

**Review of the “Accredited Investor” Definition under the Dodd-Frank Act**



This is a report by the staff of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings, or recommendations contained herein.

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## I. Introduction

### A. Overview

Section 413(b)(2)(A) of Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”),<sup>1</sup> requires the Securities and Exchange Commission (the “Commission” or the “SEC”) to undertake a review of the accredited investor definition, in its entirety, as it pertains to natural persons, at least once every four years to determine whether the requirements of the definition should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy. The Commission staff has previously conducted two such reviews, in 2015 and 2019. The first review, in 2015,<sup>2</sup> examined the background and history of the accredited investor definition and considered comments and recommendations from the public, the Commission’s Investor Advisory Committee (the “IAC”),<sup>3</sup> the Commission’s Advisory Committee on Small and Emerging Companies (the “ACSEC”),<sup>4</sup> and the 2014 SEC

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> See Report on the Review of the Definition of “Accredited Investor” (Dec. 18, 2015) (“2015 Staff Report”), available at <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>3</sup> The IAC was established in Apr. 2012 pursuant to Section 911 of the Dodd-Frank Act to advise and make recommendations to the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, and initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. See Recommendation of the IAC: Accredited Investor Definition (Oct. 9, 2014) (“2014 IAC Recommendations”), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-advisor-accredited-definition.pdf>. IAC recommendations related to the accredited investor definition since 2019 are discussed in Section III.

<sup>4</sup> The ACSEC was voluntarily established by the Commission in 2011 with a mandate to provide the Commission with advice on the Commission’s rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation as they relate to small privately held business and publicly traded companies with market caps of less than \$250 million. The ACSEC’s third two-year term expired September 24, 2017. See Final Report of the SEC ACSEC (Sept. 21, 2017), available at <https://www.sec.gov/info/smallbus/acsec/acsec-final-report-2017-09.pdf>. See ACSEC: Recommendations Regarding the Accredited Investor Definition (Mar. 9, 2015), available at <https://www.sec.gov/info/smallbus/acsec/acsec-accredited-investor-definition-recommendation-030415.pdf>. The ACSEC was succeeded by the SEC’s Small Business Capital Formation Advisory Committee (the “Small Business Advisory Committee”), which was established by the SEC Small Business Advocate Act of 2016, Pub. L. No. 114-284, 130 Stat. 1447 (2016). Small Business Advisory Committee recommendations related to the accredited investor definition since 2019 are discussed in Section III.

Government-Business Forum on Small Business Capital Formation.<sup>5</sup> The second Dodd-Frank Act-related review was completed in 2019 in conjunction with a concept release by the Commission that solicited public comment on possible ways to revise the exempt offering framework under the Securities Act of 1933 (the “Securities Act”).<sup>6</sup> Certain of the recommendations in, and feedback generated by, these prior reviews were reflected in the Commission’s 2020 amendments to the accredited investor definition.<sup>7</sup> The Commission further committed to continue to monitor the size of the accredited investor pool, the characteristics of individual accredited investors who participate in the private markets, and the appropriateness of the income and net worth thresholds, among other things.<sup>8</sup>

This review is focused on changes in the composition of the accredited investor pool since the definition was adopted; the extent to which accredited investors have the financial sophistication, ability to sustain the risk of loss of investment, and access to information that have traditionally been associated with an ability to fend for themselves; and accredited investor participation in the Regulation D<sup>9</sup> market and the market for exempt offerings more generally.

Section I.B. of this review provides background on the development of the exempt offering market, the evolution of the accredited investor definition, and the important interplay between the definition and the most common exempt offerings — offerings under Regulation D. Section I.C. summarizes the 2015 and 2019 reviews as well as the limitations on the staff’s

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<sup>5</sup> See Final Report of the 2014 SEC Government-Business Forum on Small Business Capital Formation (May 2015), available at <https://www.sec.gov/info/smallbus/gbfor33.pdf>.

<sup>6</sup> 15 U.S.C. 77a *et seq.* See Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33-10649 (June 18, 2019) [84 FR 30460 (June 26, 2019)] (“2019 Concept Release”).

<sup>7</sup> See Accredited Investor Definition, Release Nos. 33-10824; 34-89669 (Aug. 26, 2020) [85 FR 64234 (Oct. 9, 2020)] (“2020 AI Adopting Release”).

<sup>8</sup> See *id.*

<sup>9</sup> 17 CFR 230.500 *et seq.* (“Regulation D”).

ability to review the definition. Section II provides various estimates related to, and reviews certain characteristics of, the accredited investor pool. Section III reviews frequently suggested revisions to the accredited investor definition and the potential implications of such changes.

## **B. Background**

All offers and sales of securities must either be registered under the Securities Act or fall within an exemption from registration. The purpose of such registration is to provide “investors with full and fair disclosure of material information so that they are able to make their own informed investment and voting decisions.”<sup>10</sup> Congress, however, recognized that in certain situations the need for registration is lessened and may not be necessary.<sup>11</sup> Accordingly, the Securities Act contains a number of exemptions from the registration requirements that an issuer may rely upon to issue securities if the issuer can demonstrate that the conditions of the exemption are met.<sup>12</sup>

The scope of exempt offerings has evolved over time through Commission rules and legislative changes. As the regulatory and operational framework for exempt offerings has evolved, the amount of funds raised in the market for offerings that are exempt from registration (often referred to as the private markets) has increased both absolutely and relative to the public registered markets. While the exemptions from registration serve an important role in facilitating

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<sup>10</sup> See 2019 Concept Release at 30460.

<sup>11</sup> See H.R. Rep. No. 73-85 (1933) at 5.

<sup>12</sup> For example, Section 3 of the Securities Act generally identifies certain classes of securities that are exempt from the registration requirements of the Securities Act whereas Section 4 identifies a number of transactions that are exempt from the registration requirements. The Securities Act also authorizes the Commission to adopt additional exemptions from registration. Specifically, Section 3(b)(1) of the Securities Act authorizes the Commission to exempt certain issues of securities where the aggregate amount offered does not exceed \$5 million to the extent that “the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering.” Additionally, Section 28 of the Securities Act authorizes the Commission to exempt other persons, securities, or transactions to the extent “necessary or appropriate in the public interest [and] consistent with the protection of investors.”

capital formation and may offer attractive investment opportunities, investors in the private market are subject to risks not associated with registered offerings. For example, although some issuers provide certain disclosures in private placement memoranda or similar disclosure documents in many offerings,<sup>13</sup> issuers in the private markets generally are not required to provide information comparable to that included in a registration statement. This potential lack of information may make it more difficult for investors, their advisors, or other intermediaries to accurately value these investments or to assess and mitigate the risk of a loss.<sup>14</sup> We are therefore mindful of the critical need for investor protection in the private securities marketplace, especially given the expansion of the private securities marketplace discussed in more detail in Section II.C.<sup>15</sup>

The current exemptions from registration impose a variety of conditions designed to protect investors, including both initial investors and those purchasing securities in the secondary market. For example, some offerings are exempt if sales are limited only to accredited investors<sup>16</sup> while other exemptions require disclosures that must be either included in prescribed

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<sup>13</sup> See notes 139 and 140 and accompanying text. The Commission generally lacks information about the actual frequency, type, quality, and extent of such disclosure and how bargaining power dynamics impact such disclosures across various investors. *See id.*

<sup>14</sup> Within the market for private company securities, this risk is particularly acute in the case of small businesses and new operating companies. *See* George S. Georgiev, *The Breakdown of the Public-Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J.L. & Bus. 221 (2021), at 110, (stating that “... most new companies have little or no record of profitability, their valuations are based largely on speculation about their future performance.”). *See also* U.S. Small Business Administration Office of Advocacy Frequently Asked Questions About Small Business (Mar. 2023) (stating that small businesses, which they define as businesses with less than 500 employees, constitute 99.9% of business within the U.S. and that from 1994 through 2020, an average of 67.7%, 48.9% and 33.7% of new businesses survived for at least two years, five years, and ten years, respectively, during that period), *available at* <https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf>.

<sup>15</sup> *See, e.g.*, NASAA 2021 Enforcement Report, NASAA, at 9, (stating “[a]lthough legitimate businesses may rely on private offering exemptions to lawfully raise capital, illegitimate issuers continue to exploit the exemptions to defraud the general public.”), *available at* <https://www.nasaa.org/wp-content/uploads/2021/09/2021-Enforcement-Report-Based-on-2020-Data-FINAL.pdf>.

<sup>16</sup> *See, e.g.*, 17 CFR 230.506(c) (“Rule 506(c”).

forms to be filed with the Commission<sup>17</sup> or otherwise provided to all or a subset of prospective investors.<sup>18</sup> The terms and conditions applicable to an issuer’s reliance on an exemption from registration are often based on the type of investors participating in the offering.<sup>19</sup>

The U.S. Supreme Court has focused on the characteristics of the investors participating in a particular offering in the context of the exemption under Section 4(a)(2) of the Securities Act applicable to “transactions by an issuer not involving any public offering.”<sup>20</sup> In *SEC v. Ralston Purina Co.*,<sup>21</sup> the Supreme Court established the basic criteria for determining the availability of the exemption under Section 4(a)(2) by focusing the inquiry on whether the issuer claiming the exemption can ensure that the persons participating in the offering are able to fend for themselves and, accordingly, do not need the protections afforded by the registration requirements under the Securities Act because they “have access to the kind of information which registration would disclose.”<sup>22</sup> Subsequent cases have built upon *Ralston Purina*’s core principles by stating that the availability of the exemption under Section 4(a)(2) is conditioned “on either actual disclosure of the information registration would provide or the offerees’ effective access to such information. If the issuer has not disclosed but instead relies on the offerees’ access to information, the privileged status of the offerees relative to the issuer must be shown.”<sup>23</sup>

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<sup>17</sup> See, e.g., 17 CFR 227.100 *et seq.* (“Regulation Crowdfunding”); and 17 CFR 230.251 *et seq.* (“Regulation A”).

<sup>18</sup> See, e.g., 17 CFR 230.506(b) (“Rule 506(b)”), which requires disclosures under 17 CFR 230.502(b) (“Rule 502(b)”) to be provided to non-accredited investors prior to the sale of securities.

<sup>19</sup> See 2019 Concept Release at 30461.

<sup>20</sup> Securities Act Section 4(a)(2) [15 U.S.C. 77d(a)(2)].

<sup>21</sup> *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

<sup>22</sup> *Id.* at 127.

<sup>23</sup> See *Doran v. Petroleum Management Corp.*, 545 F.2d 893 (5<sup>th</sup> Cir. 1977) at 909.

The emphasis on the characteristics of the investors participating in the offering has been incorporated into the current exempt offering framework as it has evolved over time. One of the most significant examples of this is found in the accredited investor definition in Regulation D.<sup>24</sup> Additionally, the accredited investor definition is used outside of Regulation D with the goal of balancing investor protection and capital formation objectives obtained in other federal and state securities laws.<sup>25</sup> Two recent examples include legislative changes through the Jumpstart Our Business Startups Act of 2012 (“JOBS Act”),<sup>26</sup> which provides an exception to the one-year prohibition on investors’ resales of securities purchased under Regulation Crowdfunding for resales to accredited investors<sup>27</sup> and the exclusion of accredited investors from the investment limitations set forth in Regulation Crowdfunding,<sup>28</sup> adopted in 2020 as part of the Commission’s rulemaking to amend the exempt offering framework.<sup>29</sup>

Regulation D, adopted in 1982, provides a number of exemptions from the Securities Act’s registration requirements, allowing certain issuers to offer and sell their securities without having to register the offering with the Commission. It was designed to facilitate capital

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<sup>24</sup> This emphasis on the investor characteristics can also be seen in Commission rulemaking prior to the adoption of Regulation D. For example, in 1974, the Commission adopted 17 CFR 230.146 (“Rule 146”) stating that the ability of an investor to fend for themselves also includes whether “the offeree can bear the economic risk of the investment.” *See* Transactions by an Issuer Deemed Not to Involve any Public Offering, Release No. 33-5487 (Apr. 23, 1974) [39 FR 15261 (May 2, 1974)] (“Rule 146 Adopting Release”) at 15262. This rule was rescinded when Regulation D was adopted.

<sup>25</sup> For example, the laws of several states have incorporated the Commission’s definition of accredited investor to determine whether other aspects of state law apply, such as whether or not an investment adviser is required to register with the state. Accordingly, the accredited investor definition is significant for determining numerous other rights and protections that the Commission does not directly control. *See, e.g.*, notes 76 through 93 and accompanying text.

<sup>26</sup> Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

<sup>27</sup> 17 CFR 227.501(a)(2).

<sup>28</sup> 17 CFR 227.100(a)(2).

<sup>29</sup> *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Market, Release Nos. 33-10884; 34-90300; IC-34082 (Nov. 2, 2020) [86 FR 3496 (Jan. 14, 2021)] (“2020 Harmonization Release”) at 3497.

formation by simplifying and clarifying existing exemptions for private or limited offerings, expanding their availability, and providing more uniformity between federal and state exemptions.<sup>30</sup> Regulation D is the most widely used set of exemptions for securities offerings by issuers.<sup>31</sup> Regulation D consists of three main operative provisions— Rule 504,<sup>32</sup> Rule 506(b)<sup>33</sup> and Rule 506(c)<sup>34</sup> – and includes the definition of “accredited investor” in Rule 501(a).<sup>35</sup>

The definition of “accredited investor” is a cornerstone of Regulation D, and also plays an important role in other federal and state securities law contexts, as discussed in detail below. The accredited investor definition provides that natural persons and entities that come within, or that the issuer reasonably believes come within, any of thirteen enumerated categories at the time of the sale of the securities is an accredited investor. As described in more detail below, in 2020, the Commission’s amendments to the definition expanded the categories to include natural

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<sup>30</sup> See Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales, Release No. 33–6389 (Mar. 8, 1982) [47 FR 11251 (Mar. 16, 1982)] (“1982 Adopting Release”). Former Rule 146 permitted exempt offers and sales only to persons the issuer reasonably believed had the requisite knowledge and experience in financial matters to evaluate the risks and merits of the prospective investment or who could bear the economic risks of the investment. See Rule 146 Adopting Release. Former 17 CFR 230.242 (“Rule 242”) introduced the accredited investor concept into the federal securities laws, providing an exemption to accredited persons, defined as a person purchasing \$100,000 or more of the issuer’s securities, a director or executive officer of the issuer, or an enumerated entity. See Exemption of Limited Offers and Sales by Qualified Issuers, Release No. 33–6180 (Jan. 17, 1980) [45 FR 6362 (Jan. 28, 1980)]. The Commission rescinded both Rule 146 and Rule 242 in 1982 in connection with the adoption of Regulation D.

