

January 21, 2021

The President
The White House
1600 Pennsylvania Avenue, Northwest
Washington, D.C. 20500

Dear President Biden:

As the Biden-Harris Administration prepares to request critical economic stimulus legislation from Congress, we write to express our firm conviction that the legislation in question must not include any amendments to weaken the federal securities laws or exempt companies from those laws. We raise this issue now, because some in Congress have suggested that further measures to roll back our securities laws should be part of any upcoming economic stimulus bill. While the undersigned individuals and organizations may hold differing views on the appropriate regulation of public companies and the public markets, we all strongly agree that further expanding the use of exempt offerings is unlikely to spur economically beneficial capital formation for investors or businesses. On the contrary, further expanding the pool of securities exempt from the disclosure and investor protections afforded by the federal securities laws has the potential to damage the economic recovery, including by increasing the probability of fraud and hindering the efficient allocation of capital.

As you know, the securities laws are intended to promote market efficiency by ensuring investors have essential information about companies so that they make informed investment decisions. Congress and the Securities and Exchange Commission (SEC) have repeatedly affirmed that access to this information is essential to promoting a fair and efficient marketplace, as well as protecting investors.

As a preliminary matter, Congress and the Administration should promote corporate accountability, not reduce it. Expanding exemptions from securities laws or regulations reduces the information available to investors and the public, while also diminishing rights for investors. Furthermore, there is little, if any, evidence to support the premise that businesses, of any size, are unduly hindered by the securities laws in their ability to access the investment capital they require to continue to grow.¹ On the contrary, more capital has been raised in recent years than ever before, and investors have been flooding companies with capital, pushing valuations in both the public and private markets to unprecedented levels.²

¹ See Proposed Revision of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, Release No. 33-6339; File No. S7-891, Federal Register, Vol. 46, No. 159 (August 18, 1981) at 48.

² Written Testimony of Elisabeth de Fontenay, Professor of Law at Duke University, Before the U.S House of Representatives, Committee on Financial Services, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, 116th Cong. (September 11, 2019), available at <https://financialservices.house.gov/uploadedfiles/hrg-116-ba16-wstate-defontenave-20190911.pdf>.

Congress and the SEC acted repeatedly over the past two decades to expand the number and scope of securities registration exemptions. As a result, today there are more securities registration exemptions available to companies than at any other time in history, and many of them are arguably intended to appeal primarily to emerging businesses or smaller-sized issuers.³ Indeed, from the numerous new private offering exemptions established by the JOBS Act of 2012, to the expansion of the accredited investor definition,⁴ to sweeping SEC rules adopted in 2020 to liberalize the exempt offering framework,⁵ to state crowdfunding statutes and exemptions,⁶ there have *never* been more viable avenues for raising investment capital available to U.S. businesses, especially in the private markets. In fact, an estimated 70 percent of capital raised in 2019 was exempt from the SEC’s regulatory framework.⁷ Many of these involve few, if any, disclosure requirements needed to enable investors to make informed decisions about how to allocate their capital.

Previous Congresses and Administrations have enacted policies designed to expand the methods by which companies can raise money outside the registration requirements of the federal securities laws. Unfortunately, there has not been, contemporaneous with the expansion of the unregulated marketplace, efforts to provide additional information by which regulators can monitor/oversee these markets. Moreover, the premise that relaxation of the securities laws will encourage investment in small and emerging companies has time-and-again proven incorrect.⁸ Ironically, we can only speculate about why, because the lack of data regarding the private markets means we have no idea how investors fare in the private markets, and neither does Congress.⁹

Further, it appears that many “mom and pop” investors are not all that interested in the private or quasi-private deals that the JOBS Act made available to them.¹⁰ It also seems evident that

³ See The Statement from SEC Commissioner Allison Herren Lee on Amendments to the Exempt Offering Framework (November 7, 2020), available at <https://www.sec.gov/news/public-statement/lee-harmonization-2020-11-02>.

⁴ For instance, it resulted in a 550% increase in households qualifying as accredited since 1983. (See Amending the Accredited Investor Definition, Final Rule, Rel. No. 33-10824, 143 (August 26, 2020).)

⁵ On November 2, 2020, the SEC voted to adopt a series of major changes to the exempt offering framework. (See <https://www.sec.gov/news/press-release/2020-273>.)

⁶ For additional information about intrastate crowdfunding, See <https://www.nasaa.org/industry-resources/securities-issuers/intrastate-crowdfunding-resources/>.

⁷ See <https://www.sec.gov/rules/proposed/2020/33-10763.pdf>.

⁸ See Written Testimony of Tyler Gellasch, Executive Director of the Healthy Markets Association, Before the U.S House of Representatives, Committee on Financial Services, Subcommittee on Capital Markets, Securities and Investment, 115th Cong. (May 23, 2018), available at <https://healthymarkets.org/wp-content/uploads/2018/06/05-23-18-HM-letter-Fuel-Capital-Growth.pdf>.

