

August 25, 2010

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Request for Advance Comment on Rulemakings to Implement
Dodd-Frank Wall Street Reform and Consumer Protection Act;
Revisions of Limited Offering Exemptions in Regulation D and
Rule 144A; SEC Webpage Inviting Advance Comments
<http://www.sec.gov/spotlight/regreformcomments.shtml>

Dear Ms. Murphy:

We appreciate the opportunity to submit an advance comment on behalf of the State of Alaska on the Commission's planned rulemakings to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act, HR. 4173 (2010), (the "Act"). The request for advance comments is set forth in the above-referenced Commission webpage and in Chairman Schapiro's remarks of July 27, 2010 "*Moving Forward: The Next Phase in Financial Regulatory Reform*" at the Center for Capital Markets Competitiveness, U.S. Chamber of Commerce on July 27, 2010, (the "Request for Advance Comments").

The State of Alaska strongly urges the Commission to include in the initial rulemakings to implement the Act the Commission's long-standing proposal to add governmental bodies to the definitions of "accredited investor" in Rules 215 and Regulation D/Rule 501(17 C.F.R. §§ 230.215, 230.501) and "qualified institutional buyer" (QIBs) in Rule 144A (17 C.F.R. § 230.144A).

The Act's legislative history includes language urging the Commission to take the opportunity of the initial rulemaking under the Act to amend these rules to include governmental entities in the definitions of "accredited investor" and "qualified institutional buyer."

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The Commission proposed to make these changes in August 2007.¹ The Commission's proposal to include governmental bodies in these definitions received favorable comment from the state securities commissioners.² The Commission has not yet acted on its 2007 proposal.

We urge the Commission to take action as part of the rulemakings implementing the Act to include governmental bodies within these definitions in order to permit state governments to more fully participate in the private placement market as sovereign investors.

The Legislative History Supports Action with the Initial Rulemakings to Implement the Act

On the day the Senate passed the Bill that became the Act, Senator Dodd, Chairman of the Senate Committee with jurisdiction over the legislation and the Commission, confirmed to the Alaska Senate delegation both the Commission's authority to adopt such a change and the appropriateness of the Commission taking that action in connection with other rulemakings mandated by the legislation:

Mr. BEGICH. Section 412 of the legislation requires the Securities and Exchange Commission to conduct a rulemaking to implement changes to the definition of "accredited investor" in regulation D, and other sections of the legislation will require the SEC to conduct other rulemaking to implement the new law. It is my understanding, and I believe the understanding of my colleague from Alaska, that the SEC has authority under existing law to amend the definitions of "accredited investor" in Regulation D and related SEC rules and "qualified institutional buyer" in rule 144A under the Securities Act of 1933, to expressly include Federal, State and local government bodies within those definitions. In fact, the SEC proposed to do so in 2007 but has not completed that rulemaking. Does the Senator from Connecticut concur that the SEC already has the authority to amend these definitions?

Mr. DODD. The Senator from Alaska is correct. The SEC certainly has existing authority to add State and local governments to the definitions of "accredited investor" and "qualified institutional buyer" under its Securities Act rules....

¹ 72 Fed. Reg. 45,116 (Aug. 10, 2007).

² Letter to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, from Karen Tyler, President, North American Securities Administrators Association, Inc. and Director, North Dakota Securities Department. (October 26, 2007) at pp 14-15 (NASAA Comment Letter submitted in rulemaking docket for this proposal).

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Ms. MURKOWSKI. Our State—the great State of Alaska—believes that it would be appropriate and in the public interest and, in the interests of State and local governments across the Nation, for the SEC to add governmental entities to the definitions of “accredited investor” and “qualified institutional buyer” when it promulgates rules pursuant to this legislation. The reasons for including governmental entities in these definitions are as sound today as they were 3 years ago. In particular, governments are large and sophisticated investors with professional treasury management staffs that manage large amounts of the government’s own money and seek to invest in bonds and other securities investments in order to prudently diversify their investment portfolios and obtain a favorable return. Many of the most attractive investments are offered only in private placements to institutional investors conducted under regulation D or rule 144A. Without access to these investments, the government earns a lower return and has less diversification in its investments than would be optimal.

Does the chairman agree with us that when the SEC promulgates its rules under this legislation, it should address, while taking care to ensure appropriate minimum asset protections are in place, the inclusion of State and local governments in the definitions of accredited investor and qualified institutional buyer?

Mr. DODD. I believe it would be appropriate for the SEC to take the opportunity presented by the rulemakings under this legislation, to consider whether to include State and local government bodies within those definitions.³

Thus, the legislative history of the Act confirms that the Commission has authority to make the proposed changes including government bodies within the definitions of “accredited investor” and “qualified institutional buyer” and the appropriateness of the Commission doing so now as part of its initial rulemakings to implement the Act.

