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Marc I. Steinberg
Rupert and Lillian Radford Professor of Law

Re: Amending the "Accredited Investor" Definition
File No: S7-25-19

January 23, 2020

Ms. Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F. Street N.E.
Washington DC 20549-1090

Dear Ms. Countryman:

This comment letter is submitted by me *expressing solely my individual views* with respect to the Securities and Exchange Commission's (SEC or Commission) proposed amendments to the "accredited investor" definition. While certain aspects of the proposal are beneficial, one glaring and inexplicable deficiency prevails: namely, the Commission's maintenance of the current financial thresholds for individual accredited investors. Simply put, to assert that merely on the basis of $200,000 individual income (or $300,000 joint income) for a relatively short time period or $1 million net worth (exclusive of primary residence) renders one conclusively to have financial sophistication — without entitlement to mandatory disclosure of material information relating to the contemplated investment — contravenes common sense and reality. Moreover, by expanding categories for one's qualification as an accredited investor while maintaining the current financial thresholds tellingly points to the SEC's priority — clearly, seeking to enhance capital formation at the expense of investor protection.

As the agency charged with protecting investors, the Commission's position is perplexing. Financial scams, elder fraud, and ponzi schemes are all too common in purported Regulation D offerings. As the states are preempted from regulating Rule 506 offerings, the SEC should be vigilant in seeking to ensure that investors are not defrauded. After all, private damages actions and regulatory enforcement proceedings frequently occur when the money already is lost.

By the statistics set forth in the SEC's proposing release, overall *13%* of U.S. households qualify as accredited investors based on the current financial thresholds as compared to *1.6%* of overall U.S. qualifying households in 1983 (a year after Regulation D was adopted). Many of these individuals do not have formal education beyond high

School of Law
PO Box 750116 Dallas TX 75275-0116
214-768-4072 Fax 214-768-4330

school, do not have any significant level of financial acumen, and/or may be disadvantaged due to their mental capabilities. The Commission leaves these individual financial thresholds at generally the same level as determined nearly four decades ago when it promulgated Regulation D (when I was at the Commission). This indeed is startling and contrary to the SEC's primary mission.

As the Commission notes in the proposing release, the $1 million net worth level now excludes one's primary residence. Tellingly, this modification was due to congressional directive — not the SEC's initiative. Moreover, in the Dodd-Frank Act of 2010, Congress set forth that this $1 million net worth level is to be periodically reviewed by the Commission for adjustment. The Commission has not been proactive in fulfilling this provision — and has declined to adjust upward the financial thresholds for individual accredited investors.

Of course, as originally promulgated, Rule 506 was a safe harbor to the Section 4(2) (now § 4(a)(2)) exemption. And, of course, the rule far exceeds judicial construction of that statutory exemption. Under Section 4(a)(2), financial wealth clearly is not sufficient alone to render an individual accredited or sophisticated. *See, e.g., Lawler v. Gilliam*, 569 F.2d 1283 (4th Cir. 1978); *Doran v. Petroleum Management Corp.*, 545 F.2d 893 (5th Cir. 1977). That the Commission would promulgate such a financial threshold definition — and maintain it for nearly four decades at the same basic level — evidences where its priority too frequently is directed — capital formation rather than investor protection. The Commission may express whatever hortatory sayings it may about its concern for the ordinary investor — but this rule proposal, if adopted at its current individual financial thresholds, speaks volumes.

This is not the first occasion when I have lamented the Commission's neglect of the investing public with respect to the individual accredited investor financial threshold. Shortly after Regulation D was promulgated, I expressed the position that basing financial sophistication solely on wealth contravened the statutory exemption of Section 4(2) (now § 4(a)(2)). *See* Steinberg, *The Securities and Exchange Commission's Administrative, Enforcement, and Legislative Programs and Policies — Their Influence on Corporate Internal Affairs*, 58 Notre Dame L. Rev. 173, 209-214 (1982). Nearly two decades ago, I urged the Commission to increase the financial thresholds for individual accredited investors. *See* Steinberg, *The "Accredited" Individual Purchaser Under SEC Regulation D: Time to Up the Ante*, 29 Sec. Reg. L.J. 93 (2001). And, in my recent book published in 2018, I pointed out a number of other instances where the Commission's failure to invoke its statutory resources has proven detrimental to investor protection. *See* Steinberg, *The Federalization of Corporate Governance* 274-284 (Oxford University Press 2018).

As a former SEC attorney, it is disconcerting to witness the Commission all too often favoring capital formation interests over those of investor protection. This rule

proposal provides yet another example of the Commission's unbalanced priorities. Hopefully, when finalized, the definition of accredited investor will include a realistic increase in the individual financial thresholds in a fitting manner as we approach the third decade of the 21st century.

Thank you for your consideration.

Sincerely,

Marc I. Steinberg
Radford Chair in Law and Professor of Law
Director, Corporate Counsel Externship Program
Editor-in-Chief, The Securities Regulation Law Journal
Editor-in-Chief, The International Lawyer