



SOUTHERN UTE INDIAN TRIBE

Submitted electronically on March 3, 2020 via
<http://www.sec.gov/rules/proposed.shtml>

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

**Re: Comments on Securities and Exchange Commission Proposed Rule
Amending the ‘Accredited Investor’ Definition
File No. S7-25-19**

Dear Sir or Madam:

The Southern Ute Indian Tribe (the “Tribe”) appreciates the opportunity to comment on the SEC’s proposed amendments (the “Proposed Amendments”) to the definition of “accredited investor” in Rule 501(a) of Regulation D of the Securities Act of 1933 (“Securities Act”),¹ as set out in Release Nos. 33-10734; 34-87784 published in the Federal Register at 85 Fed. Reg. 2574 (Jan. 15, 2020) (the “SEC Publication”).

A. Background on the Tribe.

The Tribe is one of 574 federally recognized tribal entities, including tribes and Alaska native villages.² It is organized under the Indian Reorganization Act of 1934 (“IRA”),³ and operates under a Constitution initially adopted by the Tribe in 1935 and amended in 1975 and 1991. It is located on the Southern Ute Indian Reservation (“Reservation”) encompassing approximately 700,000 acres within the exterior boundaries of the state of Colorado. As a result of allotment laws and other policies designed to decimate tribes, the Reservation is a checkerboard reservation, meaning that non-tribal members, through breach of the federal government’s trust responsibilities, have acquired fee interests in Reservation land. Within the Reservation, the Tribe is the beneficial owner of over 300,000 surface acres held in trust by the United States and the fee owner of an additional 7,500 acres, with the remaining surface acres being divided among allotted lands held in trust for the benefit of the Tribe and tribal members and lands owned by the federal government or private landowners.

¹ Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa).

² 85 Fed. Reg. 5462 (Jan. 30, 2020).

³ Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101-5129).

Unlike a state or county government, the Tribe, like all federally recognized tribes, has limited taxing authority. Therefore, the Tribe supports governmental services for its members principally through investments, responsible development of natural resources and business ventures.

During the 1980s and 1990s, the Tribe aggressively began developing its natural resource base and, in 1999, adopted an official financial plan (the “Financial Plan”) to establish a system of governance that separates its core government from its various business and related investment activities. The goal of the Financial Plan was to provide the Tribe with an economic strategy that would ensure a core government and baseline per capita distributions in perpetuity, while also optimizing the Tribe’s available resources to achieve greater socioeconomic well-being for tribal members.

The Financial Plan created two main funds, its “Permanent Fund,” which finances operations of the tribal government, and its more aggressive, growth-focused “Growth Fund.” Through these funds, the Tribe conducts its investment activities, including the purchase of securities and other financial instruments, among other investments, and manages and operates a number of businesses in various industries and diverse locations. These activities are conducted both by the Tribe directly, through its various divisions, and through limited liability companies and other state-organized entities. In the decades since these funds were established, the Tribe has steadily acquired the expertise needed to manage its investments and financial affairs successfully. In recognition of its heralded economic achievements, the Tribe has consistently received AAA credit ratings from Wall Street credit rating agencies.

Based on its investment and general business experience and interests, the Tribe respectfully submits the following comments.

B. Support for the Proposed Amendments.

The Tribe supports the Proposed Amendments as advancing tribal sovereignty, self-determination, and economic independence, and for the same reasons, provides the comments set forth in Section C below.

The IRA, which passed Congress within a year of the Securities Act, contemplated tribal economic development through, among other things, establishment of tribal corporations with “powers as may be incidental to the conduct of corporate business.”⁴ However, despite this goal of promoting economic opportunity, Tribes, both through prejudice and ambivalence,⁵ have been excluded from fully engaging in investment opportunities. In 2007, after substantial public support for including tribes in the definition of “accredited investors,” including from the

⁴ 25 U.S.C.A. § 5124

⁵ This inaction by the SEC in including Tribes within the definition of accredited investors has been described by one commentator as “benign neglect.” Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country As A Domestic Emerging Market*, 80 U. Colo. L. Rev. 285, 291 (2009).

