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Alert Memo

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SEC Proposes to Liberalize Solicitation and Advertising in Private Placements

On August 29, 2012, the U.S. Securities and Exchange Commission proposed rule changes to liberalize the use of solicitation and advertising in private placements of securities. The Proposal was made pursuant to the JOBS Act, which was signed into law on April 5, 2012.

Section 201(a) of the JOBS Act directs the Commission to change two of its "safe harbor" rules for private placements. Both changes have the same effect – they eliminate restrictions on how securities are offered, as long as the resulting sales meet the requirements of the safe harbor. In particular, they eliminate the longstanding requirement that there be no "general solicitation or general advertising" in connection with private placements under the safe harbor rules.

The proposed rule changes follow the statutory mandate closely and are limited to what the Commission considers necessary to implement the mandate in Section 201(a). They may, however, have significant effects on the conduct of private placements of all kinds of securities. This memorandum describes the Proposal and some of its implications for private placement practices.

Comments on the Proposal are due 30 days after its publication in the Federal Register. Publication is likely to occur during the week of September 4, so comments would be due in early October 2012.[1]

[1] The proposed rule changes (the "Proposal") are set forth in a Commission release dated August 29, 2012 (the "Proposing Release"), which is available at http://www.sec.gov/rules/proposed/2012/33-9354.pdf.

I. The Proposal

A. Proposed New Rule 506(c)

The central element of the Proposal is to amend Rule 506 under the Securities Act. Rule 506, part of Regulation D, is a safe harbor for issuer private placements: it provides that offers and sales by an issuer that meet certain conditions are exempt from registration under Section 4(a)(2) of the Act. One of the conditions is that neither the issuer nor any person acting on its behalf may offer or sell the securities by any form of general solicitation or general advertising. Rule 506 currently permits offers and sales to an unlimited number of "accredited investors" and up to 35 other investors. The term "accredited investor" is defined in Rule 501 to mean a person who comes within any of eight specified categories, or who the issuer reasonably believes comes within any of the categories, at the time of the sale of the securities to that person.

Section 201(a) of the JOBS Act directs the Commission to amend Rule 506 to permit general solicitation or general advertising in offerings under the Rule, provided that all purchasers of the securities are accredited investors. Section 201(a) also provides that "[s]uch rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission."

The Proposal would leave the existing safe harbor under Rule 506 unchanged, but would add a new paragraph 506(c) providing for offerings under the Rule that use general solicitation and general advertising and stating the conditions that must be met for those offerings. These conditions differ from existing Rule 506 in four respects.

- All the purchasers must be accredited investors. The Proposing Release emphasizes that this is not an absolute standard, because the definition of accredited investor includes *both* persons that actually fall in specified categories *and* persons that the issuer reasonably believes fall in the specified categories.
- The issuer "shall take reasonable steps to verify" that the purchasers are accredited investors.
- The limitation on manner of offering in Rule 502(c) – which requires that there be no general solicitation or general advertising – does not apply.
- The information requirement in Rule 502(b) does not apply.[2]

[2] Even under the existing rules, the information requirement does not apply with respect to accredited investors, and all purchasers in a Rule 506(c) offering must be accredited investors.

B. Private Placements without General Solicitation or General Advertising

As noted above, the Proposal does not modify the existing safe harbor, except to retitle existing paragraph (b) of Rule 506 as follows: "Conditions to be met in offerings not using general solicitation or general advertising." Consequently, assuming the Proposal is adopted in its current form, private placements conducted without the use of general solicitation or advertising may proceed exactly as before. For example, a Rule 506(b) offering could include up to 35 investors that are not accredited investors, as long as the information requirement of Rule 502(b) is met, and there would be no separate requirement of "reasonable steps to verify."

C. Reasonable Steps to Verify

Section 201(a) of the JOBS Act states that the Commission's rule permitting private placements with general solicitation or general advertising must require the issuer to take reasonable steps to verify that all purchasers are accredited investors, "using such methods as determined by the Commission." The Proposal takes a simple approach to this requirement: one of the conditions in Rule 506(c) is that "[t]he issuer shall take reasonable steps to verify that purchasers of securities sold in any offering under this [Rule 506(c)] are accredited investors."

