115TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
115–375

FAIR INVESTMENT OPPORTUNITIES FOR PROFESSIONAL EXPERTS ACT

OCTOBER 31, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HENSARLING, from the Committee on Financial Services, submitted the following

R E P O R T

[To accompany H.R. 1585]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 1585) to amend the Securities Act of 1933 to codify certain qualifications of individuals as accredited investors for purposes of the securities laws, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Investment Opportunities for Professional Experts Act".

SEC. 2. DEFINITION OF ACCREDITED INVESTOR.

(a) IN GENERAL.—Section 2(a)(15) of the Securities Act of 1933 (15 U.S.C. 77b(a)(15) is amended—

(1) by redesignating clauses (i) and (ii) as subparagraphs (A) and (F), respectively; and

(2) in subparagraph (A) (as so redesignated), by striking "; or" and inserting a semicolon, and inserting after such subparagraph the following:

"(B) any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000 (which amount, along with the amounts set forth in subparagraph (C), shall be adjusted for inflation by the Commission every 5 years to the nearest $10,000 to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics) where, for purposes of calculating net worth under this subparagraph—

"(i) the person's primary residence shall not be included as an asset;

"(ii) indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except

that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

"(iii) indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;

"(C) any natural person who had an individual income in excess of $200,000 in each of the 2 most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

"(D) any natural person who is currently licensed or registered as a broker or investment adviser by the Commission, the Financial Industry Regulatory Authority, or an equivalent self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934), or the securities division of a State or the equivalent State division responsible for licensing or registration of individuals in connection with securities activities;

"(E) any natural person the Commission determines, by regulation, to have demonstrable education or job experience to qualify such person as having professional knowledge of a subject related to a particular investment, and whose education or job experience is verified by the Financial Industry Regulatory Authority or an equivalent self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934); or".

(b) RULEMAKING.—The Commission shall revise the definition of accredited investor under Regulation D (17 C.F.R. 230.501 et seq.) to conform with the amendments made by subsection (a).

PURPOSE AND SUMMARY

On March 16, 2017, Representative David Schweikert introduced H.R. 1585, the "Fair Investment Opportunities for Professional Experts Act," to modify the definition of an accredited investor under the federal securities laws to create additional avenues of funding for smaller private companies and to provide investors with additional investment opportunities.

H.R. 1585, as modified by an amendment in the nature of a substitute offered by Representative French Hill, amends the Securities Act of 1933 (Securities Act) to modify the definition of accredited investor to include: (1) persons whose individual net worth, including their spouse's, exceeds $1,000,000, excluding the value of their primary residence; (2) persons with an individual income greater than $200,000, or joint income with one's spouse greater than $300,000; (3) persons with a current securities-related license; and (4) persons whom the U.S. Securities and Exchange Commission (SEC) determines have demonstrable education or job experience to qualify as having professional subject-matter knowledge related to a particular investment, with FINRA or an equivalent self-regulatory organization verifying the education and job experience of such individual. The SEC also is directed to modify the definition of accredited investor under Regulation D to conform to these amendments.

BACKGROUND AND NEED FOR LEGISLATION

Smaller and emerging companies play a significant role as drivers of U.S. economic activity, innovation, and job creation. According to the SEC Advisory Committee on Small and Emerging Companies, companies less than five years old generate the majority of net new jobs in the United States, and these companies continue to add jobs as they mature. In short, the ability of these companies

to raise capital in the private markets is critical to both job creation and the economic well-being of the United States.

Under existing law, the federal securities laws allow companies to raise funds through both public and private offerings. The Securities Act requires companies that are publicly offering securities for investment to register the offering of the securities with the SEC and provide investors with all material information necessary to make an investment decision. The Securities Act contains certain exemptions from registration and authorizes the SEC to provide additional exemptions by rule in order for companies to raise capital through private offerings.

The SEC's Regulation D, which provides such an exemption, is based on a Securities Act provision stating that the obligation to register with the government will not apply to any "transactions by an issuer not involving any public offering." The U.S. Supreme Court stated that the exemption—when an offering is considered private—should turn on whether "the particular class of persons affected needs the protection" of the securities laws and should be utilized only by persons who can "fend for themselves."

To codify the criteria that only persons who can "fend for themselves" may participate in a private offering, and in 1982 the SEC adopted the term "accredited investor.". Under the SEC's standards, an investor's financial status is a proxy for their ability to fend for himself. Specifically, a the law deems a natural person as accredited if that person: (1) earned income that exceeded $200,000 (or $300,000 together with a spouse) in each of the prior two years, and reasonably expects the same for the current year; or (2) has a net worth over $1 million, either alone or together with a spouse (excluding the value of the person's primary residence).

