May 1, 2020

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

Re: Amending the 'Accredited Investor' Definition [File Number S7–25–19]

Dear Ms. Countryman:

I am pleased to provide these comments regarding the proposed rule amending the 'accredited investor' definition.[1]

Request for Comment 1. Are professional certifications and designations or other credentials an appropriate standard for determining whether a natural person is an accredited investor? Do the types of certifications and designations that the Commission is considering indicate that an investor has the requisite level of financial sophistication and abilities to render the protections of the Securities Act unnecessary?

Response 1. Yes, to both questions.

Rule 506(b)(2)(ii) requires that "each purchaser who is not an accredited investor either alone or with his purchaser representative(s)" have "such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment …" Similarly, under Rule 501(i), a purchaser representative must have "such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment." The shorthand for these requirements is "sophistication."

Sophistication has been, in principle, a pathway to qualifying as an investor in Regulation D offerings since Regulation D was adopted.[2] Sophistication is, as Regulation D is currently structured, an *alternative* to being an accredited investor. Issuers, however, have been reluctant to rely on these provisions in Regulation D because the Commission has never adopted clear guidance as to what constitutes sophistication and the potential price of guessing regulators' or juries stance incorrectly is disqualification of the offering or, at a minimum, rescission rights. From 2013 to 2018, only 6% of the offerings conducted under Rule 506(b) included any non-accredited investor purchasers.[3]

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[1] "Amending the 'Accredited Investor' Definition," Proposed Rule, *Federal Register*, Vol. 85, No. 10, January 15, 2020, pp. 2574-2613 (RIN 3235–AM19) https://www.govinfo.gov/content/pkg/FR-2020-01-15/pdf/2019-28304.pdf (hereinafter "Proposing Release").
[2] "Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers of Sales" (Release No. 33-6389), *Federal Register*, No. 47 (March 16, 1982), p. 11251.
[3] "Proposing Release" p. 2601.

The proposed rule builds on the original idea incorporated into Regulation D by outlining a process by which specific bright-line tests can be adopted to make it clear that certain certifications and designations or other credentials make an investor sophisticated and therefore an 'accredited investor.' This will breathe life into this aspect of Regulation D. It will help investors that would typically otherwise be barred from investing in Regulation D offerings (most often younger investors or those that live outside of high-income metropolitan areas). It will democratize access to offerings by high-growth companies that offer substantially higher returns (albeit often at greater risk). It will help issuers seeking to raise capital (particularly those operating outside of high-income metropolitan areas).

Request for Comment 2. Are the professional certifications and designations we preliminarily expect to designate as qualifying credentials in an initial Commission order accompanying the final rule appropriate to recognize for this purpose? Should we include a credential from an accredited educational institution, such as an MBA, in such initial order?

Response 2. The qualifying credentials are too narrow. They primarily benefit securities industry professionals. These professionals lawfully give investment advice to others so they should be able to give investment advice to themselves. Clearly, however, others can and do have the sophistication and knowledge that would enable them to evaluate these investments. Those with an advanced degree in business, business administration or business management, entrepreneurship, economics, finance or accounting should qualify as accredited. These curriculums often provide more relevant information and skills than those that must be learned to obtain licensure. Certified public accountants should qualify. A law degree can but need not provide relevant information. For example, only two of the seven JD programs at Harvard provide even the most rudimentary education about business and investing.[4] Medical and advanced scientific, engineering or technology degrees can clearly better enable an investor to more effectively evaluate the merits of some types of investments than any securities licensure or business degree. When a potential investment involves evaluating a scientific, medical or technological matter, these degrees should qualify an investor.

The Commission should focus on the knowledge and skills that a degree, certification or licensure evidences. It should not limit the qualification to just securities industry professionals.

Request for Comment 3. 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? For example, there are several FINRA Representative-level and Principal-level exams, as well as FINRA-administered NASAA exams, Municipal Securities Rulemaking Body exams, and National Futures Association exams, that cover a broad range of subjects relating to the markets, the securities industry and its regulatory structure. Should we consider any other FINRA-developed examinations or FINRA-administered examinations not discussed in this release? Should we consider designating any professional certifications or designations or credentials issued outside of the United States? Should we consider other certifications and designations administered by private organizations, such as the CFA Institute and the Certified Financial Planner Board of Standards? Does the fact that these private organizations are not

[4] "Programs of Study," Harvard Law School https://hls.harvard.edu/dept/academics/programs-of-study/.

subject to Commission oversight or regulation raise concerns with respect to the inclusion of certifications or designations such as the CFA Charter or the CFP Certification as a means of accredited investor qualification?

Response 3. The CFA Charter and CFP certification generally require the mastery of a broader range of material at a deeper level than the series 7 exam and, therefore better equip a person to evaluate investments. They, and similar certification programs, should accord accredited investor status. FINRA and government licensure should not be accorded a monopoly on conferring accredited investor status. Private programs should be a pathway to accreditation. The Commission should evaluate the level of investment and business knowledge that the accreditation, certification or degree program requires the person in the program to demonstrate. That the accrediting, certifying or degree conferring institution is not subject to direct Commission oversight should be irrelevant since that has no bearing on the amount of information imparted by the program.

