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May 22, 2020

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

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

Dear Ms. Countryman:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section of the American Bar Association (the "ABA") with respect to the above-referenced proposing release issued by the Securities and Exchange Commission (the "Commission") relating to amendments to the definition of "accredited investor" contained in Rule 501 under Regulation D of the Securities Act of 1933, as amended (the "Securities Act") (the "Proposing Release").[1]

The comments set forth in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and should not be construed as representing the policy of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law nor does it necessarily reflect the views of all members of the Committee.

The Committee commends the efforts of the Commission to continue to address aspects of the exempt offering framework, including the accredited investor definition, which is central to the regulation of exempt offerings. The Committee supports expanding the accredited investor definition in the various ways now proposed. As we have previously suggested,[2] one key objective should be to have a clear, objective and workable definition of accredited investor that can be easily understood and applied, and monitored on an ongoing basis for

[1] The Committee also included and consulted with members of the Middle Market and Small Business Committee of the Business Law Section of the ABA.

[2] See our comment letter, dated October 16, 2019 on the Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33-10649; 34-86129; IA-5256; IC-33512; File No. S7-08-19 (June 18, 2019). [, *available at* https://www.sec.gov/comments/s7-08-19/s70819-6297110-193413.pdf.]

purposes of the Exchange Act Section 12(g) registration requirement. In order to promote certainty, the Committee has a strong preference for preserving the income and net worth tests for individual investors, in view of market participants' high level of familiarity with and long use of these tests.

We also strongly support the existing aspects of the definition that an accredited investor includes a person who meets one of the listed qualification methods, or who an issuer reasonably believes meets one of the qualification methods, at the time of the sale of the securities to that person. Under this standard, if an issuer has an objectively reasonable belief that a person is an accredited investor at the time of investment, it has legal certainty, even if it turns out the person was not in fact an accredited investor. As noted in the Proposing Release, offerings under Regulation D have proven to be important to issuers and investors, and account for significant amounts of capital raised. As such, who qualifies as an accredited investor is of great importance to the issuer and investor communities.

We have the following specific comments in respect of the Proposing Release.

Adding Categories of Natural Persons Who Qualify as Accredited Investors

We are in favor of expanding the "accredited investor" definition to encompass more of those natural persons who can objectively be identified as possessing the sophistication to invest responsibly in Regulation D offerings.

In this regard, including additional objective tests for categories of investors deemed to be sophisticated—either new ones created for this purpose or existing tests—would be a step forward, expanding overall access to capital from investors while providing certainty for issuers and their advisers. Additionally, expanding the definition to encompass those investors with relevant experience in respect of the particular investment expands the potential pool of investors to additional groups who can reasonably and responsibly invest in the securities in question. We think this would increase investment opportunities with little or no impact on investor protection. We would stress, however, that unless a new category has objective certainty, issuers are unlikely to find it useful.

Professional Certifications and Designations and Other Credentials

Under the proposed rule changes, natural persons would be able to qualify as accredited investors based on certain professional certifications, designations, or credentials. The Proposing Release notes that the Commission will accompany the final rule amending the definition of accredited investor with an order that includes designations for licensed securities representatives (Series 7), licensed investment adviser representatives (Series 65), and licensed private securities offerings representatives (Series 82). Individuals with these designations would qualify as accredited investors, regardless of net income or net worth. We support this change.

The Proposing Release notes that the Commission would consider four factors in determining whether to add holders of other professional certifications. The Committee supports this approach, which would be based on criteria that are verifiable and provide ongoing flexibility for the Commission to add further appropriate investor categories. For example, the Committee believes that other categories of securities licenses should be included (e.g., Series 3, Series 6, Series 22, Series 66, Series 86, and Series 87). On the other hand, a standard that

simply considered a natural person's investment history or educational history or professional attainments or experiences (other than CPA or CFA designations) may be more difficult to administer and may introduce subjectivity into the process of verifying an individual's status, which would undercut that standard's utility.

The Committee also suggests that "qualified purchasers" (as defined in Section 2(a)(51) of the Investment Company Act of 1940, as amended (the "Investment Company Act") specifically be included as "accredited investors." We believe that this change will reduce unnecessary administrative and other expenses for private funds.

Knowledgeable Employees of Private Funds

The Proposing Release would permit an individual that is a "knowledgeable employee" (as defined in Rule 3c-5 under the Investment Company Act) of an issuer to qualify as an accredited investor for purposes of offerings made by that issuer. The Committee supports this amendment.

