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February 14, 2020

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Amending the "Accredited Investor" Definition, File No. S7-25-19
Release Nos. 33-10734; 34-87784; RIN 3235-AM19

Dear Ms. Countryman:

We appreciate the opportunity to comment on the above-referenced release (the "Release")[1] on behalf of our client the Montana Board of Investments, which strongly supports the Commission's proposal to add governmental bodies to the definition of "accredited investor" in Regulation D and Rule 215 and to similarly expand the list of qualified institutional buyers in Rule 144A to include governmental bodies by cross-referencing the amended list of institutional accredited investors in Regulation D.

As of June 30, 2019, the Board of Investments managed approximately $20 billion in pension funds, trust funds, insurance reserves, state operating funds, and certain local government funds. Within these broad categories, a combination of investment pools and separately managed investments are utilized to meet the financial goals and expectations of the agencies and entities which entrust these funds to the Board. Montana's State Constitution, Article VIII, Section 13, requires that the state's financial assets be managed through the Unified Investment Program. The Board of Investments was established by the Montana Legislature to carry out that mandate. The Board manages the state's investments within those constitutional and statutory guidelines.

The Board of Investments urges the Commission to proceed with this Rulemaking.

[1] 85 Fed. Reg. 2574 (Jan.15, 2020).

The Commission Should Expand the Definition of "Accredited Investor" to Include Governmental Entities

We strongly support the Commission's proposal to expand the types of entities that qualify as accredited investors under Regulation D, Section 501(a) and Rule 215. The proposed amendment would add a new subsection (a)(9) to the definition of "accredited investor" in Section 501 of Regulation D that would read:

"(9) Any entity, of a type not listed in paragraphs (a)(1), (a)(2), (a)(3), (a)(7) or (a)(8), not formed for the specific purpose of acquiring the securities offered, owning investments in excess of $5,000,000;"

We believe that the proposed language is sufficient to bring a broad range of state, local, tribal and foreign sovereign governmental entities and their respective funds, agencies, departments and other organizational units within the definition of "accredited investor." However, to avoid uncertainty and a future round of interpretive and no-action letter requests, we believe it would be useful and appropriate for the adopting release that accompanies the final rule to make clear that in the context of governmental "entities," the term "entity" is to be interpreted broadly to include, without limitation, the government of the United States of America and any:

- State, Commonwealth or Territory of the United States, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and any county or subdivision thereof;
- "Municipal government entity" as that term is defined in Section 15B(8) of the Securities Exchange Act of 1934 and regulations thereunder, including, without limitation, a state government, county government or city government;
- United States government branch, agency, department or unit;
- Federal or state-recognized tribe within the United States;
- Foreign sovereign government recognized by the United States government;
- Multi-lateral agency such as those listed in 17 C.F.R. 230.902(k)(2)(vi);
- Subdivision, department, agency, bureau or other formally-constituted body of a municipal government entity, United States federal government entity, or foreign sovereign entity that is recognized by the United States;
- Sovereign investment fund; or

- Fund, pool or endowment, established by a federal, state, local, tribal or foreign government pursuant to a Constitution, statute, regulation, executive order, or treaty, for a specified use or purpose, subject to oversight and control by a government officer, board or similar governing body with the powers to contract and to litigate.

The Commission has also proposed to amend Rule 215 (17 C.F.R. 230.215) to incorporate by reference the definition of "accredited investor" in Regulation D. Our suggested mention in the adopting release to accompany the amendments, of the breadth of the term in the context of governmental entities in the new subjection (a)(9) of Rule 501(a) of Regulation D, would be incorporated by reference as well into the meaning of "accredited investor" in amended Rule 215.

An earlier effort to amend Regulation D to include government entities took a more granular approach to the definition. As proposed in 2007,[2] the definition of "accredited investor" in Rule 215(c) and Section 501(a)(3) of Regulation D would have been 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…."

That 2007 proposal would have defined "governmental body" for purposes of both Rule 215 and Regulation D in 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."

