Lee D. Neumann

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June 12, 2012

Via E-mail

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Request for Public Comments on SEC Regulatory Initiatives under the JOBS Act Title II: Access to Capital for Job Creators

Dear Ms. Murphy:

Thank you for this opportunity to comment on rule-making to be undertaken by the SEC in connection with Title II: Access to Capital for Job Creators under the JOBS Act.

I would like to address an issue which has been raised by some of the comment letters posted to date as well as numerous law firm memoranda published on the Internet: whether general solicitation and advertising by an issuer in connection with a Rule 506 or Rule 144A placement would be considered "directed selling efforts" in the event of a concurrent offering outside the US under Regulation S ("Reg S").[1] At issue is whether, and to what extent, companies may take advantage of the new opportunities created by the JOBS Act for raising capital in US private placements while concurrently seeking financing overseas under Reg S.

As further explained below, because the purpose of the JOBS Act is to expand and facilitate opportunities for raising capital, companies should be permitted to take advantage of the newly created opportunities for private placements in the US without forgoing concurrent opportunities to raise capital overseas. However, information communicated in the United States regarding overseas offerings should continue to be limited by Rule 135c. In addition, because the new opportunities created by the JOBS Act for communicating to US financial markets have raised widespread uncertainties regarding their interaction with activities prohibited under Reg S, conduct contrary to the interests of US companies and investors may result. The scope of activities excluded from the definition of directed selling efforts should therefore be clarified to cover explicitly activities undertaken in connection with placements in the United States under Rule 506 and Rule 144A.

1. Companies should be permitted to take advantage of the new opportunities created under the JOBS Act for private placements in the US without forgoing concurrent opportunities to raise capital overseas.

Companies have successfully raised capital for many years through offerings conducted concurrently under Rule 506 or Rule 144A within the United States and under Reg S outside the United States. Despite the prohibition under Reg S against "directed selling efforts" -- activities which may

[1] References to Regulation S herein are to Rules 902, 903 and 904 under the Securities Act of 1933, as amended.

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condition US markets for securities being offered outside the United States -- offering participants have relied on the SEC's position, reflected in the Reg S adopting release (No. 33-6863, April 24, 1990), that activities which are permitted in connection with registered or exempt offerings in the United States would not constitute directed selling efforts in a concurrent Reg S offering.[2]

The possibility created by the JOBS Act to engage in general solicitation and advertising in connection with Rule 506 and Rule 144A placements has raised concerns, however, that the SEC may consider such activities as inconsistent with Reg S's prohibition against directed selling efforts. If the SEC were to adopt such a position, companies would not be free to take advantage of the new opportunities created by the JOBS Act in connection with Rule 506 and Rule 144A placements and also conduct a concurrent offering outside the United States under Reg S. As a result, rather than benefitting from expanded and facilitated access to capital, companies would be required to decide whether to forgo, on the one hand, the new opportunities for communicating with US financial markets created by the JOBS Act, or, on the other hand, capital raising outside the United States under Reg S. This result would be directly contrary to the JOBS Act's stated purpose: to facilitate and expand companies' access to capital, not to limit their options.

2. However, information communicated in the United States regarding overseas offerings under Reg S should continue to be limited by the restrictions on content set forth under Rule 135c.

The definition of directed selling efforts under Reg S excludes notices published under Rule 135c (Rule 902(c)(3)(vi)). Rule 135c permits eligible companies to notify US markets that they will make, are making or have made unregistered offerings of securities, provided, among other things, that the information regarding such unregistered offerings does not go beyond the basic items set forth in the rule.[3] Rule 135c thus serves to strike a balance between the need to provide certain information to US investors regarding unregistered offerings overseas and the desire to prevent such unregistered offshore offerings from being marketed in the United States.

The objectives of the JOBS Act, and the new opportunities it creates for communicating with US financial markets in connection with placements under Rule 506 and Rule 144A, do not change the basic concerns summarized above. Information communicated in the United States regarding overseas offerings under Reg S should therefore continue to be limited by the restrictions set forth under Rule 135c, including when concurrent placements under Rule 506 or Rule 144A are carried out.

