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COMMON SENSE REFORMS TO FACILITATE CAPITAL FORMATION

SEC Chairman Paul Atkins has an opportunity to implement many common-sense reforms of the federal securities laws. In this article, the authors discuss six actions the SEC can take: (1) withdraw SEC Staff bulletins on standards of conduct for broker-dealers and investment advisers; (2) withdraw stay of amendments to FINRA Rule 2210 to allow broker-dealers to use projected and target performance; (3) increase monetary thresholds under the M&A Broker exemption; (4) adopt an exemption from broker-dealer registration for finders; (5) update electronic delivery guidance; and (6) facilitate capital formation through private funds.

By James E. Anderson and Brian J. Baltz *

With his confirmation now behind him, Chairman Paul Atkins can focus on fulfilling President Donald J. Trump's promise of a return of common sense to the federal government. The Securities and Exchange Commission ("SEC") has an opportunity to take significant action to implement many common-sense reforms of the federal securities laws. During his short term, acting Chairman Mark Uyeda took steps to lessen unnecessary regulatory burdens, including extending the compliance date for Form PF amendments,[1] the Investment Company Names rule,[2] Form N-PORT,[3] and rules impacting standards for covered clearing agencies in U.S. Treasury Securities.[4] In a helpful move, Chairman Atkins has already publicly withdrawn consideration of proposed rules related to ESG disclosures, cybersecurity risk management, outsourcing by investment advisers, digital engagement

[1] Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers; Extension of Compliance Date, Investment Advisers Act Release No. 6838 (Jan. 29, 2025) (extending the compliance date for the amendments to Form PF from March 12, 2025, to June 12, 2025).

[2] Investment Company Names; Extension of Compliance Date, Investment Company Act Release No. 35500 (Mar. 14, 2025) (extending the compliance date for larger fund groups from Dec. 11, 2025, to June 11, 2026, and for smaller fund groups from June 11, 2026, to Dec. 11, 2026).

[3] Form N-PORT Reporting; Extension of Effective and Compliance Dates, Investment Company Act Release No. 35538 (Apr. 16, 2025) (extending the compliance date for larger fund groups is extended from Nov. 17, 2025, to Nov. 17, 2027, and the compliance date for smaller fund groups from May 18, 2026, to May 18, 2028).

[4] Extension of Compliance Dates for Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities, Securities Exchange Act Release No. 102487 (Feb. 25, 2025) (extending the compliance dates for Rule 17ad-22(e)(18)(iv)(A) and (B) under the Securities Exchange Act by one year to Dec. 31, 2026, for eligible cash market transactions, and June 30, 2027, for eligible repo market transactions).

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practices, safeguarding advisory client assets, amendments to Rule 3b-16 under the Exchange Act defining "exchange," Regulation Best Execution, and other market structure proposals. Chairman Atkins has an opportunity to carry those and other reforms forward by recalibrating the SEC's focus on its tripartite mission: protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation. In this article, we outline six actions that the SEC can take that will provide needed certainty to market participants, modernize the federal securities laws, and facilitate capital formation.

1. WITHDRAW SEC STAFF BULLETINS ON STANDARDS OF CONDUCT FOR BROKER-DEALERS AND INVESTMENT ADVISERS

In 2019, the SEC adopted a package of rules impacting the standards of conduct for broker-dealers and investment advisers when engaging with retail customers, including Form CRS,[5] Regulation Best Interest ("Reg BI"),[6] and an interpretation of an investment adviser's fiduciary duty ("IA Interpretation").[7] Form CRS is a standardized disclosure document regarding broker-dealers' and investment advisers' services, fees, standard of conduct, conflicts of interest, and disciplinary history.