Request for Comment 4. A FINRA introductory-level examination, the "Securities Industry Essentials" (SIE) examination, is a corequisite to the Series 7 and Series 82 examinations and assesses a candidate's knowledge of basic securities industry information. The SIE examination is open to any individual aged 18 or over, and association with a firm is not required. Passing the SIE examination alone does not qualify an individual for registration with a FINRA member firm or to engage in securities business. We have not included the SIE examination among those we expect initially to designate as qualifying credentials because the SIE examination is relatively new and evaluates introductory-level comprehension of the securities industry. Should we consider the SIE examination as a means for individuals to qualify as accredited investors? Should we consider the SIE examination, in addition to the completion of an investing-related course at an accredited college or university, as a means for individuals to qualify as accredited investors?

Response 4. Based on the curriculum provided by FINRA, probably yes. The sample test, however, seems more concerned with the regulation of investment professionals than investment knowledge. Moreover, the investment knowledge tested for appears to be primarily the nature of various public securities other than common stock and investment products rather than an understanding of business, enterprise, accounting or finance.[5]

Request for Comment 5. FINRA's Series 86 and 87 examinations assess the ability of an entry-level registered representative to perform their job as a research analyst. As with the Series 7 and Series 82 examinations, an individual must be associated with and sponsored by a FINRA member firm or other applicable self-regulatory organization member firm to be eligible to take the Series 86 and 87 examinations. The SIE examination is also co-requisite to the Series 86 and 87 examinations. Should we consider the Series 86 and 87 examinations as a means for individuals to qualify as accredited investors?

Response 5. No comment.

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[5] "Sample SIE Curriculum Outline," FINRA https://www.finra.org/sites/default/files/2020-04/sample-sie-curriculum-outline.pdf; "Practice Test for the Securities Industry Essentials Exam," FINRA https://www.finra.org/registration-exams-ce/qualification-exams/securities-industry-essentials-exam/practice-test.

Request for Comment 6. The Series 66 NASAA Uniform Combined State Law Examination (Series 66) is designed to qualify candidates as investment adviser representatives and as broker-dealer representatives. NASAA developed the Series 66 examination, and FINRA administers it. An individual does not need to be sponsored by a member firm to take the exam, and successful completion of the exam does not convey the right to transact business prior to being granted a license or registration by a state. Should we consider the Series 66 examination and registration as an investment adviser representative as a means for individuals to qualify as accredited investors?

Response 6. Yes. If successful completion of an exam confers the right to a person to provide investment advice to others, then they should be able to provide "investment advice" to themselves, be deemed accredited and make investment in Regulation D offerings.

Request for Comment 7. Several types of certifications and designations, including the Series 7, Series 82, Series 86, and 87 licenses, require that an individual be sponsored by a FINRA member firm to take the exam. Other certifications and designations, including the Series 65, Series 66, and the SIE, do not have such a requirement. With respect to certifications and designations for which an individual does not need to be sponsored by a member firm, should we consider imposing a waiting period following an individual's attainment of the credential or designation before the individual can invest in an offering as an accredited investor? If so, would a 30-day waiting period, or some other period of time be appropriate?

Response 7. No. Whether a person is sponsored by a member firm has no bearing on the degree of knowledge that they have. The content and depth of information tested for should be the determining factor.

Request for Comment 8. Should we, as proposed, designate certain certifications, designations, or credentials as qualifying credentials by order, or should we instead include specific certifications, designations, or credentials in the rule itself? The proposed provision specifies various attributes that the Commission would consider in making this determination. Is the proposed list of attributes appropriate or are there other criteria that we should consider in determining whether certain professional certifications or designations or other credentials should be recognized as qualifying for accredited investor status? One proposed attribute that may be considered is that an indication that an individual holds the certification or designation is made publicly available by the relevant self-regulatory organization or other industry body. Would such a publicly available indication be necessary if the individual can demonstrate to the issuer that he or she has actually obtained the certification, or designation?

Response 8. For many programs, it probably will work better in the long-run if it is generally done by order. The designation and name of various tests, accreditations, certifications and degrees will change. For certain tests, the registered representative test, for example, or an accredited investor investment knowledge test to be developed and administered by the Commission or FINRA, it may make sense to put it in the rule itself. It is important that the process for approving a program as qualifying be streamlined. The Commission should not create needless regulatory barriers to investors having access to Regulation D offerings.

Request for Comment 9. Should the individuals who obtain the designated professional credentials be required to maintain these certifications or designations in good standing in order to qualify as accredited investors, as proposed? Should they also be required to practice in the fields related to the certifications or designations, or to have practiced for a minimum number of years? Certain of the professional certifications or designations we are considering require an individual to be associated with a FINRA member firm or other applicable self-regulatory organization member firm, or require a certain amount of work experience in order to qualify for the certification or designation, while others do not. Is it appropriate to recognize professional certifications or designations that require employment at certain firms, state registration or licensure, or a minimum amount of work experience, as proposed? If work experience is a requirement for a certification but not a prerequisite to taking the relevant exam, should successful completion of the exam be sufficient to qualify for accredited investor status, instead of requiring certification?

Response 9. The general investment knowledge imparted by these programs will not materially dissipate or decline, particularly if the person is making investments. The Commission should not erect needless barriers reducing access to these investments. It should not actively create an advantage for those it regulates (i.e. those in the securities industry) by requiring that a person be associated with a broker-dealer.

