

August 8, 2016

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Mr. Brent Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Report on the Review of the Definition of “Accredited Investor”
(December 18, 2015) (“Report”),
<https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>

Dear Mr. Fields:

We represent the Private Investor Coalition (“Coalition”), a group of single family offices that has been actively involved in developments under the Federal securities laws that affect single family offices. Specifically, the Coalition supported the inclusion of Section 409 in the Dodd-Frank Wall Street Reform and Consumer Protection Act, and subsequently participated actively in the proposal and adoption of Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940 (“Family Office Rule”). Among the issues that the Coalition is now following closely is the definition of “family” in the definition of “accredited investor” in Regulation D under the Securities Act of 1933 (“1933 Act”) and “qualified purchaser” in Section 2(a)(51)(A) of the Investment Company Act of 1940 (“Investment Company Act”). In submitting this letter regarding the Report, the Coalition wishes to express its view that (i) there should be a common definition of “family” for purposes of the Advisers Act, 1933 Act, and Investment Company Act, and (ii) the definition of “family client” in the Family Office Rule is the definition that should be applied in each of these statutory frameworks.

Background:

Family offices frequently acquire interests in private equity funds and hedge funds (referred to collectively as “Private Funds”) as part of the family office asset allocation process. The Private Funds have to be certain of their ability to rely on an exclusion from the definition of “investment company.” Both Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act require that interests in a Private Fund relying on either exclusion not be offered in a public offering, and it is common for the sponsor of a Private Fund to fulfill that requirement by complying with Regulation D under the 1933 Act. For purposes of the exemption in the Investment Advisers Act, the Family Office Rule has a detailed definition of “family client.” In general, a person is a “family member” if he is a lineal descendant of a common ancestor, or a

spouse or child of a lineal descendant of the patriarch or matriarch of the family. The related definition of “family client” includes each such “family member” and every possible trust, charitable organization, or ownership situation to which the family office could give investment advice. However, the operative definition of “family” in the definitions of “accredited investor” and “qualified purchaser” differs in important respects from the definition of “family client” in the Family Office Rule.

Discussion of Legal Issues:

Regulation D under the 1933 Act defines the circumstances in which an offer or sale of a security will not involve a public offering. Rule 501(a) in Regulation D defines to the term “accredited investor” to include:

- a natural person whose individual net worth, or joint net worth with a spouse, exceeds \$1,000,000 (without taking into account his resident and related indebtedness);
- a natural person who had an individual income in excess of \$200,000 in each of the two most recent years (or joint income with a spouse in excess of \$300,000), and has a reasonable expectation of reaching the same income level in the current year;
- any trust with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities being offered, and whose decision is being made by a sophisticated investor; or
- an entity in which all of the equity owners are accredited investors.

Hypothetically, a younger member of a family might be able to invest in a Private Fund through a trust whose trustor was a sophisticated investor, but we will assume that she is otherwise unlikely to be an accredited investor based on her net worth or her income. On the other hand, a charitable organization with less than \$5 million in total assets would not be an accredited investor even if the sophisticated investor who formed the charitable trust was herself fully qualified in every other respect.

For those Private Funds that intend to rely on Section 3(c)(7), the offeree must not only be an accredited investor under the 1933 Act, but also be a “qualified purchaser” under the Investment Company Act. Section 2(a)(51)(A) of the Investment Company Act defines the term “qualified purchaser” to mean:

- a natural person who owns not less than \$5 million of investments;
- a company that owns not less than \$5 million in investments and that is owned by two or more natural persons who are related as siblings or spouse (including former spouses) or

direct lineal descendants by birth or adoption, spouses and estates of such persons, or charitable organizations or trusts established by or for the benefit of such persons;

- any “trust” not identified in the bullet point immediately above, not formed for the purpose of making the investment, and as to which each person authorized to make decisions and each settlor or contributor of assets is himself a qualified person; or
- any institutional investor who, in the aggregate, owns and invests on a discretionary basis not less than \$25 million

So, the charitable foundation in the previous hypothetical example with less than \$5 million in investments, which was not an accredited investor, may nevertheless be a qualified purchaser under the third bullet point if established and managed by a qualified person. Similarly, a parent exercising investment discretion over a trust for the benefit of her child or children could qualify the trust as a “company” identified in the second bullet point above even though the child could not qualify as an accredited investor in her own right.

The Family Office Rule allows a family office to give investment advice to a “family client” without registering under the Investment Advisers Act. The public policy supporting that exclusion is based on the notion that members of a family will protect each other, and that the investor protections of the Investment Advisers Act do not need to apply in this unique situation. In this context, it is notable that, unlike the definitions of “accredited investor” and “qualified purchaser,” the definitions of “family member” and “family client” in the Family Office Rule do not contain any minimum sophistication, net income, or wealth component, which underscores the anomalies in the hypothetical examples immediately above. However, the Family Office Rule removes the protective environment for former-employees or former-family members when they leave the family office because, upon such an event happening, the family office is no longer permitted to give them investment advice. In short, the public policy rationale applies only to those who currently enjoy the alternative investment protection of the family office.

Recommendation:

The different definitions of “family” in each of these three statutory settings can be a trap for the unwary. Family offices that establish investment vehicles to acquire interests in Private Funds must successfully navigate this terrain to achieve their purpose. By the same token, a sponsor of a Private Fund attempting to sell interests to members of a family office is eager to get this legal analysis correct so as not to jeopardize its own status under the 1933 Act and Investment Company Act. Inadvertent risks would be minimized and the world would be more hospitable to investments in Private Funds by family offices, from the perspective of the family office as well as from the perspective of the sponsor of the Private Fund, if the definitions of “family” in all three contexts were identical. The most comprehensive treatment of the definition of “family client” is found in the Family Office Rule. Therefore, the Coalition

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respectfully recommends that, when the Commission amends the definition of “accredited investor,” it deem “a family office itself and its ‘family clients’ as those terms are defined in Rule 202(a)(11)(G)-1 under the Investment Advisers Act” to be an accredited investor for purposes of Regulation D and of Sections 3(c)(1) and 3(c)(7) in the Investment Company Act.

Conclusion:

We believe that the Coalition is expressing views that are widely shared by members of the family office community, and of those persons sponsoring Private Funds, in urging the Commission to adopt one comprehensive definition for the definition of “accredited investor.” We appreciate this opportunity to comment on the Report, and if the Commission or its staff should so wish we would be pleased to provide any additional information that might be needed fully to consider this recommendation and request.

Respectfully submitted,


Martin E. Lybecker

cc. Chair Mary Jo White
Commissioner Kara Stein
Commissioner Michael S. Piwowar
Keith F. Higgins, Director, Division of Corporation Finance
David Grimm, Director, Division of Investment Management