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Client Memo

A Seismic Shift In The Securities Laws:

The Elimination of the Ban on the Use of General Solicitation or General Advertising in Certain Private Placements, and What It Means for Issuers, Accredited Investors, and Crowdfunding

New rules lifting the ban on the use of general solicitation or general advertising radically change the manner in which securities can be offered for private sale, and pave the way for accredited investor crowdfunding.

In accordance with its mandate in Section 201(a) of the Jumpstart Our Business Startups Act ("JOBS Act"), on July 10, 2013, the Securities and Exchange Commission ("SEC") adopted new Rule 506(c)[i], which is an amendment to the private offering safe harbors found in Regulation D, and amendments to Rule 144A, to permit, in certain situations, the use of general advertising or general solicitation through mass communications outlets such as the Internet, in connection with the offer and sale of securities. The SEC simultaneously adopted rules, mandated by Section 926 of The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), to disqualify "bad actors" from participating in any Rule 506 offering, whether or not general solicitation is used. The amendments will become effective on September 23, 2013.

Simultaneously with adopting the new rules, the SEC proposed further rules for public comment that would substantially impact the reporting obligations of Reg D offerings. The purposed rules will limit some of the flexibility afforded by the newly adopted rules and, if adopted, may have a chilling effect on issuers taking advantage of the new rules.

Regulation D and new Rule 506(c) offers using General Solicitation or General Advertising

Regulation D is a series of safe harbor rules that, when followed, will result in a securities offering to be deemed to be not a "public offering" for purposes of the registration requirement of the Securities Act of 1933. Pre-Rule 506(c) Regulation D contains three alternative safe harbors from registration requirements: Rules 504, 505 and 506.

- Rule 504 permits offerings up to $1 million per year by companies not otherwise subject to the reporting obligations of the Securities Exchange Act of 1934 ("Exchange Act"), ("non-reporting companies") (but including foreign private issuers that provide information under Rule 12g3-2(b)), with no limitations on the type of purchaser.[ii]
- Rule 505 permits offerings up to $5 million per year to an unlimited number of "accredited investors"[iii] and up to 35 non-accredited investors.[iv]
- Existing Rule 506 permits an offering of any size to an unlimited number of accredited investors and up to 35 non-accredited investors ("non-AIs") provided each non-AI has a level of business and financial sophistication making him or her capable of evaluating the merits and risks of the investment.[v] This Rule has been renumbered Rule 506(b).

Existing Rule 506 has been preserved and renumbered Rule 506(b), and new Rule 506(c) permits issuers to conduct a general solicitation to offer securities so long as:

- all sales are limited to "accredited investors",
- the issuer takes "reasonable steps" to verify that *all* purchasers of the securities are indeed accredited investors, and
- All terms and conditions of Rule 501 (tests for accredited investor status), Rules 502(a) (all sales made within 6 months before or after the Rule 506(c) offering will be deemed to be part of that offering and must meet all the requirements), and Rule 502(d) (restricted securities subject to resale limits) must be satisfied.

Securities issued in reliance upon Rule 506(c) will be deemed to be "covered securities" which means that they will be exempt from registration under state securities ("blue sky") laws.

The Rule 506(c) exemption is available to both public and private companies, domestic US or non-US companies; however, issuers that have "bad actors" as participants in the offering are excluded from relying on Rule 506(c), see the discussion below.

For those issuers who do not want to undertake the burden of taking reasonable steps to ensure that all purchasers are accredited investors, or who want to offer and sell to a limited number of non-accredited investors, the SEC has preserved the ability of an issuer to rely upon the pre-existing safe harbors in Regulation D, which prohibit the use of general solicitation or general advertising (renumbered Rule 506(b)). Consequently, an issuer will have the choice whether to proceed with an offering using or foregoing general solicitation or general advertising and be subject to different rules depending on its choice. The statutory fall-back "private placement" exemption under Section 4(a)(2) (formerly Section 4(2)) of the Securities Act is only available if the issuer foregoes the use of general solicitation and general advertising.

Who is an "accredited investor"? The Commission did not change the definition of accredited investor ("AI"), which includes most categories of institutional investors such as banks, broker dealers and pension funds, and natural persons who are presumed to have an adequate level of financial sophistication and are able to bear investment risks based on income and net worth tests. Pursuant to the current definition, a natural person qualifies as an accredited investor if he or she has individual net worth – or joint net worth with a spouse – that exceeds $1 million at the time of the purchase, excluding the value of the primary residence of such person, or, if he or she has income exceeding $200,000 in each of the two most recent years or joint income with a spouse exceeding $300,000 for those years and a reasonable expectation of the same income level in the current year. However, simultaneously with its release adopting Rule 506(c), the SEC proposed additional rule changes, described below, in which it requested public comments on the definition of "accredited investor", the standards for which will likely become more stringent with respect to natural persons.