<sup>31</sup> See Annual Report for Fiscal Year 2022: Office of the Advocate for Small Business Capital Formation, (“2022 OASB Annual Report”), at 13, available at <https://www.sec.gov/files/2022-oasb-annual-report.pdf>.

<sup>32</sup> 17 CFR 230.504 (“Rule 504”) provides an exemption from registration under the Securities Act for the offer and sale of up to \$10 million of securities in a 12-month period from an unlimited number of investors (without regard to whether those investors are accredited)

<sup>33</sup> Rule 506(b), which is a safe harbor under Section 4(a)(2), permits issuers to raise any amount from an unlimited number of accredited investors but limits the number of non-accredited investors to 35. The rule does not permit general solicitation and, where non-accredited investors purchase in the 506(b) offering, the information requirements in Rule 502(b) must be met. See 17 CFR 230.506(b)(2)(i) (“Rule 506(b)(2)(i)”), 17 CFR 230.506(b)(1) and Rule 502(b).

<sup>34</sup> Rule 506(c) permits issuers to raise any amount from an unlimited number of accredited investors. The exemption permits general solicitation, but issuers may not make any sales to non-accredited investors under Rule 506(c), and the issuer must take reasonable steps to verify that all purchasers are accredited.

<sup>35</sup> 17 CFR 230.501(a) (“Rule 501(a”).

persons holding in good standing certain professional certifications or designations, among other categories. Accordingly, natural persons may qualify as accredited investors based on any of the following criteria:

- Directors, executive officers, and general partners of the issuer or of a general partner of the issuer under Rule 501(a)(4);<sup>36</sup>
- Individuals who have a net worth exceeding \$1,000,000 (excluding the value of the individual’s primary residence), either alone or with their spouse or spousal equivalent under Rule 501(a)(5);<sup>37</sup>
- Individuals who had an income in excess of \$200,000 in each of the two most recent years, or joint income with the individual’s spouse or spousal equivalent in excess of \$300,000 in each of those years, and have a reasonable expectation of reaching the same income level in the current year under Rule 501(a)(6);<sup>38</sup>
- Individuals holding in good standing one or more professional certifications or designations or credentials from an accredited educational institution that the Commission has designated as qualifying an individual for accredited investor status under Rule 501(a)(10);<sup>39</sup>

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<sup>36</sup> 17 CFR 230.501(a)(4) (“Rule 501(a)(4”).

<sup>37</sup> 17 CFR 230.501(a)(5) (“Rule 501(a)(5”).

<sup>38</sup> 17 CFR 230.501(a)(6) (“Rule 501(a)(6”).

<sup>39</sup> 17 CFR 230.501(a)(10) (“Rule 501(a)(10”). In 2020, the Commission designated the following credentials as qualifying for accredited investor status: the General Securities Representative license (Series 7), the Private Securities Offerings Representative license (Series 82), and the Investment Adviser Representative license (Series 65). *See* Order Designating Certain Professional Licenses as Qualifying Natural Persons for Accredited Investor Status, Release No. 33–10823 (Aug. 26, 2020) [85 FR 64234 (Oct. 9, 2020)]. The Commission may designate additional professional certifications or designations or credentials it determines are appropriate. Also, the public may propose other professional certifications or designations or credentials, and such proposal must indicate how the particular certification, designation, or credential satisfies the nonexclusive list of attributes in Rule 501(a)(10), and may include other information the requestor believes is relevant to the Commission’s consideration of their proposal. *See* 2020 AI Adopting Release at 64243.

- Individuals who are “knowledgeable employees,” as defined in Rule 3c-5(a)(4)<sup>40</sup> under the Investment Company Act of 1940 (the “Investment Company Act”), of the private-fund<sup>41</sup> issuer of the securities being offered or sold under Rule 501(a)(11);<sup>42</sup> or
- Individuals who are “family clients,” under Rule 501(a)(13),<sup>43</sup> which cross references the definition in Rule 202(a)(11)(G)-1 of the Advisers Act,<sup>44</sup> of a “family office” meeting the requirements in Rule 501(a)(12).<sup>45</sup>

Institutions may qualify as accredited investors based on their status alone or on a combination of their status and the amount of their total assets or investments. Institutions that qualify based on status alone include:

- Banks; savings and loan associations; brokers or dealers registered pursuant to Section 15 of the Exchange Act; insurance companies; SEC- and state-registered investment advisers; small business investment companies; rural business investment companies; investment companies registered under the Investment Company Act; business development companies as defined in Section 2(a)(48) of the Investment Company Act; employee benefit plans (within the meaning of the Employee Retirement Income Security Act of 1974 (“ERISA”)<sup>46</sup>) if a bank, savings and loan association, insurance company, or registered investment adviser makes the investment decisions; or a self-directed plan,

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<sup>40</sup> 17 CFR 270.3c-5(a)(4).

<sup>41</sup> A private fund is an issuer that would be an investment company, as defined in Section 3 of the Investment Company Act, but for Sections 3(c)(1) or 3(c)(7) of that act. *See* Section 202(a)(29) [15 U.S.C. 80b-2(a)(29)] of the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 *et seq.*] (“Advisers Act”).

<sup>42</sup> 17 CFR Rule 230.501(a)(11) (“Rule 501(a)(11)”).

<sup>43</sup> 17 CFR Rule 230.501(a)(13) (“Rule 501(a)(13)”).

<sup>44</sup> 17 CFR 275.202(a)(11)(G)-1 (“Rule 202(a)(11)(G)-1”).

<sup>45</sup> 17 CFR 230.501(a)(12) (“Rule 501(a)(12)”).

<sup>46</sup> 29 U.S.C. 1001 *et seq.*

with investment decisions made solely by persons that are accredited investors under Rule 501(a)(1);<sup>47</sup>

- Private business development companies as defined in Section 202(a)(22) of the Advisers Act under Rule 501(a)(2);<sup>48</sup>
- Entities in which all of the equity owners are accredited investors under Rule 501(a)(8);<sup>49</sup> and
- Entities that are “family clients,” under Rule 501(a)(13), which cross references the definition in Rule 202(a)(11)(G)-1 of the Advisers Act of a “family office” meeting the requirements in Rule 501(a)(12).<sup>50</sup>

Institutions qualifying as accredited investors based on a combination of their status and the amount of their total assets or investments include:

- Plans established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000;<sup>51</sup>
- Employee benefit plans (within the meaning of ERISA) with total assets in excess of \$5,000,000;<sup>52</sup>

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<sup>47</sup> 17 CFR 230.501(a)(1) (“Rule 501(a)(1)”).

<sup>48</sup> 17 CFR 230.501(a)(2) (“Rule 501(a)(2)”).

<sup>49</sup> 17 CFR 230.501(a)(8) (“Rule 501(a)(8)”).

<sup>50</sup> Rule 501(a)(12) requires that the family office: (i) have assets under management in excess of \$5,000,000, (ii) is not formed for the specific purpose of acquiring the securities offered, and (iii) its prospective investment is directed by a person who has such knowledge and experience in financial and business matters that such family office is capable of evaluating the merits and risks of the prospective investment.

<sup>51</sup> Rule 501(a)(1).

<sup>52</sup> *Id.*

- Tax exempt charitable organizations, corporations, Massachusetts or similar business trusts, partnerships, or limited liability companies not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000 under (Rule 501(a)(3));<sup>53</sup>
- Trusts with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, the purchases of which are directed by a person who meets the legal standard of having sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment under Rule 501(a)(7);<sup>54</sup>
- Any entity, of a type not listed in Rules 501(a)(1), (2), (3), (7), or (8), not formed for the specific purpose of acquiring the securities offered, owning investments in excess of \$5,000,000 under Rule 501(a)(9);<sup>55</sup> and
- Entities that are “family offices,” under Rule 501(a)(12), which cross references the definition in Rule 202(a)(11)(G)-1 of the Advisers Act, meeting the requirements of Rule 501(a)(12).<sup>56</sup>

Historically, the Commission has stated that the accredited investor definition is “intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act’s registration process unnecessary.”<sup>57</sup> While the Commission has used a variety of ways to

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<sup>53</sup> 17 CFR 230.501(a)(3) (“Rule 501(a)(3)”).

<sup>54</sup> 17 CFR 230.501(a)(7) (“Rule 501(a)(7)”).

<sup>55</sup> 17 CFR 230.501(a)(9) (“Rule 501(a)(9)”).

<sup>56</sup> See note 50.

<sup>57</sup> Regulation D Revisions; Exemption for Certain Employee Benefit Plans, Release No. 33-6683 (Jan. 16, 1987) [52 FR 3015 (Jan. 30, 1987)] at 3017.

demonstrate such characteristics of an investor,<sup>58</sup> this standard is grounded in the basic principle set forth in *Ralston Purina*: the persons in a private offering must be shown to be able to fend for themselves, and moreover, “have access to the kind of information which registration would disclose.”<sup>59</sup>

The Commission has substantively amended the accredited investor definition four times since the adoption of Regulation D in 1982. In 1988, the Commission expanded the definition to include additional types of entities,<sup>60</sup> added the \$300,000 joint income test for natural persons, and eliminated a standard under which a person could qualify as an accredited investor based on the purchase of \$150,000 of the securities being offered when the purchase price did not exceed 20% of the person’s net worth.<sup>61</sup> In 1989, the Commission amended the definition to include plans established and maintained by state governments and their political subdivisions, as well as their agencies and instrumentalities, for the benefit of their employees if the plans have total assets in excess of \$5 million.<sup>62</sup> In 2011, to implement the requirements of Section 413(a) of the Dodd-Frank Act, the Commission amended the \$1,000,000 net worth standard for natural persons to exclude the value of the investor’s primary residence.<sup>63</sup>

Most recently, in 2020,<sup>64</sup> the Commission expanded the definition to include additional categories of natural persons and institutional investors. The amendments created additional

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<sup>58</sup> See 2020 AI Adopting Release at 64235.

<sup>59</sup> See *Ralston Purina Co.* at 127.

<sup>60</sup> The types of institutional investors added were savings and loan associations and other institutions specified in Section 3(a)(5)(A) of the Securities Act (including credit unions), broker-dealers, certain trusts, partnerships, and corporations. See Regulation D Revisions, Release No. 33–6758 (Mar. 3, 1988) [53 FR 7866 (Mar. 10, 1988)].

<sup>61</sup> *Id.*

<sup>62</sup> See Regulation D, Release No. 33–6825 (Mar. 15, 1989) [54 FR 11369 (Mar. 20, 1989)].

<sup>63</sup> See Net Worth Standard for Accredited Investors, Release Nos. 33–9287 IA–3341; IC–29891 (Dec. 21, 2011) [76 FR 81793 (Dec. 29, 2011)] (“2011 Net Worth Release”).

<sup>64</sup> 2020 AI Adopting Release.

categories under which natural persons could qualify as accredited investors irrespective of their income or net worth, including individuals holding certain Commission-designated credentials,<sup>65</sup> and certain knowledgeable employees of private funds.<sup>66</sup> The amendments also included SEC- and state-registered investment advisers<sup>67</sup> and rural business investment companies<sup>68</sup> in the definition, and also codified long-standing staff guidance by adding to the definition limited liability companies that have total assets in excess of \$5 million and were not formed for the specific purpose of acquiring the securities being offered.<sup>69</sup> The amendments also added certain family offices<sup>70</sup> and family clients,<sup>71</sup> and created a new “catch-all” category for certain entities owning investments in excess of \$5,000,000.<sup>72</sup>

The accredited investor definition is a central element of the Rule 506 exemptions. As discussed in more detail below,<sup>73</sup> whether an investor qualifies as “accredited” is important for evaluating the availability of each Rule 506 exemption. All investors in offerings conducted under Rule 506(c) must be accredited investors, and the issuer must take reasonable steps to verify such investors’ status as accredited.<sup>74</sup> Offerings conducted under Rule 506(b) may have an unlimited number of accredited investors but no more than 35 non-accredited investors.<sup>75</sup>

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<sup>65</sup> Rule 501(a)(10). *See* note 39.

<sup>66</sup> Rule 501(a)(11).

<sup>67</sup> Rule 501(a)(1).

<sup>68</sup> *Id.*

<sup>69</sup> Rule 501(a)(3).

<sup>70</sup> Rule 501(a)(12).

<sup>71</sup> Rule 501(a)(13).

<sup>72</sup> Rule 501(a)(9).

<sup>73</sup> *See* Section II.B.

<sup>74</sup> 17 CFR 230.506(c)(2)(i).

<sup>75</sup> Rule 506(b)(2)(i). Further, every non-accredited investor in a 506(b) offering must “either alone or with his purchaser representative(s) [have] such knowledge and experience in financial and business matters that he is

Further, the presence of accredited versus non-accredited investors in Regulation D offerings also has implications for the type of disclosures that issuers are required to provide, if any. For example, in Rule 506(c) offerings, which must include only accredited investors as purchasers, no disclosure is required by Regulation D. But in Rule 506(b) offerings, Rule 502(b) requires certain financial and non-financial disclosures to be provided to any non-accredited investor participating in the offering.

The accredited investor definition also plays an important role in other federal securities law contexts.<sup>76</sup> For example, both Regulation Crowdfunding<sup>77</sup> and Regulation A Tier 2 offerings<sup>78</sup> impose limits on the amounts that non-accredited investors can invest. There are no limits on the amount that a particular accredited investor may invest under Regulation A or Regulation Crowdfunding other than the limits in those regulations on the aggregate size of the offering. In addition, under Section 12(g) of the Exchange Act,<sup>79</sup> an issuer that is not a bank, bank holding company, or savings and loan holding company is

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capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.” 17 CFR 230.506(b)(2)(ii) (“Rule 506(b)(2)(ii)”).

<sup>76</sup> The accredited investor standard is similar to, but distinct from, other regulatory standards in Commission rules that are used to identify persons who are not in need of certain investor protection features of the federal securities laws. Each regulatory standard serves a different regulatory purpose, and, accordingly, an accredited investor will not necessarily meet these other standards and these other regulatory standards are not designed to capture the same investor characteristics as the accredited investor standard. For example, Section 3(c)(7) of the Investment Company Act exempts from the definition of investment company any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are “qualified purchasers,” and which is not making and does not at that time propose to make a public offering of securities.

