May 5, 2020

VIA ELECTRONIC SUBMISSION

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

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

Dear Ms. Countryman,

GTS appreciates the opportunity to comment on the Securities and Exchange Commission's (the "Commission") proposed rule on amending the "accredited investor" definition. *See* Amending the "Accredited Investor" Definition, File No. S7-25-19, Release Nos. 33-10734; 34-87784 (Dec. 18, 2019). GTS agrees with the Commission's twin goals of democratizing access to unregistered investment opportunities while protecting investors and the market more generally. Today's technology facilitates greater financial transparency for non-public companies and allows the private market to bring buyers and sellers together like never before. Products that were previously reserved for institutional or repeat private investors "in the know" are now practically accessible by retail investors, but for regulations limiting their availability. The Commission should adapt current rules and regulations to respond to the evolving private market and ensure all investors have access to these products.

While GTS agrees with the spirit of the Commission's proposed rule, it recommends that the Commission reconsider its approach. Expanding the categories of individuals or entities that qualify as "accredited investors" will create a group of potential investors that is both over- and under-inclusive. Individuals might qualify based on their net worth or employment history, but not truly understand the investments or be able to bear their risks financially. At the same time, other sophisticated investors—or investors advised by experienced financial professionals—will still not be able to add any amount of some of the market's most important offerings to their portfolios.

In light of the rapidly changing private market and the number of variables relevant to investing in private offerings, we respectfully recommend that the Commission look at these investments through a fundamentally different lens. Rather than tweaking the old, rigid categories of "qualifications" that say little to nothing about whether the "accredited investor" actually understands the risks of these products, the Commission should focus on the presence of an experienced professional who can properly assess the wide array of information and opportunities in the private market and how they suit a particular investor.

We therefore recommend that the Commission permit investors to qualify as "accredited investors" when they are advised by appropriately qualified and registered investment advisers or when the product is recommended by a registered broker-dealer. *See* A Financial System That Creates Economic Opportunities Capital Markets, U.S. Dept. of the Treasury (Oct. 2017), at 44.

Investors hire registered investment advisers and seek advice from registered brokers-dealers for exactly this purpose—to expand their investments to include products they might not otherwise understand or appreciate themselves. This change would strengthen protections for accredited investors. Registered broker-dealers and registered investment advisers already have a legal responsibility to ensure they only recommend suitable products to their discretionary clients. The Commission should leverage these existing duties to democratize the market while ensuring that financial professionals protect investors.

These suitability rules also provide an answer to the Commission's questions about this potential change. For example, the Commission has asked "under what circumstances" a registered financial professional would likely recommend a Regulation D offering to an investor, and "[w]hat types of investors would be likely to receive a recommendation from that financial professional to invest in a Regulation D offering. *See* Release No. 33-10734 at 87. Under the suitability regime, advisers are required to consider the investor's entire investment profile before recommending these or any products. As such, advisers should only recommend Regulation D offerings to investors who can bear their financial risks—often high net worth investors—when those offerings would complement an otherwise diverse, stable portfolio in line with the investor's investment objectives. *See infra* § III(B). Furthermore, to address the Commission's question concerning "additional investor protections" for investors who are "considered an accredited investor by virtue of being advised," GTS recommends simple, common-sense additional protections to ensure even well-advised retail investors only add the highest-quality investments to their portfolios. *See infra* § III(C); *see also* Release No. 33-10734 at 87-88.

I. GTS Background

GTS is a leading market making across equity and global financial instruments and is the largest designated market maker at the New York Stock Exchange. GTS makes markets in US equities, equity options, derivatives, ETFs and foreign exchange. GTS is also one of the largest U.S. market makers of OTC securities, including non-exchange-listed and unregistered securities. GTS trades over $4 billion worth of OTC Securities per month and is a leading destination for non-exchange traded securities. Additionally, GTS is the majority shareholder of ClearList LLC ("ClearList"), a newly created firm that is dedicated to reducing the opacity in trading of non-registered securities.