What are "reasonable steps to verify accredited investor status"? The Commission has made clear in the adopting release that the requirement to take reasonable steps to verify accredited investor status is independent of the requirement that all purchasers indeed be accredited investors, and the reasonable steps requirement must be met and verified – hence good record keeping is essential – even if all purchasers happen to be accredited investors. The adopting release does not set out a specific safe harbor for verification, rather it takes a principles-based "facts and circumstances" approach to determining if the steps taken are reasonable and goes on to specify four methods that will be deemed to constitute "reasonable efforts" to verify AI status unless the issuer has knowledge that a particular purchaser is in fact not an AI .

Among the factors that issuers should consider under this facts and circumstances analysis are:

- **Nature of the purchaser** and the type of accredited investor that the purchaser claims to be (for example, a registered broker-dealer would require fewer steps than other natural persons relying on the income or net worth test);
- **Information about the purchaser** can be garnered from the following sources which may or may not be relied upon as sufficient depending on the circumstances:
    - Publicly available information in regulatory filings such as proxy statements or IRS filings
    - Third-party sources such as pay stubs or publicly available information about compensation levels at the person's workplace for persons at his or her level
    - Verification by a third party, which in future may lead to the development of vendors to fulfill this purpose.
- **Nature of the offering**, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount. For example, offerings through social media or other media available to the general public would require more verification procedures than an offering made to a limited list of pre-screened investors. Self-certification and purchaser questionnaires would be inadequate when solicitation is made to the general public.
- **Terms of the offering**, if the minimum investment amount is sufficiently high such that only an accredited investor could reasonably be expected to invest, then additional verification may not be necessary, however the issuer should verify that the purchase is not being finance by a third party or the issuer itself.

After consideration of the facts and circumstances of the purchaser and of the transaction, the more likely it appears that a purchaser qualifies as an accredited investor, the fewer steps the issuer would have to take to verify accredited investor status, and vice versa. The Commission provided a non-exclusive list of four methods that investors may use to satisfy the verification requirement:

- **Income verification** Reviewing copies of IRS forms that report income, such as a Form W-2 or Form 1099.
- **Net worth verification** by reviewing documentation to vet net worth that is dated within three months of the purchase, such as bank statements, tax assessments, appraisal reports, and credit reports to determine the net

worth of an individual, in addition to obtaining a written representation from such investor that all liabilities necessary to make a determination of net worth have been disclosed.

- **Reliance on third parties** such as obtaining a written opinion from a registered broker dealer, an SEC-registered investment advisor, a licensed attorney, or a certified public accountant that such person has taken reasonable steps to verify that the investor is accredited within the past three months and that such investor is in fact accredited.
- **Existing Accredited Investors**. Any investor that participated in a Rule 506(b) offering prior to the effective date of the new rules, and remains an investor of the issuer, may provide a certification to the issuer that such investor remains accredited.

The Commission specified that the current rule requiring issuers who rely on Regulation D file a Form D within 15 days after the first sale of securities, applies to offering made under Rule 506(c); however, the Commission simultaneously released proposed new rules for public comment, fully discussed below, which would enhance the Form D filing requirement. Further, the Commission adopted a rule amendment requiring a new check-the-box disclosure for issuers relying on Rule 506(c).

Rule 144A

The Commission amended Rule 144A[vi] to allow securities resold pursuant to Rule 144A to be offered to persons other than "qualified institutional buyers" ("QIBs"), including by way of general solicitation, provided that the securities are sold only to persons that the seller (or any person acting on behalf of the seller) "reasonably believes" are QIBs. “Qualified Institutional Buyer” includes insurance companies, mutual funds, hedge funds, pension funds and commercial and investment banks.

