April 27, 2016

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Report on the Review of the Definition of "Accredited Investor"

Dear Secretary Fields:

We are writing on behalf of the Consumer Federation of America (CFA)[1] and Americans for Financial Reform (AFR)[2] in response to the December 2015 staff report on the definition of accredited investor.[3] For many years, efforts to update the definition of accredited investor have gone nowhere, with one side arguing to strengthen protections for investors by raising the outdated financial thresholds on which the definition is based and the other side arguing to retain the existing thresholds in order to preserve the flow of capital to private offerings. We congratulate the Commission staff for looking beyond this narrow argument in drafting this report. The report reflects a reasonably thorough review of the various approaches that could be adopted to update the definition, including options to strengthen the definition's investor protections without unnecessarily sacrificing capital formation.

On the other hand, the study suffers from two major shortcomings that seriously undermine its usefulness in providing the basis for further regulatory action. First and foremost, it does not carefully assess the effectiveness of the current accredited investor definition in identifying a population of investors who are able to fend for themselves without the protections afforded in the public markets. Nor does it include a meaningful assessment of the likely impact of the various alternatives that have been put forward. In the current regulatory environment, it is difficult to see how the Commission will justify actions that could be viewed as narrowing the

[1] The Consumer Federation of America is a non-profit association of nearly 300 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.
[2] Americans for Financial Reform is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, we are working to lay the foundation for a strong, stable, and ethical financial system – one that serves the economy and the nation as a whole.
[3] While the study addresses issues in additional to the natural person component of the accredited investor definition, our comments will focus exclusively on that aspect of the issue.

population of accredited investors unless and until it undertakes the analysis that shows these changes are needed to better protect investors and can be achieved without unnecessarily constraining the flow of capital to private offerings. Second, the study fails to consider changes that could streamline the verification process for issuers by promoting use of reliable third-party verification. Given the certain opposition of the issuer community to any changes to the definition that would complicate the verification process, this too is likely to undercut the willingness of the Commission to adopt some of the most promising alternative approaches.

We believe it is possible to update the definition of accredited investor so that it better protects investors without threatening the flow of capital to the secondary market. We further believe that the recommendations of the Investor Advisory Committee provide a sound basis for Commission action in this area.[4] We urge the Commission to move forward with reforms in this area by first filling in the gaps in this study in order to lay the foundation for sound policy.

Background

The Securities Act of 1933 provides an exemption from registration and disclosure requirements for securities transactions "not involving any public offering." Although Congress did not provide clear guidance on what it meant by this phrase, the Supreme Court ruled in 1953 that availability of the exemption "should turn on whether the particular class of persons affected needs the protection of the Act."[5] "An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering,'" according to the Court. The Court and the Commission have over the years described the ability to fend for oneself as involving one or all of the following characteristics: 1) access to information about the issuer that makes the '33 Act's mandated disclosures unnecessary; 2) the financial sophistication to weigh the risks and merits of the offering; and 3) the ability to bear the economic risks of the offering, including risks associated with the illiquidity of private offerings and the heightened risk of loss associated with investing in start-ups.

The Commission has adopted a number of regulations over the years seeking to clarify when and how issuers can conduct offerings of securities without triggering the '33 Act's registration and disclosure requirements. Even before the JOBS Act loosened restrictions on general solicitation in such offerings, the majority of private offerings were being conducted in reliance on Rule 506 of Regulation D. Because Rule 506 allows sales to an unlimited number of "accredited investors," the accredited investor definition has come to play a central role in determining whether an offering qualifies for the private offering exemption. That role has taken on even greater importance in the wake of the JOBS Act, which, in lifting the ban on general solicitation, eliminated both an important red flag of a potentially fraudulent offering and the Commission's most effective tool for shutting down fraudulent offerings before significant investor money is lost. It has therefore become more important than ever to ensure that those who are targeted with these offerings are fully capable of assessing the risks and bearing the potential losses.

