

# FEATURE: ESTATE PLANNING & TAXATION



By **Arlene Osterhoudt** & **Ivan Taback**

## Securities Law Considerations for Trusts and Estates Advisors: Part I

Accredited investors and qualified purchasers

**A**s trusts and estates advisors, one of our primary goals is to structure estate-planning transactions for our clients in a tax-efficient manner, with minimum impact on other objectives. Although an estate-planning transaction may achieve a client's transfer tax objectives, draftspersons could inadvertently structure a trust in a manner that restricts the trustees from making certain investments. When working with high-net-worth (HNW) families, advisors must consider the potential and anticipated investments of a trust, a family limited partnership (FLP) or limited liability company (LLC) so that a particular estate-planning transaction may achieve both tax and investment objectives.

That's why it's important for trusts and estates advisors to understand U.S. securities law considerations.<sup>1</sup> We'll provide an overview of trust and FLP qualification requirements under the Securities Act of 1933 (the Securities Act) and the Investment Company Act of 1940 (the ICA). In a follow up article, we'll consider the treatment of common trust-related transactions under the Securities Exchange Act of 1934 for directors, officers and principal stockholders.

U.S. securities laws require potential investors, including trusts and other entities commonly used in estate-planning transactions, to meet certain requirements to be eligible to participate in transactions exempt from registration. Specifically, the Securities Act and the ICA provide regulatory and registration exemptions for

certain companies and their offerings of securities if investors meet the requirements of an "accredited investor" (under the Securities Act) or a "qualified purchaser" (under the ICA). These regimes set forth minimum asset and management requirements for entities, trusts and their trustees. Therefore, trusts and estates advisors should structure wealth transfer transactions in light of these requirements to serve their clients' (and trustees') tax and non-tax objectives.

### The Securities Act

The Securities Act provides protection to investors in connection with companies offering securities for sale to the public.<sup>2</sup> Generally, a company must register any public offering of securities with the U.S. Securities and Exchange Commission (the SEC) unless an exemption applies.<sup>3</sup> The Securities Act requires the issuer of the securities to file a registration statement with the SEC and provide detailed information on the securities offered so that potential investors can make informed decisions whether to invest. However, the Securities Act provides several exemptions from registration.<sup>4</sup> Further, Regulation D—Rules Governing the Limited Offer and Sale of Securities without Registration under the Securities Act of 1933, known as "Regulation D," establishes several exemptions from the registration requirements of the Securities Act and sets forth the types of investors who may participate in certain exempted transactions.<sup>5</sup> Note the exemptions from registration described in Regulation D apply only to the offering of securities by an issuer, so any subsequent resales or transfers of such securities will be subject to different rules.<sup>6</sup>

**Purchaser cap.**<sup>7</sup> The exemptions under Rules 505 and 506 of Regulation D cap the number of purchasers at 35; however, issuers may exclude accredited investors when calculating the number of purchasers.<sup>8</sup> In addition

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to excluding accredited investors, any relative (or spouse of a relative) who shares a primary residence with another purchaser won't be considered a separate purchaser when calculating the number of purchasers and neither will any trust, estate or other entity majority owned by another purchaser and his relatives (or spouse of a relative).<sup>9</sup> Therefore, even if a trust doesn't independently qualify as an accredited investor, the trust may nonetheless be permitted to participate in an exempted offering if another purchaser already participating in the offering is related to the trust. For example, if a purchaser (regardless of the purchaser's accredited investor status) individually participates in an exempted securities offer-

### The ICA requires investment companies to register with the SEC unless an exception applies.

ing and the trustee of a trust for the benefit of his spouse and minor children (which isn't an accredited investor) seeks to participate in the same offering, the individual purchaser and the trust should be counted as a single purchaser for purposes of the 35-purchaser cap.<sup>10</sup>

#### Accredited Investor

Generally, an accredited investor is a person (including a trust or other entity) that has sufficient assets to bear the risk of investing in a private placement without the protections of SEC registration.<sup>11</sup> Due to an accredited investor's theoretical enhanced ability to bear risk, he has the opportunity to participate in private placements of securities not available to the public. For example, exemptions under Rules 505 and 506 of Regulation D permit issuers to offer securities to an unlimited number of accredited investors without registration with the SEC. The Securities Act defines the term "accredited investor" in two broad categories to include: (1) certain institutional investors (for example, banks),<sup>12</sup> and (2) other financially sophisticated individuals or entities directed by them.<sup>13</sup> The SEC further prescribed rules and regulations expanding on this meaning under Rule 215<sup>14</sup> and Regulation D.<sup>15</sup> The categorical defi-

nitions of "accredited investor" are identical under Rule 215 and Regulation D and include: (1) certain institutional investors, whether acting for themselves or in a fiduciary capacity;<sup>16</sup> (2) certain entities having assets in excess of \$5 million;<sup>17</sup> (3) certain insiders of the issuer;<sup>18</sup> (4) HNWI individuals and their spouses;<sup>19</sup> (5) consistently high income-earning individuals and their spouses;<sup>20</sup> (6) certain trusts with assets in excess of \$5 million and sophisticated investment decisionmakers, which weren't formed for the specific purpose of acquiring the securities offered;<sup>21</sup> and (7) entities owned solely by accredited investors.<sup>22</sup> Although certain trusts will reach accredited investor status under Category (6) above, trusts may also qualify as accredited investors under other categories, depending on the trust's structure and the identity of trustees. We'll consider each accredited investor category relevant to trusts separately below.

