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SEC Approves Changes to Private Offering Rules and Adopts New “Bad Actor” Prohibitions; Proposes Additional Changes to Better Monitor Private Offering Market

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On July 10, 2013, the U.S. Securities and Exchange Commission (SEC) approved changes to Rule 506 of Regulation D under the Securities Act of 1933 to implement the elimination, mandated by the Jumpstart Our Business Startups (JOBS) Act, of the prohibition against general solicitation or advertising in the offer and sale of securities under Rule 506, provided that all of the purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that status. Also as required by the JOBS Act, the SEC approved amendments to Rule 144A to permit the offer of securities for resale under Rule 144A to persons other than qualified institutional buyers (QIBs) provided that the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are QIBs. The new rules will take effect in mid-September 2013.

The U.S. Congress, in passing the JOBS Act in 2012, felt that the rules relating to private placements had not kept pace with the significant changes in technology and communication that could allow start-ups and small businesses to reach a vastly larger pool of potential investors, and thus were unduly limiting those entities' ability to raise private capital, grow their businesses and hire more employees. Neither the JOBS Act itself nor the SEC's implementing rules, however, confine the new availability of public solicitation in Rule 506 offerings to start-ups and small businesses. In particular, public solicitation will now be permitted by private investment funds, which a recent SEC study found to be the principal current users of Rule 506.

The SEC acknowledged that the removal of the prohibition against general solicitation and general advertising (collectively, general solicitation) from Rule 506—the most frequently relied upon private offering exemption available under the federal securities laws—represents a paradigm shift that will likely give rise to a "new private offering market" with the potential to expose investors to greater risks. To mitigate those risks, the SEC simultaneously adopted new "bad actor" rules to implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The bad actor rules will disqualify certain issuers and other market participants from using Rule 506 if certain "bad actors" are participating in the offering. Further, the SEC simultaneously proposed legending and disclosure requirements and additional changes in Form D and Regulation D designed to allow the SEC to monitor and evaluate the development of market practices in Rule 506 offerings, particularly new Rule 506(c) offerings where general solicitation is used, to ensure that the new rules achieve their intended effect on private capital formation while still protecting investors from fraud.

New Rule 506(c) Private Offerings

Under Rule 506(c), any issuer (including large corporate issuers and private funds, such as hedge, private equity and venture capital funds) can offer securities through advertising and general solicitation provided that they satisfy the following conditions:

- All of the purchasers of the securities must be accredited investors.[1]
- The issuer must take reasonable steps to verify that the purchasers are accredited investors and that all of the requirements of Rules 501 (definitions), 502(a) (integration) and 502(d) (limitations on resale) are met.

"Principles-Based" Verification Methods

One of the most debated aspects of the new rulemaking was how to implement the JOBS Act requirement that issuers take "reasonable steps to verify" accredited investor status. Historically, investors in a Rule 506 private offering self-certified that they met the definition. This practice allowed issuers to support the standard in the old rule that required issuers to "reasonably believe" that a prospective investor was accredited. In adopting Rule 506(c), the SEC reaffirmed its view that this standard had not changed for other Rule 506 offerings in general, but stated that issuers desiring to use general solicitation in a Rule 506(c) offering will have an additional affirmative obligation to take reasonable steps to verify the accredited investor status of purchasers. The SEC clearly stated in its adopting release that a simple "check-the-box" approach will not be a "reasonable step to verify" in a Rule 506(c) offering, absent other information indicating accredited investor status.

Although many commenters asked the SEC to provide more substantial guidance and safe harbor tests, the SEC opted for an objective "principles-based" method of determining whether the steps taken by the issuer to verify the purchaser's accredited investor status are "reasonable" based on the particular facts and circumstances. In determining which verification methods will be considered reasonable under the circumstances, the SEC encouraged issuers to consider (i) the nature of the purchaser and the type of accredited investor that the purchaser claims to be (*e.g.*, institutional investor versus natural person satisfying income or net worth test); (ii) the amount and type of information that the issuer has about the purchaser (*e.g.*, publicly available

[1] The definition of accredited investor includes investors that the issuer reasonably believes are accredited.

compensation information versus investor-provided); (iii) the nature of the offering, such as the manner in which the purchaser is solicited to participate in the offering (*e.g.*, web or print-based solicitation versus a database of pre-screened accredited investors created by a reasonably reliable third party); and (iv) the terms of the offering, such as minimum investment amount. This principles-based approach permits issuers to apply a "sliding scale" in determining which verification methods are reasonable under the circumstances. For example, the likelihood is higher than an investor who is able to meet a high minimum investment amount qualifies as an accredited investor, and fewer other steps may be necessary in that situation to verify an investor's status.