Reg BI includes a "best interest" obligation for a broker-dealer and its associated persons that requires them, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, to act in the best interest of the retail customer at the time the recommendation is made, without placing the broker-dealer's or associated person's financial or other interest ahead of the retail customer's interest.[8] A broker-dealer satisfies the best interest obligation by meeting four component obligations: (1) disclosure obligation; (2) care obligation; (3) conflict-of-interest obligation; and (4) compliance obligation. In adopting Reg BI, the SEC enumerated the requirements under each of the four component obligations in the rule and provided guidance regarding how the SEC would interpret those obligations.

An investment adviser owes a federal fiduciary duty to its clients under Section 206(1) and (2) of the Advisers Act.[9] "The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent."[10] The fiduciary duty includes both a duty of loyalty and a duty of care. The SEC has stated that the "duty of loyalty requires that an adviser not subordinate its clients' interests to its own," and that an investment adviser should make full and fair disclosure to its clients of all material facts relating to the advisory relationship.[11] The SEC has stated that the "duty of care includes a duty to provide investment advice that is in the best interest of the client, including a duty to provide advice that is suitable for the client."[12]

Under former Chairman Gensler, the SEC staff issued three staff bulletins that purport to assist broker-dealers and investment advisers satisfy their care obligations, including in making account recommendations and in

[5] Form CRS Relationship Summary; Amendments to Form ADV, Securities Exchange Act Release No. 86032 (June 5, 2019).

[6] Regulation Best Interest: The Broker-Dealer Standard of Conduct, Securities Exchange Act Release No. 86032 (June 5, 2019), 84 Fed. Reg. 33318 (July 12, 2019).

[7] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019), 84 Fed. Reg. 33669 (July 12, 2019) ("IA Interpretation").

[8] Exchange Act Rule 15la-1(a)(1). Reg BI applies not just to a broker-dealer, but also to its associated persons. For ease of reading, we refer only to broker-dealers and not associated persons (i.e., financial professionals).

[9] *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963).

[10] IA Interpretation, 84 Fed. Reg. at 33670.

[11] *Id.* at 33675.

[12] *Id.* at 33672.

addressing conflicts of interest.[13] While the staff bulletins purport to "reiterat[e] the standards of conduct for broker-dealers and investment advisers," they go well beyond the SEC's guidance in adopting Reg BI or the IA interpretation. While firms might consider the staff bulletins as a frame of reference in considering their obligations to retail customers, they "represent[] the views of the staff"; are "not a rule, regulation, or statement of," and have not been approved or disapproved by, the SEC; and "like all staff statements, have no legal force or effect: . . . do[] not alter or amend applicable law, and . . . create[] no new or additional obligations for any person."

When viewed in their totality, the staff bulletins appear to be designed to close perceived gaps between Reg BI and an investment adviser's fiduciary duty that were not addressed in the Reg BI adopting release or the IA Interpretation. For example, while the SEC did not require that broker-dealers or investment advisers document the basis for any particular type of recommendation and instead allowed broker-dealers to take a risk-based approach in deciding whether to document certain recommendations, the staff appears to suggest in its bulletins that firms must document the basis for a recommendation. In various contexts, the staff stated that it "may be difficult for a firm to assess periodically the adequacy and effectiveness of its policies and procedures, or to demonstrate compliance with its obligations to retail investors without documenting the basis for the recommendation." These statements led many firms to develop costly systems to document information regarding the basis for recommendation, including consideration of reasonably available alternatives.

Another example is the staff's suggestion in the bulletin on the care obligation that dual registrants and dually licensed financial professionals need to consider whether it is in the retail customer's best interest to recommend the purchase of a security through a brokerage or advisory account. "[W]here a retail investor holds both brokerage and advisory accounts, the staff believes a dually registered firm or dually licensed financial professional should consider whether a recommendation of an investment or investment strategy is better suited for the investor's brokerage account or advisory account." The SEC did not address this concept in either the Reg BI adopting release or the IA Interpretation, and the interpretation seems to conflict directly with the concept that a dual registrant's capacity in making a recommendation can be determined through clear disclosure to the client.

