March 18, 2020

Via Electronic Submission (rule-comments@sec.gov)

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

Re: Proposing Release, Amending the "Accredited Investor" Definition, SEC Rel. No. 33-10734; File No. S7-25-19

Dear Ms. Countryman:

The Investment Adviser Association ("IAA")[1] appreciates the opportunity to comment on the SEC's proposal to amend the definitions of "accredited investor" in Regulation D ("Regulation D") under the Securities Act of 1933 ("Securities Act") and "qualified institutional buyer" ("QIB") in Rule 144A under the Securities Act.[2] Our members are SEC-registered investment advisers that manage assets for institutional and/or individual clients as fiduciaries under the Investment Advisers Act of 1940 ("Advisers Act").

The Proposing Release follows the Commission's 2019 Concept Release seeking feedback about how to provide access to capital for a variety of issuers and access to investment opportunities for a variety of investors while maintaining investor protections. We are pleased that the Commission is proposing to modernize the eligibility requirements for investing in private offerings, and that it is soliciting input on the important issue of investor access to the private (exempt) markets, especially given the changes in the capital markets around the offering of bonds in reliance on Rule 144A.

Access to the capital markets, including to private offerings, is critically important to our members as they help their clients meet their financial goals, including investing for retirement, education, and home ownership. The private markets have evolved significantly in recent years,

[1] The IAA is the largest organization dedicated to advancing the interests of investment advisers registered with the Securities and Exchange Commission ("SEC" or "Commission"). For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *Amending the "Accredited Investor" Definition*, SEC Rel. No. 33-10734 (Dec. 18, 2019) ("Proposing Release" or "Proposal"), available at https://www.sec.gov/rules/proposed/2019/33-10734.pdf. The Commission issued the Proposing Release after considering comments on its June 2019 *Concept Release on Harmonization of Securities Offering Exemptions*, SEC Rel. No. 34-86129 (June 18, 2019), 84 FR 30460, 30467 (June 26, 2019) ("Concept Release"), available at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13255.pdf.

and now constitute a considerably larger and mainstream portion of the capital markets. We support all of the SEC's proposals to expand the accredited investor and QIB definitions in the Proposing Release to allow greater access to these markets. In particular, we appreciate that the Proposal addresses our request to clarify that non-U.S. entities such as sovereign wealth funds and non-U.S. pension funds that are substantially equivalent to the entities that currently qualify for QIB status may be QIBs, and also that it would include as accredited investors SEC-registered investment advisers investing on their own behalf. However, as we discussed in our letter on the Concept Release,[3] we recommend that the SEC broaden its approach in the Proposal to expand the characteristics of investors that are eligible to invest in these important private markets.

I. Recommendations

Specifically, we make the following recommendations:

A. Accredited Investor. The Commission should amend the accredited investor definition in Rule 501 under Regulation D to include: (i) the discretionary clients of SEC-registered investment advisers; (ii) "qualified purchasers," as defined in Section 2(a)(51) of the Investment Company Act of 1940 ("Investment Company Act");[4] (iii) "qualified clients," as defined in Rule 205-3 under the Advisers Act;[5] (iv) Investment Company Act Section 3(c)(7) qualified purchaser funds; and (v) SEC-registered advisers' knowledgeable personnel investing on their own behalf.

B. Qualified Institutional Buyer. The Commission should amend the QIB definition in Rule 144A to expand opportunities for (i) discretionary separate account clients of SEC-registered investment advisers and (ii) families of private funds and other funds managed by SEC-registered investment advisers to participate in Rule 144A offerings.

[3] IAA Letter to SEC on Concept Release (Oct. 18, 2019) ("2019 Letter").

[4] Qualified purchaser is defined to mean: (i) natural persons who own not less than $5 million in investments; (ii) family-owned companies that own not less than $5 million in investments; (iii) certain trusts; and (iv) persons, acting for their own accounts or the accounts of other qualified purchasers, who in the aggregate own and invest on a discretionary basis not less than $25 million in investments (*e.g.*, institutional investors).