In other words, the Commission proposes not to specify the methods of verification, and not to provide a non-exclusive list of specified methods. The Proposing Release notes that the Commission has received a number of comment letters proposing specific approaches to the verification requirement, but it observes that private placement practices encompass a very wide range of circumstances, that a prescriptive rule would be overly burdensome in some cases and ineffective in others, and that a safe harbor rule might be ineffective or inappropriate in some cases.

Instead, the Proposing Release states that whether verification of accredited investor status is reasonable "would be an objective determination, based on the particular facts and circumstances of each transaction." Issuers would consider "a number of factors," and the release goes on to discuss three examples: the nature of the purchaser, the information the issuer has about the purchaser, and the nature and terms of the offering. All this discussion is guidance, and none is reflected in the language of the rule itself.

D. Filing of Form D

Rule 503 of Regulation D provides that an issuer that offers or sells securities in reliance on any of several exemptions, including Rule 506, must file with the Commission a notice of sales using Form D. One of the requirements of Form D is to check a box indicating the provision on which the issuer relied. The Proposal would modify Form D to require that the issuer check either "Rule 506(b)" if it has relied on the existing safe harbor (i.e., without general solicitation or general advertising) or "Rule 506(c)" if it has relied on the new safe harbor (i.e., with general solicitation or general advertising).

Commissioners Walter and Aguilar, in their remarks on the Proposal, both asked whether Regulation D should be amended to make filing of Form D a condition of the safe harbor, at least for an offering with general solicitation or general advertising. Under current rules, the filing is an independent requirement and not a condition for the safe harbor. That suggestion, which picks up on several comments submitted prior to the meeting, was not included in the Proposal.

E. Proposed Amendment of Rule 144A

In addition to requiring the Commission to amend Rule 506, Section 201(a) of the JOBS Act also required it to amend Rule 144A. Rule 144A is a safe harbor that permits a person other than the issuer to resell securities without registration if the transaction meets specified requirements, including a requirement that the securities be offered and sold only to persons the seller and any person acting on the seller's behalf reasonably believe are qualified institutional buyers, or QIBs, as defined in Rule 144A. Because Rule 144A requires that there be no offers to anyone other than those reasonably believed to be QIBs, it effectively prohibits general solicitation and general advertising.

Section 201(a) requires the Commission to amend Rule 144A to permit offers to persons other than QIBs, including by means of general solicitation or general advertising. In response, the Proposal would modify Rule 144A to eliminate the references to offers and offerees in the conditions set forth in paragraph (d)(1) of Rule 144A. Consequently a seller may rely on Rule 144A even if the securities were offered to non-QIBs and even if there has been general solicitation or general advertising.

F. SEC Rulemaking Process

The JOBS Act directed the Commission to amend Rule 506 and Rule 144A within 90 days of enactment. That deadline passed in July 2012. In order to limit further delay, the Commission was moving toward adopting interim final rules – which would take effect immediately and be subject to public comment after adoption. In mid-August, however, the Commission changed its approach and announced that it would follow the more usual process in which a proposed rule is published and subject to comment before a final rule is adopted and takes effect.[3] The release provides for only a short 30-day comment period, but the timing for final rules is difficult to predict. In the meantime, the old rules prohibiting general solicitation and general advertising remain in effect.

One question regarding the Proposal that has been clearly framed is whether the Commission should do more to limit potential adverse consequences of permitting broad solicitation and advertising for unregistered securities. The debate on this question is reflected in many of the comments submitted prior to the Commission's Proposal and in the published remarks of Commissioners Walter and Aguilar,[4] and it is sure to continue in comment letters on the Proposal. Commissioner Aguilar, in particular, took the unusual step of publishing an extensive independent request for comments on the Proposal.

