March 16, 2020

VIA ELECTRONIC SUBMISSION
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, SEC Release Nos. 33-10734; 34-87784; File No. S7-25-19 (Dec. 18, 2019)

Dear Ms. Countryman:

The American Investment Council (the "AIC") appreciates the opportunity to submit this letter to the Securities and Exchange Commission (the "SEC") on the proposed amendments (the "Proposed Amendments") to the definition of "accredited investor" under Regulation D of the Securities Act of 1933 (the "Securities Act") and the definition of "qualified institutional buyer" in Rule 144A under the Securities Act.[1]

The AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, the AIC develops, analyzes, and distributes information about the private equity and private credit industry and its contributions to the U.S. and global economy. Established in 2007 and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC's members are the world's leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest.[2]

The AIC commends the SEC for the Proposed Amendments and specifically supports the addition of categories for "knowledgeable employees" and persons with professional designations as well as new types of entities, such as limited liability companies and family offices and their family clients, that would be able to qualify as "accredited investors" and "qualified institutional buyers." However, the AIC requests that the SEC consider making several additional changes to the Proposed Amendments. In particular, the AIC requests that the SEC (*i*) expressly incorporate existing guidance on investments by "knowledgeable employees"

[1] Amending the "Accredited Investor" Definition, SEC Release Nos. 33-10734; 34-87784; File No. S7-25-19 (Dec. 18, 2019) (the "Proposing Release").

[2] For further information about the AIC and its members, please visit our website at http://www.investmentcouncil.org.

under the Investment Company Act of 1940 (the "Investment Company Act"), (*ii*) broaden the types of entities in which such "knowledgeable employees" may invest, (*iii*) expand the pool of employees who may qualify as "accredited investors" to include "knowledgeable employees" and certain other employees, (*iv*) amend the definition of "qualified institutional buyer" to capture more private funds and their investment advisers, and (*v*) add "qualified purchasers," as defined in the Investment Company Act, as a new category of "accredited investor."

I. The AIC Supports Adding Knowledgeable Employees of Private Funds to the Definition of Accredited Investor and Requests That Existing Guidance Under the Investment Company Act Be Incorporated into the Adopting Release.

The AIC supports including in the definition of "accredited investor" "knowledgeable employees" as defined in Rule 3c-5 under the Investment Company Act. As noted in the Proposing Release, "knowledgeable employees" are "financially sophisticated and capable of fending for themselves in evaluating investments in such private funds."[3]

We note that the SEC intends that the scope of the "knowledgeable employee" category in the "accredited investor" definition be the same as under Rule 3c-5 under the Investment Company Act.[4] The SEC requests comment on whether a knowledgeable employee's accredited investor status should cover joint investments with spouses or dependents and family corporations and estate-planning vehicles. We believe that it should, particularly in light of the SEC's stated goals of harmonizing the various aspects of the federal securities laws.[5] Thus, when adopting the Proposed Amendments, the SEC should state that the scope of the definition of "knowledgeable employee" *and the permissible investments that may be made by* "knowledgeable employees" are intended to be the same as those outlined in the guidance provided by the SEC Staff with respect to Rule 3c-5 under the Investment Company Act.[6]

In connection with the point concerning "permissible forms of investment," the Proposed Amendments appear to only permit knowledgeable employees to be treated as accredited investors when making investments in the fund of which they participate in the management. Under the Investment Company Act, however, knowledgeable employees of an "affiliated management person" (as such term is defined in Rule 3c-5 under the Investment Company Act) are not limited to employees participating in the investment activities of the private fund in which they seeking to invest, but rather includes employees who participate in the investment activities of certain other private funds, investment companies, separately managed accounts, and other entities advised by the affiliated management person (and certain affiliates of such affiliated management person).[7] For this reason, the AIC requests that the SEC permit an

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3 Proposing Release at fn. 118 and the accompanying text.

4 Proposing Release at fn. 115 and the accompanying text.

5 *See, e.g.*, Concept Release on Harmonization of Securities Offering Exemptions, SEC Release Nos. 33-10649; 34-86129; IA-5256; IC-33512; File No. S7-08-19 (June 18, 2019); Harmonizing, Simplifying and Improving the Exempt Offering Framework, Public Statement by Chairman Jay Clayton (March 4, 2020), https://www.sec.gov/news/public-statement/statement-clayton-harmonization-2020-03-04.

6 *See, e.g.*, Managed Funds Association, SEC No-Action Letter (Feb. 6, 2014); American Bar Association, SEC No-Action Letter (Apr. 22, 1999); PPM America Special Investments CBO II, L.P., SEC No-Action Letter (Apr. 16, 1998).

