



DIVISION OF  
CORPORATION FINANCE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

May 2, 2022

Howard Schiffman  
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901 Fifteenth Street, NW, Suite 800  
Washington, DC 20005

Re: ***SEC v. BTIG, LLC*, Case No. 1:21-cv-04521 (S.D.N.Y., May 2, 2022) - Waiver of  
disqualification pursuant to Rule 506(d)(2)(ii) of Regulation D**

Dear Mr. Schiffman:

This is in response to your letter dated April 29, 2022 (“Waiver Letter”), written on behalf of BTIG, LLC (“BTIG”) and constituting an application for a waiver of disqualification under Rule 506(d)(2)(ii) of Regulation D under the Securities Act of 1933 (“Securities Act”). In the Waiver Letter, BTIG requests relief from any disqualification that will arise as to BTIG under Rule 506 of Regulation D under the Securities Act as a result of the entry of a final judgment against BTIG on May 2, 2022 (the “Final Judgment”) in the United States District Court for the Southern District of New York relating to the complaint filed by the Commission on May 19, 2021 against BTIG in *SEC v. BTIG, LLC*, (Civil Action No. 1:21-cv-04521).

Assuming that BTIG complies with the Final Judgment, we have determined that BTIG has made a showing of good cause under Rule 506(d)(2)(ii) of Regulation D that it is not necessary under the circumstances to deny reliance on Rule 506 of Regulation D by reason of the entry of the Final Judgment. Accordingly, the relief requested in the Waiver Letter is hereby granted on the condition that BTIG complies with the terms of the Final Judgment. Any different facts from those represented in the Waiver Letter or BTIG’s failure to comply with the terms of the Final Judgment would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Tim Henseler  
Chief, Office of Enforcement  
Liaison  
Division of Corporation Finance

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April 29, 2022

## **BY E-MAIL**

Timothy B. Henseler, Esq.  
Chief, Office of Enforcement Liaison  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-3628

Re: *Securities and Exchange Commission v. BTIG, LLC*  
Case No. 21-cv-4521 (S.D.N.Y.)

Dear Mr. Henseler:

We submit this letter on behalf of our client, BTIG, LLC (“BTIG”), which is registered with the U.S. Securities and Exchange Commission (“Commission”) as a broker-dealer, in connection with the anticipated settlement of the above-captioned action (“Action”) by the Commission in the U.S. District Court for the Southern District of New York (“District Court”).

Pursuant to the terms of the settlement, it is anticipated that the District Court will enter a judgment in this Action (“Final Judgment”) enjoining BTIG from violating Rules 200(g) and 203(b)(1) of Regulation SHO, 17 C.F.R. §§ 242.200(g) and 242.203(b)(1), under the Securities Exchange Act of 1934 (“Exchange Act”). BTIG understands that the entry of the Final Judgment would disqualify it for five years from relying on exemptions pursuant to Rule 506 of Regulation D under the Securities Act of 1933, as amended (“Securities Act”) (“Rule 506” or “Regulation D”), if the Commission does not waive this disqualification. The Commission has the authority to waive the Rule 506 disqualification upon a showing of good cause that it is not necessary under the circumstances that the exemptions under Rule 506 be denied. For the reasons described below, BTIG respectfully requests that the Commission (or the Director of the Division of Corporation Finance, pursuant to the delegation of authority of the Commission) waive any disqualifications from relying on the exemptions under Rule 506 that would be applicable as a result of the entry of the Final Judgment against BTIG. This is BTIG’s first request for a waiver of the Regulation D exemption disqualification.

## **I. Background**

BTIG is a broker-dealer and FINRA member registered under the Exchange Act. It is headquartered in San Francisco and has over 500 employees and 11 office locations in the United States. Its key business lines include institutional equity and fixed income sales and trading, investment banking, research and strategy, outsource trading, and prime brokerage. A meaningful portion of BTIG's business concerns work with clients that are conducting private placement offerings that rely on Rule 506 exemptions, including in its investment banking business in raising capital for public and private companies and working as a compensated solicitor (in its role as a paid placement agent) for private investment fund clients.

