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Mike Liles, Jr.


January 4, 2012

Advisory Committee on Small and Emerging Companies
c/o Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: File Number 265-27
Meeting of Advisory Committee on Small and Emerging Companies
January 6, 2012
Relaxation of Current Restrictions on General Solicitation and Advertising in
Exempt Offerings of Securities

Dear Members of the Advisory Committee:

This submission is in response to Release Nos. 33-9285 and 34-65984 requesting statements and comments concerning topics to be addressed at the meeting of the Advisory Committee on Small and Emerging Companies on January 6, 2012. One of the topics on the agenda for the meeting is the relaxation of current restrictions on general solicitation and advertising in exempt offerings of securities. Set forth below are some general observations concerning this topic. These comments are mine alone and do not reflect any input from other members of the Business Law Section of the American Bar Association or the Securities Laws Committee of the Washington State Bar Association, nor do they constitute the official position of this firm or any of its clients.

As the Advisory Committee is aware, most securities offerings by small and emerging companies are made without registration under the Securities Act of 1933 in reliance upon Rule 506 of Regulation D under that Act. Rule 506 is deemed to constitute a "safe harbor" for the exemption afforded by Section 4(2) of that Act for "transactions by an issuer not involving a public offering." The criterion for determining whether the Section 4(2) private offering exemption is available, which criterion was defined over 50

years ago by the U.S. Supreme Court, is whether the investors are able to “fend for themselves” in the offering, so that registration under the Act is not necessary.

Most securities practitioners and regulators over the years have considered an offering involving general solicitation (including advertising) as constituting the *quintessential public* offering and not one that is private in nature, and, indeed, it is difficult to see how investors who are introduced to an offering by mass solicitation could be assured to be able to “fend for themselves” in any meaningful way. In this regard, under Regulation D investors are deemed to be able to fend for themselves when they are provided an opportunity through direct, private interaction to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the company possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information that has been furnished to them in the offering. Assuring that such an opportunity would be provided in a meaningful way might be difficult in the general solicitation context, and without such an assurance, confidence of the ability for investors to “fend for themselves” would be problematic.

I am concerned that any attempt by the Commission to try to redefine the words “not involving a public offering” of Section 4(2), which to me appear plain upon their face, to include general solicitation would not definitively reconcile the words of the statute with the general solicitation concept. This might be difficult even with some form of enabling legislation from Congress, such as that now pending, as the inherent logical inconsistency suggests that sufficient ambiguity could result and give rise to litigation unless the wording of the legislation were carefully crafted indeed.

Thus, my concern is that, without carefully crafted enabling legislation from Congress, any regulation that the Commission might adopt proclaiming that a general solicitation does not involve a public offering might evoke litigation which could be prolonged and create uncertainty concerning the use of general solicitation in unregistered small business offerings which eventually the U.S. Supreme Court would have to resolve. In the meantime, securities practitioners and their clients might face uncertainty that would preclude effective reliance upon any such new regulation for years. And in the interim, competition with less-inhibited promoters of small business funding who might proceed using general solicitation in the scramble to access what venture funding is available in the present economy could generate unwise funding practices within the small business community, particularly among those emerging businesses needing immediate funding in order to survive. Such unwise funding practices might later turn out to have been illegal, with the various consequences which would result, including possible triggering of the “bad actor” disqualification under Rule 506.

Under these circumstances, it might be prudent for the Advisory Committee to consider recommending to the Commission another type of intermediate approach, such as a rule based upon Section 3(b) of the Act, which, although limiting offerings to \$5 million, is not based upon the private offering exemption of Section 4(2) and would not raise the logical conundrum referenced above. Alternately, the Advisory Committee might consider recommending a rule that would permit general solicitation for the sole purpose of identifying and qualifying a group of "accredited" investors within the meaning of Rule 501(a) but without identifying any particular offering. Under such a rule, after the lapse of some minimum specified time separating the solicitation of investors from the offering itself, a private offering could be made in reliance upon Section 4(2) and Rule 506. This latter suggestion would formalize by rule an approach that the Staff of the Commission has addressed in several no-action letters in the past and would not be likely to precipitate uncertainty in the venture funding market.

I hope that the above comments will prove useful to the Advisory Committee in considering this issue at the January 6, 2012 meeting.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Liles, Jr.", with a long horizontal flourish extending to the right.

Mike Liles, Jr.