Unfortunately, the current definition as it pertains to natural persons does not, in our view, satisfy any of the three criteria used to define the ability to fend for oneself. While some of

[4] The IAC accredited investor recommendation, adopted October 9, 2014, is available here: http://1.usa.gov/22HoUHw

[5] *Securities and Exchange Commission v. Ralston-Purina Co.*, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953).

those who fit the definition and invest in Rule 506 offerings may be financially sophisticated, there is nothing in the definition that ensures that this is the case, and evidence suggests that many are not in fact financially sophisticated. Nor are the financial thresholds high enough to protect the investor from suffering unaffordable losses, particularly if the investor's net worth is based on non-liquid assets, such as a family farm or small business, or if it is based primarily on investments the individual must rely on for a steady stream of income throughout retirement. And the financial thresholds certainly aren't set high enough to ensure the investor favored access to information about the issuer comparable to what institutional investors or venture capitalists are able to attain in similar circumstances.

It was for these reasons that we strongly urged the Commission to strengthen the definition of accredited investor as part of its rulemaking setting the terms for general solicitation in private offerings. Unfortunately, that opportunity has passed. However, there does seem to be some continuing interest in updating and revising the definition, particularly among those who believe that more should be done to enable financially sophisticated individuals to qualify as accredited investors regardless of whether they meet the financial thresholds in the current definition. This offers an opportunity to revisit the definition and, in doing so, to consider whether alternative approaches might also achieve the goal of better ensuring that investors in private offerings have the financial sophistication to assess the risks of private offerings and the financial resources to withstand potential losses.

While the staff study provides a good overview of the various alternative approaches that have been suggested, and provides some thoughtful recommendations for Commission action, it does not provide the analytical underpinnings to determine whether the alternatives are likely to be effective in identifying a population of investors capable of fending for themselves without the protections afforded in the public markets. To have a realistic chance of success, however, any effort to strengthen the protections afforded by the definition would have to be based on a more thoughtful analysis than is provided here of the adequacy of the existing definition, the likely impact of various alternatives, and means of decreasing the burden of verification for approaches that do not rely on a bright line test.

The Study Does Not Sufficiently Assess the Adequacy of the Current Definition

Before the Commission can determine whether the accredited investor definition should be updated, it needs to determine whether the current definition adequately serves its purpose. As indicated above, we do not believe that the current definition does satisfy the standard established by the Supreme Court for non-public offerings. Unfortunately, in preparing this study, the staff does not appear to have undertaken any serious analysis of the characteristics of the accredited investor pool to determine whether investors who meet the current definition, or at least a large majority of those investors, have the financial sophistication, access to information, or ability to withstand the risks of loss that would reasonably be deemed to make them capable of fending for themselves without the protections afforded in the public markets.

Such an assessment is essential to determine, consistent with the statutory mandate behind this study, "whether the requirements of the definition should be adjusted or modified for the protection of investors." Instead, the report simply states: "While the size of the accredited investor pool has increased significantly, the staff is not aware of evidence suggesting that individuals qualifying as accredited investors under the current financial thresholds and participating in the Regulation D market require the protections of registration. On the other

hand, inflation has increased the likelihood that the current pool of accredited investors may contain individuals the definition did not originally intend to encompass." A topic of this gravity deserves more careful scrutiny than this see-no-evil, hear-no-evil approach. At the very least, the staff should be expected to undertake an analysis designed to determine, to the best of its ability, whether the current definition of accredited investors is over- (or under-) inclusive.

