NAFOA
Growing Tribal Economies. Strengthening Tribal Finance.

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March 16, 2020

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

RE: Amending the 'Accredited Investor' Definition; File Number S7-25-19

Dear Secretary Countryman:

The Native American Finance Officers Association (NAFOA) represents 120 tribal governments concerning tribal financial management and economic development. We are writing to express our support for a regulatory fix that would define tribal governments as accredited investors for the purposes of Regulation D (17 C.F.R. §§ 230.501-230.508) of the Securities Act of 1933. We support the proposed expanded definitions of Accredited Investors to include Indian tribes. This is long overdue.

NAFOA has actively worked toward an acceptable solution for inclusion that would seek parity with other governments, protect certain tribal assets, and ensure a level of suitability for participation. NAFOA has convened meetings with tribal leadership, tribal professionals and diverse professionals from different sectors of the investment community in developing our recommendation. NAFOA is copying the definition of our original letter in September 2019 below for your reference. To ensure parity, protection, and suitability, we are recommending the following provisions for regulatory consideration:

> NAFOA requests that the SEC amend the eligible entities excluded under Regulation D (17 C.F.R. §§ 230.501 (a)(1)) of the Securities Act to include "a tribal government and its political subdivisions, or any agency or instrumentality of a tribal government or its political subdivisions, for the benefit of its citizens (members), if such entity has total assets in excess of $5,000,000 in non-trust assets." Additionally, the term "non-trust asset" should be defined as "an asset that is under the direct control of a tribe or tribal entity, and which is not held in trust by the United States for the benefit of the tribe" to provide clarity.

In response to the specific questions outlined in the proposed amendments in Release Nos. 33-10734; 34-87784 published in the Federal Register as 85 Fed. Reg 2574 on January 15, 2020 we've addressed our responses 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? 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?

NAFOA supports adding a new category to the accredited investor definition for any entity with investments in excess of $5 million outlined in response to Number 24. With an emphasis on investments the rule will be instrumental in categorizing sophistication based on current market inclusions. An investment by definition involves the purchase of assets acquired with the goal of future return or appreciation. Having assets doesn't necessarily mean they are liquid and could skew recognizing those items.

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?

Indian Tribes should rightfully be included in any enumerated entity list. We suggest an enumerate to include the following: An Indian tribe, its political subdivisions, or any agency or instrumentality of an Indian tribe or its political subdivisions. Also to be included are business entities, i.e. tribal corporations, tribal LLCs, etc. that are operated under tribal law.

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 sovereign nations with their own pursuit of self-governance and ability to issue laws with their own governance powers within their boundaries. Tribes, similar to states have adopted their own corporate code, LLC code, and other business codes to form entities under tribal law. Yet, Indian tribes are not "foreign governments" or "foreign countries" and for clarity if there are restrictions to specifically enumerate federally recognized tribes and any divisions or instrumentalities are not to be included under such restriction.

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?

Not all assets are created equal. Some assets are more liquid than others and, in some cases, could be detrimental to business success if liquidated. For example, if a manufacture of lumber sold their trucks to transport the lumber, they would cease to do profitable business. As a result, the company could have $5 million in assets, but in some instances they could not readily liquidate and deploy those assets elsewhere. This would be similar in other business entities where not all assets are created equal. Investments go through robust due diligence by the tribe's financial advisors and a decision is made by the Indian tribe to engage in investments or not engage in investments.

The investment purpose restriction on real estate, commodity interests, physical commodities, and certain financial contracts in 17 CFR § 270.2a51-1 – Definition of investments for purposes of section 2(a)(51) is intended to exempt real estate used, "by a Prospective Qualified Purchaser if it is used by the Prospected Qualified Purchaser or a Related Person for personal purposes or as a place of business, or in connection with the conduct of the trade or business of the Prospective Qualified Purchaser or a Related person…" It is unclear if this similar definition would be used despite not being applicable to an accredited investor. Further clarification is needed.

The investment purpose issue is directly related to the similar issue when assets are used to assess a degree of investment acumen. Assets that are directly related to the personal purposes or as a place of business or in connect with the conduct of the trade or business also should not be included in the total assets if that is the metric used.

Whether the SEC continues forward with an investment or asset test to these entities the rule should be applied to tribal governments in a similar manner to that of states.

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

NAFOA concurs this is the appropriate threshold since the amount is applied uniformly. No increase should be entertained.

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?

Indian tribes that have the resources are as capable as similar sovereign entities to assess their own investment decisions.

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 participants familiar with the definition such that implementation would not be unduly difficult?

If the investment definition is to be used it needs to be reworked to fit the accredited investor terminology and not leave any uncertainty on the ability for Indian Tribes to enter into the market.

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)?

No comment at this time.

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?

NAFOA supports keeping the threshold at $5 million; however, divergence of investment and asset thresholds would make uniform application and could have unintended consequences. Indian tribes and other investors should have equal application in this regard since investment sophistication.

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)?

Since Indian tribes would be included as an accredited investor we should add the generic "entities" to the "natural persons" to read "natural persons or entities" to avoid disadvantaging Indian tribes.

Indian Country suffers from a historical lack of access to capital and the exclusion of tribal governments as accredited investors further compounds this problem. We respectfully request the SEC give full consideration to our request to include tribal governments as accredited investors and the added clarifications included in this letter.

Please feel free to contact me by phone at (202) 631-2003 or by email at Dante@nafoa.org if you have questions, concerns, or need further information.

Sincerely,

Dante Desiderio
Executive Director, NAFOA