II. Potential Implications of the Proposal

A. Effects on Other Exempt Offerings

The liberalization of general solicitation and general advertising under the Proposal will apply only to offerings under the Rule 506(c) and Rule 144A safe harbors. There are, however, limitations on the manner of making offers or contacting investors in connection with other categories of exempt offers and sales, including: (1) private placements conducted without the benefit of a safe harbor under Section 4(a)(2) of the Securities Act; (2) private resales under the so-called "Section 4(1½) exemption;" (3) small offerings under Rules 504 and 505 of Regulation D; and (4) offshore offerings under Regulation S of the Securities Act.

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[3] Commissioners Aguilar and Gallagher sharply criticized this change of plan at the Commission's August 29 meeting. In response, Chairman Schapiro referred to comment letters urging the Commission to take the notice-and-comment approach.

[4] Commissioner Walter's remarks are available at http://www.sec.gov/news/speech/2012/spch082912ebw.htm. Commissioner Aguilar's remarks, titled "Increasing the Vulnerability of Investors," are available at http://www.sec.gov/news/speech/2012/spch082912laa.htm.

The Proposal does not apply to any of these types of transactions, which has led to questions about whether they are nevertheless affected and about the interaction between different types of exemptions in particular offerings.

1. Section 4(a)(2) and Section 4(1½)

The exemption from registration in Section 4(a)(2) of the Securities Act applies to a transaction by an issuer "not involving any public offering." The Commission's view expressed over many years has been that for there to be no public offering, the issuer and those acting on its behalf may not contact investors for the offering by means of a public solicitation – or to put it another way, there must be a substantive pre-existing relationship between the issuer, or those acting on its behalf, and the purchaser.

The Proposing Release refers very briefly to that view, noting that "[a]n issuer relying on Section 4(a)(2) is restricted in its ability to make public communications to attract investors for its offering because public advertising is incompatible with a claim of exemption under Section 4(a)(2)." It goes on to observe that the JOBS Act mandate "affects only the Rule 506 safe harbor, and not Section 4(a)(2) offerings in general." In support of this position, the release notes that some of the JOBS Act's predecessor bills included an amendment to Section 4(a)(2) itself to add the words "whether or not such transactions involve general solicitation or general advertising," and that this language was eliminated during debate on the House floor.[5]

Consequently, if the Proposal is adopted in its current form, general solicitation and general advertising will be permitted in transactions under Rule 506(c) and in transactions under Rule 144A, but as is the case today, they would appear not to be permitted in a private placement by an issuer under Section 4(a)(2) or a private resale under the interpretive doctrine referred to as the "Section 4(1½) exemption." The policy basis for this distinction is not obvious where all sales are to accredited investors or QIBs, and over time market participants may question whether, in those circumstances, general solicitation or other public communication necessarily compel the conclusion that a "public offering" is involved and thus that reliance on Section 4(a)(2) is precluded.

2. Rule 144A Offerings

As the Proposing Release observes, issuers regularly raise capital in "Rule 144A offerings," which involve two exemptions: the initial sale by the issuer to a financial intermediary is exempt under Section 4(a)(2), and the subsequent resale

[5] Proposing Release at page 11 and note 35.

by the financial intermediary to QIBs is exempt under Rule 144A. Under the Proposal, general solicitation and general advertising can be used in the subsequent resale because Rule 144A, as proposed to be amended, will no longer restrict offers. Although the Proposing Release is silent on the point, we believe it is clear that this will not undermine the Section 4(a)(2) exemption for the initial placement.[6] Further, the additional verification requirements of Rule 506(c) will not apply to the initial sale by the issuer – assuming that all the conditions for exempt resales under Rule 144A have been met.

On the other hand, if there has been general solicitation or general advertising, but Rule 144A is unavailable (e.g., because the investors will include non-QIBs, or because the securities are not eligible for Rule 144A), the financial intermediaries will have no available exemption. New Rule 506(c) will be available only to the issuer, so the only means of structuring an exempt offering with general solicitation or general advertising, other than a Rule 144A offering, would appear to be a direct offering by the issuer under Rule 506(c), in which financial intermediaries may act as placement agents of the issuer but may not purchase and resell. Such an offering would require the filing of Form D and, depending on the circumstances, possibly the imposition of additional restrictions on resale.

