

March 9th, 2020
Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Amending the “Accredited Investor” Definition, SEC Rel. Nos. 33-10734;
34-87784; File No. S7-25-19

Dear Ms. Countryman:

Dolan McEniry Capital Management, LLC (“Dolan McEniry”) appreciates the opportunity to comment on the proposed rule to amend the accredited investor definition in Rule 501(a) of Regulation D under the Securities Act of 1933, as amended (the “Securities Act”) and the definition of qualified institutional buyer (QIB) in Rule 144A(a)(1) under the Securities Act. Dolan McEniry is an investment adviser registered under the Investment Advisers Act of 1940, as amended (the “Advisers Act”) and has over \$7.1 billion in assets under management. Dolan McEniry specializes in providing investment management services regarding fixed income strategies, particularly corporate bonds, to a wide variety of clients, including foundations, endowments, public pensions, Taft-Hartley accounts, corporations, sovereign nations, high net worth individuals, charitable organizations, wrap clients and investment companies registered under the Investment Company Act of 1940, as amended (the “1940 Act”).

Our comments in this letter relate in part to the Commission’s request for feedback on whether an investor advised by a registered investment adviser or broker-dealer should be considered an accredited investor.¹ We believe that such an investor should be treated as an accredited investor in situations where an SEC-registered investment adviser provides advice to an investor with respect to a Regulation D exempt offering, or exercises its discretionary authority with respect to such investor’s account with respect to such offering. In addition, we strongly urge the Commission to amend the QIB definition to similarly treat investors that are advised by an SEC-registered investment adviser that is a QIB (a “QIB Qualified Adviser”) as QIBs themselves for purposes of Rule 144A offerings in which a QIB Qualified Adviser has advised such investor or has exercised its discretionary authority with respect to such offering. These changes would democratize access to the bond markets, which has increasingly become composed of fixed income securities initially offered under Regulation D and traded pursuant to Rule 144A (as further described below). We believe that a QIB Qualified Adviser’s fiduciary obligations to its clients, combined with the Commission’s exercise of its examination and enforcement powers, provide adequate protection to investors in these situations. However, to the extent further protection is considered necessary, we believe that the Commission could amend the QIB definition to include any investor that is both an accredited investor and is advised by a QIB Qualified Adviser.

¹ See Amending the “Accredited Investor” Definition, SEC Rel. Nos. 33-10734; 34-87784; 85 FR 2574, 2595 (Jan. 15, 2020) (“Proposing Release”), available at <https://www.govinfo.gov/content/pkg/FR-2020-01-15/pdf/2019-28304.pdf>.

As the Proposing Release notes, the accredited investor definition is “intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or fend for themselves render the protections of the Securities Act’s registration process unnecessary.”² Regulation D already contemplates that a non-accredited investor can nonetheless be treated as having sufficient sophistication to participate in offerings otherwise restricted to accredited investors if the non-accredited investor is supported by a sufficiently sophisticated purchaser representative.³ We believe that when a SEC-registered investment adviser, which has a significant amount of assets under management to qualify for federal registration, is required under the Advisers Act to serve as a fiduciary to its clients, provides advice to its clients regarding exempt offerings, its knowledge and sophistication should be imputed to its investor in the same way a purchaser representative of such investor would be, and thereby ensures that the goals of the accredited investor definition are satisfied.⁴

The Commission has similarly noted that the intent of the QIB definition is to “identify a class of investors that can be conclusively assumed to be sophisticated and in little need of the protection afforded by the Securities Act’s registration requirements.”⁵ Dolan McEniry correspondingly believes that a QIB Qualified Adviser’s support of a client should deem the client sophisticated enough to be a QIB in itself and therefore eligible to acquire Rule 144A securities. In fact, Dolan McEniry believes that the case for treating clients advised by QIB Qualified Advisers as QIBs themselves is particularly compelling since such clients will by definition be advised by a registered investment adviser that, in light of its assets under management, has already demonstrated a high level of financial sophistication and reputation and is itself within the QIB definition provided it manages \$100 million or more in eligible assets.

We believe changing the QIB definition now is particularly important in light of certain trends in the bond market. In his speech to the Economic Club of New York in 2019, Chairman Clayton correctly noted that the increasing portion of our financial markets that is made up of private securities posed a challenge for Main Street investors that lack access to those markets.⁶ We believe this problem is

² Proposing Release, 85 FR at 2577.

³ See 17 C.F.R. §230.506(b)(ii) (“Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.”).