Request for Comment 10. Under the proposed approach, individuals with certain certifications, designations, or credentials would qualify as accredited investors regardless of their net worth or income. While having such a certification, designation, or credential may be a measure of financial sophistication, which should encompass the investor's capacity to allocate their investments in a way to mitigate or avoid risks of unsustainable loss, the impact of an investment loss on an investor that does not meet the current net worth or income thresholds may be significant. Should we consider additional conditions, such as investment limits, for individuals with these certifications, designations, or credentials who do not meet the income test or net worth test, in order to qualify as accredited investors? If so, what types of investment limits or other conditions should we consider?

Response 10. No. This would create a large administrative burden and substantially reduce the attractiveness of this approach (as it has for Regulation A and Regulation CF). Since it effectively would constitute the SEC imposing portfolio limits, it is a step towards federal merit review.

Request for Comment 11. Should we consider educational backgrounds more generally, such as advanced degrees in certain areas such as law, accounting, business, or finance, as a means for qualifying as an accredited investor? If so, which degrees would be appropriate? Should the individual also be required to demonstrate professional experience in such areas?

Response 11. Those with an advanced degree in business, business administration or business management, entrepreneurship, economics, finance or accounting should qualify as accredited. These curriculums often provide more relevant information and skills than those that must be learned to obtain licensure. CPAs should qualify. A law degree can but need not provide relevant

information. For example, only two of the seven JD programs at Harvard provide even the most rudimentary education about business and investing.[6] Medical and advanced scientific, engineering or technology degrees can clearly better enable an investor to more effectively evaluate the merits of some types of investments than any securities licensure or business degree. When a potential investment involves evaluating a scientific, medical or technological matter, these degrees should qualify an investor.

The Commission should focus on the knowledge and skills that a degree, certification or licensure evidences. It should not limit the qualification to just securities industry professionals.

Request for Comment 12. Should we consider professional experience in areas such as finance and investing, apart from professional certifications and designations, as another means for qualifying for accredited investor status? If so, what factors should we consider in evaluating whether an individual has the capability of evaluating the merits and risks of a prospective investment based on his or her professional experience? For example, should the focus be on specific types and levels of job experience? Should we consider only professional experience related to the securities industry? If so, would it be appropriate to include only those actively involved in the buying and selling of securities, or should we consider other professionals whose work experience may demonstrate an understanding of the investment process? How should the Commission determine the appropriate level of experience needed in order to qualify as an accredited investor under such a test?

Response 12. Certified Public Accountants (CPAs) should qualify as accredited. Their education, training, licensure and professional experience make them highly qualified to evaluate businesses and potential investments. Business people generally are among the most able to accurately evaluate business opportunities. They may not, however, have the formal credentials to establish that fact. It is not clear how bright line tests could be developed regarding this.

Request for Comment 13. Should we consider developing an accredited investor examination as another means for determining investor sophistication? What are the advantages and disadvantages of such an approach? What should be considered in developing and designing such an examination?

Response 13. Definitely yes. Ordinary people outside of the financial industry should have a means to prove that they have the knowledge and sophistication to qualify. Such a test would be central to democratizing access to Regulation D investments and enabling people who have developed the requisite knowledge to have access to these investments. Otherwise, the Commission will be effectively creating barriers where only affluent people or those it regulates in the financial industry have access to these investments.

Request for Comment 14. Should we consider permitting individuals to self-certify that they have the requisite financial sophistication to be an accredited investor as another means for determining investor sophistication?

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[6] "Programs of Study," Harvard Law School https://hls.harvard.edu/dept/academics/programs-of-study/.

Response 14. In principle, I would support such an approach. However, it is probably prudent to establish these other means of accessing private offerings and evaluate their impact first.

Request for Comment 15. Should knowledgeable employees of private funds be added to the definition of accredited investor as proposed?

Response 15. No Comment.

Request for Comment 16. Would adding ''knowledgeable employees'' as a category in the accredited investor definition raise concerns that small private funds could qualify as accredited investors under Rule 501(a)(8) when all or most of its equity owners consist of knowledgeable employees? Do small private funds raise different concerns than pooled investment funds such as registered investment companies, business development companies, and small business investment companies that qualify as accredited investors without satisfying any quantitative criteria such as a total assets or investments threshold?

Response 16. No Comment.

Request for Comment 17. Under the proposed definition of ''accredited investor,'' should a knowledgeable employee's accredited investor status be attributed to his or her spouse and/or dependents when making joint investments in private funds? Is the answer to this question the same for a family corporation or similar estate planning vehicle for which the knowledgeable employee is responsible for investment decisions and the source of the funds invested?

Response 17. No Comment.

Request for Comment 18. Should the Commission consider including certain types of employees of a non-fund issuer in the accredited investor definition for purposes of a securities offering by that issuer? If so, what are the job types or categories of employees that should be considered to have the appropriate level of financial sophistication and access to the information necessary to make informed investment decisions about the issuer's offerings? For example, would it be appropriate to consider including officers of an issuer, or employees that serve a particular function such as employees who oversee the issuer's financial reporting or business operations? Similarly, should the Commission consider including other individuals with a familial or similar relationship to an issuer in the definition for purposes of such an issuer's securities offering? If so, how should we determine the appropriate individuals and types of relationships that would be covered by such a provision?

