JONES DAY

OCTOBER 2013

"GENERAL SOLICITATION" NOW PERMITTED IN RULE 144A OFFERINGS: ARE FOREIGN PRIVATE ISSUERS FREE TO TALK?

On July 10, the SEC adopted final rules under Section 201(a) of the Jumpstart Our Business Startups Act (the "JOBS Act") removing the ban against general solicitation and general advertising in private offerings made in reliance on Rule 144A and Rule 506 of Regulation D under the Securities Act of 1933.[1] The new rules went into effect on September 23.

Amended Rule 144A. The amendments to Rule 144A permit *offers* of securities to persons other than qualified institutional buyers ("QIBs"), provided that the securities are *sold* only to persons reasonably believed to be QIBs. Put simply, *offers* may be made to the public orally and in print by means of press releases, interviews, email messages, newspaper "advertisements," and trade magazines.

Amended Rule 506. The amendments to Rule 506 permit an issuer to use general solicitation or general advertising, as long as all purchasers are accredited investors and the issuer takes "reasonable steps" to verify that the purchasers are accredited investors.

This *Commentary* focuses on the practical effect of the elimination of the prohibition against general solicitation and general advertising on Rule 144A offerings by foreign private issuers ("FPIs")—a relaxation that FPIs and international market participants have been lobbying for since the 1990s. In summary, given the continuing effect of the federal anti-fraud rules and concerns with respect to state blue sky laws, we do not expect marketing of international capital markets transactions, other than broader dissemination of press releases and pre-deal advertising, to materially change.

1 *Available at* http://www.sec.gov/rules/final/2013/33-9415.pdf (the "Adopting Release").

EXECUTIVE SUMMARY

Effective September 23, amendments to Rule 144A under the Securities Act permit companies to engage in general solicitation and general advertising in Rule 144A offerings, provided that securities are sold only to "qualified institutional buyers" and the offering otherwise complies with Rule 144A.

However, given the continuing effect of the federal antifraud rules and concerns with respect to state blue sky laws, we do not expect marketing of international capital markets transactions, other than broader dissemination of press releases and pre-deal advertising, to materially change.

Pre-Deal Marketing and Advertisement. General solicitation is now permitted in connection with a Rule 144A tranche, and pre-deal marketing can include non-QIBs in the United States. Offering participants may now use mass emails (through Bloomberg or otherwise), advertisements, articles, and interviews, among others, which may be published in newspapers, magazines, on the internet, or broadcast on television and radio. Rule 10b-5 potential liability remains a concern, however.

Press Releases. Because the new Rule 144A permits general solicitation, issuers are now permitted to broadly disseminate press releases free of the prior restrictions on the type of information permitted under Rule 135c. We would expect some tension between issuers who are no longer constrained by the general solicitation prohibitions and underwriters who may urge caution, given the analogous limitations of Rule 135c. Because Rule 10b-5 liability is still a concern, as a matter of prudence, press releases should be limited and consistent with offering disclosure documents

Section 4(1-1/2) Offerings. Because general solicitation and general advertising is still prohibited in Section 4(a)(2) transactions, Section 4(1-1/2) offerings should continue to rely on old procedures and restrictions consistent with Section 4(a)(2) offerings.

Publication and Distribution of Pre-Deal Research. Now more liberally permitted, but it is expected that liability concerns still mitigate potential benefits of publishing or distributing such material more broadly than current practice.

Initial Purchase Agreements. Offering participants may move to limit representations regarding general solicitation and general advertising to sales only; however, blue sky laws may not allow for such changes.

OVERVIEW OF RULE 144A

Rule 144A is a safe harbor that permits a person (other than the issuer) to resell securities without registration if the transaction meets specified conditions. Under old Rule 144A, one of the conditions was that the securities be *offered or sold* only to persons the seller and any person acting on the seller's behalf reasonably believe are QIBs. The JOBS Act required the SEC to amend Rule 144A to permit *offers* to persons other than QIBs, as long as the securities are *sold* only to persons that the seller and any person acting on behalf of the seller reasonably believe are QIBs.

Revised Rule 144A permits a seller to rely on Rule 144A even if the securities are *offered* to non-QIBs, including by means of general solicitation, 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 Rule 144A exemption now will be available even where general solicitation is actively used in the marketing process or has occurred inadvertently.

The amendments do not add any additional standards with respect to the manner or process used by a seller to determine whether a purchaser is a QIB.

FPIs rely on Rule 144A for equity and debt securities offerings made to investors in the United States, typically as part of a global or other cross-border capital markets transaction. The new rule raises a number of interesting questions in connection with Rule 144A offerings by FPIs, which are discussed in detail below.

CAN GENERAL SOLICITATION BE USED IN CONCURRENT RULE 144A/REGULATION S OFFERINGS?