<sup>77</sup> Regulation Crowdfunding limits the amount of securities non-accredited investors with either an annual income or net worth of less than \$124,000 can purchase to no more than the greater of \$2,500, or 5% of their annual income or net worth. *See* 17 CFR 227.100(a)(2)(i). Non-accredited investors with both an annual income and net worth equal to or greater than \$124,000 are limited to no more than 10% of the greater of their annual income or their net worth, capped at \$124,000. *See* 17 CFR 227.100(a)(2)(ii).

<sup>78</sup> Regulation A limits the amount of securities non-accredited investors can purchase in a Tier 2 offering to no more than 10% of the greater of their annual income or their net worth. *See* 17 CFR 230.251(d)(2)(i)(C).

<sup>79</sup> Exchange Act Section 12(g) [15 U.S.C. 78l(g)].

required to register a class of equity securities under the Exchange Act if it has more than \$10 million of total assets and the securities are “held of record” by either 2,000 persons, or 500 persons who are not accredited investors.<sup>80</sup> As a result, issuers seeking to rely on these thresholds must differentiate between record holders who are accredited investors and non-accredited investors.

The accredited investor definition also served as a model for an exemption under the Uniform Securities Act of 2002.<sup>81</sup> However, that Act contains a higher financial threshold for institutional accredited investors.<sup>82</sup> Specifically, it notes that “[g]iven the significant period of time since Rule 501(a) was adopted, [the Uniform Securities Act of 2002] has used a \$10 million minimum for several categories of institutional investor rather than \$5 million minimum used in Rule 501(a).”<sup>83</sup> As of November 2023, 20 states and the U.S. Virgin Islands have adopted the Uniform Securities Act of 2002.<sup>84</sup> In addition, some states use the accredited investor definition to determine whether investment advisers to certain private funds are required to be registered.<sup>85</sup> States also incorporate the definition in a variety of other contexts. For example, the definition is

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<sup>80</sup> *See id.*; *see also* Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, Release No. 33-10075 (May 3, 2016) [81 FR 28689 (May 10, 2016)], at 28693, (stating that “[u]nder amended Rule 12g-1, an issuer will need to determine, based on facts and circumstances, whether prior information provides a basis for a reasonable belief that the security holder continues to be an accredited investor as of the last day of the fiscal year.”).

<sup>81</sup> The Uniform Securities Act of 2002 is a model legislation designed to guide each state in drafting its state securities law. It was promulgated by the National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission). The Uniform Law Commission provides states with model legislation in areas of state statutory law when uniformity is desired and practicable. The Uniform Securities Act of 2002 is *available at* <https://www.uniformlaws.org/viewdocument/final-act-121?CommunityKey=8c3c2581-0fea-4e91-8a50-27eee58da1cf&tab=librarydocuments>.

<sup>82</sup> Uniform Securities Act of 2002 Sections 102(11)(F) through 102(11)(K), 102(11)(O), and 202(13).

<sup>83</sup> Uniform Securities Act of 2002 at 27.

<sup>84</sup> *See* Enactment History, *available at* <https://www.uniformlaws.org/committees/community-home?communitykey=8c3c2581-0fea-4e91-8a50-27eee58da1cf>.

<sup>85</sup> *See, e.g.*, Wis. Stat. 551.403; Ohio Admin. Code 1301:6-3-01.

used in government finance,<sup>86</sup> finance lending,<sup>87</sup> mortgage lending,<sup>88</sup> life insurance,<sup>89</sup> and financial institution regulation.<sup>90</sup>

Financial Industry Regulatory Authority (“FINRA”) Rule 5123 uses portions of the accredited investor definition<sup>91</sup> to provide an exemption from the general requirement that each member firm that sells an issuer’s securities in a private placement must file with FINRA a copy of any private placement memorandum, term sheet, or other offering document, and any retail communication<sup>92</sup> that the firm used to promote or recommend the private placement within 15 calendar days of the date of the sale, or indicate that it did not use any such offering documents.<sup>93</sup> In connection with adoption of the rule, FINRA expressly excluded natural persons

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<sup>86</sup> *See, e.g.*, Cal. Gov’t Code 64111.

<sup>87</sup> *See, e.g.*, Cal. Fin. Code 22064.

<sup>88</sup> *See, e.g.*, Fla. Stat. 494.001.

<sup>89</sup> *See, e.g.*, Fla. Stat. 626.99(4)(b)(2).

<sup>90</sup> *See, e.g.*, Conn. Gen. Stat. 36a-2.

<sup>91</sup> Accredited investors qualifying under the criteria set forth in Rule 501(a)(1), (2), (3), or (7), none of which apply to natural persons, are expressly exempted from the application of FINRA Rule 5123. The Commission release approving FINRA’s adoption of this rule stated the following rationale: “Several commenters requested additional exemptions from coverage under Rule 5123. [One commenter], for example, requested an exemption for all accredited investors. FINRA stated that it does not believe that the exemption should extend to offers to accredited investors under Rule 501(a)(4), (5), or (6) of Regulation D. In particular, FINRA stated that it believes that the criteria used to measure whether a person meets the accredited investor standard do not necessarily reflect a sufficiently high level of sophistication to justify exemption from the proposed rule.” Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendments No. 2 and No. 3 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendments No. 1, No. 2, and No. 3 to Adopt FINRA Rule 5123 (Private Placements of Securities) in the Consolidated FINRA Rulebook, Release No. 34-67157 (June 7, 2012) [77 FR 35457 (June 13, 2012)] at 35459.

<sup>92</sup> Effective Oct. 1, 2021, FINRA amended FINRA Rule 5123. As stated in the rule proposal, the intent of the amendment was to add any retail communications based on the “comparatively high rate of non-compliance of private placement retail communications, and the increased risk of investor harm associated with those communications.” *See* Exchange Act Release No. 90302; File No. SR-FINRA-2020-038 (Nov. 2, 2020) [85 FR 71120 (Nov. 6, 2020)] at 71122.

<sup>93</sup> FINRA Rule 5123(b)(1)(J).

that qualify as accredited investors based on the having the net worth<sup>94</sup> or income specified in the definition.<sup>95</sup>

### **C. Prior Dodd-Frank Act Reviews and Limitations**

As noted in Section I.A., the Dodd-Frank Act requires the Commission to undertake a review of the accredited investor definition, as it pertains to natural persons, at least once every four years to determine whether the requirements of the definition should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy. The Commission staff has previously conducted two such reviews, in 2015 and 2019, as summarized in more detail in Section I.A. We received significant comment on these prior staff reviews of the definition, as well as on the concept and proposing releases for the rule changes described above.<sup>96</sup>

As described above, the accredited investor definition plays a key role under the various exemptions from Securities Act registration in determining what information must be provided to investors, the aggregate number of investors that can participate in an offering, and the aggregate amounts that can be raised from such investors. In light of its significance to the exempt offering framework, our current review is focused on changes in the composition of the accredited investor pool since the definition was adopted; the extent to which accredited investors have the financial sophistication, ability to sustain the risk of loss of investment, and access to information

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<sup>94</sup> Rule 501(a)(5).

<sup>95</sup> Rule 501(a)(6).

<sup>96</sup> In connection with the 2020 amendments to the accredited investor definition, the Commission received over 200 unique comments, which varied in terms of whether the commenter supported the expansion of the accredited investor definition or opposed it. *See* 2020 AI Adopting Release at 64236. *See also* “Amending the “Accredited Investor” Definition, Release Nos. 33–10734; 34–87784 (Dec. 18, 2019) [85 FR 2574 (Jan. 15, 2020)] (“2020 AI Proposing Release”) and 2019 Concept Release at Section II.A., which includes a summary of the comments received after the 2015 review. The comments received on the 2020 AI Proposing Release are *available at* <https://www.sec.gov/comments/s7-25-19/s72519.htm>. The comments received on the 2019 Concept Release are *available at* <https://www.sec.gov/comments/s7-08-19/s70819.htm>.

that have traditionally been associated with an ability to fend for themselves; and accredited investor participation in the Regulation D market and the market for exempt offerings more generally.

These observations are based on the data available to the Commission, which, as we discuss in more detail in the remainder of this review, are limited by a number of factors. These factors include the lack of comprehensive data on the characteristics of the accredited investor pool and limited data regarding whether current market practices in Regulation D offerings are providing sufficient investor protection, such as access for investors to information that would permit informed investment decisions. In addition, we have limited information on the Regulation D market. The Commission’s primary source of information on the Regulation D market is the Form D, a form used by issuers to provide notice of an exempt offering of securities under Regulation D. While an issuer offering or selling securities without registration under the Securities Act in reliance on Rule 504 or 506 of Regulation D is required under Rule 503 to file a notice of sales on Form D with the Commission for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering, the failure to do so does not invalidate the exemption; as a result, some Regulation D issuers may fail to file a Form D.<sup>97</sup> Additionally, aside from a material mistake of fact or error in a previously filed Form D, specified enumerated changes to the offerings, or offerings that will exceed a year in duration,

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<sup>97</sup>17 CFR 230.503 (“Rule 503”). We note that, while failure to file Form D does not affect the availability of the exemption for an offering, it could have other consequences, including, under 17 CFR 230.507 (“Rule 507”), the potential loss of ability to rely upon Regulation D in the future. *See e.g.*, Kathleen Weiss Hanley and Qianqian Yu, *Strategic Regulatory Non-Disclosure: The Case of the Missing Form D*, (Feb. 18, 2023), at 10, (stating that their research suggests that “many issuers do not file with either state or federal regulators when conducting a private offering”), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4363027](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4363027); and Danny Crichton, *Okay, one final Form D note*, TechCrunch (Nov. 12, 2018), (stating “that startups are increasingly foregoing filing a Form D with the SEC that provides details of their venture rounds like investment size and main investors in order to stay stealth longer.”), available at <https://techcrunch.com/2018/11/12/okay-one-final-form-d-note/>.

issuers are not required to amend or update their Form D filings.<sup>98</sup> Among other things, to the extent any issuer does not file a Form D or amend its existing Form D filing, this limits our ability to fully assess the scope of the Regulation D market, which is important to our understanding of whether Regulation D is adequately balancing the need for investor protection and capital formation, particularly as it relates to small businesses.<sup>99</sup> Finally, it is possible for issuers to file the Form D before the first sale of the offering, at which time the offering amount and number of investors are both zero. As a result, information can be absent from Form D filings, further making it difficult to estimate the size of the Regulation D market.

## **II. Accredited Investor Pool: Certain Estimates and Characteristics**

For this analysis, we use the same methodology and variable definitions as the 2019 review. Because the Commission lacks a source of data on the number of natural persons who satisfy the financial qualifications in the accredited investor definition, we estimate the number of U.S. households that satisfy the financial qualifications as a proxy for the number of natural persons who would qualify financially. We obtained the underlying household data for this analysis from the Federal Reserve Board’s Survey of Consumer Finances (the “SCF”) for 2022.<sup>100</sup> In the context of the Securities Act, thresholds that are currently indexed for inflation

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<sup>98</sup> 17 CFR 230.503(a).

<sup>99</sup> See 1982 Adopting Release (stating that “Regulation D is the product of the Commission’s evaluation of the impact of its rules and regulations on the ability of small businesses to raise capital.”) at 11251.

<sup>100</sup> The SCF is a triennial survey that provides insights into household income and net worth, where the household is considered to be the primary economic unit within a family, *available at* <https://www.federalreserve.gov/apps/scfcb>. The SCF employs weights to make the data representative of the U.S. population. The 2015 Accredited Investor Staff Report used the definitions from Jesse Bricker, Lisa J. Dettling, Alice Henriques, Joanne W. Hsu, Kevin B. Moore, John Sabelhaus, Jeffrey Thompson, and Richard A. Windle, Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances, 100 Federal Reserve Bulletin 1 (2014), *available at*: <https://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf>. In the SCF database, income is reported at the household level. As a result, accredited investor (household) estimates based on individual income thresholds are likely overestimated and would represent an upper bound estimate. A household can have multiple family members with independent sources of income that qualify them as accredited investors based on income. We count them as

use the Consumer Price Index (the “CPI-U”).<sup>101</sup> Accordingly, in this review, unless specified, CPI-U is used for any inflation adjustments that we have made.

Set out below in Table 1 is the staff’s estimate of the number of U.S. households that would have qualified as accredited investors under the existing income and/or net worth criteria applicable to natural persons in 1983 (the year after Regulation D went into effect), 1989 (the year after joint annual income was included in Rule 501(a)(6), and 2022. While we are unable to estimate the actual number of natural persons that qualify as accredited investors based on income or net worth due to lack of comprehensive data, we are able to estimate the overall pool of qualifying households in the United States based upon underlying household data from the SCF.<sup>102</sup> We estimate households and not individuals because the database underlying our analysis measures wealth and income at the household level. Thus, in Table 1, the first row presents the number of households that meet the individual income threshold, while the second row presents the number of households that meet the joint income threshold. We do not attempt to differentiate income based on marital status of the household because data on individual income from all sources is not publicly available in the database.

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one accredited investor for each household, which implies we are also likely underestimating the actual pool of accredited investors when we provide household estimates. Consequently, the household estimates we derive using the joint income threshold would represent a lower bound for individuals qualifying on the basis of income. The actual number of individuals that qualify as accredited investors on an income basis (individually or jointly) would, in all likelihood, lie between the estimates that we derive for the individual income threshold and the joint income threshold.

<sup>101</sup> For example, the definition of “emerging growth company” and offering limitations under Regulation Crowdfunding. *See* Securities Act Section 2(a)(19) [15 U.S.C. 77b(a)(19)]. *See also*, Securities Act Section 4A(h)(1) [15 U.S.C. 77d-1(h)(1)].

<sup>102</sup> *See* notes 100 and 103 and accompanying text.

