February 28, 2015

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Advisory Committee on Small and Emerging Markets

Ladies and Gentlemen:

One of the topics this Committee is considering is the definition of an accredited investor. The Dodd-Frank Act requires the Commission to undertake a review of the accredited investor definition in its entirety as it relates to natural persons. We believe it is appropriate to first consider whether the accredited investor concept is still desirable.

When investing in private placements, accredited investors take on the risk that they could lose 100% of their investment.

Let us begin by considering five other categories of investments that are available to non-accredited investors (Margin, Pattern Day Traders, Security Futures, Commodity Futures and FOREX) that might seem riskier than these private placements available only to accredited investors. We will examine the associated risks and investor sophistication requirements for each.

Margin

Here's what the SEC says about margin:

> "Margin" is borrowing money from your broker to buy a stock and using your investment as collateral. Investors generally use margin to increase their purchasing power so that they can own more stock without fully paying for it. But margin exposes investors to the potential for higher losses. Here's what you need to know about margin.
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> Margin accounts can be very risky and they are not suitable for everyone. Before opening a margin account, you should fully understand that:
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> - You can lose more money than you have invested;
> - You may have to deposit additional cash or securities in your account on short notice to cover market losses;
> - You may be forced to sell some or all of your securities when falling stock prices reduce the value of your securities; and
> - Your brokerage firm may sell some or all of your securities without consulting you to pay off the loan it made to you.

Maximum Possible Loss: 200% of investment

In a standard margin account investors are able to "borrow" an amount equal to the funds they have available. Thus, it's possible that they could lose not only their entire investment, but owe the brokerage as much as they invested.

Investor Sophistication Requirements:

With regards to investor sophistication, there are no regulations prohibiting any investor from opening a margin account. The way that the government protects these investors from losing up to twice the value of their investment is by encouraging them to educate themselves and understand the risks involved in margin investing.

Pattern Day Traders

FINRA rules define a “pattern day trader” as any customer who executes four or more “day trades” within five business days, provided that the number of day trades represents more than six percent of the customer’s total trades in the margin account for that same five business day period.

Maximum Possible Loss: 400% of investment

The rules permit a pattern day trader to trade up to four times the maintenance margin excess in the account as of the close of business of the previous day.

Investor Sophistication Requirements:

With regards to investor sophistication, there are no regulations prohibiting any investor from operating a "pattern day trading" account. The way that the government protects these investors from losing up to four times the value of their investment is by encouraging them to educate themselves and understand the risks involved in pattern day trading investing.

Security Futures

FINRA describes security futures as follows:

> Security futures are among the potentially riskiest financial products available in the United States.
> Federal regulations permit trading in futures contracts on single stocks (also known as single stock futures or SSFs) and narrow-based security indices.
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> A security futures contract is a legally binding agreement between two parties to buy or sell a specific quantity of shares of an individual stock or a narrow-based security index at a specified price, on a specified date in the future (known as the settlement or expiration date). If you buy a futures contract, you are entering into a contract to buy the underlying security and are said to be "long" the contract. Conversely, if you sell a futures contract, you are entering into a contract to sell the underlying security and are considered "short" the contract.

Maximum Possible Loss: 500% of investment

Minimum margin requirements for security futures are set by law at 20 percent of the contract's value, calculated daily.

Investor Sophistication Requirements:

With regards to investor sophistication, there are no regulations prohibiting any investor from participating in security futures trading. The way that the government protects these investors from losing up to five times the value of their investment is by encouraging them to educate themselves and understand the risks involved in security futures investing.

Commodity Futures

An investor can buy commodity futures (including bulk goods, such as grains, metals, and foods) through a trading account with a commodity futures broker that must be registered with the Commodity Futures Trading Commission (CFTC) and the National Futures Association (NFA). After acknowledging a disclosure that the investor understands the risks of futures and options trading, they can open an account and deposit money for trading.

Maximum Possible Loss: 2,000%+ of investment

Margin requirements for commodity futures are set by the futures exchanges and vary according to the risk associated with each commodity. Typical margin requirements are in the 5-15% range. While it would be truly extraordinary for a contract to lose its entire value, substantial losses far in excess of the amount invested are not uncommon.

Investor Sophistication Requirements:

With regards to investor sophistication, there are no regulations prohibiting any investor from participating in commodity futures trading. The way that the government protects these investors from losing up to 20 times the value of their investment is by encouraging them to educate themselves and understand the risks involved in commodity futures investing.