In light of the confusion caused by these staff bulletins, the significant differences from the Reg BI adopting release and IA Interpretation, and additional costs imposed on firms as a result of the bulletins, the SEC should consider withdrawing the bulletins or significantly narrowing them to the extent any concepts differ from Reg BI or the IA interpretation.

2. WITHDRAW STAY OF AMENDMENTS TO FINRA RULE 2210 TO ALLOW BROKER-DEALERS TO USE PROJECTED AND TARGET PERFORMANCE

On July 19, 2024, the SEC's Division of Trading and Markets, under delegated authority, approved a FINRA proposed rule change to FINRA Rule 2210 to allow a member to project performance or provide a targeted return in certain circumstances.[14] FINRA Rule 2210(d)(1)(F) generally prohibits communications that "predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion, or forecast." The amendments to Rule 2210 would allow projected performance and targeted returns in institutional communications; communications distributed only to qualified purchasers (as defined in the Investment Company Act of 1940 ("Investment Company Act") that promotes or recommends the member's own unregistered securities, or those of a control entity that is

[13] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligations (Apr. 30, 2023), *available at* https://www.sec.gov/about/divisions-offices/division-trading-markets/broker-dealers/staff-bulletin-standards-conduct-broker-dealers-investment-advisers-care-obligations; Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest (Aug. 3, 2022), *available at* https://www.sec.gov/about/divisions-offices/division-trading-markets/broker-dealers/staff-bulletin-standards-conduct-broker-dealers-investment-advisers-conflicts-interest; Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors, Mar. 30, 2022, *available at* https://www.sec.gov/about/divisions-offices/division-trading-markets/broker-dealers/staff-bulletin-standards-conduct-broker-dealers-investment-advisers-account-recommendations-retail.

[14] Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend FINRA Rule 2210 (Communications with the Public) To Permit Projections of Performance in Institutional Communications and Specified Communications to Qualified Purchasers and Knowledgeable Employees, Securities Exchange Act Release No. 100561 (July 19, 2024), 89 Fed. Reg. 60461 (July 25, 2024).

exempt from the requirements of FINRA Rule 5122; and communications distributed only to qualified purchasers or knowledgeable employees (as defined in Rule 3c-5 under the Investment Company Act) that promotes or recommends a private placement that is exempt from the requirements of FINRA Rule 5123. The rule would require the member to "adopt[] and implement[] written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the investor receiving the communication and to ensure compliance with all applicable requirements and obligations." The member would also need to have "a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return, and retain[ ] written records supporting the basis for such criteria and assumptions." In addition, the rule would require the member to satisfy certain disclosure requirements. One week after the proposed rule change was approved, the SEC issued a letter notifying FINRA that the SEC would review the delegated action pursuant to Rule 431 of the Rules of Practice. As a result, the order approving the proposed rule change was stayed until the SEC orders otherwise.

The SEC should remove this stay and confirm the approval of the proposed rule change, which acknowledged the divergence between FINRA Rule 2210 and Rule 206(4)-1 under the Advisers Act (the "Marketing Rule"), including that investors can receive different types of information from broker-dealers and investment advisers. This is particularly relevant in the case of private funds, where prospective investors who are solicited without the involvement of a full-service FINRA Member are permitted to receive performance information, including related, extracted, predecessor, and hypothetical performance, that a full-service FINRA Member might not be able to include in its marketing materials for the same products. The SEC should also consider encouraging FINRA to further harmonize FINRA Rule 2210 with the Marketing Rule.

