Morgan Lewis

Charles A. Sweet
Partner
+1.202.739.5635
charles.sweet@morganlewis.com

March 16, 2020

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

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

Re: Amending the "Accredited Investor" Definition, Release Nos. 33-10734; 34-87784; File No. S7-25-19

Ladies and Gentlemen:

On behalf of our client, the Oregon State Treasury (the "OST"),[1] we are pleased to respond to the request for comment by the Securities and Exchange Commission (the "SEC" or the "Commission") on the Commission's release, Amending the "Accredited Investor" Definition, Release Nos. 33-10734; 34-87784; File No. S7-25-19 (the "Accredited Investor Release").[2]

The OST wishes to extend its thanks to the Commission for its willingness to re-examine and modernize a long-standing regulatory scheme. In general, the OST supports the proposition that an investor's need for the protections of the Federal securities registration scheme has little to do with the specific form of the investor – rather, it depends almost entirely on the investor's experience and sophistication, which inform the

[1] The Oregon State Treasury is led by State Treasurer Tobias Read. As Treasurer, he is the state's financial leader, the custodian of public funds and chief investment officer. The OST prioritizes investing for the long term, doing business the right way, and empowering Oregonians to invest in themselves. Among other things, the OST operates the state's investing, banking, and debt programs. The OST invests for the long-term, and sells Oregon bonds to help finance community projects like schools, roads and armories. Because of sound Treasury management, more than 73 cents of every dollar in pension benefits comes from investment returns. For more information, please visit https://www.oregon.gov/treasury/Pages/index.aspx.

[2] 80 Fed. Reg. 2574 (Jan. 15, 2020).

investor's ability to fend for itself.[3] For that reason, the OST supports the Commission's proposals to add "catch all" categories to the definitions of both "accredited investor" and "qualified institutional buyer." The OST appreciates your consideration of their views.

Among other things, the Commission has proposed to add a new category of "accredited investor" under Rule 501(a)(9) that includes any "entity" owning investments in excess of $5 million that is not formed for the specific purpose of acquiring the securities being offered. This "catch all" category is intended to expand the types of entities that may qualify as accredited investors, including "certain state and local governmental entities" such as "state and local governmental entities" having the requisite amount of assets under management."[4] Further, the Commission has proposed to add a new category of "qualified institutional buyer" ("QIB") under Rule 144A(a)(J) that includes any "institutional accredited investor, as defined in Rule 501(a) . . . , of a type not listed in paragraphs A(1)(i)(A) through (I) or paragraphs (a)(1)(ii) through (vi)," that owns and invests on a discretionary basis at least $100 million in securities of unaffiliated issuers. This "catch all" category is intended to encompass the new catch all category of accredited investor referenced above, as well as any other entities that may be added to the accredited investor definition in the future. It also is meant to include all of the entity types suggested by commenters,[5] including "additional state and local governmental entities and organizations."[6]

In the OST's view, there is little if any substantive difference between large governmental investment funds and their private counterparts, and no reason to restrict them from buying securities that have selling or transfer restrictions limiting them to accredited investors or QIBs. The State of Oregon, in particular, has two large, sophisticated funds that would benefit greatly from the Commission's proposed rule changes. The Oregon Short Term Fund ("OSTF") is a short-term investment fund for local governments in Oregon, all state agencies, and the Oregon Public Employees Retirement Fund. The Oregon Intermediate Term Pool ("OITP") is an intermediate-term investment fund for several Oregon state agencies. As further detailed on Exhibit A, each of the OSTF and the OITP is a large, professionally managed fund that is substantially similar in almost all respects to its private counterparts, in terms of size and investment sophistication, as well as organization, governance and transparency. Despite these similarities, because neither the OSTF nor the OITP is the type of entity that is specifically contemplated by Regulation D or Rule 144A, they have been foreclosed from investing in credit-worthy financial instruments that otherwise are within the scope of their investment

---

[3] *E.g.*, *SEC v. Ralston Purina*, 346 U.S. 119, 125 (1953).

[4] Accredited Investor Release, 80 Fed. Reg. at 2588, including n.81.

[5] Accredited Investor Release, 80 Fed. Reg. at 2598.

[6] Accredited Investor Release, 80 Fed. Reg. at 2597

authority, even though these instruments are freely available to their private sector counterparts. This result is unfair and to the disadvantage of the OSTF's and OITP's stakeholders.

