American Bankers Association
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Via Electronic Submission

March 16, 2020

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: SEC Proposed Rule Amending the "Accredited Investor" Definition. File Number S7-25-19; 85 Fed. Reg. 2574 (January 15, 2020).

Dear Ms. Countryman:

The American Bankers Association[1] (ABA) appreciates this opportunity to comment on the Securities and Exchange Commission's (Commission or SEC) proposed rule amending the "accredited investor" definition in Regulation D and "qualified institutional buyer" (QIB) definition in Rule 144A. In the release, the Commission notes that the proposed amendments are intended "to identify more effectively institutional and individual investors that 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 of 1933."

ABA comments on behalf of its member banks, savings associations, and trust companies (collectively, banks) that sponsor and maintain collective investment trusts (CITs)[2] and common trust funds (CTFs)[3] (collectively, "collective investment funds" or CIFs) for their fiduciary clients. In response to the Concept Release in September 2019, we urged the Commission to amend Rule 144A to remove unnecessary limitations on the ability of these bank-maintained

[1] The American Bankers Association is the voice of the nation's $18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard more than $14 trillion in deposits, and extend more than $10 trillion in loans. ABA members collectively maintain over $4 trillion in collective investment funds on behalf of their fiduciary clients.

[2] CITs for the investment of assets of employee benefit trusts. CITs are tax-exempt under Internal Revenue Code section 501(a) provided they meet the conditions under Internal Revenue Service (IRS) Revenue Ruling 81-100, as amended, and are excepted from the definition of "investment company" under Section 3(c)(11) of the Investment Company Act of 1940, as amended (1940 Act).

[3] CTFs for the investment of assets held by the bank as trustee or other designated fiduciary capacity. CTFs are tax-exempt under Internal Revenue Code section 584 and are excepted from the definition of "investment company" under Section 3(c)(3) of the 1940 Act. Interests in CITs and CTFs are exempted securities pursuant to the provisions of Section 3(a)(2) of the 1933 Act.

funds to achieve QIB status.[4] We also sought additional flexibility for banks to meet the investment needs of their fiduciary clients through clients' investment in CIFs. We are pleased to see that the proposal addresses most of these comments in helpful fashion.

We also comment in this letter on behalf of the Certified Trust and Financial Advisor (CTFA) designation that ABA offers to eligible individuals working in the wealth management and fiduciary industry who meet certain criteria and pass an extensive examination.

ABA Supports the Expansion of the *Qualified Institutional Buyer* Definition in Rule 144A

Under the proposal, the Commission would amend Rule 144A to add the following new category to the QIB definition: "any *institutional* accredited investor, as defined in rule 501(a) under the Act (17 CFR 230.501(a)), of a type not listed in paragraphs (a)(1)(i)(A) through (I) or paragraphs (a)(1)(ii) through (vi)."[5] [Emphasis added] The aforementioned accredited investor definition includes a category for trusts, which reads: "Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in §230.506(b)(2)(ii)."[6]

Accordingly, under the proposal, a bank-maintained CIF that satisfies the $100 million requirement under Rule 144A(a)(1)(i)[7] and the other requirements of rule 501(a)(7) could therefore qualify as a QIB regardless of the type and size of its investors.[8] Hence, a CIT that cannot meet the current QIB definition in Rule 144A(a)(1)(i)(F), because it has an H.R. 10 plan investor would be able to qualify as a QIB under the newly proposed category, provided that it satisfies the $100 million requirement and the other requirements of rule 501(a)(7). Similarly, a CTF that satisfies the $100 million requirement and the other requirements of 501(a)(7) could qualify as a QIB under the newly proposed category without having to confirm the QIB status of each fiduciary account invested in the CTF. In both situations, the Commission would expand

[4] ABA Letter to SEC on Concept Release (Sept. 24, 2019), *available at* https://www.sec.gov/comments/s7-08-19/s70819-6184363-192414.pdf.
[5] Proposed 17 CFR 230.144A(a)(1)(i)(J).
[6] 17 CFR 230.501(a)(7).
[7] 17 CFR 230.144A(a)(1)(i). An eligible institutional accredited investor would be considered a qualified institutional buyer if such investor, in the aggregate, owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the entity (referred to herein as the "$100 million requirement").
[8] Alternatively, CIFs may qualify as "institutional accredited investors" under rule 501(a)(8) ("Any entity in which all of the equity owners are accredited investors.") and the newly proposed rule 501(a)(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;").

the pool of accredited investors, which in turn, would allow banks to offer their fiduciary clients increased access to investment opportunities in private capital markets. We, therefore, strongly support this proposed changed to Rule 144A.

The Commission Should Expand the "Family of Investment Companies" Test to CIFs

As we urged in our letter on the Concept Release, the Commission should also amend the QIB definition to allow bank-maintained CIFs to qualify using the "family of investment companies" test that is made available to registered investment companies (RICs) under Rule 144A(a)(1)(iv). Under this test, a newly launched RIC that does not itself satisfy the $100 million requirement may purchase Rule 144A securities if it is part of a family of RICs that own, in the aggregate, at least $100 million in securities of issuers that are not affiliated with the RICs or part of the RICs' family of investment companies and are advised by the same investment adviser, regardless of the QIB status of the newly-launched RIC's investors.