Worse, rather than simply acknowledging its lack of evidence on this point, the staff study reaches the unsupported conclusion that financial thresholds are effective in defining a population of sophisticated investors. Its only basis for this conclusion is limited data showing a correlation between wealth and a tendency to make common investing errors. It doesn't provide any insight into the possible causes of the correlation, although focusing on causes would arguably lead to a more reliable assessment of the best regulatory approach. If, for example, the correlation can be attributed to greater investing experience or to reliance on a professional adviser, that would suggest that these factors could be incorporated in a definition, rather than relying on financial thresholds that are imperfect proxies for the factors that lead to greater investment success.[6] The staff doesn't even appear to have assessed whether the failure to make those common investing errors is indicative of the financial sophistication needed to assess the potential risks and benefits of a private offering, which may be qualitatively different from the investing expertise measured by the study it cites. Without this analysis, the Commission has no basis for concluding that the correlation is sufficient to justify continued reliance on the current approach.

Nor does the study attempt to assess more generally what level of financial knowledge would be necessary for an individual to be deemed capable of fending for him- or herself, although that strikes us as an essential step in analyzing the adequacy of the both the current definition and possible alternatives. Instead, it relies on financial literacy data that tests a far lower level of financial sophistication than is relevant for this purpose, and it concludes based on this data that the correlation between wealth and literacy is sufficient to justify reliance on financial thresholds in setting the definition. But the fact that wealthier individuals are more likely to have basic financial literacy skills than less wealthy individuals is not the relevant issue. And, contrary to the conclusion arrived at by the staff, the data they cite suggests that a significant portion of the wealthy population lacks even basic financial literacy skills, calling into serious question the effectiveness of financial thresholds as proxies for financial sophistication. The study notes, moreover, that accredited investors tend to be older than the general population, but nowhere does it address the implications of diminished capacity among older investors for a regulatory approach that relies on financial thresholds. The study doesn't even attempt to analyze whether financial thresholds are sufficient to protect against the risk of unaffordable losses, though it treats that question indirectly in its discussion of alternative approaches to financial thresholds.

Based on this wholly inadequate assessment, the study takes a position in favor of retaining financial thresholds as part of the accredited investor definition. It does so without having shown that the current thresholds are adequate, that a threshold could be adopted that would be adequate, or, if it could, at what level it should be set. Our point in raising this issue is not to rule out reliance on appropriate financial thresholds entirely. On the contrary, we are

[6] We are not arguing that these are, in fact, responsible for the correlation found, nor are we advocating this approach. Rather, we are offering these hypotheticals as examples of what we mean when we say that looking at the cause of the correlation would be more useful in identifying an appropriate regulatory approach.

inclined to agree that financial thresholds can play an important role in a revised accredited investor definition, particularly in ensuring that investors have the financial wherewithal to suffer potential losses without unduly devastating effect. Our point is simply that a determination by the Commission that it will continue to rely on financial thresholds for its accredited investor definition should be made based on: 1) a careful assessment of the effectiveness of that approach relative to other options and 2) a careful assessment of the specific levels at which the thresholds would need to be set to reasonably ensure that investors who meet those thresholds have either the financial sophistication or the financial wherewithal to fend for themselves without the protections afforded in the public markets.

The report does not provide that analysis, which was surely the central purpose of the legislative mandate to conduct periodic studies to reassess the definition. Moreover, its failure to do so seriously decreases the likelihood that the Commission will ultimately adopt an accredited investor definition that meets the Supreme Court standard of identifying a population of individuals capable of fending for themselves without the protections afforded in the public markets. It is inevitable that many of the same business groups that supported the JOBS Act will resist any changes to the definition that would be perceived as narrowing the pool of accredited investors. For the Commission to muster the regulatory will to overcome these objections, it must be able to show that the change is needed to better protect investors and that it can be accomplished without unnecessarily restricting the flow of capital to the private offering market.

The Commission Should Collect the Data to Support a More Thorough Analysis

The lack of a thorough assessment of the adequacy of the existing definition can likely be explained, at least in part, by the lack of good data on which to base such an assessment. After all, under existing rules for Form D filings, regulators typically receive only minimal information about offerings, and many issuers appear to ignore even those limited filing requirements. That is why we have previously voiced support for the Commission's proposals to enhance the content requirements for Form D and to restore the requirement to amend the filing at the closing of the offering. Unfortunately, those proposals have yet to be acted on, just as we predicted when the Commission determined to move forward with a rulemaking to lift the general solicitation ban without including these data collection requirements and other investor protection measures as part of the original rulemaking.