⁴ Dolan McEniry believes that an investor advised by a registered investment adviser does not need to otherwise meet the requirements of the accredited investor definition, since the registered investment adviser’s fiduciary duty to its clients requires it to consider its client’s ability to bear the economic risk of these investments.

⁵ Proposing Release, 85 FR at 2596-97.

⁶ See Remarks to the Economic Club of New York, Sept. 9, 2019, available at <https://www.sec.gov/news/speech/speech-clayton-2019-09-09>.

clearly exemplified by trends in the corporate bond market.⁷ In our experience, an increasing portion of the corporate bond market has become composed of Rule 144A securities. For instance, from January 1, 2000 to January 1, 2020, the share of the U.S. high yield market represented by Rule 144A securities has increased from approximately 10% to approximately 59%⁸ and the share of the U.S. investment grade market represented by Rule 144A securities has increased from approximately 8% to approximately 33%⁹. This trend is continuing; in both 2017 and 2018 approximately 70% of new issuances in the U.S. high yield market have been in Rule 144A securities.¹⁰ This market trend has made it increasingly challenging for Dolan McEniry to find appropriate fixed income instruments for non-QIB clients.

Dolan McEniry believes that this challenge will only increase as these trends continue. Moreover, while this is a problem in itself, it is not as if the current system has determined that Rule 144A securities are too risky to be owned by retail investors at all. A registered investment company, which primarily sells to retail investors, can qualify as a QIB if it owns or is part of a family of investment companies that own in the aggregate over \$100 million in securities. Dolan McEniry believes there is no reason why smaller institutional or retail investors who invest through separately managed accounts with financially sophisticated registered investment advisers with significant financial resources should be treated any differently with respect to access to 144A securities when compared to smaller institutional or retail investors who invest through registered investment companies instead. The result of this differential treatment is to drive retail investors that invest through separately managed account to instead invest through high cost mutual funds. The retail investor is thus harmed.

It may be argued that certain retail investors lack the resources or sophistication to monitor the activities of QIB Qualified Advisers and therefore require the protections of the 1940 Act and should only invest in Rule 144A securities through a registered investment company as a result.¹¹ Dolan McEniry respectfully submits that such concerns should not apply to the limited and reputable registered investment advisers that would meet the QIB Qualified Adviser definition. However, if the Commission believes it to be necessary, this concern could be addressed by requiring an investor advised by a QIB Qualified Adviser to also be an accredited investor in its own right.

⁷ We understand that our experience is not uncommon. See comment letter from the Investment Adviser Association regarding the Concept Release on Harmonization of Securities Offering Exemptions (File No. S7-08-19), dated October 18, 2019.

⁸ Based upon number of bonds in Bloomberg Barclays High Yield index that are Rule 144A securities.

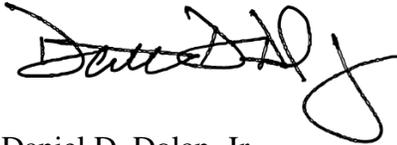
⁹ Based upon number of bonds in Bloomberg Barclays U.S. Corporate index that are Rule 144A securities.

¹⁰ See “144As” – A Large But Often Misunderstood Segment of the High Yield Bond Market, DDJ Capital Management, LLC – Vol. 5 Issue 4 at 5 (Nov. 2018), available at <https://www.ddjcap.com/wp-content/uploads/DDJ-Thought-Piece-144As-A-Large-But-Often-Misunderstood-Segment-of-the-High-Yield-Bond-Market.pdf>. 2018 information provided through September 30, 2018.

¹¹ Cf. comment letter from the Investment Company Institute regarding the Concept Release on Harmonization of Securities Offering Exemptions (File No. S7-08-19), dated September 24, 2019 (contending that investors advised by registered financial professionals should not be considered accredited investors because it believes the 1940 Act requirements provide an additional layer of substantive protection that is necessary to ensure adequate investor protection).

We appreciate your consideration of our comments on these important matters. Please contact me by email at fixedincome@dolanmceniry.com or by phone at (312) 345-4800 with any questions or if you would like additional information.

Respectfully,

A handwritten signature in black ink, appearing to read "Daniel D. Dolan, Jr.", written in a cursive style.

Daniel D. Dolan, Jr.
Managing Member
Dolan McEniry Capital Management, LLC

A handwritten signature in black ink, appearing to read "Roger S. McEniry", written in a cursive style.

Roger S. McEniry
Managing Member
Dolan McEniry Capital Management, LLC