**Institutional investors: bank as trustee.** If a qualified bank is acting as trustee of a trust, the trust will be an accredited investor.<sup>23</sup> Specifically, the trustee-bank must be a ". . . national bank, or banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official."<sup>24</sup> Because this definition doesn't appear to cover every trust company, practitioners shouldn't assume that any corporate trustee of a trust would qualify the trust as an accredited investor.<sup>25</sup> If a bank does qualify, the bank-trustee needn't be the sole trustee of the trust, so long as the bank-trustee acts in its fiduciary capacity with respect to investment decisions and the trust follows the bank-trustee's direction.<sup>26</sup>

**Natural persons.** An individual may qualify as an accredited investor under Rule 501(a)(5) if he, alone, or jointly with his spouse, has a net worth in excess of \$1 million.<sup>27</sup> However, "net worth" for this purpose specifically excludes an individual's primary residence and related indebtedness.<sup>28</sup> Although Rule 501(a)(5) refers to a natural person's net worth, the SEC has determined that the grantor of a revocable trust may aggregate the trust's assets with his individual assets to qualify the grantor individually as an accredited investor.<sup>29</sup>

An individual may also qualify as an accredited investor if, in each of the two years preceding the date of investment, he had income over \$200,000 (individually), or \$300,000 (jointly with his spouse) and reasonably



expects to meet that income level in the year of investment.<sup>30</sup> Regulation D doesn't expressly define income for this purpose.<sup>31</sup>

**Trusts as accredited investors under Rule 501(a)(7).**

A trust may also qualify as an accredited investor if it: (1) wasn't formed for the specific purpose of acquiring the securities offered, (2) holds assets exceeding \$5 million, and (3) has a "sophisticated person" making investment decisions for the trust (that is, an investment trustee or investment advisor).<sup>32</sup> The SEC has stated that the first prong is a facts-and-circumstances consideration, particularly in the entity context, and is intended to prevent unaccredited investors from pooling their assets to then qualify as such.<sup>33</sup>

Further, unlike the individual net worth test, any asset held in the trust, including residential real estate, will count towards the \$5 million minimum asset test. For purposes of Rule 501(a)(7), neither the trustee's nor any beneficiary's individual assets will be considered to meet the \$5 million threshold.

Finally, the trust's investment decisions must be controlled by a "sophisticated person," defined as a person having "such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment."<sup>34</sup> Notably, a sophisticated person need only control investment decisions at the time the security is acquired.

**Accredited investor entities.** Under Rule 501(a)(8), an entity solely owned by accredited investors is an accredited investor. Therefore, an FLP owned entirely by individuals, trusts or entities that are independently accredited investors would separately qualify as an accredited investor. A trust may also separately qualify as an accredited investor under Rule 501(a)(8). A trust's beneficiaries won't be considered equity owners for purposes of this rule; however, the SEC will look through a trust revocable by an accredited investor grantor and deem him the equity owner.<sup>35</sup>

Although the SEC considers a revocable trust of which all grantors are accredited investors an accredited investor under 501(a)(8),<sup>36</sup> whether an irrevocable grantor trust qualifies is less settled. The SEC has determined that the grantor of an irrevocable grantor retained annuity trust (GRAT), of which he was the sole current beneficiary, investment trustee and owner for income tax purposes, could be considered the equity owner of an irrevocable trust.<sup>37</sup> Specifically, the SEC ruled this

in cases when: (1) the trust is a grantor trust for federal income tax purposes and solely funded by the grantor; (2) the grantor is a co-trustee of the trust and has sole investment discretion on behalf of the trust at the time the investment is made; (3) the grantor will be taxed on all income and any sale of trust assets during the GRAT term; (4) during the GRAT term, all of the assets of the trust will be includible in the grantor's estate for federal estate tax purposes; (5) the grantor bears the economic risk of loss of the investment; (6) the trust is irrevocable and established by the grantor for family estate-planning purposes to facilitate the distribution of his estate and to effectuate his estate-planning goals; and (7) creditors of the grantor can reach the grantor's interest in the trust at all times.<sup>38</sup> Because this determination is very specific, practitioners and clients desiring certainty may wish to rely on other definitions to qualify the trust as an accredited investor, perhaps by funding the trust with additional assets or naming a bank as an investment trustee. To better understand the decision-making process in attaining the status of accredited investor, see "Accredited Investor Flowchart," p. 22.