The Commission filed a complaint in the Action on May 19, 2021 ("Complaint"). Since the filing of the Complaint, BTIG has engaged in settlement discussions with the Staff of the Division of Enforcement and has agreed to a settlement in principle, under which BTIG anticipates submitting an executed written Consent ("Consent"). Pursuant to the Consent, BTIG would consent to the entry of the Final Judgment, without admitting or denying the allegations in the Complaint (except as to jurisdiction).

The Complaint alleges the following: Regulation SHO regulates the short selling of securities and is designed, in part, to protect investors by restricting naked short selling and reducing failures to deliver. From December 2016 through July 2017, BTIG marked as "long" or "short exempt" 92 equity sale orders from a single hedge fund customer in an agency capacity in violation of Rule 200(g) of Regulation SHO, in reliance on its customer's instructions that it was "long" the securities in question. BTIG's customer was not "long" the shares of stock and was not "deemed to own" the shares of stock sold at the moment the sale orders were entered, and was therefore "short" the stock at the time of each of those sale orders. Accordingly, BTIG should have marked its customer's sale orders as "short." BTIG was not entitled to rely on its customer's representations concerning order marking and was obligated to independently verify that its customer was, in fact, long, before marking the trades. On each of these occasions, BTIG also failed to borrow and locate shares before executing these short sales. As a result, BTIG violated the order marking and locate requirements of Rules 200(g) and 203(b)(1) of Regulation SHO (the "Alleged Misconduct").

As indicated above, the Final Judgment would enjoin BTIG from violating Rules 200(g) and 203(b)(1) of Regulation SHO under the Exchange Act. Pursuant to the Final Judgment, BTIG would be required to disgorge \$315,048, pay \$64,258 in interest, and pay a civil penalty of \$315,048.

## **II. Discussion**

Rule 506(d)(1) of Regulation D disqualifies certain covered persons from relying on the exemptions from the Securities Act registration provided by Rule 506 of Regulation D when such covered persons are, among other things, the subject of any order or judgement that restrains or

enjoins such person from engaging in any conduct or practice in connection with the purchase or sale of any security or arising out of the conduct of the business of a broker-dealer.<sup>1</sup>

The Commission has the authority to waive these disqualifications upon a showing of good cause that such disqualifications are not necessary under the circumstances.<sup>2</sup> The Commission has delegated this authority to the Division of Corporation Finance (“Division”),<sup>3</sup> but retains the authority to consider waiver requests and review actions taken pursuant to this delegated authority.

The Division’s “Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D” (“Policy Statement”) states that, in determining whether a party seeking a waiver has shown good cause that it is not necessary under the circumstances that the exemptions be denied, the focus of the analysis will be on how the identified misconduct bears on the applicants’ fitness to participate in exempt private or limited offerings of securities.<sup>4</sup> The Policy Statement further states that the following factors will be considered when evaluating requests for waivers:

- The nature of the violation and whether it involved the offer and sale of securities;
- Whether the conduct involved a criminal conviction or scienter-based violation, as opposed to a civil or administrative non-scienter-based violation;
- The party responsible for, and the duration of, the misconduct;
- What remedial steps were taken; and
- The impact on the issuer and third parties if the waiver is denied.

BTIG respectfully requests that the Commission or the Division waive any disqualifying effects that the Final Judgment will have. For the reasons described below, there is good cause for granting the requested waiver.

### **III. Reasons for Granting the Waiver**

#### **A. The Alleged Misconduct Involved the Offer and Sale of Securities.**

The Alleged Misconduct involved the offer or sale of securities, as it involved the mismarking of equity sale orders and failure to meet the locate requirement for those orders.

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<sup>1</sup> See 17 C.F.R. § 230.506(d)(1).