Generally, smaller companies face significant obstacles when they seek to raise funds in the U.S. public capital markets. These obstacles often are attributable to the proportionately larger burden that securities regulations, which typically have been written for large public companies, place on smaller companies when they seek to go public. Beyond the costs directly impacting smaller companies in accessing capital, the stifling regulatory environment has restricted bank and other traditional financing for these companies, including an insufficient and too arbitrary pool of investors eligible to participate in private offerings.

Robust private markets have helped to serve as an alternative capital-raising forum in lieu of an initial public offering (IPO) process that has grown too burdensome. Today, the private securities markets rival the public markets in size, and the vast majority of private offerings are conducted in reliance on Rule 506 of Regulation D. According to SEC data, in 2014 registered (public) offerings accounted for $1.35 trillion of new capital raised, whereas $2.1 trillion was raised in private offerings. Of this $2.1 trillion in 2014, Regulation D accounted for $1.3 trillion (62 percent) of private offerings. As evidenced by these numbers, private offerings are a critical tool for small and emerging companies to raise capital, especially in light of the increasing burden to raise capital through public offerings. Furthermore, the SEC's Division of Economic and Risk Analysis has observed: "[T]he importance of the Regulation D market is magnified when considering that approximately two-thirds of Reg D offerings represent new equity capital . . . which is a more

permanent source of capital than debt, and thus more likely to reflect new investment as opposed to the refinancing of existing investment."

Against this backdrop, Congress and the SEC have the responsibility to modernize the ability to raise capital in private placements. Small and emerging companies rely on private placements to raise capital in a cost-effective manner without being subject to SEC rules and regulations that are increasing in burden and scope. Congress must not allow the private capital markets to follow the same path of the public markets, whereby innovators and entrepreneurs are stifled from starting and growing businesses.

The Need to Amend the Definition of Accredited Investor

Congress should act to expand the pool of eligible investors that can participate in private placements to enable investors—other than wealthy investors—to participate in private offerings by amending the definition of accredited investor to account for education and professional expertise. Individual investors that have the risk appetite and ability to understand the private offering should be able to invest; the government should not limit the options of individual investors to only those wealthy individuals the government deems worthy.

As Tom Quaadman, Executive Vice President of the U.S. Chamber of Commerce's Center for Capital Market Competitiveness, testified before the Capital Markets Subcommittee in March 2017:

> Only very wealthy people are afforded the opportunity to invest in private offerings. These arbitrary thresholds have the effect of being both under-inclusive and over-inclusive at the same time: They allow someone who inherited a fortune—but has no concept of financial markets—to invest in private offerings, but they won't allow someone with a Ph.D. in economics or finance to invest if their net worth and income happen to be below the thresholds. This makes little sense, and has the effect of contributing to disparities in income and wealth across our country.

At an October 4, 2017 Financial Services Committee hearing, SEC Chairman Jay Clayton agreed that the definition of accredited investor should be reconsidered and testified that he did not care for the binary nature of the current definition. Expanding the accredited investor definition not only benefits the companies raising funds but also provides investors with more attractive investment opportunities. As SEC Commissioner Michael Piwowar has astutely observed, allowing retail investors to invest in both public and private companies can actually have the effect of reducing risk in their overall portfolio.

In the Department of the Treasury's October 2017 report on Capital Markets, mandated by President Trump's February 3, 2017 Executive Order, Treasury advocates for broadening 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 or state-registered investment adviser, and financial professionals who are considered qualified to recommend Regulation D investments, such as registered representatives and investment adviser representatives.

To date, the SEC has failed to act on capital formation initiatives in a timely manner, including ensuring that individuals with the risk appetite and ability to understand private offerings may be permitted to invest. Accordingly, H.R. 1585 amends the definition of accredited investor to account for educational or professional expertise. H.R. 1585 also codifies the SEC's existing monetary thresholds and thereby prevents an increase in the current financial requirements to qualify as an accredited investor. The legislation does contemplate adjustments to those requirements every five years to account for inflation.

