Speech

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Commissioner Mark T. Uyeda

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Thank you, Dixie [Johnson], for that kind introduction. I am honored to be delivering the Alan B. Levenson Keynote Address before so many distinguished securities law practitioners. Alan's legacy and work at the Commission staff still resonates on the securities industry and market participants today.

Alan served as Director of the Division of Corporation Finance ("CorpFin") from 1970 to 1976. During his tenure, the Commission adopted a very significant and impactful regulation — rule 146 under the Securities Act of 1933 (the "Securities Act").[1] If rule 146 does not ring a bell, do not worry. You are probably well acquainted with its successor, rule 506.[2] Prior to the adoption of former rule 146 in April 1974, the Commission did not have rules interpreting section 4(2) of the Securities Act.[3] As a result, issuers faced uncertainty in determining whether a sale of securities did not involve "any public offering" and in applying case law on the topic, including the Supreme Court's decision in *SEC v. Ralston Purina Co.*[4] Imagine that — the Commission engaging in notice-and-comment rulemaking, including a re-proposal, to address regulatory uncertainty and ambiguity following judicial decisions. Yet, apparently, this approach is not feasible when it comes to crypto and digital assets.

But let's return to Alan. His leadership during the Commission's adoption of this first-of-its-kind rule is an example of his thought leadership as a securities lawyer and his significant contribution as a member of the Commission staff. When asked in an interview to name his greatest accomplishments as CorpFin director, Alan included former rule 146 but emphasized that the accomplishment belonged to a team and not him individually.[5]

Nearly fifty years after the adoption of former rule 146, the Commission's regime for regulating private offerings is the subject of continuing debate. In thinking about how to regulate these offerings, what should we do if we had a blank canvas to craft a new regime? Today, I will share my thoughts on how we might fill this canvas, with a focus on retail investors and early-stage start-up companies, as opposed to institutional investors and late-stage private companies or pooled investment vehicles.

This speech is the third in my initial trilogy of thoughts regarding topics in the CorpFin space. I previously discussed why the trajectory of rule 14a-8 shareholder proposals is unsustainable,[6] and why the Commission's recent rules on public company disclosure may be both ineffective for shareholders and costly for companies.[7] While the third movie of a trilogy is usually the worst and probably did not need to be made,[8] I am nonetheless excited to discuss the regulatory regime for private offerings.

My remarks today reflect my individual views as a Commissioner of the SEC and do not necessarily reflect the views of the full Commission or my fellow Commissioners.

Overview of Current Regulatory Regime for Raising Capital without Registration

Today, an issuer has multiple options for raising capital without filing a registration statement. Besides private offerings under section 4(a)(2) and its safe harbor, rule 506(b), there are at least five other categories of exemptions: (1) rule 506(c) under the Securities Act; (2) rule 504 under the Securities Act; (3) Regulation A, including tier 1 and tier 2; (4) Regulation Crowdfunding; and (5) the intrastate exemptions under section 3(a)(11) of the Securities Act and rules 147 and 147A.

And since we are in San Diego and I am a former California state securities regulator, let me throw in one more — Regulation CE, a Commission exemption for transactions exempt from qualification under Section 25102(n) of the California Corporations Code.[9]

Each exemption differs on particular factors, such as whether general solicitation is permitted, the types of issuers that can use the exemption, the types of investors that can purchase under the exemption, the amount of disclosure required, whether securities sold pursuant to the exemption are "restricted," and whether the exemption preempts state blue sky requirements. Normally, having choices is a good thing. However, even the most sophisticated securities lawyers often need a chart to track the different exemptions across the various factors.[10]

If we were starting from scratch, consideration should be given to streamlining the number of exemptions. I was recently in a meeting with a partner at a small venture capital firm who asked, "what is the exemption for the friends and family round?" It was a practical question that should have had a simple answer. Unfortunately, the answer given by a lawyer in the meeting was "it depends." Of course, this was the correct answer, as several of the exemptions could apply.

The interaction during this meeting was not a unique example. Many entrepreneurs have raised the complexity of our regulatory regime for exempt offerings.[11] A law school hypothetical on which exemption to use is the last thing that an entrepreneur wants to think about, or pay for, when trying to get his or her business off the ground.

