

Small Business Securities Bulletin

A periodic bulletin keeping small businesses informed about current developments in securities law and related matters



[Penny Somer-Greif](#) | psomergreif@ober.com

SEC's Final Rule Adopting Revised Accredited Investor Definition

Last month, the Securities and Exchange Commission (SEC) adopted final amendments to its rules defining an “accredited investor” under the Securities Act of 1933 (Securities Act), with respect to private offerings exempt from the registration provisions of the Securities Act. Certain securities offerings solely to accredited investors are exempt from Securities Act registration pursuant to Section 4(5) of the Act. Further, accredited investors are exempt from the 35-person limit for private offerings conducted pursuant to Rules 505 and 506 of Regulation D under the Securities Act and do not have to be provided the higher level of disclosure regarding the offering and the issuer that is required if non-accredited investors participate in the offering. Individuals can be considered accredited investors if they meet certain income requirements or have a \$1 million net worth.

The SEC’s amended rules revise the definition of “accredited investor” in accordance with Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which required the SEC to adjust the net worth standard to exclude the value of the investor’s primary residence. The SEC’s amended rules provide that, for purposes of the net worth calculation, (i) a person’s primary residence shall not be considered an asset, (ii) debt secured by such residence, up to the estimated fair market value of the residence, is not included as a liability, except to the extent that such debt exceeds the amount outstanding 60 days before the date of the investment (other than as a result of the purchase of the residence), and (iii) debt secured by the primary residence will be included as a liability to the extent such debt exceeds the estimated

fair market value of the home. There is also a grandfathering provision for persons who purchase securities pursuant to a right to purchase such securities acquired before July 20, 2010, the date Dodd-Frank was enacted, if such person qualified as an accredited investor based on the net worth calculation when the rights were acquired and held other securities of the issuer on July 20, 2010.

Since the exclusion of an investor's primary residence from the net worth calculation was effective upon the enactment of Dodd-Frank, the only change from current practice as a result of the SEC's final rules is the provision with respect to additional mortgage debt incurred within 60 days before the investment date. The SEC enacted this provision to "prevent investors from artificially inflating their net worth by incurring incremental indebtedness secured by their primary residence, thereby effectively converting their home equity – which is excluded from the net worth calculation ...- into cash or other assets that would be included in the net worth calculation," and, similarly, to prevent the sellers of securities to convince potential investors to do so. The SEC's adopting release is available at www.gpo.gov/fdsys/pkg/FR-2011-12-29/pdf/2011-33333.pdf.

About Ober Kaler

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About Me

I am a former SEC attorney who also has prior "big firm" experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you. Visit my bio at www.ober.com/attorneys/penny-somer-greif.

This Bulletin contains only a general overview of the matters discussed herein and should not be construed as providing legal advice. If you have any questions about the information in this Bulletin or would like additional information with respect to these matters, please contact me at 410.347.7341 or via e-mail at psomergreif@ober.com.

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