Judging from the economic analysis presented in this study, one result of the Commission's failure to act on these proposals is that the Commission does not appear to be collecting the information needed to determine whether its current definition of accredited investor is adequately protecting investors or how various possible changes to the definition would affect both investor protection and capital formation. Among other things, the study doesn't tell us whether those who invest in Rule 506 offerings are materially different, as a group, from the class of accredited investors as a whole (those who fit the definition but may or may not invest in Rule 506 offerings). But an understanding of the distinguishing characteristics of Rule 506 investors is essential to understanding the likely impact of any changes to the definition. If, for example, a large majority of those actual investors have income or net worth well above the thresholds, then concerns that raising the thresholds would significantly impact capital formation would be blunted, and vice versa. Similar questions could be analyzed regarding the likelihood that investors rely on advice from a financial professional with, or without a financial stake in the offering, when making such investments, the percentage of their

assets that are devoted to such offerings, and other factors related to the risks specific to private offerings. All these factors would be relevant to an analysis of regulatory alternatives.

In short, the staff study fails to include the underlying, more detailed analysis that would support a better understanding of the policy options before the Commission. Instead, it enumerates the various suggestions that have been put forward for revising the definition and provides a brief description of their pros and cons. That description typically takes the form of "he said, she said" commentary from supporters and opponents of the proposed approach rather than any deeper assessment by the staff of the merits of the various arguments based on the relevant market data.

In order to provide the data needed for a more thoughtful review of the current definition and possible alternatives, we therefore reiterate our call for the Commission to move forward expeditiously with rulemaking to improve data collection and otherwise strengthen protections for investors in Regulation D offerings. As we have previously indicated in comments submitted to the agency, we believe the proposed rule should be significantly strengthened, including with regard to the Form D filing requirements, before being finalized in order to ensure that it serves this purpose. Among other things, the Commission should review and revise the proposal to ensure that it provides the data necessary to informed policymaking and that the filing requirement is reasonably likely to be complied with.

Study Offers Reasonable Alternatives to Setting Financial Thresholds

The staff study suggests several approaches that the Commission could take to adjust the financial thresholds. These include:

- Leaving the current income and net worth requirements in place, but adding investment limitations based on a percentage of income or net worth, and adding new inflation-adjusted thresholds not subject to investment limits.

We agree with the staff study that setting investment limits based on a percentage of income or net worth is a promising approach. This approach is generally consistent with the IAC recommendation to "allow some investments in private securities once a person reaches an initial threshold, based on percentage of income or assets, with restrictions being reduced and then eliminated as income or assets rise." Moreover, we share the view expressed in the study that the chief benefits of such an approach is that it "could provide protections for those individuals who are less able to bear financial losses" without unnecessarily shrinking the pool of eligible investors. Indeed, since one measure of the ability "to fend for oneself" is the ability to withstand financial losses, investment limits are arguably a far better proxy than straight financial thresholds for identifying a population of investors who do not require the protections afforded in the public markets. This is only true, however, if the investment limits are applied, as we believe they should be, not on an investment-by-investment basis but rather to the individual's total annual investments in private offerings.

We recognize, however, that some in the issuer community are likely to object that such an approach makes an already challenging verification process more burdensome. This is a valid concern, but it is a concern that can and should be addressed by encouraging the development of a reliable third-party verification system. Such a system has the potential to reduce burdens on

issuers while strengthening protections, including privacy protections, for investors. (We discuss this issue further below.)