Non-Exclusive List of Acceptable Verification Methods – "Safe Harbors"

The SEC recognized that while the status of institutional accredited investors is likely to be more easily "verified," verifying the status of natural persons, under either the income test[2] or the net worth test,[3] presented greater difficulties and risks to issuers. As a result, although not included in the proposed rule, the SEC adopted, in addition to its principles-based method of verification, the following four specific (but non-exclusive) methods of verifying the accredited investor status of natural persons, effectively providing four safe harbors for compliance (so long as the issuer does not "have knowledge" that the person in question is not actually an accredited investor):

- **IRS filings.** For natural persons claiming accredited investor status under the income test, issuers may rely on Internal Revenue Service (IRS) forms (Form W-2, Form 1099, Schedule K-1 or Form 1040) filed by the person for the two most recent years and a written representation that the investor reasonably expects to meet the income test in the current year. For persons claiming accredited investor status based on joint income with a spouse, similar IRS documents and representations will be required from the person's spouse.

- **Bank or brokerage statements and credit reports.** Under the net worth test, issuers may rely on statements of accounts, consisting of bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments and appraisal reports issued by independent third parties, and, for liabilities, a credit report from at least one of the national consumer reporting agencies, in each case dated within the prior three months. These materials will also need to be accompanied by a written representation from the investor that all liabilities necessary to make a net worth determination have been disclosed to the issuer. For persons claiming accredited investor status based on joint net worth with a spouse, similar documents and representations will be required from the person's spouse.

- **Reliable third-party verification (broker-dealers, investment advisers, lawyers and CPAs).** Under either the income or net worth tests, issuers may also rely on written confirmation from a person's broker-dealer, investment adviser, lawyer or certified public accountant (CPA), received within the prior three months. The SEC identified these professionals as "reliable" sources of verification information because, by virtue of their professions, they are subject to rules of conduct and ethics. However, the issuer may also be entitled to rely on verification information from a different third-party source that does not fall into any of these professional categories, provided that the third-party source itself takes reasonable steps to verify the information that it received and the issuer has a reasonable basis to rely on such verification.

- **Prior investors – self-certifications.** For any person (institutional or natural) that purchased securities from the issuer as an accredited investor in a private offering, including prior to the effective date of new Rule 506(c), remains an investor, and invests in a subsequent Rule 506(c) offering conducted by the same issuer, issuers may rely on a written certification from the investor that the person in question still qualifies as an accredited investor.

Regardless of the steps taken, issuers should retain adequate records of the verification steps taken and documentation received.

New Checkbox on Form D for Rule 506(c) Private Offerings

In connection with the adoption of new Rule 506(c), the SEC adopted a corresponding amendment to Form D requiring an issuer that conducts a Rule 506(c) offering to so indicate by checking a new box included on the form. See the section entitled

[2] Under the income test, a natural person is considered an accredited investor if he or she had income in excess of $200,000 in each of the two most recent years or joint income with a spouse in excess of $300,000 in each of those years, with a reasonable expectation of reaching the same income level in the current year.

[3] Under the net worth test, a natural person is considered an accredited investor if he or she has individual net worth, or joint net worth with the person's spouse, that exceeds $1 million at the time of the purchase, excluding the value of the primary residence of such person.

"Proposed Rules Amending Regulation D and Form D" below for a discussion of the proposed additional changes to Form D included in the new market monitoring rules proposed by the SEC.

