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A legal update from Dechert's Financial Services Group

SEC Proposes Amendments to Permit General Solicitation and General Advertising in Private Placements Under Rule 506 of Regulation D and Rule 144A

The Jumpstart Our Business Startups Act (JOBS Act) enacted on April 5, 2012, directed the Securities and Exchange Commission (SEC) to eliminate the prohibition against general solicitation and general advertising in securities offerings conducted pursuant to Rule 506[1] of Regulation D[2] or Rule 144A[3] promulgated under the Securities Act of 1933 (Securities Act).[4] On August 29, 2012, the SEC proposed amendments to its rules to implement that mandate.[5] As intended by the JOBS Act, these proposed amendments would make it easier for issuers to raise capital for potential offerings and sales of securities made under Rule 506 and Rule 144A.

The proposed amendments would create a new Rule 506(c) permitting an issuer to conduct an offering using general solicitation and general advertising, provided that all purchasers of the securities in that offering are "accredited investors," and the issuer of the securities takes reasonable steps to verify that all purchasers of the securities are accredited investors. Under the proposed amendments to Rule 144A, offers made pursuant to Rule 144A by the financial intermediaries who buy securities from an issuer and, in turn, sell such securities under Rule 144A to qualified institutional buyers (QIBs) by means of general solicitation and general advertising, would fall within the exception from registration found in Section 4(a)(1), provided that the actual purchasers were QIBs or persons reasonably believed to be QIBs.

Background

The existing Rule 506 is a non-exclusive safe harbor under Section 4(a)(2) of the Securities Act, which exempts transactions by an issuer "not involving any public offering" from the registration requirements of Section 5 of the Securities Act.[6] Under this safe harbor, an issuer may offer and sell securities, without any limitation on the offering amount, to an unlimited number of "accredited investors," as defined in Rule 501(a) of Regulation D, and to no more than 35 non-accredited investors who meet certain "sophistication" requirements. The availability of Rule 506 is subject to a number of requirements and, pursuant to Rule 502(c), is conditioned on the issuer, or any person acting on its behalf, not offering or selling securities through any form of general solicitation or general advertising.

1 17 CFR §230.506 (Rule 506).

2 17 CFR §§230.500 through 230.508.

3 17 CFR §230.144A (Rule 144A).

4 15 U.S.C. 77a *et seq.*

5 Release No. 33-9354, Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Aug. 29, 2012 (the Proposing Release).

6 15 U.S.C. 77d(a)(2).

The existing Rule 144A is also a non-exclusive safe harbor that provides an exemption from the registration requirements of the Securities Act for offers and sales of securities by persons other than the issuer to QIBs or persons reasonably believed to be QIBs. Although Rule 144A currently does not explicitly prohibit general solicitation, offers may be made only to QIBs or persons reasonably believed to be QIBs.

Proposed Amendments to Rule 506

Under the proposed amendments, new Rule 506(c) would provide that the prohibition against general solicitation and general advertising contained in Rule 502(c)[7] does not apply to offerings of securities made pursuant to Rule 506(c), subject to the following conditions:

- the issuer takes reasonable steps to verify that the purchasers of the securities are accredited investors;
- all purchasers of securities are accredited investors either because they come within one of the enumerated categories of persons that qualify as accredited investors or the issuer reasonably believes so at the time of sale; and
- the issuer meets all terms and conditions of Rule 501[8] (which provides the definitions used in Regulation D, including the multiple categories of accredited investors), Rule 502(a)[9] (which outlines the factors to be considered in determining whether a Rule 506 offering should be integrated with another offering), and Rule 502(d)[10] (which provides that securities sold under Regulation D are restricted securities under the Securities Act and cannot be resold without registration under the Securities Act or an exemption therefrom).

It is important to note that the proposed amendments would preserve the existing Rule 506 as a separate exemption, so that issuers conducting Rule 506 offerings without the use of general solicitation or general advertising would not be subject to the new accredited investor verification requirement. Therefore, the proposed amendments to Rule 506 would effectively create two related exemptions under Rule 506: one for Rule 506(c) offerings that employ general solicitation and general advertising, and one for Rule 506(b) offerings that do not use such general solicitation or general advertising.