⁹ As Ohio Securities Commissioner Andrea Seidt noted in a recent meeting of the SEC Investor Advisory Committee, “The best ‘data’ we have now is the VC adage that 9 out of 10 private deals go bust. If that’s even close to true, it doesn’t bode well for mom and pop. Assuming they stumble upon a good deal, they will have to compete with accredited and institutional investors to get in and get a fair shake.” (See Meeting of the SEC Investor Advisory Committee (November 7, 2019), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac110719-agenda.htm>.)

¹⁰ One reason is simply financial capacity: Only a small percentage of non-accredited investors have the means to invest in these deals. As the SEC Investor Advocate Rick Fleming pointed out in his preliminary comment to the file, half of American households have less than \$10,000 in savings. That’s not enough to buy a single share of most private company stock. (See Letter from SEC Investor Advocate Rick Fleming to Vanessa Countryman, *Re: Concept Release on Harmonization of Securities*

as registration exemptions continue to evolve to become more attractive to issuers, many well-established companies understandably take advantage of the lack of mandatory disclosure and fewer investor rights to remain private longer, sometimes to both the companies' and their investors' detriment.¹¹ For many companies that are able to raise significant sums in the unregulated private markets, and avoid complying with regulatory and investors' demands, there is little to no reason to go public at all.¹² Thus, the growth in private capital in recent years has come at the expense of the public markets, rather than as a way to help growing companies transition to the public markets.¹³

Instead of repeating the mistakes of the past and pursuing further deregulation of private or small-sized quasi-private securities offerings without evaluating the risks or benefits of these actions, your Administration should immediately place a "pause" on the further expansion and deregulation of the private offering marketplace. The Administration should use that pause to study the impact of the expansion of private offering exemptions on the protection of investors, the state of our public markets, and the health of the overall economy. In developing its policy response, your Administration should commit, from Day 1, to giving at least equal consideration and attention to the expectations and needs of retail investors who, because of the expansion of private markets, are increasingly directly exposed to the risks of these markets.

In summary, as you undertake critically important efforts to stimulate the economy, we urge you to actively oppose the inclusion of any provisions that would expand or codify any proposed or adopted securities registration exemptions, and instead focus on restoring market information and efficiency. Policymakers are in the early stages of a robust and ongoing debate about the appropriate balance between the public and the private securities marketplace. It would be a mistake to prejudge or short-circuit this overdue discussion by rushing it into any stimulus legislation.¹⁴ Further, any discussion of reforms to the private markets should occur concurrently with a discussion of how to

Offering Exemptions File No. S7-08-19 (July 11, 2019), available at <https://www.sec.gov/comments/s7-08-19/s70819-5800855-187067.pdf>.)

¹¹ @ThomasFarley (Thomas Farley). Former NYSE President explained that the "Experiment (sic) of high-growth companies staying private an extra five years was a failure. Uber and WeWork floundered in private markets in last few years and would have benefited from being public. ... Uber. Public markets would not have tolerated lighting a couple billion on fire in futile China effort. Bad behavior by management would have been dealt with quicker. Focus on unit economics would have happened years ago. ... WeWork. Wave pools. Kindergarten. Questionable accounting. Self-dealing. Poor unit economics. The public market would have squashed this on first earnings call." Twitter (September 22, 2019), available at <https://twitter.com/ThomasFarley/status/1175786943231254531>.

¹² Due in significant part to policy decisions by Congress and the SEC, issuers now have more options to raise money through private securities offerings than at any other time in our history. It's also easier for companies to avoid ongoing reporting obligations as a "public" company, meaning that these companies can stay private longer. In fact, whole new business models have been created to allow for, as one company calls it, "Private markets for the Public." (See Written Testimony of Michael Pieciak, NASAA Past-President and Vermont Commissioner of Financial Regulation, Before the U.S. House of Representatives, Committee on Financial Services, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, 116th Cong. (September 11, 2019) at 5, note 13 ("Investors that previously couldn't access late-stage private companies due to investment minimums can now invest in private growth companies"), available at <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-pieciakm-20190911.pdf>.)

¹³ See Elisabeth de Fontenay, et al., *Law Professor Comment Letter on Harmonization of Private Offering Rules* (September 24, 2019), available at <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1010&context=research-data>.

¹⁴ 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.

reinvigorate the public markets, which have for generations largely succeeded in protecting investors, promoting investor confidence, and attracting liquidity thanks to an array of legal rules that are absent or much weaker in private or exempt offerings.¹⁵

Thank you for your attention to our views.

Sincerely,



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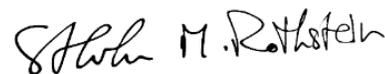
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¹⁵ See Law Professor Comment Letter on Harmonization of Private Offering Rules. Ibid.

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