What kind of activities might we see from issuers and Rule 144A resellers, and some cautionary remarks

Issuers under the new Rule 506(c) are free to use virtually any type of media for purposes of soliciting or advertising an offering. We will likely see statements regarding securities offerings on corporate websites, more frequent and detailed press releases, cold calls, blast emails, and more information being discussed at conferences, and on analyst and earnings calls. Currently certain Exchange Act reporting issuers and foreign private issuers in private offerings limit the type of information posted on websites to Rule 135c[vii] - compliant press releases, and although issuers may be free to make broader statement in the context of an offering under Rule 506(c), it is likely that issuers will manage liability risk by continuing to follow Rule 135c inasmuch as posted material would be kept consistent with the offering memorandum. It might also be prudent for issuers to limit discussion of Rule 144A and Rule 506(c) transactions at public speaking events to completed transactions with statements that are consistent with an up-to-date offering memorandum.

As a practical matter, in syndicated Rule 144A offerings that rely on Rule 506(c) we should expect to see changes to the representations and warranties in the purchase agreement related to general solicitation. Issuers will be able to publish more informative press releases, including identifying the initial purchasers who are participating as 144A resellers in the offering, and we may see a trend toward executives participating in investor conferences and press interviews before, during or after a Rule 144A offering.

In all cases, it behooves an issuer to keep at the forefront of its mind when choosing the media resource the fact that the anti-fraud provisions of the Securities Acts still apply – any untrue statement of a material fact, or perhaps more to the point when contemplating chat room sound bites or 140-character tweets, any omission of a material fact, can subject an issuer to securities fraud liability. Additionally, the requirements of Regulation FD, requiring that if an issuer discloses material nonpublic information to certain individuals (usually financial market professionals like analysts or existing shareholders who might trade on the information) then in the interests of fair disclosure the issuer must disclose the information publicly.

Additionally, any issuer who offers securities under Rule 506(c) on its own, without the support of a website or other third-party who assumes the responsibility for vetting the accredited investor status of actual purchasers, will need to take this burden upon itself, and the self-certification investor questionnaire process that is the norm for standard Reg D offerings under newly renumbered Rule 506(b), that do not use general solicitation or general advertising, will not be sufficient for Rule 506(c).

Regulation S offshore offers and sales.

Many issuers engage in global securities offerings whereby they offer and sell securities concurrently offshore in reliance on Regulation S and privately in the United States in reliance on Regulation D (referred to as "side-by-side offerings"). The Regulation S safe harbor prohibits "directed selling efforts" in the United States, which as a matter of practice, prior to adoption of Rule 506(c), meant that the overseas side-by-side offer had to be conducted in a manner that would prevent the offshore offering or solicitation materials, press releases or website content from being accessible in the US. With the adoption of the new rule, the Commission has confirmed that the use of general solicitation in conformity with Rule 506(c) or revised Rule 144A would not be deemed to be "directed selling efforts" in the United States for purposes of Regulation S, which is a significant breakthrough for global offerings because overseas issuers who are offering securities in offshore markets with a concurrent private placement in the US will now be able to make their press releases and web content available in the US. The Commission confirmed its pre-existing guidance on such side-by-side offerings by stating that concurrent offshore offerings that are conducted in compliance with Regulation S will not be integrated with domestic unregistered offerings that are conducted in compliance with Rule 506 or amended Rule 144A.

However, because the prohibition on directed selling efforts in the US remains a condition for relying on the safe harbor, in a Reg S-only offering the prudent course of action is to continue to prohibit directed selling efforts in purchase agreements and for issuers to continue to be guided by Rule 135e to ensure that they use marketing efforts that will not be construed as directed selling efforts in the US.

Sales under Section 4(a)(2) and "4(1-1/2)"

"Section 4(1-1/2)" is the colloquial reference to the practice, to which the SEC does not object, of a purchaser from an issuer of restricted securities in a private placement pursuant to the Section 4(a)(2) statutory exemption for offers "not involving any public offering", to immediately resell those securities in a transaction in which the selling purchaser follows the strict requirements for a transaction that would not involve a public offering under Section 4(a)(2). The new Rule 506(c) elimination of the prohibition on general solicitation or general advertising applies only to offerings that meet other requirements of Regulation D, and not generally to any Section 4(a)(2) offering; consequently, prudence dictates that Section "4(1-1/2)" resales continue to refrain from general solicitation or general advertising.

Private funds and Rule 506(c)

Private investment funds will be treated like other issuers and can decide whether to conduct an offering without general solicitation under Rule 506(b), or engage in general solicitation under new Rule 506(c). The SEC confirmed that an offering under Rule 506(c) will not jeopardize a private investment fund's otherwise available exemptions under Sections 3(c)(1)[viii] or 3(c)(7)[ix] of the Investment Company Act of 1940, but did impose additional disclosure-related obligations including specific requirements for advertising that includes performance data.