Foreign Currency Transactions (FOREX)

Here's what the SEC says about FOREX:

> Individual investors who are considering participating in the foreign currency exchange (or “forex”) market need to understand fully the market and its unique characteristics. Forex trading can be very risky and is not appropriate for all investors.
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> It is common in most forex trading strategies to employ leverage. Leverage entails using a relatively small amount of capital to buy currency worth many times the value of that capital. Leverage magnifies minor fluctuations in currency markets in order to increase potential gains and losses. By using leverage to trade forex, you risk losing all of your initial capital and may lose even more money than the amount of your initial capital. You should carefully consider your own financial situation, consult a financial adviser knowledgeable in forex trading, and investigate any firms offering to trade forex for you before making any investment decisions.

> The risk of loss for individual investors who trade forex contracts can be substantial. The only funds that you should put at risk when speculating in foreign currency are those funds that you can afford to lose entirely, and you should always be aware that certain strategies may result in your losing even more money than the amount of your initial investment.

Maximum Possible Loss: 5,000% of investment

Leverage is capped at 50 time the amount invested. In practice, the chances of a currency going to zero overnight with respect to another currency are extremely slim to say the least, losing a full 5,000% of the money an investor has put up might not be that realistic, but is possible in theory. To give an idea of the magnitude of losses an investor might actually incur, let us imaging an investor invested $10,000 in early 2015 betting the Swiss Franc would drop against the Euro. Leveraged at 50:1, they would have a $500,000 position. On January 15, the Swiss Franc jumped nearly 30% against the Euro (and about 18% vs. the US dollar). To be generous, let's say they managed to get out with a 25% loss. This would equate to a loss of $125,000 or 1,250% of their $10,000 investment.

Usually as a trade moves against an investor, their broker will close out their trades to limit their losses, but when moves like this happen suddenly there don't have that option as was evidenced when recently Fortune reported that FXCM, the U.S.'s largest online brokerage for retail foreign currency trading, said many of its clients had been wiped out in the markets on Thursday (January 15) as well. The firm said it was owed $225 million by clients who had lost everything in this week's volatile currency markets. In turn, FXCM had to be rescued by an emergency $300 million loan from investment firm Leucadia National Corp.

Investor Sophistication Requirements:

With regards to investor sophistication, there are no regulations prohibiting any investor from operating a FOREX account. The way that the government protects these investors from losing up to 50 times the value of their investment is by encouraging them to educate themselves and understand the risks involved in FOREX investing.

Given the numerous examples above, it is clear that there are many investment options that investors can participate in with no sophistication requirements that can lead to not only the loss of the entire investment, but has the potential to leave them in debt for several times the amount of the investment. The most an investor can lose in a private placement is the amount of their investment. In terms of investor protection, in all these cases listed above, the protection offered for investors is information given advising them to educate themselves and understand the risks involved in these types of investments.

So if it's not the magnitude of the losses that is so worrisome regarding private placements, what is driving the need to protect these investors?

Perhaps it is the risk of loss. Perhaps more private placements lose money for their investors.

There isn't a lot of data readily available on this subject, but let us look at a few examples.

According to a disclosure that FXCM made to the CFTC, nearly 70% of FXCM's client FOREX accounts lost money in 2014. It should be noted that this does not include any losses from the Swiss currency debacle in January 2015.

In an article for Investopedia, Geoffrey Michael states, "The success rate for day traders is estimated to be around only 10%"

In an article for About Money, Chuck Kowalski writes, "If you have not heard by now, most people who trade commodities lose money. Most of the estimates range in the 80 to 95 percent range of those who have lost or who are losing in the world of trading commodities." Similarly, in an interview with Matthew Bradbard, the president and founder of MB Wealth, a full service commodity brokerage firm, Mr. Bradbard suggests "The statistics vary but as many as 90-95% of investors trading commodities lose money."

So how does this compare to private placements in startup companies? According to Entrepreneur Weekly, Small Business Development Center, Bradley Univ, University of Tennessee Research; across industries, after 10 years 71% of startup businesses have failed.

Given these statistics, with the failure rate of private placements being around 71%, it's hard to imagine that they would require special protections for investors, when investments with failure rates in the 70-95% range do not require the same special protections.