3. Regulation S Offering with Concurrent Rule 144A or Section 4(a)(2) Offering

Unregistered private offerings in the United States are frequently made in conjunction with offerings under Regulation S, which provides a safe harbor from registration for offers and sales made outside the United States so long as specified conditions are met. One of those conditions is the absence of "directed selling efforts" in the United States. Commentators questioned whether the use of general solicitation in a U.S. private placement would constitute "directed selling efforts," potentially making the Regulation S safe harbor unavailable for the concurrent offering outside the United States.

The Commission addressed this concern by reaffirming guidance first provided when Regulation S was adopted in 1990. That guidance stated that "offshore transactions made in compliance with Regulation S will not be integrated

[6] The issuer and the initial purchaser have a substantive preexisting relationship, and the general solicitation employed by the intermediary is unrelated to the issuer's sale to the intermediary. *See* Paragraph (e) of Rule 144A ("Offers and sales of securities pursuant to this section shall be deemed not to affect the availability of any exemption or safe harbor relating to any previous or subsequent offer or sale of such securities by the issuer or any prior or subsequent holder thereof") and Preliminary Note 7 to Rule 144A ("The fact that purchasers of securities from the issuer thereof may purchase such securities with a view to reselling such securities pursuant to this section will not affect the availability to such issuer of an exemption under section 4(2) of the Act, or Regulation D under the Act, from the registration requirements of the Act").

with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act, even if undertaken contemporaneously".[7] The Proposing Release cites this language and states that it will still apply, and that concurrent Regulation S offers will not be integrated with private placements conducted in compliance with Rule 506 or Rule 144A, as proposed to be amended. We believe this statement means that the existence of general solicitation or general advertising for the exempt private U.S. offering does not bear on whether there have been directed selling efforts for the concurrent Regulation S offering.

B. Inadvertent Publicity for a Private Placement

Under current rules, the private placement exemption for a proposed transaction can be compromised by inadvertent publicity that may constitute general solicitation (in a Rule 506 offering) or prohibited offers to non-QIBs (in a Rule 144A offering). Examples of these "foot faults" include unintentional or ill timed disclosures to the press and internal-only emails inadvertently sent outside the sender's institution. At another level, the publicity surrounding a proposed private offering of Facebook shares in early 2011 led to questions whether intense media attention could be inconsistent with a private placement.

Under the Proposal, publicity will not be inconsistent with the Rule 144A exemption. Nor will it be inconsistent with a Rule 506(c) private placement, as long as the purchasers are limited to accredited investors and there are "reasonable steps to verify" that all purchasers are accredited investors. If the Proposal is adopted, an issuer that plans not to engage in general solicitation or general advertising as part of its Rule 506 offering might still consider implementing "reasonable steps to verify" as part of its standard procedures, so that Rule 506(c) can be available as an alternative to Rule 506(b) if any "foot faults" are discovered prior to filing the related Form D.

The proposed change in Form D will, however, present the issuer with a decision in an instance of unintentional publicity. It would require the issuer to decide which approach under Rule 506 it is taking. In practice, there is often doubt about whether specific conduct constituted general solicitation, and under the new rule there may also be doubt about whether there have been reasonable steps to verify that all purchasers were accredited investors. An issuer might prefer to preserve two alternative analyses – the conduct was not general solicitation, or there were reasonable steps to verify – but Form D would not permit this.

[7] Release No. 33-6863 (1990). The Commission also noted in the 1990 release, in addressing directed selling efforts, that "Offering activities in contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors." Id.

C. Verification of Accredited Investor Status

As described above, the Proposal takes a principles-based approach to the requirement that the issuer take reasonable steps to verify that all purchasers are accredited investors. The Adopting Release says that whether verification has been reasonable is an objective determination, based on the particular facts and circumstances of the transaction, and then it provides guidance on some aspects of that determination. It also says that an issuer should maintain adequate records to document the steps it takes. But beyond that the Commission would leave it to market participants to evaluate particular practices, consistent with the general purpose of the requirement and the brief and rather open-ended guidance the Commission has provided.

