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Comment on SEC Release 33-8828; IC-27922; File No. S7-18-07 in 72-FR45116

Concerning “II. Proposed Revisions of Regulation D”, “B. Proposed Revisions Related to Definition of Accredited Investor”, “4. Adding Categories of Entities to List of Accredited and Large Accredited Investors” (p. 24)

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Tribes Should Be Eligible To Be Accredited Investors

It is important that the clarification regarding Indian tribes be added to the list of Rule 501(a)(3) entities which can potentially qualify as accredited investors, as is done in the new language contained in this SEC Release 33-8828 (72-FR45116), dated August 10, 2007. As consultants to many Native American tribes and tribal businesses who are in the process of forming privately placed equity funds to invest in Native businesses, we support this addition as a way for tribes to participate in the investment markets on an equal footing with everybody else, and as a continued spur to tribal economic development.

Not being explicitly mentioned in the list of allowable accredited investors can lead to exclusion. These days, tribes are complex agglomerations of tribal government and tribally-owned non-profits, corporations, and limited liability companies (LLCs). Some of these are state-chartered, and many are federally- or tribally-chartered. The status of tribes as accredited investors has therefore been somewhat ambiguous. The SEC’s recent clarification, stating that it was intended that tribes be included as potential accredited investors, therefore comes as welcome clarification. Making it clear whether and how tribes can qualify as accredited investors will save months of time and thousands of dollars for issuers, and more importantly will open the doors to more investment choices for tribes.

Just like everyone else with growing, substantial investment assets, tribes should have the ability to select from a variety of investment choices to determine the investment portfolio that best meets their needs. In recent years, for large, well-diversified investors, some of the best investment returns have come from private alternative investments such as venture capital, private equity, hedge funds, and private REITs. Participation in these funds is restricted to accredited investors. Without clear accredited investor status, tribes would be excluded from investing in these investment categories. Anecdotal discussion suggests that tribes have been able to invest in these types of investments through tribally-owned qualifying entities such as development corporations, growth or permanent funds using corporate structures, and endowments. However, not all tribes separate their investment functions from government activities, and so clarifying whether tribal governments can invest for future needs as accredited investors would open opportunity for these tribes.

Tribes are somewhat unique in that they combine elements of government and social services, and business and economic development. As such, tribes have a need to consider financial needs over a time horizon of a few years to many generations into the future. Many tribes have kept cash not immediately needed in low-earning, but safe investments such as Treasury bonds and certificates of deposit (CDs). Tribes not diversifying into higher earning investment portfolios are falling behind other investors and individuals on a relative basis. Of course, investment diversification should be done prudently, without undue risk, due to the purpose of tribal governments. However, with sufficiently large assets, it is prudent to seek growth in privately-placed investments in a component of tribal investments. Some tribes have tens or hundreds of millions of dollars to invest, and should be able to put a reasonable allocation into these higher-earning, accredited investor requiring investments just as other wealthy and institutional investors do. Tribes increasingly have high-caliber finance/investment staff and external financial advisors, and are participating in larger and larger deals. Recently, one tribe outbid a private equity fund for a corporation in an investment greater than \$1 billion. Clearly if tribes can compete for investments sought by funds requiring accredited investors, then they should also be able to invest in investment funds requiring accredited investors. Clearly, some tribes have amounts to invest much higher than the minimum asset requirements for accredited investor rules.

Tribes are also increasingly desiring to invest together in business opportunities. To the extent that multi-tribe joint venture investments might fall under rules requiring accredited investors, if tribes were not accredited investors, they might not be able to do these deals, and Indian Country development would probably be able to access less capital as a result. Allowing tribes to qualify as accredited investors allows intertribal investing to support the continued private sector growth in Indian Country.

The CDFI Fund found that access to capital was more difficult in Indian Country, the sum total of U.S. reservations and other tribal lands, than in the surrounding U.S. Economic conditions and the limitations on capital investment from sources of credit and other types of capital were documented in the CDFI Fund's October 2001 report on the Native American Lending Study (http://www.cdfifund.gov/docs/2001_nacta_lending_study.pdf). The CDFI Fund's 2001 Native American Lending Study "Equity Investment Roundtable and Research Report" (http://www.cdfifund.gov/docs/2001_nacta_final_report_equity.pdf) found a \$10 billion equity gap in

Indian Country. This gap came mostly from the lack of external equity being invested in Indian Country. The CDFI Fund has subsequently funded the creation of at least 40 certified Native CDFIs, with more in design. Investment skill sets, capabilities, and capital under management are growing within many tribes. There is still a need for much more capital, given the economic progress and potential of Indian Country, and some funds are trying to bridge the gap. Tribes need to be accredited investors to be able to invest in these funds, in order to be able to fund more tribal and Native-owned businesses, and begin to bridge the capital access gap in Indian Country.

Real estate investment is another need in Indian Country that REITs or funds requiring accredited investors might meet. As trust land can not serve as collateral for traditional mortgages without other enhancements such as government guarantees or programs, adequate housing is still in short supply with waiting lists at most tribes. Buildings to be used in businesses also suffer from these restrictions. Opening up tribes to invest in these types of investments as accredited investors allows wealthy tribes to invest in these types of investments in Indian Country as well. Many tribes feel more comfortable having other tribes invest in their opportunities than outside investors who may not have as great an understanding of tribal needs and dynamics.

Tribal governments are sovereign nations who need to serve the needs of their people today and long into the future. Some tribes are creating endowments, permanent funds, or growth funds to provide for the future social and economic needs of the tribe. These investors should be able to invest in the investments that make the most sense for their risk-return characteristics, including those requiring accredited investors.

Tribes increasingly have diversified economies with cash coming in from businesses in different industries, investment portfolios, bank deposits, and government and other grants. Making a prudent investment into investments requiring accredited investors should not pose undue risk or hardship to a tribe wealthy enough to diversify risk. In fact, it could well be argued in many cases that a “prudent man” would find it limiting not to be able to invest in investments requiring accredited investors.

Some tribes may also be able to qualify as the newly defined status of “large accredited investor” and therefore also as a “qualified purchaser” based on their financial characteristics, as discussed in “I. Background and Overview of Proposals”, n25-n26, pg. 5. For the same reasons as outlined above for tribes as accredited investors, it also makes sense to allow tribes to participate in investments requiring large accredited investors and qualified purchasers.

For all these reasons, we support the SEC’s clarification on allowing Indian tribes to be included among the list of allowable entities to try to qualify as accredited investors and large accredited investors under all applicable securities laws.