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KIRSTIN P. SALZMAN
KANSAS CITY:
816.983.8316
KIRSTIN.SALZMAN@
HUSCHBLACKWELL.COM

Issuers Beware: SEC Has Amended the Definition of an “Accredited Investor”

On December 21, 2011, the Securities and Exchange Commission announced an amendment to its definition of “accredited investor” that excludes the value of a primary residence and includes certain liabilities secured by primary residences in the net worth calculations used to determine whether an individual qualifies as an accredited investor. The amendment also has a limited “grandfathering” provision. The amendment, which affects an issuer’s ability to qualify for certain exemptions from the registration requirements of the Securities Act of 1933 for certain private and limited offerings, was enacted to comply with requirements set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

New Rules Regarding Primary Residences

Under the new rules, individuals qualify as accredited investors if their net worth alone or jointly with their spouse exceeds \$1 million, excluding the value of their primary residence. This is a significant change from the former net worth requirement for an accredited investor, which allowed investors to include the equity in their homes in their net worth.

Debt secured by a primary residence will be considered a liability, reducing an individual’s net worth in two circumstances. First, any debt in excess of the fair market value of the primary residence will reduce an investor’s net worth. Second, any debt incurred within the 60 days prior to the sale of securities will reduce an investor’s net worth, regardless of whether the total amount of debt secured by the primary residence exceeds its fair market value, unless the debt was incurred to purchase the primary residence.

The SEC stated that the purpose of the 60-day look-back provision is 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 under the rules adopted today – into cash or other assets that would be included in the net worth calculation.”

As under the current rules, net worth is calculated once at the time of the sale of securities.

“Grandfathering” Provision

The amendment provides for limited grandfathering under certain circumstances. A person who no longer qualifies as an accredited investor may still purchase securities in that capacity if, as of July 20, 2010, the person satisfied the then-existing definition of an accredited investor and owned from the issuer both securities and a right to purchase future securities. Examples of rights to purchase securities include pre-emptive rights and a right of first offer to purchase securities later sold by the issuer.

What This Means to You

Issuers of securities should exercise greater diligence, including amending investment documents, to determine whether investors qualify as accredited investors.

Contact Info

If you have any questions about these recent developments or any other SEC compliance matters, please contact your Husch Blackwell attorney.

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