Special Issues for Private Funds

One important area of concern to hedge fund managers that the SEC could not deal with relates to exemptions used by many managers from various requirements imposed on commodity pool operators (CPOs) and commodity trading advisors (CTAs) by U.S. Commodity Futures Trading Commission (CFTC) regulations. Particularly because Dodd-Frank expanded the definition of "commodities" that are subject to CFTC regulation, many fund managers either must be registered as CPOs or must qualify for an exemption from registration. Some fund managers do not register in reliance on the CFTC Rule 4.13(a)(3) *de minimis* trading exemption, which requires that fund interests have been sold "without marketing to the public"; CFTC Rule 4.14(a)(10)—which elaborates upon the registration exemption provided by Section 4m(1) of the Commodity Exchange Act for CTAs that, among other things, do not hold themselves out to the public as providing commodities advice—similarly provides that a CTA's participation in the sale of interests in a collective investment vehicle does not constitute "holding out" by the CTA so long as the interests are sold in a "non-public" offering. Unless either the CFTC or its staff rules otherwise, these exemptions may not be available to a fund manager that makes general solicitations under Rule 506.

Also, many registered CPOs take advantage of CFTC Rule 4.7's provisions lessening the regulatory burdens on CPOs with respect to commodity pools that are owned solely by "qualified eligible persons" and are offered in compliance with the Securities Act private placement exemption, Section 4(a)(2). While the SEC promulgated Rule 506 under the authority of Section 4(a)(2), CPOs relying on the Rule 4.7 exemptions will presumably want to confirm with the CFTC staff that the exemption remains available when a fund is offered using a Rule 506(c) public solicitation.

Impact of New Rule 506(c)

It is important to note that, while the adoption of Rule 506(c) to permit general solicitation in a private offering represents a significant change in the rules, many other aspects of the securities laws relating to private offerings remain unaltered. For example:

- The definition of "accredited investor" has not changed.
- Securities sold in a Rule 506(c) private offering remain "restricted securities."
- "Old Rule 506" (now Rule 506(b)) remains unchanged and is available for use by issuers that, for example, (i) do not need or want to engage in general solicitation in conducting their private offerings, (ii) do not want to subject themselves to the affirmative verification requirements of Rule 506(c), or (iii) want to include non-accredited investors in their offering (up to 35 are permitted under Rule 506(b) if additional disclosure standards are met). By contrast, the Rule 506(c) requirement to take reasonable steps to verify accredited investor status is separate from the requirement that sales be limited to accredited investors and cannot be satisfied simply because all purchasers in the offering are, in fact, accredited.
- An issuer relying, outside of Regulation D, on the statutory private placement exemption provided by Section 4(a)(2) of the Securities Act will still be prohibited from using general solicitation.
- Securities offered under Rule 506(c) will continue to be deemed "covered securities" for purposes of state securities law preemption.
- Liability under the antifraud provisions of the federal securities laws for misstatements or omissions by issuers, fund managers, intermediaries and certain related persons has not changed.

"Bad Actor" Disqualification Rules

The SEC also adopted amendments to implement Section 926 of Dodd-Frank, which required the SEC to adopt rules disqualifying securities offerings involving certain "bad actors" from reliance on any of the provisions of Rule 506. The disqualification provisions are codified in new subparagraphs (d) and (e) of Rule 506 and apply to the issuer and the other specified individuals and entities.

Covered Persons

The new disqualification provisions will apply to the following:

- The issuer, the issuer's predecessors and any affiliated issuer
- The issuer's directors, executive officers, other officers participating in the offering, general partners or managing members
- Beneficial owners of 20 percent or more of the issuer's outstanding voting equity securities, calculated based on voting power
- Any promoter[4] connected with the issuer in any capacity at the time of the sale of the securities
- Any investment manager (and its general partners and managing members) and certain other related parties if they participate in the offering
- Any person (and its general partners and managing members) that has been or will be paid (either directly or indirectly) for soliciting purchasers in connection with the sale, and certain other related parties if they participate in the offering

Events Triggering Disqualification

Under the amendments, the Rule 506 exemption (whether under clause (b) or new clause (c)) will not be available if certain "bad acts" are found, after the effective date of the amendments, to have been committed by any of the foregoing covered persons. These bad acts include convictions of certain crimes and being subject to certain orders, judgments, decrees, suspensions, bars or expulsions. The "look back" period with respect to these various acts ranges up to 10 years. See Exhibit A for a complete listing of the events triggering disqualification under the new rule.