[5] An adviser may charge a performance fee only to a qualified client, which is a natural person who, or a company that: (i) has at least $1 million in assets under management with the adviser immediately after entering into an investment advisory contract with the adviser; (ii) the adviser reasonably believes has a net worth (together with assets held jointly with a spouse) of more than $2.1 million exclusive of the value of a person's primary residence immediately prior to entering into an advisory contract; (iii) the adviser reasonably believes is a "qualified purchaser" at the time an advisory contract is entered into; (iv) is an executive officer, director, trustee, general partner, or person serving in a similar capacity, of the adviser; or (v) is an employee of the adviser who participates in the investment activities of the adviser, and has performed investment activities for at least 12 months.

We believe these changes to modernize the private offering rules for investors will benefit eligible investors and provide additional needed capital to issuers, while appropriately addressing investor protection concerns.

II. Discussion

A. The SEC Should Amend the Accredited Investor Definition to Expand the Pool of Sophisticated Investors Able to Invest in Regulation D Offerings.

1. *Background.*

Under Rule 506(b) of Regulation D, an issuer may sell securities to an unlimited number of accredited investors,[6] as long as (i) there is no "general solicitation" or "general advertising" to market the securities, and (ii) securities are sold to no more than 35 non-accredited investors that, alone or with a purchaser representative, have sufficient knowledge and financial experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment. Rule 506(c) of Regulation D provides a separate exemption, without any limitation on offering amount, pursuant to which offers may be made through general solicitation or general advertising, so long as the purchasers in the offering are limited to accredited investors and the issuer takes reasonable steps to verify their accredited investor status.[7]

The SEC proposes to broaden the definition of accredited investor in several important ways to include: (i) natural persons with certain professional certifications and designations;[8] (ii) "knowledgeable employees" of Section 3(c)(1) or 3(c)(7) private funds, with respect to investments in the fund;[9] (iii) SEC-registered investment advisers investing on their own behalf;

[6] Generally, investors, whether individuals or entities, are not permitted to invest in private offerings unless they are accredited investors, as defined in Rule 501 of Regulation D. To be an accredited investor, an individual must meet specified financial thresholds based on income or net worth such that the individual is presumed to be sufficiently sophisticated so as not to require the protections of registration under the Securities Act. *See SEC Staff Report on the Review of the Definition of "Accredited Investor"* (Dec. 18, 2015) ("2015 Staff Report"), available at https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf.

[7] The SEC recently proposed significant additional changes to the private offering process. *See Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, SEC Rel. No. 33-10763 (Mar. 4, 2020), available at https://www.sec.gov/rules/proposed/2020/33-10763.pdf.

[8] Proposed Rule 501(a)(10) defines accredited investor to include any natural person holding in good standing one or more professional certifications or designations from an accredited educational institution that the SEC has designated as qualifying an individual for accredited investor status. The SEC specifies in the Proposing Release that it expects the following certifications or designations to be included in an initial SEC order accompanying the final rule, if adopted: Series 7 (Licensed General Securities Representative); Series 65 (Licensed Investment Adviser Representative); or Series 82 (Licensed Private Securities Offerings Representative - seeking to effect the sales of private securities offerings).

[9] Proposed Rule 501(a)(11). The SEC states that "knowledgeable employees," as defined in Rule 3c-5(a)(4) under the Investment Company Act, through their knowledge and active participation of the investment activities of the

and (iv) a new category of entity that is not formed for the specific purpose of acquiring the securities offered and that owns at least $5 million in investments.[10]

We support these proposed amendments. We agree that these categories of investors exhibit attributes of financial sophistication and an ability to fend for themselves or sustain losses that are similar to those of the entities enumerated in the definition. However, we recommend that the SEC broaden the definition of "accredited investor" to consider alternative measures of sophistication as well, including discretionary clients of SEC-registered investment advisers. When the SEC reviewed the definition of accredited investor in 2015, the IAA urged the SEC to broaden and rationalize the categories of investors to be considered "accredited" for purposes of investing in a private securities offering.[11] Consistent with the recommendation in the more recent 2017 U.S. Treasury Report,[12] we continue to believe it is important to provide additional opportunities for a wider range of investors to participate in the potential growth presented by private offerings, while appropriately maintaining investor protection. As outlined below, we believe that the Commission should expand the category of accredited investors and confirm explicitly that certain additional types of investors are also accredited investors.

