Frequently Asked Questions
Regarding the Private Placement of Securities
under Regulation D Rule 506

In the absence of an applicable exemption, each offering of securities must be registered with the Securities and Exchange Commission and in each state where the securities are offered. Due to the high costs of registration, start-up, early stage and small-cap companies commonly utilize the private placement exemption available under the SEC's Regulation D Rule 506. If a company complies with Rule 506 when issuing securities, it will not be engaged in a public offering of securities for which registration is required.

The following are commonly asked questions regarding the requirements under Regulation D Rule 506.

- **How much money can be raised in a Rule 506 offering?**

Rule 506 does not impose a limit upon the amount of money that the issuer can raise.

- **What limitations exist on the manner of the offering?**

Neither the issuer nor any person acting on the issuer's behalf may offer or sell the securities by <u>any form of general solicitation or advertising</u>. This includes, but is not limited to, any advertisement, article, press release, mass mailing, notice or other communication published in a newspaper, magazine, or similar media or broadcast over television or radio. <u>This also includes Internet websites, blast emails, and social networking media that may be viewed, accessed, or received by the public</u>. Realistically, this limitation requires that the issuer control the number and kind of offerees and investors so it can demonstrate that no general solicitation or advertising occurred. If a website is used, it must be password protected to prevent access by anyone other than those persons with whom the issuer or its representatives have a pre-existing personal relationship.

It is critical that all officers, directors and other representatives of the issuer take care not to make any statements or engage in any activities that could be construed as "general solicitation" at any point during the private placement. The offering <u>must</u> remain private. Any statement about the offering, the securities, the need or desire to raise additional capital or similar statements, if made to a reporter, published in a press release, news article released to the media, published on a website or blog or otherwise disseminated broadly, could result in the immediate loss of the private placement exemption.

- **Who may the issuer contact as potential investors?**

To demonstrate that the offering is private, you generally should contact only prospective investors that have a pre-existing relationship with the issuer, its officers, directors or representatives. The existence of a pre-existing relationship will tend to show that the investor was not obtained through a general solicitation.

The general rule is that the pre-existing relationship must be of such a nature that it enables the issuer or its representative to be aware of the financial circumstances or sophistication of the potential investor or that are otherwise of some substance and duration. This relationship may arise in a business, social or any other context.

The SEC has stated in past no-action letters that a third-party broker-dealer (but not the issuer) may establish a pre-existing relationship with a potential investor by sending the potential investor a generic form to complete that contains sufficient information to enable the issuer to assess the potential investor's financial circumstances and sophistication. Such a form may **not** make reference to the particular offering the issuer is undertaking.

The issuer also may rely upon pre-existing relationships of other individuals or companies that act as representatives of the issuer in this context. However, significant care must be exercised if the issuer is considering utilizing a broker-dealer or "finder" (discussed below) and relying on the relationship of those individuals or firms with potential investors to meet the pre-existing relationship requirement.

- **How many offerees and investors may there be?**

Rule 506 does not place any limitation on the number of persons to whom the issuer may offer the securities. However, when viewed as a whole, offers to a significant number of persons may be deemed a general solicitation resulting in the loss of the private placement exemption.

Rule 506 also does not limit the number of investors (purchasers) in the offering if they are "accredited investors" as defined in Regulation D. Rule 506 also would permit the issuer to sell its securities to a maximum of 35 unaccredited investors if the issuer reasonably believes that each of these investors has the required level of investment sophistication. However, if an offer or sale of securities is made to even one unaccredited investor, there are substantial additional disclosure requirements that must be met in the offering documents.

- **Should the offering be limited to accredited investors only?**

As discussed above, Rule 506 permits the issuer to sell its securities to a maximum of 35 unaccredited investors. However, before proceeding with an offering that may include any unaccredited investors (including friends and family), you should carefully consider the need to prepare a private placement memorandum that meets the more extensive disclosure requirements mandated in this context (see "Why use a private placement memorandum?" below) and the need to verify that each unaccredited investor has the necessary investment

sophistication (see "What level of investment sophistication must the investors possess?" below). In many cases, it is preferable to avoid including unaccredited investors in the offering.

- **Who is an "accredited investor?"**

An "accredited investor" is any person who, at the time of the sale of the securities to that person, meets at least one of several pre-determined wealth, income, or asset requirements (or who the issuer reasonably believes meets any of the requirements), as set by the SEC. The definition of an "accredited investor" is contained in Attachment A and is summarized below.