Our regulatory regime should have an offering exemption tailored to each of the common capital raising scenarios. The requirements to raise capital for a start-up company in the "friends and family" round should be different from the requirements to raise capital for a billion-dollar company shortly before its IPO. The conditions for an operating company seeking money for working capital should be different from the conditions for a pooled investment vehicle seeking subscriptions for the fund.

Due partly to our regulations and partly to market practice, one exemption is much more commonly used than the others. As you have probably surmised, that is rule 506(b). I will share some statistics based on offerings by private companies between July 1, 2022 and June 30, 2023 and in which retail investors could participate.[12] Over 17,000 offerings relied on rule 506(b) to raise approximately $259 billion.[13] The next most used exemption was rule 506(c), with slightly more than 2,200 deals raising approximately $16 billion.[14] Other ways to raise capital without registration – such as Regulation A, Regulation Crowdfunding, and rule 504 – accounted, in the aggregate, for just over 1,500 offerings that raised approximately $2 billion.

Definition of Accredited Investor

When one exemption is used for offerings of all shapes and sizes, the conditions to that exemption can be both over- and under-inclusive, depending on the type of issuer claiming the exemption and the type of investor purchasing in the offering. Any regulatory changes aimed at addressing the over-inclusive aspect may worsen the under-inclusive aspect, and vice versa. There is perhaps no better example of this than the accredited investor condition in rule 506(b). Because of the frequent use of rule 506(b), recent debate on private capital raising tends to focus on that rule and its accredited investor element.[15]

A company relying on rule 506(b) can sell to up to 35 non-accredited investors.[16] However, if there are any non-accredited investors, the company must provide disclosure equivalent to that required in a Regulation A offering.[17] Due to this requirement, companies relying on rule 506(b) often do not permit participation by non-accredited investors. Indeed, approximately 95% of rule 506(b) offerings did not have any non-accredited investors.[18] The implication of the current rule and market practice is that many non-accredited investors do not have an opportunity to invest in private companies, even when these investors desire to do so and are able to assess the risks and rewards of making such investments.

Since its inception, the accredited investor definition has required a natural person to exceed $1 million net worth or $200,000 annual income thresholds.[19] Because these thresholds were introduced in 1982, some have called for the amounts to be indexed to inflation.[20] However, simply adjusting the thresholds for inflation assumes that the amounts established in 1982 are the correct levels on which to base any adjustment and that net worth and annual income are the correct metrics for eligibility to participate in private offerings.

In the year after the net worth and annual income thresholds were initially adopted, approximately 1.8% of U.S. households qualified as an accredited investor.[21] Accordingly, one potential adjustment is to set the net worth and annual income levels so that 1.8% of households today would qualify as accredited investors. Alternatively, the net worth and annual income levels could be adjusted for inflation from 1982 to current dollars. If this adjustment were made to 2022 dollars, approximately 6.5% of U.S. households would have qualified as accredited investors.[22]

As of 2022, approximately 18.5% of households qualified as accredited investors under the current net worth or annual income thresholds.[23] Should that 18.5% be reduced to 6.5% or an even lower 1.8%? What is the appropriate percentage of households that should qualify as accredited investors under the net worth and annual income thresholds? It is unclear why having fewer accredited investors, whether at 6.5% or 1.8% of U.S. households, is preferrable to having more accredited investors. Raising the thresholds would have profound negative implications for two groups of investors.

The first group is racially and ethnically diverse investors. Black and Hispanic investors qualify as accredited investors at a lower rate than White and Asian American investors.[24] Increasing the net worth and annual income requirements would have a disproportionate impact on these groups and heighten the disparity.[25] This may be particularly consequential because diverse investors are more likely to fund diverse founders.[26] Entrepreneurs of color may not have adequate access to traditional financial systems, including bank loans, and they may not benefit from an existing network of accredited investors.[27] Accordingly, any reduction in the pool of diverse accredited investors may also adversely affect the ability of persons of color to finance their start-ups.

The second group is younger investors. These investors may not have had the time or opportunities to build more than $1 million in net worth or exceed $200,000 in annual income. However, they may have less need for liquidity, longer investment horizons, and greater risk tolerance compared to a person nearing retirement. The profile of younger investors may make them better suited for investments in private companies, but more stringent net worth and annual income thresholds do not reflect those considerations. By making it more difficult for younger people to qualify as accredited investors, our rules may deny them opportunities to invest in private companies at an earlier age and build wealth through that investment as they age and the company grows.

