



Eversheds Sutherland (US) LLP
1114 Avenue of the Americas, 40th
Floor
New York, NY 10036-7703
D: +1 212.389.5000
F: +1 212.389.5099

March 16, 2020

Via E-Mail
rule-comments@SEC.gov

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

**Re: File No. S7-25-19; Fed. Reg. 2574 (January 15, 2020)
Proposed Amendments to "Qualified Institutional Buyer" Definition in Rule
144A under the Securities Act of 1933
Release Nos. 33-10734; 34-87784**

Dear Ms. Countryman:

We are submitting this comment letter on behalf of the Coalition of Collective Investment Trusts (the "Coalition"),¹ in response to the proposal (the "Proposal") issued by the U.S. Securities and Exchange Commission (the "SEC") soliciting comments on proposed amendments to the definition of "accredited investor" in the SEC's rules and the definition of "qualified institutional buyer" ("QIB") in Rule 144A under the Securities Act of 1933, as amended (the "Securities Act").² The Coalition has particular interest in the proposed amendments to the definition of QIB in Rule 144A under the Securities Act. The Coalition appreciates the opportunity to submit these comments on the Proposal to the SEC.

BACKGROUND

In June 2019, the SEC issued a concept release that solicited public comment on possible ways to simplify, harmonize, and improve the exempt offering framework under the Securities Act to promote capital formation and expand investment opportunities while maintaining appropriate investor protections. In the concept release, the Commission requested comments on possible approaches to amending the accredited investor definition, which is a central component of several exemptions from registration such as Rules 506(b) and 506(c) of Regulation D, and plays an important role in other federal and state securities law contexts. The SEC also solicited comments on certain aspects of the Rule 144A safe harbor for unregistered resales of certain restricted securities to QIBs.

In response to the request for comment, the Coalition submitted a comment letter that urged the SEC to amend or otherwise provide guidance which would modify Rule 144A(a)(1)(i)(F) (the

¹ The Coalition has membership of more than 45 member firms comprised of a diverse group of fund sponsors, money managers and service providers. Additional information is accessible via: <https://www.ctfcoalition.com>.

² The Proposal is available at: <https://www.sec.gov/rules/proposed/2019/33-10734.pdf>

"Trust Fund Provision"), which classifies as QIBs certain trust funds with requisite qualifying assets whose trustee is a bank or trust company and whose participants are exclusively certain types of retirement plans, to allow a collective investment trust ("CIT")³ to accept investments from H.R. 10 plans ("Keogh Plans"),⁴ without any negative implications for the CIT's status as a QIB under Rule 144A.⁵

Today, CITs rely on the Trust Fund Provision in order to qualify as a QIB and therefore invest in securities offered in reliance on Rule 144A. Under the current provision, a CIT must: (i) have a trustee who is a bank or trust company, (ii) own and invest on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the CIT, and (iii) limit its plan participants to only (a) plans established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees or (b) an employee benefit plan within the meaning of Title I of ERISA. However, the Trust Fund Provision specifically excludes CITs that have Keogh Plan investors from qualifying as a QIB. While a Keogh Plan may itself qualify as a QIB, it will cause a CIT to lose its status as a QIB by virtue of that plan's investment in the CIT.

Thus, CITs, in shaping their investment strategies, are faced with the choice of either banning a Keogh Plan from investing or foregoing the ability to invest in securities offered in reliance on Rule 144A. In other words, the current regulatory framework effectively prohibits a CIT from allowing Keogh Plan investors if the CIT invests in securities offered in reliance on Rule 144A.

PROPOSED AMENDMENTS

On December 18, 2019, the SEC proposed amendments to the definition of "accredited investor" in the SEC's rules and the definition of QIB in Rule 144A under the Securities Act ("Revised Rule"). As mentioned above, the Coalition has particular interest in the proposed amendments to the QIB definition, which would expand the list of entities that are eligible to qualify as QIBs. More specifically, the proposed amendments would add limited liability companies and rural business investment companies to the types of entities that are eligible for QIB status if they meet the \$100 million in securities owned and investment threshold in the definition.

Additionally and most relevant to the Coalition, the proposed amendments would add a "catch-all" category that would permit institutional accredited investors under Rule 501(a), of an entity type not already included in the qualified institutional buyer definition, to qualify as qualified institutional buyers when they satisfy the \$100 million threshold ("Proposed Catch-All Amendment"). Importantly, the SEC notes that the Proposed Catch-All Amendment would encompass bank-maintained CITs that include as participants individual retirement accounts or Keogh Plans that are currently excluded from the qualified institutional buyer definition pursuant to Rule 144A(a)(1)(i)(F), so long as the CIT satisfies the \$100 million threshold.⁶

³ CITs are tax-exempt, pooled investment vehicles. Interests in CITs are exempt from registration pursuant to section 3(a)(2) of the Securities Act, which provides an exemption from registration where a fund is "maintained by a bank" and participation in the fund is limited to certain investors (such as a pension or profit sharing plan qualified under Section 401 of the Internal Revenue Code of 1954 or a governmental plan as defined in Section 414(d) of the Internal Revenue Code of 1954). Likewise, CITs avoid registration as investment companies under the Investment Company Act of 1940, as amended (the "1940 Act") in reliance on an exclusion from the definition of "investment company" found in section 3(c)(11) of the 1940 Act. Section 3(c)(11) excludes, among other entities, CITs maintained by a bank, the assets of which consist solely of certain types of retirement plans. Additionally, since CITs hold qualified retirement plan assets, CIT trustees are held to heightened fiduciary standards under applicable banking law, and the Employee Retirement Income Security Act of 1974 ("ERISA"), when ERISA assets are invested in the CIT.

⁴ H.R. 10 plans or Keogh Plans are tax-deferred pension plans available to self-employed individuals or unincorporated businesses set-up for retirement purposes.

⁵ The Coalition's comment letter is available at: <https://www.sec.gov/comments/s7-08-19/s70819-6193378-192524.pdf>.

⁶ See footnote 241 in the Proposal.

COALITION COMMENTS

The Coalition supports the SEC's proposal to include this Proposed Catch-All Amendment to the QIB definition in the Revised Rule. The Proposal would address the concern we expressed in our comment letter in response to the SEC's June 2019 concept release. Further, the Coalition urges the SEC to approve the Proposed Catch-All Amendment to the QIB definition under Rule 144A, regardless of whether the SEC proceeds with approving the other changes contemplated by the other proposed amendments.

CONCLUSION

The Coalition appreciates the opportunity to provide these comments to the Proposal. Please do not hesitate to contact Cliff Kirsch (212.389.5052 or CliffordKirsch@eversheds-sutherland.com) if you have any questions regarding these comments.

Respectfully submitted,

Eversheds Sutherland (US) LLP


Clifford Kirsch

FOR THE COALITION OF COLLECTIVE INVESTMENT TRUSTS