7 *Id.*

employee who is a knowledgeable employee of an affiliated management person be treated as an "accredited investor" with respect to any private fund, investment company, pooled investment vehicle or other vehicle advised by such affiliated management person to same extent permitted under the Investment Company Act and the relevant SEC Staff interpretations thereunder.

In addition, employees often invest in or through entities affiliated with their employer other than the fund itself, including, for example, the general partner or equivalent entity of the fund. For this reason, the AIC requests that the SEC clarify that "knowledgeable employees" may be treated as "accredited investors" when acquiring securities of any affiliated management person of such fund and any entity or vehicle that, directly or indirectly, primarily owns an interest in such fund or such affiliated management person.[8]

II. The AIC Believes That a Broader Group of Employees Should Be Included in the Definition of Accredited Investor.

The AIC also believes that the definition of "accredited investor" should capture a broader group of employees of a fund manager. The definition of "knowledgeable employee" is intended to cover employees who have sophistication on par with "qualified purchasers," who must meet a higher financial threshold than "accredited investors." An individual needs to own $5 million in investments to be a "qualified purchaser" but only needs to have $1 million in net worth (excluding its primary residence) to be an "accredited investor." Employees of a private fund sponsor who do not satisfy the "knowledgeable employee" standard may nevertheless have the same or greater level of financial sophistication and knowledge as a "knowledgeable employee" with respect to an investment in the private funds and related entities for which they work (including the general partners or equivalent entities of such private funds). In addition, such employees would generally have significant access to information about the private funds managed by their employer (or an investment adviser that is affiliated with their employer, particularly if the employer and the affiliated adviser conduct a single advisory business). Thus, we believe that the definition of "accredited investor" should include any "supervised person" (as defined in Section 202(a)(25) of the Investment Advisers Act of 1940 (the "Advisers Act")) of an investment adviser (excluding employees performing only clerical, administrative, support, or similar functions) where such supervised person is making an investment in the investment adviser, any related person of the investment adviser (including any related relying advisers and general partners), or any private fund advised by such investment adviser or a related person of the investment adviser.[9]

In addition, the AIC understands that the new "knowledgeable employee" category that the Proposed Amendments would add to the "accredited investor" definition would not extend to employees of a firm that manages a privately offered fund that may rely on an exception other than Section 3(c)(1) or 3(c)(7) of the Investment Company Act, such as Section 3(c)(5) or Rule 3a-7, who are looking to invest in that fund. As a result, a mid-level investment professional at such a firm may not qualify for "accredited investor" status (with respect to an investment in that

[8] We note that these investments may not need to rely on Rule 3c-5 under the Investment Company Act, since such entities may not be relying on either Section 3(c)(1) or 3(c)(7) of the Investment Company Act.

[9] We note that an employee who makes an investment in a private fund relying on Section 3(c)(7) of the Investment Company Act would still need to qualify as a "knowledgeable employee."

fund) under the Proposed Amendments in circumstances where the individual does not meet the applicable net worth or income thresholds and does not hold a Series 7, 65 or 82 license.

We recommend amending the proposed "accredited investor" definition to cover individuals investing in privately offered pooled investment vehicles that may rely on an exception other than Section 3(c)(1) or 3(c)(7) where these individuals would be "knowledgeable employees" with respect to such vehicles (as defined in Rule 3c-5 under the Investment Company Act) if the vehicles were relying on Section 3(c)(1) or 3(c)(7). The AIC believes that, from a regulatory policy standpoint, a mid-level investment professional at a firm managing funds relying on Section 3(c)(5) or Rule 3a-7 should be treated the same as a mid-level investment professional at a firm managing funds that rely on Section 3(c)(1) or 3(c)(7) for purposes of the "accredited investor" definition.

III. The AIC Believes That the Types of Professional Certifications Should Be Broadened.

In the Proposing Release, the SEC states that it expects that the initial professional certifications that will be covered by the new category would be a (*i*) Licensed General Securities Representative (Series 7), (*ii*) Licensed Investment Adviser Representative (Series 65), and (*iii*) Licensed Private Securities Offerings Representative (Series 82). The AIC notes that, in many circumstances, whether a person has taken the relevant examinations is a consequence of requirements related to his or her job function rather than his or her financial sophistication and knowledge. For example, most employees of a private fund sponsor are not required to take such examinations because they are not affiliated with a registered broker-dealer and are not "investment adviser representatives" for purposes of the Advisers Act since they do not provide advice to retail clients. However, private fund sponsor employees often have the same or equivalent sophistication as persons who are required to, and do take, such exams.