Yes. Regulation S is an independent safe harbor for offshore transactions. Although the SEC has not revised Regulation S, and the ban on "directed selling efforts" in the United States remains, the SEC reiterated its view that a global offering complying with Regulation S (including, presumably, the ban on "directed selling efforts") will not be "integrated" with a concurrent offering in the U.S. in accordance with the new rule.[2] Accordingly, the use of general solicitation in a Rule 144A offering should not be deemed to constitute directed selling efforts in the United States that would jeopardize a concurrent Regulation S offering.

IN PRACTICE, HOW WILL PUBLICITY GUIDELINES FOR RULE 144A OFFERINGS BE AFFECTED?

Restrictions on general solicitation typically have been addressed by publicity restrictions imposed on the issuer at the beginning of an international offering. "General solicitation or general advertising," which was effectively prohibited under the old rule,[3] could include any advertisement, article, notice, or other communication published in any newspaper, magazine, or similar media or broadcast over television, radio, or the internet.

All of these activities historically have been scrutinized in advance and monitored by legal counsel with an eye to their possible effects on the availability of applicable exemptions.

The new rule permits offering participants to communicate with prospective investors in Rule 144A offerings with no limit as to the method of communication or the number or type of investors (QIBs or non-QIBs) contacted using the following methods:

- Mass emails (through Bloomberg or otherwise);
- Advertisements;
- Cold calls;
- Articles;
- Interviews and other communications;

which may be published

- In newspapers;
- In magazines;
- On the internet (including social media, such as Facebook, Twitter, etc.);
- On television broadcasts; or
- On radio broadcasts.

Ultimate *sales*, however, must be made to investors reasonably believed to be QIBs.

It is important to note that because investors can still claim they relied upon these types of communications in making their investment decision to purchase securities, use of such materials and communication media to solicit prospective investors remains subject to the general anti-fraud provisions under the federal securities laws, including Rule 10b-5. In addition, many foreign jurisdictions have their own publicity rules and restrictions in connection with an offering that must be observed.

In light of these liability concerns, as well as state blue sky issues discussed below, Rule 144A offering participants should continue to carefully consider the content, form,

2 *See* pages 56-57 of the Adopting Release.
3 Although old Rule 144A did not include an express prohibition against general solicitation, offers of securities under Rule 144A were limited to QIBs, which had the same practical effect.

and distribution of solicitation materials and public discussion regarding the offering. These materials will continue to be reviewed by counsel to ensure that they are consistent with the disclosure contained in the offering memorandum. It seems likely that marketing in the U.S. should not change significantly, and documentation for a Rule 144A transaction will continue to be limited to an offering memorandum or prospectus, a roadshow presentation, and any pricing announcements. On the other hand, one can safely assume that issuer press releases to Reuters, Bloomberg, and other press agencies announcing the launch of deals will be more widely disseminated.

WILL GENERAL SOLICITATION RAISE ISSUES UNDER STATE BLUE SKY LAWS?

Section 18 of the Securities Act preempts state "blue sky" laws with respect to offerings of "covered securities," which include

- All securities offered and sold in Rule 506 offerings; and
- Securities of *reporting issuers* offered and sold in Rule 144A transactions.

There is no corresponding preemption for Rule 144A offerings by non-reporting issuers. Although state statutes generally exempt offers and sales to sophisticated institutional investors by all issuers, broad-reaching general solicitation in Rule 144A offerings *by non-reporting issuers* to *non-institutional investors* may require registration under most state blue sky laws.

The SEC and state securities regulators have not yet indicated whether or how this possible impediment to the use of new rules will be addressed. Commentators to the JOBS Act suggested that the SEC address this concern and provide for preemption of state blue sky laws for all offers and sales made pursuant to Rule 144A (in line with the preemption for all offers and sales under Rule 506). The SEC has not yet addressed these comments. Although it is unclear whether states will actively pursue enforcement actions in such cases, until the issue is resolved, it remains advisable for *non-reporting issuers* to refrain from broad-reaching general solicitation.

MUST AN ISSUER CONDUCTING A RULE 144A OFFERING COMPLY WITH RULE 135C UNDER THE SECURITIES ACT?

No. Because general solicitation is now permissible, issuers conducting a Rule 144A offering may no longer be subject to the stringent requirements of Rule 135c or other similar safe harbors in connection with press releases.

Under Rule 135c of the Securities Act, an announcement that an issuer makes regarding an unregistered offering is not deemed to be an offer of securities for purposes of Section 5 of the Securities Act if, among other things, the announcement contains certain limited information (e.g., information limited to the name of the issuer, the basic terms and size of the offering, the timing of the offering, a brief statement of the manner and purpose of the offering, and statements that the securities have not been registered) regarding the offering and is not used for the purpose of conditioning the market in the United States.