The Proposing Release states the Commission's belief that "… the purpose of the verification mandate is to address concerns, and reduce the risk, that the use of general solicitation under Rule 506 may result in sales to investors who are not, in fact, accredited investors." Consistent with this view, the Commission says that if the issuer has actual knowledge that a purchaser is an accredited investor, no further verification steps would be necessary. It also distinguishes between broad means of solicitation – such as a website accessible to the general public, or a widely disseminated email – and narrower means like using a database of pre-screened investors from a registered broker-dealer. After a broad solicitation, the release says, it would not be reasonable to simply require an investor to check a box on a questionnaire or to sign a form. On the other hand, after a narrower solicitation, an issuer might reasonably rely on some procedures that are already in wide use today.[8]

The guidance refers to the possibility that an issuer might reasonably rely on verification by a third party, but it does not say more about what might constitute a reasonable basis for doing so. In some comparable situations in the past, the Commission staff has issued no-action letters based on the standards and practices described by a commercial verification provider, but there is no indication in the release that such an approach might be followed under Rule 506(c).

With respect to institutional investors, issuers and their agents may find the Commission's guidance to be relatively easy to work with, because reasonable steps are already in use or could be achieved with minimal changes. The guidance notes the relative ease of obtaining third-party information regarding institutional investors including publicly available information in filings with regulatory bodies.

[8] The Commission "anticipate[s] that many practices currently used by issuers in connection with existing Rule 506 offerings would satisfy the verification requirement proposed for offerings pursuant to Rule 506(c)." Proposing Release at page 25.

For smaller institutions and individuals, the guidance may be more challenging to meet as it focuses on methods of verification that are currently less common and more intrusive than current practice, including obtaining copies of tax documentation, or seeking verification from a broker-dealer, attorney or accountant (provided the issuer has a reasonable basis to rely on such third-party verification). The Proposing Release, however, notes that the terms of the offering also affect whether the verification method is reasonable and adds that "there is merit" to the view that a purchaser's ability to meet a high minimum investment amount could be relevant.

The Commission's general approach to verification is a departure from its historical approach to safe harbor exemptions from the registration requirements of the Securities Act. The consequence of failing to comply (considered in hindsight) is a strict liability "put" or rescission right by the investor to the seller under Section 12(a)(1) of the Securities Act. For decades, the Commission has taken a series of steps under the Securities Act, including Regulation D, Rule 144A, Regulation S and Rule 144, to provide bright-line safe harbors to provide assurance of compliance with exemptions from Section 5. In contrast, the "all the facts and circumstances" approach to verification under the Proposal requires judgment and will entail uncertainty, even with the Commission's guidance in the Proposing Release.

D. Integration of Public and Private Offerings

Under current rules, when an attempted private placement occurs concurrently with or immediately following a public offering, the filing of the registration statement and solicitation of investors in the public offering may be interpreted as general solicitation, making the Rule 506 safe harbor unavailable. Conversely, when an attempted public offering occurs concurrently with or immediately following a private placement, the solicitation for the private placement may constitute "gun jumping" in connection with the public offering that would violate Section 5(c) of the Securities Act.

The Commission has created safe harbors for (a) abandoned public offerings followed by private offerings, (b) abandoned private offerings followed by public offerings, (c) completed public offerings followed by Regulation D private offerings and (d) Regulation D private offerings followed by public offerings.[9] But each of these safe harbors requires a "cooling off period" between the offerings and is therefore unavailable for *concurrent* private and public offerings. The concurrent

[9] *See generally* Rule 502(a) and Rule 155 under the Securities Act; The Black Box Incorporated (avail. June 26, 1990) and Squadron, Ellenoff, Pleasant & Lehrer (avail. Feb. 28, 1992); and SEC Release No. 33-8828 (2007).

offering question may arise, for example, when a privately held issuer files an IPO registration statement and simultaneously seeks to place a large block of equity on a private basis with a strategic investor. The Commission has published guidance that requires an analysis of the facts and circumstances and particularly whether the interest of specific investors in the private placement arose from the public offering or by other means, such as a pre-existing relationship.