2. *The SEC Should Consider Alternative Measures of Investor Sophistication.*

With respect to individual investors, we agree that in order to maintain investor protection, a certain level of investment sophistication should be required as a threshold for investing in the private markets. We supported the recommendations in the 2015 Staff Report that the Commission create measures of accreditation in addition to financial thresholds,[13] since alternative measures of accreditation may be even more indicative of sophistication than income and net worth. As we have commented in the past and discuss below, there are several ways that the Commission could amend the definition of accredited investor that would expand access for retail investors to the private markets, provide clarity for market participants, promote the supply of capital in the private offering market, and provide appropriate investor protection.

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private fund, are likely to be financially sophisticated and capable of fending for themselves in evaluating investments in these private funds. Proposing Release at 43.

[10] Proposed Rule 501(a)(9).

[11] IAA Letter to SEC re: Report on the Review of the Definition of "Accredited Investor" (June 29, 2016) ("2016 Letter"), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/160629cmnt.pdf.

[12] *A Financial System That Creates Economic Opportunities: Capital Markets*, U.S. Dept. of the Treasury (Oct. 2017) ("2017 Treasury Report") at 44, available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

[13] *See* 2015 Staff Report at 7-8.

a) The SEC Should Treat Individual and Entity Discretionary Account Clients of SEC-Registered Investment Advisers as Accredited Investors.

The SEC seeks comment on whether an investor should be considered an accredited investor by virtue of being advised by a registered investment adviser.[14] We strongly believe that it should where an adviser registered with the SEC is acting in a discretionary capacity.[15] The IAA has long supported this approach.[16] The SEC notes that the 2017 Treasury Report also recommended that the SEC amend the accredited investor definition to include any investor who is advised on the merits of making a Regulation D investment by a fiduciary, such as an SEC-registered investment adviser.[17] Amending the accredited investor definition in the manner we recommend would provide appropriate investor protection for several reasons.

In managing assets on a discretionary basis, advisers have the authority to make investment decisions on behalf of their clients on an ongoing basis. They are stepping into the shoes of their clients and continuously managing their clients' portfolios to optimize their clients' investment goals. They are responsible for the ongoing management of the portfolio and not merely making recommendations for clients to consider. Advisers' overarching fiduciary duty requires that they manage portfolios and make investment decisions in their clients' best interest and only after assessing a client's sophistication, reaching an understanding of the client's investment objectives and risk tolerance and the suitability of each investment, and conducting a reasonable investigation into the investment.[18] To conduct a reasonable investigation, an adviser must have the requisite level of sophistication and expertise to understand the investment, both individually and as part of the client's portfolio, and its risks.[19] If an investment in the private markets is not in a client's best interest, including within its investment parameters, risk tolerance, and goals, the adviser may not place the client in that investment.

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[14] *See* Proposal at 87.

[15] The SEC defines a client of an SEC-registered adviser as "discretionary" (*i.e.*, the adviser has discretionary authority or manages assets on a discretionary basis) if the adviser "has the authority to decide which securities to purchase and sell for the client" or "if it has the authority to decide which investment advisers to retain on behalf of the client." *See Form ADV Glossary*, available at https://www.sec.gov/about/forms/formadv-instructions.pdf.

[16] *See* 2019 Letter and 2016 Letter. *See also*, Letters to the SEC from the IAA, dated Sept. 23, 2013 and Mar. 9, 2007.

[17] Proposal at 74.

[18] *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, SEC Rel. IA-5248 (June 5, 2019) ("Fiduciary Duty Interpretation") at 12-13, n. 34, available at https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf.

