

Via Email

May 28, 2020

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

***Re: File Number S7-05-20***

Dear Madam Secretary:

The Council of Institutional Investors (CII), appreciates the opportunity to provide comments to the United States (U.S.) Securities and Exchange Commission (SEC or Commission) in response to the “Proposed rule on Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets (Release).<sup>1</sup> CII generally does not support the provisions of the Release.

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.<sup>2</sup>

### **Exempt Offering Framework and Public Capital Markets**

CII believes anyone who has familiarity with the U.S. exempt offering framework or has otherwise read the Release would likely agree with the Commission that the “current exempt offering framework is complex and made up of differing requirements and conditions, which may be confusing and difficult” to understand.<sup>3</sup> The issue for CII, is not whether existing exempt

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<sup>1</sup> Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Proposed Rule, Securities Act Release No. 10,763, Exchange Act Release No. 88,321, 85 Fed. Reg. 17,956 (Mar. 31, 2020), <https://www.federalregister.gov/documents/2020/03/31/2020-04799/facilitating-capital-formation-and-expanding-investment-opportunities-by-improving-access-to-capital>.

<sup>2</sup> For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

<sup>3</sup> See, e.g., 85 Fed. Reg. at 17,957.

offering framework should be improved, but whether the Release’s proposed revisions to the framework would benefit long-term investors.

CII generally agrees with the Commission’s current strategic plan that explicitly supports expanding “the number of companies that are SEC-registered and exchange-listed.”<sup>4</sup> We note that key factors in the decline of SEC-registered over the last 20 years has been “regulatory changes and the growth of private asset classes . . . .”<sup>5</sup> More specifically, we generally share the following views expressed in a September 2019 comment letter submitted by more than a dozen prominent securities regulation professors:

The remarkable growth in private capital has come at least in part at the expense of the public markets. The number of public companies has fallen significantly over the last 20 years, and private capital-raising now outpaces public capital-raising by a substantial factor. . . . [T]he deregulation of private capital by Congress and the SEC over the last few decades—including the expansion of transaction exemptions—has clearly played a large role, by allowing even very large firms to delay or avoid going public. The private and public markets are to some degree substitutes for one another, in terms of their ability to attract issuers and investors, and regulators should be aware of the tradeoffs involved in expanding private capital.

Without question, the private markets play a significant and important role in financing U.S. businesses. Yet *rather than continuing to expand exemptions from securities registration*, we should pause to ask whether doing so undermines the public markets that have served retail and institutional investors so well. . . . [W]e all agree that the private markets cannot replicate what the public markets have achieved solely through private ordering. There are significant collective action problems and agency costs in corporate finance that hinder price discovery, liquidity, and information quality in the absence of regulation. *Therefore, we believe that robust public markets are crucial to continued economic growth in the United States.*<sup>6</sup>

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<sup>4</sup> U.S. Securities and Exchange Commission, Strategic Plan 2018-2022 (modified Mar. 19, 2019), <https://www.sec.gov/strategic-plan>.

<sup>5</sup> Frank Benham & Robert Obregon, Commentary: The decreasing number of public companies— an elephant in the markets?, P&I, Jul. 12, 2019, <https://www.pionline.com/industry-voices/commentary-decreasing-number-public-companies-elephant-markets>.

<sup>6</sup> Letter from to Elisabeth D. de Fontenay et al. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, 1-2 (Sept. 24, 2019), *available at* <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1010&context=research-data> (emphasis added); *see* Commissioner Allison Herren Lee, Public Statement, Statement on Proposed Amendments to the Exempt Offering Framework (Mar. 4, 2020), <https://www.sec.gov/news/public-statement/lee-statement-proposed-amendments-exempt-offering-framework> (“What’s more, we fail in both contexts to adequately address a significant factor in the decline of the public markets – the growing availability of increasingly unrestricted private offerings”); *see also* Letter from Andy Green, Managing Director of Economic Policy at the Center for American Progress et al. to Securities and Exchange Commission Chairman Jay Clayton (May 26, 2020) (“the Commission should: [ ]Reduce—not expand—exemptions to public offering rules to ensure capital is allocated in brightly lit U.S. public markets”), *available at* <https://sites.duke.edu/thefinregblog/2020/05/26/letter-to-sec-on-corporate-transparency-and-accountability-and-the-coronavirus-pandemic/>.