**Table 1: Households qualifying under accredited investor financial criteria  
(standard errors are in parentheses)**

Basis for Qualifying as Accredited Investor	1983		1989		2022	
	Number of qualifying households	Qualifying households as % of U.S. households	Number of qualifying households	Qualifying households as % of U.S. households	Number of qualifying households*	Qualifying households as % of U.S. households
Individual income <sup>103</sup> threshold (\$200,000)	0.44 million (0.10 million)	0.5% (0.12%)	1.4 million (0.2 million)	1.5% (0.5%)	18.1 million (0.71 million)	13.8% (0.54%)
Joint income threshold (\$300,000) <sup>104</sup>	N/A	N/A	0.7 million (0.3 million)	0.7% (0.2%)	9.8 million (0.45 million)	7.5% (0.34%)
Net worth <sup>105</sup> (\$1,000,000)	1.42 million (0.18 million)	1.7% (0.22%)	2.3 million (0.4 million)	2.4% (0.4%)	16.4 million (0.89 million)	12.5% (0.76%)
Overall number of qualifying households <sup>106</sup>	1.51 million (0.19 million)	1.8% (0.23%)	2.8 million (0.5 million)	3.0% (0.5%)	24.3 million (0.99 million)	18.5% (0.76%)

<sup>103</sup> For purposes of this analysis, income is defined to include wage income, business income, rent income, interest and dividend income, pension income, social security income, income from retirement accounts, transfers, and other income. According to the SCF documentation, income data is collected for the year prior to the year of the SCF while family balance sheet data covers the status of the family at the time of the interview. The SCF adjusts income data for the preceding calendar year (2021) to 2022 dollars using the CPI-U.

<sup>104</sup> The joint income threshold is not applicable in 1983 because it was not added to the accredited investor definition until 1988. *See* text accompanying note 61.

<sup>105</sup> For purposes of this analysis, net worth is defined as the difference between household assets and household debt. Assets include all financial assets (stocks, bonds, mutual funds, cash and cash management accounts, retirement assets, life insurance, managed assets like trusts and annuities, and other financial assets like deferred compensation, royalties, futures, etc.) and non-financial assets. Debt includes mortgage and home equity loans, lines of credit, credit card debt, installment loans including vehicle loans, margin loans, pension loans, and other debt (e.g., loans against insurance). We exclude the value of the household's principal residence and any outstanding mortgages associated with the principal residence for the 2022 calculations only.

<sup>106</sup> Because some households qualify as accredited investors under two of the definitions (e.g., both the individual income threshold and the net worth threshold, or both the joint income threshold and the net worth threshold), the total number of qualifying households does not equal the sum of the number of households qualifying as accredited investors under the individual income threshold, the joint income threshold, and the number of households qualifying as accredited investors under the net worth threshold. This may result in over or undercounting. Households qualifying under the joint income threshold are a subgroup of the households qualified under the individual income thresholds.

Our estimates indicate that the percentage of U.S. households that qualify as accredited investors has grown steadily in the four decades since the definition was adopted, which appears to be largely due to the fact that the natural person accredited investor thresholds have not been adjusted to reflect inflation.<sup>107</sup> If the natural person accredited investor thresholds were adjusted to reflect inflation since their initial adoption through 2022 using CPI-U, the net worth threshold would increase from \$1 million to \$3,037,840, the individual income threshold would increase from \$200,000 to \$607,568, and the joint income threshold would increase from \$300,000 to \$911,352.<sup>108</sup> Outside of the Securities Act, other metrics, such as the Personal Consumption Expenditures Chain-Type Price Index (“PCE”) are currently used.<sup>109</sup> If instead of the CPI-U, we used the PCE in calculating the thresholds as adjusted for inflation since their initial adoption through 2022, the net worth threshold would increase from \$1 million to \$2,590,069, the individual income threshold would increase from \$200,000 to \$518,014, and the joint income threshold would increase from \$300,000 to \$777,021.<sup>110</sup> Table 2 below presents the number of households that would qualify as accredited investors under CPI-U and PCE inflation-adjusted thresholds based on the 2022 SCF.

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<sup>107</sup> As discussed in Section II.C, we are unable to estimate the number of individuals that qualify as accredited investors that are participating annually in Regulation D offerings.

<sup>108</sup> CPI-U for 1982 is 97.70, the CPI-U for 2022 is 296.797. The net wealth threshold change is estimated as  $1,000,000 * (296.797/97.70)$ ; the individual income threshold is estimated as  $200,000 * (296.797/97.70)$ ; the individual income threshold is estimated as  $300,000 * (296.797/97.70)$ .

<sup>109</sup> For example the “qualified client” threshold under the Advisers Act, is inflation adjusted using the PCE by order of the Commission every five years. *See* Section 205(e) and Rule 205-3(e) of the Advisers Act.

<sup>110</sup> The PCE for 1982 is 45.693, the PCE for 2022 is 118.348. The net wealth threshold change is estimated as  $1,000,000 * (118.348/45.693)$ ; the individual income threshold is estimated as  $200,000 * (118.348/45.693)$ ; the individual income threshold is estimated as  $300,000 * (118.348/45.693)$ . The SCF calculates the inflation-adjusted income data for 2022 using the CPI-U. To estimate incomes in 2022 based on the PCE, we first estimate 2021 incomes by taking out the CPI-U inflation adjustment the SCF uses and then, using the PCE for 2022, we estimate PCE income in 2022.

**Table 2: Adjusted households qualifying under accredited investor financial criteria  
(standard errors are in parentheses)**

Basis for Qualifying as Accredited Investor (CPI-U)	2022		Basis for Qualifying as Accredited Investor (PCE)	2022	
	Number of qualifying households (CPI-U)	Qualifying households as % of U.S. households (CPI-U)		Number of qualifying households (PCE)	Qualifying households as % of U.S. households (PCE)
Individual income threshold (\$607,568)	3.4 million (0.24 million)	2.6% (0.18%)	Individual income threshold (\$518,014)	4.2 million (0.3 million)	3.17% (0.21%)
Joint income threshold (\$911,352)	2.2 million (0.18 million)	1.7% (0.14%)	Joint income threshold (\$777,021)	2.5 million (0.2 million)	1.89% (0.15%)
Net worth (\$3,037,840)	6.6 million (0.31 million)	5.0% (0.24%)	Net worth (\$2,590,069)	7.6 million (0.4 million)	5.76% (0.28%)
Overall number of qualifying households	7.4 million (0.33 million)	5.7% (0.25%)	Overall number of qualifying households	8.5 million (0.4 million)	6.51% (0.28%)

As shown in Table 1 above, the number of households that meet one of the accredited investor financial standards for natural persons has increased from approximately 1.8% of households in 1983 to more than 18% of households in 2022. The number of households qualifying under either the income or net worth criterion is smaller than the sum of the number of households qualifying under the income and the number of households qualifying under the net worth criterion because some households qualify under both criteria.

If the thresholds are not adjusted for inflation going forward, we estimate that 31% and 30% of households would qualify as accredited investors by 2032, using CPI-U and PCE, respectively. Table 3 below contains our estimation of the number of U.S. households that would qualify as accredited investors after 10, 20, and 30 years under the existing income and net worth thresholds applicable to natural persons, assuming the thresholds and the stated rates of inflation remain constant.

**Table 3: Households qualifying under accredited investor criteria in ten-year increments**

2022				
Criterion	Number of qualifying households (CPI-U) <sup>111</sup>	Qualifying households as % of U.S. households (CPI-U)	Number of qualifying households (PCE) <sup>112</sup>	Qualifying households as % of U.S. households (PCE)
Individual income threshold (\$200,000) <sup>113</sup>	18,129,518	13.8%	17,761,426	13.5%

<sup>111</sup> The CPI-U calculations in this Table 3 use the 2022 calculations from Table 1 as the base year.

<sup>112</sup> As noted above, the SCF calculates inflation-adjusted income data for 2022 using the CPI-U. To generate the 2022 income estimates using the PCE, we first estimated 2021 incomes by taking out the CPI-U inflation adjustment the SCF uses. Then, using the PCE for 2022, we estimated incomes in 2022.

<sup>113</sup> The household data are from the Federal Reserve Board's SCF for 1983 and 2022, *available at* <https://www.federalreserve.gov/econresdata/scf/scfindex.htm>. For this analysis, we use the same methodology and variable definitions as Table 1, and we exclude the value of a household's primary residence when measuring net worth. *See* note 63 and accompanying text.

Joint income threshold (\$300,000)	9,778,012	7.5%	9,336,985	7.11%
Net worth (\$1,000,000) <sup>114</sup>	16,442,392	12.5%	16,442,392	12.5%
Overall number of qualifying households <sup>(1)</sup>	24,254,049	18.5%	24,017,123	18.3%
<b>2032</b>				
<b>Criterion</b>	<b>Number of qualifying households (CPI-U)</b>	<b>Qualifying households as % of U.S. households (CPI-U)</b>	<b>Number of qualifying households (PCE)</b>	<b>Qualifying households as % of U.S. households (PCE)</b>
Individual income threshold (\$200,000)	37.1 million	25.4%	34.9 million	23.9%
Joint income threshold (\$300,000)	21.4 million	14.7%	20.3 million	13.9%

As in Table 1, each respondent with income greater than \$200,000, greater than \$300,000, and net worth greater than \$1,000,000 are identified as households that would qualify as accredited investors under the current definition. To estimate the proportion of households that would qualify as accredited investors in 10, 20, and 30 years, we assume that the percentage of U.S. households with joint income remains constant, and we estimate the growth rate for inflation (2.49% using the CPI-U and 2.07% using the PCE) and the total number of U.S. households (1.06%), and the real growth in household income (1.95% based on the CPI-U and 2.3% based on the PCE), and net worth (4.0% based on the CPI-U and 4.48% based on the PCE) from 1983 to 2022. We use the averages to extrapolate the future growth rates.

According to the SCF documentation, the underlying 1983 and 2022 SCF data are reported in 2022 dollars. To measure inflation, we use the CPI-U and PCE, from the U.S. Bureau of Labor Statistics and Bureau of Economic Analysis, respectively, *available at* [https://www.bls.gov/regions/mid-atlantic/data/consumerpriceindexhistorical\\_us\\_table.htm](https://www.bls.gov/regions/mid-atlantic/data/consumerpriceindexhistorical_us_table.htm) and [https://apps.bea.gov/iTable/?reqid=19&step=3&isuri=1&1921=survey&1903=84&\\_gl=1\\*1rmr5of\\*\\_ga\\*MTQ1NjA5MTEwNy4xNzAyMTMxNzM4\\*\\_ga\\_J4698JNNFT\\*MTcwMjEzMTczNy4xLjAuMTcwMjEzMTczNy4wLjAuMA..#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDNdLkJKYXRhIjpbWyJOSVBBX1RhYmxlX0xpc3QiLCI4MSJdL FsiQ2F0ZWdvcmlcyIsIIN1cnZleSjJdXX0=](https://apps.bea.gov/iTable/?reqid=19&step=3&isuri=1&1921=survey&1903=84&_gl=1*1rmr5of*_ga*MTQ1NjA5MTEwNy4xNzAyMTMxNzM4*_ga_J4698JNNFT*MTcwMjEzMTczNy4xLjAuMTcwMjEzMTczNy4wLjAuMA..#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDNdLkJKYXRhIjpbWyJOSVBBX1RhYmxlX0xpc3QiLCI4MSJdL FsiQ2F0ZWdvcmlcyIsIIN1cnZleSjJdXX0=).

Using the 2022 inflation-adjusted income and wealth measures, we derived the real growth in income and net worth. We obtained the number of U.S. households from the U.S. Census Bureau, *available at* <https://www.census.gov/data/tables/time-series/demo/families/households.html>. The number of households in the 2022 SCF were used to calculate extrapolators for sample weights and total number of households.

<sup>114</sup> The net worth estimates in 2022 are the same for CPI-U and PCE because the net worth figures used are not inflation adjusted; however, the rates underlying the future estimates vary depending on whether the measurement is CPI-U or PCE. *See* note 113.

Net worth (\$1,000,000)	29.5 million	20.2%	29.6 million	20.3%
Overall number of qualifying households <sup>(1)</sup>	45.8 million	31.4%	44.1 million	30.2%
<b>2042</b>				
<b>Criterion</b>	<b>Number of qualifying households (CPI-U)</b>	<b>Qualifying households as % of U.S. households (CPI-U)</b>	<b>Number of qualifying households (PCE)</b>	<b>Qualifying households as % of U.S. households (PCE)</b>
Individual income threshold (\$200,000)	70.5 million	43.5%	66.6 million	41.1%
Joint income threshold (\$300,000)	43.2 million	26.6%	39.8 million	24.5%
Net worth (\$1,000,000)	46.8 million	28.8%	47.0 million	29.0%
Overall number of qualifying households <sup>(1)</sup>	79.7 million	49.2%	76.7 million	47.3%
<b>2052</b>				
<b>Criterion</b>	<b>Number of qualifying households (CPI-U)</b>	<b>Qualifying households as % of U.S. households (CPI-U)</b>	<b>Number of qualifying households (PCE)</b>	<b>Qualifying households as % of U.S. households (PCE)</b>
Individual income threshold (\$200,000)	110.6 million	61.4%	105.5 million	58.5%
Joint income threshold (\$300,000)	80.9 million	44.9%	76.6 million	42.5%
Net worth (\$1,000,000)	67.9 million	37.7%	68.2 million	37.8%
Overall number of qualifying households <sup>(1)</sup>	118.8 million	65.9%	115.0 million	63.8%

(1) The overall number of qualifying households is less than the sum of the number of households qualifying under the income criterion and the number of households qualifying under the net worth criterion because some households qualify under both criteria.

The number of individuals who qualify as accredited investors has likely also increased as a result of the Commission's 2020 amendments to the definition to include as accredited investors individuals holding in good standing certain professional certifications or designations,<sup>115</sup> as well as knowledgeable employees of certain private funds.

Based on data from FINRA, we estimate that there were 701,859 FINRA-registered individuals as of December 2022.<sup>116</sup> We estimate that 308,565 individuals were registered only as broker-dealer representatives; 312,317 were dually registered as broker-dealer and investment adviser representatives; and 80,977 were registered only as investment adviser representatives.<sup>117</sup> However, these numbers do not necessarily reflect the additional number of individuals who qualify as accredited investors as a result of the professional certification designations, as some of these individuals may have already qualified as accredited investors under the financial thresholds in existence at the time of the 2020 amendments. In addition, because many FINRA-registered representatives hold multiple professional certifications, this aggregation likely overstates the actual number of individuals that hold a Series 7 or Series 82, and we cannot

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<sup>115</sup> The Commission has designated General Securities Representative license (Series 7), the Private Securities Offerings Representative license (Series 82), and the Investment Adviser Representative license (Series 65) as qualifying credentials. *See also* note 39.

<sup>116</sup> *See* 2023 FINRA Industry Snapshot, available at <https://www.finra.org/sites/default/files/2023-04/2023-industry-snapshot.pdf>. At the time of the 2020 amendments to the definition, we estimated that there were 691,041 FINRA-registered individuals as of December 2018. We estimated that 334,860 individuals were registered only as broker-dealer representatives; 294,684 were dually registered as broker-dealer and investment adviser representatives; and 61,497 were registered only as investment adviser representatives. *See* 2019 FINRA Industry Snapshot, available at <https://www.finra.org/sites/default/files/2019%20Industry%20Snapshot.pdf>.

