concept/2019/33-10649.pdf ("Concept Release").

2 BlackRock is one of the world's leading asset management firms. We manage assets on behalf of institutional and individual clients worldwide, across equity, fixed income, liquidity, real estate, alternatives, and multi-asset strategies. Our client base includes pension plans, endowments, foundations, charities, official institutions, insurers, and other financial institutions, as well as individuals around the world.

3 17 CFR 230.501(a).

sustain the risk of loss or ability to fend for themselves are sufficient to render the protections provided by the offering registration requirements of the Securities Act unnecessary.[4]

We welcome the Commission's willingness to consider a wide range of potential changes to this definition. As a first principle, we believe that any changes should maintain clear, objective standards so that an issuer can determine whether an investor meets the necessary qualifications. Maintaining the existing aspect of the definition to include those persons who an issuer "reasonably believes" meets the qualifications at the time of sale will aid in capital formation as an issuer can be confident that its private offering is conducted in compliance with exempt offering rules, including Regulation D.

The Commission should consider permitting "knowledgeable employees" of private fund managers (as defined in Rule 3c-5 under the Investment Company Act of 1940) to qualify as accredited investors for investments in private funds of their employers. Knowledgeable employees have the investment experience and sufficient access to information necessary to make informed decisions about the private fund's offerings.[5] Investments by knowledgeable employees further align investor interests with that of the fund and its manager.

The Concept Release requests views on whether investors should be considered accredited if they are represented by an investment professional, including a registered investment adviser[6] or registered broker-dealer representative, who is required to act as a fiduciary on behalf of its clients. BlackRock believes that if the investor representative can demonstrate its status as a fiduciary[7], that such a change in the definition can be made without compromising investor protection. In proposing a change to the definition of accredited investor to include those represented by an investment professional, the Commission should solicit specific comments on whether any additional qualifications are necessary to assure the protection of investors, informed by comments received in relation to the Concept Release. For example, the investor representative could be required to demonstrate experience in evaluating exempt offerings by having not less than $25 million in assets under discretionary management invested in such securities and/or to have passed certain qualifying examinations.[8]

In order to simplify the existing mismatch for private fund investors, the Commission should consider harmonizing the qualifications for "accredited investors" with the qualifications required for "qualified purchasers" as defined in Section 2(a)(51) of the

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[4] Anti-fraud provisions of Securities Act apply to the offer and sale of all securities. See SEC, Frequently asked questions about exempt offerings, available at https://www.sec.gov/smallbusiness/exemptofferings/faq.

[5] The Commission should also consider expanding the definition of "knowledgeable employee" to include accredited investors.

[6] We note that not all fiduciaries are subject to registration under the Advisors Act, including those entities acting in a fiduciary capacity under banking laws or the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

[7] Those acting in a fiduciary capacity include registered investment advisers and their associated persons, state and national banks when exercising their trust powers and certain entities and persons that meet the definition of fiduciary under ERISA.

[8] See, e.g., FINRA Series 82 — "Private Securities Offerings Representative Exam". Additional examination requirements may be appropriate for investment advisors or broker-dealer representatives.

Investment Company Act, and amending the definition of "qualified clients" under the Advisers Act.

Additional simplification could be accomplished by the Commission revising Rule 501(a)(3) of Regulation D to permit any entity meeting the financial threshold to qualify as an accredited investor. The list of entities is outmoded, as evidenced by staff guidance which has expanded the permitted entity types to include limited liability companies and certain governmental units. If the entities list were replaced with the financial thresholds test, it would increase efficiency, reduce uncertainty and promote capital formation. In connection with the elimination of enumerated entities, we would support a financial test that considers the total investment assets of an entity, not its total assets.

Pooled Investment Funds

As the Concept Release notes, for retail investors that are not currently accredited investors, the ability to obtain exposure to private funds and privately placed securities is limited to indirect exposure through shareholdings in registered investment companies ("RICs") – open end funds, closed end funds and ETFs — and business development companies ("BDCs"). Yet, there are regulatory restrictions and practices that discourage funds'[9] participation in exempt offerings. Broadening the ability of funds to acquire interests in exempt offerings could expand the opportunities for smaller issuers to access the capital markets and provide retail investors with the opportunity to benefit from increased exposure with the added protections provided by a professionally managed diversified portfolio.

Many Americans' retirement savings are held in defined contribution plans ("DC plans") where the plan sponsor (most often the employer) or another plan fiduciary selects the investment options to be made available to plan participants (who in turn may choose from the investment menu). Typically, these investment options are RICs or bank maintained collective investment funds,[10] and over the last 15 years there has been increased use of target date funds ("TDFs") as investment options.[11] If the Commission were to allow funds, and in particular those employing a TDF strategy, greater flexibility in investing in exempt offerings (including private funds), DC plan participants would benefit from exposure to these investments with the safeguards provided by the responsibilities of the plan fiduciary and the fund's investment manager. To this end, we suggest the Commission consider whether existing staff no-action letter precedents that allow DC plan investment options greater flexibility should be codified, including certain conditions, such as minimum plan asset size.