**The ICA**

The ICA requires investment companies to register with the SEC unless an exception applies.<sup>39</sup> Generally, investment companies are in the business of investing and trading securities on behalf of others. Private investment funds typically rely on ICA Section 3(c)(1) or Section 3(c)(7), which exempts certain issuers that engage in private offerings of securities and either have fewer than 100 investors or are exclusively owned by qualified purchasers, respectively, from the definition of investment company. Therefore, trusts and estates advisors should become familiar with the types of trusts that may invest in such private offerings.

**Section 3(c)(1) exception: fewer than 100 investors.**

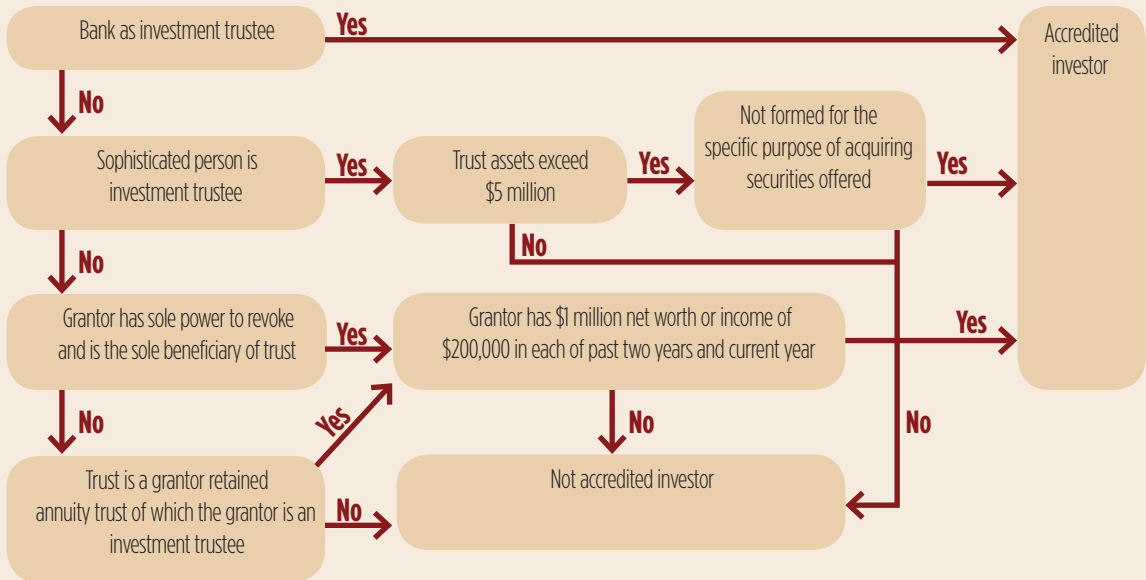
Under ICA Section 3(c)(1), an issuer isn't an investment company if its outstanding securities are beneficially owned by fewer than 100 persons, and it isn't making and doesn't propose to make a public offering of securities.<sup>40</sup> The term "person" includes individuals and entities, and for this purpose, an entity includes a trust.<sup>41</sup>

Generally, an entity investor, including a trust, will be counted as one person under this rule, unless such investor is an investment company or would be an investment company but for the exceptions under ICA



## Accredited Investor Flowchart

Determine whether a trust qualifies



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Section 3(c)(1) or Section 3(c)(7) and owns 10 percent or more of the issuer’s voting securities.<sup>42</sup> If one trustee is acting as trustee of several trusts, each trust will be counted separately.<sup>43</sup> Further, if the investor is a partnership owned by trusts, the SEC will consider two trusts with the same beneficiaries as one person.<sup>44</sup> Unlike the equity owner rule of 501(a)(8), the SEC may look through the trusts under this rule to determine the ultimate number of beneficial owners.<sup>45</sup>

Furthermore, “knowledgeable employees” participating in the investments of the fund for 12 months, that is, executive officers, directors, trustees, general partners and advisory board members, aren’t counted under the 100-person rule.<sup>46</sup> In addition, knowledgeable employees investing in an issuer’s securities needn’t be qualified purchasers, as discussed below.