<sup>117</sup> *See id.*

estimate the extent of overlap.<sup>118</sup> We are also not able to directly estimate the number of knowledgeable employees at private funds, as we do not have precise data on the number of such employees. Using data on private fund statistics compiled by the Commission’s Division of Investment Management, we estimate that there were 47,088 private funds as of the end of 2022.<sup>119</sup>

### **A. Composition of Accredited Investor Pool Based on Net Worth**

How natural persons meet the net worth threshold in the accredited investor definition has likely changed over time. In addition to the exclusion of the value of an investor’s primary residence from the calculation of their net worth, which was implemented in 2011,<sup>120</sup> changes in market practice with respect to retirement savings have likely affected the pool of accredited investors. Retirement savings are a significant portion of many households’ net wealth.<sup>121</sup> Accordingly it is likely that currently, a significant percentage of investors’ assets, for purposes of determining accreditation, are retirement savings held in defined contribution plans and individual retirement accounts (“IRAs”), which was not the case in 1982, at the adoption of Regulation D. For example, in 1982 private sector defined benefit plans had 29.7 million active

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<sup>118</sup> See 2020 AI Adopting Release (stating “we believe it is less relevant to focus on the number of individuals that will qualify and more relevant to consider whether the criteria applied appropriately capture the attributes of financial sophistication that is a touchstone of the definition”) at 64243.

<sup>119</sup> See U.S. Securities and Exchange Commission, Division of Investment Management Fourth Calendar Quarter 2022 Private Fund Statistics, *available at* <https://www.sec.gov/files/investment/private-funds-statistics-2022-q4.pdf>. At the time of the 2020 amendments, we estimated that there were 32,622 private funds as of third quarter 2019. See U.S. Securities and Exchange Commission, Division of Investment Management Third Quarter 2019 Private Fund Statistics, *available at* <https://www.sec.gov/divisions/investment/private-funds-statistics/private-funds-statistics-2019-q3.pdf>.

<sup>120</sup> In 2011, as required by Section 430(a) of the Dodd-Frank Act, the Commission amended Rule 501(a)(5) to exclude the value of the primary residence from the calculation of net worth. See 2011 Net Worth Release.

<sup>121</sup> See Aladangady, Aditya, et al., *Changes in U.S. Family Finances from 2019 to 2022: Evidence from the Survey of Consumer Finances*. Washington: Board of Governors of the Federal Reserve System, (Oct. 2023), (“2022 SCF Bulletin”), at 17, (“[f]or many families, the assets held in IRAs and [defined contribution] plans (typically associated with either a current job or a past job) are among the most important components of their balance sheets and are a key determinant of their future retirement security.”), *available at* <https://doi.org/10.17016/8799>.

participants, while private sector defined contribution plans had 23.4 million active participants. But as of 2020, those numbers had dramatically shifted, with 12 million and 85.3 million private sector defined benefit plan and defined contribution plan active participants, respectively.<sup>122</sup> This movement away from defined benefit plans may have created investor protection considerations not present to the same degree at the time of the adoption of the income and net worth thresholds.

Specifically, much of the responsibility for the management of retirement investments shifted from employers and professional pension fund managers to individual participants. Those individuals may have little, if any, prior investing experience and may not seek the assistance of professional advisors. In defined benefit plans, employers are responsible for appropriately managing risk, including selection of investments and monitoring to ensure proper risk allocation based on market developments and participant activities, to ensure the defined benefit plans remain properly funded. Moreover, they typically would have a much larger pool of assets that can be accessed for payments, while also having a pool of assets that can continue to be invested and grow.<sup>123</sup> In contrast, employees saving for retirement through defined contribution plans or

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<sup>122</sup> See Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2020*, U.S. Department of Labor (Oct. 2022), available at <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf>.

<sup>123</sup> See, e.g., Alicia H Munnell and Anqi Chen, *401(K)/IRA Holdings in 2019: An Update from the SCF Center for Retirement Research at Boston College*, Center for Retirement Research at Boston College (October 2020), Number 20-14, at 3, (stating that initially 401k plans “were viewed mainly as supplements to employer-funded pension and profit-sharing plans. Since 401(k) participants were presumed to have their basic retirement income needs covered, they were given substantial discretion over their 401(k) choices, including whether to participate, how much to contribute, how to invest, and when and in what form to withdraw the funds.”), available at [https://crr.bc.edu/wp-content/uploads/2020/10/IB\\_20-14.pdf](https://crr.bc.edu/wp-content/uploads/2020/10/IB_20-14.pdf) and Tyler Bond & Dan Doonan, *The Growing Burden of Retirement Rising Costs and More Risk Increase Uncertainty*, National Institute on Retirement Security (Sept. 2020), at 9, (stating “[b]oth interest rate risk and longevity risk, when unpooled, act as volatility multipliers for what a reasonable target would be for an individual or couple who are trying to achieve a certain level of retirement income.”), available at <https://www.nirsonline.org/wp-content/uploads/2020/09/The-Growing-Burden-of-Retirement.pdf>.

IRAs individually bear much greater responsibility for the risks related to their investment decisions.<sup>124</sup>

As of December 31, 2022, it is estimated that, of dedicated retirement assets, 34% are held in IRAs<sup>125</sup> compared to 2.5% of retirement savings in 1980.<sup>126</sup> The aggregate value of all dedicated retirement assets as of December 31, 2022 is estimated to be \$33.6 trillion of which the value of the IRA holdings is estimated to be \$11.5 trillion<sup>127</sup> and the value of employer sponsored defined contribution plans is estimated to be \$9.3 trillion.<sup>128</sup> A significant amount of the value of assets within IRAs is money that has been rolled over from prior employer sponsored defined contribution plans.<sup>129</sup> This appears to be driven by the fact that when individuals leave their jobs they often want to have greater control over their investment decisions by rolling the funds into an IRA rather than leaving the funds in plans controlled by their prior employers.<sup>130</sup> Such investor control may increase investment risk because responsibility for investment decision making is shifted away from a professional custodian with a fiduciary duty, as is the case with employer sponsored plans, to the individual investor, who may lack experience in building a portfolio that appropriately allocates risk and ongoing management of investments, including preparing for the illiquid nature of private company

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<sup>124</sup> *See id.*

<sup>125</sup> *See* Investment Company Institute, *2023 Investment Company Fact Book* (2023) (“ICI 2023 Fact Book”), available at <https://www.ici.org/system/files/2023-05/2023-factbook.pdf>.

<sup>126</sup> *See* John Sabelhaus and Daniel Schrass, *The Evolving Role of IRAs in U.S. Retirement Planning* (Nov. 2009, Vol. 15, No. 3), available at <https://www.ici.org/doc-server/pdf%3Aper15-03.pdf>.

<sup>127</sup> *See* ICI 2023 Fact Book at 99.

<sup>128</sup> *See id.* at 103.

<sup>129</sup> In this review, we generally refer to traditional non-employer sponsored IRAs as IRAs or self-directed IRAs. *See* Investment Company Institute, *The Role of IRAs in US Households’ Saving for Retirement, 2022*, ICI Research Perspective (Feb. 2023, Vol. 29, No. 1), available at [http://www.ici.org/system/files/2023-02/per29-01\\_0.pdf](http://www.ici.org/system/files/2023-02/per29-01_0.pdf).

<sup>130</sup> *See* *Pew Survey Explores Consumer Trend to Roll Over Workplace Savings Into IRA Plans*, The Pew Charitable Trust (Sept. 2021), available at [https://www.pewtrusts.org/-/media/assets/2021/09/nestegg\\_retirement\\_issuebrief\\_v2.pdf](https://www.pewtrusts.org/-/media/assets/2021/09/nestegg_retirement_issuebrief_v2.pdf).

investments. There has also been an increase over time in the use of self-directed IRAs.<sup>131</sup> A self-directed IRA is an IRA held by a custodian that allows investment in a broader set of assets than most IRA custodians permit. Self-directed IRA custodians are only responsible for holding and administering the assets in the account and the investor has sole responsibility for evaluating the investments held in his or her account. However, investors may hire professional advisors to provide advice regarding their investments.

Further, investors who are investing for imminent retirement, or to provide income in retirement, may have a lower risk tolerance than the general population of investors and less ability to bear the burden of potential losses, even where their net worth is substantial.<sup>132</sup> Older investors who are either nearing retirement or have already left the workforce may have a limited ability to recover any investment losses.<sup>133</sup>

Taken together, the increase in the size of the accredited investor pool over time as a result of inflation and the expanded role of retirement savings in qualifying as an accredited investor, have led some to question the continuing utility of the financial thresholds as a measure

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<sup>131</sup> See *Investor Alert: Self-Directed IRAs and the Risk of Fraud*, SEC Office of Investor Education and Advocacy (Feb. 7, 2023), available at <https://www.sec.gov/investor/alerts/sdira>. IAC recommended among other things, that the SEC strengthen investor protection related to self-directed IRAs and stated that IAC “believe[s] that the extent of the problem associated with [self-directed IRAs] is far greater than currently reported through enforcement actions and other mechanisms for gathering such information.” See Recommendation of the SEC Investor Advisory Committee to Better Protect Older Adult Investors (June 9, 2022), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/20220609-protecting-older-investor-recommendation.pdf>.

<sup>132</sup> Jean Eaglesham and Coulter Jones, *Opportunities to Invest in Private Companies Grow*, Wall St. J. (Sept. 23, 2018), (stating that in a 2018 analysis by the Wall Street Journal, a third of accredited investor households are retirees, and 19.28% of households in the 55-64 age group meet the accredited investor thresholds), available at <https://www.wsj.com/articles/opportunities-to-invest-in-private-companies-grow-1537722023>.

<sup>133</sup> *Id.*

of accredited investors’ ability to sustain the risk of loss of investment with respect to accredited investors who are investing for imminent retirement or to provide income in retirement.<sup>134</sup>

Table 4 illustrates the effect that excluding retirement assets would have on the number and percentage of U.S. households that qualify as accredited investors based on net worth. Table 4 uses the definition of retirement assets used by the SCF.<sup>135</sup>

**Table 4: Exclusion of Retirement Assets from Net Worth Calculation**

	Including Retirement Assets		Excluding Retirement Assets	
	Number of Households	Percentage of Households*	Number of Households	Percentage of Households*
<b>Current Net Worth (\$1 million)</b>	16.44 million	12.5%	11.6 million	8.8%

\* Percentages based on approximately 131.3 million total households.

## **B. Indicators of Financial Sophistication and Access to Information**

Because offerings under Rules 506(b) and 506(c) may be accompanied by limited or no disclosures, involve heightened risks, or entail complex investing strategies, such as investments in multiple securities with unusual terms, it is important for those investors, therefore, to be able to fend for themselves in such offerings. Accordingly, Congress and the Commission have looked to financial sophistication as an important measure of an individual’s ability to fend for

<sup>134</sup> See, e.g., Letter from the Consumer Federation of America to Hon. Gary Gensler, Chairman, SEC, (Nov. 15, 2022), (stating that the Commission should “consider potential harms to Americans’ retirement security resulting from the growing encroachment of private securities into retirement accounts, thereby increasing risk exposure for investors who qualify as accredited investors based on savings they must rely on for income throughout several decades of retirement”), available at <https://consumerfed.org/wp-content/uploads/2022/11/CFA-Urges-SEC-Chair-Gensler-to-Prioritize-Restoring-Health-of-Public-Securities-Markets-Letter-11.15.22.pdf> and Letter from NASAA Regarding Private Market Reforms (Mar. 7, 2023) (“2023 NASAA Letter to Director Gerding”), available at <https://www.nasaa.org/wp-content/uploads/2023/03/2023-03-07-Letter-to-Erik-Gerding-Regarding-Private-Market-Reforms.pdf>.

<sup>135</sup> The term “retirement assets” used in Table 4 is based on the SCF’s definition of retirement accounts as “individual retirement accounts, Keogh accounts, and certain employer-sponsored accounts, such as 401(k), 403(b), and thrift savings accounts from current or past jobs; other current job plans from which loans or withdrawals can be made; and accounts from past jobs from which the family expects to receive the account balance in the future.” 2022 SCF Bulletin at 37.

themselves without the additional protections provided by registration under the Securities Act. However, the concept of financial sophistication is not easily defined, and the effectiveness of various indicators of financial sophistication can be difficult to assess. Financial sophistication for purposes of the accredited investor definition may be demonstrated in a variety of ways, including through the ability to assess an investment opportunity—which includes the ability to adequately analyze the risks and rewards, the capacity to allocate investments in such a way as to mitigate or avoid risks of unsustainable loss, or the ability to gain access to information about an issuer or about an investment opportunity—or the ability to assess and mitigate the risk of a loss.<sup>136</sup> The accredited investor definition has historically used wealth—in the form of a certain level of income or net worth—as a proxy for financial sophistication.<sup>137</sup>

Limited information is available on the financial sophistication of accredited investors, which makes it challenging to assess the effectiveness of the definition’s financial thresholds as a proxy for such sophistication. Available analyses and surveys on investor knowledge generally do not track the financial thresholds in the definition and typically measure a relatively modest level of financial knowledge or financial “literacy.” For example, FINRA’s December 2022 survey report, *Investors in the United States: The Changing Landscape*, includes a 10-question test of investor knowledge and presents the results for individuals with portfolio values of less than \$50,000, values between \$50,000 and \$250,000, and values above \$250,000.<sup>138</sup> Although this test was not designed as an assessment of the accredited investor definition, we note that

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<sup>136</sup> See note 58.

<sup>137</sup> In 2020, the Commission amended the accredited investor definition to enable certain financially sophisticated individuals to qualify as accredited investors without meeting the financial thresholds. See 2020 AI Adopting Release.

<sup>138</sup> See Judy T. Lin et al, *The Changing Landscape of Investors in the United States: A Report of the National Financial Capability Study*, FINRA Investor Education Foundation (Dec. 2022), at 25, available at <https://www.finrafoundation.org/sites/finrafoundation/files/NFCS-Investor-Report-Changing-Landscape.pdf>.

while those with higher portfolio values scored better on the knowledge test than those with lower portfolio values, the highest portfolio value group averaged only 5.3 correct responses on the 10-question test. Moreover, the highest portfolio value for which response rates were recorded is \$250,000 and above, well below the accredited investor net worth threshold.