In conflict with the views of the securities regulation professors and the own SEC's strategic plan, the Release's provisions would generally expand the existing exempt offering framework. As summarized in the economic analysis the provisions of the Release include:

- Proposed changes to *increase* investment limits for non-accredited investors in Regulation Crowdfunding offerings;
- Provisions *expanding* integration safe harbors for Rule 506 offerings, potentially enabling more frequent offerings involving non-accredited investors; and
- Provisions that . . . [*increase* the offering limits for] Rule 504, Regulation A, and Regulation Crowdfunding, [and expand] . . . the eligibility of crowdfunding vehicles under Regulation Crowdfunding . . . .<sup>7</sup>

We generally agree with Commissioner Allison Herren Lee that those provisions “do[] not reflect a balanced approach to revising the exempt offering framework.”<sup>8</sup>

### **Economic Analysis is Incomplete**

We believe Release's economic analysis is incomplete because it fails to adequately consider the potential costs of the proposed revisions to long-term investors.

We note that while the Release's economic analysis exceeds 30 pages in length,<sup>9</sup> it devotes only a single paragraph to the critical issue of the potential impact on long-term investors and the capital markets from expanding the exempt offering framework.<sup>10</sup> Moreover, that one paragraph makes the following qualified conclusionary statement without explicitly referencing any supporting evidence: “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.”<sup>11</sup>

While we do not disagree with the statement that provisions of the Release would not be expected to “deter a significant portion” of issuers from pursuing a public offering, we believe,

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<sup>7</sup> 85 Fed. Reg. at 18,004 (emphasis added); *see, e.g.*, Commissioner Allison Herren Lee, Public Statement, Statement on Proposed Amendments to the Exempt Offering (“Among other things, today's proposal would: []raise the offering limits for three different exempt offerings; []remove statutorily imposed investment limitations for certain investors; []shorten the integration safe harbor period from six months to 30 days, thus effectively collapsing different exemptions to the lowest common denominator for investor protection; []reduce the disclosure required for non-accredited investors under Regulation D; []expand the use of test-the-waters communications across all exempt offerings and for all types of investors; []expand the use of general solicitation overall; and, []weaken requirements for establishing whether an investor is accredited to little more than self-certification”).

<sup>8</sup> Commissioner Allison Herren Lee, Public Statement, Statement on Proposed Amendments to the Exempt Offering.

<sup>9</sup> *See* 85 Fed. Reg. at 18,003-34.

<sup>10</sup> *Id.* at 18,005; *see, e.g.*, Commissioner Allison Herren Lee, Public Statement, Statement on Proposed Amendments to the Exempt Offering Framework (“Without conducting a thorough analysis of how . . . [public and private] markets do and should interrelate, we put investors at risk, both by diminishing incentives for issuers to engage in public offerings—with all the benefits to investors such offerings entail—and by weakening the traditional investor protections in both markets.”).

<sup>11</sup> 85 Fed. Reg. at 18,005.

consistent with the views of the securities regulation professors, that the provisions of the Release would be expected to contribute to a lower (rather than higher) number of SEC-registered companies. The Release's economic analysis does not, in our view, sufficiently consider the potential costs to long-term investors of this more likely result.

### **Regulation A Exemption Should Not Be Expanded**

In previous comment letters CII has respectfully requested that the Commission (1) analyze the costs of investors of the problems that Nasdaq had observed with companies conducting Regulation A offerings;<sup>12</sup> and (2) not take any action to expand the Regulation A exemption without compelling evidence that such a change would benefit long-term investors and the capital markets.<sup>13</sup> We note that as a result of requirements contained in the 2015 Regulation A Release<sup>14</sup> and the Jumpstart Our Business Startups Act 2012,<sup>15</sup> the SEC staff recently conducted a lookback and offering review of the Regulation A market (Staff Report).<sup>16</sup>

We are pleased that the Staff Report included our requested review of the problems that the Nasdaq had observed with companies conducting Regulation A offerings.<sup>17</sup> On this issue, the Staff Report states:

Recently, some concerns have emerged regarding Regulation A issuers that obtained an exchange listing. Nasdaq has amended listing eligibility requirements

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<sup>12</sup> See, e.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Secretary, Securities and Exchange Commission 3 (May 2, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/May%202019%20SEC%20Letter%20on%20Nasdaq%20Regulation%20A%20Listing%20Proposal%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/May%202019%20SEC%20Letter%20on%20Nasdaq%20Regulation%20A%20Listing%20Proposal%20(final).pdf) (“More broadly, we would respectfully request that the Commission perform their own detailed analysis of the costs to investors resulting from companies that have opted into the limited accounting and disclosure requirements of Regulation A [and] [t]hat analysis should then be explicitly discussed and carefully considered in any future SEC or exchange rulemaking that permits less burdensome accounting and disclosure standards for some, or all, SEC registrants.”).

