June 1, 2020

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

RE: Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets [Release Nos. 33–10763; 34–88321; File No. S7–05–20 RIN 3235–AM27]

To Whom It May Concern:

The Americans for Financial Reform Education Fund (AFREF) appreciates the opportunity to comment on the above referenced proposed rule (the "Proposal") by the Securities and Exchange Commission (the "SEC" or the "Commission") concerning rules for fundraising in private markets. Members of the AFR Education Fund coalition include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.[1]

In September, 2019, AFREF and the AFL-CIO commented on the Commission's concept release concerning securities offering exemptions.[2] At that time, we pointed out the many dangers posed to investors and the public by the rapid expansion in the size of opaque private markets as compared to public markets that require disclosure and transparency and foster liquidity. We also pointed out that the rapid and unprecedented expansion in private capital markets and the reduction in the number of public companies over the past two decades poses fundamental risks to the New Deal framework of securities laws that the SEC was created to implement. We urged the Commission to undertake a full and careful study of private markets, including the costs and risks of private market expansion, which was not properly examined in the Concept Release.

Our concerns were shared by many other commenters who also urged the Commission to better and more carefully examine the costs of private market expansion before moving ahead with rulemakings. These commenters included the North American Association of Securities Administrators (NAASA), the Consumer Federation of America, the Healthy Markets

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

[2] Americans for Financial Reform Education Fund and AFL-CIO, "Comment on Concept Release on Harmonization of Securities Offering Exemptions", September 30, 2019, available at https://www.sec.gov/comments/s7-08-19/s70819-6233332-192690.pdf

Association, Better Markets, the California Attorney General, the Council of Institutional Investors, numerous highly qualified academics in the field of securities law, and others.[3]

Unfortunately, the Commission has not heeded this advice. Instead, it has chosen to move forward with this Proposal, which contains numerous ill-considered measures to further deregulate markets for private fundraising. These measures are not supported by a careful and fully researched analysis of the potential costs of expanding the private markets, but instead by an inadequate cost-benefit analysis in which SEC staff freely admit that they lack reliable data on such critical elements as the true returns of private market investments and the impact of deregulating private market investments on the use of public markets.

This Proposal includes a long list of measures that would dramatically expand the ability of companies to raise large amounts of money from the public without a registered offering and the associated disclosures and governance requirements. These include:

- Greatly weakening the integration doctrine by permitting issuers to conduct multiple exempt offerings regardless of whether such offerings are part of a single plan of financing, so long as each offering qualifies for an exemption from 1933 Act registration requirements and is separated by at least 30 days. Rather than preventing evasion of registration requirements as is done under the current facts and circumstances enforcement of the integration doctrine with a six months waiting period, this new version of integration doctrine defines a mechanism by which issuers could easily avoid registration requirements by dividing large financings into multiple smaller exempt offerings separated by only a brief period of time.

- Expanding the ways in which issuers can communicate with the public to effectively market potential "private" offerings, for example by permitting communication around so-called "demo days" to be exempted from general solicitation limits and allowing or greatly expanding permissible "testing the waters" communications for all exempt offerings. In cases where general solicitation is currently allowed for accredited investors, such as 506(c) offerings, this Proposal weakens verification requirements for accredited investor status, expanding issuers effective ability to incorporate retail investors into solicitations. These changes effectively allow general solicitation even to relatively unsophisticated retail investors for a far broader range of offerings.

- Rendering Section 12(g) of the Exchange Act, one of the only remaining mechanisms to push private companies into public markets, even less relevant by weakening its applicability in cases of crowdfunding. This is in addition to the previous statutory weakening of 12(g) requirements in the JOBS Act, which have clearly contributed to the expanding number of very large "unicorn" private companies.

- Directly expanding the offering and investment limits for a number of existing exemptions from '33 Act registration requirements, including Reg A, Reg CF (crowdfunding), and Rule 504. Especially combined with other forms of deregulation

[3] See comment file for Concept Release on Harmonization of Securities Offering Exemptions, Release Nos. 33-10649, 34-86129, IA-5256, IC-33512; File No. S7-08-19, Securities and Exchange Commission, available at https://www.sec.gov/comments/s7-08-19/s70819.htm

listed above, this will lead to private companies raising more money both collectively and individually from investors. It has been well documented that exemptions which would be expanded by this Proposal have been used to facilitate scams and other rip-offs of retail investors.

