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A legal update from Dechert's Financial Services Group

How Will SEC and FINRA Advertising Rules Apply to General Solicitations and Advertising Under Rule 506?

Under Section 201(a)(1) of the Jumpstart Our Business Startups Act (the JOBS Act) adopted by Congress on April 5, 2012, the Securities and Exchange Commission (SEC) was directed to revise Rule 506[1] under Regulation D[2] within 90 days after enactment of the JOBS Act to remove the prohibition under Rule 502(c) against general solicitation and general advertising in connection with offers and sales of securities made pursuant to Rule 506. On August 29, 2012, the SEC proposed amendments to its rules to implement that mandate. Under the mandated changes to Rule 506, when an issuer conducts an offering using general solicitation and general advertising, all purchasers of the securities of the issuer in that offering will be required to be "accredited investors," and the issuer of the securities must take reasonable steps to verify that all purchasers of the securities are accredited investors.[3]

This *DechertOnPoint* discusses some of the implications of the mandated changes to Rule 506 for hedge funds[4] that do not register as "investment companies" by virtue of the exclusions from the definition of "investment company" contained in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940, as amended (the 1940 Act), and that do not sell their shares in public offerings registered under the Securities Act of 1933, as amended (the 1933 Act).[5]

Rule 506 of Regulation D under the 1933 Act generally provides a safe harbor from the registration requirements of the 1933 Act for offers and sales of securities to purchasers who are "accredited investors," including any person who the issuer of the securities reasonably believes is an accredited investor (as well as up to 35 persons who are not "accredited investors"). One of the conditions for the use of the Rule 506 safe harbor is that there may be no general solicitation or general advertising to offer the securities.

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1 17 CFR §230.506 (Rule 506).

2 17 CFR §§230.500 *et seq.*

3 Section 201(a)(2) of the JOBS Act contains a similar directive with respect to Rule 144A offerings.

4 For a discussion of the implications of those changes for private equity issuers, please refer to *Jobs Act Implications for Private Equity*, Spring/Summer 2012 *DechertOnPoint*.

5 Under the 1933 Act, a general public solicitation of offers to buy a security is deemed to be a "public offering" of securities. Although the exclusions from the definition of "investment company" under Sections 3(c)(1) and 3(c)(7) are available only to an issuer that "is not making and does not presently propose to make a public offering of its securities," Section 201(b)(2) of the JOBS Act amended Section 4 of the 1933 Act to state that offers and sales of securities that are exempt under Rule 506 "shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation." In footnote 88 of the adopting release for the Rule 506 amendments, the SEC stated that it has historically "regarded Rule 506 transactions as non-public offerings for purposes of Sections 3(c)(1) and 3(c)(7) [of the Investment Company Act of 1940]." Release No. 33-9354, August 29, 2012, *infra* at footnote 6.

The SEC's Proposed Amendments to Rule 506

At its August 29, 2012 open meeting, the SEC voted to propose amendments to Rule 506 (and related rules) of Regulation D to add a new subsection (c) to Rule 506 that would permit issuers to use general solicitation and general advertising in such offerings, provided that all purchasers of securities in the offering are accredited investors and that the issuer takes reasonable steps to verify the accredited investor status of all purchasers.[6] While a detailed analysis of the provisions of the Rule 506 Proposing Release is beyond the scope of this *DechertOnPoint*, a few observations are relevant to a discussion of advertising rules and standards that may be applied to such offerings. The amendment to Rule 506 would allow, for example, the use of broader means of public communication to advertise private placements — such as correspondence, print and social media advertisements, internet-based communications, and public appearances, which the SEC currently deems to be general solicitation or general advertising.[7]

In the Rule 506 Proposing Release, the SEC states that while commentators have suggested that the SEC propose rules governing the content and manner of advertising and solicitations used in offerings under the proposed amendment to Rule 506, "particularly with respect to private funds," the SEC is not doing so "at this time." Instead they proposed "only those rule and form amendments that are, in [the SEC's] view, necessary to implement the mandate in section 201(a)."[8]