To this end, a "knowledgeable employee" for purposes of the Investment Company Act should be permitted to qualify as an "accredited investor" with respect to investments in entities other than the private fund itself.[10] As discussed above, "knowledgeable employees" must meet a threshold of financial sophistication that exceeds that which is necessary to be an "accredited investor." Furthermore, the SEC Staff has recognized that the sophistication of a "knowledgeable employee" is not limited to the investment in the vehicle in whose investment activities they participate.[11]

The AIC also believes that the SEC should expand the types of credentials to include instances where the person has an educational or professional background that provides the person with the sophistication of an "accredited investor." Specifically, the definition of "accredited investor" should include a person who has a bachelor's, bachelor's equivalent, or higher degree (such as a master's or J.D.) from an accredited educational institution in a discipline that requires a significant amount of statistical or quantitative analysis or acquaintance with business and legal issues. These disciplines could include mathematics, science (for example, physics or computer

[10] We note that this expands on the point in Section I, in which we also noted that "knowledgeable employees" should be permitted to invest in related investment products and related management entities.

[11] *See, e.g.*, American Bar Association, SEC No-Action Letter (Apr. 22, 1999); PPM America Special Investments CBO II, L.P., SEC No-Action Letter (Apr. 16, 1998).

science), business, accounting, finance, economics or law. A professional background might include having at least 12 months of employment experience in the financial industry (including employment experience at an investment adviser, broker-dealer, bank, bank holding company, insurance company, commodity pool operator, commodity trading adviser, municipal broker, municipal adviser, or family office) or other professional experience that touches on financial and investment matters (such as in the finance, legal or mergers and acquisition functions of an operating company or at a law or accounting firm).

IV. The AIC Does Not Believe That the Financial Thresholds in the Definition of "Accredited Investor" Should Be Increased.

In the Proposing Release, the SEC also raises the question of whether it should consider raising the financial thresholds in the "accredited investor" definition and/or whether to index such financial thresholds to inflation on a going-forward basis.[12] The AIC shares the SEC's concerns that such an inflation adjustment could have "disruptive effects on capital raising activity."[13] We further agree that the investing environment in 2020 is materially different than the environment in 1982, as investors have access to more information, investment and other advice, and overall resources. Furthermore, making such changes to the financial thresholds would also harm the SEC's larger goals of permitting greater participation in private markets, which we believe would be beneficial for many investors' investment portfolios and facilitating capital formation, particularly for small and medium-sized businesses.

V. The Definition of "Qualified Institutional Buyer" Should Be Expanded to Include Private Funds with $100 Million or More in Gross Asset Value and Investment Advisers Who Have Discretionary Authority Over Such Private Funds.

The AIC supports the Proposed Amendments to the definition of "qualified institutional buyer" that harmonize the entity types covered in the "accredited investor" definition. However, the AIC believes that the definition of "qualified institutional buyer" should be amended to include (*i*) a "private fund" (as defined in Section 202(a)(29) of the Advisers Act) with $100 million in gross asset value (calculated in accordance with Instruction 6.e.(3) of Part 1A of Form ADV), and (*ii*) any investment adviser that manages the investments of such a private fund on a discretionary basis. A private fund (and, in particular, a private equity fund) may not satisfy the definition of "qualified institutional buyer" because (*a*) the fund holds controlling positions in the underlying portfolio companies, so the securities of such portfolio companies may be "affiliated" with the fund and, therefore, not eligible to be included in the calculation of the $100-million threshold in the definition of "qualified institutional buyer," and (*b*) the fund may have capital commitments in excess of $100 million but may not currently hold a sufficient amount of securities.

The $100-million threshold is intended to ensure that the entity has "the financial sophistication and access to resources such that they do not need the protection of registration under the Securities Act."[14] A private fund and its investment adviser would qualify under the conditions above, as they would have the same level of financial sophistication and access to resources as

[12] Proposing Release at p. 78 – 79 and 134 – 135.
[13] Proposing Release at p. 135.
[14] Proposing Release at p. 92.

other entities that currently satisfy the definition of "qualified institutional buyer." In fact, a private fund that purchases and sells securities that give the private fund a controlling position in a portfolio company often must possess greater financial sophistication and resources than another entity that invests in an equivalent amount of securities in non-controlling positions, since (*i*) the purchase and sale of controlling positions are often the result of complex, long processes that involve significant negotiations between sophisticated parties, and (*ii*) the development and operation of such investments require significant resources, including financial and other skills, in order to create value for the fund. Limiting the entities relying on this recommended amendment to private funds will also remove the concern that the entity is a holding company or operating company that is not primarily engaged in the business of investing in securities for purposes of Section 3(a) of the Investment Company Act.