Corporations, LLCs and other companies with total assets in excess of $5,000,000 will qualify as accredited investors, as long as they have not been formed for the specific purpose of purchasing the securities offered. In addition, entities that are entirely owned by persons who otherwise qualify as accredited investors are themselves accredited.

Prior to July 21, 2010, individuals meeting the following requirements would have qualified as an accredited investor: (1) any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000, or (2) any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

However, an important change was made in Section 413 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by President Obama on July 21, 2010. With this change, a natural person may no longer include the value of his or her primary residence in the $1 million net worth test above. Informally, the SEC staff has indicated their belief that the amount of any mortgage or other indebtedness secured by an investor's primary residence may be netted against the current fair market value of the residence. Indebtedness secured by the primary residence does not need to be deducted from an investor's net worth unless the outstanding debt exceeds the value of the residence and the investor is personally liable to the lender for any deficiency. If, however, the investor's mortgage is "underwater," then the excess liability must be deducted from the investor's net worth.

The other provisions of the accredited investor definition, including the income test for natural persons, remain unchanged for now. In the new law, Congress directed the SEC to review the accredited investor definition and make appropriate adjustments, though it may not raise the $1 million net worth threshold for four years. Further, the U.S. Comptroller General must conduct a study to assess the financial thresholds and other criteria used to qualify for accredited investor status.

Each prospective investor should be required to complete a questionnaire that establishes "accredited investor" status and those records should be retained in the issuer's files indefinitely, together with copies of all of the offering documents. (See the SEC's complete definition of an "accredited investor.")

- **Why use a private placement memorandum (PPM)?**

If securities are sold to any unaccredited investors—even just one—Rule 506 prescribes that substantial disclosures and information must be delivered to the investors at a reasonable time prior to the sale of securities. In general, this requires a private placement memorandum (PPM) or similar document containing substantially the same information as would be required in a registration statement filed with the SEC. The PPM is intended to inform prospective investors of all material facts associated with the investment and incorporate all required specific information called for by Rule 506.

In offerings made exclusively to accredited investors, Rule 506 does not contain any specific requirements for information to include in a PPM. However, it is strongly advisable to deliver a well-prepared PPM to each accredited investor. As discussed above, the antifraud rules require each issuer of securities to provide all material information to its investors. Failure to deliver a PPM before the sale of the securities could leave the issuer exposed to potential claims by investors who may become unhappy with their investment for any reason. Without a PPM or a substantially similar document, it would be difficult for the issuer to demonstrate that it has met the antifraud requirements of the securities laws.

In addition, all investors must be given the opportunity to ask questions and receive answers about the offering and to obtain information reasonably obtainable by the issuer to verify the information furnished.

Offers to prospective investors should only be made by delivering a copy of the PPM and logging the prospect's name and date of delivery. Generally, the issuer or its agents should not furnish in connection with the offering (whether for review in the office, review by the offeree's advisors, or otherwise):

(a) any written information (such as additional projections, analyses, reports, documents or powerpoints) relating to the issuer or its operations other than containing the same information as covered in the PPM; or

(b) any information contrary to that contained in the PPM.

- **When must the PPM be amended or supplemented?**

If it at any time it is discovered that the PPM contains inaccurate or incomplete information, or if there is new material information that should be disclosed, the issuer will need to amend the PPM promptly to reflect these changes and provide the amendment to prospective investors. **Depending on the nature of the amendment, for pending subscriptions it may be necessary to reconfirm the prospective investor's continued subscription to the offering in light of the new information.**

- **What level of investment sophistication must the investors possess?**

The issuer must reasonably believe immediately prior to making any sale that each unaccredited investor, either alone or with a purchaser representative, has such knowledge and experience in financial and business matters that the investor is capable of evaluating the merits and risks of the prospective investment. Technically, this requirement only applies to unaccredited investors. However, it is recommended that each prospective investor complete a questionnaire that elicits responses concerning education, investment background, net worth, investment experience, and other matters. Review of the completed questionnaire will allow the issuer to make a determination that the potential investor qualifies as either an accredited investor or a sophisticated unaccredited investor.

Because the burden of proof is on the issuer to show that the offering complied with all exemption requirements, detailed records should be kept of the manner of solicitation, the process of accepting investors, and the disclosure of information to offerees. See "What back-up documents should be maintained?" below.