**Section 3(c)(7) exception: all investors are qualified purchasers.** Under ICA Section 3(c)(7), an issuer isn’t an investment company if its outstanding securities are owned exclusively by qualified purchasers (at the time of acquiring such securities), and it isn’t making and

doesn’t propose to make a public offering of securities.<sup>47</sup> Further, unlike the accredited investor rules discussed above, securities transferred by a qualified purchaser by gift, bequest, legal separation, divorce, death or other involuntary transfer are treated as owned by a qualified purchaser.<sup>48</sup>

### Qualified Purchaser

ICA Section 2(a)(51)(A) defines the term “qualified purchaser” in four categories: (1) an individual owning (either singly or held jointly with his spouse) at least \$5 million of investments;<sup>49</sup> (2) a family company owning at least \$5 million of investments;<sup>50</sup> (3) a trust (other than a trust falling within the preceding category) not formed for the specific purpose of acquiring securities, of which each of the settlor and any trustee controlling investment decisions is a qualified purchaser;<sup>51</sup> and (4) certain institutional investors, acting for themselves or others, that own and invest at least \$25 million of investments.<sup>52</sup> In addition, a company beneficially owned by qualified purchasers may be deemed a



qualified purchaser.<sup>53</sup> Thus, there are multiple ways for trusts to meet the qualified purchaser requirements. For purposes of this rule, “investments” generally include cash and cash equivalents, securities, real estate (for investment, not personal or business use) and other property, only if such property is held for investment purposes.<sup>54</sup>

**Family company.** A trust may qualify as a family company if it holds at least \$5 million of investments and is for the benefit of two or more individuals 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.”<sup>55</sup> Under this rule, the trust beneficiaries are considered the owners of the trust.<sup>56</sup> Therefore, single beneficiary trusts and trusts for the benefit of unrelated persons won’t qualify under this rule. Further, an FLP with sufficient assets and at least two related equity owners may also qualify under this rule.

**Trusts created and controlled by qualified purchasers.** Similar to the accredited investor rules, the policy behind the “not formed for the specific purpose” rule is to prevent persons who aren’t qualified purchasers from pooling their assets to indirectly qualify to invest in a fund. The SEC has stated that the purpose of an entity’s formation is a facts-and-circumstances determination, and no single factor, even the percentage of the entity’s assets invested in the issuer, is determinative.<sup>57</sup> Most trusts, however, serve purposes other than acquiring securities, for example, providing transfer tax benefits and creditor protection.<sup>58</sup>

Under ICA Section 2(a)(51)(A)(iii), both the grantor and the investment trustee of the trust must be qualified purchasers for a trust to meet the qualified purchaser requirements. Because a trust may be created after the grantor’s death, the grantor must be a qualified purchaser at the time he contributed assets to the trust; however, the trustee need only be a qualified purchaser at the time of the investment decision.<sup>59</sup>

**Institutional investors.** A trust or FLP that doesn’t otherwise qualify as a qualified purchaser, as discussed above, must have at least \$25 million of investments to qualify as an institutional investor.<sup>60</sup> If an institutional investor is acting as a trustee of a trust, the trust itself must independently meet the requirements of

a qualified purchaser to qualify under this section. Unlike the accredited investor rules discussed above, the bank-trustee’s status alone won’t qualify the trust as a qualified purchaser. To better understand the decision-making process in obtaining the status of qualified purchaser, see “Qualified Purchaser Flowchart,” p. 24.

### Transferee

If an investor in a Section 3(c)(1) fund or a qualified purchaser gifts or bequeaths his securities to any person, the securities are deemed to be owned by such 3(c)(1) person or qualified purchaser due to the transferor’s status.<sup>61</sup> Therefore, if a qualified purchaser transfers securities to a trust by gift, then the trust needn’t otherwise satisfy the statutory qualified purchaser requirements, including the investments threshold or trustee qualification. While this rule seems straightforward, practitioners should be mindful of trusts or entities providing any form of consideration for the transferred securities. For example, if a grantor transfers securities to a trust and the trust, rather than the grantor, acquires the grantor’s obligation to fund additional contributions related to those securities (for example, capital calls to a private equity fund), the SEC will treat the trust’s future obligations as consideration.<sup>62</sup> Further, a person’s contribution to an FLP in exchange for a partnership interest is also a transfer for consideration.

Note that the SEC has stated that a distribution from a qualified purchaser trust to a beneficiary doesn’t necessarily transfer qualified purchaser status; rather it’s a facts-and-circumstances determination.<sup>63</sup>

### Common Lifetime Planning Structures

If a client is considering creating and funding a trust or FLP during his lifetime with exempted securities or anticipates that the trust or FLP will invest in exempted securities, practitioners should consider the accredited investor and qualified purchaser rules when structuring the transaction. We’ll address common funding situations below in light of these rules, assuming that the grantor at issue, individually or with his spouse, is an accredited investor, a sophisticated person and a qualified purchaser.