<sup>2</sup> See 17 C.F.R. § 230.506(d)(2)(ii).

<sup>3</sup> See 17 C.F.R. § 200.30-1(c).

<sup>4</sup> See U.S. Securities and Exchange Commission, Division of Corporation Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D (updated Mar. 13, 2015).

**B. The Alleged Misconduct Was of Limited Duration.**

The Alleged Misconduct involved trading by only one BTIG customer over fewer than seven months. The customer involved in the Alleged Misconduct is no longer a customer of BTIG and has not been since August 2017. In addition, although the SEC has alleged that 92 sale orders were mismarked and concerned nearly 160 million shares of stock, totaling \$250 million in value, they all pertained to only two issuers, during a period where BTIG was executing trades for an average of 75 million shares per day with a notional value of over \$1.8 billion per day across its equity trading department.

**C. The Alleged Misconduct Was Not Scier-Based and Will Not Result in a Criminal Conviction.**

The Final Judgment does not result in a criminal conviction, nor does the Alleged Misconduct implicate any scier- based provisions of the federal securities laws. Every share BTIG's customer ordered sold was actually delivered by the customer; the alleged violations concern the accuracy of the sale order markings at the time the sales were ordered.

**D. Responsibility for the Alleged Misconduct.**

With respect to responsibility for the Alleged Misconduct, the Policy Statement asserts that the Division would consider, among other things: (i) whether the party seeking the waiver is the same as the party responsible for the misconduct or if an individual committed the misconduct and such individual continues to exert influence on the operations of the entity seeking the waiver; (ii) whether the misconduct reflects more broadly on the entity as a whole; (iii) whether warning signs were disregarded; (iv) whether the tone at the top of the party seeking the waiver condoned, encouraged or did not address the misconduct; and (v) whether actions or omissions by the party seeking the waiver or its affiliates obstructed the regulatory or law enforcement investigation.<sup>5</sup>

BTIG was responsible for the Alleged Misconduct. The Complaint does not allege that BTIG lacked proper or sufficient supervisory procedures. Further, we do not believe that the Alleged Misconduct reflects broadly on BTIG as a whole. The Alleged Misconduct concerned sale orders that were handled entirely by BTIG's equity trading and sales group, and only a small fraction of that department's hundreds of employees were involved with the single customer whose sale orders resulted in the Alleged Misconduct.<sup>6</sup> None of the business departments that typically play a role in private placements involving Rule 506 exemptions played any role in connection with those sale orders or the Alleged Misconduct.

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<sup>5</sup> See *id.*

<sup>6</sup> In anticipation that the Commission might seek disgorgement of commissions earned in connection with the Alleged Misconduct, BTIG recaptured a significant portion of the commissions that were paid to the individual sales trader for the sale orders at issue in the Alleged Misconduct.

The Complaint does allege that BTIG ignored warning signs indicating that its customer was not “deemed to own” the shares at issue at the time the sale orders were placed, which led to BTIG’s allegedly improper marking of the sale orders. BTIG recognizes that the order marking and locate requirements under Regulation SHO provide important protections for investors and market stability. As such, while the investigation by the Commission of the Alleged Misconduct was ongoing, BTIG redoubled its efforts to ensure its compliance with Regulation SHO and has committed to continue those efforts moving forward, as discussed further below.

#### **E. Remedial Steps Were, and Continue to Be, Undertaken.**

In the time since the Alleged Misconduct occurred, BTIG has voluntarily enhanced its training, employee education, compliance efforts, and trading supervisory procedures specifically to prevent any future Regulation SHO violations. BTIG’s remedial efforts in connection with the Alleged Misconduct have been and will continue to be focused on all of the departments involved in the sale orders at issue in the Alleged Misconduct.