Perhaps then it is because as the SEC puts it, "Generally speaking, private placements are not subject to some of the laws and regulations that are designed to protect investors, such as the comprehensive disclosure requirements that apply to registered offerings."

Here is some of the information the SEC gives regarding microcap or "penny" stocks:

> The term "penny stock" generally refers to a security issued by a very small company that trades at less than $5 per share. Penny stocks generally are quoted over-the-counter, such as on the OTC Bulletin Board (which is a facility of FINRA) or OTC Link LLC (which is owned by OTC Markets Group, Inc., formerly known as Pink OTC Markets Inc.); penny stocks may, however, also trade on securities exchanges, including foreign securities exchanges. In addition, the definition of penny stock can include the securities of certain private companies with no active trading market.
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> Penny stocks may trade infrequently, which means that it may be difficult to sell penny stock shares once you own them. Moreover, because it may be difficult to find quotations for certain penny stocks, they may be difficult, or even impossible, to accurately price. For these, and other reasons, penny stocks are generally considered speculative investments.
> Consequently, *investors in penny stocks should be prepared for the possibility that they may lose their whole investment (or an amount in excess of their investment if they purchased penny stocks on margin).*
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> **How Are Microcap Stocks Different From Other Stocks?**

Lack of Public Information Often, the biggest difference between a microcap stock and other stocks is the amount of publicly available information about the company. Most large public companies file reports with the SEC that any investor can get for free from the SEC's website. Professional stock analysts regularly research and write about larger public companies, and it's easy to find their stock prices on the Internet or in newspapers and other publications. In contrast, information about microcap companies can be extremely difficult to find, making them more vulnerable to investment fraud schemes and making it less likely that quoted prices in the market will be based on full and complete information about the company.

No Minimum Listing Standards Companies that trade their stocks on exchanges must meet minimum listing standards. For example, they must have minimum amounts of net assets and minimum numbers of shareholders. In contrast, companies on the OTCBB or OTC Link generally do not have to meet any minimum standards, although companies quoted in OTC Link's OTCQX marketplace are subject to initial and ongoing requirements and companies quoted in the OTCQB marketplace must be SEC reporting companies.

Risk While all investments involve risk, microcap stocks are among the most risky. Many microcap companies are new and have no proven track record. Some of these companies have no assets, operations, or revenues. Others have products and services that are still in development or have yet to be tested in the market. Another risk that pertains to microcap stocks involves the low volumes of trades. Because many microcap stocks trade in low volumes, any size of trade can have a large percentage impact on the price of the stock.

On October 30, 2014, FINRA and the SEC's Office of Investor Education and Advocacy issued an alert to "warn investors that some low-priced "penny" stocks that are aggressively promoted may in fact be stocks of dormant shell companies – companies that have no or nominal business operations or non-cash assets for an extended period of time. Many dormant shell companies that continue to trade in the over-the-counter (OTC) market are susceptible to market manipulation. This alert follows action by the SEC to suspend trading in 255 dormant shell companies in February 2014 and subsequent suspensions of other thinly traded penny stocks."

"FINRA and the SEC continue to be concerned about pump-and-dump schemes in which a fraudster deliberately buys shares of a very low-priced, thinly traded stock and then spreads false or misleading information to pump up the stock's price. The fraudster then dumps his shares, causing the price to fall, leaving investors with worthless or nearly worthless shares of stock. A shell company is often used in these types of scams. These dormant shell companies may be on the brink of insolvency or even bankrupt. These companies also may not file periodic reports with the SEC that would provide public information about their business and financial condition and may no longer be in good standing in their state of incorporation. Dormant shell companies often have no officers or management. As the name implies, these companies are simply shells."

The protection they offer investors from this are 5 tips to help investors avoid these risks http://www.sec.gov/oiea/investor-alerts-bulletins/dormantshell.html#.VPNgIvmjOjc

So to sum up some of these characteristics, "penny" stocks may:

- Be difficult to sell shares once you own them

- Be difficult or impossible to accurately price
- Be new and have no proven track record
- Have products or services still in development or yet to be tested in the market
- Have no officers or management
- Have no assets, operations or revenue
- Be on the brink of insolvency or even bankrupt
- Have no information regarding their business or financial condition
- Not be in good standing in their state of incorporation

In addition, FINRA and the SEC warn that the potential for fraud is high.