The Commission's current proposed approach -- using the term "entity" to pick up both additional types of business entities and government entities -- is better. The current proposal is less detailed and therefore more flexible and inclusive of new or less common business or government organization forms. However, because most government entities (other than towns, cities and universities, which often are in corporate form) do not have a traditional charter or organizational certificate like a corporation in the sense understood by private corporate lawyers, it is useful to

[2] 72 Fed. Reg. 45,116 (Aug. 10, 2007).

include in the adopting release a clear statement of the types of governmental units that qualify as government "entities." Sovereign entities exist by will of the governed, or are established by Constitution and statute. Their agencies, departments and bureaus are subdivisions created by statute, rule, budget directive or executive order of the overarching state, county or local government. Rather than following the approach of the 2007 proposal of seeking to anticipate and define by rule every type of government entity, we believe the more generic use of the term "entity" is preferable, provided that the Commission's adopting release makes clear that the term is to be interpreted broadly, and contains a non-exclusive list of examples of governmental "entities" included within the term.

Moreover, due to the uncertainty in some cases of linking or measuring the investment (or asset) threshold associated with each governmental unit that may itself constitute an "entity" of a larger government to the $5 million investment threshold of an "accredited investor," we believe it would also be useful to include in the adopting release how that applies to governmental entities, as described above. Since the purpose of the investment test is to establish sophistication, the central management and oversight by a government treasurer's office or investment board of the investments of different funds or units within the government should meet the test if the aggregate amount of investment under common supervision or management, or that are included within a consolidated reporting unit of a government, meets the $5 million threshold.

This set of amendments is important for governmental entities, including, for example, 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 entities participate as investors in private placements. Although state governmental entities clearly qualify as sophisticated institutional investors that are permitted investors in private placements conducted under Section 4(a)(2) of the 1933 Act, as well as under various state blue sky laws,[3] the current omission of governmental entities from the list of "accredited investors" in Rule 215 and Regulation D (and from the definition of "qualified institutional buyer" in Rule 144A as discussed further below) raises issues that can interfere with governmental entities investing in private placements conducted under those rules.[4] This omission of governmental entities from the list of accredited investors in the rule can reduce the ability of a governmental entity to gain access to appropriate investment opportunities and fully diversify its investment portfolio, potentially impacting risk and return characteristics of the portfolio in an adverse manner.

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[3] *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).

[4] 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.

We note that foreign government entities are not similarly limited from accessing unregistered U.S. investments, because they are permitted in invest in parallel Regulation S offerings and purchase non-U.S. secondary market resales of private securities. We do not believe it is good policy to allow foreign governments free access to our domestic investment opportunities that are denied to domestic governmental entities.

In addition, the inability of governmental entities to invest in certain types of private offerings may tend to reduce capital otherwise available to issuers or available to provide liquidity in 144A markets. Limiting the ability of issuers to access an entire category of highly solvent, sophisticated investors in the form of governmental entities, may be detrimental to the continued growth of our economy.

We urge the Commission to move forward with this proposal as rapidly as possible. We note that the Commission's proposal to include governmental entities in the definition of "accredited investor" has already received favorable comment from a number of other domestic sovereigns and their associations.[5]

Investors should not be excluded from the definition of "accredited investor" simply because the rules do not contemplate the form of association selected by the investor. If a state governmental entity was 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." However, because many state governmental entities 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 definition. Issuers conducting private placements to other governmental entities 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 entities to the definition of accredited investor would allow greater flexibility to governmental entities to participate in certain investments without raising investor protection concerns. Rather, 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.

We note that 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,

[5] Release at nn. 13, 28, 29.

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 tens of 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 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. Similarly, cities, towns and public universities, which normally have corporate charters and are "corporations," qualify as "accredited investors" under Regulation D as it exists today, but the much larger state governments do not, because states are not incorporated. Surely this is a drafting oversight, not a considered policy judgment, and should be corrected.

The Commission Should Similarly Expand the List of "Accredited Investors" in Rule 215 by Cross-Referencing the Definition in Regulation D

The Commission has also proposed to amend the definition of "accredited investors" in Rule 215 under the 1933 Act to incorporate by reference the definition of that term in Regulation D, as amended by the current proposed amendments to Regulation D. The effect would be to include a broader term "entity" into the Rule 215 definition. For the reasons discussed above, we also support that proposed amendment.

