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January 31, 2020

Via Email

Vanessa A. Countryman, Secretary
U.S. Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: Release Nos. 33-10734, 34-87784
File No. S7-25-19

Dear Ms. Countryman:

The undersigned appreciates the opportunity to comment on the above-referenced release (the "Release") and recognizes the significant amount of staff time and effort required to produce a comprehensive survey of the development of the definition of "accredited investor" under Rule 501 of Regulation D adopted by the U.S. Securities & Exchange Commission (the "SEC") pursuant to the Securities Act of 1933, as amended (the "1933 Act").

My comments are based upon almost 40 years' experience as a securities practitioner, securities regulator and legal academic.¹ The views expressed herein are my own and do not constitute the views or positions of the law firm with which I am or have been associated or any client thereof, any academic institution with which I am or have been associated or any governmental or non-governmental organization with which I have been associated.

In my opinion, there are two overarching public policy goals to be achieved with respect to expanding the definition of accredited investor. The first goal is to define the universe of persons where there is a reasonable basis to believe that they do not need the protections afforded by the prospectus disclosure provisions of an offering of securities registered under the 1933 Act.

The second goal is ensure that issuers relying on exemptions for non-public offerings which are offered and sold to accredited investors in accordance with the terms and conditions of those exemptions are able to quickly and objectively ascertain who qualifies as an accredited investor. It must be remembered that issuers are not experts in securities laws and, for any expansion in the definition to be meaningful in the marketplace, the definition must be clear and accredited investor status must be capable of easy determination.

¹ Partner, Bybel Rutledge LLP; Visiting Professor of Securities Law, BPP University Law School (London); Tutor, School of Finance and Management, University of London (UK); former Adjunct Faculty at Widener Commonwealth University School of Law and The Dickinson School of Law of the Pennsylvania State University; and former general counsel, Pennsylvania Securities Commission.

Heretofore, the objective criteria used for determining accredited investor status was mainly financial. For individuals, this resulted in a definition that contained arbitrary minimum requirements with respect to net worth or annual income (“Minimum Financial Requirement”).

While the purpose of the Minimum Financial Requirement was to ensure that these individuals possessed the financial wherewithal to withstand the loss of their entire investment without enduring penury, it foreclosed individuals with lesser financial assets from investment opportunities where their experience or knowledge gave them the ability to understand and appreciate the merits and risks of the offering, perhaps to a much greater degree than those who met the Minimum Financial Requirement.

The SEC is to be commended for revisiting this conundrum and seeking to facilitate legitimate capital formation via non-public offerings and make the accredited investor definition more relevant and useful to issuers.

Professional Certifications and Designations and Other Credentials (Questions 1-14)

I would suggest taking a “tiered” approach to those individuals who could be deemed as accredited investors based on objective criteria.

FINRA Licensed Persons. The first category would be those individuals who took and passed an examination required by FINRA in order to perform a specific function with a FINRA member firm and, at the time of the investment, remained an associated person with a FINRA member. This would include, but not be limited to, Series 7, 65, 82, 24, etc. If the SEC and relevant state securities regulators think them sufficiently qualified to render investment-related services to the public, those individuals should be able to purchase investments of their choice (“FINRA Licensed Person”).

An argument could be made that accredited investor status should not be conferred on FINRA Licensed Persons who have unpaid arbitrations, unpaid civil judgments, unpaid liens, criminal convictions, bankruptcies, customer complaints, regulatory proceedings and other matters that are reportable on Form U-4 because they engaged in such behavior and should not benefit from a regulatory dispensation.

I would counsel against such a view since the focus of this rulemaking should be on the issuer being able to readily ascertain whether a particular individual comes within the accredited investor definition. This can be accomplished easily by the issuer referencing FINRA’s BrokerCheck. If the individual appears in BrokerCheck as a current FINRA Licensed Person, the issuer’s due diligence is complete and the individual can be deemed to be an accredited investor. For the same reasons, I would counsel against imposing any minimum term of employment.

Since this individual would be deemed an accredited investor solely for purposes of the individual being able to participate in a non-public offering of securities, there is no harm to the public since, if the individual were to recommend the sale of the same securities to a client, the individual would be subject to the suitability requirements of SEC Regulation BI, FINRA Rule

2111 and the FINRA member firm would be subject to FINRA Rule 2123 relating to private placements.