Those private funds that are subject to the Commodity Exchange Act or the rules of the Commodity Futures Trading Commission (CFTC) must also consider whether Rule 506(c) is inconsistent with any of those obligations. For example, the CFTC has not issued guidance as to whether a private investment fund that engages in a Rule 506(c) offering using general solicitation will be able to rely on the "de minimus" exemption in CFTC Rule 4.13(a)(3) which provides that fund managers can avoid registration with the CFTC if the fund is not "marketed to the public in the United States." Consequently, absent guidance, to avoid running afoul of CFTC Rule 4.13(a)(3), private investment funds that trade commodity interests regulated by the CFTC may opt to rely on Rule 506(b) and continue to forego engaging in general solicitation and general advertising.

A private investment fund that decides to rely on Rule 506(c) would, for instance, be able to conduct an offering campaign to its mailing list. However, any issuer seeking to use an email marketing campaign needs to keep in mind that it is subject to the provisions of the CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003) concerning, among other things, opt-out mechanisms, and rules regarding content and the manner in which an email is sent. Additionally, private funds are subject to various privacy laws, including some enforced by the US Federal Trade Commission governing how the funds and their service providers maintain the privacy of natural persons in connection with an investment. Private funds will need to pay close attention to their privacy compliance procedures when verifying the AI status of natural persons.

Who can use the new Rule 506(c), and how can they use it -- Direct Issuer offerings, and Accredited Investor "Crowdfunding".

Direct Issuer Offerings.

Rule 506(c) provides a tool for small and emerging companies to raise capital directly. Under this rule, a company can offer and sell securities directly to accredited investors, without the need for a broker or underwriter. For example, a company can use its website to provide a link to an offering document, or a video, or conduct an email campaign to reach out to interested target audiences, with one caveat – the anti-fraud provisions of the Securities laws still apply, and every communication must be accurate, not misleading, and not misstate or omit material facts. Additionally, as a practical matter accredited investors are sophisticated and will expect some sort of disclosure about the company, its products and financial condition, and the securities, consequently each investor will expect to receive some form of private placement or offering memorandum. The issuer *must* take reasonable steps to verify the accredited investor status of any purchaser.

Crowdfunding – Clearing Away the Fog. There is a high level of confusion exhibited in the market place about the JOBS Act, crowdfunding, and the new Rule 506(c) allowing general solicitation and general advertising in certain offerings. This may, in part, stem from the sloppy use of the terminology in the media and social networks, using the same term "crowdfunding" or "crowdsourcing" to refer to everything from donations made to charity for nothing in return, to perk-based donations made to businesses for a token object in return, to advertising to accredited investors for an equity stake in the business which is now legal under Rule 506(c), what I will refer to as "accredited investor crowdfunding". "Retail equity crowdfunding", the concept that a large number of small investors can invest small amounts of money in a company for a financial return in the form of equity or interest on a loan, is the kind of crowdfunding that was addressed in Title III of the JOBS Act, and is NOT legal currently and will not be legal until the SEC adopts rules governing how that market will be regulated. There is tremendous debate in the market place over the usefulness and advisability of retail equity crowdfunding as envisioned by the JOBS Act, please refer to my memorandum "Crowdfunding -- Clearing Away the Fog" for a discussion of this topic.

The new Rule 506(c) paves the way for accredited investor crowdfunding sites to develop for both primary offerings by issuers and secondary market resales. The sites can provide a venue where issuers and accredited investors can meet. Current leading angel sites like AngelList, CircleUp and FundersClub can broaden their practices (they had been operating in a restrained manner without general solicitation and general advertising up to this point, pursuant to SEC no action letters), and new sites like SeedInvest and Rock the Post for primary sales, and SecondMarket and SharesPost for secondary market sales, can expand into accredited investor crowdfunding.

The accredited investor crowdfunding sites will likely be affiliated with a broker-dealer so that they have the option of taking on certain issuers using a more traditional underwritten model for which they can collect transaction-based compensation, but the sites will likely offer a tier of service where issuers may pay a flat fee to use the websites tools for uploading information and communicating with potential accredited investors who are registered on the site.