Reasonable Steps to Verify Accredited Investor Status

Although Section 201(a)(1) of the JOBS Act states that such rules adopted by the SEC must require the issuer to take reasonable verification steps "using such methods as determined by the Commission," the proposed amendments to Rule 506 do not detail specific methods that an issuer must employ in verifying the accredited investor status of a purchaser under Rule 506(c).[11] Accordingly, the Proposing Release states that issuers would be required to undertake an "objective determination" based on the "particular facts and circumstances" of the applicable offering, in evaluating whether the steps taken by the issuer to verify a purchaser's accredited investor status are "reasonable."[12] To that end, the Proposing Release provides the following non-exhaustive list of examples of such factors that may be appropriate for an issuer to consider:[13]

- Nature of the purchaser.
- Information that the issuer has about the purchaser.
- Nature and terms of the offering.

Please see Exhibit A hereto for an excerpt of the Proposing Release's discussion regarding verification of accredited investor status. In the event that the proposed amendments to Rule 506 become effective in substantially the same form as proposed, issuers may wish to internally retain a copy of Exhibit A for com-

7 The Proposing Release reaffirms previous guidance by the SEC regarding what constitutes general solicitation or general advertising, but does not provide further discussion. Proposing Release at 6.

8 17 CFR 230.501.

9 17 CFR 230.502(a).

10 17 CFR 230.502(d).

11 The SEC supported this decision in the Proposing Release by stating that a list of specified methods for satisfying this requirement "would be impractical and potentially ineffective in light of the numerous ways in which a purchaser can qualify as an accredited investor" and that such a list could potentially create requirements that are overly burdensome to issuers. Proposing Release at 26.

12 Proposing Release at 14.

13 The Proposing Release notes that "these factors are interconnected," and that the more this "facts and circumstances" analysis indicates that a purchaser qualifies as an accredited investor, the fewer steps would be needed to verify accredited investor status. Proposing Release at 20.

pliance purposes given that it contains direct SEC guidance on the process of verifying an investor's accredited investor status. [14]

Regardless of the specific method of verification employed by an issuer, it should be noted that any issuer claiming an exemption from the registration requirements of Section 5 of the Securities Act bears the burden of proving that such exemption was properly relied upon. Accordingly, it is important for issuers to maintain adequate records that document the steps they have taken to verify that a purchaser was an accredited investor.

All Purchasers Must be Accredited Investors: Reasonable Belief Standard Preserved

In the Proposing Release, the SEC confirmed that Section 201(a)(1) of the JOBS Act does not replace the existing "reasonable belief" standard in the accredited investor definition of Rule 501(a) with an absolute standard. Accordingly, the SEC stated that if a person were to provide an issuer with false information as to its accredited investor status within one of any of the eight enumerated categories in Rule 501(a), the issuer would not lose the ability to rely on Rule 506(c) for that offering, provided the issuer "took reasonable steps to verify that the purchaser was an accredited investor and had a reasonable belief that such purchaser was an accredited investor." [15]

Proposed Amendment to Form D

The SEC also is proposing to amend Form D, [16] which issuers are currently required to file with the SEC when they sell securities pursuant to Regulation D. The revised Form D would add a separate box for an issuer to check if it is claiming the new Rule 506(c) exemption permitting general solicitation and general advertising. This would help the SEC gather data on the use of general solicitation and general advertising in offerings relying on Rule 506(c).

[14] Although some commentators have expressed the view that the SEC should create a safe harbor provision within the proposed amendments in connection with verifying investor accreditation, it is unlikely that the SEC will do so.

[15] Proposing Release at 29.

[16] 17 CFR 239.500.

Proposed Amendment to Rule 144A

Under the proposed Rule 144A, offers made pursuant to Rule 144A to persons who are not qualified institutional buyers (QIBs) would be permitted, including by means of general solicitation and general advertising, so long as the securities are sold only to QIBs or persons reasonably believed to be QIBs. The Proposing Release does not address what would constitute "reasonable belief" of QIB status, and is seeking comments as to whether the current list of non-exclusive methods for establishing a prospective purchaser's QIB status under the existing Rule 144A has been effective in practice.