[19] *Id.*

Indeed, the SEC appears to recognize that an adviser's experience and its duty of care act as a proxy for a client's own sophistication when it notes, that, "[f]or example, it might be consistent with an adviser's fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with relatively higher fees and significantly less liquidity as compared with a fund that invests in publicly-traded companies if the private equity fund was in the client's best interest because it provided exposure to an asset class that was appropriate in the context of the client's overall portfolio."[20]

The SEC should consider retention by an investor of an SEC-registered investment adviser to provide discretionary investment advice as qualifying that investor as an accredited investor with respect to such advice. Such a client should be considered sophisticated within the context of that relationship because the investment adviser must have the requisite sophistication to make ongoing investment decisions as a fiduciary and must make those decisions in the client's best interest. Indeed, the adviser's sophistication in this situation is analogous to that of the "purchaser representative" recognized by the SEC as the sophisticated expert in investment decision making.[21] Because we believe that SEC-registered advisers acting in a discretionary capacity have the requisite sophistication to make investment decisions as fiduciaries for their clients, we do not support any additional limitations on investment size or percent of investor assets or other conditions on our recommended amendment.[22]

b) <u>The SEC Should Confirm that Accredited Investors Include the Categories of Qualified Purchasers, Section 3(c)(7) Funds, and Qualified Clients</u>.

As we recommended in our 2019 Letter, the Commission should define accredited investor specifically to include a qualified purchaser, as defined under Section 2(a)(51) of the Investment Company Act. Private funds offered under Section 3(c)(7) may only be sold to qualified purchasers, *i.e.*, individuals with at least $5 million in investments, and institutions with at least $25 million in investments. Currently, however, a trust that is a qualified purchaser may not meet the accredited investor definition, *e.g.*, in the case of an irrevocable trust where the trustees and settlors are all qualified purchasers, but the trust itself has less than $5 million in assets. Given that the financial thresholds for qualified purchasers are higher than those required

[20] *Id.*

[21] As noted above, offers under Rule 506(b) may be made to up to 35 non-accredited investors who meet, or who the issuer reasonably believes meet, an investment sophistication standard, which is met if the non-accredited investor, either alone or with its "purchaser representative," has such knowledge and experience in financial and business matters that makes the investor capable of evaluating the merits and risks of the prospective investment.

[22] In 2013, the U.S. Government Accountability Office (GAO) published a report regarding its study mandated by the Dodd-Frank Act on the appropriate criteria for determining the financial thresholds or other criteria needed to qualify for accredited investor status. According to the GAO, the use of a registered investment adviser could balance investor protection concerns with the policy objective of facilitating capital formation and be relatively feasible to implement. *See U.S. Government Accountability Office Report, Alternative Criteria for Qualifying as an Accredited Investor Should Be Considered* (July 2013), available at https://www.gao.gov/assets/660/655963.pdf.

to be an accredited investor, we believe that the Commission should make clear that qualified purchasers are included in the accredited investor definition.

We also urge the SEC to include Section 3(c)(7) funds themselves as accredited investors. While investors in Section 3(c)(7) funds reach the financial thresholds required to be accredited investors, the funds are not themselves accredited investors since they are not among the entities enumerated in the Regulation D definition. A Section 3(c)(7) fund should be considered sophisticated enough by virtue of the sophistication of its investors to invest in the private markets as an accredited investor itself.

We also recommend that the Commission add qualified clients, as defined in Rule 205-3 under the Advisers Act, to the definition of accredited investor to make clear that all qualified clients are accredited investors, even though not all accredited investors are qualified clients.

We believe that these three changes would improve the private offering process and ease the complexity and costs of issuers' diligence without reducing investor protections.

c) SEC-Registered Investment Advisers' Knowledgeable Personnel should be Included in the Definition of Accredited Investor When they Invest on their own Behalf.

While we support the SEC's proposal to include SEC-registered investment advisers as accredited investors, we reiterate our recommendation that the definition also include knowledgeable personnel of investment advisers. Currently, for example, employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA") are accredited investors if they are represented by an SEC-registered investment adviser acting as a fiduciary.[23] However, that adviser's knowledgeable personnel are not considered accredited investors when they invest on their own behalf. We believe that investment adviser personnel that meet the criteria in Rule 3c-5 under the Investment Company Act should be presumed to have the sophistication necessary to be able to invest in private offerings on their own behalf, regardless of whether they are employees of Section 3(c)(1) or 3(c)(7) funds.

d) The SEC Should Clarify the "Catch-All" Entity Category for the Accredited Investor Definition.