- **When should a purchaser representative be employed?**

In instances where it is uncertain whether a prospective investor meets the sophistication requirements discussed above, it is advisable that the investor be represented by another individual (referred to as a "purchaser representative") who does meet these requirements. Purchaser representatives may include securities brokers, investment advisers, lawyers, accountants, bankers, or other financial professionals.

To avoid conflicts of interest, special rules and requirements are imposed when purchaser representatives are used. Except in a very few instances, any affiliate of the issuer cannot act as the purchaser representative.

- **What are the limitations on resale of the securities?**

Securities purchased in a private placement transaction under Rule 506 must be acquired for investment purposes and may not be purchased with a view toward resale to other investors. For purchasers who are not closely associated with the issuer, the holding period generally is six months if the issuer files periodic reports with the SEC and one year if the issuer is not an SEC-reporting company. These securities will be deemed "restricted" and, as such, cannot be resold without registration or an exemption from registration under the Securities Act.

The issuer must exercise reasonable care to assure that the investors do not intend to immediately redistribute the securities acquired. Such reasonable care includes, but is not limited to, an inquiry as to whether the investor is acquiring the securities for his or her own account; written disclosure to each investor prior to the sale that the securities have not been registered under the Securities Act and therefore cannot be resold unless they are registered under the Securities Act or unless an exemption is available. If the securities will be certificated, the placement of a legend on any certificate or document that evidences the security stating that the security has not been registered under the Securities Act and setting forth the restriction on

transferability and sale of the securities. If not certificated, a similar statement should be made in the issuer's ownership transfer records.

- **What SEC and state filings are necessary?**

The issuer will be required to file four copies of a notice on Form D with the SEC no later than 15 days after the first sale of securities in the Regulation D offering. The receipt of the first subscription agreement or the acceptance of subscription funds directly by the issuer or into an escrow account pending receipt of minimum subscriptions would trigger this filing requirement.

A Form D, and generally a filing fee, must also be filed with state securities law regulators. Some states also require a separate form to consent to service of process in the state. All states except New York require a filing within 15 days of first sale in that state. New York requires that the filing be made in advance of any offer or sale in the state. **Many states impose significant penalties for a late filing of the Form D and some take the position, correct or not, that it causes the offering to fail to comply with Rule 506 and thus renders federal preemption of state requirements ineffective.**

- **What are the state securities law requirements of a Rule 506 offering?**

Federal law has preempted most state review of Rule 506 offerings. However, Congress is currently considering amendments that would reduce or eliminate federal preemption of state securities laws. The states can and do still require a filing of forms and fees. Often, the Form D will be the only document required to be filed. State filing fees typically are between $100 and $300. Some states also require a separate consent to service of process.

While federal legislation preempts most state requirements that are in addition to the filing and fees disclosed above, federal legislation does not preempt antifraud rules at the state level. As a result, making sure that investors receive all material information in the offering documents will be important for state law securities compliance as well as federal compliance.

- **Are the officers and other individuals who assist the issuer in the offering subject to any SEC registration requirements?**

Many private placements are best efforts offerings made directly by the issuer and without use of a sales agent, private placement agent, broker-dealer, or underwriter in connection with the offering. This is a common plan of distribution for private placements.

Under the federal securities laws, any person who acts a "broker" of securities must register with the SEC and comply with a host of rules and regulations promulgated by the SEC and the Financial Industry Regulatory Authority (FINRA). The term "broker" is defined as "any person engaged in the business of effecting transactions in securities for the account of others."

For these types of transactions, the SEC has promulgated a "safe harbor" Rule 3a4-1 to provide clarity to the question of what activities the employees and other representatives of an issuer may engage in without being deemed to be acting as a "broker" in the sale of the issuer's securities. Rule 3a4-1 applies to "associated persons" of the issuer, which includes individuals serving as officers, directors or employees of either the issuer or a company under common control with the issuer. Rule 3a4-1 establishes three threshold requirements and three optional exemptions. If an associated person meets all three threshold requirements and also meets one of the three optional exemptions, the associated person will not be deemed to be a broker solely by reason of his participation in the sale of the securities of the issuer.

Rule 3a4-1 establishes the following three threshold requirements.

1. The associated person must not be subject to the certain statutory disqualifications. These disqualifications are commonly referred to as "bad boy" limitations (See Attachment B for a list of these disqualifications).