Proposed Note to Rule 501(a)(5)

As we have commented before, we support clarifying that the calculation of "joint net worth" for purposes of Rule 501(a)(5) can be the aggregate net worth of an investor and his or her spouse or spousal equivalent and that securities being purchased by an investor in reliance on the joint net worth test need not be purchased jointly. We also support including spousal equivalents when determining joint income under Rule 501(a)(6).

Adding Categories of Entities that Qualify as Accredited Investors

Registered Investment Advisers, Rural Business Investment Companies

The Committee supports the addition of investment advisers registered with the Commission, investment advisers registered with the states, and rural business investment companies as entities that qualify as accredited investors.

Limited Liability Companies and Other Business Entities

We support including within the definition of accredited investor limited liability companies with assets in excess of $5 million, in view of the widespread use of these entities. However, we recommend that the provision also include "any similar business entity" in order to encompass any new form of entity that might be created in the future and thus avoid the problem that has existed with respect to LLCs. By limiting this to "similar business entities," the concern identified in the Proposing Release regarding other entities, like government bodies for which an asset test would not be meaningful, would be addressed. The basic point is that there is simply no need to limit this category of the definition—based on the amount of assets held—to any particular organizational form or forms, since organizational form is irrelevant to the investor protection considerations that bear on how the category should be defined.

We also agree that persons performing the equivalent of the duties of an executive officer of an LLC should be considered accredited investors in order to treat them in a manner consistent with the treatment of "executive officers" of corporations. We further agree that it is not necessary to specifically name managers, managing members, and other persons holding specific

titles because they are already covered, to the extent appropriate, by the term "executive officer" as a "person who performs similar policy making functions." In addition, LLC statutes typically give total discretion to the LLC's organizers as to how responsibility and managerial authority is allocated, with the result that particular titles, such a "manager" or "managing member," may not have the significance otherwise associated with them.

The Committee agrees that any entity that holds investments in excess of $5 million and that was not formed for the specific purpose of investing in the offered securities should qualify as an accredited investor. We suggest that this provision be simplified by stating that it applies to "any entity that does not otherwise qualify as an accredited investor."

Certain Family Offices and Family Clients

The Committee supports the creation of a new category of accredited investors for "family offices" and their "family clients," (as such terms are defined in Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940), to the extent that a family office has more than $5 million in assets under management. The Committee does not believe that it is necessary to add a prong regarding the knowledge and experience of the person directing the family office's investments. Rather, financial sophistication and an ability to withstand losses should be presumed from the assets threshold.

Proposed Amendments to Rule 215

We support the proposed amendments to Rule 215, which would harmonize the accredited investor definitions in Rules 215 and 501(a).

Proposed Amendments to Rule 163B

We also support the proposed amendments to Rule 163B to include the new entities that would be included as accredited investors under Rule 501(a)(9) and Rule 501(a)(12).

Amendments to Qualified Institutional Buyer Definition

We support the Commission's proposed changes to the QIB definition in order to include limited liability companies and rural business investment companies that satisfy the $100 million threshold and the "catch all" category of other entities not otherwise included in the QIB definition that also meet the $100 million threshold. As noted above, organizational form is irrelevant to the investor protection considerations that bear on how QIB should be defined.

The Committee recommends that the Commission also consider amending the QIB definition in order to permit broader aggregation of holdings by funds. Currently, the QIB definition allows only U.S. registered investment companies that are part of an investment company family to aggregate for purposes of meeting the $100 million threshold. Foreign registered funds should be able to be aggregated with U.S. registered investment companies for purposes of meeting the threshold. The Commission also should consider allowing aggregation of other investment funds, such as business development companies, managed by the same investment adviser group.

Reliance on Financial Intermediary Status

The Proposing Release seeks comment as to whether the Commission should allow an investor that is advised by a registered investment adviser or a broker-dealer to be deemed an accredited investor. The Committee believes that this idea may merit further consideration after there has been some experience with Regulation Best Interest and with the rule amendments (once adopted) proposed here.

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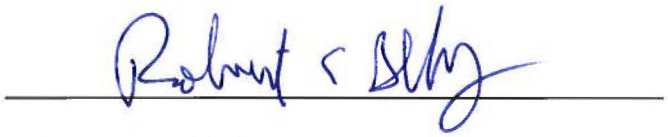
The Committee appreciates the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the recommendations set forth above. We are available to meet and discuss these matters and to respond to any questions.

Very truly yours,



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