The Commission Should Similarly Expand the List of Qualified Institutional Buyers in Rule 144A to Include Governmental Bodies

The Release also requested comments on amending the definition of qualified institutional buyers (QIBs) in Rule 144A(1)(i)(H) to include the broader list of entity types from Rule 501(a) (as amended to the list of institutional accredited investors) that qualify as QIBs if they have $100 million or more in investment securities, when aggregated as discussed above with the investments of related governmental units. We support this expansion for governmental entities. We believe that governmental entities that meet the $100 million investment size threshold under Rule 144A should qualify as QIBs for the reasons articulated above.

Allowing governmental entities 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. Furthermore, this approach is consistent with the Commission's proposal to expand the definition of accredited investor in Regulation D and Rule 215. On behalf of our client, we strongly support this proposal and the similar expansion of the list of entities that may qualify as QIBs. As is the case with the definition of "accredited investor" in Regulation D, the current omission of governmental entities from the definition of "qualified institutional buyer" in Rule 144A,

reduces the ability of a governmental entities 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(a)(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.

Responses to Specific Questions Posed in the Release

The Release poses a list of questions. Certain of those questions (in bold), followed by our responses (indented, not in bold) are set forth below.

24. Should we add a new category to the accredited investor definition for any entity with investments in excess of $5 million that is not formed for the specific purpose of acquiring the securities being offered, while maintaining the current $5 million assets test for entities currently listed in Rules 501(a)(3) and (a)(7), as proposed?

Yes. See discussion above.

Are the entities that would be eligible under proposed Rule 501(a)(9) sufficiently different in nature from the enumerated entities in Rules 501(a)(3) and (a)(7) such that an investment test should be applied to demonstrate financial sophistication? If not, should Rule 501(a)(3) be expanded to include any entity that has more than $5 million in assets?

Some governmental entities own large amounts of non-investment real estate, such as parks, schools and government office buildings that are operating assets of the particular jurisdiction, rather than "investments" of the type that indicate financial sophistication. Other government entities own income-producing real estate, stocks, bonds and other securities investments, and cash, that can serve as a proxy for financial sophistication. We do not object to drawing a distinction between the entities treated as "accredited investors" under new subsection (a)(9) of Rule 501(a) from those listed in 501(a)(1) and (a)(7), but note that it is to some degree an artificial distinction.

25. Instead of using the catch-all "any entity" in proposed Rule 501(a)(9), should we enumerate specific entity types? If so, which entity types should we enumerate?

No. It is better to have a catch-all term "entity" that allows for more flexibility to include new or unique entity types, than to attempt to anticipate and catalog all entity types into the definition. We believe, however, it would be beneficial in the adopting release that accompanies the final rule to make clear that the term "entity" is to be read expansively, and in the context of governmental entities, to include in the adopting release a non-exclusive list of examples of governmental entities that are intended to be included within the definition of the term "entity." Suggested language for that purpose is set out at pages 1-2 of this letter.

26. Should any restrictions be applied with respect to entities covered by proposed Rule 501(a)(9)? For example, should we consider any restrictions on entities organized or incorporated under the laws of a foreign country?

No.

27. Should we use an asset test instead of an investments test in proposed Rule 501(a)(9)? Should the current $5 million asset test be adjusted?

Either approach is acceptable. In the case of governmental entities, the test (whether investments or assets) should include investment (or assets) of related governmental entities if either: (a) they are consolidated into the same financial reporting unit for governmental accounting standards; or (b) they are managed by the same office or officer of the broader government of which they are a part.

28. Is $5 million in investments the appropriate threshold for the proposed new category?

Yes.

33. Should we add a note to clarify that one may look through various forms of equity ownership to natural persons when determining accredited investor status under Rule 501(a)(8)?

We suggest adding a note to clarify that one may look through the various forms of ownership and control of a governmental entity to the overarching government of which a specific governmental entity is a part when determining accredited investor status under Rule 501(a)(9).

41. Should the Commission amend Rule 215 by replacing the existing text with a cross reference to the accredited investor definition in Rule 501(a) as proposed?

Yes. That is the simplest approach to assure the definitions in the two rules will be interpreted in the same way.

Should the Commission instead incorporate any amendments to the accredited investor definition in the text of Rule 215?