We appreciate that the Proposal incorporates the IAA's recommendation to include the addition of a "catch-all" category of entities with $5 million in investments,[24] and support this change. However, to avoid uncertainty in the interpretation of this new category, we recommend that the SEC clarify that the term "entity" covers all non-natural persons, regardless of whether they are organized as legal entities. For example, the adopting release could clarify that "entity"

[23] Rule 501(a)(1) of Regulation D.

[24] Proposed Rule 501(a)(9).

in the catch-all may include non-natural persons, such as trusts or non-U.S. pension funds formed under local statute that invest on behalf of their own balance sheet but do not have legal personality (*e.g.*, Australian superannuation funds, the United Nations, Native American tribes, or Japanese farm cooperatives). Such a clarification would provide assurances for these investors and their registered investment advisers that the investor is considered sufficiently sophisticated to be considered an accredited investor and invest in the private markets.

B. The SEC Should Expand QIB Eligibility for Rule 144A Offerings.

1. *The SEC Should Expand QIB Eligibility for Rule 144A Offerings to Discretionary Separate Account Clients of SEC-Registered Advisers.*

Rule 144A is an important source of capital formation in the United States.[25] The Rule 144A market for bonds – municipal and corporate – has changed dramatically in the last 20 years as more and more fixed income issuers are opting to rely on the Rule 144A process for bond issuance, rather than going through the more expensive and burdensome public offering process.[26] As the Commission has noted, the majority of private debt offerings are now conducted using Rule 144A, and 99 percent of Rule 144A offerings are debt offerings.[27] Rule 144A bonds also outnumber registered issues both in number and in volume and currently make up more than half of the high yield bond market.[28] The dramatic changes in the bond markets call for a reconsideration by the SEC of who should be able to access these markets.

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[25] Rule 144A provides a non-exclusive safe harbor exemption from the registration requirements of the Securities Act for resales to QIBs of certain restricted securities. Any person, other than the issuer or a dealer, who offers or sells securities in compliance with Rule 144A is deemed not to be engaged in a distribution of the securities and therefore not an underwriter of the securities.

[26] *See, e.g.*, "Only Special Investors Get to Buy These Bonds. They Make Up More Than Half of the High Yield Bond Market," by Ellen Carr, *Institutional Investor*, Feb. 21, 2020 (last accessed Feb. 24, 2020), available at https://www.institutionalinvestor.com/article/b1kft61brvkkx6/Only-Special-Investors-Get-to-Buy-These-Bonds-They-Make-Up-More-Than-Half-of-the-High-Yield-Bond-Market.

[27] *See Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities*, SEC Rel. No. 33-10762 (Mar. 2, 2020) at 36, n.95, available at https://www.sec.gov/rules/final/2020/33-10762.pdf (citing *SEC Division of Economic and Risk Analysis, Access to Capital and Market Liquidity* 96 (Aug. 2017), available at https://www.sec.gov/files/access-to-capital-and-market-liquidity-study-2017.pdf; *SEC Division of Economic and Risk Analysis, Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2014* (Oct. 2015), available at https://www.sec.gov/dera/staff-papers/white-papers/30oct15_white_unregistered_offering.html).

[28] *See* SKY Harbor Capital Management, Weekly Briefing: *SKYView: The Rise of Unregistered Bonds Under Rule 144A* at 3 (Feb. 17, 2020) ("SKY Harbor note"), available at http://www.skyhcm.com/documents/weekly/SKY_Harbor_Weekly_Briefing_17Feb2020.pdf?pdf=17Feb2020 (noting that the market appears to view registered and Rule 144A unregistered bonds as virtually indistinguishable as differences in spreads have essentially disappeared, particularly when adjustments are made for variances in credit rating and duration over time).