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[9] "Funds" as used here includes both registered funds and private funds that operate pursuant to an exemption or exclusion from the Investment Company Act. One type of "excluded funds" is bank maintained common trust funds ("CTFs").

[10] Large DC plans may use separate accounts as investment options, which may allow for customization of the investment strategy and its related fees and expenses.

[11] As the Commission knows, TDFs — which can be passively or actively managed — invest in a mix of equities and fixed income securities where the asset allocation changes over time to be more conservative as the target date approaches. TDFs are based on well-accepted investment theories that investors can take more risk when they are younger but should move to lower risk investments as they near retirement.

Given the daily liquidity provided by the majority of DC plans, any such investments would likely be a small percentage of any fund offered as a DC plan investment option and of course, the fund's investment manager would need to manage liquidity risk as it does today for open end funds. However, we believe this additional flexibility in investments would provide the potential for higher returns to plan participants and provide additional capital formation opportunities.

The Commission should revise its historical position that CTFs are "look through" vehicles for 144A purposes. CTF investment decisions, including whether to purchase securities in a 144A transaction, are made by the bank that maintains the CTF, and who is acting in a fiduciary capacity. Similarly, the Commission should eliminate its anachronistic approach that precludes bank-maintained collective investment funds, including CTFs, from acquiring 144A securities if there is an HR 10 plan invested in the collective investment fund. The decision to invest in 144A securities is made by the bank, and further HR 10 plans (typically used by professional services entities such as law and accounting firms) are not in need of protection from indirect investment through their participation in a pooled vehicle such as the collective investment fund.[12]

Commission staff has taken a position that if a registered CTF invests more than 15% of their assets in private funds, only accredited investors may invest in these funds. The Commission should consider whether this staff position is consistent with its efforts to expand capital raising opportunities for smaller issuers and increase access for investors. We note that in this situation, both the fund and its manager are registered with the Commission. We believe that, consistent with investor protection, this restriction could be altered and other criteria considered, such as an asset diversification test.

We share the views of other commentators[13] that, as suggested by the Concept Release, easing restrictions on interval funds would promote increased formation of such funds, enabling additional investment in smaller issuers and startup companies. We believe that more flexible provisions, including allowing an interval fund to determine for itself the length of its periodic interval, would provide the flexibility for such funds to invest in those issuers who may be public but have thinly traded shares, or private companies with limited or no liquidity.

The affiliated transaction restrictions of the Investment Company Act currently prevent a fund sponsor from managing a RIC that invests in private funds of the same sponsor. Where registered funds (currently available only to accredited investors) focus their investments on private funds of a single sponsor, the registered fund is managed by an unaffiliated third party. While a third party is one way to mitigate potential conflicts of interest, the Commission should consider alternatives to conflicts management, and permit affiliated fund of funds. An affiliated manager of a fund of private funds has the

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[12] Letter from the American Bankers Association ("ABA") to the SEC in response to the Concept Release (Sep. 24, 2019), available at https://www.aba.com/-/media/documents/comment-letter/sec-concept-release-harmonization-securities-offering-exemtpions-092419.pdf.

[13] See e.g., Letter from Managed Funds Association ("MFA") and the Alternative Investment Management Association ("AIMA") to the SEC in response to the Concept Release (Sep. 24, 2019), available at https://www.managedfunds.org/wp-content/uploads/2019/09/MFA-AIMA-Final-Letter-on-SEC-Concept-Release.pdf; Letter from the Investment Company Institute ("ICI") to the SEC in response to the Concept Release (Sep. 24, 2019), available at https://www.ici.org/pdf/19_ltr_exemptions.pdf.

advantage of superior knowledge of the investment characteristics of the underlying funds which should inure to the benefit of investors. Concerns about affiliated transactions can be addressed by imposing certain limitations, such as limiting the percentage that can be invested in any one underlying affiliated fund, the total percentage that can be invested in affiliated funds, and enhanced oversight by the registered fund's Board concerning fund-level fees to avoid payment for potentially duplicative services.

Conclusion

BlackRock appreciates the opportunity to comment on the Concept Release. We believe that revisions to the exempt offering framework are one of the most significant changes that the Commission could undertake to expand opportunities for investors who are saving to meet their goals, whether paying for their children's college or for their retirement, to participate in the potential upside performance of exempt offerings. There are many aspects of the existing framework that need to be reviewed and revised to reflect the current market environment and we urge the Commission in particular to eliminate the "lore" that has developed that unnecessarily inhibits investor access and capital formation. We believe enhanced access can be achieved while maintaining investor protection. Enhanced access also means more capital to be invested to the benefit of startup companies and smaller issuers.

BlackRock is a significant investor on behalf of its clients in the US securities markets. We commend the Commission for issuing the Concept Release, and we urge it to propose changes to its rules that will effectuate many of the changes suggested. We stand ready to provide our views on those proposals. If you have questions on the comments made by this letter, please contact Barbara Novick or Joanne Medero.

Barbara Novick
Vice Chairman

Joanne Medero
Managing Director