II. The Changing Market for Private Investments

The market for private securities has changed in several material ways that are relevant to how the Commission approaches access to these markets. First, technology has made the purchase and sale of these products much easier, with ClearList a significant example. These platforms allow buyers and sellers to meet just like investors in public markets, subject to current regulatory limitations. Investors express interest, enter an order, and receive an execution. These technological advances have gone hand-in-hand with the growth of the private market. In 2017, private offerings raised approximately $3.0 trillion, compared to $1.5 trillion of new capital flowing into registered offerings. *See* Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2017, U.S. Securities and Exchange Commission, at 7 (Aug. 2018). As the Commission's previous concept release noted, that trend continued the following year, with exempt offerings raising $2.9 trillion, compared to $1.4 trillion in new capital for registered offerings. *See*

Concept Release on Harmonization of Securities Offering Exemptions, File No. S7-08-19, Release No. 33-10649 (June 18, 2019).

The ability of technology to bring together buyers and sellers fundamentally changes the risks of a private investment. Because private investments are no longer investments with no viable exit, the decision to enter them carries incrementally less risk. As the pool of potential investors expands, the risk of illiquidity should also decline. Similarly, as private companies understand that the number of potential investors has grown, the conditions of transferability imposed by private companies on investors should evolve.

Second, technology has vastly improved the access to and dissemination of financial information. Online tools now facilitate the broad and secure dissemination of detailed financial information that will allow investors to evaluate and compare private companies. An investor today can compare the ratio of earnings to price for many similar private companies in a way that was previously impossible. Whereas previous private investments were largely measures of faith in management, modern private company investing looks more and more like traditional evaluation of public companies. Again, as more investors with sophisticated advisors engage in this market, rewarding transparency, issuers will evolve to become more forthcoming with financial information.

GTS has directly contributed to the evolution of the private marketplace—reducing transaction costs and increasing liquidity in ways that fundamentally reduce the risk of private company investing. GTS, via its ClearList platform, will provide qualified investors with advanced pricing technology to the private markets that reduces costs by fully automating transactions involving private market securities. ClearList will use technology similar to the technology used by GTS in its market making products for listed and unlisted securities, which not only reduces transaction costs, but also provides a better price for shares traded on the platform. This will provide the unlisted market with the same transparency and cost efficiency that GTS currently provides to the markets for listed (including GTS's New York Stock Exchange Designated Market Maker) securities.

III. Discussion

With all of these material changes in the private market, the proposed adjustments to the "accredited investor" definition should go further in recognizing the modern market and the impact technology has had on the private company space. Increasing the types of entities that can invest, rather than focusing on the expertise an investor has access to, is a solution less correlated to a marketplace of rapidly increasing opportunities for transactions and access to information. As such, GTS urges the Commission to consider a new regulatory regime for a more democratic era in private investing. Instead of tweaking the categories of "accredited investors"—created when the private market looked very different than it does today—the Commission should allow investors advised by a registered investment adviser or registered broker-dealer to qualify as "accredited investors." This change would expand access to the private market while adding a layer of protection via existing regimes of fiduciary duties, suitability, and "best interest" protections. With some small changes to the structure of the Commission's regulations, GTS believes the Commission can implement this change while addressing certain valid concerns raised by comment letters responding to the

Commission's original concept release on the harmonization of securities offering exemptions that preceded this proposed rule. *See* Release No. 33-10649 (June 18, 2019).

A. The Commission's Proposed Rule Should Permit Greater Access to Regulation D Offerings.

GTS appreciates that the Commission has recognized that Main Street investors should have access to the private market. The private market represents billions of dollars of investment opportunity that is rapidly expanding. There are a number of well-publicized successes in this space that have evolved into public companies and household names. However, the wealth generated by these new companies has historically been shared among only institutional investors or the largest and best-connected retail clients. *See* Commissioner Elad L. Roisman's Statement at Open Meeting on Proposed Amendments to the Accredited Investor Definition (Dec. 18, 2019). This is contrary to the purpose of the free market. Current law and market practice unnecessarily denies the average American the opportunity to invest in many safe and profitable opportunities.