Implications of General Solicitation and General Advertising in Private Placements Under Rule 506 and Rule 144A

In not registering as an "investment company" under the Investment Company Act of 1940 (Investment Company Act), [17] private funds generally rely on the exclusions from the definition of an "investment company" available under Section 3(c)(1) and 3(c)(7) of the Investment Company Act (a 3(c)(1) Fund or 3(c)(7) Fund, as applicable). However, these exclusions are not available if the funds make a public offering of their securities. The SEC confirmed in the Proposing Release that such private funds would be permitted to engage in a general solicitation and general advertising under Rule 506(c) without losing either exemption under the Investment Company Act, even though such exemptions currently prohibit the "public offering" of a private fund's securities. It should be noted, however, that the Proposing Release did not explicitly extend this confirmation to the new Rule 144A offerings, although a footnote to the Proposing Release states that many issuers of asset-backed securities rely on Sections 3(c)(1) and 3(c)(7) of the Investment Company Act, and participate in Rule 144A offerings. [18]

Integration of Offerings

Integration of Domestic Offerings

With respect to satisfying the Rule 506(b) or Rule 506(c) safe harbors under Regulation D, the Proposing Release does not address the circumstances under which (i) an adviser's 3(c)(7) Fund that is conducting a

[17] 17 CFR 230.501(a)(1).

[18] Proposing Release at 31.

domestic offering pursuant to the Rule 506(c) with the use of general solicitation and general advertising would be integrated with (ii) such adviser's 3(c)(1) Fund that is contemporaneously conducting a domestic offering pursuant to Rule 506(b) without the use of general solicitation and general advertising. If the SEC were to integrate the two offerings, the 3(c)(1) Fund would be held to the higher standards of Rule 506(c) (regardless of whether the 3(c)(1) Fund was promoted through the use of general solicitation or general advertising). To protect against this outcome, all prospective investors for both funds should be subjected to the same vetting procedures to ensure they are accredited, and caution should be exercised in accepting an investment in the 3(c)(1) Fund from an investor who is not accredited — limiting such investments, for example, to employees of the adviser or to other investors having a close pre-existing relationship with the adviser.

Integration of Domestic and Offshore Offerings

The Proposing Release provides that private domestic offerings conducted pursuant to the new Rule 506(c) or Rule 144A would not be integrated with offshore offerings made in compliance with Regulation S[19] under the Securities Act. Accordingly, issuers would be able to conduct a Rule 506(c) or Rule 144A (as applicable) offering concurrently with a Regulation S offering while employing general solicitation and general advertising in the United States, without violating the prohibition in Regulation S with respect to "directed selling efforts" in the United States.

Commodity Futures Trading Commission (CFTC) Regulation

With respect to private funds that are considered commodity pools under the Commodity Exchange Act[20] and regulations thereunder, certain advisers to such commodity pools currently qualify for an exemption from registration as a commodity pool operator pursuant to CFTC Rule 4.13(a)(3),[21] or are registered as a commodity pool operator yet provide limited disclosure to investors pursuant to CFTC Rule 4.7,[22] provided that interests in the pools are offered and sold "without marketing to the public," among other conditions. Because the CFTC has not yet provided guidance on the extent to which the above exemptions may continue to be relied on by advisers to private funds that are conducting Rule 506(c) offerings with the use of such general solicitation and general advertising, such advisers should consider the implications of any general solicitation and general advertising on their CFTC exemptions.

Looking Ahead

The amendments to Rule 506 and Rule 144A are not yet effective. The SEC is soliciting comments regarding numerous questions raised in the Proposing Release. Public comments will be due by October 5, 2012 (within 30 days of publication in the Federal Register, which occurred on September 5, 2012).

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[19] 17 CFR 230.901 through 230.905.

[20] 7 U.S.C. §1.

[21] 17 C.F.R. §4.13(a)(3).

[22] 17 C.F.R. §4.7.