**Transfers to revocable trusts.** A revocable trust is a commonly used testamentary substitute that clients may fund during their lifetimes. A grantor’s transfer to a revocable trust will typically remain incomplete for gift

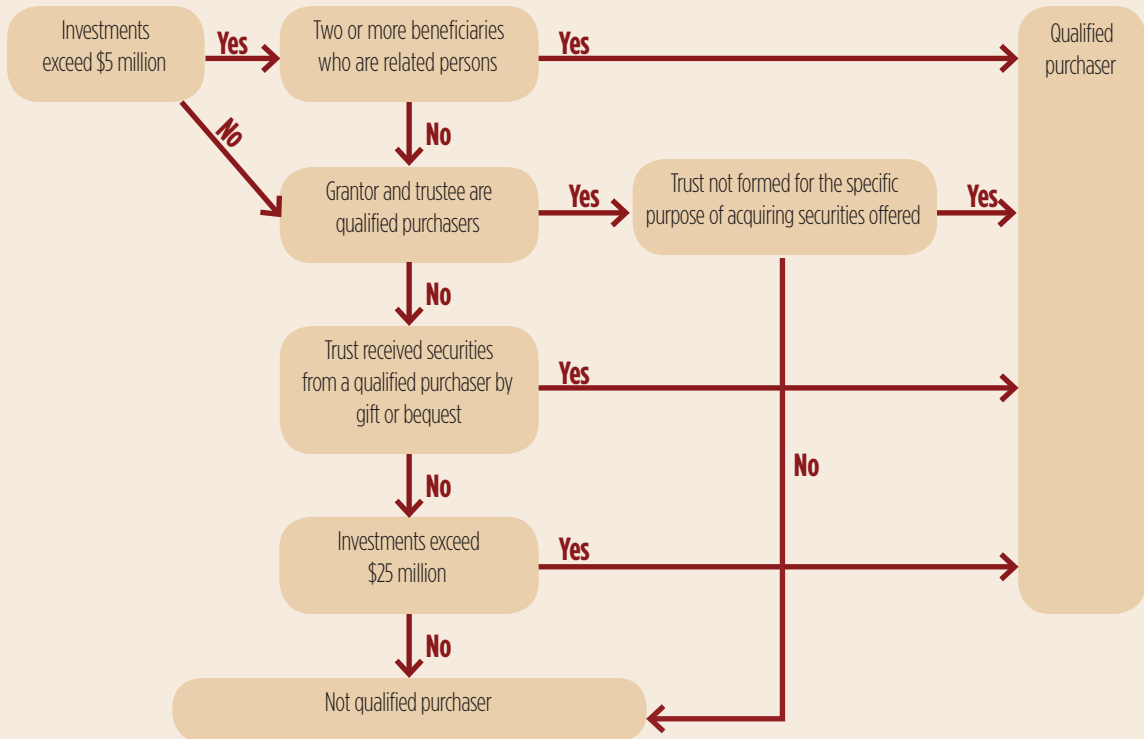




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### Qualified Purchaser Flowchart

Determine whether a trust qualifies



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tax purposes. It may be problematic for accredited investor status if such trust is revocable with the consent of a non-adverse party (see the discussion of Rule 501(a)(8), above). Therefore, trust drafters should ensure the trust is revocable solely by the grantor for this purpose. In the case of a joint revocable trust created by two spouses, both spouses should be grantors and have the power to revoke the trust without the consent of any person other than the other spouse. Even if the grantor doesn't fully fund his revocable trust, the assets in the revocable trust will be aggregated with his individual assets so that the grantor and the trust both have the flexibility to invest in exempted securities. Similarly, the grantor's creation of a revocable trust for his benefit will cause the trust to be a deemed qualified purchaser if he's also the trustee.<sup>64</sup>

**Transfers to irrevocable trusts.** An irrevocable trust may be structured in many different ways, and thus

determining the trust's status under either rule is a bit more involved than with a revocable trust. There are several factors to consider to determine if a trust qualifies as an accredited investor or a qualified purchaser: (1) beneficiaries; (2) trustees; (3) assets or investments; and (4) the timing and manner of acquiring securities.

1. *Beneficiaries.* If the grantor is the sole beneficiary of the trust and meets the other criteria set forth in the accredited investor entity section, above, the trust could qualify as an accredited investor and as a qualified purchaser (if the grantor or the investment trustee is also a qualified purchaser). If any other person is a beneficiary, the beneficiary's status is irrelevant for accredited investor purposes. On the other hand, if the beneficiaries are related individuals or spouses, foundations or trusts created by those persons, the trust will qualify if it also meets the asset-level requirements. Therefore, if



the grantor creates a trust for the benefit of the grantor's spouse, descendants and his family foundation, it should qualify as a qualified purchaser under the family company rule.