<sup>13</sup> Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission 8 (Oct. 3, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/October%203%202019%20Comment%20Letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/October%203%202019%20Comment%20Letter.pdf) (“At a minimum, CII believes the Commission should not take any action to broaden or expand the Regulation A+ exemption without compelling evidence that such a change would benefit long-term investors and the capital markets”).

<sup>14</sup> Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Securities Act Release No. 9,741, 80 Fed. Reg. 21,805, 21,809 (Apr. 20, 2015), <https://www.federalregister.gov/documents/2015/04/20/2015-07305/amendments-for-small-and-additional-issues-exemptions-under-the-securities-act-regulation-a> (“The staff . . . will undertake to study and submit a report to the Commission no later than 5 years following the adoption of the amendments to Regulation A, on the impact of both the Tier 1 and Tier 2 offerings on capital formation and investor protection.”).

<sup>15</sup> Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 401(a), 126 Stat. 306 (Apr. 5, 2012), <https://www.govinfo.gov/content/pkg/PLAW-112publ106/pdf/PLAW-112publ106.pdf> (“Not later than 2 years after the date of enactment of the Small Company Capital Formation Act of 2011 and every 2 years thereafter, the Commission shall review the offering amount limitation described in paragraph (2)(A) and shall increase such amount as the Commission determines appropriate.”).

<sup>16</sup> See Staff of the U.S. Securities and Exchange Commission, Report to the Commission, Regulation A Lookback Study and Offering Limit Review Analysis 4 (Mar. 4, 2020), <https://www.sec.gov/files/regulationa-2020.pdf> (“Staff has conducted a lookback review of Regulation A as specified in the 2015 Regulation A Release and an offering limit review as required under the JOBS Act.”).

<sup>17</sup> *Id.* at 23.

for Regulation A companies seeking a Nasdaq listing to require issuers to have a minimum operating history of two years at the time of approval of its initial listing application. Nasdaq stated in its proposal that “it has observed problems with certain companies listing on the Exchange in connection with an offering under Regulation A” and also noted, among other things, that “Regulation A offering statements have lighter disclosure requirements as compared to a traditional initial public offering on Form S-1.”<sup>18</sup>

The Staff Report contains three observations presumably related to the Regulation A offering problems identified by Nasdaq: (1) some Regulation A issuers have restated their financial statements or have not filed or timely filed their periodic reports, but the SEC staff “lack the data to systematically assess the potential effects of these factors . . . .”<sup>19</sup> (2) some Regulation A issuers have involved lines of business, such as real estate, “that may be associated with higher risk”;<sup>20</sup> and (3) Regulation A issuers with a higher risk profile could have “relied on other exemptions from registration or a registered offering.”<sup>21</sup> While we find these observations somewhat helpful in perhaps better understanding the problems the Nasdaq may have observed with Regulation A issuers, they do not, in our view, provide a basis for revisions expanding the Regulation A exemption as proposed in the Release.

More broadly, we believe it is revealing that the Staff Report describes *only one* potential change to Regulation A that “would benefit investors.”<sup>22</sup> That modest change would amend the eligibility criteria of Regulation A to make them more (rather than less) restrictive for certain registrants that are delinquent in their SEC filings. The Staff Report explains:

The Commission could amend the eligibility restrictions of Regulation A with respect to Exchange Act filers such that a delinquent Exchange Act filer would be ineligible to rely on the exemption. Such a change would hold Exchange Act reporting company issuers to the same standard as repeat Regulation A issuers. *This requirement would benefit investors by ensuring that they have access to historical financial and non-financial statement disclosure about Exchange Act reporting companies that are conducting Regulation A offerings and may facilitate the development of an efficient secondary market for the securities they purchase in Regulation A offerings.* Furthermore, because they are already required to file such reports, such a requirement would not increase the burden of making a Regulation A offering for Exchange Act reporting companies or companies that were Exchange Act reporting companies within the two years prior to making a Regulation A offering.<sup>23</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 24.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 26.

<sup>23</sup> *Id.* (emphasis added).

For the reasons described in the Staff Report, CII supports the provisions of the Release that propose this change to the Regulation A eligibility criteria.<sup>24</sup>

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If you have any questions regarding this letter or need additional information, please do not hesitate to contact me at 202.822.0800 or [jeff@cii.org](mailto:jeff@cii.org).

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeffrey P. Mahoney  
General Counsel

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<sup>24</sup> See, e.g., 85 Fed. Reg. at 18,001 (“As proposed, companies that do not file all the reports required to have been filed by Sections 13 or 15(d) of the Exchange Act in the two-year period preceding the filing of an offering statement would be ineligible to conduct a Regulation A offering.”).