EXHIBIT A – Extract from the Proposing Release*

Nature of the Purchaser. The definition of "accredited investor" in Rule 501(a) includes natural persons and entities that come within any of eight enumerated categories in the rule, or that the issuer reasonably believes come within one of those categories, at the time of the sale of securities to that natural person or entity. Some purchasers may be accredited investors based on their status, such as:

- a broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934 (the Exchange Act)[42] or
- an investment company registered under the Investment Company Act of 1940 (the Investment Company Act) or a business development company as defined in Section 2(a)(48) of that Act.[43]

Some purchasers may be accredited investors based on a combination of their status and the amount of their total assets, such as:

- a plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5 million;[44] or
- an Internal Revenue Code (IRC) Section 501(c)(3) organization, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5 million.[45]

Natural persons may be accredited investors based on either their net worth or their annual income, as follows:

- a natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1 million, excluding the value of the person's primary residence (the net worth test);[46] or
- a natural person who had an individual income in excess of $200,000 in each of the two most recent years, or joint income with that person's spouse in excess of $300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year (the income test).[47]

As Rule 501(a) sets forth different categories of accredited investors, we expect the steps that would be reasonable for an issuer to take to verify whether a purchaser is an accredited investor under proposed Rule 506(c) would likely vary depending on the type of accredited investor that the purchaser claims to be. For example, the steps that may be reasonable to verify that an entity is an accredited investor by virtue of being a registered broker-dealer – such as by going to FINRA's BrokerCheck website[48] – would necessarily differ from the steps that would be reasonable to verify whether a natural person is an accredited investor.

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42 See 17 CFR 230.501(a)(1).

43 See id.

44 See id.

45 See 17 CFR 230.501(a)(3).

46 See 17 CFR 230.501(a)(5).

47 See 17 CFR 230.501(a)(6).

48 This website is available at http://www.finra.org/Investors/ToolsCalculators/BrokerCheck.

We recognize that taking reasonable steps to verify the accredited investor status of natural persons poses greater practical difficulties as compared to other categories of accredited investors, and these practical difficulties likely would be exacerbated by natural persons' privacy concerns about the disclosure of personal financial information.[49] As between the net worth test and the income test for natural persons, we recognize that commentators have suggested that it might be more difficult for an issuer to obtain information about a person's assets and liabilities than it would be to obtain information about a person's annual income,[50] although there could be privacy concerns with respect to either test. The question of what type of information would be sufficient to constitute reasonable steps to verify accredited investor status under the particular facts and circumstances of each purchaser would also depend on other factors, as described below.

Information about the Purchaser. The amount and type of information that an issuer has about a purchaser would be a significant factor in determining what additional steps would be reasonable to verify the purchaser's accredited investor status. The more information an issuer has indicating that a prospective purchaser is an accredited investor, the fewer steps it would have to take, and vice versa.[51] Examples of the types of information that issuers could review or rely upon – any of which might, depending on the circumstances, in and of themselves constitute reasonable steps to verify a purchaser's accredited investor status – include, without limitation:

- publicly available information in filings with a federal, state or local regulatory body – for example, without limitation:
  - the purchaser is a named executive officer of an Exchange Act registrant, and the registrant's proxy statement discloses the purchaser's compensation for the last three completed fiscal years; or
  - the purchaser claims to be an IRC Section 501(c)(3) organization with $5 million in assets, and the organization's Form 990 series return filed with the Internal Revenue Service discloses the organization's total assets;[52]
- third-party information that provides reasonably reliable evidence that a person falls within one of the enumerated categories in the accredited investor definition – for example, without limitation:
  - the purchaser is a natural person and provides copies of Forms W-2; or

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49 See, e.g., letters from BrokerBank Securities, Inc. (BrokerBank) ("By the time most people accumulate a net worth of $1,000,000+ not counting their principal residence, they usually really want to keep their financial information very close to the vest."); Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (ABA) (stating that "the Commission should be sensitive to the legitimate privacy concerns of purchasers" when considering the steps that issuers should take to verify accredited investor status); SecondMarket Holdings, Inc. (SecondMarket). ("In addition, legitimate privacy concerns may result in potential investors being unwilling to provide highly sensitive personal information outside of a clearly protective framework, which may cause such investors to avoid participating in Rule 506 offerings").