Although Section 201(a)(1) of the JOBS Act states that such rules adopted by the SEC shall require the issuer to take reasonable verification steps "using such methods as determined by the Commission," the proposed amendment to Rule 506 does not detail specific methods that an issuer must use to verify the status of a purchaser under Rule 506 (although an example is given of how to verify an investing registered broker-dealer's status as such, and other examples detail what would be reasonable steps with respect to determining an investor's income). Instead, the Rule 506 Proposing Release states that whether the steps taken to verify accredited investor status are "reasonable" would be an objective determination, using a "facts and circumstances" analysis of both the purchaser and the offering. Examples of such factors cited in the Rule 506 Proposing Release include the following:

- The nature of the purchaser and the type of accredited investor that the purchaser claims to be;
- The amount and type of information that the issuer has about the purchaser; and
- The nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.[9]

Form D would be amended to include a check box for issuers to indicate if they are relying on the exemption that permits general solicitation and general advertising in the subject offering. Additionally, existing Rule 506(b) provisions would be retained so that issuers that do not choose to use general solicitations and general advertising would not be subject to the new verification process for accredited investors.

Much of the proposal outlines concerns about the process to verify accredited investor status and discusses concerns raised by commentators. While the proposal does not include any specific substantive standards for advertisements used in general solicitations in offerings under Rule 506(c), there is a reference to how the SEC and SEC staff might view the role of general advertisements used in such offerings: the Rule 506 Proposing Release states that "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."[10] The Release goes on to state that "an issuer that

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6 Release No. 33-9354, *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Aug. 29, 2012, available at http://www.sec.gov/rules/proposed/2012/33-9354.pdf (the "Rule 506 Proposing Release"). The proposed amendments also would permit securities to be offered pursuant to Rule 144A to persons other than qualified institutional buyers, provided that the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are qualified institutional buyers.

7 Rule 506 Proposing Release at 6.

8 Rule 506 Proposing Release at 10.

9 Rule 506 Proposing Release, at 14.

10 Rule 506 Proposing Release at 19.

solicits new investors through a website accessible to the general public or through widely-disseminated e-mail or social media solicitations 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 investors created and maintained by a reasonably reliable third-party, such as a broker-dealer." This may give some issuers pause as to the means of general advertising they choose.

There is a 30-day comment period following the date of publication of the proposed rules in the Federal Register, and some Commissioners have urged the SEC to take final action on the amendments by year end if possible. In particular, the SEC has requested further public comment on a variety of approaches to verification, and indicates that it will monitor and study actual practices and the impact of compliance on capital formation. However, the SEC does not request any comments on the need to adopt or interpret content standards or practices for advertisements used in connection with proposed Rule 506(c).

Issuers, investment advisers and broker-dealers that contemplate taking advantage of the newly-permitted advertising and solicitation rules for Rule 506 private offerings should be interested in learning what rules FINRA and the SEC will apply to those communications, what roles FINRA and the SEC will play in scrutinizing those communications and what standards will be applied to their content and review. A related question is what standards will apply to public communications used to offer private placements in which no registered broker-dealer or registered investment adviser participates.

Although private offerings under Rule 506 for which public solicitations and public advertising are used will be exempt from registration requirements under the 1933 Act, they will remain subject to the anti-fraud provisions of the Federal securities laws.[11] Additionally, as discussed below, registered investment advisers and broker-dealers will remain subject to oversight of their conduct in connection with private offerings under Rule 506, including oversight of communications that they create or use as part of any general public solicitation.

[11] *E.g.*, Section 10(b) of the Securities Exchange Act of 1934, as amended (the Exchange Act), and Rule 10b-5 thereunder.