Another aspect of financial sophistication, for which the financial thresholds have been considered a proxy, is the ability of an investor to access the information needed to assess the risk of an investment. While we believe that issuers and funds conducting private accredited investor-only offerings often provide prospective purchasers with information about the issuer,<sup>139</sup> we lack information about the actual frequency with which such information is provided, and about the type, quality, and extent of the information provided. In addition, we lack information about whether investors with increased assets have more bargaining power to request additional information from issuers and funds, and if so, to what extent.<sup>140</sup>

### **C. Accredited Investor Participation in the Regulation D Market<sup>141</sup>**

As noted below, we are unable to estimate the precise number of individuals that qualify as accredited investors that are participating annually in Regulation D offerings. However, based

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<sup>139</sup> See 2019 Concept Release at 30480.

<sup>140</sup> See Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Release No. IA-6383 (Aug. 23, 2023) [88 FR 63206 (Sept. 14, 2023)], at 63208, (stating “a trend of rising interest in private fund investments by smaller investors with less bargaining power, such as the growth of new platforms to facilitate individual access to private investments with small investment sizes”).

<sup>141</sup> Data for the Regulation D analyses are obtained from Form D filings. The amount raised is based on “Total amount sold” stated by issuers under Item 13 in new and amended Form D filings. Incremental proceeds reported in amended filings are recorded in the year of the amended filing. We believe reported data is likely an underestimate of the amount raised because (1) Rule 503 of Regulation D requires issuers to file a Form D no later than 15 days after the first sale of securities, but a failure to do so does not invalidate the exemption; so, some Regulation D issuers may fail to file a Form D (we note that, while failure to file Form D does not affect the exempt offering, it could have other consequences, including, under Rule 507, the potential loss of ability to rely upon Regulation D in the future), and (2) there is no requirement to file a Form D at completion of the offering, or to file an amendment to reflect additional amounts offered if the aggregate offering amount does not exceed the original offering size by more than ten percent (so, amounts reported may be lower than total amounts sold). Historical Regulation D data includes offerings under Rule 505, which was repealed effective May 2017, thus in certain cases where Regulation

on information in initial Form D filings and amended filings, we estimate that approximately 9.6 million investors participated in Regulation D offerings initiated during 2009 through 2022.<sup>142</sup> Of that total, approximately 99.7% were accredited investors; we estimate that only approximately 27,900 non-accredited investors participated in Regulation D offerings from 2009 through 2022. For the same period, we estimate that there were on average approximately 684,000 accredited investors participating annually in Regulation D offerings. In contrast, we estimate that only approximately 20,259, or 6%, of all Rule 506(b) offerings initiated during 2009 through 2022 involved non-accredited investors.<sup>143</sup>

However, these counts do not adjust for any repeat participation among investors in offerings. Because none of the data identifies individual investors, we cannot estimate the number of unique investors participating in Regulation D offerings. Further, because issuers do not always file Form D, the data available to the Commission does not include all offerings, and the aggregate amount of such omitted offerings is unclear.

As noted in Section I.C., although there are clearly limitations to the data available to the Commission, review of the data related to Regulation D offerings is important given the interplay of the accredited investor definition and the operation of the Regulation D market. Additionally, the importance of the exempt market overall is significant. For example, the Commission has estimated that approximately \$3.7 trillion of new capital was raised through

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D data is disaggregated by applicable rule, those amounts do not sum to the aggregate number of Regulation D offerings.

<sup>142</sup> Section 4(a)(5) of the Securities Act provides an exemption for issuers for the offer and sale of securities to accredited investors if the aggregate offering amount does not exceed \$5 million; the issuer, or anyone acting on its behalf, does not engage in general solicitation or general advertising; and the issuer files a notice on Form D with the Commission. Based on DERA staff's review of Form D filings from January 1, 2009 through December 31, 2022, no issuer has reported relying on Securities Act Section 4(a)(5) as an exemption.

<sup>143</sup> Further, as noted in Section I.C., given issuers' ability to time the filing of the Form D to minimize the information included within it, that also limits the information available to the Commission.

exempt offerings in 2022, which is 270% more than the \$1.0 trillion raised in registered offerings over the same period.<sup>144</sup>

Just as the pool of individuals and entities qualifying as accredited investors has grown and evolved since the definition was adopted four decades ago, capital raising under Regulation D has also undergone dramatic changes during that time. The detail of the data regarding Regulation D offerings prior to 2009 is limited, but increased use of Regulation D is still apparent. For example, from 1993 through 2008, a total of 247,974 Regulation D offerings were reported, with an annual median number of offerings of 15,488. In contrast, from 2009 through 2022, a total of 350,337 Regulation D offerings<sup>145</sup> were reported, with an annual median number of offerings of 22,922.

Not only has the Regulation D market grown in size, the type of issuers that raise capital through Rule 506 offerings has also changed. The accredited investor definition was adopted in response to the Small Business Investment Incentive Act of 1980, which was intended to address difficulties small businesses had experienced raising capital amid the challenging economic

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<sup>144</sup> Exempt offering data is comprised of capital raising activity by operating companies and pooled investment funds and the registered offerings data is comprised of capital raising activity by operating companies. Data on registered offerings was collected from Thomson Financial's SDC Platinum database. Exempt offerings include Regulation D offerings, Regulation Crowdfunding offerings, Regulation A offerings, Rule 144 A offerings, and Regulation S offerings, which may be implicated directly through use of the accredited investor definition, or indirectly. For example, Regulation S does not use the accredited investor definition, but the exemption may be used concurrently with other exemptions that do use the definition, thus impacting the disclosures provided in the transaction. The amount raised under Regulation Crowdfunding is collected from Form C and Form C-U filings. Estimates of the amount raised under Regulation A offerings are based on offerings qualified during the referenced period, excluding post-qualification amendments; estimates of amounts raised are based on proceeds reported in filings made during the report period. The data used to estimate the amounts raised in offerings under Regulation S were collected from Thomson Financial's SDC Platinum database. Data on resale offerings under Rule 144A were collected from Thomson Financial's SDC New Issues database, the Mergent database, the Dealogic database, and the Asset-Backed Alert and Commercial Mortgage Alert publications. These numbers are accurate only to the extent that these databases are able to collect such information and may understate the actual amount of capital raised under these offerings if issuers and underwriters do not make this data available. The data on Rule 144A debt offerings from Mergent is available only through June 30, 2022. We have extrapolated the data to produce an estimate for the full calendar year.

<sup>145</sup> These represent offerings that were initiated during the year. Generally, offerings by pooled investment funds are continuous in nature and extend into multiple years.

conditions of the 1970s. While offerings by small start-up companies still account for a large majority of the offerings under Rules 506(b) and 506(c), as discussed below, they account for only a small fraction of the capital raised. There were 230,667 Regulation D offerings by operating companies, accounting for an estimated 66% of all Regulation D offerings during 2009-2022, but for only 14% (\$2.7 trillion) of the total of \$19.8 trillion of capital raised under Regulation D during the same period. Private funds, in turn, accounted for just 119,670 (34%) of all Regulation D offerings, but \$17.1 trillion (86%) of total capital raised.

Tables 5 and 6 below present summary statistics for Regulation D capital raising activity and issuer characteristics.

**Table 5: Summary of Regulation D Issuer and Offering Characteristics, January 1, 2009– December 31, 2022**

Year	Num. Issuers	Num. Offerings	Amounts Reported Sold (\$ bil.)	Mean Amount Sold (\$ mil.)	Median Amount Sold (\$ mil.)	Mean Offer Size (\$ mil.)	Median Offer Size (\$ mil.)	Used Intermed	Total Investors		Mean Investors/ Offering	Median Investors/ Offering
									Initial Form D filings	All filings, including amendments		
2009	12,059	13,709	588	36.0	1.5	159.3	2.2	14.8%	247,832	239,234	18	4
2010	15,071	17,535	1,021	26.0	1.4	59.9	2.0	14.0%	234,661	287,430	13	4
2011	15,888	18,127	858	27.7	1.5	97.6	2.0	12.9%	226,470	288,622	12	4
2012	16,004	18,121	900	27.0	1.5	35.1	2.0	12.0%	233,166	303,376	13	4
2013	17,504	19,741	1,048	23.6	1.5	47.7	2.0	12.1%	257,439	362,103	13	4
2014	19,717	22,004	1,348	23.9	1.4	37.3	2.0	11.2%	301,734	408,879	14	4
2015	20,652	22,853	1,361	24.7	1.4	40.3	2.1	11.5%	306,263	418,181	13	4
2016	20,925	22,991	1,322	23.7	1.5	37.1	2.3	11.4%	324,353	458,970	14	4
2017	22,376	24,476	1,849	31.9	1.5	90.5	2.4	12.2%	398,384	548,328	16	4
2018	24,849	27,156	1,723	34.3	1.6	146.9	2.6	10.7%	414,441	639,273	15	4
2019	25,267	27,381	1,559	25.4	1.7	47.2	3.0	11.1%	420,321	641,019	15	4
2020	25,832	27,996	1,355	22.6	1.5	88.7	2.5	10.9%	611,488	655,827	22	5
2021	39,530	46,558	2,497	29.4	1.5	42.0	2.2	9.4%	1,066,397	1,219,897	23	7
2022	39,374	41,689	2,365	22.2	1.1	32.4	2.0	9.2%	1,615,192	3,133,042	39	6

The number of issuers is based on a unique Central Index Key (CIK) identifier. Number of offerings represents all new offerings initiated during the period 2009 through 2022, as represented by a Form D filing, and offerings initiated prior to 2009 but continuing into the period 2009 through 2022 (as represented by an amendment filed). Amounts Reported Sold is calculated as described above and includes amounts sold reported in initial Form D filings and incremental amounts sold reported in amendment filings. Used intermed is the percent of issuers that reported paying a party direct or indirect compensation in connection with the sale of securities in the offering, as reported in the Form D and Form D/A filings. Total number of investors, as reported in Form D and Form D/A filings, is calculated similarly to Amount Reported Sold. Issuers are not required to file a Form D at the close of an offering (although they are required to file a Form D no later than 15 days after the first sale of securities). Not all offerings report amounts raised or sold in their initial Form D filing. Moreover, issuers' responses in the Form D are not reviewed for accuracy.

**Table 6: Summary of Issuer and Offering Characteristics by Exemption Used,  
January 1, 2009- December 31, 2022**

Characteristic	Non- Fund Issuers		Pooled Investment Funds
	Rule 504	Rule 506	Rule 506
Number of Issuers	6,138	136,879	111,033
Number of Form D filings	7,677	221,465	119,352
Number of Form D/A filings	1,135	48,330	166,335
Amount Reported Sold	\$7.9 billion	\$2.67 trillion	\$17.12 trillion
Mean Amount Sold (if reported)	\$747,000	\$12.1 million	\$61.19 million
Median Amount Sold (if reported)	\$120,000	\$1.28 million	\$3.04 million
Percentage of Form D Filings	2.2%	63.5%	34.3%

Moreover, due to limitations of the data available to the Commission, we cannot provide more granularity on many characteristics of issuers, such as those private companies that have an estimated valuation in excess of \$1 billion,<sup>146</sup> often referred to as “unicorns,”<sup>147</sup> an originally extremely small number of companies. However, market participants have estimated that in 2023 the number of unicorns within the U.S. is at least 700.<sup>148</sup>

<sup>146</sup> Issuers are not asked to disclose their valuations within Form D, nor are issuers required to disclose their revenues within Form D. Based on Form D filings from January 1, 2009, to December 31, 2022, we estimate that only 30% of Form D filers disclose their revenue range. Further, the largest revenue that can be selected is “Over \$100,000,000.”

<sup>147</sup> The term “unicorn” was coined by venture capital investor Aileen Lee in 2012, in connection with her research on the then rarity (39 or .07% of venture-backed start ups at the time of the research) of private companies that managed to garner a valuation exceeding \$10 billion within the first decade of their formation. See Aileen Lee, *Welcome To The Unicorn Club: Learning From Billion-Dollar Startups*, TechCrunch (Nov. 2, 2013), available at <https://techcrunch.com/2013/11/02/welcome-to-the-unicorn-club/>.

<sup>148</sup> Estimating 700 U.S. unicorns as of Aug. 31, 2023. See Jordan Rubio, *Unicorn Companies tracker*, Pitchbook (Nov. 1, 2023), available at <https://pitchbook.com/news/articles/unicorn-startups-list-trends>. Estimating 727 U.S. unicorns as of Nov. 28, 2023. See Crunchbase News, *The Crunchbase Unicorn Board*, available at <https://news.crunchbase.com/unicorn-company-list/>.

Additionally, as shown in Table 6 above, Regulation D offerings by pooled investment funds account for a substantial amount of Regulation D offerings during 2009 through 2022. Also notable is the median size of offerings during the same period – approximately \$1.3 million for operating companies and approximately \$3 million for pooled funds – which indicates that the typical amount of capital raised by operating companies is significantly less than the amount raised by pooled investment funds. In fact, these median offering sizes are far below the offering limitation for Rule 504 offerings.

Offering amounts and the amount that accredited investors may purchase are unlimited under either Rule 506(b) or Rule 506(c). Table 7 below shows the total offering amounts and median offering amounts of offerings made in reliance on Rule 506 in recent years.

**Table 7: Amounts raised under Rule 506 offerings from January 1, 2009- December 31, 2022**

<b>Offering Type</b>	<b>Total offering amount</b>	<b>Median offering amount</b>
Rule 506(b)	\$19 trillion	\$1.6 million
Rule 506(c)	\$752 billion	\$0.8 million

The data available to the Commission indicates that Rule 506(b) offerings occur with greater frequency than any other type of offering. While Rule 506(b) permits sales to up to 35 non-accredited investors, most issuers limit sales to accredited investors. As shown in Table 8 below, of the approximately \$19 trillion raised in approximately 318,386 Rule 506(b) offerings, a small number (20,259 offerings) indicated non-accredited investor participation. Non-accredited investor participation is more prevalent in Rule 506(b) offerings by non-fund issuers with 17,145 offerings in 2009 through 2022, as compared to 3,114 offerings by pooled investment funds over the same period.