In addition, the definition of "qualified institutional buyer" should capture a broader range of pooled investment vehicles that are under common management. Currently, the definition of qualified institutional buyer includes a "family of investment companies" which owns in the aggregate at least $100 million in securities of issuers.[15] Currently, a family of investment companies only includes registered investment companies and not other pooled investment vehicles that are managed by the same investment adviser. Given the increased role that business development companies, private funds and other types of pooled investment vehicles play in the securities markets, and the sophistication of the managers of, and investors in, these vehicles, we recommend that the term "family of investment companies" capture a greater range of pooled investment vehicles and other investment products. In particular, the category should include any investment company (whether or not registered), business development company, private fund, other pooled investment vehicle, or separately managed account that is managed by the same investment adviser group.[16] The AIC believes that amending this category would reflect the growth of different investment products since 1990, when Rule 144A was adopted, including, in particular, private funds.[17]

These recommended amendments would not create a "greater likelihood of restricted securities sold under Rule 144A flowing into the public market."[18] Rather, these amendments would modernize the definition of "qualified institutional buyer" and reflect the increased importance of private funds and other similar investment vehicles in the private securities markets.

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15 Rule 144A(a)(iv).

16 For these purposes, "investment adviser group" would include any investment adviser that controls, is controlled by, or is under common control with the other investment adviser, including, but not limited to, any investment adviser that is the filing adviser or relying adviser of the other investment adviser where the investment advisers are relying on umbrella registration.

17 We note, in particular, regulatory developments that have occurred since 1990, which provide the Commission with the tools to monitor private fund investments in Rule 144A securities. Specifically, private fund managers that would be in a position to take advantage of an expanded "family of investment companies" definition would be registered investment advisers and subject to Commission examination (which was not generally the case prior to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

18 Proposing Release at p. 94, Question 65.

VI. "Qualified Purchasers" Should Be Added as a New Category of "Accredited Investor"

Investors that wish to invest in funds that rely on Section 3(c)(7) of the Investment Company Act are typically required to certify in subscription documents that they are "accredited investors," as defined in Rule 501 of Regulation D, and that they are "qualified purchasers," as defined in Section 2(a)(51) of the Investment Company Act. Accredited investor certifications in subscription documents typically require investors to indicate the basis for qualifying as accredited investors. Similarly, qualified purchaser certifications in subscription documents typically require investors to indicate the basis for qualifying as qualified purchasers.[19]

The AIC recommends adding "qualified purchasers," as defined in Section 2(a)(51) of the Investment Company Act, as a new category of "accredited investor." Adding this category is unlikely to significantly expand the pool of investors that qualify for accredited investor status because nearly all persons with qualified purchaser status also qualify as accredited investors under the current definition. However, we anticipate that adding this category would reduce the administrative costs associated with the preparation and completion of subscription documents, as investors would only need to complete a qualified purchaser certification and would not need to complete a separate accredited investor certification. The AIC believes that qualified purchasers have the knowledge and expertise to participate in our private capital markets and therefore do not need the additional protections of registration under the Securities Act.

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[19] These certifications are designed to enable the private fund to form a "reasonable belief" that (1) the investor comes within one of the categories of "accredited investors" enumerated in Rule 501(a) of Regulation D at the time the private fund sells securities to that investor and (2) the investor meets the "qualified purchaser" definition (for purposes of Rule 2a51-1(h)).

The AIC appreciates the opportunity to comment on the Proposed Amendments and the Commission's efforts to make private investment opportunities available to broader categories of investors, including retail investors without compromising core investor protections. We encourage the Commission to pursue the initiatives that we recommended in our comment letter responding to the Commission release requesting comment on the harmonization securities offering exemptions.[20] Specifically, we recommend that the Commission: (1) eliminate the accredited investor requirement for offering of registered funds of private funds; (2) ease liquidity restraints for target date funds; (3) allow retail investors to access registered funds offered by private equity sponsors, in part by harmonizing the Qualified Client definition in Rule 205-3 under the Advisers Act, to track the accredited investor definition; and (4) provide increased flexibility for interval funds with longer investment periods. The AIC would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,

Jason Mulvihill
Chief Operating Officer & General Counsel
American Investment Council

[20] *See* Concept Release: Harmonization of Securities Offering Exemptions, Release Nos. 33-10649, 34-86129, IA-5256, IC-33512; File No. S7-08-19 (June 18, 2019).