To illustrate important changes in the Rule 144A high yield debt marketplace that have affected our members and their discretionary separate account clients, we note that:[29]

- In January 2012, 70 percent of high yield offerings were SEC registered outstanding; 19 percent were "144A for life" (meaning that the Rule 144A bonds are never registered, and will thus never be available for purchase by non-QIBs); and 11 percent were Rule 144A with registration rights.
- By January 2020, 40 percent of high yield offerings were SEC registered outstanding; 55 percent were 144A for life; and 5 percent were Rule 144A with registration rights.
- In September 2014, trading in Rule 144A bonds accounted for approximately 35 percent of overall high yield trading volume. By January 2020, however, trading in Rule 144A bonds accounted for approximately 50 percent of overall high yield trading volume.
- In 2003, Rule 144A issuance for life was just emerging, and it rose to 25 percent of new issuance by 2010, 50 percent of new issuance by 2015, and 68 percent of new issuance by 2017.
- As of September 2019, 144A for life was 79 percent of new issuance.

These market changes have significantly limited the ability of retail investors and institutional investors that are not QIBs to access the bond markets, even when they have hired sophisticated fiduciaries to invest on their behalf. Our members are especially concerned that their discretionary investment advisory clients that are pursuing fixed income strategies are being significantly disadvantaged by the increasing lack of availability of bond offerings that are only offered in the Rule 144A market, and in an increasing number of cases, only offered on a 144A for life basis.[30]

Access to the bond markets for separate account clients as part of an asset allocation strategy (whether for retirement or other investment purposes) is critically important. We understand that, when purchasing high yield bonds as part of an investment strategy for clients, most investment advisers would not base the decision on whether or not the corporate bond is registered. In fact, as noted in note 28, above, the market's valuation, pricing, and liquidity of a Rule 144A bond and a registered bond from the same issuer are, in most cases, indistinguishable. As a result of the evolution of the Rule 144A markets over recent years, neither the marketplace nor these investment advisers appear to value registered offerings more than Rule 144A offerings. Moreover, since Rule 144A bonds trade in lot sizes as low as $2,000, they would be just as if not more available to smaller, retail separate accounts as many registered bonds.

To address this concern and consistent with our recommendation in our 2019 Letter, we recommend that the SEC expand the QIB definition to include investors that receive

[29] *See, e.g.*, Letter to SEC from GW&K Investment Management, LLC re: Proposing Release (Mar. 16, 2020).

[30] *See, e.g.*, Letter to SEC from Dolan McEniry Capital Management LLC re: Proposing Release (Mar. 9, 2020).

discretionary investment advice from SEC-registered advisers if, consistent with other QIB categories, the adviser manages in the aggregate in excess of $100 million in securities of issuers that are not affiliated with the adviser or the client on behalf of which the adviser is making the investment.

While we recognize that investors that are not QIBs may invest in registered funds that invest in Rule 144A bonds, investors also may choose an adviser to manage a separately managed account, having made the decision that they prefer to own bonds directly rather than as an interest in a mutual fund that invests in the bonds. Advisers to registered funds are considered sufficiently sophisticated to invest in Rule 144A bonds for the funds (and their underlying non-QIB investors). Investment advisers that meet the financial threshold should similarly be considered sufficiently sophisticated to invest in Rule 144A bonds on behalf of their discretionary separate account clients. Simply put, an SEC-registered investment adviser should be able to buy the same bonds for its discretionary separate account clients as for a registered fund that it manages to the same investment strategy if it determines that investing in those bonds are in its clients' best interest.