Oversight by FINRA of Sales Materials Used by Broker-Dealers

FINRA has long been active in overseeing communications used by registered broker-dealers in connection with private offerings of securities. In October 2011, FINRA filed with the SEC a proposal to adopt FINRA Rule 5123 (Private Placements of Securities)[12] that will require FINRA members to submit to FINRA a copy of any private placement memorandum, term sheet or other offering document used in connection with the sale of a security in a private placement, within 15 days of the date of the first sale, "for the purpose of review to determine compliance with the provisions of applicable FINRA rules . . . ." In the alternative, if applicable, the firm may tell FINRA that no such offering documents were used. The 15-day requirement was added to avoid any implication that FINRA would comment on the offering memorandum — by contrast, FINRA's newly-adopted advertising Rule 2210(c)(8)(e) expressly excludes from its filing requirements a prospectus that has been filed with the SEC or any state.[13]

There are extensive exemptions from this filing requirement, for private offerings sold solely to qualified purchasers, institutional purchasers, certain (but not all) accredited investors and similar categories of sophisticated investors. If sales are made to other non-exempt categories of investors (including accredited investors who are directors, officers and general partners of the issuer, and other natural persons meeting net worth or income tests under Rule 501(a)), the documents will have to be filed with FINRA. Because offerings that will rely on the provisions of Rule 506 (as and when it will be amended) to take advantage of the ability to use general solicitations and advertising can be sold only to "accredited investors," the documents for those offerings might not be subject to this new filing requirement, but only if such offerings meet the exemption requirements.[14]

[12] File No. SR-FINRA-2011-057, Oct. 4, 2011. The Rule was approved on an accelerated basis by the SEC on June 13, 2012.

[13] FINRA Rule 2210, effective February 4, 2013, will replace existing NASD Conduct Rules 2210 and 2211, which govern communications with the public and institutional sales materials, respectively.

[14] Although offering documents for offerings sold only to "qualified purchasers," as defined in Section 2(a)(51) of the 1940 Act, are exempt from the filing requirement,

FINRA rules that apply to the filing and review of retail and institutional communications used by FINRA member firms [15] currently do not have specific, separate standards for the content, filing and review of communications provided by broker-dealers to accredited investors to solicit purchases of securities in a private placement. The definition of "accredited investor" is not co-extensive with the definition of "institutional investor" under both the current and newly-adopted FINRA advertising rules. [16] FINRA has not yet had the opportunity to determine whether there will be a need for special advertising rules to address the filing and review of communications for private placements made in a manner contemplated by whatever amendments to Rule 506 are adopted to conform to the mandate of the JOBS Act.

In past notices to member firms, FINRA has addressed the advertising rule compliance responsibilities that apply to broker-dealers that use advertising materials in private offerings. In *Notice to Members 10-22* in 2010, FINRA underscored that its advertising rules can apply to communications used to solicit purchases in private placements. [17] In that *Notice to Members*, the Executive Summary stated that ". . . any broker-dealer that recommends securities offered under Regulation D must meet its suitability requirements under NASD Rule 2310 (Suitability), and *must comply with the advertising and supervisory rules of FINRA and the SEC*" (emphasis added). *Notice to Members 10-22* also states that a broker-dealer that prepares a private placement memorandum or offering document has a duty to investigate the securities offered and the representations made by the issuer in the offering document, and if a broker-dealer assists in preparing a private placement memorandum or other offering document used in a Regulation D offering, that document "will be considered a communication with the public by that [broker-dealer] for purposes of NASD Rule 2210 . . . " The *Notice to Members* adds that if the document:

> . . . presents information that is not fair and balanced or that is misleading, then the [broker-dealer] that assisted in its preparation may be deemed to have violated NASD Rule 2210. Moreover, sales literature concerning a private placement that a [broker-dealer] distributes will generally be deemed to constitute a communication by that [broker-dealer] with the public, whether or not the [broker-dealer] assisted in its preparation.

Notice to Members 22-10 requires firms to have supervisory procedures with respect to private offerings, which procedures are reasonably designed to ensure that the firm's personnel, including its registered representatives, ". . . do not violate the antifraud provisions of the federal securities laws or FINRA rules in connection with their preparation or distribution of offering documents or sales literature."