Response 18. Officers and board members of an issuer should have access to sufficient information to make informed judgments and should be deemed accredited for purposes of securities offered by the issuer.

Request for Comment 19. Should we add a note to clarify the calculation of ''joint net worth'' for purposes of Rule 501(a)(5), as proposed?

Response 19. Yes. The clarification may help some investors and practitioners to better understand the rules.

Request for Comment 20. Should SEC- and state-registered investment advisers be added to the list of entities specified in Rule 501(a)(1) and qualify as accredited investors, as proposed? Alternatively, should only SEC-registered investment advisers qualify as accredited investors? If so, why? Should we allow exempt reporting advisers to qualify as accredited investors? If so, should exempt reporting advisers be subject to additional conditions?

Response 20. Yes. Since they can give investment advice to others, they should be permitted to do so for themselves.

Request for Comment 21. Should RBICs be added to the list of entities specified in Rule 501(a)(1) and qualify as accredited investors, as proposed? Is there any reason to treat RBICs differently than SBICs in this regard?

Response 21. I am aware of no reason to treat RBICs differently than SBICs.

Request for Comment 22. Should limited liability companies be added to the list of entities specified in Rule 501(a)(3), as proposed?

Response 22. Definitely yes. LLCs are a highly useful and flexible type of entity. There are nearly 3 million LLCs in existence.[7] They account for nearly 69 percent of partnership tax returns.[8] Although the authors of the proposing release appear to be unaware of it,[9] the Internal Revenue Service Statistics of Income has detailed information about the revenues, profits and assets of LLCs.[10] The IRS public use file, which can be purchased by qualified users, would have more detailed information.

Request for Comment 23. If limited liability companies are listed in Rule 501(a)(3), should we further amend our rules to specifically include managers of limited liability companies as executive officers under Rule 501(f)? Instead of all managers, should we limit this provision to managing members, which would preclude third-party managers from being considered executive officers under Rule 501(f)? Alternatively, should we include managers of limited liability companies in Rule 501(a)(4)'s list of insiders who may qualify as accredited investors?

Response 23. Managers of limited liability companies should be treated the same as corporate executive officers. Legal form should be irrelevant. Economic and business substance and function should govern. The LLC form should not be legally disfavored. The same is true of business trusts. Business trusts are not nearly as common as LLCs but are typically taxed as partnerships and have many of the same advantages as an LLC.

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[7] "Partnership Returns, 2017," Internal Revenue Service https://www.irs.gov/pub/irs-pdf/p5338.pdf.
[8] Ibid.
[9] Proposing Release, p. 2587 ("Due to a lack of publicly available information about limited liability companies, we are unable to estimate the number of limited liability companies that would qualify as accredited investors under the proposed rule.")
[10] See "SOI Tax Stats - Partnership Statistics by Entity Type," Internal Revenue Service https://www.irs.gov/statistics/soi-tax-stats-partnership-statistics-by-entity-type.

Request for Comment 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?

Response 24. No comment.

Request for Comment 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?

Response 25. “Any entity” is preferred. Legal form should be irrelevant. Economic and business substance should govern. There are now many different types of business associations under various state laws including corporations, non-stock corporations, professional corporations, close corporations, benefits corporations, partnerships, limited partnerships, limited liability limited partnership, limited liability partnerships, limited liability companies, and business trusts.[11] In addition, foreign governments allow the formation of still other types of entities.

Request for Comment 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?

Response 26. International trade and investment are mutually beneficial and should certainly not be discouraged by rules that discriminate against foreign legal forms absent some sound policy rationale.

Request for Comment 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?

Response 27. In general, asset has a more defined meaning that investment. Although securities lawyers tend to think of an investment as a security, the term investment can include real property, plant and equipment, intellectual property, research and development and so on. The Commerce Department (for National Income and Product Accounting), the Federal Reserve (for Flow of Funds and other purposes) and other agencies all use the term investment in very different ways. So do those in the private sector. Using assets as defined by generally accepted accounting principles would eliminate most ambiguity.

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

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[11] Business trusts are different from ordinary trusts.

Response 28. No comment.

Request for Comment 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?

Response 29. No comment.

Request for Comment 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?

Response 30. Using assets as defined by generally accepted accounting principles would eliminate most ambiguity. It is not clear to me, for example, why real property used in a trade or business should not be considered. Nor is it clear to me how in practice one would determine whether cash or cash equivalents was held "for investment purposes" or why the purpose for which it is held is even relevant to the question of whether an entity is an accredited investor.

Request for Comment 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)?

Response 31. No comment.

Request for Comment 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?

Response 32. See responses 27 and 30.

Request for Comment 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)?

Response 33. Yes. This could be very helpful to practitioners.

Request for Comment 34. Should family offices and their family clients qualify as accredited investors?

Response 34. No comment.

Request for Comment 35. Do the proposed new categories for these investors have the proper scope? If not, what parameters would be more appropriate? If yes, which ones and why? If not, why not? Are we correct that all or most family offices and their clients would qualify as accredited investors under the proposed amendments?

Response 35. No comment.

Request for Comment 36. Should we require that the purchase be directed by a person who has the requisite knowledge and experience in financial and business matters? How would issuers assess this in practice?

Response 36. No comment.