National Congress of American Indians, the SEC proposed doing so.⁶ Despite no opposition to the regulatory change, it was never implemented.

Many tribes, like the Southern Indian Tribe, are responsible not only for the operation of a government and the provision of governmental services, but for tribal economic development. Because of the absence of widespread taxing authority available to state and county governments, tribal governments must rely on the reasonable development and management of natural and economic resources to support governmental operations. For this reason, many tribes use the services of financial and economic advisors to prudently invest tribal resources both for short term needs and long term growth.

While in the distant past, a well-diversified investment portfolio might consist of a mixture of stocks and bonds, in the present economic environment, with low interest rates and a volatile equity market, investment advisors are increasingly recommending that at least a modest portion of a portfolio for qualified investors be invested in non-traditional investments, including private equity, private real estate investment trusts, and hedge funds, in order to increase diversification, reduce overall portfolio risk and increase long term gains. For that reason, a typical government or educational endowment today will include a portion allocated to such investments limited by regulation to “accredited investors.”

By excluding tribes from the definition of an accredited investor, a financially eligible tribe may have to rely on low yielding investments for long term investment needs, depriving it of key investment opportunities to benefit tribal members. Therefore, as one commentator has explained, “for those tribes with sufficiently large assets, prudent portfolio diversification would include privately-placed investments as a component of overall tribal investment strategy.”⁷

In its past investment activities, the Tribe has experienced firsthand how the uncertainty inherent in the existing definition of an “accredited investor” impacts Indian tribes and how such uncertainty can complicate the Tribe’s participation in certain investments. As an example, the Tribe has generally been required to avail itself of state law to form and capitalize investment entities to participate in certain investment opportunities. This is inconsistent with the Tribe’s sovereign status and the purpose of the IRA in enhancing economic opportunities for Tribes.

Based on this experience, and the need to promote economic development and investment opportunities in Indian country, in general, the Tribe strongly supports the intent of the proposed changes to the definition.⁸ Furthermore, the Tribe welcomes the opportunity to comment on the specific language of the Proposed Amendment, as set forth below.

⁶ Revisions of Limited Offering Exemptions in Regulation D, 72 Fed. Reg. 45,116 (Aug. 10, 2007).

⁷ Clarkson, 80 U. Colo. L. Rev. at 319

⁸ Changes in the definition of accredited investor to include federally recognized tribes would necessarily require a comprehensive look at the securities regulations that are used to gauge suitability for private equity and other non-traditional investments. This would include ensuring that Tribes and tribal entities come within the definition of qualified purchasers under § (c)(3)(7) of the Investment Company Act of 1940, and the definition of U.S. Person under § 902(k)(1) of Regulation S, promulgated under the Securities Act.

C. Responses to Requests for Comment Nos. 24 through 32.

The SEC Publication includes a number of Requests for Comment to address specific considerations with respect to the Proposed Amendments. This Section reprints the Requests for Comment Nos. 24 through 32 (in italics) and sets forth the Tribe's responses to those Requests.

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? 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?

The Tribe supports the expansion of Rule 501(a) to include Indian tribes, whether by addition of the proposed Rule 501(a)(9), as set forth in the Proposed Amendment, or expansion of Rule 501(a)(3) to include any entity that has more than \$5 million in assets. However, as further described in our response to Request for Comment No. 25 below, in connection with any such expansion, we suggest the addition of a definition of "entity" or other specific language to make clear that Indian tribes are included in such a term.

Furthermore, as described in the response to Request for Comment No. 27 below, the application of different standards to Indian tribes as opposed to corporations, partnerships or other entities, unfairly disadvantages Indian tribes that otherwise possess the skill, sophistication and resources to protect themselves adequately from these risks. As such, the Tribe does not see a valid reason why corporations or other business entities should be subject to a \$5 million *asset* standard while Indian tribes are subject to a \$5 million *investment* standard, and we encourage the adoption of a uniform standard applicable to Indian tribes and other entities on a non-discriminatory basis.

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

In our experience, the term "entity" is most commonly used to refer to "business entities," and is not generally understood to refer to governments or governmental agencies. Even less commonly are "entities" understood to include Indian tribes or their divisions or instrumentalities.