2. The associated person must not be compensated in connection with his or her participation by the payment of commissions or other remuneration based either directly or indirectly on transactions in securities.

3. The associated person must not be associated with a broker or dealer at the time of his participation in the sale of the issuer's securities.

If an associated person meets all three of these threshold requirements, there are three alternative exemptions available under Rule 3a4-1.

The first alternative is a "limited transaction" exemption that limits the associated person to participating in the following securities transactions: (a) transactions with certain types of regulated institutions such as banks, insurance companies, investment companies, brokerage firms and registered investment advisers; (b) transactions involving bankruptcy proceedings or the exchange of securities with existing securities holders; (c) transactions involving mergers, acquisitions or corporate reorganizations; and (d) transactions related to pension plans, bonus or option plans or other employee benefit plans.

The second alternative is a "conventional employee" exemption that sets forth three conditions that the associated person must meet. First, the associated person must primarily perform substantial duties for the issuer otherwise than in connection with transactions in securities or, alternatively, it must be intended that the associated person will perform such duties at the end of the offering. Second, the associated person must not have been an employee or otherwise associated with a broker or dealer within the preceding twelve months. Third, the associated person must not participate in selling an offering of securities for an issuer more than once every twelve months, except for (a) as permitted by the first and third alternatives under Rule 3a4-1 or (b) in a delayed or continuous shelf offering registered with the SEC.

The third alternative is a "limited activities" exemption that restricts the associated person to performing only the following activities. First, the associated person may

prepare and deliver written communications by mail or by any other method that does not involve the associated person in oral solicitation of a potential investor. All such written communications must be approved by a partner, officer or director of the issuer. Second, the associated person may respond to inquiries from a potential investor if the communication is initiated by the potential investor and the response is limited to information contained in the issuer's prospectus or offering circular. Third, the associated person may perform ministerial and clerical work related to the securities offering.

Rule 3a4-1 functions essentially as a safe harbor. Individuals who meet all the above requirements will not be deemed to be acting as brokers in the sale of the issuer's securities. However, failure to comply with the rule does not mean the individual automatically is a broker. Rather, the facts and circumstances of each particular case must be considered to determine if the individual is "engaged in the business of effecting securities transactions for the account of others"

Due to the safe harbor provided by Rule 3a4-1, issuers generally should offer and sell securities only through individuals who are "associated persons" of the issuer (as defined above) and who meet all the other requirements of Rule 3a4-1.

- **May the issuer utilize "finders" to assist in making introductions to potential investors?**

The issuer may be approached by persons offering to make an introduction to potential investors for a fee. Such persons are sometimes referred to as "finders." If structured properly, a registered broker-dealer firm may act as a finder or placement agent in connection with a private placement transaction. However, it is not uncommon for unregistered firms or individuals to seek to act in this capacity for issuers involved in a private placement of securities.

The law in this area is complex and evolving, and the practice of using unregistered finders in private placements and other securities transactions is a current "hot" topic among regulators. Generally, anyone who receives transaction-based compensation, such as a finder's fee, is viewed as being in the business of effecting transactions in securities and so should be registered as, or registered through, a broker-dealer who is a member of FINRA. While the SEC is has been considering the question of whether "finders" might be regulated in a different manner than traditional retail broker-dealers, no changes in federal law are anticipated in the short term. The SEC's no-action letter interpretations in this area have grown increasingly restrictive and the SEC's staff has reversed older no-action interpretations that once permitted a broader range of unregistered activities by finders. The number of SEC enforcement cases against unregistered finders has been increasing.

Accordingly, until such time as the SEC provides regulatory relief in this area, it should be assumed that any firm or individual who receives transaction-based compensation in connection with locating, introducing or negotiating with potential investors most likely will be deemed a "broker" who must register with the SEC and be a member of FINRA.

State regulators take a similar view when interpreting and applying their definitions of "broker-dealer" under state securities laws. A few states, including Texas and Michigan, specifically register and regulate "finders" as such. Compliance with state finder registration and regulation does not, however, satisfy the requirements of federal securities laws.

- **What back-up documents should be maintained?**

An issuer claiming an exemption from the securities laws has the burden of proof in showing that the exemption was in fact available. It is therefore important that a compliance program be established so as to document the availability of the exemption, referred to by some as the "Burden of Proof" file. The purpose of the Burden of Proof file is to have available supporting documentation in the event of any litigation or regulatory enforcement inquiry. Issuers and promoters have been subjected to liability for violation of the securities laws because they were unable to sustain their burden of proof in court that the offering was in fact conducted in a manner warranting an exemption.

