

WHY GOLDMAN CHOSE REGULATION S OVER REGULATION D

To do a legal private offering in the U.S., Goldman could not engage in a “general solicitation” of shareholders; otherwise, the public registration requirements under securities laws would be applicable, with their burdensome disclosure requirements.

If an offering of shares is private, limits apply as to the manner in which purchasers can be solicited. Rule 502 of Regulation D the Securities Act states that “neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising” Goldman not only did not make a general advertisement or solicitation, it strictly complied with the rules for private offerings. But the media madness surrounding the offering is the type of public hype that the securities rules for private offerings are meant to avoid, so Goldman accurately assessed the attitude of the SEC when it decided to exclude U.S. citizens from its “private” offering.

The remedy for a violation of the general solicitation rule is rescission at the initial offered price, so Goldman was guaranteeing the purchase.

Goldman’s new offering to foreign investors is being done under the Regulation S exemption, which requires that “no directed selling efforts” be made in the United States. This is defined as “any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered” The Regulation S exemption, as opposed to the Regulation D exemption, requires that “no directed selling efforts” be made in the United States. The S.E.C. has also stated that Reg S securities are not to be resold through an offering in the United States after the distribution.

Information made available for a public company should be made available for private companies—unless only investors who can truly assess the risks are allowed to participate—whether those investors are U. S. citizens or not.

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