

Securities and Exchange Commission  
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United States  
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- **17 CFR Parts 230 and 239**
- **File No. S7-21-11**
- **Disqualification of Felons and Other “Bad Actors” from Rule 506 Offerings**

Dear Sir.

Thank you for giving us the opportunity to comment on your proposed rule: Disqualification of Felons and Other “Bad Actors” from Rule 506 Offerings.

You are proposing amendments to your rules to implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Section 926 requires you to adopt rules that disqualify securities offerings involving certain “felons and other bad actors” from reliance on the safe harbour from Securities Act registration provided by Rule 506 of Regulation D. The rules must be “substantially similar” to Rule 262, the disqualification provisions of Regulation A under the Securities Act, and must also cover matters enumerated in Section 926 (including certain state regulatory orders and bars).

Consistency, uniformity and clarity

I would recommend that you propose a more consistent and uniform approach to the disqualification of felons and bad actors. This should act to improve investor protection by excluding more felons and bad actors, and would be less confusing from a regulatory point of view. A more consistent and uniform approach, both internally and externally, should also close or reduce the number of any regulatory loopholes, and prevent felons and bad actors, and potentials, from gaming the system in their favour and to the detriment of investors. Investor protection is the most important issue here, and regulatory consistency, uniformity and clarity should reinforce this.

Domestic uniformity and domestic / foreign consistency are very important in order to promote confidence and market integrity. Imagine that a felon or bad actor had been convicted of securities fraud or other violation abroad, or had escaped disqualification under another domestic exemptive rule, and then went on to commit securities fraud again on unsuspecting investors. It would be intolerable and would damage investor protection efforts and confidence in markets. We should act to prevent this. I would therefore comment and recommend the following:

1) Domestic / Foreign Consistency: from the standpoint of disqualification, conduct outside the United States is clearly as relevant as conduct within the United States. After all, bad character and dishonesty do not respect borders. Therefore:

- corresponding convictions in foreign courts should trigger disqualification on the same basis as US criminal convictions;
- injunctions and orders of foreign courts should trigger disqualification on the same basis as US federal and state court injunctions and orders;
- and suspension or expulsion from participation in foreign securities exchanges should also be covered.

2) Domestic Uniformity: it would be appropriate to apply the proposed disqualification standards uniformly to offerings under Regulation A, Regulation D and Regulation E, and to include all regulators or judgments whose final orders would be potentially disqualifying. It would also be appropriate to apply uniform look-back periods to similar disqualifying events. However, such new proposals, which are not required under Section 926 of Dodd-Frank, should not act retrospectively.

#### Extent of securities fraud or other violation

I would not support one fixed punishment, sanction or procedure (such as a uniform look-back period) for all types of violation. Punishment and sanction should fit the crime. As a minimum I would recommend that you should apply different punishments and sanctions depending on the severity of the violation, for example as follows:

- maximum severity - fraudulent, manipulative, deceptive or reckless conduct involving scienter<sup>1</sup>
- medium severity - other acts, practices or courses of business which act as fraudulent, manipulative, deceptive or reckless conduct
- lowest severity - technical violations which are not fraudulent, manipulative, deceptive or reckless in nature

This approach would be more just and reasonable, and would reflect the common sense view that to knowingly commit a felonious act is considered worse, and demands a greater punishment, than unknowingly doing so, or compared with just committing a simple technical violation.

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<sup>1</sup> Specific intent or prior knowledge of wrongdoing.

Due process

I agree with the proposed definition of “final order” under § 230.501(g). The requirement for any written directive or declaratory statement issued pursuant to applicable statutory authority and procedures by a federal or state agency to constitute a “final disposition or action” is a good compromise here. We must consider that federal and state agencies do not take (disqualifying) regulatory actions on a whim, but only after a considered and careful process. I would therefore not support a definition of final order to mean an order for which all rights of appeal have terminated or been exhausted, as this process could take several years and could compromise, or be seen to compromise, investor protection. Investor protection is the most important issue here.

Yours faithfully

Chris Barnard