The Burden of Proof file will typically contain many documents in connection with the offering. Of primary importance is a "control sheet" or "distribution log" for the PPM. This form is designed to provide a record of the distribution of PPMs, and to show that offerings were only made to a limited number of individuals who met the suitability standards established by the issuer as described in the PPM. This form should typically contain a numbered listing of all PPMs issued, the names of the recipients and their addresses, and the dates of transmittal to the recipients. Prior to delivery of a PPM to a prospective investor, the prospective investor's name should be inserted in the upper right-hand corner of the cover of the numbered PPM. That copy must be delivered only to the named person. If the PPM is being furnished to persons who are not prospective investors (such as to the issuer's accountants or other legal counsel), the right hand corner should be marked "Information Only."

It is advisable that the issuer establishes and documents its procedures for determining the qualifications of potential investors before engaging in discussions about the offering. Each potential investor should be required to complete a confidential questionnaire soliciting financial, investment, and educational information. These questionnaires should be reviewed to determine if all questions have adequately been answered and to verify that the investor meets both the financial standards and investment sophistication levels established by the issuer and required under Rule 506. Only after this determination has been made should the issuer make an offer and accept a subscription for the securities. Following this practice will allow the issuer to demonstrate that the offering (and not just the sale) of securities was conducted in a limited manner without general solicitation.

If a purchaser representative represents a prospective investor, a number of additional documents will be required showing that the purchaser representative satisfies the conditions required by Regulation D.

The foregoing is a summary of complex laws and legal requirements. It is not intended to provide legal advice and does not purport to be a complete explanation of private placement exemptions or of other requirements under state and federal securities laws applicable to the offering of securities.

For further information, contact Tim Horner, the Chair of our Business Practice Group, or any member of our Securities Law Group or our Business Start Ups and Early Round Financing Group.

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ATTACHMENT A
"ACCREDITED INVESTOR" DEFINED

Accredited investor means any person who the issuer reasonably believes comes within any of the following categories at the time of the sale of the securities to that person:

1. Any bank as defined in section 3(a)(2) of the Securities Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Securities Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(13) of the Securities Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

2. Any private business development company as defined in section 202(a)22 of the Investment Advisers Act of 1940;

3. Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;

4. Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

5. Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000; provided that, effective July 1, 2010, a natural person may no longer include the value of his or her primary residence in the $1,000,000 net worth test;

6. Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

7. Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in Rule 506(b)(2)(ii) and

8. Any entity in which all of the equity owners are accredited investors.

ATTACHMENT B
"Bad Boy" Limitations

A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self- regulatory organization, if such person—

(A) has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self- regulatory organization, foreign equivalent of a self regulatory organization, foreign or international securities exchange, contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), or any substantially equivalent foreign statute or regulation, or futures association registered under section 17 of such Act (7 U.S.C. 21), or any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market or foreign equivalent;

(B) is subject to—

(i) an order of the Commission, other appropriate regulatory agency, or foreign financial regulatory authority—

(I) denying, suspending for a period not exceeding 12 months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer or limiting his activities as a foreign person performing a function substantially equivalent to any of the above; or

(II) barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or foreign person performing a function substantially equivalent to any of the above;

(ii) an order of the Commodity Futures Trading Commission denying, suspending, or revoking his registration under the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(iii) an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(C) by his conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer, or while associated with an entity or person required to be registered under the Commodity Exchange Act [7 U.S.C.A. § 1 et seq.], has been found to be a cause of any effective suspension, expulsion, or order of the character described in subparagraph (A) or (B) of this paragraph, and in entering such a suspension, expulsion, or order, the Commission, an appropriate regulatory agency, or any such self-regulatory organization shall have jurisdiction to find whether or not any person was a cause thereof;

(D) by his conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or any other entity engaged in transactions in securities, or while associated with an entity engaged in transactions in

contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subparagraph (A) or (B) of this paragraph;

(E) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person described by subparagraph (A), (B), (C), or (D) of this paragraph; or

(F) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (D), (E), (H), or (G) of paragraph (4) of section 15(b), has been convicted of any offense specified in subparagraph (B) of such paragraph (4) or any other felony within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.