

Impact of DOMA's unconstitutionality on the definitions of "accredited investor" and "qualified purchaser"

The June 26, 2013 decision of the US Supreme Court in *United States v. Windsor*, by invalidating Section 3 of the Defense of Marriage Act ("**DOMA**"), among other things has the effect of changing the meaning of the term "spouse" in the definitions of "accredited investor" in Rule 501(a) of the SEC's Regulation D under the Securities Act of 1933 (the "**1933 Act**") and "qualified purchaser" in Section 2(a)(51) of the Investment Company Act of 1940 (the "**1940 Act**"). Effective immediately, an individual's "spouse" now includes anyone to whom the individual is married, including someone of the same sex. The resulting expansion of eligibility for accredited investor and qualified purchaser status will have a positive impact on capital formation by emerging growth companies and other issuers and will broaden the base of potential investors in private equity and hedge funds.

Regulation D under the 1933 Act defines "accredited investor" in Rule 501(a) to include "[a]ny natural person whose individual net worth, or joint net worth with that person's *spouse*, exceeds \$1,000,000" and "[a]ny natural person who had an individual income in excess of \$200,000 in each of the two 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" (emphasis added). Accredited investors may be included in private securities offerings under the Regulation D "safe harbor" without limit. Under the Jumpstart Our Business Startups Act of 2012 (the "**JOBS Act**"), private securities offerings conducted without "general solicitation" restrictions may include *only* accredited investors.

Section 2(a)(51) of the 1940 Act defines "qualified purchaser" to include "[a]ny natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under Section 3(c)(7) with that person's qualified purchaser *spouse*) who owns not less than \$5,000,000 in investments" and "[a]ny company that owns not less than \$5,000,000 in investments and that is owned directly or indirectly by or for two or more natural persons who are related as siblings or *spouse* (including former *spouses*), or direct lineal descendants by birth or adoption, *spouses* of such persons, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons" (emphasis added). The Section 3(c)(7) exception from the definition of "investment company" under the 1940 Act is available only to private funds and other investment vehicles owned exclusively by qualified purchasers.

Section 3 of DOMA provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

In yesterday's *Windsor* decision, the Supreme Court declared this provision of DOMA to be an unconstitutional deprivation of the equal liberty of persons that is protected by the Fifth Amendment's Due Process Clause. Specifically, in the words of the Court's opinion:

"The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."

Among the immediate consequences of the Court's ruling is that for purposes of the "accredited investor" and "qualified purchaser" definitions, the term "spouse" no longer refers only to a person of the opposite sex. An individual's "spouse" now includes anyone to whom the individual is married, including someone of the same sex.

In this regard, it is interesting to note that the SEC, in its 2011 final rule exempting family offices from regulation under the Investment Advisers Act of 1940, defined "family member" to include "spousal equivalents"—and did so expressly as a means of getting around DOMA. Following the Supreme Court's decision in *Windsor*, such awkward terminology may no longer be required.

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