Investment Advisers and Investment Adviser Representatives. The second category of individual accredited investor based solely on status would be investment advisers currently registered with the SEC or the state in which the investment adviser has its principal place of business and investment adviser representatives who have taken and passed the Series 65 exam (or held a professional designation which acted to waive the exam requirement) (an "IAR") and, at the time of the investment, remained registered as an IAR. Again, an issuer can access FINRA's BrokerCheck or the SEC's IAPD web site to verify current registration information.

Similarly, if an IAR would be deemed an accredited investor solely for purposes of the individual being able to participate in a non-public offering of securities, there is no harm to the public since, if the individual were to recommend the sale of the same securities to a client, the individual would be subject to its fiduciary duty to act solely in the client's best interest.

What if an individual took and passed a FINRA exam for which he or she was at one time licensed but is no longer an associated person of a FINRA member or a registered investment adviser or IAR? If the individual should continue to be deemed to be an accredited investor, should there be a time limit? How will issuers determine if the individual took a designated FINRA exam which conferred accredited investor status?

In response to these questions, I suggest that, at the outset, individuals who would be deemed accredited investors due to the foregoing must be a FINRA Licensed Person or a registered investment adviser or IAR at the time of the sale of securities in a non-public offering. This suggestion is based principally on the need for issuers to have an easy method of determining accredited investor status which, for example, is provided by BrokerCheck which indicates immediately whether the individual currently is registered.

Non-Licensed Individuals. The third category would be individuals who are not required to take a FINRA exam for purposes of their vocation but would like to take an existing FINRA exam to be deemed to be an accredited investor. The Release indicates that it may be too early to approve the SIE examination for this purpose but seems to suggest that the Series 66 exam could be approved for such purpose.

Although I would favor a means whereby individuals could take a FINRA-administered examination for purposes of qualifying as an accredited investor even if their vocation did not otherwise require such licensure, it remains important that an issuer easily be able to determine that the individual took and passed the designated examination.

If this information would be accessed via BrokerCheck, it may require the individual to have some sort of status within FINRA. However, this approach may not be feasible in context of relevant privacy issues and whether FINRA would have statutory immunity for civil causes of action for information published on BrokerCheck with respect to individuals not licensed by FINRA.

As an alternative, the SEC could develop an accredited investor examination that could be administered by FINRA and the publicly available information relating to those who passed the examination and would be deemed accredited investors could be accessed through the SEC website.

However, if one passes a SEC accredited investor examination, is that individual deemed an accredited investor forever or for a specified period of time after which the individual may have to re-take the examination?

For the immediate future, I suggest the SEC only accept FINRA administered examinations as FINRA is subject to SEC oversight and has existing mechanisms for making examination-related information publicly available.

Investment Related Professional Designations. The fourth category would be individuals who currently hold the following professional investment adviser-related designations (“IA Designations”) but who may not be a FINRA Licensed Person or an IAR: Certified Financial Planner (CFP) awarded by the Certified Financial Planner Board of Standards, Inc.; Chartered Financial Consultant (ChFC) or Master of Science and Financial Services (MSFS) awarded by the American College, Bryn Mawr, PA; Chartered Financial Analyst (CFA) awarded by the Institute of Chartered Financial Analysis; Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants and Chartered Investment Counselor (CIC) awarded by the Investment Counsel Association of America, Inc.

State securities administrators have recognized these professional designations for purposes of waiving the Series 65 examination requirement for registration as an investment adviser or IAR and it would seem that these designations would be appropriate to confer accredited investor status on their recipients.²

However, the question again becomes how issuers will be able to determine that individuals currently hold an IA Designation if they currently are not a FINRA Licensed Person or an IAR. Obviously, this question could be addressed easily if a roster of individuals who currently hold an IA Designation is publicly available on the web site of the awarding institutions.

Issues Relating to Individuals who are Accredited Investors by Status. By adopting new categories of accredited investors based on status because they may not meet the Minimum Financial Requirement, the SEC must confront the issues of duration and grandfathering. Should individuals who, at some point in time, met the elements of the revised definition of accredited investor but currently do not meet those requirements, be eligible for accredited investor status? If the answer is in the affirmative, must they have met the elements of the revised definition of accredited investor within a specific time frame (eg the last 10 years) or is it sufficient that they, at some point in time, had met the relevant elements? An affirmative answer to the latter position could extend accredited investor status to individuals well into their retirement years and invoke considerations of potential declining cognitive function.