Since the Alleged Misconduct occurred, BTIG has specifically discussed the Alleged Misconduct (and the resulting investigation and Action) with its equity trading and sales groups, trading operations staff, prime brokerage staff, and trading compliance staff as a learning experience and case study concerning BTIG’s obligations in marking orders under Regulation SHO, BTIG’s ability to rely on its customer’s representations, and the importance of maintaining market stability and the investor protections that Regulation SHO is intended to provide. Those discussions and learning have enhanced the firm’s and its employees’ understanding of Regulation SHO, the due diligence processes, and how to approach similar fact patterns.

In addition, since the Alleged Misconduct occurred, BTIG’s Compliance Department has reminded employees regarding BTIG’s obligations under Regulation SHO, particularly concerning “red flags” for certain trading patterns and the Regulation’s locate requirements. With respect to the former, on November 2, 2017, BTIG’s Compliance Department issued a reminder to its U.S. equity sales and trading groups and global portfolio trading group regarding facts and circumstances to monitor for in large sales activity and raise to Compliance’s attention, including where a customer encounters settlement issues or asks about extended settlement, as was the case for the customer involved in the Alleged Misconduct. With respect to Regulation SHO’s locate requirements, on March 11, 2020, BTIG’s Compliance Department reminded employees that for good-til-canceled and good-til-date short sale orders, they must get or confirm a locate on each trading day that order is open before the market opens. Similarly, BTIG’s Compliance Department advised its U.S. equity sales and trading groups, global portfolio trading group, and global options trading group on January 13, 2022, that, prior to executing a client short sale order, they must confirm that a locate has been secured and that blanket assurances from clients cannot satisfy the locate requirement.

BTIG also has voluntarily enhanced its trading written supervisory procedures following the Alleged Misconduct and the resulting investigation. On December 22, 2020, in response to the investigation of the Alleged Misconduct and BTIG’s own internal review, BTIG updated its existing procedures—which already called for its personnel to review weekly and monthly reports of clients who sold large amounts of individual issuers’ securities to flag uncharacteristic sales

volumes for those securities and investigate further—to specify that such further investigation may include, but is not limited to, inquiring with the client as to how it obtained the securities and checking with BTIG’s Operations Department as to whether the client has had any settlement date failures in that security that could indicate a pattern of failures to deliver or other similar trading activity suggesting the sale orders may not be “long.” BTIG also has required the use of a form email for outreach to clients with large sales in low-priced securities to verify how and when the client initially acquired the shares. That email specifically highlights and requests details concerning the types of acquisitions by the customer involved in the Alleged Misconduct, and it requests details and documentation demonstrating that the client was long the stock that was sold.<sup>7</sup>

Finally, beginning in 2022, BTIG intends to introduce a new training module specific to Regulation SHO to be completed by its equity trading and sales department members, trading operations staff, prime brokerage staff, and trading compliance staff as part of its annual continuing education requirements.

#### **F. Denial of the Waiver Would Severely Negatively Impact BTIG and Third Parties.**

In the absence of a waiver, BTIG would be disqualified from relying on the exemptions in Regulation D for five years. This would prevent BTIG from serving as a compensated solicitor in connection with its ongoing work as a broker-dealer for issuers who are themselves conducting transactions relying on Rule 506 exemptions.

BTIG’s ability to participate as a compensated solicitor in private placement transactions relying on Rule 506 exemptions is an ongoing and growing part of its business strategy, especially for its Investment Banking Department, Capital Introduction Department, and Placement Agent activity. A five-year disqualification of BTIG’s ability to participate in Rule 506 exempt transactions would have a negative impact on BTIG’s business and prospects and would harm BTIG’s ability to present itself as a full service broker-dealer for its clients.

BTIG’s Investment Banking Department engages in a variety of capital raising efforts with public and private companies. Many of those offerings are structured as private placements that rely on Rule 506 exemptions. Since its inception in 2012, the Investment Banking Department has been hired by issuers as a compensated solicitor (each, an “engagement”) for dozens of offerings that relied or are relying on Rule 506 exemptions. Finally, a number of those engagements are ongoing, and at different stages in the pre-offering and offering process. Based on the nature of BTIG’s business, BTIG’s discussions with its clients, and BTIG’s current knowledge and understanding of the active offerings, those ongoing engagements will rely on Rule 506 exemptions.