It is important to note, however, that for a company to be entitled to make notices under Rule 135c, it must already be subject to SEC reporting requirements, or be a foreign issuer exempt from registration under Rule 12g3-2(b) under the Securities Exchange Act (Rule 135c(a)). Most companies, and in particular the kinds of smaller or growing businesses which the JOBS Act seeks to assist, do not satisfy such criteria and thus would not be qualified to issue notices under Rule 135c. In the case of companies making concurrent offerings under Rule 506 or Rule 144A, the definition of directed selling efforts should therefore clarify that information regarding offerings outside the United States under Reg S is excluded provided it complies with the restrictions on content set forth under Rule 135c, regardless of the company's satisfaction of Rule 135c's eligibility criteria.

[2] In addition, Rule 500(g) under the Securities Act states that "Regulation S may be relied upon for [offers and sales outside the United States] even if coincident offers and sales are made in accordance with Regulation D inside the United States."

[3] Such basic items include the size of the unregistered offering and the manner and purpose of the offering, without naming the underwriters. A statement that the securities may not be offered or sold in the United States, absent registration or an applicable exemption, must also be included.

3. In addition, because the new opportunities created by the JOBS Act for communicating to US financial markets have raised widespread uncertainties regarding their interaction with activities prohibited under Reg S, conduct contrary to the interests of US companies and investors may result. The scope of activities excluded from the definition of directed selling efforts should therefore be clarified to cover explicitly activities undertaken in connection with placements in the United States under Rule 506 and Rule 144A.

As noted at the beginning of this letter, the new opportunities created by the JOBS Act for communicating to US financial markets have raised widespread uncertainties regarding their interaction with activities prohibited under Reg S. In particular, although, as noted above, the definition of directed selling efforts excludes notices compliant with Rule 135c, it does not confirm that information which is not compliant with Rule 135c would also be excluded if in connection with a concurrent Rule 506 or Rule 144A private placement.[4] Companies contemplating concurrent unregistered offerings in the US and overseas may thus be concerned that activities undertaken in the United States in connection with a Rule 506 or Rule 144A placement, and which include communications going beyond the limited information permitted under Rule 135c, would cause them to lose the exemption from registration provided by Reg S for their overseas offering. Such uncertainty may lead to conduct harmful to the interests of US companies and investors:

> *US companies: Reduced opportunities for capital formation:* US companies may refrain from conducting concurrent unregistered offerings in the United States and under Reg S overseas, thereby losing opportunities to raise capital which existed prior to the JOBS Act; and
>
> *US investors: Excluded from foreign company offerings:* Non-US companies may decide not to extend offerings to the United States, thus causing US investors to be excluded from rights offerings and public offerings on non-US markets typically structured in the United States as private placements.

The scope of activities excluded from the definition of directed selling efforts should therefore be clarified to cover explicitly activities undertaken in connection with placements in the United States under Rule 506 and Rule 144A. Despite the statement in Rule 500(g) (see footnote 2 above) that Regulation S remains available even when concurrent offerings under Regulation D are carried out, the widely expressed uncertainties following the enactment of the JOBS Act and their potentially harmful consequences may be avoided by confirming the compatibility of an offering outside the United States under Reg S with placements in the United States under Rule 506 and Rule 144A which take advantage of the new opportunity to conduct general solicitation and advertising.

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The comments above are respectfully submitted as a practical means to resolve existing uncertainties regarding the interaction of private placements under Rule 506 and Rule 144A and offerings overseas under Reg S, while both supporting the objectives of the JOBS Act and maintaining the protections for US investors established under Reg S. If you have any questions, I would be pleased to respond.

Sincerely,

Lee D. Neumann

[4] As discussed in Section 1 above, the opposite position -- that general solicitation and advertising in connection with placements under Rule 506 or Rule 144A constitute directed selling efforts -- would be contrary to the purpose of the JOBS Act. See Section 1 above.