² See 10 Pa. Code §303.032(c).

In resolving these issues, the SEC must not lose sight of the importance of issuers easily being able to determine accredited investor status. BrokerCheck and IAPD can provide publicly available registration histories for FINRA Licensed Person, registered investment advisers and IARs.

With respect to the foregoing categories of individuals who would be deemed to be accredited investors solely by virtue of their status, it would appear reasonable, at least initially, that an individual must be a FINRA Licensed Person, registered investment adviser or IAR, or hold an IA Designation at the time the individual purchases a security from an issuer in a non-public offering as this requirement generally evidences that the individuals currently are actively engaged in a securities-related vocation and can be expected to be conversant with current developments within the private placement arena.

If an examination is adopted for purposes of qualifying non-securities professionals as accredited investors, a mechanism would need to be established whereby issuers could confirm the status of an individual who has qualified as an accredited investor under that method. The more difficult issue may be access by issuers to information of individuals who held an IA Designation at some point in time but may no longer be active.

Lawyers and Certified Public Accountants. The Release asks whether individuals who are licensed lawyers or certified public accountants (“CPA”) should be deemed accredited investors based solely on their professional qualifications. With respect to CPAs, the assumption would be that they are sufficiently numerate to understand financial information (including prospective financial information) that may be given to investors. On the other hand, they may not be sufficiently familiar with the variety of capital instruments that may be offered or how the governing documents of the enterprise (eg limited liability company operating agreement) may affect their rights as an investor.

For lawyers, the assumption would be that they are sufficiently educated to understand the variety of capital instruments that may be involved in an offering or how the governing documents (eg limited liability company operating agreement) may affect their rights as an investor. On the other hand, they may not be financially literate, or their legal practice may focus on non-financially related areas of the law.

Also, newly minted lawyers or CPAs may lack sufficient experience in their respective profession that otherwise might serve as basis to preliminarily qualify them as accredited investors. According to a 2017 survey by U.S. News and World Reports, the median salary for new law school graduates is \$72,000 for those entering private practice and \$54,550 for those entering government practice.³ Not only are these salaries impacted by everyday living costs but also by repayment schedules of student loan debt which could be significant.

³ Kowarski, Ilana, “See the Price, Payoff of Law school before Enrolling,” US News and World Reports (March 12, 2019).

For all these reasons, I would not recommend designating lawyers or CPAs as accredited investors based solely upon holding such license but they otherwise could qualify as an accredited investor if they met the Minimum Financial Requirement.

It is suggested that, in final rulemaking, the introductory language in proposed Rule 501(a)(10) be clarified. In the language contained in the Release, it is unclear whether the professional certifications, designations or credentials must be issued by an accredited educational institution or that only the designations or credentials must be issued by an accredited educational institution with the professional certifications being issued by some other organization, such as FINRA.

Accredited Educational Institutions. It is also suggested that the SEC define “accredited educational institution” (“AEI”) in the proposed rule. What organizations will the SEC accept as the “accreditor” of the AEI?⁴ Some educational institutions may be accredited by non-profit voluntary associations that perform peer evaluations of their member institutions⁵ and also may be subject to state jurisdiction.⁶ Similar to the proposal in the Release that the SEC would designate by order which FINRA exam may be used to confer accredited investor status, the SEC should consider issuing an order that specifies which “accreditors” of AEIs were acceptable for purposes of the relevant accredited investor definition. If such a list is developed, what criteria will the SEC use to determine how an organization may apply to the SEC to become an “accreditor” for an AEI? Would this require the SEC to perform periodic oversight of designated “accreditors” of AEIs?

What if the AEI is placed on “probationary” status or loses its accreditation? Can an individual be qualified as an accredited investor if the AEI is on probationary status at the time of qualification and perhaps more importantly, may an individual who qualified when the AEI was not placed on probationary status but later was placed on probationary status or even dissolved and went out of existence continue in the status of an accredited investor?

AEIs may be organized as non-profit or for-profit institutions. Should only non-profit organizations qualify as an AEI for purposes of the proposed rule rather than for-profit institutions whose profit motivation might affect the quality and effectiveness of instruction?