2. *Trustees.* If a bank (within the meaning of the Securities Act) is serving as a trustee of a trust, then the trust will qualify as both an accredited investor and a qualified purchaser based on the bank-trustee's status. Practitioners should ensure the trustee qualifies as a bank (for accredited investor status) and has investment authority over the trust's assets. If a bank serves as an administrative trustee of a directed trust, an investment advisor, rather than the trustee, gives investment directions to the bank-trustee, which the bank-trustee simply implements.<sup>65</sup> In that case, the investment advisor, rather than the bank-trustee, directs the decision that the bank-trustee follows.<sup>66</sup> Therefore, practitioners relying on this category to qualify a trust as an accredited investor should consider tailoring the investment advisor and administrative trustee's powers under a trust agreement to ensure any bank-trustee maintains some level of investment authority. For example, the trust agreement could provide that with respect to any proposed investment requiring accredited investor and/or qualified purchaser status, an individual investment advisor's directions aren't binding on the bank-trustee. With this limitation, the trust will still qualify as an accredited investor because the bank continues to act in a fiduciary capacity when determining whether to implement the investment.<sup>67</sup>

As for qualified purchaser status, as long as the bank-trustee is a qualified purchaser (that is, it invests at least \$25 million of assets on a discretionary basis for its own account or for other qualified purchasers, taken together), the trust will qualify as a qualified purchaser.

If an individual is serving as a trustee, practitioners should consider naming the grantor or another person as a trustee specifically for investment purposes to ensure a sophisticated person and qualified purchaser controls trust investment decisions. However, the trust agreement should limit the grantor's authority as a trustee in a manner so as to avoid estate tax inclusion issues (for example, creating restrictions on voting stock of a controlled corporation under Internal Revenue Code Section 2036(b)).

3. *Assets.* For an irrevocable trust other than a GRAT, the trust should (if possible) have at least \$5 million of

investments to ensure accredited investor and qualified purchaser status.

4. *Timing and manner of acquiring securities.* The trust must be an accredited investor or qualified purchaser, as applicable, at the time of acquiring the securities. Therefore, if the grantor funds the trust with cash or publicly traded securities for the trust to acquire exempted securities on its own, the criteria above must be satisfied when the trust actually invests in such securities. For example, if a grantor funds a trust with his annual exclusion amount each year, the trust could eventually invest in securities years later when the trust's investments exceed \$5 million, so long as the grantor

Because the qualified purchaser-transferee rules apply to testamentary transfers, the trust will inherit the grantor's qualified purchaser status here as well.

was a qualified purchaser at the time he contributed assets to the trust.

On the other hand, if the grantor transfers the securities to the trust by gift, the trust will automatically inherit the grantor's qualified purchaser status, but not his accredited investor status. Note the grantor should ensure the issuer permits the transfer to the trust before arranging this transfer. In addition, practitioners should ensure the grantor has held the initial security for an appropriate length of time before he gifts securities to the trust.<sup>68</sup>

If the grantor will transfer the securities to a trust as part of a sale to a grantor trust, the trust should independently qualify as a qualified purchaser before the sale, because only transfers by gift cause the trust to inherit the grantor's qualified purchaser status. Therefore, the grantor's seed gift to the trust, and any appreciation thereon, should exceed \$5 million prior to his sale of securities to the trust (unless the trust otherwise meets the qualified purchaser requirements).



### After-Death Structures

If, at the grantor's death, the trustees hold securities in an existing trust or the grantor's will or revocable trust agreement creates new trusts, the applicable governing document should name sophisticated persons and/or qualified purchasers as investment trustees. This will maintain the trust's preferred status if the trustees intend to make future investments in exempted securities. Because the qualified purchaser-transferee rules apply to testamentary transfers, the trust will inherit the grantor's qualified purchaser status here as well.

### Transfers to FLPs

Unlike the trust examples above, an FLP should qualify as both an accredited investor and a qualified purchaser as long as all of its equity owners are accredited investors and qualified purchasers.<sup>69</sup> For qualified purchaser purposes only, an FLP having at least \$5 million of assets and owned by two or more related persons who aren't qualified purchasers will also meet the qualified purchaser requirements.


### Examples

To further illustrate these rules, assume an HNW individual with financial expertise, Gail Grantor, forms a single member LLC, and she's the LLC's sole member. Gail manages the LLC's investments but has no control over distributions. If Gail, as manager, determines to invest the LLC's property in exempted securities through the LLC, the entity will qualify as an accredited investor under Rule 501(a)(8) and a qualified purchaser under Rule 2a51-3 because Gail, individually, is an accredited investor and qualified purchaser and is the sole equity owner of the LLC.

Assume that Gail transfers her entire membership interest in the LLC to The Gail Grantor Revocable Trust (GGRT). Gail is the sole beneficiary of the trust during her lifetime and retains the sole power to revoke the trust. Because Gail has the power to revoke the trust at any time and recover all of the trust assets individually, she's the deemed equity owner of the trust. The LLC will continue to qualify as an accredited investor under Rule 501(a)(8) because Gail, individually, is an accredited investor and is the sole equity owner of the GGRT, which in turn is the sole equity owner of the LLC. In addition, the LLC will continue to be a qualified purchaser because both the revocable trust and Gail indi-

vidually are qualified purchasers.

