September 30, 2019

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

RE: Concept Release on Harmonization of Securities Offering Exemptions, File No. S-07-08-19

To Whom It May Concern:

The Americans for Financial Reform Education Fund (AFR Education Fund) and the AFL-CIO appreciate the opportunity to comment on the above referenced Concept Release (the "Release") by the Securities and Exchange Commission (the "SEC" or "Commission") concerning securities offering exemptions. AFR Education Fund is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.[1] The AFL-CIO is the umbrella federation of U.S. labor unions, including 55 unions representing 12.5 million members. Union-sponsored and Taft-Hartley pension and employee benefit plans hold more than $667 billion in assets. Union members also participate directly in the capital markets as individual members and as participants in pension plans sponsored by corporate and public-sector employers. Altogether, US workers' pension plans hold over $7 trillion.

The Securities Act of 1933 and the Securities Exchange Act of 1934, which the SEC was in large part established to implement, created a revolutionary new system of public securities markets. By requiring registration and extensive public disclosure as a condition of selling and trading securities, the public market system improved capital allocation and economic efficiency, and held corporate management responsible to both investors and the public. In the decades after the 1933 Act, this system of public markets became a model to the world and led American capital markets to become the deepest, most liquid, and most transparent securities markets in history.

Unfortunately, over the past several decades, regulators and policymakers have gradually moved away from the clear principles of the original securities laws and greatly expanded the ways in which companies can raise funds without entering the public markets and complying with the required disclosures and investor protections. The ad hoc expansion of private markets has led to a situation where funds raised in the private markets, once a small minority of total capital raised, are now significantly larger than the amount raised in public markets, and the number of U.S.

[1] A list of coalition members is available at: http://ourfinancialsecurity.org/about/our-coalition/

public companies has declined by over 50 percent during the last two decades.[2] Instead of going public, companies are remaining in the private markets until they have reached asset sizes in the billions of dollars – a phenomenon that was once extremely rare but is now becoming common.

This state of affairs poses significant risks to investors and to the broader economy. In the absence of public company disclosures, investors who are not privileged insiders may not have access to sufficient information to determine the correct price for their securities, and can lack liquidity when seeking to exit the investment. The qualifications for accredited investor status, which permits investment in private offerings, are based on a fundamentally unsound principle, that financial thresholds alone can identify investors who are capable of "fending for themselves" without the protections afforded in the public markets. Even if one believed in the use of purely financial thresholds, since the current thresholds have not been comprehensively updated since the early 1980s many accredited investors in private offerings also do not have the financial resources to take such risks without courting financial ruin. Worse still, even the most sophisticated investors have proven, time and again, that they will make financially unsound investment decisions when not in possession of essential corporate information.

The impact of private market expansion on investors, while critical, is not the only issue. Non-investor stakeholders in a company will lack information needed to assess claims made by the company and the actions of the company. For example, workers at a company will not know if cuts in pay or benefits are due to actual financial pressures or to a decision by top management to increase their own compensation.

In a broader economic sense, the lack of disclosure and accompanying mechanisms for responsible corporate governance lead to economic inefficiency and capital misallocation, as they enable companies to conceal problems in their business that should properly lead to a reduction in the capital investors are willing to commit to them. It is, for example, extremely doubtful that Theranos could have kept its fraudulent activities hidden so long had it been a public company. There are numerous other examples of governance breakdowns that have occurred in private companies which were enabled to grow to a large scale through exemptions to public registration and public reporting requirements and loosening of secondary trading restrictions.[3] In the case of private offerings of debt, exemptions to public registration requirements, such as the 144A exemption, were used to issue trillions of dollars of "toxic"

[2] See discussion in Release, as well as Doidge, Craig and Kahle, Kathleen M. and Karolyi, George Andrew and Stulz, Rene M., Eclipse of the Public Corporation or Eclipse of the Public Markets? (January 1, 2018). Rotman School of Management Working Paper No. 3100255; European Corporate Governance Institute (ECGI) - Finance Working Paper No. 547/2018. Available at SSRN: https://ssrn.com/abstract=3100255

[3] Jones, Renee M., The Unicorn Governance Trap (October 3, 2017). University of Pennsylvania Law Review Online, Vol. 166, 2017; Boston College Law School Legal Studies Research Paper No. 463. Available at SSRN: https://ssrn.com/abstract=3047189; Thompson, Derick, WeWork and the Great Unicorn Delusion (September 20, 2019), Atlantic Magazine, Available at https://www.theatlantic.com/ideas/archive/2019/09/unicorn-delusion/598465/

mortgage securitizations that played a central role in the 2008 financial crash. It is doubtful whether could have been done through offerings that required full public disclosure.[4]

The dramatic expansion in the size of private markets in recent years makes this a good time to engage in a comprehensive review of private market exemptions that these markets rely upon to avoid complying with the disclosure and regulatory regime of the federal securities laws. To that extent, this Release is appropriate. However, the substantive content of the Release is highly disturbing, as it appears to move in the direction of significant and unjustified additional expansions in private market exemptions without even considering the impact on investors, the public markets, or the economy overall. It also appears that the Commission is considering loosening restrictions on the pool of accredited investors permitted to purchase private offerings, further exposing vulnerable investors to private market risks they are ill-equipped to face.