The academic world is replete with various certificate programs offered by AEIs that usually consist of a short-term intensive course in a specific subject and may or may not include an examination. Would the SEC accept a “Certificate of Accredited Investor Qualification” issued by an AEI pursuant to a certificate program which may be offered online or in a residential setting as a “designation or credential” from an AEI that would qualify the individual as an accredited investor? Such certificate programs generally are profitable to AEIs as they can use existing infrastructure to develop additional streams of income.

⁴ For example, would the SEC recognize the Federally Recognized Accrediting Agencies by the U.S. Department of Education at www.ope.ed.gov? See also, Council for Higher Education Accreditation at www.chea.org.

⁵ Eg the Middle States Commission on Higher Education.

⁶ See 22 Pa. Code, Chapter 31.

It does not stretch the imagination to conceive that educational institutions may view establishing programs that would result in qualification of individuals as accredited investors as a potential new revenue stream that would appeal to those interested in investing but currently do not qualify as accredited investors and are not interested in pursuing an academic degree.

For the reasons below, I think such a certificate program could be more effective than conferring accredited investor status on individuals solely because they hold an academic degree because the course content could be structured in a relevant manner and require a more meaningful examination. However, I fear that the questions posed above as well as those which no doubt will arise in future would enmesh the SEC in academic matters for which it may not be well-suited.

Accredited Investors Status by Academic Degree. For similar reasons, I would counsel against designating an individual holding a specific academic degree as being deemed to be an accredited investor. Although the Release suggests that an individual holding a Masters of Business Administration degree (MBA) could be deemed to be an accredited investor, there are some serious issues of quality control with such an approach.

First, it may be possible for an individual to obtain a MBA without ever taking any finance-related courses that would address corporate finance issues, financial regulatory compliance or the structure of US securities markets and the role of financial intermediaries. One could envision an individual taking computer courses, statistical courses and systems engineering courses and obtain a MBA with a concentration in artificial intelligence.

The second quality control issue is that all MBA degrees are not equal. There are traditional residential degree offerings as well as online degree offerings. Educational institutions offering the MBA degree operate on a non-profit and for-profit basis. Required coursework, quality of course material and quality of instruction may vary widely from institution to institution.

Is a MBA from a for-profit educational institution that is on probationary status with an educational accrediting agency equal to a MBA from an Ivy League school? Also, there are “mills” whereby degrees can be purchased with no coursework required.

It would seem foolhardy for the SEC to become a referee in pedagogical matters in which it does not have any obvious expertise. Undoubtedly, the SEC would be accused of being biased if it included MBAs from certain schools while excluding MBAs from other schools. Most institutions will not confirm issuance of an academic degree unless the awardee consents. This means that the issuer will have to obtain authorization of the proposed purchaser to obtain confirmation that he or she holds an approved degree from an approved institution. Although the issuer could pursue this course of action, the issuer also could conclude that it is not worth the time or expense. Most likely, an issuer would reply upon a representation of the prospective investor without any further inquiry.

I concur with the proposal in the Release that all examinations or designations should be specified by SEC order rather than in the regulation to give the SEC flexibility to add or subtract from those examinations or designations as it deems appropriate.

The Release raises an interesting question with respect to whether individuals who meet certifications, designations or credentials designated by the SEC also must meet a minimum income test or net worth test or other investment limitations. Historically, accredited investors were not subject to any regulatory restriction on the amount of investment which could be made, only minimum net worth or annual income requirements. The only exception appears to be Regulation Crowdfunding where even accredited investors are subject to investment limitations.⁷

I would posit that imposing a minimum net worth or annual income requirement or investment limitation is the antithesis of the apparent *raison d'être* of the SEC for expanding the definition of accredited investor to certain individuals precisely because they may possess particular knowledge or experience relating to evaluating the merits and risks of a specific investment or industry segment (eg multi-family real estate) but fall short of the Minimum Financial Requirement.

In context of rulemaking with respect to Rule 506(c), the SEC stated that self-certification of accredited investor status is insufficient for an issuer to have acquitted its duty thereunder to “verify” the individual’s status as an accredited investor.⁸ If the SEC now would accept self-certification of accredited investor status, it would seem that it would have to reverse the position taken with respect to verification of accredited investor status in Rule 506(c) offerings.