50 See letters from NASAA (July 3, 2012) ("Verification of net worth is more challenging because an individual could provide proof of assets but not liabilities."); SecondMarket (indicating that, in its experience, the majority of natural persons who indicated that they were accredited investors did so based on the income test of Rule 501(a)(6), which can be verified through tax returns, Form W-2, Form 1099, or other income documentation, in addition to a pay stub from the current year, whereas verifying that a purchaser satisfies the net worth test may be very difficult; therefore, this commentator recommended that a "substantial minimum investment requirement," coupled with representations by the purchaser, should be deemed sufficient evidence to presume that a purchaser satisfies the net worth test without requiring additional verification of that purchaser's accredited investor status).

51 If an issuer has actual knowledge that the purchaser is an accredited investor, then the issuer would not have to take any steps at all.

52 Such an organization is required to make the Form 990 series returns available for public inspection. See Internal Revenue Service, Public Disclosure and Availability of Exempt Organizations Returns and Applications: Documents Subject to Public Disclosure, http://www.irs.gov/charities/article/0,,id=135008,00.html (last updated Sept. 21, 2011).

- the purchaser works in a field where industry or trade publications disclose average annual compensation for certain levels of employees or partners, and specific information about the average compensation earned at the purchaser's workplace by persons at the level of the purchaser's seniority is publicly available; or

- verification of a person's status as an accredited investor by a third party, such as a broker-dealer, attorney or accountant, provided that the issuer has a reasonable basis to rely on such third-party verification.[53]

Nature and Terms of the Offering. The nature of the offering – such as the means through which the issuer publicly solicits purchasers – may be relevant in determining the reasonableness of the steps taken to verify accredited investor status. An issuer that solicits new investors through a website accessible to the general public or through a widely disseminated email or social media solicitation would likely be obligated to take greater measures to verify accredited investor status than an issuer that solicits new investors from a database of pre-screened accredited investors created and maintained by a reasonably reliable third party, such as a registered broker-dealer. In the case of the former, we do not believe that an issuer would have taken reasonable steps to verify accredited investor status if it required only that a person check a box in a questionnaire or sign a form, absent other information about the purchaser indicating accredited investor status. In the case of the latter, we believe an issuer would be entitled to rely on a third party that has verified a person's status as an accredited investor, provided that the issuer has a reasonable basis to rely on such third-party verification.

The terms of the offering would also affect whether the verification methods used by the issuer are reasonable. Some commentators have expressed the view that a purchaser's ability to meet a high minimum investment amount could be relevant to the issuer's evaluation of the types of steps that would be reasonable to take in order to verify that purchaser's status as an accredited investor.[54] We believe that there is merit to this view. By way of example, the ability of a purchaser to satisfy a minimum investment amount requirement that is sufficiently high such that only accredited investors could reasonably be expected to meet it, with a direct cash investment that is not financed by the issuer or by any other third party, could be taken into consideration in verifying accredited investor status.

These factors are interconnected, and the information gained by looking at these factors would help an issuer assess the reasonable likelihood that a potential purchaser is an accredited investor, which would, in turn, affect the types of steps that would be reasonable to take to verify a purchaser's accredited investor status. After consideration of the

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55 For example, in the future, services may develop that verify a person's accredited investor status for purposes of proposed Rule 506(c) and permit issuers to check the accredited investor status of possible investors, particularly for web-based Rule 506 offering portals that include offerings for multiple issuers. This third-party service, as opposed to the issuer itself, could obtain appropriate documentation or otherwise verify accredited investor status. Several commentators, in fact, have recommended that the Commission take action to facilitate the ability of issuers to rely on third parties to perform the necessary verification. See letters from NASAA (July 3, 2012) (recommending that the Commission allow an issuer to obtain the necessary verification through registered broker-dealers, provided that there are independent liability provisions for failure to adequately perform the verification); Massachusetts Securities Division (urging the Commission to adopt as a safe harbor or best practice the use of an independent party, such as a broker-dealer, bank, or other financial institution, that would verify the accredited investor status of potential purchasers). One commentator, however, expressed concerns that some of the websites that currently offer lists of accredited investors could be used to facilitate fraud, noting that some offer lists based on "ethnicity, gender, and lifestyle – presumably to make [it] easier for scammers to relate to marks – and ominously, 'seniors.'" Letter from Moscovitz and Maxfield.