Request for Comment 37. Would it be appropriate to impose a financial threshold for a family office to qualify as an accredited investor as proposed? Should we also impose a financial threshold for a family client to qualify? In either case, what is the appropriate threshold? For instance, should there be a minimum investment amount or minimum assets under management?

Response 37. No comment.

Request for Comment 38. Are there specific categories of family clients that should be excluded? For instance, should the proposed rule exclude anyone who is not a "family member," as defined in the family office rule? Should a family client qualify as an accredited investor if it becomes a "former family client,'' as defined in the family office rule?

Response 38. No comment.

Request for Comment 39. Rule 202(a)(11)(G) under the Advisers Act deems a person who receives assets upon the death of a family member (or other involuntary transfer from a family member) to be a family client (''a beneficiary'') for only one year following the involuntary transfer. Should such a beneficiary qualify as an accredited investor during that year if the beneficiary would not
otherwise qualify?

Response 39. No comment.

Request for Comment 40. Should we allow spousal equivalents to pool finances for the purpose of qualifying as accredited investors? If so, is our proposed definition of "spousal equivalent" appropriate? If not, what definition should we use?

Response 40. No comment.

Request for Comment 41. Should the Commission amend Rule 215 by replacing the existing text with a cross reference to the accredited investor definition in Rule 501(a) as proposed? Should the Commission instead incorporate any amendments to the accredited investor definition in the text of Rule 215?

Response 41. No comment.

Request for Comment 42. Would amending the scope of the accredited investor definition in Rule 215 to encompass any amendments to the accredited investor definition in Rule 501(a) as well as certain entities that are currently included in the definition in Rule 501(a) raise concerns regarding the application of the Section 4(a)(5) exemption? Would adding a reasonable belief standard to the definition in Rule 215 raise concerns?

Response 42. Conforming the Rule 215 definition to the Rule 501 definition makes sense. In general, having multiple definitions of the same term in the same area of law is a source of complexity and inadvertent non-compliance. I know of no reason why adding a reasonable belief standard in Rule 215 should cause problems.

Request for Comment 43. Would the proposed amendment to the accredited investor definition in Rule 215 affect an issuer's considerations in determining whether to use the Section 4(a)(5) exemption? Would issuers be more likely to use the Section 4(a)(5) exemption?

Response 43. No comment, other than it is my impression that section 4(a)(5) is not commonly used and therefore relatively unimportant.

Request for Comment 44. Should the Commission amend Securities Act Rule 163B to include a reference to proposed Rules 501(a)(9) and (a)(12)?

Response 44. Yes, with respect to 501(a)(9) entities. These types of entities should be able to participate in test the waters discussions. There is no good reason to exclude them. I have no comment with respect to 501(a)(12).

Request for Comment 45. Would the proposed amendments to the accredited investor definition and the qualified institutional buyer definition raise concerns in connection with the test-the-waters communications that issuers may engage in pursuant to Rule 163B or Section 5(d) of the Securities Act?

Response 45. No.

Request for Comment 46. Should the Commission amend Rule 15g–1(b) to include a reference to proposed Rule 501(a)(9)? Are there certain entities that would fall within the scope of proposed Rule 501(a)(9) that have more need for the disclosures required under Rules 15g–2 through 15g–6?

Response 46. No comment.

Request for Comment 47. Should the Commission amend Rule 15g–1(b) to include a reference to proposed Rule 501(a)(12)?

Response 47. No comment.

Request for Comment 48. As discussed above, the Commission is proposing to expand the list of entities that would qualify for accredited investor status under Rule 501(a)(1). Should the entities that are proposed to be added under Rule 501(a)(1) be included in the exemption set forth in Rule 15g–1(b)? Would certain of these entities have more need for the disclosures required under Rules 15g–2 through 15g–6?

Response 48. No comment.

Request for Comment 49. As discussed above, the Commission is proposing to codify a longstanding staff position that limited liability companies that satisfy the other requirements of the definition are eligible to qualify as accredited investors under Rule 501(a)(3). Should these limited liability companies continue to be included in the exemption set forth in Rule 15g–1(b)? Do limited liability company investors have more need for the disclosures required under Rules 15g–2 through 15g–6?

Response 49. There should be no distinction between LLCs and other business entities. Legal form should be irrelevant. Economic and business substance and function should govern.

Additional Requests for Comment on the Accredited Investor Definition

In the Concept Release, we requested comment on whether we should revise the financial thresholds in the accredited investor definition. Specifically, we requested comment on, among other things, three recommendations that the Commission staff included in the 2015 Staff Report: (1) Leaving the current income and net worth thresholds in place, subject to investment limits; (2) creating new, additional inflation-adjusted income and net worth thresholds that are not subject to investment limits; or (3) indexing all financial thresholds for inflation on a going-forward basis. Table 3 below provides an overview of the feedback provided by commenters on the Concept Release about each of the three recommendations. While we are not proposing to amend the financial thresholds in the accredited investor definition at this time, we are requesting further comment on possible approaches to adjusting these financial thresholds. If the financial thresholds in the definition remain constant, the pool of accredited investors would likely continue to expand as a result of inflation. It is challenging to generate a precise forecast of how much the pool of accredited investors will expand in the future, particularly over longer time periods. We expect that the Commission will continue to monitor the size of this pool as well as the percentage and types of individuals from this pool who participate in our private markets, including in connection with its quadrennial review of the accredited investor definition required by the Dodd-Frank Act. In addition to feedback on possible adjustments to the financial thresholds in the definition, we are requesting further comment on whether we should permit an investor, whether a natural person or an entity, that is advised by a registered investment adviser or broker-dealer to be considered an accredited investor. The 2017 Treasury Report recommended that the Commission undertake amendments to the accredited investor definition,