Indian tribes share a unique and complicated status as domestic dependent nations within the United States, and the organization and legal status of Indian tribes may vary widely based on specific traditions, treaties, statutes, and legal regimes. The Tribe would strongly support inclusion of a list of the specific types of entities to be included within the term, such as "limited liability companies, governmental entities, Indian Tribes and any other entity ..." or a separate definition of the term "entity" which specifically identifies "Indian tribes and the divisions or instrumentalities thereof."

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?*

Indian tribes are not legally considered “foreign countries,” but they are, nonetheless, sovereign nations, having their own governance powers and laws applicable within their territorial boundaries.⁹ Further, many Indian tribes have adopted corporate or other business codes which allow for formation of entities under tribal law. Therefore, for purposes of clarity, if restrictions on entities organized or incorporated by a foreign country are included, the exclusion should be clear that the phrase “foreign country” specifically excludes federally recognized tribes and any divisions or instrumentalities thereof or entities formed pursuant to tribal law.

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?*

The standard to be applied to Indian tribes seeking to qualify as accredited investors should be consistent with the asset-based standards applicable to corporations and other entities such as those contained in Rules 501(a)(3) and 501(a)(7). As discussed below, the Tribe’s position is based on principles of basic fairness and on practical considerations applicable to the calculation of an investor’s “investments” as opposed to its “assets.”

The SEC Proposal articulates the concern that, “[f]or example, certain types of entities that would be covered by the proposed amendment, such as governmental entities, may have \$5 million in non-financial assets such as land, building and vehicles, but not have any investment experience.” (*see* Amending the “Accredited Investor” Definition, 85 Fed. Reg. 2574, 2588 (Jan. 1, 2020)). With respect to Indian tribes, this concern reflects an unnecessary attitude of paternalism by the federal government. The same logic would apply equally to corporations, partnerships or other entities currently subject to an asset test, rather than an investments test. Many asset-based operating businesses, such as construction companies or trucking companies, for example, may own land, buildings, vehicles and other assets having substantial value, but have no significant investment experience. Tribes, like other entities, should be able to rely on the expertise of their financial advisors in determining the suitability of investments. The same standard should apply to Indian tribes as applies to corporations or other entities.

We note that Rule 506(c) requires issuers to take reasonable steps to verify the accredited investor status of those purchasing its securities. Our only concern with the proposed \$5 million in investments test, is the comparative ease of understanding and documenting an investor’s satisfaction of an assets-based standard, as compared to the relative complexity of the “investments” definition set forth in Sec. 270.2a51-1. As an example of these complexities, under the investments definition, the investor would need to demonstrate, and the issuer would need to verify, not just the aggregate value of its investments, but also the character of the investments. To do so, Indian tribes or other investors subject to an investments-based standard

⁹ *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 17 (1831)(holding tribes are not foreign nations but properly denominated as domestic dependent nations).

would be required to demonstrate that their securities are not disqualified under § 270.2a51-1(b)(1)(i), (ii) or (iii), and that real estate, commodity interests, physical commodities and certain financial contracts are held for investment purposes. By way of comparison, corporations, partnerships, and other entities identified in Rule 501(c)(3) would not have to make any such showing regarding the intent and character of their assets. Indian tribes and their members would be better served by an asset-based standard that investors and issuers could apply with greater certainty than an investment standard.

Finally, we note that the definition of “investments” from § 270.2a51-1 currently applies in the context of establishing status as a “qualified purchaser” under the Investment Company Act of 1940 and applies the terms “Prospective Qualified Purchaser” and “qualified purchaser” throughout the relevant provisions. Use of this terminology further complicates the application of this definition to a determination of “accredited investor” status, as it is not clear whether the terms “Prospective Qualified Purchaser” and “qualified purchaser” should be disregarded, read to substitute the term “accredited investor,” or otherwise construed.

