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July 14, 2011

***VIA E-MAIL TRANSMISSION***

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: ***File No. S7-21-11***

Dear Ms. Murphy:

This letter responds to the Securities and Exchange Commission's (the "Commission") request for comments in Release No. 33-9211 (the "Release") proposing amendments to Rule 506 of Regulation D under the Securities Act of 1933, as amended (the "Act") to implement Section 926 of the Dodd-Rank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The numbering of our comments below correspond to the Commissions requests for comments as set forth in the Release.

The comments below do not necessarily reflect the views of any clients of this Firm.

Comments

(3) While we believe it is appropriate to include managing members of limited liability companies for purposes of Rule 506(c), we believe that in the context of "member managed" limited liability companies, all members may be deemed to be managing members, even those with small, and obviously non-controlling, membership interests. It is not unusual for a few members of a limited liability company to have large membership interests constituting majority control, and for other members to have small membership interests as a means of giving them some equity interest in the success of the entity. Although the latter members would have

them some equity interest in the success of the entity. Although the latter members would have voting rights in a member-managed company, their small, perhaps only 1% or 2% interests, obviously have no controlling influence when weighed against the majority control of the larger members. Notwithstanding their limited voting influence, such members may be viewed as managing members because, theoretically, *all* members participate in management. We would suggest that in the context of a member managed limited liability company, only those members holding, perhaps, a 25% membership interest (or some other significant percentage) based upon the amount of capital contributed or the right to the return of capital upon dissolution (as is the standard in Schedules A and B of Form BD), be deemed to be "managing members" for purposes of the disqualifying events. Please also see our comment in No. (4) below with respect to the use of a 25% threshold in a shareholder context.

(4) We are concerned that in the context of a public company issuer, a person who is subject to a disqualifying event could obtain ownership of 10% or more of a class of the company's equity securities while having no input or control over the company's management, and possibly even being adversaries of management, yet such person would inhibit the company's ability to make a Rule 506 offering. In that regard, we believe that in a shareholder context, only persons who have at least a 25% interest (a threshold utilized in several other contexts under the federal securities laws, including Schedules A and B of Form BD) should be deemed to be covered persons. Moreover, the rule as proposed covers ownership of 10% of *any* equity security (as does Rule 262(h) under the Act), whether or not those securities are voting securities. We believe the test should encompass only voting securities, since only they have the power to affect the management and control of the issuer. In the context of a privately-held issuer, we also believe that a 25% interest be used as the threshold. In that regard, in a corporation, the test should be ownership of 25% or more of voting equity securities as in the public company context discussed above, and in a limited liability company context, the test should measure the 25% interest using the Form BD concept of capital contributed or the right to the return of capital upon dissolution. Since the Dodd-Frank mandate is only that the rule be "substantially similar" to Rule 262, and not identical, we believe the Commission can make these revisions.

(7-8) With respect to covered persons other than the issuer in particular, we believe it is appropriate to replace the reference to "officers" with a reference to "executive officers." Moreover, we believe that the disqualifying events should be limited to those affecting persons having responsibility for the particular Rule 506 offering. Especially in the broker-dealer community, it is common for many individuals to hold officer titles, yet have no real executive officer functions or authority. Such broker-dealers should not be precluded from participating in

Rule 506 offerings merely because such a non-executive officer, who has no input as to the management and control of the broker-dealer's business, is subject to a disqualifying event if that person is not otherwise a participant in the offering.

But we believe that merely utilizing the narrower "executive officer" formulation would not cure the inequity that could result in broker-dealer organizations where functions are dispersed among several executive officers. It is not unusual for responsibility for the various activities of a broker-dealer (e.g., trading, retail, research, asset management, investment banking) to be lodged with several different senior officers, each of whom may fall within the definition of "executive officer." It may only be the investment banking and retail functions that have any participation in the approval or supervision of a private placement, yet that broker-dealer could be disqualified from acting as a placement agent if, say, the head of asset management or trading are subject to disqualifying events. We believe that the rule should cover only those executive officers who have responsibility for either the approval or supervision of Rule 506 offerings. But in the event that such limitation is not incorporated in the rule itself, we suggest that such segregation of the disqualified officers (or executive officers) be considered as a basis for a Commission waiver as discussed in No. (61) below.

(9) We believe it is premature to consider the inclusion of investment advisers, and their officers, directors, general partners and managing members, in this rule amendment. Such persons are not presently covered by Rule 262 (except if the investment adviser is also the general partner of the issuer), and Dodd-Frank did not choose to include them in Section 926. We believe that their inclusion should be considered in a separate rulemaking proposal in which all ramifications of such inclusion can be analyzed and considered.