including by broadening the definition to include, among other things, any investor who is advised on the merits of making a Regulation D investment by a fiduciary, such as an SEC- or state registered investment adviser. As noted in the Concept Release, being advised by a financial professional has not been a complete substitute historically for the protections of the Securities Act registration requirements and, if applicable, the Investment Company Act. Commenters on the Concept Release who addressed this topic were generally supportive of expanding the accredited investor definition in this manner, though other commenters were opposed to or expressed concern regarding this approach. We are seeking feedback on whether amending the accredited investor definition in this manner would provide sufficient investor protections and whether additional limitations on the types or amounts of investments or other conditions may be appropriate if the Commission were to adopt such an approach in expanding the accredited investor definition.

Response. There is absolutely no reason to believe that the current thresholds are problematic. They should not be raised. They quite possibly should be reduced. The Commission should monitor the situation and only take action if a problem develops. Inflation is currently very low, so accredited investor "bracket creep" is quite small and very gradual.

Being advised by a fiduciary and by an 'investment professional' is not the same thing. These sorts of distinctions where at the core of the debates over the DOL's fiduciary rule and the SEC's Regulation Best Interest. The idea of 'purchaser representative' has been in Regulation D since the beginning but is in practice rarely used given a lack of relevant SEC guidance. It could be given life – protecting investors both in the sense of ensuring an understanding of the investment and of giving them access to higher return investments – by indicating that a fiduciary that has met certain licensure requirements or other accreditation would be deemed a purchaser representative.

Request for Comment 50. Should we maintain the current financial thresholds in the definition of accredited investor and index the thresholds to inflation on a going forward basis? If so, what would be an appropriate interval to index the thresholds to inflation? For example, should the Commission consider whether adjustment for inflation is appropriate every four years in connection with the Commission's quadrennial review of the accredited investor definition required by the Dodd-Frank Act?

Response 50. There is absolutely no reason to believe that the current thresholds are problematic. They should not be raised. They quite possibly should be reduced. The Commission should monitor the situation and only take action if a problem develops. Inflation is currently very low, so accredited investor "bracket creep" is quite small and very gradual.

Request for Comment 51. Should we make a one-time adjustment to increase the thresholds to take into account some or all of the effects of inflation on the pool of potential accredited investors since adoption? What would be the effects of any such change on investors and issuers? Should we also index the thresholds to inflation on a going forward basis? Should we consider other approaches such as the recommendation in the 2015 Staff Report to leave the current thresholds for natural persons in place but subject them to investment limits? If so, what

investment limits should we consider? What would be the impact of such changes on investors and on the ability of companies to raise capital, particularly small businesses?

Response 51. There is absolutely no reason to believe that the current thresholds are problematic. They should not be raised. They quite possibly should be reduced. The Commission should monitor the situation and only take action if a problem develops. Inflation is currently very low so accredited investor "bracket creep" is quite small and very gradual. Raising the thresholds would have a substantial adverse impact on young investors and entrepreneurs, on investors and issuers outside of high-income metropolitan areas and on minorities. It would be a serious mistake.[12]

Request for Comment 52. Should we increase the thresholds to take into account the effects of inflation since adoption, but grandfather investors that currently meet the accredited investor definition with respect to existing investments?

Response 52. The thresholds should not be increased. They quite possibly should be reduced. See discussion above.

Request for Comment 53. Is there any evidence that investor protections provided by the existing thresholds have eroded over time?

Response 53. None that I know of. $1.7 trillion annually is raised using Rule 506. Given the amount of capital raised and the scope of the activity, the problems are remarkable small.

Request for Comment 54. As noted above and in the Economic Analysis below, income levels vary, sometimes substantially, in different geographic areas of the country. Should we take into account income disparities that may be attributable to different costs of living across the country in establishing financial thresholds in the accredited investor definition? If so, how should we categorize different geographic regions for these purposes and how should we calculate income differences that may be attributable to differences in cost of living?

• For example, should we categorize the regions by state, by county or parish, or by census tract? If we should instead use larger regions, how should those be defined? How often would we need to reconsider how the regions are defined?

• If income disparities that may be due to local differences in the cost of living were taken into account, would the financial thresholds need to be adjusted for certain regions? How would we determine which regions require adjustment? Similarly, how would we determine which regions should maintain the current thresholds?

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[12] David R. Burton, "Congress Should Increase Access to Private Securities Offerings," Heritage Foundation Issue Brief No. 4899, August 29, 2018 https://www.heritage.org/sites/default/files/2018-08/IB4899.pdf; David R. Burton, "Don't Crush the Ability of Entrepreneurs and Small Businesses to Raise Capital," Heritage Foundation Backgrounder No.2874 February 5, 2014 http://thf_media.s3.amazonaws.com/2014/pdf/BG2874.pdf.

