SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
787 SEVENTH AVENUE
NEW YORK, NY 10019
(212) 839 5300
(212) 839 5599 FAX

jmclaughlin@sidley.com
(212) 839-5312

BEIJING
BRUSSELS
CHICAGO
DALLAS
FRANKFURT
GENEVA
HONG KONG
LONDON

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C.

FOUNDED 1866

November 12, 2007

By email to: rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Revisions of Limited Offering Exemptions in Regulation D
Release No. 33-8828 (File No. S7-18-07) ("Proposing Release")

Ladies and Gentlemen:

The Commission compares its proposed changes to the private placement rules to the comprehensive reform it adopted in June 2005 to the rules relating to registered public offerings ("Securities Offering Reform"). The Commission describes its objective as being "to clarify and modernize" the private placement rules so as "to bring them in to line with the realities of modern market practice and communications technologies without compromising investor protection."

The Commission has identified the correct objective, but speaking for myself, and not for my firm or any of its clients, I believe the proposed rules represent exceedingly modest progress and if adopted would not compare in any way to the progress achieved by Securities Offering Reform.

I. The Commission Should Recognize the Costs and Inefficiencies Associated with the Prohibition on General Solicitation and Advertising

The Commission's reference in the Proposing Release to Securities Offering Reform is quite in point, because the current prohibition on general solicitation and advertising is as outmoded today as were the prohibitions on non-prospectus written communications (or "gun-jumping") prior to Securities Offering Reform. In the adopting release for Securities Offering Reform, the Commission noted:

> … [S]ignificant technological advances over the past three decades have increased both the market's demand for more timely corporate disclosure and the ability of issuers to

> capture, process, and disseminate this information. Computers, sophisticated financial software, electronic mail, teleconferencing, videoconferencing, webcasting, and other technologies available today have replaced, to a large extent, paper, pencils, typewriters, adding machines, carbon paper, paper mail, travel, and face-to-face meetings relied on previously.
>
> … [T]he gun-jumping provisions of the Securities Act were enacted at a time when the means of communications were limited and restricting communications (without regard to accuracy) to the statutory prospectus appropriately balanced available communications and investor protection….
>
> … Today, issuers engage in all types of communications on an ongoing basis …. Modern communications technology, including the Internet, provides a powerful, and cost-effective medium to communicate quickly and broadly. … Thus, while investor protection remains a paramount interest, the gun-jumping provisions of the Securities Act impose substantial and increasingly unworkable restrictions on many communications that would be beneficial to investors and markets and would be consistent with investor protection.[1]

Every word of the Commission's observations justifying Securities Offering Reform applies as well to the private placement rules. The costs and inefficiencies associated with the prohibition on general solicitation and advertising in private placements are equally as significant as those associated with gun-jumping in connection with registered public offerings, and they demand equally bold action from the Commission.

Some of the costs and inefficiencies associated with the prohibition on general solicitation and advertising can be illustrated by the following examples:

- Issuers and investors are unable in many cases to use websites to provide and receive offering materials for private placements unless they do so by means of costly and inefficient password mechanisms.

- Issuers and investors are unable in many cases to use websites to provide and receive performance information on outstanding privately-offered asset-backed securities unless they do so by means of costly and inefficient password mechanisms.

[1] Release No. 33-8591 (July 19, 2005), 70 Fed. Reg. 44722, at 44726 and 44731.

- Out of an abundance of caution, issuers and their agents are often distribute private placement offering materials in paper form rather than by means of email and PDF attachments.

- A company's casual public references to a private placement can jeopardize an exemption, leading to costly investigations and deliberations among counsel, or even to postponement of the private placement with attendant market risk.

- Rule 135e, which permits "notices" of private offerings, is not available to non-reporting/non-12g3-2(b) companies.

- Rating agencies can cause an exemption to be called into question when they publish reports on securities that are to be the subject of a private placement.

- Information about a proposed private offering can appear in the trade press, leading to investigations and inquiries about whether the source of the information was an issuer or its agent (possibly fatal to the exemption) or a prospective investor (not fatal).

As in the case of 1933 Act gun-jumping prior to Securities Offering Reform, compliance with the prohibition on general solicitation and advertising inhibits truthful communications about an offering. More to the point, the need to police compliance with the prohibition adds to the cost of private placements, while non-compliance (inadvertent or not) can result in at best the possible postponement of a private placement and at worst the risk for issuers and agents or dealers of a Section 5 violation with resulting rescission rights on the part of purchasers. Just as in the case of gun-jumping prior to Securities Offering Reform, the resulting economic and legal risks and costs to companies and their agents and dealers are out of all proportion to any concern about investor protection.