Of the 27 offerings that BTIG’s Investment Banking Department completed since its inception in 2012—all of which relied on Rule 506—eight were completed between 2012–2019.

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<sup>7</sup> The employees in BTIG’s equity trading and sales group involved with the single customer whose sale orders resulted in the Alleged Misconduct have all gone through, received, and/or participated in the remedial steps and efforts that BTIG discusses in this section.

19 of those offerings were completed in 2020–2021. We expect the Investment Banking Department to continue its trajectory of increasing engagements as a compensated solicitor for offerings relying on Rule 506 exemptions, and to serve in that capacity in even more offerings over the next five years.

BTIG's Capital Introduction Department would also be negatively impacted by a Regulation D disqualification, because it regularly serves as a compensated solicitor (by serving as a paid placement agent) for offerings that rely on Rule 506 exemptions on behalf of private investment fund clients. From 2018–2021, the Capital Introduction Department was hired as a compensated solicitor for 48 such private placement transactions that relied upon or are continuing to rely on Rule 506 exemptions. This Department currently serves as a compensated solicitor for 15 offerings that are expected to rely on Rule 506 exemptions. Most, if not all, of the clients of this department conduct ongoing private placement offerings and thus their reliance on Rule 506 exemptions is also ongoing.

BTIG also has a department separate from the Investment Banking Department and Capital Introduction Department that provides placement agent services in which it serves as a compensated solicitor in offerings relying on Rule 506 exemptions for private investment fund clients and similar entities. Since 2006, that department has served as a compensated solicitor for 18 offerings that relied or are continuing to rely on Rule 506 exemptions. Of those 18 total offerings, nine have been completed and nine are still active. Like the Capital Introduction Department's clients, many of this department's clients also conduct ongoing offerings continually relying on Rule 506 exemptions.

The current BTIG clients who are actively involved in private placement offerings in which BTIG is serving as a compensated solicitor that are expected to rely on Rule 506 exemptions would likely be required to delay, modify, or abandon their offerings. As examples, they may have to restructure their offering to avoid relying on Rule 506's exemptions, or may have to find another firm to take over BTIG's role as a compensated solicitor, potentially delaying or otherwise impacting the offering. Of the ongoing offerings that are expected to rely on Rule 506 exemptions for which BTIG is serving as a compensated solicitor, to the best of BTIG's knowledge, BTIG is the sole placement agent for at least 36 of those offerings, for which the burden of disqualification would be disproportionate and unduly severe.

Given the limited scope, duration, and nature of the Alleged Misconduct described in the Complaint, and its lack of relationship to BTIG's work as a compensated solicitor for offerings relying on Rule 506 exemptions<sup>8</sup>, BTIG believes that the adverse collateral consequences of disqualification on its business and its clients would be disproportionate and unduly severe. For these reasons, disqualifying BTIG from relying on the exemptions to Regulation D is not necessary or appropriate.

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<sup>8</sup> Regulation SHO and the order marking and locate requirements thereunder are inapplicable to BTIG's Investment Banking department, Capital Introduction department, and Placement Agent activities, as none of those departments or their activities concern short sales of equity securities or marking of customer sale orders.



Timothy B. Henseler, Esq.

April 29, 2022

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**IV. Request for Waiver**

For the foregoing reasons, BTIG respectfully submits that any disqualification from reliance on the offering exemptions under Regulation D effectuated by the Final Judgment is not necessary under the circumstances and that BTIG has shown that good cause exists for the relief requested. Accordingly, BTIG respectfully requests that the Commission or the Division waive any disqualification under Regulation D to the extent applicable as a result of the entry of the Final Judgment.

Respectfully submitted,



Howard Schiffman