Issuers should keep in mind that the elimination of the prohibition on general solicitation or general advertising does not eliminate the need for a disclosure document. Accredited investors will likely require a certain level of disclosure and therefore issuers should expect to prepare some sort of offering memorandum and collateral documentation relevant to the securities being offered (such as shareholder agreements and debt instruments) and any other documents needed to finalize a transaction. Even if a particular accredited investor crowdfunding site does not require an offering document with disclosure, an issuer should provide adequate disclosure because the fact that a person is an accredited investor by virtue of income or net worth does not mean that s/he is a sophisticated investor, arguably the less sophisticated the investor, the more dire the need for disclosure -- the issuer must protect itself from 10b-5 securities fraud liability. Sites currently being developed will have the capability for issuers to upload offering documents and other materials such as product demonstration videos and running FAQs, as well as offer tools to host real-time video conferences with potential investors.

How offerings on accredited investors sites work in practice may be substantially impacted by any further rules that the SEC adopts pursuant to its proposed rules for safeguards, discussed below, which may require advance filing with the SEC of all general solicitation materials before they are made public.

Additional Proposed Rules and Regulatory "Safeguards" for 506 Offerings May Stifle How Rule 506(c) Can Be Used In Practice

Simultaneously with the adoption of the Rules described above, the SEC has proposed new rules[x] that, if adopted, would impact the content of Form D and the timing of its filing. Among other things, the proposed rules would:

- Require the filing of Form D at least 15 days in advance of engaging in any general solicitation in reliance on Rule 506(c) (supported by state regulators), instead of 15 days after the first sale of securities which is the current timing for the filing of a Form D under current Rule 503;
- Require the filing of a closing amendment to Form D within 30 days after the end of the offering, which would disclose, among other things, the total amount of securities ultimately sold in the offering;
- For the first two years following the effective date of the new rules, require the submission to the SEC of any written general solicitation materials no later than the day on which such materials are first used;
- Require that written general solicitation materials include certain legends and other specified disclosures;
- Amend Form D to require additional information for Rule 506 offerings (including, for offerings using general solicitation, the types of general solicitation to be used and the steps the issuer proposes to take to verify accredited investor status);
- Amend Rule 156, which is an interpretive rule that provides general guidance on the circumstances in which investment company sales literature could be considered misleading (and therefore violate anti-fraud rules), to extend the Rule to sales literature of private investment funds. This proposal, if adopted, is not likely to result in significant changes to existing marketing practices for private investment funds, given that anti-fraud rules already apply to their sales literature;
- Amend Rule 509 requiring private funds to include certain disclosures in any written general solicitation materials that include performance data (such as that data represents past performance, does not guarantee future results and may be higher or lower in the future, that the fund is not required by law to follow any particular methodology in calculating and representing data, and that performance data may not be directly comparable to performance data of other funds, and if the data did not include the deduction of fees must state that the data would be lower if fees and expenses had been deducted), and require that the data be as of the most recent practicable date, and that the legend provide a phone number or website where an investor can obtain current performance data; and
- If the issuer (or predecessor or affiliate) failed to file a Form D in compliance with Rule 503 at any time in the previous five years (although the five-year look back would not go beyond the effective date of the new rule, if adopted), the rule as proposed would preclude an issuer from relying on Rule 506 for a one-year period after all required filings had been made. The SEC would have the authority to grant waivers from the one-year penalty. This proposal represents a significant departure from current law.

As noted above, the SEC also requested comment on the definition of "accredited investor”.

Arguably these proposed rules, if implemented, would have a chilling effect on the practical ability of entrepreneurs to take advantage of Rule 506(c). Entrepreneurs are nimble, and successful entrepreneurial businesses are characterized by their ability to adapt to uncertain market conditions and change course quickly. In reality, the plans for raising capital, and the product and business itself in certain highly competitive industries such as high tech, may be in an active evolutionary phase until the actual first sale of securities occurs. If, for example, issuers must wait 15 days to respond to an investor inquiry because the response must be pre-filed on Form D, the offering process comes to a halt and effectively stymies business development and change for 15 days, which is antithetical to the manner in which start-up and emerging companies develop. Additionally, the proposed one year cooling-off period penalty for failure to pre-file the solicitation materials, which can be construed to include an email or other response to an inquiry, can effectively put a start-up out of business. All the new filing requirements will add an expensive administrative burden to cash-strapped startups and emerging companies. Some commentators have advocated a compromise rule requiring issuers to file general solicitation materials on Form D at the time of the first sale of securities. Additionally, the SEC is squeezed between the political positions of Congressional Democrats whose letter to the SEC Chairman prior to the release of the proposed rules advocated for an advance filing requirement, and Republicans in Congress, whose somewhat hostile letter to the SEC Chairman took the position that the proposed rules violate the JOBS Act and should be withdrawn.