Sliding Scale Approach to Investing in Private Companies

Instead of simply adjusting the net worth and annual income thresholds for inflation, we should consider new approaches to defining the pool of investors that can invest in private companies. One possibility is to create a sliding scale approach and allow any individual to invest at least a small amount in private companies over the course of a year.[28] Currently, the accredited investor definition is an “all or nothing” approach. If a person has a dollar more in net worth or income than the applicable threshold, then that person can invest all of his or her assets into a single offering. But, if that person has a dollar less, then he or she cannot invest in any offering limited to accredited investors. Does that result make sense?

With a sliding scale approach, a person would be able to invest up to a certain percentage, based on a personal financial metric, in private companies during a rolling time period. The percentage would increase as the amount of the financial metric increases. The financial metric could be the dollar value of a person’s investments in securities. For example, if a person’s securities investments were less than $100,000, then the person could invest up to 5% of such amount in private companies during a rolling 12-month period. If securities investments were between $100,000 and $500,000, then the person could invest up to 10%. The percentage would increase until it reaches 100% when the person's securities investments exceed a certain level.

This approach, as opposed to simply indexing the net worth and annual income tests to inflation, is rooted in the notion that investor protection cannot be achieved through paternalistic policies. Investments in private, growth-stage companies that are higher-risk, higher-reward may be beneficial as part of a person's diversified portfolio. Our regulatory regime should allow an investor to include these investments in their portfolio to some degree if the investor believes that the risk is appropriate. Prohibiting individuals who fall below net worth and annual income thresholds from making such investments, under the guise of investor protection, may ultimately harm those individuals by depriving them a source of wealth accumulation and reducing their risk diversification. Such prohibition also harms entrepreneurs and start-up companies by denying them potential sources of capital.

Furthermore, prohibiting a subset of investors from investing in private companies — based on the notion that the investments are too risky – may be a form of merit regulation. The government should not substitute its risk tolerance for that of investors. In perhaps the most famous example of when a government's risk assessment turned out to be incorrect, Massachusetts barred individual investors, but not institutional investors, in the state from purchasing shares of Apple during the company's IPO in 1980 due, in part, to Apple's price to earnings ratio exceeding the regulator's statutory amount by four and one-half times.[29] Since its IPO, the annualized return of Apple stock is approximately 19%, compared to approximately 9% for the S&P 500 index during the same period. Of course, not every investment will perform as Apple stock has. But the government should not make that investment decision for individuals.

In 2020, the Commission began to move away from solely relying on net worth and annual income levels for individuals to qualify as accredited investors, when it expanded the definition to include individuals holding a Series 7, 65, or 82 license.[30] In doing so, the Commission recognized that "[an expanded] pool of accredited investors may have a positive impact on capital formation…in offerings by issuers that are small, in development stages, or in geographic areas that currently have lower concentrations of accredited investors."[31] A sliding scale approach that allows more individuals to invest in private companies to some degree may have the same positive impact.

Historically, the Commission considered an individual's ability to sustain the risk of loss of an investment when determining whether the individual should be an accredited investor.[32] But in the 2020 amendments to expand the definition, the Commission recognized that the ability to assess an investment opportunity should also be considered.[33]

The sliding scale approach follows this consideration by using securities investment, as opposed to net worth or annual income, as the financial metric. A person may have a high net worth or annual income but little to no experience investing in securities. He or she may therefore lack the ability to analyze the risks and rewards that come with such investing. However, when an individual has a history of investing in securities, he or she may be more likely to be able to assess the risks and rewards of investing in a private company. In 2007, the Commission proposed, but did not ultimately adopt, a similar "investments-owned" standard for qualifying as an accredited investor.[34] Though this standard would have included non-securities investments, such as certain real estate, the Commission noted that "investments owned may be a more accurate…standard than assets owned to determine whether an investor needs the protection of Securities Act registration."[35]

General Considerations for the Private Markets

Beyond the issue of who can invest in private companies, recent debate has also focused on the size of the private markets relative to the public markets and the lack of disclosure available about private companies.[36]

When discussing the growth and size of the private markets, an important distinction must be made between offerings by pooled investment vehicles, or funds, and offerings by operating companies. Both funds and companies can rely on rules 506(b) and 506(c) to raise capital. Between July 1, 2022 and June 30, 2023, the dollar value of offerings by funds accounted for approximately 90% of all amounts raised under Regulation D.