**Table 8: Selected data on Certain Rule 506(b) offerings from January 1, 2009-December 31, 2022**

<b>Offering Type</b>	<b>Number of offerings</b>	<b>Percentage of this offering type of Rule 506(b) offering<sup>149</sup></b>
Rule 506(b) offerings by pooled investment funds (that indicated non-accredited investor participation)	3,114	3% of 111,928 offerings
Rule 506(b) offerings by non-fund issuers (that indicated non-accredited investor participation)	17,145	8% of 206,458 offerings
Total Rule 506(b) offerings (that indicated non-accredited investors participated)	20,259	6% of 318,386 offerings

Issuers in offerings made solely to accredited investors are not required to provide any substantive disclosure to investors.<sup>150</sup> Similarly, such issuers are not required to establish a reasonable belief that each accredited purchaser has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the prospective investment, as they would be required to do if non-accredited investors were participating in the offering.<sup>151</sup> Because the accredited investor definition is intended to identify

<sup>149</sup> This calculation is limited to Rule 506(b) offerings, which is a subset of the Rule 506 offerings reported in Table 6.

<sup>150</sup> Rule 506(b) and Rule 506(c). *See* note 58.

<sup>151</sup> Under Rule 506(b)(2)(ii), each purchaser in a Rule 506(b) offering who is not an accredited investor either alone or with his purchaser representative must have such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer must reasonably believe immediately prior to making any sale that such purchaser comes within this description.

investors capable of fending for themselves, such requirements were considered unnecessary.<sup>152</sup>

However, with the increased use of the private markets and expansion of the number of persons that may be considered accredited investors, it is possible that some accredited investors may not be able to negotiate access to information from issuers in Rule 506 offerings,<sup>153</sup> and, therefore these investors may not receive the information they need to make informed investment decisions.<sup>154</sup> This has led some observers to express concerns about the potential for misallocation of capital or opportunities for fraud in the exempt market.<sup>155</sup>

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<sup>152</sup> See, e.g., 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 (Aug. 7 1981) [46 FR 41791 (Aug. 18, 1981)], at 41802, (stating that the Commission’s intent in incorporating the accredited investor concept into Rule 506 was “based on the presumption that accredited investors can fend for themselves without the protections afforded by registration.”), available at <https://www.govinfo.gov/content/pkg/FR-1981-08-18/pdf/FR-1981-08-18.pdf>.

<sup>153</sup> See, e.g., 2020 AI Adopting Release, at 64269, (stating “more limited disclosure makes it harder for prospective investors to evaluate business prospects or the financial health of the issuer and may result in investors spending more resources on due diligence or other analysis. In addition, as suggested by some commenters, individual accredited investors and institutional accredited investors with low amounts of assets under management who lack the ability to perform more extensive due diligence on their own, or lack the bargaining power to extract more disclosure from the private issuers, may be subject to adverse selection, in the sense that they may be offered highly speculative investment opportunities that are rejected by more sophisticated investors with the ability to perform extensive due diligence or have the bargaining power to demand more disclosure.”). See also, e.g., letter from Healthy Markets Association dated Mar. 16, 2020), at 28, (commenting on the 2020 AI Proposing Release, stating “recent history is replete with examples of even the most sophisticated private market investors making clearly erroneous judgments regarding private securities based on a lack of information.”).

<sup>154</sup> See notes 21 and 22 and accompanying text discussing the standard set forth in *Ralston Purina*.

<sup>155</sup> See, e.g., NASAA Report and Recommendations for Reinvigorating our Capital Markets (Feb. 7, 2023) (“NASAA 2023 Recommendations to Congress”), at 10, (stating “voluntary disclosures are often tainted with inaccuracies or overly optimistic projections that lead to mispricing of the securities. Even the most sophisticated investors often lack the information needed to make informed investment decisions, and this can lead to market-wide bubbles that cause widespread harm when they burst.”), available at <https://www.nasaa.org/wp-content/uploads/2023/02/NASAA-Report-and-Recommendations-on-Reinvigorating-Our-Capital-Markets-2.7.23-Final.pdf>; Elizabeth Pollman, *Private Company Lies*, 109 GEO. L.J. 353 (2020), at 402, (stating “[w]ithout the discipline that mandatory disclosure can impose, information asymmetries abound fostering the characteristic ingredients for fraud.”); and Jason Zweig, *An Iowa Farmer Tried to Dodge the Stock-Market Turmoil. It Cost Him \$900,000*, Wall St. J. (Jan. 13, 2023), (stating “[t]he individual investors buying these unregulated private offerings aren’t stupid. They believe they’re buying safe and potentially lucrative assets from someone they trust.”), available at <https://www.wsj.com/articles/regulation-d-private-offering-debt-equity-11673625595>. See also *SEC v. Stephone N. Patton, et al.*, No. 8:23-cv-02212 (M.D. Fla. filed Sept. 29, 2023), (the SEC alleges in the complaint that the defendants in the matter filed over 30 Forms D filings in which the defendants “falsely claimed to have raised hundreds of billions of dollars from investors in dozens of exempt private offerings conducted since February 2020”), available at <https://www.sec.gov/files/litigation/complaints/2023/comp25873.pdf>.

### *Non-Rule 506 Exempt Offerings*

Even though most capital raised in the private markets is raised through offerings exempt under Rule 506, non-Rule 506 offerings have been updated dramatically within the last decade to expand capital formation opportunities. In 2015, in accordance with the JOBS Act, the Commission adopted final rules creating two tiers of Regulation A offerings: Tier 1, for offerings of up to \$20 million in a 12-month period; and Tier 2, for offerings of up to \$50 million in a 12-month period.<sup>156</sup> In 2016, also in accordance with the JOBS Act, the Commission adopted final rules creating Regulation Crowdfunding, which permits crowdfunded offerings (at the time of adoption of up to \$1 million in a 12-month period).<sup>157</sup> In 2016, the Commission also adopted rules increasing the offering limit under Rule 504 from \$1 million to \$5 million.<sup>158</sup> In 2020, the offering limit of Tier 2 offerings was increased to \$75 million in a 12-month period, the offering limit under Rule 504 was increased from \$5 million to \$10 million, and the offering limit under Regulation Crowdfunding was increased to \$5 million.<sup>159</sup> Additionally, there are also exemptions for offerings that are limited to residents of a specific state, more commonly referred to as “intrastate exemptions.”<sup>160</sup> Each of these exemptions permits investment by non-accredited investors, with differing levels of prescribed disclosure depending on the exemption used.

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<sup>156</sup> See JOBS Act Sec. 401(a). See also Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), Release No. 33-9741 (Mar. 25, 2015) [80 FR 21806 (Apr. 20, 2015)]. In 2018, the Commission adopted further amendments to the issuer eligibility and related provisions pursuant to the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 [Pub. L. No. 115-174, 132 Stat. 1296 (2018)] to allow issuers that are subject to the ongoing reporting requirements of Section 13 or 15(d) of the Exchange Act to use the exemption. See also Conditional Small Issues Exemption Under the Securities Act of 1933 (Regulation A), Release No. 33-10591 (Dec. 19, 2018) [84 FR 520 (Jan. 31, 2019)].

<sup>157</sup> See Title 3 of JOBS Act. See also Crowdfunding, Release No. 33-9974 (Oct. 30, 2015) [80 FR 71387 (Nov. 16, 2015)].

<sup>158</sup> See Exemptions to Facilitate Intrastate and Regional Securities Offerings, Release No. 33-10238 (Oct. 26, 2016) [81 FR 83494 (Nov. 21, 2016)].

<sup>159</sup> See 2020 Harmonization Release.

<sup>160</sup> See 17 CFR 230.147 and 17 CFR 230.147A.

### III. History of Suggestions to Revise the Accredited Investor Definition

A variety of proposals and suggestions have been put forward over the years to revise the accredited investor definition, both by the Commission and commenters. Many of these suggestions and proposals have had a particular focus on the financial thresholds in the definition.<sup>161</sup> Proposals received by the Commission range from adjustments to the thresholds to account for inflation since 1982,<sup>162</sup> to periodic adjustments for inflation going forward,<sup>163</sup> to elimination of the thresholds entirely,<sup>164</sup> or elimination of the definition altogether.<sup>165</sup>

The 2015 Staff Report presented staff recommendations on amending the definition, one of which was to index all financial thresholds in the definition for inflation on a going-forward basis.<sup>166</sup> The 2019 review also solicited public comment on the definition, including whether to index the financial thresholds for inflation.<sup>167</sup> Most recently, in connection with the amendments to the accredited investor definition in 2020, the Commission sought comment on a number of inflation-adjustment-related questions, including whether the Commission should make a one-time inflation adjustment to the financial thresholds to account for the effects of inflation since those thresholds were first adopted in 1982 or instead maintain the thresholds but adjust for inflation on a going-forward basis.<sup>168</sup> A number of commenters supported raising the thresholds

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<sup>161</sup> See, e.g., 2015 Staff Report.

<sup>162</sup> See, e.g., letter from Public Investors Arbitration Bar Association dated Mar. 16, 2020 (“PIABA Letter”) note 172; and 2023 NASAA Letter to Director Gerding.

<sup>163</sup> See, e.g., 2019 Concept Release at 30475.

<sup>164</sup> See, e.g., 2019 Concept Release at 30473.

<sup>165</sup> See, e.g., letters responding to the 2019 Concept Release from Nathan Eames dated September 1, 2019 and Andrew Deville dated June 19, 2019.

<sup>166</sup> 2015 Staff Report, at 91, (recommending that the Commission “could consider indexing all financial thresholds in the accredited investor definition for inflation, rounded to the nearest \$10,000, on a going-forward basis every four years to coincide with the Commission reviews.”).

<sup>167</sup> 2019 Concept Release.

<sup>168</sup> 2020 AI Proposing Release.

to reflect inflation since adoption of the rule, on a going-forward basis, or both.<sup>169</sup> Other commenters on the 2020 AI Proposing Release expressed support for maintaining the thresholds as they are<sup>170</sup> or supported lowering the financial thresholds.<sup>171</sup>

Commenters providing suggestions for adjusting the thresholds frequently expressed concern that the criteria set forth in the accredited investor definition may not be an appropriate proxy for identifying investors that do not need the protections of the federal securities laws. Some, including state securities regulators, stated that the current accredited investor definition is over-inclusive, encompassing individuals who may not be able to bear the risk of loss of their investments or who are not in a position to access the information needed to assess the risk of their investments, because the financial thresholds contained in the definition have not been

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<sup>169</sup> See, e.g., letter from George Humm dated Jan. 29, 2020; letter from Howard Lichtman dated Feb. 21, 2020; letter from Marc. I. Steinberg dated Jan. 23, 2020; letter from Blake Delaplane dated Jan. 13, 2020 (“B. Delaplane Letter”); letter from Mike L. dated Dec. 19, 2020; letter from Investment Company Institute dated Mar. 12, 2020 (“ICI Letter”); letter from Sarah H. Moller dated Mar. 13, 2020 (“S. Moller Letter”); letter from Securities Arbitration Clinic at St. John’s University School of Law dated Mar. 16, 2020 (“St. John’s Sec. Arbitration Clinic Letter”); letter from NASAA dated Mar. 16, 2020 (“2020 NASAA Letter”); letter from Better Markets dated Mar. 16, 2020 (“Better Markets Letter”); letter from Xavier Becerra, Attorney General of the State of California et al. dated Mar. 16, 2020; letter from Matthew J. Trudeau dated Mar. 13, 2020 (“M. Trudeau Letter”); letter from Managed Funds Association and Alternative Investment Management Association dated Mar. 13, 2020; letter from Cornell Securities Law Clinic dated Mar. 13, 2020; letter from Riley T. Maud dated Mar. 6, 2020; PIABA Letter (suggesting that the Commission “rais[e] the net worth threshold to \$2.5 million and income threshold to \$500,000/\$750,000 for individuals and couples”); letter from Tyler Yagman and Nicholas Bruno dated Mar. 15, 2020; letter from Artinvest dated Apr. 23, 2020 (“Artinvest Letter”) and letter from CFA Institute dated May 4, 2020.

<sup>170</sup> See e.g., letter from Institute for Portfolio Alternatives dated Mar. 16, 2020; letter from Morningstar dated Mar. 16, 2020; letter from Committee on Securities Laws of the Business Law Section of the Maryland State Bar Association dated Mar. 16, 2020 (“MD St. Bar Assn. Comm. on Sec. Laws Letter”); letter from Center for Capital Markets Competitiveness dated Mar. 16, 2020; letter from National Association of Manufacturers dated Mar. 16, 2020 (“NAM Letter”); letter from OpenDeal, Inc. (d/b/a Republic) dated Mar. 16, 2020; letter from American Investment Council dated Mar. 16, 2020; letter from David R. Burton dated May 1, 2020 (this commenter also stated that the threshold could “possibly” be reduced); and letters from Geraci LLP dated Mar. 9, 2020 (“Geraci Letter”) and American Association of Private Lenders submitted May 27, 2020 (“AAPL Letter”) (the Geraci Letter and AAPL Letter are essentially identical).

<sup>171</sup> See, e.g., letter from Stuart dated Dec. 19, 2019; letter from Max Harker dated Dec. 19, 2019; letter from Robert Hall dated Feb. 23, 2020 (“R. Hall Letter”); and letter from Brandon Andrews et al. dated May 4, 2020 (“B. Andrews et al. Letter”) (stating that “[t]he current income and wealth standards that determine who can participate in private capital markets shut out even many ‘wealthy’ Americans from investing in founders from their communities.”).

adjusted for inflation<sup>172</sup> or because the net worth calculation includes certain assets, such as retirement accounts, that should be omitted.<sup>173</sup>

On the other hand, some commenters have raised concerns about possible disparate geographic effects of the current financial thresholds, or that certain groups may be less likely to be eligible to be accredited investors under the current definition, due to systemic inequality and racial discrimination that has negatively impacted the ability of certain groups to build generational wealth, access higher education, pursue certain professions, and be members of certain social networks.<sup>174</sup> In particular, some posited that the accredited investor definition, as it applies to individuals, is under-inclusive because financially sophisticated individuals who are not wealthy may not qualify as accredited investors.<sup>175</sup>

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<sup>172</sup> See, e.g., the following letters received in response to the 2020 AI Proposing Release, *available at* <https://www.sec.gov/comments/s7-25-19/s72519.htm>: B. Delaplane Letter (suggesting that the unadjusted thresholds have lowered the level of sophistication required for accredited investor status over time); ICI Letter (stating that “changes in technology that have occurred since 1982 do not make up for the loss of investor protection as a result of the erosion of the financial thresholds”); S. Moller Letter (stating that “[inflation] adjustment is not only definitively warranted but essential for the protection of investors”); St. John’s Sec. Arbitration Clinic Letter (stating that “the SEC’s purpose in setting those monetary requirements in 1982 is undermined as inflation increases and yet the thresholds remain the same”); M. Trudeau Letter (positing that the thresholds should be raised to “get back to the original intent of the category”); PIABA Letter (stating that raising the thresholds would “be a meaningful step forward in moving back to the original intention of limiting the pool of accredited investors”); and Better Markets Letter (stating that “there may indeed now [be] hundreds of thousands of investors who have become qualified as Accredited Investor solely on the virtue of inflation of their asset prices but who otherwise lack necessary financial sophistication to carefully weigh the risks associated in investing in exempt offerings”).

