

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10262 / December 6, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 79481 / December 6, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17708

In the Matter of

**EQUIDATE, INC. and
EQUIDATE HOLDINGS
LLC,**

Respondents.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933 AND SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING A
CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Equidate, Inc. and Equidate Holdings LLC (“Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant To Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

Summary

1. Beginning in August 2014, Equidate, Inc. ("Equidate"), a San Francisco-based company that referred to itself as "the marketplace for pre-IPO equity," with its wholly owned subsidiary Equidate Holdings LLC ("Equidate Holdings"), began offering and selling security-based swaps, with payments linked to the occurrence of certain events at private, growth-stage companies. By selling security-based swaps related to shares of these private companies, Equidate intended to avoid triggering the transfer restrictions and notification requirements imposed on the shares and shareholders by the issuing companies.

2. As an initial step, Equidate matched employees and other shareholders of privately held companies with investors seeking to invest in the potential economic return on those shares. Equidate conducted these transactions through contracts that Equidate Holdings entered into with the shareholders and investors. Specifically, the contracts between Equidate Holdings and the shareholders featured payment provisions that were triggered by certain events – such as a merger or acquisition, an initial public offering ("IPO"), or a dividend distribution – at an underlying company. Receipt of payment from the shareholders upon occurrence of those same events would trigger an obligation of Equidate Holdings to make payments to the investors.

3. Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") established a comprehensive regulatory framework for swaps and security-based swaps. Generally, these products include any agreement, contract or transaction whose value is based on the value of something else (e.g., interest rates, currencies, commodities, or securities), or that provides for a payment that is dependent on the occurrence of an event associated with a potential financial, economic, or commercial consequence.

4. Among other reforms, Dodd-Frank sought to regulate the sale of security-based swaps to persons who are not "eligible contract participants."¹ The legislation modified Section 5 of the Securities Act to make it unlawful for any person to offer to sell, offer to buy, or purchase or sell a security-based swap to any person who is not an eligible contract participant without an effective registration. In addition, Dodd-Frank modified Section 6 of the Exchange Act to make it

¹The definition of "eligible contract participant" includes several categories of persons and, in certain cases, contains monetary thresholds that vary depending on the particular type of person or entity involved. For example, individuals need to have at least \$5 million and often \$10 million invested on a discretionary basis to qualify as eligible contract participants. *See* 7 U.S.C. § 1a(18).

unlawful for any person to effect a transaction in a security-based swap with or for a person who is not an eligible contract participant, unless the transaction is effected on a national securities exchange.

5. These requirements were enacted in order to provide important investor protections, including ensuring such investors receive prescribed disclosure about security-based swaps and that trading of security-based swaps occurs on exchanges subject to the highest level of regulation, which in turn helps ensure that such security-based swaps are cleared on registered clearing agencies. For products such as these, exchange trading and central clearing benefit investors by providing public price discovery mechanisms, access to relevant trading information, appropriate monitoring of trading activity and regulated counterparty credit risk management.

6. From their first transaction in August 2014 through December 2015, Equidate offered, and Equidate Holdings sold, dozens of contracts, totaling over \$13 million, in violation of the Section 5(e) of the Securities Act and Section 6(l) of the Exchange Act, which limit transactions in security-based swaps with persons who are not eligible contract participants.

Respondents

7. Equidate, Inc. was established in 2014 as a Delaware corporation based in San Francisco, California. Equidate sought to provide investors with the ability to invest in contracts whose value was linked to the value of shares of privately held companies that had not yet conducted an IPO.

8. Equidate Holdings LLC, a Delaware limited liability company, is a wholly owned subsidiary of Equidate, and was the entity that entered into the contracts.

Facts

9. Equidate was founded in early 2014 with the goal of providing liquidity for shareholders in pre-IPO companies who typically held “restricted” shares. In general, those shareholders could not freely sell or transfer their shares to potential investors because of, among other things, transfer or other restrictions on the pre-IPO companies’ shares. Equidate received dividends through its ownership interest in an affiliated broker-dealer, which processed all of the transactions in exchange for a 5% commission from each side.² Equidate engaged counsel to help create its contracts and comply with the securities laws.

² Equidate is a part owner of a holding company that is the 100% owner of the registered broker-dealer.

10. Equidate publicized its services to shareholders and potential investors through its website, word-of-mouth, and by marketing to venture capital investors.