3. INCREASE MONETARY THRESHOLDS UNDER THE M&A BROKER EXEMPTION

Section 15(b)(13) of the Exchange Act codifies an exemption from broker-dealer registration for an M&A Broker under certain conditions. An "M&A broker" means a broker, and person associated with a broker, engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately held company, if the broker reasonably believes that, upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert, (1) will control[15] the eligible privately held company or the business conducted with the assets of the eligible privately held company and (2) directly or indirectly be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company, including by electing executive officers, approving the annual budget, or serving as an executive or other executive manager.[16] An eligible privately held company is defined as a privately held company that

1) does not have any class of securities registered or required to be registered with the SEC under Section 12 of the Exchange Act or with respect to which the company files or is required to file periodic information, documents, and reports under Section 15(d); and

2) in the fiscal year ending immediately before the fiscal year in which the services of the M&A broker are initially engaged with respect to the securities transaction, the company either had (a) earnings before interest, taxes, depreciation, and amortization

[15] The term "control" means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control if, upon completion of a transaction, the buyer or group of buyers — (1) has the right to vote 25 percent or more of a class of voting securities or the power to sell or direct the sale of 25 percent or more of a class of voting securities or (2) in the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital. Exchange Act § 15(b)(13)(E)(ii).

[16] In addition, if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent fiscal year-end financial statements of the issuer of the securities as customarily prepared by the management of the issuer in the normal course of operations and, if the financial statements of the issuer are audited, reviewed, or compiled, any related statement by the independent accountant, a balance sheet dated not more than 120 days before the date of the offer, and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

("EBITDA") less than $25,000,000 or (b) gross revenues less than $250,000,000.

To rely on the exemption, the broker cannot

- directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receive, hold, transmit, or have custody of the funds or securities to be exchanged by the parties to the transaction;

- engage on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the Commission under Section 12 of the Exchange Act or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under Section 15(d);

- engage on behalf of any party in a transaction involving a shell company,[17] other than a business combination-related shell company;[18]

- directly, or indirectly through any of its affiliates, provides financing related to the transfer of ownership of an eligible privately held company;

- assist any party to obtain financing from an unaffiliated third party without complying with all other applicable laws in connection with such assistance, including, if applicable, Regulation T (12 C.F.R. 220 et seq.), and disclosing any compensation in writing to the party;

- represent both the buyer and the seller in the same transaction without providing clear written disclosure as to the parties the broker represents and obtaining written consent from both parties to the joint representation;

- facilitate a transaction with a group of buyers formed with the assistance of the M&A broker to acquire the eligible privately held company;

- engage in a transaction involving the transfer of ownership of an eligible privately held company to a passive buyer or group of passive buyers;

- bind a party to a transfer of ownership of an eligible privately held company; or

- have been barred from association with a broker or dealer by the SEC, any state, or any self-regulatory organization, or be suspended from association with a broker or dealer.

Section 15(b)(13) authorizes the SEC by rule to modify the dollar figures for determining an eligible privately held company if the SEC determines that the modification is necessary or appropriate in the public interest or for the protection of investors. The SEC should use this authority to increase significantly the EBITDA and gross revenues thresholds. Oftentimes private securities transactions can involve privately held companies that have EBITDA and gross revenues far in excess of these thresholds and that involve persons that could otherwise rely on the M&A Broker exemption. The rationale for exempting M&A Brokers from registration should be the same regardless of the size of the privately held company.

4. ADOPT AN EXEMPTION FROM BROKER-DEALER REGISTRATION FOR FINDERS

Under Chairman Clayton, the SEC proposed a limited, conditional exemption from broker registration requirements for "finders" who assist issuers with raising capital in private markets from accredited investors.[19] The proposed exemption would have provided a non-exclusive safe harbor from broker-dealer registration with the SEC for two classes of Finders: Tier I Finders and Tier II Finders. Tier I Finders would have been permitted only to provide issuers with contact information for prospective investors. Tier II Finders would have been permitted to engage in solicitation

[17] The term "shell company" means a company that at the time of a transaction with an eligible privately held company— (I) has no or nominal operations and (II) has — (aa) no or nominal assets; (bb) assets consisting solely of cash and cash equivalents; or (cc) assets consisting of any amount of cash and cash equivalents and nominal other assets. Exchange Act § 15(b)(13)(E)(v).

[18] The term "business combination related shell company" means a shell company that is formed by an entity that is not a shell company — (I) solely for the purpose of changing the corporate domicile of that entity solely within the United States or (II) solely for the purpose of completing a business combination transaction (as defined under section 230.165(f) of title 17, Code of Federal Regulations) among one or more entities other than the company itself, none of which is a shell company. Exchange Act § 15(b)(13)(E)(i).