• If these income disparities that may be due to differences in the local cost of living were taken into account, should we use the United States Office of Personnel Management's general schedule locality areas? Should we use a different adjustment mechanism?

• Should we consider any other changes to the accredited investor definition to address the geographic disparity in the proportion of the population that qualifies as accredited investors in different regions of the country? If so, what types of changes would be appropriate?

• Would there be difficulties for investors to demonstrate, and issuers to form a reasonable belief about, the varying financial thresholds? How would we address any such difficulties?

Response 54. While the intent of such proposals is laudable, it would introduce tremendous complexity to Regulation D and probably be a mistake. Keeping the thresholds where there are and considering a gradual reduction over time would help address this. In addition, allowing people to test into accredited investor status would help address regional disparities.

Request for Comment 55. Would an inflation adjustment on an on-going basis have a disparate impact on certain types of investors, such as those in particular geographic regions or those in specific age ranges?

Response 55. No comment.

Request for Comment 56. Is there evidence that any fraud in the private markets is driven or affected by the levels at which the accredited investor definition is set, or that maintaining the current financial thresholds would place investors at a greater risk of fraud?

Response 56. I know of no such evidence and given the size of the Regulation D capital market, the amount of fraud is quite small. I also know of no evidence showing that the amount of fraud is less in the highly regulated public market than in private markets. Most of the most spectacular frauds in our financial history occurred in the public markets.

Request for Comment 57. Would providing for an inflation adjustment going forward have an impact on the ability of companies to raise capital, particularly small businesses? Would an inflation adjustment going forward have a disparate impact on certain small businesses, such as those in particular geographic regions with lower venture capital activity?

Response 57. It would have a gradual adverse impact on small firms. The impact would be slow and small for as long as inflation remains low.

Request for Comment 58. Under the current definition, the value of a person's primary residence is excluded from the net worth calculation. Should the Commission consider any changes to the rules implementing this requirement? Are there other assets or liabilities that should be excluded from or included in the calculation? Should we consider excluding all or a portion of an individual's retirement accounts when calculating net worth, similar to the exclusion for an individual's primary residence? If so, what percentage of an individual's retirement account should be excluded?

Response 58. The current rules are fine. It is far from clear that it is generally desirable to bar investors from investing some of their retirement savings in higher return private offerings. In addition, private investments tend to not be highly covariant with public markets. This enables portfolio diversification.

Request for Comment 59. If we index the financial thresholds, is CPI–U the appropriate inflation adjustor? 17 CFR 275.205–3(e) under the Advisers Act and certain other Commission rules use as an inflation adjustor the Personal Consumption Expenditures Chain-Type Price Index (''PCE'') (or any successor index thereto), as published by the United States Department of Commerce, which is an indicator of inflation in the prices for goods and services paid by persons living in the United States. Should we use PCE instead of CPI–U? Is indexing for inflation the appropriate benchmark? Are there more appropriate benchmarks?

Response 59. There is a voluminous literature on this subject. Which index is used can have a large impact on the federal budget on both the tax and spending side over extended periods of time. Chain-type indexes tend to result in lower adjustments. Many think they are more accurate.

Request for Comment 60. If we were to permit an investor advised by a registered investment adviser or broker-dealer to be deemed an accredited investor, under what circumstances would that registered financial professional be likely to recommend investing in a Regulation D offering? What types of investors would be likely to receive a recommendation from that registered financial professional to invest in a Regulation D offering?

Response 60. The idea of 'purchaser representative' has been in Regulation D since the beginning but is in practice rarely used given a lack of relevant SEC guidance. It could be given life – protecting investors both in the sense of ensuring an understanding of the investment and of giving them access to higher return investments – by indicating that a fiduciary that has met certain licensure requirements or other accreditation would be deemed a purchaser representative. Fleshing out the purchaser representative concept seems to me to be a more fruitful path forward than treating advised investors as accredited.

Request for Comment 61. If an investor is to be considered an accredited investor by virtue of being advised by a registered investment adviser or broker-dealer, should we consider additional investor protections? For example, should such financial professionals have to eliminate any conflicts of interest related to such advice for its advice to render an investor an accredited investor or should such a financial professional have to mitigate such conflicts of interest in a particular way? Should such financial professionals have to conduct any different due diligence before advising the investor on such investments? Should there be limits on the types or amounts of investments that such an investor could make under these circumstances?

Response 61. See response 60.

Request for Comment 62. Should Rule 144A(a)(1)(i)(C) be amended to include RBICs in a manner consistent with the proposed amendments to Rule 501(a)(1)? Should Rule 144A(a)(1)(i)(H) be amended to include limited liability companies in a manner consistent with

Rule 501(a)(3)? Rather than, or in addition to, amending Rule 144A in this manner, should we add other types of entities to those currently in Rule 144A(a)(1)(i)? Are there any categories of entities included in the proposed amendment to Rule 501(a) that should not be included in the definition of qualified institutional buyer under Rule 144A?

Response 62. No comment.