The staff study assumes that such an approach based on investment limits should be applied using current thresholds. This has the advantage of allowing the Commission to assure advocates of raising the thresholds that the Commission is taking steps to strengthen protections for investors and to assure opponents of raising the thresholds that they aren't shrinking the pool of available investors. We are skeptical, however, that opponents of raising the thresholds will be prepared to accept this compromise. The Commission is more likely to be able to sell this proposed approach if it starts with the analysis discussed above that shows the need for the change. Furthermore, in developing such an approach, we encourage the Commission to consider afresh, based on evidence regarding both financial sophistication and ability to withstand losses, what the appropriate thresholds would be when combined with a percentage investment limit and at what level it would be appropriate to remove any such limits. As noted above, however, this approach only makes sense if the limit is applied across all of the individual's investments in Reg D offerings, and not on an investment-by-investment basis.

To the degree that the Commission can show, based on an analysis of current investor behavior, that the change would not have a meaningful impact on capital formation (because, for example, most investors already invest at below the percentage limits or because most investors in private offerings have income or net worth well above the thresholds) that would further strengthen the Commission's hand in advocating this change.

- Indexing all financial thresholds for inflation on a going-forward basis.

We strongly support the staff recommendation to index any financial thresholds included in the definition to inflation. The staff has outlined a sensible approach, timing the adjustment to coincide with the requirement to study the definition every four years and rounding the thresholds to the nearest $10,000. Periodic adjustments of this type avoid the shock to the system associated with an abrupt and sizeable adjustment to compensate for many years of inflation. Had the Commission taken this simple step when it first adopted the financial thresholds on which the accredited investor definition is based, the decades-long debate over the need to adjust the definition would likely have been avoided.

- Permitting spousal equivalents to pool their finances for purposes of qualifying as accredited investors.

We support treating spousal equivalents in the same way that spouses are treated for the purposes of calculating accredited investor financial thresholds. We congratulate the Commission for taking this step, which helps to bring the securities laws up to date with modern values and expectations.

Taken together, these proposed changes to the financial thresholds would improve protections for investors and appropriately update the definition without inappropriately constraining capital formation.

We Generally Support Proposals to Allow Qualification Based on Financial Sophistication

To the degree that it can be measured effectively, financial sophistication is likely to be a better indicator than income- and net worth-based financial thresholds of an individual's ability to fend for his- or herself without the protections afforded in the public markets. The challenge,

and it is significant, is to come up with an appropriate measure that reflects both the extent and the nature of the knowledge and expertise relevant to this circumstance. The staff offers five recommendations in this regard with varying degrees of rigor in the level of financial sophistication necessary to meet the specified qualification. These include:

- Permitting individuals with a minimum amount of investments to qualify as accredited investors.

We agree with the staff study that, "Investments may in some cases be a more meaningful measure of individuals' experience with and exposure to the financial and investing markets than income or net worth." Clearly, this is the case where net worth is based primarily on non-financial assets, such as a family farm or other non-financial family business. We therefore would consider a definition based on investments – rather than income or net worth – as an improvement over the current definition. We further agree that basing any such definition on the definition of investments in Rule 2a51-1(b) would make sense for consistency sake.

However, the Commission has offered no evidence that a definition based on investments would be effective as a measure of financial sophistication. We can imagine circumstances in which that would definitely not be the case: such as an individual with no previous investment experience who inherits an investment portfolio upon the death of a parent or spouse or an individual with an extensive portfolio who suffers from diminished capacity or Alzheimer's. For this reason, if the Commission were to pursue such a definition, it would be important to incorporate the concept of ability to withstand losses in the definition and set the investment threshold at an appropriately high level. Indeed, we believe this recommendation is better conceived as a substitute for the net worth threshold than as a separate measure of financial sophistication.

- Permitting individuals with experience investing in exempt offerings to qualify as accredited investors.

Investing in mutual funds or listed securities relies on very different knowledge and expertise than investing in private offerings based on limited public information. We therefore view the study's recommendation to expand the definition to include individuals with experience investing in exempt offerings as providing a better measure of relevant expertise than mere investment experience. The Commission's suggested approach recognizes, moreover, that not all such individuals will have "developed knowledge about the private capital markets, including their inherent risks" or gained experience "performing due diligence, negotiating investment terms and making valuation determinations." By proposing to limit the category to those who have "invested in at least ten private securities offerings, each conducted by a different issuer, under Securities Act Section 4(a)(2), the safe harbor promulgated thereunder, or Rule 506(c)," the staff study greatly increases the likelihood that this will serve as an appropriate measure of experience and expertise.