In earlier *Notices to Members* dealing with offerings of hedge funds made under Regulation D, FINRA also reminded broker-dealers that its advertising content standards applied to sales materials. [18] *Notice to Members 03-07* advised that "the promotion of hedge funds must be balanced by a fair presentation of the risks and potential disadvantages of hedge fund investing." That *Notice to Members* contains specific guidance that disclosures should be included, as applicable, in sales materials and oral presentations

offerings sold only to "accredited investors" as defined in Rule 501(a) under the 1933 Act are not so exempt. In revising the rule proposal in response to industry concerns, FINRA changed the filing to a "notice" filing to remove any implications that the FINRA staff would comment on filings, that a filing would be a precondition to commencing an offering, or that a filer should expect to receive FINRA staff input on an offering before commencing it. The notice containing the proposal stated that the purpose of the filing was to provide FINRA with timely information about the private placement business of FINRA members. SEC Form 19b-4, File No. SR-2011-07, Oct. 4, 2011.

15 NASD Conduct Rule 2210, "Communications with the Public," and Rule 2211, "Institutional Sales Material and Correspondence." On February 4, 2013, FINRA Rule 2210 will replace these two rules, but the new rule carries forward their substantive requirements as to the content standards applicable to communications and the requirements to file them with FINRA for review.

16 New FINRA Rule 2210 defines "institutional investor" to mean governmental entities, certain employee benefit and qualified plans having at least 100 participants, member firms and associated persons, persons acting on behalf of institutional investors, and persons meeting the definition in FINRA Rule 4512(c): banks, savings and loans, insurance companies, investment companies, state- or federally-registered investment advisers or any other person (natural or otherwise) having total assets of at least $50 million.

17 FINRA *Notice to Members 10-22*, "Regulation D Offerings" (April 2010) (*"Notice to Members 10-22"*).

18 *See* FINRA *Notice to Members 03-07*, "NASD Reminds Members of Obligations When Selling Hedge Funds" (Feb. 2003) and FINRA *Notice to Members 03-71*, "Non-Conventional Investments" (Nov. 2003).

with respect to risks of leveraging, liquidity, valuation, tax issues, different regulatory requirements, and high fees. According to an earlier *Notice to Members*, merely bringing a potential investment to the attention of a customer may constitute a "recommendation" of that investment, triggering the applicability of FINRA's standards for the content of any communications, in writing or by electronic means, with respect to that investment:

> In particular, a transaction will be considered to be recommended when the member or its associated person brings a specific security to the attention of a customer through any means, including, but not limited to, direct telephone communication, the delivery of promotional material through the mail, or the transmission of electronic materials. [19]

FINRA has also used its enforcement authority to discipline member firms that distributed non-compliant institutional sales materials in connection with offerings of hedge funds. In the recent *Jahre* case, [20] FINRA found that materials (including e-mails) used to promote an unregistered hedge fund failed to meet the content standards of NASD Conduct Rules 2210(d) and 2211(d)(1) (which subject institutional sales materials to the content standards of Rule 2210). FINRA found that even though the communications were directed to institutional or sophisticated investors for whom the investments were otherwise suitable, the e-mails contained "exaggerated and unsubstantiated predictions of performance, lacked any description of the risks involved with the investments, and were not fair and balanced . . . [and] failed to provide a sound basis for evaluating the facts concerning the investment and did not provide any explanation or support for [the broker's] recommendation of the investment." In addition to finding that the e-mails used were "institutional sales materials," the decision upheld the finding that the firm also distributed other "unbalanced institutional sales materials" in violation of NASD Rules 2211(d) and 2210 (including power point presentations, newsletters, brochures and fund summaries). FINRA found that while some of the materials contained "general disclaimers and statements regarding risk," and referred to other documents for specific disclosures, the materials by themselves did not present a "fair and balanced assessment of the investments" being offered. According to FINRA, references to disclosures in other documents, through hyperlinks or otherwise, do not cure deficiencies in the documents containing the references. [21]

The *Jahre* case also reflected FINRA's wariness of the use of performance projections in hedge fund materials. In particular, in the *Jahre* case FINRA found that the materials contained "exaggerated performance projections" where they described the fund's objectives of compounded returns of 16%-18% net of fees, in violation of Rule 2210(d)(1)(D), the content standard prohibiting exaggerated claims or forecasts. FINRA stated that describing these returns as "objectives" did not cure the violation.