[37] Moreover, 81% of all amounts raised were by funds whose investors are exclusively qualified purchasers.[38] An individual is a qualified purchaser only if he or she owns at least $5 million of investments,[39] which is a significantly higher standard than the net worth and annual income tests that apply to investors in operating companies. Because of the disparity in the investor pool between funds and operating companies, any discussion of the growth and size of private markets should separate offerings by funds and offerings by companies. When isolated to capital raised by U.S. operating companies, the dollar value of offerings relying on exemptions applicable to retail investors accounted for only 17% of all offerings, both registered and exempt.[40] In contrast, registered offerings accounted for 51%.[41]

Within the private market for operating companies, investor protection mechanisms have always existed and will continue to exist. While there is less mandatory disclosure in exempt offerings, there is not necessarily an absence of disclosure. Market practice and negotiations between the issuer and a purchaser may result in issuers providing some disclosure. Another impetus for issuers to provide sufficient disclosure is that the federal securities laws' antifraud provisions apply equally in the private markets as they do in the public markets. Accordingly, issuers of exempt offerings have incentives to disclose the material information necessary to avoid liability under these provisions.

Unfortunately, no regulatory regime can completely eliminate fraud, which occurs at private companies, just as it occurs at public companies. Undoubtedly, investments in private companies may be riskier because the companies may have unproven business models and there may be little liquidity for the stock. Many of these companies may go bankrupt and return nothing to their investors. But we cannot equate business ideas that do not become successful with fraudulent behavior, and then impose disproportionately draconian rules as a remedy. Such a regulatory approach may ultimately cause far greater harm by preventing more legitimate businesses from starting than eliminating bad actors from the marketplace.

A growing private market should not be an automatic source of concern. Our capital markets can have vibrant private and public markets at the same time, and our regulatory regime should aim for that result.

Conclusion

As we look to the new year, amendments to Regulation D, including the accredited investor definition, are on the Commission's rulemaking agenda.[42] Beyond the legal discussions of how to qualify as an accredited investor or what disclosure should be required in rule 506(b) offerings, the Commission should consider the long-term, real world impacts that any rulemaking will have on retail investors and entrepreneurs, particularly those from historically underrepresented backgrounds. These investors and entrepreneurs are concerned about opportunity. For investors, it is the opportunity to build wealth through investments, even if it is a limited amount of money each year. For entrepreneurs, it is the opportunity to access an adequate pool of capital to fund a business idea.

The long-term health of our capital markets requires a vibrant start-up ecosystem where ideas can lead to new products and services that improve standards of living and otherwise enrich our lives. But if the Commission takes a paternalistic approach to regulating the private markets, those opportunities for investors and entrepreneurs may be less likely to happen. This ultimately deprives society of economic growth and gives less meaning to investor protection in the long term.

Before concluding, I would like to thank the Commission staff for two recent publications that contain thoughtful discussions on the topics of exempt offerings and accredited investors and that are also excellent sources of data, including some that I cited to today. One is the 2023 Annual Report by the Office of the Advocate for Small Business Capital Formation,[43] and the other is the Review of the "Accredited Investor" Definition,[44] prepared largely by the staff of CorpFin and the Division of Economic and Risk Analysis. I encourage everyone to review those publications.

More broadly, I also want to recognize the daily efforts of the CorpFin disclosure staff, who facilitate capital formation and protect investors by timely reviewing registration statements and Exchange Act reports and with whom many of you interact on a regular basis. Recently, the Commission approved an omnibus order to permit the listing of 11 spot bitcoin exchange-traded products.[45] Concurrent approval was important so that no particular bitcoin ETP obtained a first-mover advantage. While much of the attention was focused on the approval of rule amendments for various national securities exchanges by the Division of Trading and Markets, I want to recognize the tremendous efforts of the CorpFin staff in simultaneously declaring effective nearly all of the associated registration statements.