We believe such changes move in the wrong direction. In general, given the benefits to both investors and the broader economy of transparent, deep, and liquid markets that encourage good corporate governance and stakeholder input, the Commission should be examining the overall balance between private and public markets with a view toward maximizing the extent to which capital raising takes place through offering mechanisms appropriate for such markets. We understand that there may be some small offerings for which the full application of the securities laws may be inappropriate. But any such exemption should be grounded in careful analysis of the costs of losing the transparency, governance, and efficiency benefits of public markets.

Unfortunately, no such analysis is provided in this Release. Indeed, even a conceptual awareness of the broader context, in terms of the tradeoff between public and private markets and the benefits of public markets appears almost totally absent from the Commission's thinking. Instead, numerous elements of the Release treat individual exemptions in isolation. A repeated theme is the apparent concern that a particular private market exemption may be "underused" and that policies must be changed to encourage increased usage of the exemption. To take just one of many examples, the Release expresses concern about the limited use of the 506(c) exemption and questions 40, 42, 44, and 45 ask respondents to comment concerning barriers to the use of the 506(c) exemption and possibly suggest ways to facilitate increased use of the exemption. Yet one obvious reason that the 506(c) exemption might not see greater use is that issuers are already able to raise more capital annually using the 506(b) exemption than is raised through all registered public offerings put together (as the release notes at CFR 30484). Given the numerous already existing means of doing private offerings, the demand for additional private offering mechanisms, such as those offered through the 2012 JOBS Act, may be limited.

The contention or implication that a particular private offering mechanism may be underused, or may require easing of requirements to encourage additional use, unavoidably raises the question of what is the appropriate level of "usage" for a particular exemption? And what is the economic

[4] We note that some of these securities may have been offered using abbreviated "shelf" offering processes, and so while technically "public," they did not provide the full disclosures attendant with a full registered offering.

and analytic basis for such a determination? The Release does not offer any meaningful response to this question, and for the most part it is not even addressed.

The most fundamental and critical economic question that is never addressed in the Release is whether the Commission has reached the point of negative returns to the expansion of private markets through the profusion of registration exemptions, the reduction of disclosure and reporting requirements in connection with such exemptions, and the supply side expansion of investment through the gradual relaxation of accredited investor thresholds over time. Without addressing this question in a comprehensive way, the Commission has not met its responsibility to consider the economic costs and benefits of its actions. Actions such as lowering disclosure or investor protection requirements around particular exemptions cannot be looked at in isolation, as their effects are fundamentally tied to the larger question of the impact of each exemption on the public markets and on the overall process of capital formation in the United States.

As several other commenters have pointed out, including the SEC's own Investor Advocate, other basic economic analysis crucial to assessing the costs and benefits of elements of this release are also missing. For example, while there is an assumption at several points in the Release that investors could benefit through greater access to private markets, there is no information on the net returns to investments in private markets vs investments in public markets. Even information on the overall returns to private vs. public markets is lacking, let alone information on the likely returns to the marginal investor who would move from the private to the public markets as a result of policy changes. This information is obviously critical to basic questions of investor protection and investor benefit from policy changes. Yet even this information falls well short of the overall analysis that should and must be done in order to determine whether the facilitation of increased investment in the private as opposed to the public markets would have a beneficial impact on sustainable capital formation, economic efficiency, and the various stakeholders who are impacted by SEC-regulated markets.

We urge the Commission to call a halt to any further expansion of private offering and trading exemptions until it has conducted a thorough review of the effect past deregulatory actions have had on the public markets. In light of the dramatic changes in the balance between private and public markets that have occurred since the 1990s, it is past time for the Commission to examine the overall impact of these changes and whether a rebalancing needs to take place. Since the Commission currently lacks the data necessary for such an analysis, collecting and analyzing that data and putting that analysis out for public comment should be its first priority. It would be irresponsible to move forward on specific proposals before taking these actions.

Thank you for the opportunity to comment on this Release. If you have questions, please contact Marcus Stanley, AFR's Policy Director, at 202-466-3672 or marcus@ourfinancialsecurity.org, or Heather Slavkin Corzo, AFL-CIO's Director of Capital Markets Policy, at 202-486-2967 or hslavkin@aflcio.org.

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