HEARINGS

The Committee on Financial Services and the Subcommittee on Capital Markets, Securities, and Investment held hearings examining matters relating to H.R. 1585 on March 22, 2017, April 26, 2017 and July 18, 2017.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on October 11, 2017, and October 12, 2017, and ordered H.R. 1585 to be reported favorably to the House as amended by a recorded vote of 58 yeas to 2 nays (Record vote no. FC–90), a quorum being present. Before the motion to report was offered, the Committee adopted an amendment in the nature of a substitute offered by Representative Hill by voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The sole recorded vote was on a motion by Chairman Hensarling to report the bill favorably to the House as amended. The motion was agreed to by a recorded vote of 58 yeas to 2 nays (Record vote no. FC–90), a quorum being present.

Record vote no. FC-90

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling	X			Ms. Maxine Waters (CA)	X		
Mr. McHenry	X			Mrs. Carolyn B. Maloney (NY)	X		
Mr. King	X			Ms. Velázquez	X		
Mr. Royce (CA)	X			Mr. Sherman	X		
Mr. Lucas	X			Mr. Meeks	X		
Mr. Pearce	X			Mr. Capuano		X	
Mr. Posey	X			Mr. Clay	X		
Mr. Luetkemeyer	X			Mr. Lynch		X	
Mr. Huizenga	X			Mr. David Scott (GA)	X		
Mr. Duffy	X			Mr. Al Green (TX)	X		
Mr. Stivers	X			Mr. Cleaver	X		
Mr. Hultgren	X			Ms. Moore	X		
Mr. Ross	X			Mr. Ellison	X		
Mr. Pittenger	X			Mr. Perlmutter	X		
Mrs. Wagner	X			Mr. Himes	X		
Mr. Barr	X			Mr. Foster	X		
Mr. Rothfus	X			Mr. Kildee	X		
Mr. Messer	X			Mr. Delaney	X		
Mr. Tipton	X			Ms. Sinema	X		
Mr. Williams	X			Mrs. Beatty	X		
Mr. Poliquin	X			Mr. Heck	X		
Mrs. Love	X			Mr. Vargas	X		
Mr. Hill	X			Mr. Gottheimer	X		
Mr. Emmer	X			Mr. Gonzalez (TX)	X		
Mr. Zeldin	X			Mr. Crist	X		
Mr. Trott	X			Mr. Kihuen	X		
Mr. Loudermilk	X						
Mr. Mooney (WV)	X						
Mr. MacArthur	X						
Mr. Davidson	X						
Mr. Budd	X						
Mr. Kustoff (TN)	X						
Ms. Tenney	X						
Mr. Hollingsworth	X						

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 1585 will expand the definition of an accredited investor to increase the pool of potential investors to help further enhance a company's ability to raise capital and grow and to provide additional investment opportunities for more Americans.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 26, 2017.

Hon. JEB HENSARLING,
Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1585, the Fair Investment Opportunities for Professional Experts Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 1585—Fair Investment Opportunities for Professional Experts Act

Current law provides a number of exemptions from the requirement that securities be registered with the Securities and Exchange Commission (SEC) prior to their sale. Central to those exemptions is the accredited investor, a person with sufficient financial sophistication and ability to sustain the risk of loss so that the

protections from the registration process are unnecessary. Accredited investors may participate in investment opportunities not available to non-accredited investors, such as purchasing securities that are exempt from registration.

H.R. 1585 would broaden the definition of an accredited investor to include licensed brokers or investment advisors and individuals with professional knowledge related to a particular investment, as verified by certain regulatory authorities.

Based on information from the SEC, CBO estimates that implementing H.R. 1585 would cost less than $500,000 for rulemaking activities related to the change in the definition of an accredited investor. Moreover, the SEC is authorized to collect fees sufficient to offset its annual appropriation; therefore, CBO estimates that the net effect on discretionary spending would be negligible, assuming appropriation actions consistent with that authority.

Enacting H.R. 1585 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 1585 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1585 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA).

If the SEC increases fees to offset the costs associated with implementing the bill, H.R. 1585 would increase the cost of an existing mandate on private entities required to pay those assessments. CBO estimates that the incremental cost of the mandate would be small and would fall well below the annual threshold for private-sector mandates established in UMRA ($156 million in 2017, adjusted annually for inflation).

The CBO staff contacts for this estimate are Stephen Rabent (for federal costs) and Logan Smith (for private-sector mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995.

The Committee has determined that the bill does not contain Federal mandates on the private sector. The Committee has determined that the bill does not impose a Federal intergovernmental mandate on State, local, or tribal governments.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

With respect to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the provisions of the bill and states that the provisions of the bill do not contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

DUPLICATION OF FEDERAL PROGRAMS

In compliance with clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of the bill establishes or reauthorizes: (1) a program of the Federal Government known to be duplicative of another Federal program; (2) a program included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139; or (3) a program related to a program identified in the most recent Catalog of Federal Domestic Assistance, published pursuant to the Federal Program Information Act (Pub. L. No. 95–220, as amended by Pub. L. No. 98–169).