For Regulation S offerings with a Rule 144A tranche, the SEC has clarified that general solicitation and general advertising in connection with a Rule 144A offering will not be viewed as "directed selling efforts" in connection with a concurrent Regulation S offering. As a result, issuers are now permitted to broadly disseminate a press release regarding a proposed or completed Rule 144A offering free of the prior restrictions on the types of permitted information under Rule 135c. As noted above, however, the anti-fraud provisions of the federal securities laws, including Rule 10b-5, are still a concern.

Because Rule 135c is a safe-harbor for the *issuer*, we expect that underwriters and placement agents will require the issuer to agree on communications in advance (for example, at a minimum, that information must be consistent with disclosure contained in the offering memorandum). Existing

purchase agreement provisions to that effect, and the related indemnity provisions, are unlikely to change.

IS GENERAL SOLICITATION PERMITTED IN SECTION 4(A)(2) AND "4(1-1/2)" OFFERINGS?

The new rules apply only to offerings conducted under Rule 506 and Rule 144A. Offerings conducted under Section 4(a)(2), frequently used by foreign issuers in rights offerings, and under the Section 4(1-1/2) doctrine, frequently used in block trades where Rule 144A is not available, will still be subject to the prohibition on general solicitation and advertising.

Some practitioners have suggested that general solicitation should be permitted in a private resale under the doctrine referred to as the "Section 4(1-1/2) exemption" (resales from one purchaser in a private offering to another). It appears, however, that the SEC's affirmative statement prohibiting public solicitation in a Section 4(a)(2) offering applies to a Section 4(1-1/2) offering because a Section 4(1-1/2) offering is premised principally on a private offering that initially must be permitted by Section 4(a)(2). As a result, Section 4(1-1/2) offerings should continue to rely on the procedures and restrictions consistent with Section 4(a)(2) offerings.

Other practitioners have proposed that certain Section 4(a)(2) transactions (so-called "Rule 144A direct" offerings) should be properly viewed as Rule 144A transactions on the basis that the economic risk is completely borne by the underwriters. In such transactions, the securities are offered and sold directly by the issuer, with the underwriters agreeing "to procure purchasers for the shares, failing which the underwriters will purchase such shares." This substance-over-form argument concludes that such a "144A direct" offering should qualify for the Rule 144A exemption from registration under Section 5, notwithstanding that it is not a true "resale" but, in nominal form, a direct sale to the ultimate purchaser.

Variations in these "144A direct" and similar offerings are made in certain other jurisdictions, where, although procedurally similar to Rule 144A direct transactions, the economic risk is not so clearly transferred to the underwriter.

Because there is no SEC guidance on this issue, any "144A direct" transaction must be analyzed on a case-by-case basis considering all facts and circumstances, including the timing of, and language used in, the underwriting documentation, the legal opinions, termination provisions, and market-outs to determine whether such transaction looks and feels more like a Rule 144A transaction or more closely resembles a classic 4(a)(2) offering.

CAN PARTICIPATING BROKER-DEALERS NOW PUBLISH "PRE-DEAL" RESEARCH IN THE UNITED STATES IN ADVANCE OF A RULE 144A OFFERING?

As a practical matter, most investment banks and their internal compliance teams will continue to adhere to previous limitations on such research (or cautiously adapt their practices to permit wider dissemination of pre-deal research only upon a full vetting of the content against the offering memorandum), given potential liability concerns.

In recent years, in Rule 144A/Regulation S offerings by FPIs, particularly where Rule 139—which, in certain circumstances, permits publication and distribution of research by broker/dealers distributing securities—is not available,[4] some investment banks in certain markets seem to have relaxed research black-out periods from 40 days down to 48 hours based on a narrow distribution to QIBs only. In addition, technical arguments have been made that pre-deal research should be characterized as "investor education" and thus should fall outside of the restrictions. Although no longer problematic under the Securities Act, as a matter of prudence, investment banks appear to continue to be concerned about liability, which may outweigh the potential benefits of publishing such material or distributing it more broadly than the current practice.

4 Rule 139(a) states that a broker or dealer's publication or distribution of a research report about an issuer or any of its securities shall be deemed, for purposes of Section 5, "not to constitute an offer for sale or offer to sell a security that is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, *even if* the broker or dealer is participating or will participate in the registered offering of the issuer's securities" (emphasis added) if the criteria set out in the rule is satisfied.

HOW WILL RULE 144A INITIAL PURCHASE AGREEMENTS CHANGE?

Rule 144A purchase agreements typically contain representations by the issuer and the initial purchaser that the securities covered by the agreement have not been and will not be (i) *offered* or *sold* in the United States to anyone not reasonably believed to be a QIB or (ii) *offered* or *sold* in the United States by any means of general solicitation or general advertising. Offering participants may move to limit the first representation to *sales* only and remove the second representation entirely. However, state blue sky laws and implications for non-reporting issuers should be considered, as discussed above.

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