Exceptions to Disqualification

An issuer may be able to rely on Rule 506 if it can demonstrate that it did not know and, in the exercise of reasonable care, could not have known that any of the disqualification triggers existed. In order to demonstrate that it exercised reasonable care, the issuer must show that it made "factual inquiry" into whether any disqualifications existed. The nature and scope of the factual inquiry that must be undertaken will depend upon the facts and circumstances concerning, among other things, the participants in the offering.

Even if a covered person committed one of the defined bad acts, Rule 506's exemption from registration may still be available if, upon a showing of good cause, the SEC determines to grant a waiver of disqualification. Moreover, the offering need not be disqualified if the court or regulatory authority that entered the relevant order, judgment or decree advises in writing that disqualification should not arise as a consequence.

Effective Date, Disclosure of Triggering Events That Occur Prior to Effective Date of Amendments

The amendments will take effect in mid-September 2013, 60 days after publication in the *Federal Register*. Importantly, the disqualification provisions will not apply to convictions, orders, judgments, decrees, suspensions, expulsions or bars that occurred or were issued before the amendments take effect. However, new Section 506(e) will require issuers to provide purchasers with a written description of any matters that would have triggered disqualification but that occurred before the amendments take effect. As in the case of disqualifications, an issuer that fails to make the required disclosure may nonetheless rely on the Rule 506 exemption if it can demonstrate that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed information.

Effect on Private Funds

The bad actor provisions are unlikely to have a significant effect as far as bad actions by larger fund managers and their employees or control persons are concerned, because the various crimes and regulatory violations that will give rise to bad actor status are generally already included in violations specified in Section 203(e) of the Investment Advisers Act. Both Section

[4] The definition of "promoter" in the securities laws can be interpreted very broadly.

203(e) violations and a number of other events must be disclosed in SEC (and state) registered advisers' publicly available Form ADV filings (as well as in SEC filings made by "venture capital fund" advisers and "private fund advisers" with less than $150 million under management that utilize those exemptions from registration as an investment adviser with the SEC) and generally already draw the adverse attention of both regulators and investors. Interpretations by the SEC and its staff also require disclosure of regulatory issues applicable to investment managers in the offering document for the managers' funds. Still, because the universe of persons whose bad actions can lead to Rule 506 disqualification includes other persons involved in an offering, such as brokers, solicitors and owners of at least 20 percent of the issuer's voting equity securities, fund managers will need to engage in additional due diligence. In addition, the bad actor provisions may have a more significant effect on offerings by funds managed by smaller, unregistered advisers and advisers that are not registered even though they should be.

Proposed Rules Amending Regulation D and Form D

The SEC acknowledged that, while Rule 506(c) provides opportunities for small businesses and private funds to cost-effectively expand their reach to new investors, especially through the internet, permitting the use of general solicitation in private offerings may open the door to fraud and put investors at risk. With that in mind, the SEC has directed its staff to execute a comprehensive work plan to monitor the new Rule 506(c) market for fraud and compliance and to coordinate with state regulators.

In addition, in order to effectively monitor this new "public private" offering market (as well as to confirm that it is accomplishing its intended goals), the SEC proposed new rules that, if adopted, will expand the requirements of Regulation D and significantly overhaul Form D and the filing requirements that apply to it. Form D is the report that historically has been filed 15 days after the first sale made in reliance on any exemption provided under Regulation D, including Rule 506.

Specifically, the SEC proposed the following changes:

- Requiring the filing of a portion of a new "advance" Form D in Rule 506(c) offerings at least 15 days before any issuer engages in a general solicitation, and a supplemental filing of the rest of the information required by Form D within 15 days of the first "sale" of securities in the offering.

- In addition to the new advance filing and a traditional Form D filing within 15 days after the first "sale" completed in the offering, requiring a "closing amendment" to Form D to be filed within 30 days after the termination of any Rule 506 offering. Thus, for Rule 506(c) "continuous offerings" or offerings with staged or multiple closings under Rule 506(c), at least three different Form D filings could be required.