The rigid formulation of the "accredited investor" definition, even when expanded under the Commission's proposed rule, unnecessarily restricts access to some of the market's largest and best-known successes. Investors outside of the expanded categories who understand the products and can financially bear their risks will still be denied access to Regulation D Offerings. Similarly, investors who retain qualified, experienced financial advisors that understand these products, can explain these products to their investors, and can properly analyze whether these products are suitable for the clients in some amount, will still not be able to purchase these products.

We respectfully recommend that the Commission allow clients advised by qualified and registered investment advisers and registered broker-dealers to invest in Regulation D offerings. This would incentivize Main Street investors interested in these products to employ an experienced financial professional to determine which, if any, of these products are suitable for their investment. Registered investment advisers and registered broker-dealers are "proxies" for the investor's own sophistication and investment experience. *See* Letter from Gail C. Bernstein, General Counsel, Investment Adviser Association, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at 4 (Oct. 18, 2019). Several categories in the Commission's previous concept release recognize that investors can safely invest through proxies, such as spousal equivalents or pooled investment funds. *See* Release No. 33-10649 at 51 ("[p]ermit spousal equivalents to pool their finances for the purpose of qualifying as accredited investors); *id.* at 173 ("there are potential advantages to investing through a pooled investment fund, including the ability to have an interest in a diversified portfolio that can reduce risk relative to the risk of holding a security of a single issuer").

The definition of an "accredited investor" should similarly acknowledge that individuals invest through the "proxies" of registered investment advisers and registered broker-dealers for a reason: to invest in products they would not otherwise purchase. Indeed, one of the primary advantages of working with a registered investment adviser or registered broker-dealer is a financial professional's ability to provide investors with an appropriate introduction to products of which they were not aware and to advise investors about the appropriateness of these products for their portfolios. The securities industry already relies on these "proxies" to properly analyze their clients' needs and

recommend new, suitable products to their investors. Were it otherwise, well-advised but inexperienced investors would be limited to a tiny universe of products with low yields. Investors should not be shut out of a new era of private investing, despite having access to sophisticated individuals or entities who can guide their investment decisions.

B. Registered Investment Advisers and Registered Broker-Dealers Can Protect Their Investors.

As with any product, there is a real danger that customers will invest in unsuitable Regulation D offerings. Expanding the pool of potential investors without adding any protections could increase this risk, with investors who do not understand or cannot bear the risk of an unregistered security purchasing shares of risky, unproven companies without guidance.

Allowing well-advised investors to qualify as "accredited investors" will greatly mitigate this potential issue. Suitability rules already require registered investment advisers and registered broker-dealers to understand their clients' sophistication, investment objectives, and risk tolerance. Regulation Best Interest similarly requires any registered broker-dealers and associated persons who offer recommendations to only recommend private offerings that are in the best interest of their clients. Registered investment advisers and registered broker-dealers are also already required to investigate the product they plan to recommend to their investors and to explain those investments to their clients.

The Commission should leverage these existing duties to protect investors in Regulation D offerings. The proposed rule asks what investors would be likely to receive recommendations for Regulation D offerings, and under what circumstances. Specifically, question number 60 asks:

> *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?*

Release No. 33-10734; 34-87784, at 87. Suitability rules would dictate that registered financial professionals only recommend Regulation D offerings to investors that can bear their financial risks, and when the offerings would fit in their client's profile. Under the current suitability regime, registered investment advisers and registered broker-dealers come to know their investors' profiles, including their needs and risk tolerance, better than anyone else. This system already adequately protects investors who invest in any other product at the recommendation of their adviser or broker. These duties could similarly protect investors in Regulation D offerings, and provide them legal recourse if they invest in an unsuitable unregistered product.