This does not sound very different than the potential risks associated with private placements available only to accredited investors, however, one does not have to be an accredited investor to take part in these investments. Once again, the strategy of the SEC and FINRA to protect investors from this is to provide information and urge investors to educate themselves and understand the risks involved in this type of investing.

The question that we think should be asked is what then makes investing in private placements so different from these other risky activities that it requires government intervention prohibiting the vast majority of individual investors from participating in these investments? It's not clear at all to us. We think many of the other investment activities listed above pose greater risk to investors, and yet they are not restricted to accredited investors. We suggest that perhaps the concept of accredited investor should be dropped altogether and have private placements be treated just like all the other investment types listed above. The government should inform investors regarding the risks associated, and urge investors to educated themselves and understand these risks.

An additional point we would like to make, that we feel has been overlooked in the discussions regarding accredited investors is in reference to the overall mission of the SEC.

The mission of the U.S. Securities and Exchange Commission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."

We suggest that the SEC needs to consider that these investors might require protection from the SEC itself.

This comes down to some of the basic principles upon which our country was founded. The Declaration of Independence states; "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

While it is understandable that we would like to protect individuals that might not have the financial sophistication and/or investment experience from undertaking investments that might not be appropriate for them. The accredited investor rule denies the majority of the population two of these three rights, the rights of Liberty and the pursuit of Happiness.

This is not protecting these investors, this is denying them the ability to be investors.

While you might think you are protecting some individuals from harming themselves financially, how many are you harming by not allowing them to participate in investments of their own choosing that could lead to their financial emancipation.

These are individuals that might have little or no knowledge regarding equities, commodities or FOREX, but they know that their uncle already has two very successful restaurants and needs some money to fund the opening of a third. They know that they were right to spend a fortune sending their daughter to that Ivy League school, and now they want to help her set up her own medical practice, and get a return on the investment they already made in her education. They know that their best friend is the smartest person they have ever met, and all the years she spent immersed in the Seattle tech startup scene prepared her to launch her own startup with an idea for a product that solves a huge problem that people have now.

They can be shown all the risks and information that is given to accredited investors today. Maybe they will invest more than they should. Maybe they will lose everything they invested. But what right do we have to deny them the opportunity to follow these dreams?

There are many riskier things that the government allows people to do.

The Center for Disease Control (CDC) states that "cigarette smoking is responsible for more than 480,000 deaths per year in the United States, including an estimated 41,000 deaths resulting from secondhand smoke exposure." How does the government protect people from these risks? Cigarette packages must have warning labels informing people of the risks, and then they can decide for themselves whether to use them.

Similarly, related to alcohol consumption, the CDC states, "Excessive alcohol use led to approximately 88,000 deaths and 2.5 million years of potential life lost (YPLL) each year in the United States from 2006 – 2010" How does the government protect people from these risks? Alcohol must have warning labels informing people of the risks, and then they can decide for themselves whether to use them.

The National Council on Problem Gambling (NCPG) estimates that 4-6 million Americans (2-3% of the population are considered problem gamblers. How does the government protect people from these risks? All but two states have some form of legalized gambling, and 43 states have lotteries, so once again, it is through informing people of the risks and allowing them to make their own decisions.

In order to practice law, you must be licensed, however you are allowed to defend yourself in a court of law with absolutely no legal training or education, even against capital crimes where the result could be life in prison or the death penalty. How does the government protect people from these risks? They offer free legal representation and strongly suggest that individuals do not represent themselves, but ultimately allow them to do so should they choose.

Taking all of this into consideration, we urge you to please reconsider the entire notion that private placements are so dangerous that the vast majority of the population cannot participate in them. While the accredited investor concept might have made sense years ago before information was so freely available on the Internet, people today have much better access to the information that would allow them to make informed decisions regarding these investments. We trust our citizens to decide for themselves whether they should undertake the risks associated with margin, day trading, security and commodity futures trading, FOREX trading, "penny" stock trading.

We'll leave you with one final thought. One of Warren Buffet's keys to success is the advice that investors should stick to businesses they understand. For many of these people, the only businesses they really understand are the ones being run by those around them. The business owners that make the time to sit down and explain to them how the business works. The ones that have time for any questions they might have. And this is pretty much the only investment opportunity we are currently denying them the right to choose for themselves.

Respectfully,

Utopian Shift LLC
-Making the world better…not just in any way we can…but in every way we can