- Expanding the content of Form D to include, among other things, (i) the issuer's type of business; (ii) the issuer's size; (iii) information about the type of issuer; (iv) information about the issuer's controlling persons; (v) additional use of proceeds information; (vi) the number and type of accredited investors in the offering; (vii) whether a broker dealer involved in the offering filed general solicitation materials with the Financial Industry Regulatory Authority; (viii) the identity of any investment adviser involved in the offering; (ix) the types of general solicitation used or to be used in the offering (*e.g.*, TV, radio, print advertising, e-mail, websites); (x) the methods the issuer used or intends to use to "verify" the accredited investor status of its purchasers; (xi) the "trading venue" used or to be used to facilitate the offering (*e.g.*, trading portals, such as SecondMarket), if any; and (xii) the issuer's website address.

- Requiring written general solicitation materials to include specified legends and other disclosures. Special legend and disclosure requirements would apply to private funds.

- On a temporary basis, requiring issuers to submit written general solicitation materials used in Rule 506(c) offerings to the SEC no later than the date of first use. The SEC stated that such submissions would be made through a special, non-public intake process facilitated through the SEC's website and would not be made through the SEC's public electronic data gathering, analysis and retrieval (EDGAR) database. No formal "review" would be undertaken; rather, the SEC would review the submitted materials to monitor and track communications approaches.

- Disqualifying an issuer or any of its affiliates from relying on Rule 506 for future offerings if it has not complied within the last five years with the Form D filing requirements in a Rule 506 offering, for one year after curative filings are made, subject to cure period and waiver by the SEC.

In proposing these expansive changes to Form D and the filing requirements, the SEC said that it hoped for a swift comment and adoption timetable (the comment period will end in mid-September 2013) so that the changes to Form D would not lag too far behind the effective date of new Rule 506(c) (also anticipated in September 2013). Commenters can be expected to argue that the proposed rules run counter to the spirit underlying new Rule 506(c)—that is, making it easier for small businesses to raise capital in the private offering market. It will also be interesting to see, given the time lag between the effectiveness of the new rules and the spectre of the proposed rules, whether the private offering market will delay embracing new Rule 506(c) until the dust has settled on the changes to Form D and Regulation D.

Proposed Rules Amending Rule 156 (Investment Company Sales Literature)

In addition to the specific legends required for private funds, including legends that warn investors that the fund is not a registered investment company and relating to the inherent issues connected to performance data disclosures, the proposed rules would explicitly apply to private fund disclosure principles specified in Securities Act Rule 156 (previously specified to apply only to registered investment companies). The newly proposed changes, if adopted, will require close attention but should not significantly vitiate the advantages of being able to engage in the public solicitation of investors. The proposed changes to Rule 156 reflect existing antifraud interpretations under the Investment Advisers Act.

Looking Forward

These rule changes could be very significant for private equity, venture capital and hedge funds, particularly first time funds, because the ability to solicit broadly could substantially increase the pool of potential investors. However, that financial community is generally sophisticated and has access to many sources of equity through existing connections.

The most potential for a dramatic impact likely will be on early-stage companies that have a well-known product or service but do not have the connections and resources to attract sufficient equity capital under the old rules and have few other sources of capital (*e.g.*, technology firms with few hard assets to support borrowing). In the past, these companies could often raise equity only by attracting the attention of, and incurring the expense of involving, an investment bank or other financial intermediary, and the market was very inefficient. Now these companies will be free to pursue a virtually unlimited number of methods suited to take advantage of their high profiles. They will be able to advertise in their retail locations, to their customers, on their websites and other internet locations, or even on television and other media if they so choose. The use of one or more of these options could effectively resemble "crowd funding"—to a well-heeled crowd. Other companies without name recognition and a broad "reach" will, of course, also be able to utilize general solicitation, but their ability to cut through the "clutter" and competition will likely be more limited.

The impact of the new rules on the more traditional capital markets is difficult to predict. While the JOBS Act amendments to the Securities Act regarding "emerging growth companies" sought to increase the number of public companies by easing IPOs and some aspects of public company compliance, the Rule 506 public solicitation amendments could actually cut the other way. Coupled with the JOBS Act changes to the Securities Exchange Act of 1934 (the Exchange Act) (which now provides that a company can have up to 2,000 holders of a class of equity securities (more in some circumstances) before SEC registration is required (up fourfold from the old threshold), these rules could allow companies to raise substantial amounts of "public" money without having to live in the public company fishbowl—but at a significant loss of investor liquidity and transparency.