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

As discussed in the response to Request for Comment No. 27, the Proposed Amendments should not apply different standards to Indian tribes as compared to corporations or other entities or organizations seeking to qualify as accredited investors, and a uniform standard should be adopted. Also, for the reasons stated in response to Request for Comment No. 27, an asset-based standard would provide beneficial market efficiencies. The Tribe does not take a position on whether \$5 million in investments or assets is the appropriate threshold, although it would not support a substantial increase in the threshold.

29. *Proposed Rule 501(a)(9) is intended to capture all existing entity forms not already included within Rule 501(a), including Indian tribes and governmental bodies, that meet the proposed \$5 million investments test. Would the investments test have a disproportionate impact on Indian tribes?*

As noted above, and in particular in our response to Request for Comment No. 27, the Tribe does not believe there is a valid reason why a corporation or other entity that meets an asset-based test is inherently more sophisticated in investment matters than an Indian tribe or other type of potential investor. Therefore, the Tribe strongly supports a uniform standard that would apply universally. For the reasons of market efficiency stated in response to Request for Comment No. 27, the Tribe supports an asset-based standard.

30. *Should we use the definition of investments from Rule 2a51-1(b) under the Investment Company Act? If not, what definition should we use? Are market 59 participants familiar with the definition such that implementation would not be unduly difficult?*

As noted in the response to Request for Comment 27, the Tribe believes the complexity of the definition of “investments” under Rule 2a51-1 places an additional burden on investors

and issuers in confirming the nature and intent of investments which would decrease market efficiencies and complicate application of the proposed rule in practice.

31. *We are not proposing to revise Rule 501(a)(7). As a result, trusts with investments of more than \$5 million would not need purchases to be directed by a sophisticated person in order to qualify as an accredited investor. Is this an appropriate result? Should trusts have purchases directed by a sophisticated person in order to qualify under proposed Rule 501(a)(9)?*

The Tribe takes no position on this Request for Comment.

32. *In addition to, or in lieu of, proposed Rule 501(a)(9), should we revise the definition of accredited investor by replacing the \$5 million assets test that currently applies to certain entities with a \$5 million investments test? If so, should we also grandfather issuers' existing investors that are accredited investors under the current definition with respect to future offerings of their securities? Alternatively, should we retain the current assets test but revise the \$5 million threshold? If so, what threshold would be appropriate?*

As stated above, including in the response to Request for Comment No. 27, the Tribe supports a uniform rule that does not apply a different standard for corporations, partnerships and other business entities than it applies to Indian tribes or governmental bodies. The Tribe does not take a position as to the grandfathering of existing investors.

As stated above, including in the response to Request for Comment No. 27, the Tribe believes application of an investments-based standard may be unduly complicated and burdensome in practice and would support an asset-based standard.

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).*

As we read the proposed note to Rule 501(a)(8), it would permit one to look through equity ownership to natural persons, but would not require one to do so. The Tribe regularly invests and conducts business through state-organized limited liability companies and other entities, and the proposed rule that allows a look through only to natural persons would disadvantage the Tribe and other Indian tribes. For example, if a natural person who is an accredited investor established a wholly-owned limited liability company through which to make investments, the limited liability company would have accredited investor status by virtue of its ownership by a natural person who is an accredited investor. Under the text of the note included in the Proposed Amendments, however, it does not appear that a wholly-owned limited liability company formed by an Indian tribe that is an accredited investor for investment purposes would be able to qualify on the same basis, and such a limited liability company would need to hold \$5 million in investments before it could achieve accredited investor status. This proposed note would disproportionately impact and disadvantage Indian tribes and other organizations and entities. To address this, we request substitution of "natural persons or entities" in the place of "natural persons" in both sentences of the proposed note.

D. Conclusion

The Tribe appreciates the opportunity to express its strong support for the Proposed Amendments and its position on the various Requests for Comment, as stated above. If you have additional questions or comments regarding these comments, please feel free to contact Thomas H. Shipp (phone (xxx) xxx-xxxx) (fax (xxx) xxx-xxxx) or David Smith (phone (xxx) xxx-xxxx)(fax (xxx) xxx-xxxx) (email).

Sincerely,



Christine Sage, Chairman
Southern Ute Indian Tribal Council