[19] Notice of Proposed Exemptive Order Granting Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders, Securities Exchange Act Release No. 90112 (Oct. 7, 2020).

activities that currently require broker-dealer registration and would also be subject to additional disclosure requirements. Tier I and Tier II Finders would both have been permitted to accept transaction-based compensation. The SEC should revisit the proposed exemptions to provide greater flexibility for persons to engage in solicitation activities for privately offered securities without having to register as broker-dealers or become licensed with a registered broker-dealer.

5. UPDATE ELECTRONIC DELIVERY GUIDANCE

The SEC's guidance regarding electronic delivery generally looks to whether electronic delivery results in the receipt of substantially equivalent information as information delivered in paper form.[20] Generally, the SEC permits electronic delivery of documents required to be delivered under the federal securities laws provided that there is (i) notice, (ii) access, and (iii) evidence of delivery, as each are described below.

Notice. Notice looks to whether electronic communication provides timely and adequate notice that information is available electronically and, if necessary, supplementing the electronic communication with another communication that would provide notice similar to that provided by paper delivery.[21] Notice generally can be satisfied by sending the document to the customer's e-mail address or notifying the customer (e.g., by e-mail or regular mail) that the document is available online.[22]

Access. The SEC believes that electronic delivery should result in access to information comparable to paper delivery.[23] The SEC has stated that use of a particular medium should not be so burdensome that intended recipients cannot effectively access the information provided,[24] and that the recipient should have the opportunity to retain the information or have ongoing access equivalent to personal retention (e.g., the information can be downloaded or printed) and the information should remain available (e.g., on a website) for as long as the delivery requirement applies.[25]

Evidence of Delivery. The SEC has stated that evidence of delivery can include evidence of actual receipt, such as e-mail return receipt or evidence showing the recipient accessed a document, or through the recipient's informed consent to electronic delivery. According to the SEC, an informed consent should, among other things, specify the electronic medium or source through which the information will be delivered; describe the information that will be delivered; inform the recipient that there may be potential costs associated with electronic delivery; and if sending documents using PDF, inform the recipient of the requirements necessary to download PDF and offer to provide any necessary software and technical assistance at no cost.[26]

The SEC should revisit its electronic delivery guidance, which was last updated over 24 years ago, to reflect the realities of today's reliance on electronic commerce. As compared to 2000, Americans have significantly greater access to means of electronic

[20] Use of Electronic Media for Delivery Purposes, Securities Act Release No. 7233, 60 Fed. Reg. 53460 (Oct. 13, 1995) ("1995 Interpretive Release") ("The SEC would view information distributed through electronic means as satisfying the delivery or transmission requirements of the federal securities laws if such distribution results in the delivery to the intended recipients of substantially equivalent information as these recipients would have had if the information were delivered to them in paper form.) (footnotes omitted).

[21] Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Securities Act Release No. 7288, 61 Fed. Reg. 24646 (May 15, 1996) ("1996 Interpretive Release"); 1995 Interpretive Release, 60 Fed. Reg. at 53460.

[22] 1996 Interpretive Release, 61 Fed. Reg. at 24646 n.21 ("For example, if information is provided by physically delivered material (such as a computer diskette or CD-ROM) or by electronic mail, that communication itself generally should be sufficient notice."); 1995 Interpretive Release, 60 Fed. Reg. at 53460 ("If an electronic document itself is provided — for example, on computer disk, CD-ROM, audio tape, videotape,

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or e-mail — that communication itself should generally be sufficient notice.").

[23] 1996 Interpretive Release, 61 Fed. Reg. at 24646–47; 1995 Interpretive Release, 60 Fed. Reg. at 53460.