Request for Comment 63. Should we add a new paragraph (J) to Rule 144A(a)(1)(i) to expand the list of entities eligible to be qualified institutional buyers to include institutional accredited investors under Rule 501(a) that meet the $100 million in securities owned and invested threshold and that are an entity type not already included in paragraphs 144A(a)(1)(i)(A) through (I) or 144A(a)(1)(ii) through (vi)? Are there any types of entities that should be included under new paragraph (J) that would be excluded because of the limitation that these additional entity types may not include entities otherwise listed in existing paragraphs (a)(1)(i) through (vi) of Rule 144A? To the extent that there is overlap between the types of entities listed in the accredited investor definition and those listed in the qualified institutional buyer definition, would adding new paragraph (J) render existing paragraphs (A) through (I) under Rule 144A(a)(1)(i) unnecessary?

Response 63. No comment.

Request for Comment 64. Are there certain types of entities that are less likely to have experience in the private resale market for restricted securities and may have more need for the protections afforded by the Securities Act's registration provisions? Are there concerns about amending the definition of ''qualified institutional buyer'' to encompass an expanded list of entities in Rule 144A(a)(1)(i) that meet the $100 million in securities owned and invested threshold?

Response 64. No comment.

Request for Comment 65. If we were to expand the definition of qualified institutional buyer in this manner, would there be a greater likelihood of restricted securities sold under Rule 144A flowing into the public market? If so, should we consider additional modifications to Rule 144A to address this possibility?

Response 65. No comment.

Request for Comment 66. Would the proposed new categories of accredited investors and the proposed modifications to the existing standards present issues for non-reporting issuers in determining whether individuals and entities that meet the accredited investor definition at the time of purchase continue to be accredited investors as of the end of a fiscal year for the purposes of Exchange Act Rule 12g–1?

Response 66. In general, no.

Request for Comment 67. Would expanding the accredited investor definition to encompass the proposed new categories of accredited investors, such as persons with certain professional certifications or designations or knowledgeable employees of private funds, raise concerns under state law provisions that incorporate the Rule 501(a) accredited investor definition? If so, what are those concerns?

Response 67. No.

Request for Comment 68. Would the proposed amendments to the accredited investor definition give rise to issues under Rule 504 when issuers engage in general solicitation or general advertising to offer and sell securities pursuant to state law exemptions from registration that permit general solicitation and general advertising when sales are made only to accredited investors? If so, what are those issues?

Response 68. None that I am aware of.

Request for Comment 69. Would there be concerns about meeting the verification requirement in Rule 506(c) with respect to the proposed new categories of accredited investors or the modifications to the existing categories in the definition? If so, what are those concerns? Would amending the accredited investor definition in this manner make it more likely or less likely that an issuer would conduct a Rule 506(c) offering?

Response 69. In general, this should not be a major issue. A person either has or has not passed an exam. They either do or do not have an advanced degree. They either have or do not have an accreditation or certification. The investor should be able to establish that fact fairly easily and it will be even easier if the information is made available publicly by the institution in question. I have long been an exponent of the view that investors should be able to self-certify that they meet certain bright-line requirements (income, net-worth and now certification or licensure), potentially under penalty of perjury.

Request for Comment 70. Would expanding the accredited investor definition to encompass natural persons that are advised by investment professionals impact market efficiency, competition, capital formation, or investor protection? If so, what would those impacts be?

Response 70. Generally, reducing regulatory impediments to market transactions between willing participants enhances efficiency and competition. Increasing the pool of investors will enhance capital formation. Improving access to higher return investments will help investors. Enabling investors to diversify their portfolio will help investors – private securities are not highly covariant with public markets. I know of no actual evidence that the incidence of fraud is higher in private markets.

Request for Comment 71. Does the current exempt offering framework provide certain issuers with sufficient access to accredited investors? For example, are there capital-raising needs specific to any of the following that are currently not being met due to limited access to accredited investors: Issuers in particular industries, such as technology, biotechnology, or manufacturing; or issuers led by underrepresented minorities, women, or veterans? Is there

quantitative data available that shows the extent to which accredited investors fulfill the capital raising needs of these issuers? Would amending the accredited investor definition in the manner we propose address any such financing gaps?

Response 71. Those that live outside of high-income metropolitan areas, young people and minorities have limited access to affluent accredited investors. Broadening the pool of accredited investors in the way proposed will help entrepreneurs in these groups to raise capital.

Request for Comment 72. How should we evaluate whether our current exempt offering framework provides adequate investor protection for accredited investors? For example, is there quantitative data available that shows an increased incidence of fraud in particular types of exempt offerings or in the market for exempt offerings as a whole? If yes, is there any reliable way to predict whether the proposed amendments could have any effect on the incidence of fraud in exempt offerings? What other factors should we consider in assessing fraud in exempt offerings?

Response 72. I know of no such data.

Small Business Regulatory Enforcement Fairness Act

We request comment on whether the proposed amendments would be a ''major rule'' for purposes of SBREFA. In particular, we request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

Response. I think the rule as proposed is unlikely to have an annual "effect" exceeding $100 million. As proposed, it will increase the number of accredited investors by around 700,000 people (potentially more). There are about 16 million accredited investors currently. It will thus increase the pool of accredited investors by about 4.4 percent. Were the amount invested in Regulation D offerings to increase proportionately, that would amount to an increase of about $75 million annually. However, since the new accredited investors are likely to have less resources than existing accredited investors, this is an upper bound. If the final rule broadens who qualifies as an accredited investor considerably (as I would hope), then this could change.

Sincerely,

David R. Burton
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The Heritage Foundation