Bad Actors excluded from Rule 506 offerings.

Pursuant to Section 926 of the Dodd Frank Act, the Commission adopted new Rule 506(d)[xi] to prohibit felons and other "bad actors" from participating in any offering under Rule 506, whether or not general solicitation is used, so the prohibition applies to Rule 506(b) and Rule 506(c) offerings. The "bad actors" can include entities related to the issuer such as affiliates and predecessor entities, and with respect to private investment funds can include affiliated funds and portfolio companies that are considered "affiliates" of the fund (but certain bad acts may not count, depending on the nature of the affiliation relationship, if the bad acts occurred prior to the affiliation). Covered persons include directors, officers, partners of the issuer, beneficial owners of 20% or more of the issuer's equity securities based on voting power, any promoter of the issuer or person who will be paid for soliciting purchasers (i.e., finder, placement agent), and with respect to private investment funds, any investment manager or direct or indirect director, executive officer, officer participating in the offering, general partner or managing member of the investment manager.

The rule allows for exceptions from disqualification, including (i) for disqualifying events that occurred prior to the effective date of the rule, however the issuer will be obliged to disclose the prior bad acts to prospective investors within a reasonable time prior to sale; (ii) if an issuer can prove that it did not know and, in the exercise of reasonable care, could not have known of the disqualifying event; (iii) a court or other authority indicates that the event should not be deemed a disqualifying event.

The amended rule includes a long list of disqualifying events that primarily involve criminal, civil or regulatory rulings and court orders and injunctions related to securities laws or participation in the securities industry, and also include some events that involve final orders by state securities law, banking and insurance regulators. Some of the disqualifying events are subject to look-back periods of five years for criminal convictions of issuers (including affiliates and predecessors) and ten years for other covered persons.

It is important to note that the bad actor disqualification only applies to Rule 506 offerings, and nothing prevents a disqualified 506 offering from being completed as a registered offering or pursuant to a different exemption or safe harbor that is not subject to the bad actor disqualification.

Endnotes

[i] A copy of the SEC's final rule amendments on general solicitation and Rule 506 is available at the following link: http://www.sec.gov/rules/final/2013/33-9415.pdf.

[ii] To qualify an issuer must not be subject to the periodic reporting requirement under the Exchange Act, not be an investment company nor a development stage company with no business plan or with a plan to only engage in a merger or acquisition of an unidentified company(ies) ("blank check companies").

[iii] "Accredited investors" include most categories of institutional investors, and natural persons who are presumed to have an adequate level of financial sophistication and are able to bear investment risks based on income and net worth tests.

[iv] Issuer may not be an investment company but, unlike Rule 504, may be an Exchange Act reporting company.

[v] Available to any type of issuer (reporting or non-reporting).

[vi] Rule 144A, with its underlying exemption found in Section 4(a)(2) of the Securities Act, is a safe harbor promulgated by the SEC setting forth the criteria by which immediate resales, by initial purchasers from the issuer, of a restricted security – that is to say securities which cannot be freely resold because they were purchased pursuant to an exemption from the registration requirements of Section 5 of the Securities Act and therefore not the subject of an effective registration statement -- may be made to Qualified Institutional Buyers ("QIB"s). It was designed to improve the liquidity of the institutional secondary market for privately placed securities.

[vii] Rule 135c sets out the content of press releases, by certain Exchange Act reporting issuers or foreign issuers that are exempt from Exchange Act reporting, that will not be deemed to be an offer for the sale of securities. The notice cannot be intended to condition the US market for the sale of securities, must state that the securities will not be registered and cannot be sold in the US without an exemption, and includes basic information such as the identity of the issuer and the amount, title and basic terms of the securities offered, and any legends required by applicable state or foreign law. Special provisions apply if the securities are a rights offering, exchange offer or employee offer.

[viii] Section 3(c)(1) of the Investment Company Act of 1940 excludes from the definition of "investment company" a fund whose securities are beneficially owned by not more than 100 persons and which is not making and does not presently plan to make a public offering of its securities.

[ix] Section 3(c)(7) excludes from the definition of "investment company" a fund the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are "qualified purchasers" and which is not making and does not at that time propose to make a public offering of such securities.

[x] The SEC's proposing release is available at the following link: http://www.sec.gov/rules/proposed/2013/33-9416.pdf.

[xi] The final amendments adding new "bad actor" requirements is available at the following link: http://www.sec.gov/rules/final/2013/33-9414.pdf.

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