We believe our recommendation to broaden the definition of QIB in the limited way we have suggested is sound and is consistent with the SEC's mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation.[31]

2. *The SEC Should Expand the QIB Definition to Include Families of Private and Other Types of Public Funds.*

Another area where updating the QIB definition is appropriate is for families of funds. We recommend that the SEC amend the QIB definition so that Section 3(c)(1) and 3(c)(7) funds would be eligible to invest in Rule 144A offerings as QIBs using the "family of investment companies" test that is currently available to registered funds under Rule 144A(a)(1)(iv), as long as the family of private funds owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the investor.[32] These private funds are managed by SEC-registered investment advisers, are highly sophisticated investors, and are likely to have

[31] We note that the marketplace shift to Rule 144A and 144A for life bonds is currently an issue primarily for high yield bonds, We understand that Rule 144A issuances are currently less common for investment grade issuers because the most widely recognized index of U.S. investment grade bonds, the Bloomberg Barclays U.S. Aggregate Index, currently requires included bonds to be registered. If, in light of the evolution of the bond marketplace, that index changes its requirements to allow for inclusion of Rule 144A bonds, we would expect that many more corporate issuers would rely on the less cumbersome Rule 144A process, which would likely exacerbate the trends we describe above. We would then expect to see reduced liquidity and availability for non-QIBs in that fixed income market as well.

[32] Under the "family of investment companies" test in Rule 144A(a)(1)(iv), a QIB is defined to include any investment company registered under the Investment Company Act, acting for its own account or for the accounts of other qualified institutional buyers, that is part of a family of investment companies which own in the aggregate at least $100 million in securities of issuers, other than issuers that are affiliated with the investment company or are part of such family of investment companies.

experience in the private resale market for restricted securities, and thus have substantially less need for the protections afforded by the Securities Act's registration provisions. In our view, the same logic that permits aggregation in the registered fund context should be extended to Section 3(c)(1) and 3(c)(7) funds.

We also recommend that non-U.S. public and private investment funds that are similar to U.S. registered funds and Section 3(c)(1) and 3(c)(7) funds, respectively, and their fund families, should also be presumed to have sufficient sophistication to be treated as QIBs. Thus the SEC should permit an approach similar to the family of investment companies approach for entities such as UCITS funds, other foreign vehicles under common control (*e.g.*, Japanese funds, Australian superannuation funds, and other similar vehicles), and collective investment trusts.[33]

3. *We Support the SEC's Proposal to Include Institutional Accredited Investors as QIBs.*

We support the SEC proposal to amend the definition of QIB to include additional entity types that meet the $100 million threshold in order to avoid inconsistencies between the types of entities that are eligible for "catch-all" accredited investor status and those that are eligible for QIB status under Rule 144A.[34] Specifically, the SEC proposes to add to the QIB definition any "institutional accredited investor" as defined in Rule 501(a)[35] if the investor in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the investor.

We also appreciate the Commission's explanation that it believes the proposed catch-all category "would expand the qualified institutional buyer definition to encompass all of the entity types suggested by commenters on the Concept Release, so long as these entities meet the $100 million threshold in Rule 144A(a)(1)(i)." We appreciate that the proposed amendment addresses our request to clarify that non-U.S. entities such as sovereign wealth funds and non-U.S. pension funds that are substantially equivalent to the entities that currently qualify for QIB status may be QIBs. We strongly support this clarification so that large public plan investors and their investment advisers do not continue to face uncertainty if they cannot determine that they fit within the narrow list of entities enumerated in the current QIB definition.

We are also pleased that the Commission noted that the catch-all category would encompass bank-maintained collective investment trusts that include as participants individual retirement accounts or H.R. 10 plans that are currently excluded from the QIB definition

[33] *See, e.g.*, 2019 Letter and Letter to SEC from Franklin Templeton on the Concept Release (Sept. 24, 2019).

[34] The Proposal would 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).

[35] Proposed Rule 144A(a)(1)(J).

pursuant to Rule 144A(a)(1)(i)(F), as long as the collective investment trust satisfies the $100 million threshold. Finally, we support the SEC's proposed limited amendments to the QIB definition to include limited liability companies and RBICs.

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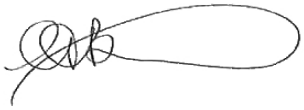
We appreciate the Commission's consideration of our comments on these important proposals and would be happy to provide any additional information that may be helpful. Please contact the undersigned or Monique Botkin at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,



Gail C. Bernstein
IAA General Counsel

cc: The Honorable Jay Clayton, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner

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