The reaction of the investment banking and financial intermediary communities will also be interesting. Although the authors of this article have not heard of many that are planning to do so, some entities may choose to participate fully in this new market by, for example, creating "clearing house" websites that provide potential investors with standardized packages of information about numerous issuers that have engaged the intermediary for fundraising. In addition, existing entities that have offered access to pre-qualified accredited investors through restricted access internet portals will need to revise their vetting procedures if they want to be able to certify potential investors' accredited status to issuers using Rule 506(c), and may seek to compete with brokers, investment advisers, lawyers and CPAs by offering investor-compensated services to investors seeking a cost-efficient source to certify their accredited status.

In any event, the more robust the "publicly solicited" private offering market becomes, the more focus there will be on liquidity alternatives. Most current private offerings impose significant restrictions on transfer, often including rights of first refusal and buyback rights for the issuer. Strong restrictions on transfer will certainly continue in the hedge, private equity and venture

capital fund markets, because the restrictions will still be required to preserve a fund's exemption from regulation as an investment company under the Investment Company Act. In other contexts, investors identified by general solicitation and with no prior connection to or knowledge of the issuer may not be as willing to agree to these types of provisions. However, while there may be significant pressure on private issuers that tap this new "publicly solicited" market to develop, or at least tolerate, liquidity options for investors—such as alternative trading systems, trading networks among existing investors and put rights—issuers will still want to limit transfers in order to keep the number of their investors low enough to avoid having to register under the Exchange Act. Those transfer restrictions will need to be contractually imposed at least because, in the absence of contractual restrictions, Securities Act Rule 144 would allow investors that are unaffiliated with an issuer to sell the securities acquired in a Rule 506(c) offering without restriction (including to unaccredited investors) after a one-year holding period, calculated in accordance with Rule 144(d), has elapsed.

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Exhibit A

Under the new amendments, the Rule 506 exemption from registration will not be available if a "covered person" under new Rule 506(d)

- Was convicted of any felony or misdemeanor involving the purchase or sale of any security; the making of any false filing with the SEC; or the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities. This provision applies to convictions that occur within 10 years (or five years, in the case of issuers, their predecessors and affiliated issuers) before the sale of the securities.

- Is subject to any order, judgment or decree that, at the time of the sale, restrains or enjoins the person from engaging or continuing to engage in any conduct or practice involving the purchase or sale of any security; the making of any false filing with the SEC; or the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities. This provision applies to orders, judgments and decrees entered within five years before the sale.

- Is subject to a final order of a state securities commission; state authority that oversees banks, savings associations or credit unions; state insurance commission; federal banking agency; the CFTC; or the National Credit Union Administration that

  - Bars the person from associating with an entity regulated by any of the foregoing authorities; engaging in the business of securities, insurance or banking; or engaging in savings association or credit union activities

  - Constitutes a final order based on a violation of any law or regulation prohibiting fraudulent, manipulative or deceptive conduct. This provision applies to orders entered within 10 years before the sale.

- Is subject to an SEC order entered pursuant to Section 15(b) or 15B(c) of the Exchange Act (which grant the SEC the authority to order sanctions against registered brokers, dealers, municipal securities dealers, investment advisers and their associated persons) that, at the time of the sale, suspends or revokes that person's registration as a broker, dealer, municipal securities dealer or investment adviser; limits the activities, functions or operations of that person; or bars that person from being associated with any entity or from participating in the offering of any penny stock.

- Is subject to any SEC order that, at the time of the sale, orders the person to cease and desist from committing or causing a violation or future violation of (i) any scienter-based anti-fraud provision of the federal securities laws or (ii) Section 5 of the Securities Act of 1933. This provision only applies to SEC orders entered within five years before the sale of securities.

- Is suspended or expelled from membership in, or suspended or barred from association with a member of, a securities self-regulatory organization (such as a registered national securities exchange) for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade.

- Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the SEC that was, within the past five years, the subject of a refusal order, stop order or order suspending the Regulation A exemption, or is, at the time of the sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued.

- Is subject to a false representation order of the U.S. Postal Service entered within five years before the sale, or is, at the time of the sale, subject to a temporary restraining order or preliminary injunction with respect to conduct that the Postal Service alleges constituted mail fraud.