However, should the Commission determine to include investment advisers in the present amendment, we believe it would be appropriate to grandfather those personnel who are associated with an adviser at the time of adoption of the amendments, since the impact of the retroactive application of the rule to such persons (who, after all, became associated at a time when no disqualification was even foreseeable) could be substantial. It would simply be unfair and inequitable to potentially foreclose the use of Rule 506 to the companies the advisers manage merely because an individual subject to disqualifying events became associated with the adviser at a time when no such effect would have occurred. Moreover, with the now-required registration of virtually all investment advisers on a state or federal level, such disqualifying events will be disclosed in Form ADV, and potential investors will have the opportunity to review such disclosures before making their investments. At the very least, if not formally grandfathered in the rule, the retroactive application of the disqualification in this context should be a basis for a waiver granted by the Commission as discussed in No. (61) below.

(12) We believe it would be appropriate to except from disqualification those entities which have undergone a change of control since the occurrence of a disqualifying event. No rational investor protection benefit would be achieved by disqualifying an entity for the entire look-back period if the persons responsible for the disqualification are no longer in control of that entity. Entities act only through their personnel, and if the tainted persons are no longer in control of an entity, that entity should no longer be considered a "bad actor."

(17) We see no need to extend the disqualifying period for permanent injunctions or restraining orders unless the enjoined or prohibited activity specifically precludes participation in securities offerings. There appears to be no valid reason to continue to prohibit an issuer's ability to raise capital through a Rule 506 offering, or to prohibit a broker-dealer from acting as placement agent in such an offering, merely because it was subject to a permanent injunction or order that is unrelated to the capital-raising activity.

(18) The Commission would be going beyond the Dodd-Frank directive by extending the look-back period for court injunctions and orders to the period provided for regulatory orders. Presumably, Congress was aware of this disparate treatment and did not see fit to treat them similarly. The Commission should not do so on its own accord in light of the Congressional approach taken in Dodd-Frank.

(21) We do not believe that a permanent bar should work as a permanent disqualification under Rule 506, so long as the person is not engaging in the barred conduct or activity. As suggested by the example posed in footnote 52 of the Release, we do not believe that there would be any valid investor protection benefit from prohibiting an individual barred from being associated with a broker-dealer or investment adviser, from being involved in an offering in another capacity, such as being an officer or 10% stockholder of an issuer raising capital.

(36) We do not believe that it would be appropriate to add the CFTC to the list of regulators whose orders would be disqualifying. Just as investment advisers are not currently covered by Rule 262, and could easily have been referred to in Dodd-Frank had Congress wished to include them among potentially covered persons, the CFTC is not currently included in Rule 262. Had Congress believed that CFTC orders should be potentially disqualifying under Rule 506, Dodd-Frank could have included them in Section 926. We believe that the possible inclusion of CFTC orders as disqualifying events in Rule 506 should be considered in a separate rulemaking proposal.

(43) There is no rationale for providing that a Commission order that merely censures or imposes a monetary penalty, but does not otherwise prohibit any conduct, should constitute a disqualifying event for purposes of Rule 506. If the order itself, imposed after a contested proceeding or in a settlement, did not prohibit any conduct or activity, it would not be appropriate to use that order to prohibit conduct in a completely unrelated activity, i.e., participation in a Rule 506 offering.

(44) There should not be any look-back period that would extend Rule 506 disqualification beyond the period for which the order or bar remains in effect. Doing so would have the anomalous result of prohibiting participation in an activity (i.e., a Rule 506 offering) because of unrelated conduct from which the actor is no longer barred or disqualified. Once the actor has figuratively "served his time" and would be permitted to return to the activity that was prohibited in the Commission order, it would be incongruous to rely on that order to extend the bar on unrelated Rule 506 activity.

(47) As stated in our comment in No. (36) above, CFTC and commodities-related matters were not included by Congress in Dodd-Frank and should not be considered in the present rulemaking proceeding. Rather, a full analysis of the reasons for the inclusion should be offered in a separate rulemaking proposal.

(54-58) Since the failure to adhere to the requirements of Regulation D may result in an offering being made in violation of Section 5 of the Act, we believe it is essential that an issuer be excepted from such a violation if it exercised reasonable care in its determination that no covered person was subject to a disqualifying event. While we believe that an issuer's factual inquiry, perhaps, through the use of questionnaires or other means, if appropriately conducted under the relevant circumstances, should constitute such reasonable care, we believe that the rule should not specifically dictate the type of factual inquiry that would suffice. Rather, we believe that the adopting release should provide examples of an adequate factual inquiry in order to provide guidance to issuers in this regard.