Knowledgeable Employees of Private Funds (Questions 15-18)

I would answer in the affirmative to questions 15-17. With respect to Question 18, I support including officers of the issuer and employees of the issuer who are responsible for the issuer’s financial reporting operations as accredited investors as they should have such intimate knowledge of the issuer’s business that any transaction with such persons would meet the test for availability of Section 4(a)(2) of the 1933 Act as interpreted by *Ralston Purina*.⁹ Due to the corporate structure of many private placements, I strongly suggest replacing “officer of the issuer” with “an individual who directly or indirectly controls the issuer.” This would reach an individual who is a manager of a limited liability company which, in turn, is the manager of a limited liability company which is the issuer.

Proposed Note to Rule 501(a)(5) (Question 19)

Yes.

⁷ 17 CFR 227.100(a)(2).

⁸ Page 33, SEC Release 33-9415 (July 10, 2013).

⁹ *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

Adding Categories of Entities that Qualify as Accredited Investors (Questions 20-40)

As indicated previously, I see no reason to exclude state-registered investment advisers or IARs from being qualified as accredited investors nor, based on the conditions of the exemption for exempt reporting advisers, should they be excluded from qualifying as accredited investors, provided that they are current in their reporting requirements to the SEC.

There does not appear to be any rationale for treating RBICs differently from SBICs. Similarly, limited liability companies should be added to the list of entities in Rule 501(a)(3).

The question for the SEC is whether \$5,000,000 is the appropriate benchmark for proposed Rule 501(a)(12). The Release does not propose to revise the Minimum Financial Requirement or the minimum dollar thresholds in Rule 501(a)(3) or (a)(7). Therefore, it appears that the SEC has concluded that no upward revision in the dollar amount is warranted at this time and the \$5,000,000 benchmark in proposed Rule 501(a)(9) would provide parity with similar existing provisions in the rule.

Although the SEC is not proposing any increase in the dollar thresholds contained in Rule 501(a), it does propose to enhance the rule by adopting an “investments test” as determined in accordance with Rule 2a51-1(b) under the Investment Company Act of 1940, as amended, in lieu of the current assets test. This is a very positive development and should be adopted for all relevant provisions in Rule 501(a), including Rule 501(a)(7), because it gives certainty as to what assets held by the entity qualify for purposes of being deemed an accredited investor.

For example, a loan receivable may be categorized as an asset on a balance sheet but it may not be viewed as an investment under Rule 2a51-1(b) of the 1940 Act which may be appropriate since this asset carries inherent credit, repayment and market risks. In this context, it does not appear that grandfathering is needed as it only would apply to prospective investments. However, it may be appropriate to delay the imposition of the “investments test” with respect to Rule 501(a)(3) and (7) for 90 days in case one of these persons is in the midst of a transaction or due diligence on a transaction for which it and the issuer were relying on one of these provisions.

It seems entirely appropriate to add a note to Rule 501(a)(8) to clarify that one may look through various forms of equity ownership to natural persons when determining accredited investor status under this provision.

I support adoption of Rule 501(a)(12) and (13) as proposed except that I recommend deletion of proposed Rule 501(a)(12)(iii) as such provision would require that issuers obtain a traditional confidential investor questionnaire to determine that the prospective purchase of the issuer’s securities is directed by a person who has such knowledge and experience in financial matters that the family office is capable of evaluating the merits and risks of the offering. It would be much simpler for the issuer to obtain written representations that the purchaser qualifies as a family office under Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940, as amended (“Family Office Rule”) and, at the time of the purchase of securities, meets all of the requirements of that rule. Also, it is important to ensure that the definitions used in

proposed Rule 501(a)(12) and (13) are consistent with those in the Family Office Rule (eg “family client”).

Furthermore, I commend the SEC’s adoption of the proposal relating to spousal equivalents to pool finances for the purpose of qualifying as an accredited investor.

Proposed Amendments to Rules 215, Rule 163B and Rule 15g-1 (Questions 41-49)

It would seem most expedient to incorporate the definition of accredited investor in Rule 215 by reference to Rule 501(a) and to amend Rule 163B as proposed in the Release. Also, the rationale for the SEC proposing to amend Rule 15b-1 under the 1934 Act appears appropriate.

Again, I appreciate the opportunity to comment on the proposals contained in the Release.

Very truly yours,

A handwritten signature in blue ink, appearing to read "G. Philip Rutledge". The signature is fluid and cursive, with a long horizontal stroke at the end.

G. Philip Rutledge