11. In broad economic terms, Equidate designed its structure to allow investors to purchase the rights to the economic upside or downside of an equity security, similar to the operation of a total return swap. Typically, Equidate Holdings entered into separate contracts with both the shareholder and the investor. The contract with the shareholder was called a Shareholder Note (“SHN”). The contract with the investor was called a Payment-Dependent Note (“PDN”). The contracts were designed to work together to transfer the potential economic return in a set of reference shares from the shareholder to the investor through Respondents, despite the payment obligations under both instruments being legally separate, and the investor not having a direct right to the shareholder’s payment. In exchange for providing the potential economic return to the investors, the shareholder received an up-front cash payment from the investors via Equidate Holdings based on an agreed-upon price for the shares.

12. Equidate described to issuers the SHN as “a purely financial contract that promises to pay the economic value of a number of shares upon liquidity, without touching the shares or conveying shareholder rights.” The terms of the SHN operate to transfer the economic outcome on a specified number of shares owned by the shareholder upon the occurrence of one or more specified future events, in exchange for an up-front cash payment. According to its terms, the SHN “does not in any way attach to or encumber any securities owned by the Shareholder.” Upon the occurrence of a specified event involving the underlying company—such as an IPO, a dividend distribution, or a merger or acquisition—the shareholder is required to pay an amount to Equidate Holdings equaling either the current market price of the shares (in the case of an IPO) or the amount actually received by the shareholder pursuant to his or her interest in the shares. At the election of the shareholder or Equidate Holdings, the shareholder could also settle the contract by transferring the reference shares.

13. Under the PDN, the investor obtains the right to receive a pro rata distribution from the cash or shares received by Equidate Holdings with respect to a specific number of reference shares in exchange for an up-front payment. This provision is intended to transfer the economic return on the shares based on specified events, but does not require Equidate Holdings to pay any collections not actually received from the shareholder. The PDN specifies that upon receipt by Equidate Holdings of any payments from a shareholder under an SHN that references a class of securities, each investor whose PDN references the same class of shares and has the same maturity date (i.e., a “series” of PDNs) has a proportionate interest in those amounts. No payments are made to the holder of a PDN (i.e., the investor) until Equidate Holdings receives payment from the shareholder following a specified event triggering payment under the SHNs that track the same class of reference shares. Thus, payment under the PDN depends on the occurrence of the same underlying events referenced in the SHN — a potential IPO, dividend distribution, or merger or acquisition involving the underlying company.

14. The physical settlement provisions in the contracts are contingent on a number of factors, including the lifting of all applicable transfer restrictions and conditions applicable to the

shares and an election by one or both parties. In addition, physical delivery is subject to the shareholder's continued ownership of the shares. Specifically, to the extent that the reference shares become encumbered, such as through a sale to another party, the SHN requires the shareholder to substitute cash or replacement assets based on the market value of the shares at the time of the triggering event.

15. Before entering into any of these contracts, Equidate retained counsel to advise it how to structure the transactions, and specifically asked counsel whether Respondents' contracts would be considered swaps. Counsel incorrectly advised Equidate that the SHNs and PDNs were not security-based swaps.

Respondents Offered and Sold Security-Based Swaps to Various Shareholders and Investors

16. From at least August 2014 through 2015, Equidate solicited shareholders and potential investors to enter into SHNs and PDNs. Equidate maintained a website (www.equidateinc.com) accessible to potential investors and to employees, founders and others that held shares in pre-IPO companies. Equidate's website described its business:

“Our marketplace gives private investors unprecedented access and exposure to top pre-IPO companies. We allow employees and early owners of growing startups to get cash based on their share ownership without having to wait years for an IPO or acquisition.”

17. Shareholders and investors were able to obtain an invitation to access the software platform through the Equidate website. Although Equidate obtained background information on investors, including a suitability questionnaire and attestation of their status as accredited investors it did not take any steps to confirm whether any shareholders or investors were eligible contract participants. Many were not eligible contract participants.

18. Shareholders electronically listed their available shares for auction on the Equidate platform, specifying the company, number of shares, target price, and a minimum price. Offers relating to more than 30 pre-IPO companies were available for auction on Equidate's platform.

19. Potential investors were then given access to view the available underlying company shares listed on the platform. Investors placed bids by inputting the number of shares in which they were interested, a target price and a maximum price.