For these reasons, the OST supports the Commission's proposals described above. The OST does, however, have some suggestions that we think will help to better implement the intent of those proposals. While it is clear that the Commission intends to include within the accredited investor and QIB definitions governmental funds such as the OSTF and the OITP that have the requisite amount of investments, the language of the rules should be clearer.

Proposed Rule 501(a)(9) refers to an "entity," a term which is not defined. While the Commission's intent in not defining this term appears to be to keep it as flexible as possible, it is not wholly clear whether all state and local governmental funds are completely separate "entities" in the legal sense. State and local governmental funds are creations of state and local law, and the mechanisms for doing so vary. While, as described in Exhibit A, the OITP and OSTF closely resemble private investment funds in their structure and operation, this may not always be as straightforward.

Therefore, instead of using the undefined term "entity" on its own, the OST suggests borrowing from the definition of "person" under Section 2(a)(2) of the Securities Act:[7]

> The term 'person' means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof.

Under this approach, Rule 501(a)(9) would instead refer to:

> any entity or any other person, as defined under Section 2(a)(2) of the Securities Act of 1933, that is not an individual

or, if the Commission prefers not to incorporate by reference:

> any entity, unincorporated organization, or government or political subdivision thereof.

The term "institutional accredited investor" is used in proposed Rules 144A(a)(1)(i)(J) and 15g-1(b). Proposed Rule 144A(a)(1)(i)(J) refers to "[a]ny institutional accredited investor, as defined in rule 501(a)..., of a type not listed in" the

[7] 15 U.S.C. §77b(a)(2).

remainder of the definition of QIB. However, the term "institutional accredited investor" is not defined in Rule 501(a). Proposed Rule 15g-1 refers to "an institutional accredited investor, as defined in [Rule] 501(a)(1), (2), (3), (7), (8), (9), or (12)." It is correct that the term "institutional accredited investor" is commonly understood to refer to accredited investors that are not individuals, which would include those currently referenced in subsections (1), (2), (3), (7) and (8) (and presumably would include subsections (9) and (12) if the Commission's proposals are adopted), but again the term is not defined. The OST suggests a simpler approach, under which the Commission would add a new definition to Rule 501:

> **Institutional accredited investor. Institutional accredited investor** shall mean any accredited investor that is not a natural person.

Proposed Rules 144A(a)(1)(i)(J) and 15g-1 would then simply use the defined term.

The OST believes that these changes to the Commission's rules would clarify, simplify and harmonize the application of Regulation D and Rule 144A. There is no policy reason to foreclose certain types of entities from investing in securities whose sale or transfer is restricted to accredited investors or QIBs, when those entities are every bit as large, sophisticated and able to fend for themselves as the types of entities that are permitted to make such investments.

We greatly appreciate your consideration of our client's views. If appropriate, we would be pleased to have the opportunity to discuss these matters further with you or with any member of the Commission staff. Please feel free to contact the undersigned at 202-739-5635.

Very truly yours,

Charles A. Sweet

Exhibit A to Comment Letter

Comparison of
Oregon Short Term Fund and Oregon Intermediate Term Pool
To Private Investment Funds

- Each of the Oregon Short Term Fund ("OSTF") and the Oregon Intermediate Term Pool ("OITP") is a large and sophisticated investor, like its private fund counterparts.
  - The OSTF is a large and sophisticated fund, with approximately $23.8 billion in assets under management as of January 31, 2020.
  - The OITP had approximately $141.1 million in assets under management as of January 31, 2020, but it is under common management with the OSTF as described below. To the extent that the sheer size of the OSTF implies a degree of sophistication, the OITP is similarly sophisticated as a result of its common management.
- Each of the OSTF and the OITP would be an institutional accredited investor and a qualified institutional buyer ("QIB") if it were organized as a corporation, business trust or partnership.
  - As noted above, the OSTF had approximately $23.8 billion in assets under management, and the OITP had approximately $141.1 million in assets under management, each as of January 31, 2020.
- Each of the OSTF and the OITP is managed by personnel that are highly qualified in training and experience in the field of investment or finance.
  - The State Treasurer is the investment officer for the Oregon Investment Council ("OIC"), but may perform only functions in that capacity as authorized or required by law and, consistent with law, by the OIC. ORS 293.716. In that regard, the office of the Treasurer runs the day-to-day activities on behalf of the OSTF and OITP, similar to the management of the day-to-day activities of a corporation by its officers of a corporation/
  - Under ORS 293.716, the State Treasurer, solely in his capacity as investment officer, is empowered to employ personnel necessary to facilitate and assist in carrying out the functions of the OIC and his own functions as investment officer. As such, the Treasurer, in his capacity as the investment officer, selects and maintains a full-time professional investment staff who are dedicated to the operation of the state investment program, including the OSTF and the OITP. Each member of the senior management of the OSTF and the OITP therefore is highly qualified in training and experience in the field of investment or finance.
- Each of the OSTF and the OITP has an oversight board similar to that of a board of directors for a corporation or partnership or the trustees of a business trust, with many members who are qualified in training and experience in the field of investment or finance.