[24] 1996 Interpretive Release, 61 Fed. Reg. at 24647; 1995 Interpretive Release, 60 Fed. Reg. at 53460 n.24 ("For example, if an investor must proceed through a confusing series of ever-changing menus to access a required document so that it is not reasonable to expect that access would generally occur, this procedure would likely be viewed as unduly burdensome. In that case, delivery would be deemed not to have occurred unless delivery otherwise could be shown.").

[25] 1996 Interpretive Release, 61 Fed. Reg. at 24647; 1995 Interpretive Release, 60 Fed. Reg. at 53460.

[26] Use of Electronic Media, Securities Act Release No. 7856, 65 Fed. Reg. 25843, 25846 (May 4, 2000); 1996 Interpretive Release, 61 Fed. Reg. at 24647; 1995 Interpretive Release, 60 Fed. Reg. at 53461.

communication. For example, it is estimated that over 90% of Americans own a smartphone, up from just 35% in 2011.[27] Over the years the SEC has considered various other means of electronic delivery, such as access equals delivery and implied consent, but has not adopted alternative approaches. Market participants, including broker-dealers and investment advisers, would likely realize significant cost savings and enhanced engagement from increased flexibility in delivering required disclosure documents.

In addition to the SEC's electronic delivery guidance, the Electronic Signatures in Global and National Commerce Act ("E-SIGN") establishes requirements for consumers to consent to electronic delivery of information that is required by statute, regulation, or other rule of law to be delivered "in writing." For statutory and other requirements to deliver information in writing, the SEC could look to the exemptive authority in Section 104(d)(1) of E-SIGN, which allows an agency "by regulation or order issued after notice and an opportunity for public comment [to] exempt without condition a specified category or type of record from the requirements relating to consent in section 101(c) [of E-SIGN] if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers."

6. FACILITATE CAPITAL FORMATION THROUGH PRIVATE FUNDS

Retail investor interest and demand for access to private funds has continued to grow over the past several years as a means to seek diversification and higher returns. According to recent research by Apex Group, 97% of asset management professionals report strong or moderate interest in private funds among retail investors, with private equity (67%) and real estate (55%) leading the way.[28] While institutions typically invest 25-35% of their portfolio in alternatives, the average retail investor's allocation to alternatives is projected to be only 5% in 2025.[29]

Retail investors' access to private funds has generally been limited to the high-net-worth segment, and in some instances the mass affluent segment, because of qualification requirements as an accredited investor under Rule 501 of Regulation D and a qualified purchaser under Section 2(a)(51) of the Investment Company Act. An accredited investor generally includes a natural person who (i) has a net worth over $1 million (excluding the value of the person's primary residence) either alone or together with a spouse or spousal equivalent; (ii) had income in excess of $200,000 (or $300,000 together with a spouse or spousal equivalent) in each of the two most recent years and has a reasonable expectation of reaching the same income level in the current year; or (iii) holds in good standing one or more professional certifications designated by the SEC as qualifying an individual for accredited investor status. The qualifying purchaser standard includes an even higher threshold of $5,000,000 in investments,[30] although the SEC may adopt rules applicable to qualified purchasers as it determines are necessary or appropriate in the public interest or for the protection of investors.

The SEC and its staff have taken some incremental steps to facilitate capital formation through private funds. For example, Chairman Atkins has stated his intent to have the SEC reconsider the Staff's 23-year-old position that closed-end funds investing 15% or more of their assets in private funds should impose a minimum initial investment requirement of $25,000 and restrict sales to investors that satisfy the accredited investor standard.[31] Chairman Atkins stated that "[a]llowing this option could increase investment opportunities for retail investors seeking to diversify their investment allocation in line with their investment time horizon and risk tolerance." In addition, the SEC Staff issued a no-action letter and update to its Compliance and Disclosure Interpretations regarding the verification requirement in Rule 506(c) offerings.[32] In the No-Action Letter, the

[27] Mobile Fact Sheet: Tech Adoption Trends, Pew Research Center (Nov. 13, 2024), *available at* https://www.pewresearch.org/internet/fact-sheet/mobile/.