Assume that Gail invested the LLC's assets in publicly traded securities having a market value of over \$5 million. Gail decides to create a new irrevocable trust for the benefit of her children and descendants for estate planning purposes (the Family Trust) and transfers 99 percent of the GGRT's membership interests in the LLC to the Family Trust. Gail and her brother, Gary, are the trustees of the Family Trust but Gail's authority as a trustee is limited to trust investments. Gary has no authority over trust investments. The LLC will qualify as an accredited investor under Rule 501(a)(8) because all of the equity owners of the LLC (Gail, individually, the GGRT and the Family Trust) independently qualify as accredited investors. The entity is also a qualified purchaser because the Family Trust's grantor and investment trustee, Gail, is a qualified purchaser, and qualified purchasers own all of the equity interests of the GGRT.

Finally, assume the same facts as above, but instead Gail transfers 99 percent of her individual membership interests in the LLC to a new GRAT. Gail is the sole beneficiary and trustee of the GRAT. Gail should be deemed the equity owner of the GRAT if it meets the irrevocable trust criteria described in the accredited investor entity section, above. Therefore, the LLC will qualify as an accredited investor because Gail is its sole equity owner. Further, the trust will be a qualified purchaser because Gail, a qualified purchaser, is both the grantor and trustee of the trust. 

### Endnotes

1. This article doesn't address state-specific securities laws.
2. U.S. Securities and Exchange Commission (SEC), "Report on the Review of the Definition of 'Accredited Investor'" (Dec. 18, 2015), at p. 1, [www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf](http://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf).
3. *Ibid.*
4. 15 U.S.C. Section 77d(a) (2012).
5. 17 C.F.R. Section 230.500 et seq. (2015).
6. *Ibid.*, Section 230.500(d). See also *ibid.*, Section 230.144.
7. *Nemo Capital Partners, L.P.*, SEC No-Action Letter, 1987 SEC No-Act. LEXIS 1932 (March 11, 1987).
8. 17 C.F.R. Section 230.501(e)(1)(iv) (2015).
9. *Ibid.*, Section 230.501 (e)(1).
10. See *ibid.*
11. SEC, Investor Bulletin: Accredited Investors (Sept. 23, 2013), [www.investor.gov](http://www.investor.gov).