Under the Proposal, the analysis for a private placement made concurrently with or immediately following a public offering would be substantially simplified, as long as the private placement is under Rule 144A, as proposed to be amended, or new Rule 506(c). An issuer considering an initial public offering, for example, should be free to file a registration statement and then discuss private investment opportunities and strategic partnerships with a potential investor that becomes aware of the issuer from the filing, preserving the possibility of a private placement to that investor.

E. Exempt Exchange Offers

The Proposal should facilitate exchange offers with existing securities holders in transactions exempt from registration under the Securities Act. Specifically, the pre-certification of QIB or accredited investor status that currently precedes such offers and makes initial distribution of offering material cumbersome could be replaced by a verification process completed only by investors that choose to participate in the offer.

F. Private Investment Funds

Many hedge funds, venture capital funds and private equity funds rely on the exclusions from the definition of "investment company" in Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act. Both Investment Company Act exclusions require that there be no public offering of the fund's securities, and Rule 506 transactions have been regarded as non-public offerings for this purpose.

New Rule 506(c) will make it possible for a private fund to use general solicitation and general advertising to raise funds, without conducting a public offering that would require the fund to register under the Investment Company Act. The Commission expressly confirms this understanding in the Proposing Release, without any other comment. However, advance comments have noted that registered investment companies are subject to restrictions on advertising that will not apply to private funds and have argued that advertising of private funds presents particular investor protection concerns. Commissioner Aguilar's remarks on the Proposal also discuss these risks, and this is sure to be a focus of comments on the Proposing Release.

G. Testing the Waters for Private Capital

The proposed rules would permit a private company to use general solicitation to "test the waters" to assess the availability of private capital, which would be similar to what an emerging growth company can do preceding an initial public offering under the "testing the waters" provisions of Title I of the JOBS Act. Under the Proposal it would be possible, for example, for a number of issuers jointly to hold an investor conference to which they may invite any number of interested members of the public and solicit the resulting attendees to invest privately in upcoming securities offerings. Issuers engaging in these practices would, in the case of Rule 506(c) offerings, still have to take reasonable steps to verify that purchasers are accredited investors and, in the case of Rule 144A offerings, still have to reasonably believe that purchasers are QIBs. This and other potential effects of the revised rules are more likely to affect smaller companies than large issuers that can access investors by other means.

H. Concerns under State Securities Laws

Section 18 of the Securities Act preempts state Blue Sky laws for "covered securities," including those issued pursuant to SEC rules or regulations under Section 4(2), like Rule 506. The elimination of the prohibition on general solicitation and general advertising in Rule 506 transactions should not alter the status of those securities as "covered securities" under Section 18. Federal preemption should continue to apply to Rule 506 transactions.

Securities offered and sold under Rule 144A are not "covered securities," but the Proposed Rules also should not have a significant effect on Blue Sky regulation of 144A transactions. All states currently have a self-executing Blue Sky exemption for offers and sales of securities made to sophisticated institutional investors, including QIBs. The presence or absence of general solicitation or general advertising is not a condition of these exemptions, and issuers should be able to continue to rely on these exemptions after adoption of the Proposed Rules as they do today.

I. Applicability of Anti-Fraud Provisions

Anti-fraud liability under federal and state securities laws potentially applies to misstatements or omissions in general solicitation or general advertising that is used to sell securities. Because of concerns in this area, some market participants may continue to observe conventional publicity restrictions, or limit departures from them, even though those restrictions might no longer be necessary for the applicable exemption from registration.

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Please contact any of our partners and counsel listed under “Capital Markets” in the “Practices” section of our website (www.cgsh.com) or any of your other regular contacts at the firm for further information about the matters discussed above.

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