In combination, loosening all of these limits on private company fundraising will permit companies to greatly expand the total amount of capital they are able to raise without registering as a public company, and engage mass marketing (general solicitation) to retail investors for such fundraising. We agree with Commissioner Alison Herren Lee's statement that this Proposal would "erode significant distinctions between public and private markets", distinctions that are critically important for the protection of investors and the efficient functioning of the markets.[4]

The SEC's economic analysis refuses to come to grips with the potential negative effects of these changes; instead they are simply denied. While the economic analysis goes on for dozens of pages, the flavor of repeated assertion can be seen in the "Broad Economic Analysis" that introduces it. For example, the negative effects of the reduction in public market registration is addressed on CFR 18003 as follows:

> "For instance, some commenters expressed concern that facilitating capital raising through exempt offerings might incrementally contribute to the ongoing decline in U.S. registered offerings, which might limit the overall set of investment opportunities available to nonaccredited investors and decrease the aggregate amount of information available to investors. Even if that were the case, expanded access to capital allowing issuers to meet their financing needs at a lower cost would enhance the efficiency of capital allocation to growth opportunities, with the resulting benefits for economic growth, competition, and capital markets as a whole."

This initial claim about enhanced efficiency is unsupported. The reduction in transparency in capital markets created by increased use of private markets could lead to significant misallocation and misdirection of capital, as investors will have less information available to make capital allocation decisions. This could easily reduce the economic growth benefits of capital markets.

The economic analysis continues by simply asserting that deregulating private offerings will not lead to substitution from public to private markets:

> "Importantly, we do not expect the proposed amendments to deter a significant proportion of the issuers that are large and mature enough to be on the cusp of going public from pursuing a public offering. Such issuers likely already have a developed network of angel investors and/or backing from venture capitalists on which they can rely to raise the necessary amount of financing today. Thus, such issuers' decision to go public is likely driven more by the benefits of being a public reporting company (relative to the cost of being public). Rather, we believe that the amendments might have the most significant effects on smaller growth issuers that presently lack sufficient access to financing that they require to develop their business model and gain scale."

[4] Alison Herren Lee, "Statement on Proposed Amendments to the Exempt Offering Framework", March 4, 2020.

The entire concern with deregulating private offering mechanisms is that it will increase the effective size at which companies reach "the cusp of becoming public". By lowering the costs of raising private funds relative to going public, the deregulatory elements of this Proposal will shift the supply curve for private fundraising downward, leading to companies expanding to a larger size before it makes sense to go public for fundraising purposes. It is unclear whether this analysis is claiming that there is some fixed level of size that leads companies to go public regardless of fundraising costs, or that companies go public not due to any need to raise funds, but due to unspecified other benefits of becoming a public firm. Both claims seem unlikely.

Such assertions are littered throughout the economic analysis. For example, the risks to non-accredited investors of greater solicitation for of opaque private offerings is simply dismissed because such investors already have access to investments that "involve a high level of risk or require extensive due diligence, both as part of the securities market….and holdings of registered nontraded securities, including REITs and structured notes)" (CFR 18006). In this way, the SEC's failure to provide effective regulatory protections in other parts of the securities markets is turned into a justification for deregulation in the private offering markets. The discussion of returns in private markets admits that comprehensive information on private market returns is lacking and simply lists a large number of academic resources (e.g. in footnote 372), without summarizing and analyzing the evidence in order to determine what it indicates about the costs or benefits of private market investment accessibility for retail investors.

In our view, this Proposal would greatly weaken private offering rules in ways that would discourage public market offerings and the associated disclosure and governance protections. This would make overall capital markets more opaque, less accountable, and less likely to lead to efficient capital allocation decisions. Especially when combined with the liberalized rules for general solicitation also included in the Proposal, it would lead to significant additional risks for ordinary investors. These changes are not properly justified through economic evidence. We urge the Commission to reject these changes. Any effort to rationalize private offering rules should proceed in a way that is much more measured, clearly supported by evidence on both the costs and benefits of encouraging additional private offerings, and less likely to contribute to the ongoing decline in public offerings.

Thank you for your attention to this comment. Should you have questions, please contact Marcus Stanley, AFREF's Policy Director, at 202-674-9885 or marcus@ourfinancialsecurity.org.

Sincerely,

Americans for Financial Reform Education Fund