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, (115th Congress), the following statement is made concerning directed rulemakings: The Committee estimates that the bill requires one directed rulemaking within the meaning of such section. This directed rulemaking will ensure that the SEC revises the definition of accredited investor under Regulation D to include the categories of investors set forth in this bill.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This Section cites H.R. 1585 as the "Fair Investment Opportunities for Professional Experts Act"

Section 2. Definition of accredited investor

This section amends the definition of an accredited investor to include (1) persons whose individual net worth, including their spouse's, exceeds $1,000,000, excluding the value of their primary residence; (2) persons with an individual income greater than $200,000 or joint income with one's spouse greater than $300,000; (3) persons with a current securities-related license; and (4) persons whom the SEC determines have demonstrable education or job experience to qualify as having professional subject-matter knowledge related to a particular investment, as verified by Financial Industry Regulatory Authority (FINRA) or an equivalent SRO. With respect to this last category (4), the SEC is responsible for establishing what education or job experience is sufficient to qualify, and FINRA or an equivalent SRO is responsible for verifying that the potential investor's education or job experience satisfies the SEC's regulation.

This section also directs to SEC to revise the definition of accredited investor under Regulation D to include the categories of investors set forth in this bill.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

SECTION 2 OF THE SECURITIES ACT OF 1933

DEFINITIONS

SEC. 2. (a) DEFINITIONS.—When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 5 shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an

issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security. Any offer or sale of a security futures product by or on behalf of the issuer of the securities underlying the security futures product, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities. Any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which such security-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell such securities. The publication or distribution by a broker or dealer of a research report about an emerging growth company that is the subject of a proposed public offering of the common equity securities of such emerging growth company pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective shall be deemed for purposes of paragraph (10) of this subsection and section 5(c) not to constitute an offer for sale or offer to sell a security, even if the broker or dealer is participating or will participate in the registered offering of the securities of the issuer. As used in this paragraph, the term "research report" means a written, electronic, or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited

liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

(5) The term "Commission" means the Securities and Exchange Commission.

(6) The term "Territory" means Puerto Rico, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 10) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 10 at the time of such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the

direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

(13) The term "insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner, or a similar official or agency, of a State or territory or the District of Columbia; or any receiver or similar official or any liquidating agent for such company, in his capacity as such.

(14) The term "separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, the District of Columbia, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(15) The term "accredited investor" shall mean—

[(i)**]** *(A)* a bank as defined in section 3(a)(2) whether acting in its individual or fiduciary capacity; an insurance company as defined in paragraph (13) of this subsection; an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account, which is subject to the provisions of the Employee Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, insurance company, or registered investment adviser**[**; or**]***;*

(B) any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000 (which amount, along with the amounts set forth in subparagraph (C), shall be adjusted for inflation by the Commission every 5 years to the nearest $10,000 to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics) where, for purposes of calculating net worth under this subparagraph—

(i) the person's primary residence shall not be included as an asset;

(ii) indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

(iii) indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;

(C) any natural person who had an individual income in excess of $200,000 in each of the 2 most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(D) any natural person who is currently licensed or registered as a broker or investment adviser by the Commission, the Financial Industry Regulatory Authority, or an equivalent self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934), or the securities division of a State or the equivalent State division responsible for licensing or registration of individuals in connection with securities activities;

(E) any natural person the Commission determines, by regulation, to have demonstrable education or job experience to qualify such person as having professional knowledge of a subject related to a particular investment, and whose education or job experience is verified by the Financial Industry Regulatory Authority or an equivalent self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934); or

[(ii)**]** *(F)* any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.

(16) The terms "security future", "narrow-based security index", and "security futures product" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934.

(17) The terms "swap" and "security-based swap" have the same meanings as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(18) The terms "purchase" or "sale" of a security-based swap shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(19) The term "emerging growth company" means an issuer that had total annual gross revenues of less than $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—

(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;

(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under this title;

(C) the date on which such issuer has, during the previous 3-year period, issued more than $1,000,000,000 in non-convertible debt; or

(D) the date on which such issuer is deemed to be a "large accelerated filer", as defined in section 240.12b–2 of title 17, Code of Federal Regulations, or any successor thereto.

(b) CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

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