No.

42. Would amending the scope of the accredited investor definition in Rule 215 to encompass any amendments to the accredited investor definition in Rule 501(a) as well as

certain entities that are currently included in the definition in Rule 501(a) raise concerns regarding the application of the Section 4(a)(5) exemption?

No.

Would adding a reasonable belief standard to the definition in Rule 215 raise concerns?

No. It will simplify compliance and allow an issuer to reasonably rely on information provided to it by an investor entity.

62. Should Rule 144A(a)(1)(i)(C) be amended to include RBICs in a manner consistent with the proposed amendments to Rule 501(a)(1)? Should Rule 144A(a)(1)(i)(H) be amended to include limited liability companies in a manner consistent with Rule 501(a)(3)? Rather than, or in addition to, amending Rule 144A in this manner, should we add other types of entities to those currently in Rule 144A(a)(1)(i)? Are there any categories of entities included in the proposed amendment to Rule 501(a) that should not be included in the definition of qualified institutional buyer under Rule 144A?

The proposal to incorporate by reference Regulation D's institutional "accredited investor" categories into Rule 144A(a)(i)(C) with the $100 million investments threshold is a simple way to have a uniform definition of the types of institutional entities that may invest in private offerings, and is particularly appropriate in the context of governmental entities as investors. As discussed at pages 1-2 above, including a statement in the adopting release that the term "entity" is intended to be read broadly, and would include, but is not limited to, a list of categories of governmental entities, would help remove uncertainty in amended Rule 144A as to what types of governmental entities are QIBs.

We also suggest that the $100 million threshold of owning and investing on behalf of itself and other QIBs should include the assets or investments of related governmental entities that are invested under a common investment officer, office, board, agency or program, for purposes of Rule 144A(a)(1)(i), much as it the case for families of investment companies (Rule 144A(a)(1)(iv)) and parent/subsidiary investments under common management (Rule 144A(4)). Accordingly, we suggest that the adopting release accompanying the final rule state that in the case of governmental entities, the test should include investments (or assets) of related governmental entities if either: (a) they are consolidated into the same financial reporting unit for governmental accounting standards; or (b) they are managed by the same board, agency, office or officer of the broader government of which they are a part. This would allow, for example, a newly-formed government fund operated and overseen by a state treasurer's office to count investments of other investment funds overseen by the treasurer's office.

63. Should we add a new paragraph (J) to Rule 144A(a)(1)(i) to expand the list of entities eligible to be qualified institutional buyers to include institutional accredited investors under

Rule 501(a) that meet the $100 million in securities owned and invested threshold and that are an entity type not already included in paragraphs 144A(a)(1)(i)(A) through (I) or 144A(a)(1)(ii) through (vi)? Are there any types of entities that should be included under new paragraph (J) that would be excluded because of the limitation that these additional entity types may not include entities otherwise listed in existing paragraphs (a)(1)(i) through (vi) of Rule 144A? To the extent that there is overlap between the types of entities listed in the accredited investor definition and those listed in the qualified institutional buyer definition, would adding new paragraph (J) render existing paragraphs (A) through (I) under Rule 144A(a)(1)(i) unnecessary?

The proposed approach of amending Rule 144A to incorporate by reference the categories of institutional accredited investors that are included in the amended Regulation D is the simplest way of having a consistent approach to what types of institutional investors are permitted to invest in private placements of securities.

64. Are there certain types of entities that are less likely to have experience in the private resale market for restricted securities and may have more need for the protections afforded by the Securities Act's registration provisions? Are there concerns about amending the definition of "qualified institutional buyer" to encompass an expanded list of entities in Rule 144A(a)(1)(i) that meet the $100 million in securities owned and invested threshold?

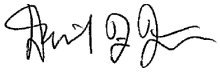
If there are, governmental entities certainly are not among the types of entities that need the protections of the Securities Act's regulation provisions.

65. If we were to expand the definition of qualified institutional buyer in this manner, would there be a greater likelihood of restricted securities sold under Rule 144A flowing into the public market? If so, should we consider additional modifications to Rule 144A to address this possibility?

No.

We appreciate the opportunity to comment on the Release 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.

Respectfully submitted,



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cc: Dan Villa
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