Given the nature of private placements, it is obvious that the problem cannot be solved by means of a device similar to the "free-writing prospectus." The problem can only be solved if the Commission accepts the proposition that truthful communications relating to private placements do not prejudice investor protection if no one other than a sophisticated investor is permitted to buy the securities.

II. The Commission Should Choose a Category of Sophisticated Investor and Eliminate All Prohibitions on General Solicitation and Advertising in Private Placements to Those Investors

The Proposing Release refers to requests that the Commission eliminate the prohibition on general solicitation and advertising[2] and explains the Commission's refusal to do so in two ways:

First, the Commission points to "the potential harm of offerings by unscrupulous issues or promoters who might take advantage of more open solicitation and advertising to lure unsophisticated investors to make investments in exempt offerings that do not provide all the benefits of Securities Act registration."[3] But the Commission provides no evidence of any such potential harm. Nor does it provide any explanation of how any such behavior could take place if *sales* in private placements were limited to a category of sophisticated investors.

Second, the Commission points to the Supreme Court's *Ralston Purina* "fend for themselves" standard as "informative" in analyzing its exemptive authority under Section 28 and states that the Commission's required determinations under Section 28 would "tend to [be] support[ed]" by the use of "high financial thresholds" *and* a "ban on most general solicitation and advertising."[4] It is mystifying how the Commission reads *Ralston Purina* as compelling, or even encouraging, reliance on the number of offerees. The Commission argued this point to the Supreme Court, and the Court flatly rejected it: "… [T]here is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation."[5] Even if *Ralston Purina* could be read to support a ban on general solicitation, the case was decided more than 50 years ago, while Section 28 itself was added to the statute 43 years later. It is doubtful in the extreme that the 104th Congress intended the SEC to be bound (or even "informed") by *Ralston Purina*'s interpretation of Section 4(2); if it did so intend, why would Congress have bothered granting the Commission the exemptive power in the first place?

The plain fact is that any workable and meaningful relief requires that the Commission recognize that content-based restrictions will not work in connection with private placements any more than they did in connection with registered public offerings prior to Securities Offering Reform. Just as the limitations on Rule 134 required the invention of the free-writing prospectus

[2] For example, the ABA Private Offering Letter and the Advisory Committee Final Report.
[3] Release No. 33-8828 (August 3, 2007) ("Proposing Release"), 72 Fed. Reg. 45116, 45118.
[4] Proposing Release n. 74.
[5] *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953).

and just as successive versions of rules such as Rule 139 have become less and less content-based, the Commission should abandon content-based restrictions on communications related to private placements.[6]

This does not mean that the Commission could not choose a sub-set of private placements for this purpose, based on the sophistication of the intended purchasers (not offerees). For convenience, I refer to such intended purchasers as "Sophisticated Investors" without expressing any view on how the Commission should define that term. For example, if the Commission were not willing to eliminate the general solicitation and advertising prohibition for all private placements pursuant to Regulation D, it could choose to adopt a version of Rule 507 that would eliminate all content-based restrictions for private placements where the only purchasers are Sophisticated Purchasers, which it could define as (1) accredited investors, (2) accredited investors other than natural persons, (3) persons falling within the Commission's proposed definition of "large accredited investors" or (4) persons who meet some other standard.

It goes without saying that a company that begins a private placement in reliance on an exemption other than my proposed version of Rule 507 should be able, in the event of publicity not permitted under the intended exemption, to switch to my proposed version of Rule 507 to complete the transaction if it limits sales to Sophisticated Investors. There is a suggestion to the contrary in note 37 of the Proposing Release, but the explanation is not persuasive in view of the Commission's current exemptive authority.

As for private investment entities that claim exemptions under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940, the Commission should explain its reasons for not permitting such entities to take advantage of either its version of or a version of Rule 507 such as that proposed above. Again, the explanation in the Proposing Release[7] is not persuasive, since the Commission could rely on its exemptive powers in Section 38(a) of the 1940 Act to define the term "public offering" so as to exclude an offering made under Rule 507.

[6] In this connection, the only conceivable reason for a distinction between written and oral communications would be to facilitate the Commission's enforcement efforts or an investor's Rule 10b-5 claim. These considerations should be irrelevant to whether or not there is a valid exemption under the 1933 Act. As for radio or television advertising, a ban appears unnecessary since it is doubtful that radio or television is a cost-effective way of reaching out to individuals who meet the qualifications required of Sophisticated Purchasers (as later defined).
[7] Proposing Release at 45122.

