

SEC Expands Private Offering Investor Pool

The Securities and Exchange Commission (the “SEC”) has adopted amendments to the definition of “accredited investor” (“AI”) in Regulation D under the Securities Act of 1933 (the “Act”) to add new categories of qualifying investors to private offerings. The amendments represent an acceptance by the SEC that wealth should not be the only means of qualifying natural persons for investment opportunities and also serve to codify certain interpretations of the staff of the SEC, e.g., to specifically include limited liability companies with \$5 million in assets and allow spousal equivalents to jointly calculate net worth and income. The SEC also approved amendments to Rule 144A under the Act (“Rule 144A”) that expand the definition of “qualified institutional buyer” (“QIB”). The amendments were proposed in December 2019 and have been largely adopted as proposed. They will become effective 180 days after publication in the Federal Register.

The changes to the definitions of AI and QIB will increase the pool of potential investors for private equity, hedge funds and other issuers in offerings conducted pursuant to Regulation D and Rule 144A and necessitate revisions to many offering and subscription materials as well as other transactional documents.

A/s. Specifically, the amendments expand the definition of AI in Rule 501 (“Rule 501”) of Regulation D in several significant areas:

- Knowledgeable Employees and other natural persons: Will include persons holding certain professional certifications or designations or other credentials or based on their status as a private fund’s “knowledgeable employee,” as defined under the Investment Company Act of 1940 (“ICA”). Also included are persons holding certain FINRA licenses - Series 7, 65 and 82.
- Registered Investment Advisers, Family Offices and Family Office Clients: (i) SEC or state registered and SEC-exempt reporting advisers that are acting for their own account; (ii) family offices as defined under Investment Advisers Act with at least \$5 million in assets under management; and (iii) their family clients.

- **Spousal Equivalents:** Will allow “spousal equivalents,” i.e., a cohabitant occupying a relationship generally equivalent to that of a spouse, to pool their income for purposes of meeting the joint income and net worth tests in Rule 501.
- **Other Entities with \$5 Million in Investments:** Will add a new category for any entity not formed for the purpose of investing in the securities offered that owns investments as defined in the ICA in excess of \$5 million.

QIBs. The amendments also expand the definition of QIB in Rule 144A to include limited liability companies and Rural Business Investment Companies and any institutional investors included in the AI definition in Rule 501 that are not otherwise enumerated in the definition of “qualified institutional buyer,” provided, in each case that they satisfy the \$100 million threshold in Rule 144A.

Rules 215, 163B and Exchange Act Rule 15g-1: The amendments include revising Rule 215 under the Act to replace the existing definition with a cross reference to the definition in Rule 501 and conforming amendments to Rule 163B under the Act and to Rule 15g-1 under the Securities Exchange Act of 1934.

For additional information, please contact any of the following: Robert Boresta at Robert.Boresta@fisherbroyles.com or Michael Pierson at Michael.Pierson@fisherbroyles.com with any questions or more specific situations.

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