- Each of OSTF and the OITP is overseen by the OIC. *See* ORS 293.706. The OIC is responsible for formulating policies for the investment and reinvestment of moneys in the OSTF and the OITP and the acquisition, retention, management and disposition of investments. ORS 293.731. Therefore, the OIC is similar to a board of directors of a corporation or of a corporate general partner of a partnership, or a board of trustees of a business trust.
    - Four of the members of the OIC are appointed by the governor, one of which may be a member of the Public Employees Retirement Board. These outside members must be qualified in training and experience in the field of investment or finance. ORS 293.706.
- The OIC is advised by the Oregon Short Term Fund Board ("OSTFB") in its oversight of the management of the OSTF, but the OIC remains responsible for investment policy. ORS 294.895. In this regard, the OSTFB is similar to a committee of a board of directors of a corporation or of a corporate general partner of a partnership, or of a board of trustees of a business trust.
    - Three members of the OSTFB are appointed by the State Treasurer, and another three (who are treasurers, finance or fiscal officers or business managers of political subdivisions) are appointed by the governor. The outside members appointed by the State Treasurer must be qualified in training and experience in the field of investment or finance. ORS 294.885.

- The OSTF and OITP have strict fiduciary duties to their beneficiaries.
    - Under applicable Oregon law, including ORS 293.726 and .863, the OSTF and the OITP are required to be invested and the investments of those funds managed as a prudent investor would do, under the circumstances then prevailing and in light of the purposes, terms, distribution requirements and laws governing each such fund, in the exercise of reasonable care, skill and caution, and in the context of each such fund's investment portfolio and as a part of an overall investment strategy, with risk and return objectives reasonably suitable to the particular fund.
    - Under ORS 293.726, the OIC and the State Treasurer, in his capacity as investment officer, must conform to the fundamental fiduciary duties of loyalty and impartiality.
- Like a corporation, business trust or partnership, each of the OSTF and the OITP is created separately by Oregon statutes. In particular:
    - The OSTF was created pursuant to ORS 293.701-796, particularly .728, and 294.885-895, and the OITP was created pursuant to ORS 293.701-796, and .861-863.

  - The assets of each of the OSTF and the OITP are in segregated accounts, separate and distinct from the state General Fund. *See* ORS 293.728 and .863.

- The authorizing statutes impose annual reporting accounting and transparency requirements on the OSTF and the OITP, more similar to a public company than a private company.
  - In his capacity as investment officer, the State Treasurer must follow generally accepted accounting practices and provide any information necessary for financial reporting required by law. ORS 293.761.
  - Oregon law requires the State Treasurer, in his capacity as investment officer, to submit to the OIC a detailed monthly report regarding the investments of each of the OSTF and the OITP. ORS 293.766.
  - Oregon law requires the OIC to report to the Governor and Legislative Assembly on the performance of the OSTF and the OITP biennially or at other times it considers of the public interest. ORS 293.771.
  - The OIC must provide for an examination and audit of the OSTF and OITP, and for submission to the OIC of a report based on the examination and audit, at least once every four years and at other times as the council may require. ORS 293.776. As a practical matter, each of OSTF and OITP publishes annual audited financial statements.
  - The audits of the annual financial statements of the OSTF and the OITP are conducted in according with auditing standards generally accepted in the U.S. and the standards applicable to financial audits contained in Government Audit Standards, issued by the Comptroller General of the United States. These standards require that the audit be performed to obtain reasonable assurance about whether the financial statements are free from material misstatement.