20. Equidate matched shareholders with investors using an auction process. Equidate provided the matched investors and shareholders with a summary of the transaction, which was to be executed through a registered broker-dealer affiliated with Equidate. The platform also provided copies of the SHN, PDN, and related documents, including an engagement agreement from the broker-dealer, all of which were electronically signed on Equidate's platform. Equidate Holdings entered into separate contracts with the shareholder (SHN) and the investor (PDN).

21. Equidate matched more than \$13 million of transactions between shareholders and investors which referenced the shares of various private companies. The transactions were executed through the affiliated broker-dealer.

Remedial Efforts

22. In determining to accept Respondents' Offers, the Commission considered the remedial acts undertaken by Respondents and their cooperation with the Commission staff.

Violations

23. A "security-based swap" is defined in Section 3(a)(68) of the Exchange Act to include any agreement, contract or transaction that is a "swap" as defined in Commodity Exchange Act Section 1a³ and is based on either (1) an index that is a narrow-based security index, including any interest therein or on any value thereof, (2) a single security or loan, including any interest therein or on the value thereof, or (3) the occurrence, nonoccurrence, or extent of an occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. *See* 15 U.S.C. § 78c(a)(68).

24. By arranging SHNs and PDNs with respect to each private company, Respondents created transactions that provide for payments that are dependent on the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (i.e., an IPO or merger or acquisition involving the underlying private company), and the event or contingency is based on an event related to a single issuer of a security (i.e., the underlying private company) that would directly affect the financial statements, financial condition, or financial obligations of that private company.

³ "[T]he term 'swap' [includes] any agreement, contract, or transaction—
... (ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence; [or]
(iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value of 1 or more . . . securities . . . and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset. . . ."

7 U.S.C. § 1a(47) (Commodity Exchange Act ("CEA") section incorporated into the securities laws).

25. Section 1a(47)(B) of the CEA contains a number of exclusions from the definition of “swap,” including for any note, bond, or evidence of indebtedness that is a security, as defined in Section 2(a)(1) of the Securities Act. *See* 7 U.S.C. § 1a(47)(B)(vii). Other exclusions apply to security forwards and other purchases and sales of securities, including (1) sales of securities for deferred shipment or delivery that are intended to be physically delivered, and (2) purchases and sales of securities on a fixed or contingent basis. *See* 7 U.S.C. §§ 1a(47)(B)(ii), (v) and (vi). Although the instruments bear the title of a “note,” as a matter of economic reality, Respondents concede that they were not designed to operate as a note, bond, or evidence of indebtedness. Similarly, the fact that the SHN contemplates the physical delivery of the underlying backup shares (or their equivalent) in certain limited circumstances does not render it a security forward or a purchase or sale of a security on a fixed or contingent basis.

26. The regulatory regime established by Dodd-Frank contains a number of provisions applicable to transactions in security-based swaps that involve persons who are not eligible contract participants. The full definition of “eligible contract participant” includes several categories of persons and, in certain cases, monetary thresholds that vary depending on the particular type of person or entity involved. For example, individuals need at least \$5 million and often \$10 million invested on a discretionary basis to qualify as eligible contract participants. *See* 7 U.S.C. § 1a(18) (definition).

27. Dodd-Frank added what is now Section 5(e) of the Securities Act, which makes it unlawful for any person to offer to sell, offer to buy, or purchase or sell a security-based swap to any person who is not an eligible contract participant without an effective registration statement. *See* 15 U.S.C. § 77e(e).

28. Dodd-Frank added Section 6(l) of the Exchange Act, which makes it unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange. *See* 15 U.S.C. § 78f(l).

29. Many shareholders and investors who entered into Respondents’ SHN and PDN contracts were not eligible contract participants.

30. By virtue of the foregoing, Respondents violated Section 5(e) of the Securities Act and Section 6(l) of the Exchange Act because the transactions were not executed with eligible contract participants, no registration statements were in effect and the contracts were not effected on a national securities exchange.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents’ Offers.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondents cease and desist from committing or causing any violations and any future violations of Section 5(e) of the Securities Act and of Section 6(l) of the Exchange Act.

B. Respondents shall, within ten (10) calendar days of the entry of this Order, pay a civil money penalty in the amount of \$80,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Equidate and Equidate Holdings as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Erin Schneider, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, California 94104.

C. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private

damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary