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Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Request for Public Comments on SEC Regulatory Initiatives
Under Title II, Section 201(a) of the JOBS Act

Ladies and Gentlemen:

I am writing to ask the staff to confirm, in connection with the Commission's rulemaking initiatives under Section 201(a) of the JOBS Act, that:

1. Any general solicitation or general advertising that is permitted in connection with an offering of securities pursuant to Rule 506 of Regulation D or offers and sales of securities pursuant to Rule 144A will not constitute "directed selling efforts" under Rule 902 of Regulation S.

2. The limitations set forth in Rule 135c do not apply to an offering of securities made pursuant to Rule 506 or Rule 144A in which general solicitation and general advertising are permitted.

Discussion

Directed Selling Efforts

Section 201(a) of the JOBS Act requires the staff to adopt rules that will remove the prohibition against general solicitation and general advertising for Rule 506 offerings in which all purchasers are accredited investors and for Rule 144A offerings where the securities are sold only to persons that the seller and persons acting on behalf of the seller reasonably believe is a qualified institutional buyer. Since offerings under Rule 506 and Rule 144A are often made concurrently with an offering made under Rule 903 of Regulation S, the question arises whether general solicitation and general advertising activities in connection with an offering under Rule 506 or Rule 144A will constitute directed selling efforts as defined in Rule 902(c) of Regulation S with respect to a concurrent offering under Regulation S.

The prohibition against directed selling efforts in offerings made outside of the United Stated under Regulation S is intended to prevent activities in the United States that could condition the market here for the securities offered and sold abroad and result in an indirect public offering of those securities in the United States without registration under the Securities Act of 1933. As discussed below, there is little risk of this happening as a result of general solicitation and general advertising in a concurrent offering under Rule 506 or Rule 144A.

For purposes of simplicity the following discussion focuses only on offerings of equity securities, but the principles discussed apply equally to offerings of debt and other types of securities.

Rule 506 Offering. Any general solicitation or general advertising for a Rule 506 offering would necessarily focus on the fact that the securities offered in the United States are available for purchase only by accredited investors. Such promotional efforts would not be for the purpose, and likely would not have the effect, of conditioning the market in the United States for the purchase by anyone in the United States of securities sold in a concurrent offering outside of the United Stated under Regulation S. Further, such promotional activities would, as a matter of course, cease at or prior to the closing of the Rule 506 offering and thus would not continue during the one-year or six-month distribution compliance period for equity securities sold concurrently outside of the United States by a domestic issuer in a Category 3 offering under Rule 903(c)(3) or during the 40-day distribution compliance period for equity securities sold concurrently outside of the United States by a reporting foreign issuer in a Category 2 offering under Rule 903(c)(2). No directed selling efforts would be permitted with regard to the offering outside of the United States, and offering restrictions would be imposed by Rule 903(c)(2) and 903(c)(3) that would help to ensure that the securities sold would come to rest outside of the United States during the applicable distribution compliance period.

Likewise, general solicitation and general advertising in connection with a Rule 506 offering by a foreign issuer that is making a concurrent Category 1 offering under Rule 903(c)(1) of Regulation S is unlikely to result in an indirect public offering in the United States of the securities sold under Regulation S. The reason for this is that a foreign issuer can make a Category 1 offering outside of the United States only if (i) there is no substantial U.S. market interest for the securities sold, or (ii) the offering is directed into a single country other than the United States – in which case that single country will ordinarily be the foreign issuer's home country and the location of the primary market for the foreign issuer's securities. Thus, in a typical scenario for a Category 1 offering, a Canadian TSX- or TSXV-listed issuer would sell its common shares in Canada. The shares sold would not be subject to any distribution compliance period under Rule 903(c)(1) but would be subject to a Canadian four-month hold period. Following expiration of the hold period, if the Canadian purchasers wanted to sell their shares they could do so through the Toronto Stock Exchange or the TSX Venture Exchange. The Canadian purchasers would have no reason or incentive to sell their shares in the United States, and the absence of any substantial U.S. market interest for the shares or any listing of the shares on a U.S. national securities exchange (which would require the issuer to comply with Category

2 as a reporting foreign issuer) would make it more difficult for them to sell their shares in the United States. On the other hand, the common shares sold concurrently to accredited investors in the United States pursuant to Rule 506 would be restricted securities for purposes of Rule 144(a)(3) and could not be sold in the United States pursuant to Rule 144 for at least one year, but after the expiration of a four-month Canadian hold period the U.S. investors could sell their shares without further restriction outside of the United States pursuant to Rule 904 of Regulation S. In short, *all* securities sold in concurrent offerings under Rule 903(c)(1) and Rule 506 are likely to be resold outside of the United States, not in the United States.

Rule 144A Offering. Rule 144A offerings are often made in connection with offerings under Regulation S by foreign issuers, especially since securities sold under Rule 144A may not, when issued, be of the same class as securities listed on a U.S. national securities exchange or quoted in a U.S. automated inter-dealer quotation system.

As an example, when a Canadian TSX-listed company makes a prospectus offering in Canada under Rule 903 of Regulation S, the underwriters may purchase a portion of the securities offered and resell them through their U.S. broker-dealer affiliates to qualified institutional buyers in the United States pursuant to the exemption provided by Rule 144A. In such an offering, general solicitation and general advertising could be used to market the securities to qualified institutional buyers in the United States under Rule 144A only if such activities were deemed not to constitute directed selling efforts in relation to the offering under Regulation S. Thus, in order for the intended benefits of the JOBS Act to be realized with respect to Rule 144A offerings, the staff's rulemaking needs to clarify that general solicitation and general advertising in connection with Rule 144A offerings will not constitute directed selling efforts under Regulation S.

Any general solicitation or general advertising of securities offered and sold pursuant to Rule 144A would necessarily focus on the fact that the securities offered are available for purchase only by qualified institutional buyers. Such promotional efforts would not be for the purpose, and likely would not have the effect, of conditioning the market in the United States for purchase by anyone other than qualified institutional buyers of the securities originally sold outside of the United States under Regulation S. Rule 144A is intended to provide an exemption from registration for precisely that situation.

In addition, some of the previous discussion about directed selling efforts in concurrent Rule 903/Rule 506 offerings by foreign issuers also applies in the context of concurrent Rule 903/Rule 144A offerings by foreign issuers.

Rule 135c

It would be helpful for the staff to make clear in Rule 135c itself or in the staff's adopting release under Section 201(a) that the limitations set forth in Rule 135c do not apply to an offering of securities made pursuant to Rule 506 or Rule 144A in which general solicitation and general advertising are permitted.

The staff could clarify, for example, that an issuer may name the broker for its Rule 506 or Rule 144A offering in a news release or other communication or advertisement that is permitted after adoption of the rules under Section 201(a). In addition, if the staff adopts the positions advocated earlier in this letter, the staff could also clarify that if an issuer makes concurrent offerings under Rule 903 and Rule 506 or under Rule 903 and Rule 144A (or both), the issuer may disclose information, including the name of the broker for the offering in the United States, in any permitted communication or advertisement for the Rule 506 or Rule 144A offering and not be in violation of Rule 135c with respect to its concurrent offering under Rule 903.

Ultimately, Rule 135c may require more comprehensive revisions to reflect all of the changes in how securities may be offered and sold after adoption of the JOBS Act.

Very truly yours,

/s/ J. Brad Wiggins
J. Brad Wiggins