- Permitting individuals with certain professional credentials to qualify as accredited investors.

Individuals who are legally qualified to advise others on the risks and benefits of investing in private offerings can reasonably be considered qualified to decide whether such investments are appropriate for themselves. We agree with the staff study that the Series 7, Series 65, and Series 82 examinations likely "provide demonstrable evidence of relevant investor

sophistication because of the subject matter their examinations cover." We would therefore support expanding the accredited investor definition to include individuals who have passed these exams, regardless of whether they meet the financial thresholds in the current definition. It is, however, inevitable in our view that, if the Commission pursues this approach, others will lobby to have their credentials included on the list. The Chartered Financial Analyst credential is one that is often mentioned in this context which would seem to measure a high level of relevant expertise. As soon as the Commission goes down that route, however, it is likely to be accused of choosing winners and losers. It is essential that the Commission err on the side of caution and include only those credentials that set rigorous standards and cover relevant subject matter.

- Permitting knowledgeable employees of private funds to qualify as accredited investors for investments in their employer's funds.

The term "knowledgeable employees" includes employees of a private fund "who, in connection with his or her regular functions or duties, participates in the investment activities of such [private fund] or entities managed by the same manager as the fund ... provided that such employee has been performing such functions and duties for or on behalf of the [private fund], or substantially similar functions or duties for or on behalf of another company, for at least 12 months." We agree with the staff study that such individuals "likely have significant investing experience and sufficient access to the information necessary to make informed decisions about investments in their employer's funds." We therefore have no objection to including this category of individuals in the definition of accredited investor, although it seems unlikely to significantly expand the pool of eligible investors.

- Permitting individuals who pass an accredited investor examination to qualify as accredited investors.

We understand the view expressed in the staff study that, "Creating an accredited investor examination could provide a path for individuals who can objectively demonstrate they are financially sophisticated and understand the nature and risks of unregistered offerings to qualify as accredited investors." As the study points out, this approach has the benefit of offering the kind of bright light test that issuers favor. To achieve this goal, however, the examination would have to be rigorous enough to reliably test whether the individual fully understands the nature and extent of such offerings and has the capacity to evaluate the merits of such offerings. That poses a significant challenge. And, if such an approach were adopted, there would need to be procedures put in place to protect against gaming the test. We are frankly skeptical that a significant number of individuals who do not otherwise qualify as accredited investors would be interested in taking such a test. Before pursuing such an approach, which could be costly to implement, the Commission would be wise to first evaluate whether there is likely to be sufficient demand to justify the cost of developing and administering such a test.

The Commission Should Reconsider Its Treatment of Reliance on Professionals

The staff study dismisses out of hand the suggestion that the Commission consider allowing individuals to qualify as accredited investors based on reliance on advice from a fiduciary adviser. Many if not most investors delegate responsibility for due diligence to a financial professional, on whom they rely of investment recommendations. This is one reason that a measure based on investments may not reflect on the expertise of the individual investor, if that investor is relying on a professional adviser to make those investments. That is why it is of

paramount importance that the standards that apply in such circumstances afford an appropriate degree of investor protection.

In dismissing any consideration of how reliance on a financial professional could be incorporated in the accredited investor definition, the staff study does so on the wholly inadequate grounds that individuals are already able to invest in private offerings based on reliance on purchaser representatives. But as the SEC's Investor Advisory Committee pointed out in its recommendation, the investor protections afforded by the current provisions on purchaser representatives are woefully inadequate. We share the view of the IAC that these provisions need to be strengthened to prohibit individuals who are acting as purchaser representatives in a professional capacity from having any personal financial stake in the investment being recommended, to prohibit such purchaser representatives from accepting direct or indirect compensation or payment from the issuer, and to require a purchaser representative who is compensated by the purchaser to accept a fiduciary duty to act in the best interests of the purchaser.