[28] *Leading the Shift: Transforming Private Markets in a Retail-Driven Landscape*, APEX GROUP (2025), *available at* https://www.apexgroup.com/media/4sthncxz/leading-the-shift-transforming-private-markets-in-a-retail-driven-landscape.pdf.

[29] *US Wealth Management: A Growth Agenda for the Coming Decade*, MCKINSEY & COMPANY (Feb. 16, 2022), *available at* https://www.mckinsey.com/industries/financial-services/our-

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insights/us-wealth-management-a-growth-agenda-for-the-coming-decade.

[30] Rule 2151-1 under the Investment Company Act (defining investments for purposes of the definition of "qualified purchaser").

[31] Prepared Remarks Before SEC Speaks, Paul S. Atkins, Chairman (May 19, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925.

[32] Latham & Watkins, SEC Staff No-Action Letter (Mar. 12, 2025).

SEC staff agreed that a high minimum investment amount is a relevant factor in verifying accredited investor status and that an issuer could reasonably conclude that it has taken reasonable steps to verify that purchasers of securities sold in an offering under Rule 506(c) of Regulation D are accredited investors if the issuer:

1) obtains written representations that (a) the purchaser is an accredited investor and (b) the purchaser's minimum investment amount is not financed[33] in whole or in part by any third party for the specific purpose of making the particular investment in the issuer; and

2) requires minimum investment amounts[34] of at least $200,000 for natural persons, at least $1,000,000 for legal entities[35]; and

3) has no actual knowledge of any facts that indicate that any purchaser is not an accredited investor or that any purchaser's minimum investment amount was financed in whole or in part by any third party for the specific purpose of making the particular investment in the issuer.

It may be time for the SEC to consider whether there are non-monetary (e.g., income, net worth) ways of determining a retail investor's sophistication for purposes of satisfying the accredited investor and qualified purchaser definitions. One approach might be to allow retail investors to qualify as accredited investors and qualified purchasers where they are purchasing a private fund as the result of a recommendation from a broker-dealer or investment advice from an investment adviser. Under this approach, the standard would look not to the sophistication of the investor, but rather to the SEC-regulated entity providing the investment advice, and the equivalent investor protections under Reg BI and an investment adviser's fiduciary duty.

CONCLUSION

The SEC has the opportunity over the next four years to modernize the federal securities laws and facilitate capital formation through common sense reforms. These approaches have the potential to reduce costs for market participants while recognizing meaningful investor protections already in place for retail and other investors. It will be interesting to see what steps the SEC takes under Chairman Atkins to fulfill President Trump's promise of a return of common sense to the federal government. ■

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[33] For this purpose, the letter requesting relief provided that the purchaser would still be able to provide the necessary representation that its minimum investment amount was not financed in whole or in part by any third party for the specific purpose of making the particular investment in the issuer, even if the purchaser obtained capital through one or more (i) financing programs, including a secured credit facility, that has other purposes than solely making the particular investment in the issuer; (ii) binding commitments or financing to the purchaser that predate the commencement of the offering under Rule 506(c); and/or (iii) financing transactions conducted by the purchaser in which the purchaser, as an issuer, has satisfied the conditions applicable to an issuer under this letter.

[34] Minimum investment amounts include investment amounts made pursuant to a binding commitment to invest a minimum amount in one or more installments, as and when called by the issuer. In addition, the requirement regarding the lack of financing in respect of the purchaser's minimum investment amount would apply solely to the funds applied or committed to the minimum investment amount but not to any greater investment amount made or committed by a purchaser or by an equity owner of a purchaser.

[35] For entity and purchasers that are accredited investors under 501(a)(8) based on each of their equity owners being accredited investors, all the equity owners have a minimum investments obligation of $200,000 if natural persons and $1,000,000 if entities, and the entity itself must be required to meet a minimum of $1,000,000 or $200,000 for each of the entity's owners if all the owners are fewer than five natural persons.