Of course, every investor, product, and portfolio is different, and it is impossible to know every circumstance that might call for investment in a Regulation D offering. However, advisers will consider, among other things, the investor's financial situation, including the investor's net worth, liquid assets, and income. Advisers will also consider the investor's investment profile, including the investor's appetite for risk, investment objectives, age, and outlook on the public and private

markets. GTS expects that Regulation D offerings will typically be recommended to high net-worth investors, or investors with enough liquid assets to risk losing their entire principal investment in a given offering, and investors with a moderate-to-aggressive risk profile. GTS also expects that Regulation D offerings would be used primarily to diversify portfolios with large amounts of liquid public equities, or portfolios centered on fixed income holding large amounts of cash.

In any event, the suitability rules and Regulation Best Interest would require advisers to analyze each and every Regulation D offering they recommend to their investors. Advisers will be able to use their intimate knowledge of their client's financial condition and investment profile to recommend these products wherever they are appropriate and in whatever amounts are appropriate for a given client. For example, an older investor with $10,000,000 of net worth might have limited sophistication, but an investment of 1% of those assets in a Regulation D offering would still provide diversity and growth potential to their exposure. On the other hand, it might be appropriate for a younger investor with an aggressive outlook, more sophistication, but lower net worth to make a larger investment in the same Regulation D offering. That younger investor would have a longer investment horizon and would be more willing to bear the risk of loss in exchange for the possibility that the offering develops into the next Uber or Airbnb.

GTS submits that expanding the definition of "accredited investor" to include properly-advised individuals is a rational, efficient, and safe way to democratize Regulation D offerings and builds upon the Commission's proposal to expand the definition to include additional entity types. For example, the proposed rule includes in the revised definition Registered Investment Advisers ("RIA"), Rural Business Investment Companies ("RBIC"), Limited Liability Companies ("LLC"), any entity owning investments in excess of $5 million that was not formed for the specific purpose of investing in the securities, and family offices with at least $5 million in assets under management ("AUM") and their family clients. GTS agrees that these entity types reflect proxies for the investor's sophistication, including AUM. *See* Release No. 33-10734 at 47-64.

However, for some of these entities, there is no guarantee that anyone at the entity understands the products or how they fit into the entity's portfolio. For example, under the Commission's proposed rule, qualified LLCs could invest in these products without the advice of a registered financial professional. A qualified LLC could thus invest in a volatile and risky Regulation D offering with no indication that anyone at all had analyzed (or even understood) the suitability of the products for the LLC. Under the Commission's proposed regime, this qualified institutional investor would be left with no recourse if it invested in a low-quality Regulation D offering and lost its entire principal.[1]

[1] There is also a potential gap in the Commission's proposed regime for investors who invest using non-discretionary accounts. Investors who qualify as accredited investors may not actually understand private offerings. *See* Commissioner Allison Herren Lee's Statement on the Proposed Expansion of the Accredited Investor Definition (Dec. 18, 2019). The Commission should consider imposing additional duties on nondiscretionary brokers limited to these products, including requiring nondiscretionary brokers to review the suitability of unregistered offerings when the customer is not advised by a registered investment adviser or unregistered financial advisor. However, GTS believes it would be necessary to include a safe harbor when a customer meets the other statutory requirements for "accredited investors," including net worth, which could be rebutted when the broker is aware of information that shows the products are unsuitable.

Allowing well-advised investors to qualify should appropriately expand the pool of "accredited investors" to those who are advised by experienced financial professionals who are duty-bound to review and understanding the products before making recommendations. This change should enhance investor protection in Regulation D offerings.