<sup>173</sup> See, e.g., 2020 NASAA Letter (proposing to exclude both “agricultural land and machinery held for production” and “the value of any defined benefit or defined contribution tax-deferred retirement accounts”); and letter from Da Kui dated Jan. 10, 2020 (recommending exclusion of a portion of the investor’s retirement accounts). See also note 194.

<sup>174</sup> See Petition for Rulemaking dated Nov. 9, 2022 from Investor Choice Advocates Network (seeking Commission action to revise the accredited investor definition by “replacing the net worth and income requirements of Rule 501(a) under the Securities Act of 1933 with non-financial metrics” thereby “reduc[ing] the diversity, equity, and inclusion barriers for ‘accredited investors’”), *available at* <https://www.sec.gov/rules/petitions/2022/petn4-796.pdf>. See also letter from Stuart Kuzik dated Apr. 24, 2020 in response to the 2020 AI Proposing Release (advocating for the elimination of the definition, stating that “this definition and the theoretical protection intended therein has perpetuated inequality in geographic, racial, age, and socioeconomic factors.”).

<sup>175</sup> See, e.g., R. Hall Letter (stating that “[w]e are in an age of information where plenty of performance data is available for your average citizen to make intelligent investments in small companies”) and Brandon Andrews et al. Letter (stating that “[t]he current income and wealth standards that determine who can participate in private capital markets shut out even many ‘wealthy’ Americans from investing in founders from their communities”).

In addition, many commenters questioned the correlation between wealth and financial sophistication and, as a result, asserted that the income and net worth tests fail to identify correctly those individuals who need or do not need the protections of the federal securities laws.<sup>176</sup>

As noted above, in 2020, the Commission added certain professional credentials to the accredited investor definition under Rule 501(a)(10).<sup>177</sup> Some commenters were supportive of these changes to the definition.<sup>178</sup> Others raised concerns about the use of certain credentials, or about the use of credentials standing alone, as a means to establish whether an investor needs the protections of the federal securities laws.<sup>179</sup> For example, some commenters expressed concern

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<sup>176</sup> See, e.g., the following letters in response to the 2019 Concept Release, *available at* <https://www.sec.gov/comments/s7-08-19/s70819.htm>: letter from NASAA dated Oct. 11, 2019 (indicating that the Commission should adjust the financial thresholds for inflation and should consider “additional reforms to the accredited investor definition that would more accurately tie it to investor sophistication and the potential ability to withstand economic loss” including the “elimination and replacement of income and net-worth standards on the grounds that such standards are inherently flawed proxies for sophistication”) and letter from the Consumer Federation of America dated Oct. 1, 2019 (indicating that the then-current accredited investor definition was “vastly over-inclusive”). See also the 2014 IAC Recommendations.

<sup>177</sup> See note 39.

<sup>178</sup> See, e.g., MD St. Bar Assn. Comm. on Sec. Laws Letter (stating support for a majority of the proposed amendments); NAM Letter (stating that the proposed amendments balance risks of investments in private offerings by instituting appropriate guardrails around ability to withstand a loss or understand the risk); letter from Investments & Wealth Institute dated Mar. 13, 2020 (suggesting expansion of the credentials to those granted by private organizations meeting the criteria set forth in the 2020 AI Proposing Release); letter from G. Philip Rutledge dated Jan. 31, 2020 (making various suggestions regarding implementation, including a tiered approach with different requirements based on the credential to be used); and letter from Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association dated May 22, 2020 (supporting an objective test to determine accredited investors status which “expand[s] overall access to capital from investors while providing certainty for issuers and their advisers.”).

<sup>179</sup> See, e.g., letter from the Consumer Federation of America dated Mar. 9, 2020 (“2020 CFA Letter”) (expressing limited support for certain aspects of the proposals, but also arguing that the Commission’s analysis failed to sufficiently emphasize the impact of inflation on the thresholds and other changes to the accredited investor population in its analysis, which “is critical to preserving the basic principle behind the ’33 Act: that no company should be able to raise capital from the general public without first registering its securities with the SEC and providing the essential facts needed to value those securities.”); and 2020 NASAA Letter (stating that the 2020 AI Proposing Release “bear[s] no relationship to the limited nature of accredited investor status envisioned by Congress.”).

about such individuals' capacity to bear the financial risk of private investments,<sup>180</sup> while others recommended that any approved credentials should be coupled with an experience requirement.<sup>181</sup> In addition, although the Commission included in the definition a non-exclusive list of attributes that the Commission will consider in determining whether to add additional qualifying professional certifications and designations or other credentials,<sup>182</sup> some commenters expressed reservations about whether the broadness of the rule would lead to interpretations that do not adequately incorporate investor protection concerns.<sup>183</sup>

In addition to considering these matters in connection with the 2020 rulemaking, the Commission has received more recent recommendations on whether to adjust the financial thresholds from the Small Business Advisory Committee.<sup>184</sup> For example, in December 2019, the Small Business Advisory Committee adopted recommendations that the Commission should, among other things, “[l]eave the current financial thresholds in place, subject to possibly

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<sup>180</sup> See, e.g., St. John's Sec. Arbitration Clinic Letter (stating that “it is unlikely that individuals qualifying pursuant to [Rule 501(a)(10)] will have the financial capacity to bear the financial risk associated with an exempt offering”); letters from Alex Naegle dated Jan. 9, 2020, Mercer Advisors, Inc. dated Mar. 11, 2020, and Artivist Letter (each supporting investment limits for individuals who are accredited under Rule 501(a)(10)); 2020 NASAA Letter (stating that a level of years of experience should be required for individuals who are accredited under Rule 501(a)(10)); and letter from Nasdaq, Inc. dated May 18, 2020 (“Nasdaq Letter”) (stating that “[a]n examination of knowledge, without an additional requirement of industry experience, is not a satisfactory means to determine whether an investor can bear the risk of and evaluate a potential investment in an exempt offering without the benefit of a registration statement or similar disclosure”). The Commission acknowledged in the 2020 AI Adopting Release that some natural person investors who would qualify as accredited investors under the amended definition may be less able to withstand investment losses of the same nominal size than an accredited investor qualifying on the basis of personal wealth. See 2020 AI Adopting Release at 64269.

<sup>181</sup> See Nasdaq Letter and 2020 NASAA Letter (stating that “any use of a professional designation or exam as one aspect of a more fulsome assessment of financial sophistication for purposes of determining accredited investor status should also include significant relevant experience.”).

<sup>182</sup> See Rule 501(a)(10).

<sup>183</sup> See, e.g., 2020 NASAA Letter (stating that the broadness of the rule could “encourage a ‘race to the bottom,’ as competing testing or certification standard bearers sought to expand the use of their metric to confer accredited investor status”); and 2020 CFA Letter (expressing a concern that “individuals who qualify as accredited investors based on certain licenses, credentials and designations: 1) is likely to be interpreted in a way that is far too broad, and 2) that the procedure for recognizing such designations does not offer sufficient protections against that outcome.”).

<sup>184</sup> The Small Business Advisory Committee's formation and mandate is discussed in Section I.A.

adjusting such thresholds downwards for certain regions of the country” and “[g]oing forward, index the financial thresholds for inflation on periodic basis.”<sup>185</sup> Similarly, in March 2022, the Small Business Advisory Committee adopted recommendations that the Commission should “not increase the current financial thresholds for individual investors to qualify as accredited” but “going forward, [should] consider indexing the financial thresholds for inflation on a periodic basis.”<sup>186</sup> The Small Business Advisory Committee reaffirmed its December 2019 and March 2022 recommendations in October 2022 in connection with a recommendation regarding ways to promote growth of diverse entrepreneurial ecosystems.<sup>187</sup> In February 2023, departing members of the Small Business Advisory Committee provided some recommendations consistent with prior recommendations of the committee and the ACSEC.<sup>188</sup>

The SEC’s Office of the Advocate for Small Business Capital Formation’s 2022 annual report recommended that the Commission expand the accredited investor definition to include “additional qualitative professional criteria and offer more opportunities to demonstrate financial sophistication as an alternative to the income and net worth thresholds” and that the Commission “consider the impact any change to the income and net worth thresholds would have on

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<sup>185</sup> See Small Business Advisory Committee Recommendation (Dec. 11, 2019), *available at* <https://www.sec.gov/spotlight/sbcfac/recommendation-accredited-investor.pdf>.

<sup>186</sup> The Committee further stated that “[g]iven the imperfect proxy that financial thresholds provide for measuring investor sophistication, the Commission should provide alternative methods for investors to qualify as sophisticated, which could include investment experience, knowledge gained through work experience or membership in associations, education credentials, additional professional certifications, or tests to demonstrate sophistication.” See Small Business Advisory Committee Recommendation (Mar. 12, 2022) *available at* <https://www.sec.gov/spotlight/sbcfac/sbcfac-accredited-investor-recommendation-021022.pdf> and Small Business Advisory Committee Recommendation (Oct. 13, 2022), *available at* <https://www.sec.gov/spotlight/sbcfac/entrepreneurial-ecosystems-recommendation-101322.pdf>. The March 2022 recommendation also urged the Commission to provide alternative methods for investors to qualify as sophisticated, which could include investment experience, knowledge gained through work experience or membership in associations, education credentials, additional professional certifications, or tests to demonstrate sophistication.

<sup>187</sup> See Small Business Advisory Committee Recommendation (Oct. 13, 2022), *available at* <https://www.sec.gov/spotlight/sbcfac/entrepreneurial-ecosystems-recommendation-101322.pdf>.

<sup>188</sup> See Small Business Advisory Committee Parting Perspectives Letter (Feb. 28, 2023), *available at* <https://www.sec.gov/files/committee-perspectives-letter-022823.pdf>.

minorities and populations located in rural areas.”<sup>189</sup>

The SEC hosts an annual Government-Business Forum on Small Business Capital Formation (“Small Business Forum”). The 42<sup>nd</sup> Small Business Forum was held in April 2023 and presented similar recommendations, which were also consistent with the recommendations of prior Small Business Forums.<sup>190</sup> These recommendations, included among other things, that the Commission “[e]xpand the accredited investor definition to include additional measures of sophistication,”<sup>191</sup> “expand the accredited investor definition to include any person who invests not more than 10% of the greater of his/her annual income or net assets,”<sup>192</sup> and “ensure capital raising rules provide equitable access to capital for underrepresented founders and investors.”<sup>193</sup>

In addition, in 2023, NASAA recommended that the Commission amend the accredited investor definition to: 1) exclude from the net worth calculation assets accumulated or held in defined contribution plans and 2) adjust the income and net worth thresholds to account for inflation since 1982 and index the thresholds to inflation on a go forward basis.”<sup>194</sup>

The IAC has discussed the accredited investor definition at various times since its

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<sup>189</sup> See 2022 OASB Annual Report at 73. See also 2022 OASB Annual Report at 54 (stating disparities in average household net worth and income by race/ethnicity).

<sup>190</sup> See, e.g., 41<sup>st</sup> Small Business Forum Report, available at <https://www.sec.gov/files/2022-oasb-annual-forum-report.pdf>; and 40<sup>th</sup> Small Business Forum Report, available at [sec.gov/files/2021\\_OASB\\_Annual\\_Forum\\_Report\\_FINAL\\_508.pdf](https://www.sec.gov/files/2021_OASB_Annual_Forum_Report_FINAL_508.pdf).

<sup>191</sup> See Report of the 42<sup>nd</sup> Annual SEC Small Business Forum (Sept. 26, 2023) (“42<sup>nd</sup> SEC Small Business Forum Report”) at 9, available at [https://www.sec.gov/files/2023\\_oasb\\_annual\\_forum\\_report\\_508.pdf](https://www.sec.gov/files/2023_oasb_annual_forum_report_508.pdf).

<sup>192</sup> 42<sup>nd</sup> SEC Small Business Forum Report at 10.

<sup>193</sup> See 42<sup>nd</sup> SEC Small Business Forum Report at 15.

<sup>194</sup> See 2023 NASAA Letter to Director Gerding. See also NASAA 2023 Recommendations to Congress (recommending that Congress: 1) raise and adjust the income and net worth thresholds for inflation; 2) exclude from the net worth calculation the value of “any defined benefit or defined contribution tax-deferred retirement accounts, as well as the value of agricultural land and machinery held for production;” and 3) require “demonstrable investment experience” for any metrics to measure sophistication.).

inception.<sup>195</sup> In 2014, the IAC recommended that the Commission carefully evaluate the accredited investor definition as it relates to natural persons, stating that their expectation is that “a closer analysis [will reveal] that a significant percentage of individuals who currently qualify as accredited investors are not in fact capable of protecting their own interests.”<sup>196</sup> The IAC also recommended the Commission consider alternatives that: 1) allow individuals to qualify as accredited investors based on their financial sophistication; 2) alternative approaches to setting the financial thresholds, such as limiting investments in private companies to a percentage of assets or income; 3) encouraging the development of an alternative method of verifying accredited investor status; and 4) strengthening the protections for non-accredited individuals that only qualify to invest by virtue of their reliance on a purchaser representative.<sup>197</sup> Most recently, in September 2023, the IAC held a panel to discuss the accredited investor definition; new recommendations or updates to existing recommendations as a result of that panel have yet to be released.

## **Conclusion**

We are interested in the public’s views regarding the matters discussed in this review. We welcome all feedback and encourage interested parties to provide feedback on any or all topics of interest.

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<sup>195</sup> *See, e.g.*, Recommendations of the IAC Regarding SEC Rulemaking to Lift the Ban on General Solicitation and Advertising in Rule 506 Offerings: Efficiently Balancing Investor Protection, Capital Formation and Market Integrity (2012), *available at* <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-general-solicitation-advertising-recommendations.pdf>.

<sup>196</sup> *See* 2014 IAC Recommendations.

<sup>197</sup> *See id.*