Thank you and enjoy the rest of this conference.

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[1] *See* Notice of Adoption of Rule 146 under the Securities Act of 1933 – "Transactions by an Issuer Deemed Not to Involve Any Public Offering," Release No. 33-5487 (Apr. 23, 1974) [39 FR 15261 (May 2, 1974)].

[2] *See* Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales,

Release No. 33–6389 (Mar. 8, 1982) [47 FR 11251 (Mar. 16, 1982)] ("Rule 506 Adopting Release").

[3] Since re-codified as Section 4(a)(2).

[4] 346 U.S. 119 (1953).

[5] Interview with Alan B. Levenson (Jan. 14, 2003) at p.15-16, available at https://www.sechistorical.org/collection/oral-histories/levenson011404Transcript.pdf.

[6] Mark T. Uyeda, Remarks at the Society for Corporate Governance 2023 National Conference (June 21, 2023), available at https://www.sec.gov/news/speech/uyeda-remarks-society-corporate-governance-conference-062123.

[7] Mark T. Uyeda, Remarks at the Practising Law Institute's 55th Annual Institute on Securities Regulation (Nov. 7, 2023), available at https://www.sec.gov/news/speech/uyeda-remarks-practicing-law-institute-110723.

[8] *See*, *e.g.*, Exa Zim and Nathaniel Lee, Why the Third Film in a Trilogy is Almost Always the Worst (May 6, 2020), https://www.businessinsider.com/why-the-third-film-in-a-trilogy-almost-always-sucks-2020-5.

[9] 17 CFR 230.1001.

[10] For an example of such a chart, see Overview of Capital-Raising Exemptions, available at https://www.sec.gov/education/smallbusiness/exemptofferings/exemptofferingschart.

[11] *See* OASB Report, *infra* note 44, at p.70 ("Many of the entrepreneurs we met—no matter how business savvy or technologically sophisticated—noted that the capital-raising rules are complex and expressed the need for accessible resources at every stage to help them understand what capital-raising pathways may be available to them.").

[12] The statistics exclude offerings by pooled investment vehicle and offerings relying on Regulation S and/or rule 144A under the Securities Act.

[13] *See* OASB report, *infra* note 44, at p.16.

[14] *Id.*

[15] *See*, *e.g.*, Meeting Agenda of the Investor Advisory Committee (Sept. 21, 2023), available at https://www.sec.gov/about/advisory-committees/investor-advisory-committee/iac092123-agenda and Agenda - Meeting of Small Business Capital Formation Advisory Committee (Nov. 29, 2023), available at https://www.sec.gov/sbcfac-agenda-112923?auHash=EFNL8yV50oQDjal_VZHfQxJ_6GvEAsxIXmVF-cf_olk.

[16] *See* 17 CFR 230.506(b)(2). The non-accredited investor purchaser must, either alone or with its representative, have "such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment…" *Id.*

[17] *See* 17 CFR 230.502(b).

[18] Based on information in Form D filings by U.S. private companies between July 1, 2022 and June 30, 2023 and compiled by the Commission staff. *See also* Staff Accredited Investor Report, *infra* note 45, at 37 ("[W]e estimate that only approximately 20,259, or 6%, of all Rule 506(b) offerings initiated during 2009 through 2022

involved non-accredited investors") and Accredited Investor Definition, Release No. 33-10824 (Aug. 26, 2020) [85 FR 64234, 64259 (Oct. 9, 2020)] ("2020 Accredited Investor Release") ("[The Commission] estimate that, from 2009 to 2019, only between 3.4% and 6.9% of the aggregate number of offerings conducted under Rule 506(b) included non-accredited investor purchasers"), available at https://www.sec.gov/files/rules/final/2020/33-10824.pdf.

[19] *See* Rule 506 Adopting Release at 11255. In 1988, the Commission added an additional $300,000 joint annual income threshold. *See* Regulation D Revisions, Release No. 33–6758 (Mar. 3, 1988) [53 FR 7866 (Mar. 10, 1988)]. References in this speech to the annual income threshold will be to both the individual $200,000 threshold and the joint $300,000 threshold, unless the context dictates otherwise.

[20] *See*, *e.g.*, Staff Accredited Investor Report at 46-48 and 2020 Accredited Investor Release at 64253.