The Amendment is Ripe for Commission Action at this Time

The Commission proposed to make these amendments in August 2007, drafted language to effect this change, and received public comments. There is no need to wait further to take action on this amendment. The work is largely done already. The previously-developed rule text can readily be included in the rulemakings required by Titles IV and IX of the Act.

³ Congressional Record S.4063-64 (May 20, 2010).

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As proposed by the Commission in August 2007, the definition of “accredited investor” in Rule 215(c) and Section 501(a)(3) of Regulation D would be amended to read, in pertinent part:

“Any corporation (*including any non-profit corporation*), Massachusetts or similar business trust, partnership, *limited liability company, Indian tribe, labor union, governmental body, or other legal entity with substantially similar legal attributes*, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000 *or investments in excess of \$5,000,000....*”
(emphasis added to show changes to current definition).

A narrower revision to this text, addressing only governmental bodies, could read:

“Any corporation, Massachusetts or similar business trust, partnership, *or governmental body*, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000 *or investments in excess of \$5,000,000....*”
(emphasis added to show changes to current definition).

The Commission’s 2007 proposal would have defined “governmental body” for purposes of both Rule 215 and Regulation D in a new Section 501(g) of Regulation D to include any:

- “(1) Nation, state, county, town, village, district or other jurisdiction of any nature;
- (2) Federal, State, local, municipal, foreign or other government;
- (3) Governmental or quasigovernmental authority of any nature (including any governmental agency, branch, department, official or entity and any court or other tribunal);
- (4) Multi-national organization or body; or
- (5) Body exercising, or entitled to exercise, any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power of any nature.”

This 2007 draft language defining “governmental body” for this purpose in Rule 501(g) still works, or could be drafted more narrowly to include simply numbers 2 and 3 above.

The Commission in its 2007 Release also requested comments on whether the list of “qualified institutional buyers” in Rule 144A(1)(i)(H) should be expanded to include governmental

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bodies in a similar manner.⁴ Although that 2007 proposal did not include specific text, the amendment to the text of Rule 144A(1)(i)(H) could simply parallel the language proposed in 2007 as an amendment to Rule 215 and Regulation D as follows (with the added language highlighted below):

Any organization described in section 501(c) (3) of the Internal Revenue Code, corporation (other than a bank as defined in section 3(a)(2) of the Act or a savings and loan association or other institution referenced in section 3(a)(5)(A) of the Act or a foreign bank or savings and loan association or equivalent institution), partnership, ***governmental body as defined in section 501(g) of Regulation D under the Act***, or Massachusetts or similar business trust; and

This Amendment is Important to State Governments in the Management of State Assets.

Inclusion of governments within these definitions, and thereby within the list of institutional investors that are permitted to invest in Rule 506 and Rule 144A private placements, is important for state governments in the investment of their sovereign funds. Particularly in the contexts of investments in fixed-income investments and private equity investments, many governmental bodies participate as investors in private placements. Although state governmental bodies clearly qualify as sophisticated institutional investors that are permitted investors in private placements conducted under Section 4(2) of the 1933 Act, as well as under various state blue sky laws,⁵ the current omission of governmental bodies from the list of “accredited investors” in Rule 215 and Regulation D and from the definition of “qualified institutional buyer” in Rule 144A raises issues that can interfere with governmental bodies investing in private placements conducted under those rules.⁶ This omission of governmental bodies can reduce the ability of a governmental body to gain access

⁴ NASAA commented favorably on this addition to the definition of “qualified institutional buyer” in their 2007 comment letter submitted in the rulemaking docket on this proposal. *See* footnote 2 *supra*.

⁵ *See e.g.* the terms “financial or institutional investor” in Section 101(5)(iv) of the Uniform Securities Act (1985) and “institutional investor” in Section 102(11)(O) of the Uniform Securities Act (2002).

⁶ Although Regulation D allows an issuer to accept up to 35 “non-accredited” investors in Regulation D private placements, this may not be enough slots to accommodate all governmental bodies and similarly sophisticated investors not specifically listed as “accredited investors” in the rule who wish to invest. In addition, there are additional disclosure requirements for offers and sales to non-accredited investors and some uncertainty among issuers as to whether the disclosure documents otherwise used in the offering are sufficient for non-accredited investors.

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to appropriate investment opportunities and fully diversify its investment portfolio, potentially impacting risk and return characteristics of the portfolio in a adverse manner.

A substantial percentage of bonds are issued in Rule 144A offerings. Inclusion of state governments in the definitions of “accredited investor” and “qualified institutional buyer” will permit state governments to more fully diversify our investment portfolios, thereby decreasing risk in the states’ investment portfolios.