We believe it would be helpful for the Commission to provide guidance as to the kind of factual inquiry that would be sufficient in any offering, but especially in the context of either a continuous offering (e.g., for a hedge fund or other pooled investment vehicle) or an offering that merely continues for a somewhat extended period, but is not intended to be continuous. Even though the issuer may have conducted an appropriate factual inquiry before engaging a particular placement agent at the start of such an offering, during the offering period for either type of offering it is certainly possible for an individual subject to a disqualifying event to have joined that placement agent in a disqualifying capacity. If the placement agent does not advise the issuer of that fact, whether through inadvertence or otherwise, the issuer would have no way of knowing unless it made continuing factual inquiries of the placement agent. The Commission should provide guidance as to whether the issuer would be protected if it relied on an agreement with the placement agent, entered into at the commencement of the offering, in which the agent was obligated to advise the issuer of such event, or whether the issuer would be required to renew its factual inquiry on some periodic basis, such as monthly, quarterly or semi-annually.

(61) We believe it is appropriate for the Commission to provide the issuer and broker-dealer communities with guidance as to the types of circumstances that would give rise to a grant or denial of a waiver. Doing so will give such parties an opportunity to structure their operations or businesses in a manner that will give them the best chance of obtaining a waiver, rather than proceeding on an inefficient "trial and error" basis with no idea of the factors the Commission will deem sufficient.

In that regard, if the Commission does not accept our suggestion set forth in No. (7-8) above to limit the disqualifying events to those affected officers (or executive officers) actually involved in the approval or supervision of the Rule 506 activity, a circumstance that should give rise to the grant of a waiver should be the appropriate segregation of the otherwise disqualifying bad actors from the Rule 506 activity. As discussed in No. (7-8) above, in many organizations, business responsibilities are widely dispersed among several members of senior management. If an individual whose prior activities would otherwise disqualify the entity from participation in a Rule 506 offering can be segregated from the determination to participate in the activity, and from the supervision of the activity, the mere fact that he or she is an officer (or executive officer) of the entity should not disqualify the entire entity. Since the bad actor would be adequately screened from the activity, there should be no harm to the investing public from allowing that entity to participate in a Rule 506 offering.

Please also see our comment in No. (9) above regarding the grandfathering of settlements entered into by investment advisory personnel. If the Commission does not postpone consideration of the inclusion of investment advisers from these amendments, and if the Commission does not grandfather settlements and consent orders previously entered into by their personnel, we believe it would be appropriate for the Commission to advise that the circumstances described above in No. (9) would be likely to provide the basis of a waiver issued by the Commission.

(63-65) We believe that negotiated settlements, or orders issued under circumstances where there was no contested hearing, entered into prior to the adoption of the amendments should be grandfathered and should not be deemed a disqualifying event. At any time that an individual or entity considers the settlement of a proceeding, or determines whether to contest a regulator's charges, he or it weighs the potential benefits of settling, or the cost of contesting the charges, against the expected consequences of that settlement. Since the disqualification from participation in Rule 506 offerings would have been completely unknown, and unknowable, at the time the settlement was entered into or the charges were brought, such a consequence could not have been considered by the individual, and it would be patently unfair to apply that disqualification to that settlement or the uncontested order. We note that the same consideration does not apply in the context of a *contested* proceeding with the issuance of a final order, since the respondent in that situation had no choice in the ultimate result of that proceeding. But when the result is adopted voluntarily, through a settlement or consent order, or a decision not to contest the charges and to accept the consequences, that result was accepted under the facts and circumstances that existed at that time, which facts and circumstances did not include a Rule 506 disqualification. It would not be equitable to effectively change the outcome of the game by fiat after the game has been completed.

(67-68) We believe that the amended rule should not apply to any sales in offerings that were already underway at the time the amended rules become effective. (While an argument can be made to apply the disqualification to sales made after the effective date, we see no rationale for applying the disqualification to sales that had already been made. To do so could result in such sales, proper when made, being in violation of Section 5 of the Act after the fact.) We are concerned that investors (both pre-existing and those who purchased in the offering prior to the effective date) could be harmed if an issuer must either delay the continuance, or possible termination of its offering, because its placement agent becomes disqualified as of the effective date, or even as of some transitional period. It is possible that such an issuer may find it difficult, or even impossible, to replace the placement agent, with the possible result that the issuer would not be able to raise the amount of capital sought in the offering. This could harm investors who had already invested in the current offering who could not have known of that possible result, and may not have invested had they known there might only be a partial offering.

We believe the impact of grandfathering existing offerings would be minimal, since it would only cover the finite number of offerings that would be underway at the effective date. The Commission could alleviate some concerns by requiring the offering documents to be "stickered" with appropriate disclosure of the otherwise applicable disqualification, and to avoid giving an unfair advantage to continuous or extended offerings (for instance, in many pooled investment vehicles), perhaps the disqualifying event should only be grandfathered for a period of time, such as six (6) or nine (9) months after the effective date.

We appreciate the opportunity to provide our comments with respect to the Proposal, and would be happy to provide any further inputs should the Commission feel that would be helpful.

Very truly yours,

LEHMAN & EILEN LLP

By: Bob E. Lehman

Bob E. Lehman

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Enclosure