C. Concerns Raised in Other Comment Letters Can Be Addressed with Additional Protections.

The Commission also rightly asks whether additional investor protections would be appropriate for investors who qualify in this manner. Specifically, question 61 asks:

> 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?*

Release No. 33-10734 at 87-88. The last round of comments about the Commission's related concept release drew a number of critiques of the Commission's suggestion that the accredited investor definition be expanded to include well-advised investors. GTS believes many of these concerns are unfounded, and do not call for additional regulations. For example, while it is true that public information about Regulation D offerings has historically been relatively scarce compared to public companies, the absence of publicly available information is precisely why a more educated intermediary experienced in the industry is necessary for investors in Regulation D offerings. *See* Letter of Susan Olson, General Counsel, Investment Company Institute, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at 14 (Sept. 24, 2019). Indeed, more frequent interactions between advisors with financial expertise and private companies could increase transparency as private companies understand the types of information and the level of detail that informed investors demand. As public information about these offerings becomes more readily available, experienced financial professionals can interpret and explain this information to newly-qualified investors.

Expanding the "accredited investor" definition in this way will also not create a problem of economies of scale or adverse selection; it will do the opposite. *Id.* Expanding the market to include all well-advised investors should discourage "sweetheart deals" between private companies and large institutional investors. Private companies are currently incentivized to seek out the largest investors who make repeated investments in similar companies, and to reward those investors to encourage future investment in each phase of the company's development. If liquidity can be drawn from a broader pool of well-advised investors, private companies will have every reason to appeal to the public instead of relying solely on repeat players.

However, some of the risks raised by earlier comment letters have merit, and can be addressed with modest additional protections. First, registered investment advisers and registered

broker-dealers can vary in financial sophistication and knowledge. *Id.* at 14. Of course, that is also true of investors that qualify as "accredited investors." And, as a group, registered investment advisers and registered broker-dealers are more sophisticated and knowledgeable than private investors. Still, to ensure that registered investment advisers and registered broker-dealers are sufficiently knowledgeable on Regulation D offerings, the Commission might consider an additional level of certification based on continuing education around these products. This would allow the Commission to ensure that investors receive advice from advisers armed with up-to-date information about these products. Such separate certification has already been used for certain insurance products.

Second, commissions always pose a risk of incentivizing unsuitable investments. *See* Letter of Christine Lazaro, PIABA President, and Samuel Edwards, PIABA Executive Vice-President/President-Elect, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at 7-8 (Sept. 24, 2019). But Regulation D offerings are not unique in this regard. Under the current regulatory regime, registered investment advisers and registered broker-dealers receive commissions for placing their clients into small over-the-counter or listed securities or derivatives that pose similar or greater risks, with none of the requirements of the current "accredited investor" definition. The same is true for illiquid exchange-traded funds or structured products. Compared to these and other similar products, Regulation D offerings do not pose a substantially larger risk of incentivizing advisers to make unsuitable recommendations. Regulation D offerings are also typically a small part of an investor's portfolio, and so it is highly unlikely that the commissions will be sufficiently large to encourage advisers to make unsuitable recommendations. Furthermore, the risk of liability would likely outweigh the gain of any commissions on small quantities of shares of Regulation D offerings.

Even so, GTS would support the Commission imposing a "cap" on commissions for Regulation D offerings, and establishing a rule that advisers and brokers cannot receive special commissions for private shares. These proposals would reduce the incentive to push investors into unsuitable products. The Commission might also consider requirements establishing minimum requirements for market caps, outstanding shares, annual revenues, or years in operation before shares can be sold to a well-advised investor. Only the highest-quality private offerings should be available to even well-advised retail investors.

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As the private market continues to evolve, Main Street investors should be able to enjoy the same benefits that large institutional investors have for years. New technology, including new electronic platforms for trading private markets, give these investors the practical ability to invest in these products. The Commission should recognize this opportunity to share the benefits of American ingenuity with the broader public. Expanding the "accredited investor" definition to include well-advised investors would democratize the private market and provide appropriate protections to investors. Registered investment advisers and registered broker-dealers have a responsibility to recommend only suitable investments to their clients. The Commission should hold members of the securities industry to their responsibilities, and rely on them to regulate the burgeoning private market.

Sincerely,

Ari M. Rubenstein

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