Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings
File No.: S7-07-12

Comments to Securities and Exchange Commission Regarding General Solicitation and Advertising of Private Placement Securities and Directors and Officers Liability Insurance Issues

Our opinion based on survey results regarding Private Company Directors and Officers Liability Insurance indicates that general solicitation and advertising of private placement securities will increase insurer risk and also increase premium. In addition, policy changes may be required.

All of the following survey questions relate to Private Company Directors and Officers Liability Insurance. Note: “Moderately” means up to 10% and “Significantly” means greater than 10%.

Survey respondents include insurance companies, insurance brokers, law firms and consultants specializing in Directors and Officers Liability Insurance.

Finding include:

- Question: In “the misrepresentations of information or risk by an issuer in solicitation and advertising of private placement securities” 33% and 58.3% of respondents indicated probability of insurance loss would increase “significantly” and “moderately” respectively resulting in 16.7% “significant” increase and 66.7% “moderate” increase in premium.
- Question: Insurance polices currently provide coverage for the private placement of securities. Do you see any changes in this policy condition? Respondents indicated 16.7% (Very Likely), 41.7% (Moderately Likely) and 21.0% (Very Unlikely)
- Question: Insurers may decline to insure companies engaged in the offering of private placement securities utilizing general advertising and solicitation methods. Respondents indicated 16.7% (Very Likely), 16.7% (Moderately Likely), 8.3% (Very Unlikely) and 50.0% (Moderately Unlikely)
- Question: Regarding the typical application question, "Does the Applicant currently file, or does it anticipate filing in the next 6 months, any documents with the Securities and Exchange Commission or similar foreign authority regarding any equity or debt securities? Do you see any change in underwriting (such as insurer permission being required) if an insured ("issuer") plans a private placement of securities? Respondents indicated 16.7% (Very Likely), 41.7% (Moderately Likely), and 33.3% (Very Unlikely)

The American Crowdfunding Investment Association (“ACFIA”) is being established as an industry association. The Association works to align the interests of companies ("issuers"), investors, funding portals and financing intermediaries, insurance companies and brokers, legal and accounting services, regulatory agencies and other professionals into a cooperative organization to advance crowdfunding initiatives.

The success of crowdfunding and new private placement rules will be dependent on identifying both business potential and risk factors, seeking to maximize the former and minimize the latter. Realistic business planning and organizational services are necessary in crowdfunding to assure individual company success, economic growth and job opportunities in the United States.

Directors and Officers (“D&O”) Liability Insurance

Directors and Officers (“D&O”) Liability Insurance (often called D&O) is liability insurance offered to public, private and non-profit companies and organizations. Insurance is payable to the directors and officers of a company, or to the organization(s) itself, as indemnifications for certain damages (losses) including the advancement of defense costs in the event of a claim resulting from a legal action (whether criminal, civil, or administrative) brought for alleged wrongful acts in their capacity as directors and officers (as to the individual directors/officers) or against the organization(s) for securities claims or other actions.

Coverage can extend to defense costs arising out of criminal and regulatory investigations/trials. Management liability insurance may also cover liabilities of the corporation (“entity”) as well as the personal liabilities for the directors and officers of the corporation.

Most US companies and organizations purchase D&O Liability or Management Liability insurance. It is also common in a corporate risk management program to include coverage for Fiduciary Liability and Employment Practices Liability.

Policy terms and conditions are complex and underwriting standards and requirements can vary among insurance companies. The difficulty in assessing risk can make policies restrictive and premiums very high. Policy conditions such as prior acts coverage are very important.

During several decades of D&O insurance underwriting policy losses can run very high at intermittent times, such as 1) financial institution losses during the financial crisis, 2) initial public offering losses during stock market boom of the late 1990’s, 2) and private company losses, which may have been under-priced relative to risk.

Traditional insurance independence of risk per account is absent in this type of insurance and typical actuarial analysis does not forecast economic, industry or legal changes that can affect future claims.

New exposures cause concern among all insurers since actuarial data does not exist. Our survey indicates the general solicitation and advertising of private placement securities will increase insurer risk and also increase premium and policy change may be required.