If these changes were adopted, it might be possible for the Commission to consider expanding the definition of accredited investor to include individuals who rely on an independent, fiduciary adviser in making their investment decisions. Without these changes, such an approach would be wholly unacceptable. Indeed, these changes to the regulations governing purchaser representatives should be made regardless of whether the Commission acts separately to update the definition of accredited investor.

The Commission Should Promote Reliable Third-Party Verification

We are disappointed that the Commission study ignores what we view as one of the most important recommendations put forward by the IAC in its recommendation on this topic, and that is the need for a reliable system of third-party verification of accredited investor status. As long as issuers remain primarily responsible for verifying whether each investor in an offering is an accredited investor, they are likely to resist any changes to the definition that complicate that process. Instead of looking to solve the problem of verification, the staff study echoes this concern, highlighting the importance of easily verifiable "bright line" tests for the accredited investor definition. By thinking narrowly about the issue, and ignoring the potential to improve the verification process, the staff study limits the options that could be developed to improve the definition, since "bright line" tests are unlikely to reflect the variety of factors that are relevant to a determination of whether an investor needs the protections afforded in the public markets.

We are skeptical that a thoughtful recommendation on the accredited investor definition can or will be developed until this issue of streamlining the verification process is addressed. The only way to streamline the process without sacrificing investor protection, in our view, is to develop a process that shifts the burden of verification away from issuers and onto reliable third parties. As the IAC noted in its recommendation, concerns about implementation have caused "some who recognize shortcomings in the existing accredited investor definition to nonetheless resist changes that would make the definition more complex. For example, setting financial thresholds based on a percentage of assets or income, as discussed above, has the potential to greatly reduce potential risks to investors without reducing the pool of capital available for private offerings. Yet, without an alternative means of verifying accredited investor status, this approach would either have to rely on self-certification, which many investor advocates have found unacceptable, or would impose significant verification burdens that issuers would find

difficult if not impossible to undertake. Similar concerns are likely to be raised with regard to recommendations to base financial thresholds on financial assets, or to back retirement accounts out of the net worth calculation. Those concerns could be reduced, if not eliminated, if an independent third party existed to perform this function."

Failure of the Commission to address this issue, like its failure to assess the adequacy of the current definition, significantly decreases the likelihood that it will end up adopting an approach to defining accredited investor that improves protections for investors. We therefore urge the Commission to correct this oversight and to begin immediately to develop an approach to third-party verification that actively encourages the availability of such services while ensuring their independence and reliability. We agree with the IAC that this should begin with a study of current market practices with regard to verification, including: "whether third-party verification services are readily available at a price that makes them affordable for small issuers; who is currently offering such services and under what circumstances; whether impediments currently exist that restrict the availability of such services; and what additional steps, if any, are needed to encourage further development of such services."

Conclusion

The Commission has an obligation to ensure that the accredited investor definition is reasonably reliable in identifying a population of investors who are capable of fending for themselves without the protections afforded in the public markets. We do not believe that the current definition meets this standard. While the staff study does a fairly good job of laying out the various options available to the Commission to update the definition, it does not provide the analytical framework necessary to determine whether the current definition is adequately protecting investors or whether the available alternatives would serve that purpose more effectively. One reason is that the Commission does not currently collect the information on the private offering market to support such an evaluation. We therefore strongly urge the Commission to act on its previously proposed Regulation D reform proposals in order to ensure that it collects the information necessary to support both sound policy decisions and basic market oversight. We further urge the Commission to give greater attention to the investor protection implications of these policy decisions than is reflected in the current study. Only then can the Commission reasonably expect to adopt an approach that finds an appropriate balance between investor protection and capital formation.

Respectfully submitted,

Barbara Roper

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