[21] *See* Staff Accredited Investor Report, *infra* note 45, at p.23.

[22] *Id*. at p.25.

[23] *Id*. at p.23.

[24] *See* OASB report, *infra* note 44, at p.73.

[25] *Id*. at p.76.

[26] *Id*. at p.73.

[27] *Id*.

[28] The Commission currently uses a similar concept in Regulation A and Regulation Crowdfunding. For tier 2 offerings under Regulation A where the security is not listed on an exchange, sales to a non-accredited investor cannot exceed more than 10% of the investor's net worth or annual income. 17 CFR 230.251(d)(2)(i)(C)(1). Under Regulation Crowdfunding, sales to a non-accredited investor relying on the crowdfunding rules during a 12-month period cannot exceed certain dollar thresholds or percentages of the investor's net worth or annual income. 17 CFR 227.100(a)(2).

[29] *See* Richard E. Rustin and Mitchell C. Lynch, *Apple Computer Set to Go Public Today; Massachusetts Bars Sale of Stock as Risky*, Wall St. J., Dec. 12, 1980, at p.5, available at https://www.wsj.com/public/resources/documents/AppleIPODec12_1980_WSJ.pdf.

[30] *See* 2020 Accredited Investor Release and Order Designating Certain Professional Licenses as Qualifying Natural Persons for Accredited Investor Status, Release No. 33-10823 (Aug. 26, 2020) [85 FR 64234 (Oct. 9, 2020)], available at https://www.sec.gov/rules/other/2020/33-10823.pdf.

[31] 2020 Accredited Investor Release at 64260.

[32] *See*, *e.g.*, Regulation D Revisions; Exemption for Certain Employee Benefit Plans, Release No. 33-6683 (Jan. 16, 1987) [52 FR 3015 (Jan. 30, 1987)] at 3017 ("[The accredited investor] concept is intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary.").

[33] *See* 2020 Accredited Investor Release at 64235. The Commission stated that ability to assess an investment opportunity includes "the ability to analyze the risks and rewards, the capacity to allocate investments in such a way as to mitigate or avoid risks of unsustainable loss, or the ability to gain access to information about an issuer or about an investment opportunity." *Id*.

[34] Revisions of Limited Offering Exemptions in Regulation D, Release No. 33-8828 (Aug. 3, 2007) [72 FR 45116 (Aug. 10, 2007), available at https://www.sec.gov/files/rules/proposed/2007/33-8828.pdf.

[35] *Id*. at 45119.

[36] *See*, *e.g.*, Staff Accredited Investor Report, *infra* note 45, at p.5-6.

[37] *See* OASB report, *infra* note 44, at p.75.

[38] *Id*. at p.74-75.

[39] *See* section 2(a)(51)(A)(i) of the Investment Company Act of 1940.

[40] *See* OASB report, *infra* note 44, at p.16 ($284 billion raised pursuant to rule 506(b), rule 506(c), Regulation A, Regulation Crowdfunding, and rule 504, compared to $1,706 billion raised pursuant to those exemptions, exempt offerings under Regulation S and/or rule 144A, and registered offerings).

[41] *Id*. ($874 billion raised pursuant to registered offerings, compared to $1,706 billion raised pursuant to registered offerings and exempt offerings). The remaining 32% were pursuant to offerings relying on Regulation S and/or rule 144A. *Id*. ($548 billion raised pursuant to Regulation S and/or rule 144A, compared to $1,706 billion raised pursuant to registered offerings and all exempt offerings).

[42] Commission Agency Rule List – Fall 2023, Regulation D and Form D Improvements, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3235-AN04.

[43] Office of the Advocate for Small Business Capital Formation, Annual Report Fiscal Year 2023 (“OASB Report”), available at https://www.sec.gov/files/2023-oasb-annual-report.pdf.

[44] Review of the “Accredited Investor” Definition under the Dodd-Frank Act (Dec. 14, 2023) (“Staff Accredited Investor Report”), available at https://www.sec.gov/files/review-definition-accredited-investor-2023.pdf.

[45] *See* Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units, Release No. 34-99306 (Jan. 10, 2024), available at https://www.sec.gov/files/rules/sro/nysearca/2024/34-99306.pdf.