- gov/news-alerts/investor-bulletins/investor-bulletin-accredited-investors* (“One principal purpose of the accredited investor concept is to identify persons who can bear the economic risk of investing in these unregistered securities”).
12. 15 U.S.C. Section 77(a)(15)(i) (2012).
  13. *Ibid.*, Section 77(a)(15)(ii).
  14. 17 C.F.R. Section 230.215 (2015). The definition applies for purposes of offerings exclusively to accredited investors under Section 4(5) of the Securities Act of 1933. “Net Worth Standard for Accredited Investors,” Securities Act Release No. 9287, 76 Fed. Reg. 81,793 (Dec. 29, 2011), [www.sec.gov/rules/final/2011/33-9287.pdf](http://www.sec.gov/rules/final/2011/33-9287.pdf).
  15. 17 C.F.R. Section 230.500 *et seq.* (2015).
  16. *Ibid.*, Section 230.501(a)(1).
  17. *Ibid.*, Section 230.501(a)(3).
  18. *Ibid.*, Section 230.501(a)(4).
  19. *Ibid.*, Section 230.501(a)(5) (“Any natural person whose individual net worth, or joint net worth with that person’s spouse, exceeds \$1,000,000”). Generally, net worth for this purpose excludes a person’s primary residence and any debt secured by such residence. *Ibid.*, Section 230.501(a)(5)(i).
  20. 7 C.F.R. Section 230.501(a)(6) (2015).
  21. *Ibid.*, Section 230.501(a)(7).
  22. *Ibid.*, Section 230.501(a)(8).
  23. Interpretive Release on Regulation D, Securities Act Release No. 6455, 1 Fed. Sec. L. Rep. (CCH) at par. 2380 (March 3, 1983), question 26 (Regulation D Interpretive Release).
  24. 15 U.S.C. Section 77c(a)(2) (2012).
  25. In a no-action letter, the SEC didn’t specifically address a requestor’s statement that a trust company was a bank because a “substantial portion of its business consist[ed] of exercising fiduciary powers.” *Nemo Capital Partners, L.P.*, *supra* note 7 (concluding that a trust with a bank as a co-trustee was an accredited investor).
  26. *Nemo Capital Partners, L.P.*, *supra* note 7; “SEC Compliance and Disclosure Interpretations,” at par. 1468 (CCH ed., 2d ed. 2011).
  27. 17 C.F.R. Section 230.501(a)(5) (2015).
  28. *Ibid.*, Section 230.501(a)(5)(i).
  29. *Herrick, Feinstein LLP*, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 24 (Jan. 5, 2001); Regulation D Interpretive Release.
  30. 17 C.F.R. Section 230.501(a)(6) (2015).
  31. Regulation D Interpretive Release, question 23; SEC, *supra* note 2, at p. 42, n.154.
  32. 17 C.F.R. Section 230.501(a)(7) (2015).
  33. *Hall, Moneytree Assocs. Limited Partnership I*, SEC No-Action Letter, 1983 SEC No-Act. LEXIS 2961 (Nov. 3, 1983).
  34. 17 C.F.R. Section 230.506(b)(2)(ii) (2015).
  35. *Ibid.*, Section 230.501(a)(8); “SEC Compliance and Disclosure Interpretations,” *supra* note 26, at par. 1470.
  36. See *Lawrence B. Rabkin*, SEC No-Action Letter, 1982 SEC No-Act. LEXIS 2690 (Aug. 16, 1982); Regulation D Interpretive Release, question 30.
  37. “SEC Compliance and Disclosure Interpretations,” *supra* note 26, at par. 1473 (referencing *Herbert S. Wander*, SEC No-Action Letter, 1983 SEC No-Act. LEXIS 3005 (Nov. 25, 1983) and *Herrick, Feinstein LLP*, *supra* note 29); see also *Trans-Resources, Inc.*, SEC No-Action Letter, 1997 SEC No-Act. LEXIS 636 (May 27, 1997).
  38. “SEC Compliance and Disclosure Interpretations,” *supra* note 26, at par. 1473.
  39. 15 U.S.C. Section 80a-8 (2012).
  40. See *ibid.*, Section 80a-3(c)(1). See also *Handy Place Investment Partnership*, SEC No-Action Letter, 1989 SEC No-Act. LEXIS 850 (July 19, 1989); *Nemo Capital Partners L.P.*, *supra* note 7; *OSIRIS Management, Inc.*, SEC No-Action Letter, 1984 SEC No-Act. LEXIS 1966 (Feb. 17, 1984).
  41. 15 U.S.C. Section 80a-2(a)(8) (2012); *ibid.*, Section 80a-2 (a)(8).
  42. 15 U.S.C. Section 80a-3(c)(1)(A) (2012).
  43. *OSIRIS Management, Inc.*, *supra* note 40.
  44. *Handy Place Investment Partnership*, *supra* note 40.
  45. *Nemo Capital Partners L.P.*, *supra* note 7.
  46. 15 U.S.C. Section 80a-3(c)(5) (2012); *American Bar Association (ABA)*, SEC No-Action Letter, 1999 SEC No-Act. LEXIS 456 (April 22, 1999).
  47. 15 U.S.C. Section 80a-3(c)(7)(a) (2012).
  48. *Ibid.*
  49. *Ibid.*, Section 80a-2(a)(5)(A)(i).
  50. *Ibid.*, Section 80a-2(a)(5)(A)(ii).
  51. *Ibid.*, Section 80a-2(a)(5)(A)(iii)
  52. *Ibid.*, Section 80a-2(a)(5)(A)(iv).
  53. 17 C.F.R. Section 270.2a51-3(b) (2015).
  54. *Ibid.*, Section 270.2a51-1.
  55. 15 U.S.C. Section 80a-2(5)(A)(ii) (2015).
  56. *Meadowbrook Real Estate Fund*, SEC No-Action Letter, 1998 SEC No-Act. LEXIS 805 (Aug. 26, 1998); see also *ABA*, *supra* note 46, question 1.
  57. *ABA*, *supra* note 46, part D.
  58. See *SCP Private Equity Partners II, L.P.*, SEC No-Action Letter, 2006 SEC No-Act. LEXIS 478 (June 6, 2006).
  59. *Meadowbrook Real Estate Fund*, *supra* note 56.
  60. 15 U.S.C. Section 80a-2(a)(5)(A)(iv) (2012).
  61. *Ibid.*, Sections 80a-3(c)(1)(B), -3(c)(7)(A).
  62. *ABA*, *supra* note 46.
  63. *Ibid.*, question 2.
  64. 17 C.F.R. Section 270.3c-6 (b)(3) (2015).
  65. Del. Code tit. 12, Section 3313 (2015).
  66. *Ibid.*
  67. See *Nemo Capital Partners L.P.*, *supra* note 7; “SEC Compliance and Disclosure Interpretations,” *supra* note 26, par. 1468.
  68. A holding period of six months or one year may apply to the grantor’s transfer of securities that were acquired in an exempted offering. See 17 C.F.R. Section 230.144 (2015).
  69. 17 C.F.R. Section 230.501(a)(8); 17 C.F.R. Section 270.2a51-3(b).