

CLIENT ALERT

SEC Proposes Expansion of Accredited Investor Definition

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The Securities and Exchange Commission, by another 3-2 vote, recently proposed amendments expanding the categories of persons who qualify as an “accredited investor” under SEC rules for offerings exempt from registration under Regulation D and other purposes.¹ The proposed amendments would add new categories of institutional and individual investors that have the knowledge and expertise to invest in our private capital markets without the need for the protections afforded by registration under the Securities Act. These new categories would supplement the current financial tests for qualifying as an accredited investor, where wealth is considered a proxy for financial sophistication. Certain conforming changes are also proposed to the definition of “qualified institutional buyer” in Rule 144A under the Securities Act.

The proposal follows the SEC Concept Release issued in June 2019² that solicited public comment on possible ways to simplify, harmonize and improve the exempt offering framework under the Securities Act to promote capital formation and expand investment opportunities while maintaining appropriate investor protections, including potential changes to the definition of accredited investor. The SEC characterizes the proposed amendments as an “initial step in a broader effort” to modernize the exempt offering framework.

¹ See *Amending the “Accredited Investor” Definition*, Release No. 33-10734 (December 18, 2019), available [here](#).

² See *Concept Release on Harmonization of Securities Offering Exemptions*, Release No. 33-10649 (June 18, 2019), available [here](#).

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Proposed Accredited Investor Changes

The proposed amendments to the accredited investor definition would add new categories of natural persons based on professional knowledge, experience or certifications. The proposed amendments would also add new categories of entities, including a “catch-all” category for any entity owning in excess of \$5 million in investments. In particular, the proposed amendments to the accredited investor definition in Rule 501(a) of Regulation D would:

- add new categories to the definition that would permit natural persons to qualify as accredited investors based on certain professional certifications and designations, such as a Series 7, 65 or 82 license, or other credentials issued by an accredited educational institution;
- with respect to investments in a private fund, add a new category based on the person’s status as a “knowledgeable employee” (as defined under the Investment Company Act) of the fund;
- add limited liability companies that meet certain conditions, registered investment advisers and rural business investment companies (“RBICs”) to the current list of entities that may qualify as accredited investors;
- add a new category for any entity, including Indian tribes, owning “investments” (as defined under the Investment Company Act) in excess of \$5 million and that was not formed for the specific purpose of investing in the securities offered;
- add “family offices” with at least \$5 million in assets under management and their “family clients,” as each term is defined under the Investment Advisers Act; and
- extend the accredited investor definition so that “spousal equivalents” may pool their finances for the purpose of qualifying as accredited investors.

Proposed Qualified Institutional Buyer (“QIB”) Changes

Rule 144A provides a non-exclusive safe harbor for unregistered resales of certain restricted securities to QIBs. To ensure consistency with the types of entities that could qualify as an accredited investor under the proposed amendments, the release proposes conforming amendments to the definition of QIB in Rule 144A(a)(1) that would add limited liability companies and RBICs to the types of entities that are eligible for QIB status if they meet the \$100 million threshold in securities owned and invested. The proposed amendments would also add a “catch-all” category that would permit institutional accredited investors under Rule 501(a), of an entity type not already included in the QIB definition, to qualify as QIBs when they satisfy the \$100 million threshold.

Related Changes

Conforming changes are also proposed to Rule 215 for purposes of the exemption under Section 4(a)(5) of the Securities Act (securities offerings to accredited investors if the offering amount does not exceed \$5 million), Rule 163B “test-the-waters” communications to institutional accredited investors and QIBs and the Securities Exchange Act Rule 15g-1

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exemption from disclosure requirements to institutional accredited investors in connection with certain “penny stock” transactions. The expanded definition of accredited investor would then also raise the threshold for being required to register equity securities under Section 12(g) of the Securities Exchange Act and become a public reporting company, and would expand the pool of accredited investors not subject to the investment limits for Tier 2 offerings under Regulation A.

As is typical, the SEC release includes 69 questions, many with various subparts, soliciting feedback on the proposed amendments as well as regarding the current income and net worth accredited investor tests, which are not modified in the proposed amendments. The two dissenting commissioners questioned the potential costs of significantly expanding eligibility to participate in exempt offerings as proposed, including, in light of inflation and other factors, that the current wealth tests may in fact be over-inclusive, particularly with regard to elderly investors who have accumulated retirement savings. Comments on the proposal are due 60 days after publication in the Federal Register.

If you have any questions regarding this client alert, please contact the following attorney or the Willkie attorney with whom you regularly work.

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