As we noted in our previous letter, a family of bank-maintained CIFs may employ the same management structure as that of a RIC family, whereby the CIF trustee is the sponsoring bank of all CIFs in a family, the assets of each CIF in the family are held legally by the bank in its capacity as trustee, and the bank trustee itself typically qualifies as a QIB. However, because a newly launched bank-maintained CIF is prevented from purchasing Rule 144A securities unless all of its investors are qualified institutional buyers (i.e., the newly launched CIF satisfies the "QIB of QIBs" exemption) or until the CIF satisfies the $100 million requirement, investors in bank-maintained CIFs have fewer investment opportunities in private capital markets than investors in a RIC. No reasonable public policy is advanced by placing a newly launched bank-maintained CIF that forms part of a family of bank-maintained CIFs that collectively holds $100 million in securities at a competitive disadvantage to a similarly situated newly launched RIC that is part of a family of RICs. We, therefore, reiterate our request for the Commission to amend the QIB definition as noted above.

The Commission Should Expand Rule 180 to Address Multiple Employer Plans

Congress, in the recently enacted *Setting Every Community Up for Retirement Act* (SECURE Act), and the Administration in Executive Order 13847 have sought to expand the ability of small and medium employers and self-employed individuals, such as H.R. 10 plans, to

participate in multiple employer plans (MEPs) to take advantage of lower cost financial services. Unfortunately, bank-maintained CITs are one investment option that is generally unavailable to MEPs due to the current limitations in Rule 180.

Rule 180 under the 1933 Act specifies that interests in CITs issued to H.R. 10 plans that meet the "sophistication" criteria of the Rule, are exempt from registration under Section 5 of that Act.[9] Therefore, to meet the safe harbor provided, most CITs admit only Rule 180 qualified H.R. 10 plans in order to maintain the exemption from registering interests in the CIT under the 1933 Act. Rule 180, however, is only available to "single employer" plans or "interrelated partnerships," and not to plans representing many employers, such as MEPs. We therefore ask the Commission to amend Rule 180 to allow for MEPs to also meet the sophistication criteria and therefore invest in CITs.

The Commission Should Allow CTFA Designation to Meet Accredited Investor Status

In the proposal, the Commission proposes to add new categories for natural persons to meet the accredited investor definition in Regulation D. In particular, the Commission is adding a provision for individuals who hold certain professional certifications or designations as an "alternative means of assessing an investor's need for the protections of registration under the Securities Act."[10] In addition, the proposal asks "Should we consider other certifications, designations, or credentials as a means for individuals to qualify as accredited investors? If so, which ones should we consider?"

In response to those questions, we urge the Commission to consider the Certified Trust and Financial Advisor (CTFA) designation to meet the qualifications for accredited investor status. ABA awards the CTFA only to those financial services professionals who pass an examination[11] and maintain their level of knowledge with ongoing education. CFTA applicants must have at least three years of qualifying wealth management experience defined as client interaction, whether direct or indirect, in the furtherance of delivering fiduciary services relating to trusts, estates, IRAs, qualified retirement plans, custody and individual asset management

[9] 17 CFR 230.180, *Exemption from registration of interests and participations issued in connection with certain H.R. 10 plans*.
[10] 85 Fed. Reg. 2579.
[11] Information about CTFA examination available at: https://www.aba.com/training-events/certifications/certified-trust-and-financial-advisor/prepare-for-the-exam.

accounts.[12] This experience includes providing specialty services and solutions in investment management, tax, legal, financial, and estate planning. Applicants with three to five years of experience must also complete an ABA-approved training program in wealth management.[13]

Individuals with sufficient experience and training must sit for and pass the 200 question CTFA exam focusing on the following knowledge areas:

- Fiduciary & Trust Activities – 25%
- Financial Planning – 25%
- Tax Law & Planning – 25%
- Investment Management – 20%
- Ethics – 5%

The Investment Management portion of the exam covers portfolio management theories and concepts including hedging strategies, as well as the types, selection and analysis of investments such as nontraditional and master limited partnerships. Upon successfully passing the exam, CTFAs must complete 45 continuing education credits every three years and uphold the Code of Ethics to maintain a high standard of conduct, competency, knowledge, professionalism, integrity, objectivity, and responsibility.[14]

The Code of Ethics requires that the individual has not signed, and will not sign, a consent decree with the Commission or any state securities agency. In addition, a competent court of jurisdiction or a federal or state regulatory proceeding must not have found the individual guilty of any of the following:

> (1) securities law violations; (2) embezzlement; (3) fraud; (4) fraudulent conversion; (5) misappropriation of funds; (6) restraint of trade; (7) knowingly filing a false report with a federal or state bank or bank holding company regulatory agency; (8) failure to comply with any law or regulation governing the reporting or disclosure of a conflict of interest; (9) willful failure to file a state or federal income tax return; (10) violation of state or federal election campaign laws; and (11) participation in violations of the Bank Secrecy Act.

[12] Information about CTFA eligibility requirements available at: https://www.aba.com/training-events/certifications/certified-trust-and-financial-advisor/eligibility-requirements.
[13] List of approved training programs available at: https://www.aba.com/training-events/certifications/certified-trust-and-financial-advisor/eligibility-requirements.
[14] Information about CTFA Code of Ethics available at: https://www.aba.com/training-events/certifications/maintaining-your-certification/certification-code-of-ethics.

Given the experience and training in wealth management required, as well as 45 continuing education credits every three years, and adherence to a Code of Ethics, individuals with a CTFA designation should qualify to be an accredited investor.

Conclusion

ABA appreciates this opportunity to provide comments to the Commission on its proposed amendments to the accredited investor definition in Regulation D and the QIB definition in Rule 144A. We support the Commission's reasonable expansion of the QIB definition to capture more CITs and CTFs, as well as consideration of particular certifications as a proxy for financial sophistication. We believe the CTFA designation should be considered amongst those certifications.

Sincerely,

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