56 See, e.g., letters from MFA (May 4, 2012) (stating that many hedge funds managed by its members obtain further assurance that investors meet the qualification standards in the Investment Company Act or the Investment Advisers Act of 1940, as applicable, through minimum investment thresholds that meet or exceed the net worth test of the accredited investor definition); NASAA (July 3, 2012) ("For example, if an investor makes an investment of $1 million in the issuer's securities, it would be reasonable for the issuer to assume that the investor has $1 million in net worth, even though it is not necessarily a certainty. NASAA would not oppose the creation of this type of specific safe harbor, provided the factors used to demonstrate the requisite net worth are set sufficiently high."); SecondMarket (recommending that a "substantial minimum investment requirement," coupled with representations by the purchaser, should be deemed sufficient evidence to presume that a purchaser satisfies the net worth test without requiring additional verification of that purchaser's accredited investor status). One commentator, however, disagreed with this approach, noting that "[w]hile a large investment amount may indicate that the investor is wealthy, it also might indicate that a non-wealthy investor is over-concentrated in the investment." Letter from Massachusetts Securities Division.

facts and circumstances of the purchaser and of the transaction, if it appears likely that a person qualifies as an accredited investor, the issuer would have to take fewer steps to verify accredited investor status, and vice versa. For example, if an issuer knows little about the potential purchaser who seeks to qualify under the natural person tests for accredited investor status, but the terms of the offering require a high minimum investment amount, then it may be reasonable for the issuer to take no steps to verify accredited investor status other than to confirm that the purchaser's cash investment is not being financed by the issuer or by a third party, absent any facts that may indicate that the purchaser is not an accredited investor.

Regardless of the particular steps taken, it would be important for issuers to retain adequate records that document the steps taken to verify that a purchaser was an accredited investor. Any issuer claiming an exemption from the registration requirements of Section 5 has the burden of showing that it is entitled to that exemption.[55]

We are mindful of the differing views expressed by commentators to date on how the Commission should implement the verification mandate of Section 201(a). A number of commentators have cautioned that unduly prescriptive or burdensome rules for verifying a purchaser's accredited investor status would have the potential to result in significant economic harm, could lead to reluctance on the part of issuers to access the relevant capital markets, or would contravene the purposes of the JOBS Act.[56]

[*] *The footnotes herein are as numbered in the Proposing Release.*

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[57] SEC v. Ralston Purina, 346 U.S. 119, 126 (1953) ("Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable.").

[58] See, e.g., letters from Committee on Securities Regulation of the New York City Bar Association (NYC Bar Association) (stating that unduly detailed or prescriptive verification rules would "have the potential to result in significant economic harm"); SecondMarket (asserting that "[p]lacing too heavy a burden on issuers and investors could have the undesired effect of inhibiting private capital formation" and that "issuers are likely to be unwilling or unable to assume the liability and cost that would arise from a significant documentary verification requirement"); NSBA (Aug. 2, 2012) (stating that "imposing additional burdens on Rule 506 issuers who engage in general solicitation or general advertising would make it more difficult for small firms to raise capital"); Small Biotechnology Business Coalition (SBBC) (stating that additional burdens on issuers seeking to utilize Rule 506 would make it more difficult for small firms to raise capital, and make it less likely that investors will invest in small firms); ABA (asserting that a verification requirement that imposes additional burdens on issuers or purchasers "would contravene the fundamental impetus for the JOBS Act"); MFA (June 26, 2012) (Stating that "overly restrictive procedures . . . would have the effect of thwarting the purposes of Title II of the JOBS Act").

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