Investment returns available to state and local governments will also be improved by including governments within the definitions of “accredited investor” and “qualified institutional buyer.” State governments invest many billions of dollars in the aggregate. The lost earnings resulting from a difference in yield between registered bonds and Rule 144A bonds of equivalent investment quality results in aggregate lost earnings to the states of many millions of dollars per month. The cost to state and local governments of further delay in adding governmental bodies to the definitions of “accredited investor” and “qualified institutional buyer” translates into fewer services for citizens and a higher debt burden that taxpayers will ultimately pay over time.

State governments as investors should not be excluded from the definitions of “accredited investor” and “qualified institutional buyer” simply because the rules do not contemplate the form of association selected by the state government. If a state governmental entity were organized as a trust, partnership or corporation, or if the state were acting on behalf of a pension plan for its own employees, it would fall squarely within the definition of “accredited investor.” Similarly, if a state governmental entity were organized as a partnership or corporation, it would fall squarely within the definition of “qualified institutional buyer.” However, because many state governmental bodies are not separate trusts, corporations or partnerships, but instead are a part of sovereign governmental entities investing for themselves as principals, they do not fit neatly within the definitions. Issuers conducting private placements under Rule 506 to other governmental bodies face the same problem and have, in various instances, relied upon Commission Staff no-action letters. Given the nature of no-action letters and the variety of fact patterns that may differ from the letters, we believe the better approach is for the rules to be amended as proposed by the Commission specifically to address the status of these governmental bodies and include them within the list of “accredited investors.”

Adding governmental bodies to the definitions of “accredited investor” and “qualified institutional buyer” would allow greater flexibility to governmental bodies to participate in certain investments without raising investor protection concerns. Rather, as stated earlier by NASAA in its favorable 2007 comment on this proposal, the amendment would remove an arbitrary distinction resting on the entity’s form of association, where there is no apparent relationship between the entity form and the need for the regulation.

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The rationale underlying the inclusion of certain categories of persons and entities within the list of “accredited investors” is essentially to make a judgment on whether that category of persons or entities needs the protections associated with a registered public offering or, instead, are likely to be sophisticated investors able to understand and bear the risks associated with the investment. The anomaly of the current definition is that an individual with no assets whatsoever and no particular knowledge of or experience with finance or investments, but an annual income over \$200,000, is an “accredited investor,” while a state government with an investment portfolio worth billions of dollars, a large, full time staff of investment professionals, and a stable of prominent investment advisory firms reviewing and providing portfolio investment advisory services to it, is not an “accredited investor.”

Moreover, as Regulation D is currently written, a state is deemed to be an “accredited investor” that is deemed sophisticated and able to fend for itself when investing in unregistered securities on behalf of its employees’ pension plans, but not when it is investing on its own behalf as principal. Surely this is a drafting oversight, not a considered policy judgment, and should be corrected.

Similarly, allowing governmental bodies that meet the investment size threshold to qualify as QIBs would increase such entities’ flexibility in their investments without posing an increased risk to the markets or investors. The current omission of “governmental bodies” in the definition of “qualified institutional buyer” in Rule 144A, reduces the ability of a governmental body to gain access to appropriate investments (particularly fixed income investments that are issued and can be resold under Rule 144A rather than only statutory 4(2) restricted resale offerings), impairs the ability of state governments to resell fixed income investments and to fully diversify their investment portfolios, and may also reduce liquidity otherwise available to 144A markets.

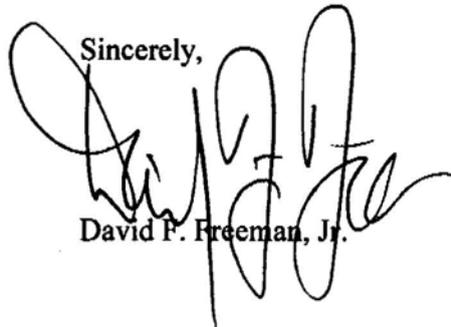
In sum, the inclusion of governmental bodies within the definitions of “accredited investors” and “qualified institutional buyers” would correct a drafting anomaly and benefit State governments and thereby residents of the State through the potential for improved investment returns and more diverse investment portfolios for state governments’ sovereign assets, the language to accomplish this change has already been drafted by the Commission and commented upon by the public, the state securities regulators have commented favorably on the proposal, and the legislative history of the Act strongly supports the Commission using its existing authority *now* to add governmental bodies to the definitions of accredited investor and qualified institutional buyer as part of the initial rulemakings to implement the Act.

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Accordingly, the State of Alaska respectfully requests that the Commission include in its initial rulemakings to implement the Act amendments to add governmental bodies to the definitions of "accredited investor" and "qualified institutional buyer" in Rule 215, Regulation D and Rule 144A.

We appreciate the opportunity to submit this advance comment on the Commission's planned rulemakings to implement the Act and thank you for your consideration of these comments. If you have any questions or wish to discuss them further, please do not hesitate to contact me at (202) 942-5745.

Sincerely,

A handwritten signature in black ink, appearing to read "David F. Freeman, Jr.", written over the typed name below it.

David F. Freeman, Jr.