III. The Commission Should Generalize Its Guidance on What Constitutes a General Solicitation

In the Proposing Release, the Commission offers guidance on the availability of the Section 4(2) exemption for an offering that overlaps with the filing of a 1933 Act registration statement where the two offerings may be subject to integration under conventional standards. The Commission's guidance is to the effect that the filing of the registration statement should not undermine the private placement exemption where prospective investors in the private placement "became interested … through some means other than the registration statement that did not involve a general solicitation and otherwise was consistent with Section 4(2), such as through a substantive, pre-existing relationship with the company or direct contact by the company or its agents outside of the public offering effort …."[8]

The guidance in the Proposing Release is consistent with the Commission's guidance in the analogous situation of a foreign company's publicly-available website used in connection with an offshore offering of securities at a time when the company is also engaged in a private offering in the United States. In 1998, the Commission advised that a foreign company in this situation could not use the website "as a means to locate investors to participate in a pending or imminent U.S. offering" relying on Section 4(2) or Regulation D but that "any investor solicited by the issuer or underwriter prior to or independent of the Web site posting could participate in the private offer, regardless of whether the investor may have viewed the posted offshore offering materials."[9]

Many lawyers will advise clients along similar lines in the event of inadvertent public disclosures about a public offering. To the extent that the Commission does not completely eliminate the prohibition on general solicitation and advertising, it would be useful for it to generalize the guidance it provides in the two releases to make clear that private offerings – whatever the exemption being relied upon – may proceed without regard to otherwise impermissible publicity if the purchasers can be shown to have been solicited independently of such publicity.

IV. Other Matters

1. *Rule 155*. The Commission states in the Proposing Release that there is a risk that it or a court might find a violation of Section 5 where, "except in those circumstances specified in

[8] Proposing Release at 45129.
[9] SEC Release No. 33-7516 (March 23, 1998) (text at and in note 28).

Rule 155," a company begins an offering as a private placement and seeks to complete "that offering" pursuant to a registration statement, or where a company commences a registered offering and seeks to complete "that offering" through a private placement.[10] It would be helpful if the Commission would clarify that this language is not intended to detract from Rule 155's explicit status as a safe harbor.

2. *Rule 144A.* The Commission states in the Proposing Release that "a general announcement of an offering published by an issuer in accordance with Rule 507 may be deemed inconsistent with the requirement under Rule 144A that offers be made solely to such persons" and that the Commission therefore proposes to clarify that a Rule 507 announcement would not preclude resales pursuant to Rule 144A.[11]

I believe this statement is inconsistent with the fact that there is no prohibition in Rule 144A on general solicitation or advertising and that the prohibition on "offers" to persons who are not QIBs must therefore mean communications that offer the subject securities for sale rather than those that contain information about the offering. More to the point, however, the statement leads to the absurd result that QIBs would be getting more "protection" than non-QIBs.

Indeed, if the Commission adopted a version of Rule 507 that eliminated the general solicitation and advertising prohibition in private placements to Sophisticated Investors, there would be no reason not to extend the same relief to Rule 144A offerings by eliminating the prohibition on offers to non-QIBs.

Finally, while the Commission is considering Rule 144A, it would be useful for the rule to be revised so that it can be relied upon by issuers for the initial sale of securities. Whatever doubt may have existed in 1990 about the Commission's authority to adopt Rule 144A as a rule exempting transactions by an issuer, that doubt has been resolved by Congress' enactment of Section 28.

3. *Regulation D.* As the undersigned pointed out many years ago,[12] broker-dealers are often surprised to learn that Regulation D applies only to transactions in which a broker-dealer acts as agent, i.e., that Regulation D (like Section 4(2)) may not be relied upon where the broker-dealer takes privately-placed securities as principal (even for an instant) before selling the securities to investors. The fact is, of course, that the broker-dealer in such a transaction is really

[10] Proposing Release at 45128-29 and in note 122.
[11] Proposing Release at 45134.
[12] "'Ten Easy Pieces' for the SEC," 18 Rev. of Secs. & Comms. Reg. 200, 202 (1985).

relying on Section 4(3) and on the assumption that Section 4(3)'s references to "public offering" and "distribution" mean the same thing as in the case of transactions under Regulation D. The Commission should finally act to clarify the situation by making Regulation D available to intermediaries. As in the case of the reverse situation described above involving Rule 144A, the Commission has ample exemptive authority to achieve this simplification.

Very truly yours,

/s/

Joseph McLaughlin

Enclosure

cc: Christopher Cox, Chairman

Paul S. Atkins, Commissioner
Kathleen L. Casey, Commissioner
Annette L. Nazareth, Commissioner
John W. White, Director, Division of Corporation Finance
Brian Cartwright, General Counsel
Michael J. Halloran, Deputy Chief of Staff and Counselor to the Chairman