Survey and Results

Respondents include insurance companies, insurance brokers, law firms and consultants specializing in Directors and Officers Liability Insurance.

Our opinion based on survey results indicate:

- Insurance premium will increase if a company is planning a new private placement offering during the policy term.
- Certain policy conditions may change such as requiring approval of a new private placement offering.
- Insurance should be available from most insurance companies; however it is likely additional information will be required regarding type, method and examples of solicitation and advertising to be used in a private placement offering.
- It is possible new policy conditions from certain insurance companies may exclude losses resulting from general advertising and solicitation in a private placement offering.
- The need of a qualified insurance broker specialist in negotiation of coverage for a company (‘Insured”) will be very important.

See Survey Results.

Submitted by:

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Insurance Issues: General Solicitation and Advertising of Private Placement Securities

All of the following survey questions relate to Private Company Directors and Officers Liability Insurance. Note: “Moderately” means up to 10% and “Significantly” means greater than 10%.

Survey respondents include insurance companies, insurance brokers, law firms and consultants specializing in Directors and Officers Liability Insurance.

ACFIA.org Survey Questions

Question # 1
The misrepresentation of information or risks by the issuer in solicitation and advertising of private placement securities through different methods of marketing and internet communication channels may "decrease/increase" probability of loss and "decrease/increase" amount of loss resulting in "decrease/increase" of insurance premium

	Significantly Decrease	Moderately Decrease	Significantly Increase	Moderately Increase	No Effect	Do Not Know
Probability of Loss	0.0%	0.0%	33.3%	58.3%	0.0%	8.3%
Amount of Loss	0.0%	8.3%	25.0%	50.0	0.0%	16.7%
Insurance Premium	0.0%	8.3%	16.7%	66.7%	0.0%	8.3%

Question# 2
More Investors participating in a private placement offering of securities may "decrease/increase" probability of loss and "decrease/increase" amount of loss resulting in "decrease/increase" of insurance premium

	Significantly Decrease	Moderately Decrease	Significantly Increase	Moderately Increase	No Effect	Do Not Know
Probability of Loss	0.0%	0.0%	25.0%	58.3%	8.3%	8.3%
Amount of Loss	0.0%	0.0%	16.7%	66.7%	8.3%	8.3%
Insurance Premium	0.0%	0.0%	25.0%	66.7%	0.0%	8.3%

Question # 3
More Investors participating in an offering and issuer responsibility for due diligence for determining accredited investor status may "decrease/increase" probability of loss and "decrease/increase" amount of loss resulting in "decrease/increase" of insurance premium

	Significantly Decrease	Moderately Decrease	Significantly Increase	Moderately Increase	No Effect	Do Not Know
Probability of Loss	0.0%	8.3%	16.7%	66.7%	0.0%	8.3%
Amount of Loss	0.0%	0.0%	8.3%	66.7%	8.3%	16.7%
Insurance Premium	0.0%	0.0%	16.7%	66.7%	0.0%	16.7%

Question # 4
Insurers may decline to insure companies engaged in the offering of private placement securities utilizing general advertising and solicitation methods (Likely, Not Likely)

	Very Likely	Moderately Likely	Very Unlikely	Moderately Unlikely	No Effect	Do Not Know
Willingness to Insure	16.7%	16.7%	8.3%	50.0%	0.0%	8.3%

Question #5
Insurance polices currently provide coverage for the private placement of securities. Do you see any changes in this policy condition? (Likely, Not Likely)

	Very Likely	Moderately Likely	Very Unlikely	Moderately Unlikely	No Effect	Do Not Know
Policy Changes	16.7%	41.7%	21.0%	0.0%	8.3%	8.3%

Question #6
Regarding the typical application question, "Does the Applicant currently file, or does it anticipate filing in the next 6 months, any documents with the Securities and Exchange Commission or similar foreign authority regarding any equity or debt securities? Do you see any change in underwriting (such as insurer permission being required) if an insured ("issuer") plans a private placement of securities? (Likely, Not Likely).

	Very Likely	Moderately Likely	Very Unlikely	Moderately Unlikely	No Effect	Do Not Know
Underwriting Changes	16.7%	41.7%	33.3%	0.0%	0.00%	8.3%

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