The charges in the *Jahre* proceeding reflected FINRA's application of the "content standards" of NASD Conduct Rule 2210, and IM-2210-1 thereunder, to sales materials for hedge funds in private offerings. FINRA's current and recently-adopted advertising rules also leave room for interpreting the application of the content standards based on the context in which statements are made and the nature of the audience to which the communications will be directed. [22]

SEC Oversight of Promotional Materials in Private Offerings

Advertising materials prepared by investment advisers to unregistered hedge funds are subject to the anti-fraud provisions of the Investment Advisers Act of 1940, as amended (the Advisers Act) and the rules thereunder. Section 206(1) of the Advisers Act prohibits a registered investment adviser from employing any device, scheme or artifice to defraud a client or prospective client; Section 206(2) prohibits registered

19 *NASD Notice to Members 96-60* (Sept. 1996).

20 *In the Matter of Hedge Fund Capital Partners, LLC and Howard G. Jahre*, FINRA NAC, Complaint No. 2006004122402, May 1, 2012 (*Jahre*). The decision found that such other sales materials violated the content standards of Rule 2210(d). Additionally, the FINRA NAC found that the firm had violated the record-keeping rules by failing to keep copies of all materials for three years from the date of last use.

21 *Compare, FINRA Dep't of Enforcement v. Donner Corp. Int'l*, Complaint No. CAF020048, 2006 NASD Discip. LEXIS 4, at *36-37 (NASD NAC Mar. 6, 2006)) (inclusion of hyperlinks to the issuer's financial statements were insufficient to cure the deficiencies in research reports).

22 FINRA Rule 2210(d)(1)(D), (E).

investment advisers from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon clients or prospective clients; and Section 206(4) prohibits a registered investment adviser from directly or indirectly engaging in any act, practice or course of business that is fraudulent, deceptive or manipulative. Rule 206(4)-1, "Advertisements by Investment Advisers," applies to registered investment advisers and contains general content standards for "advertisements" as defined in paragraph (b) of the rule [23] — those standards are similar to, but not as specific or detailed as, the content standards of the FINRA advertising rules applicable to registered broker-dealers. Although this rule is not directly applicable to communications directed to investors instead of clients, the SEC staff likely will assert in examinations that the principles of the rule should be followed.

Rule 206(4)-8, which applies to "pooled investment vehicles" and covers investment companies that are excluded from the definition of investment company under the 1940 Act, is a basic anti-fraud rule that contains no specific standards for communications that are used in offerings under Rule 506. The SEC staff typically does not require filing of, nor does it review and comment on, advertisements by investment advisers before or in conjunction with their use. Instead, the SEC depends on its enforcement powers to deal with what, after the fact, are perceived to have been violations of rules under the Advisers Act. In addition, in its examination program, the SEC staff will review and comment on perceived deficiencies in marketing pieces.

What Will the SEC and FINRA Do?

It is clear that FINRA already interprets its advertising rules, including the content standards, to apply to sales materials used by a registered broker-dealer to offer securities of a private fund pursuant to Rule 506.

Registered investment advisers remain subject to the general anti-fraud standards under Section 206(4) of the Advisers Act and the rules thereunder, with respect to offering materials they prepare and use in connection with private offerings. Admittedly, the standards applicable to communications with the public under the FINRA rules and the standards applicable under the Advisers Act are not identical, and promotional materials used in private offerings under Rule 506 made through a registered broker-dealer are subject to more detailed requirements than those applicable to registered advisers under the provisions of the Advisers Act and related rules.

It remains to be seen whether in future rulemakings the SEC will propose new advertising rules or amendments to existing rules or issue further interpretive guidance containing specific standards for marketing materials used in connection with general solicitations for private offerings under Rule 506. It also remains to be seen whether FINRA will issue further guidance with respect to the application of its communications rules to such offerings when made through broker-dealers, and whether FINRA will revise its existing communications rules. Use of promotional materials to make general solicitations in public media in connection with Rule 506 offerings may heighten the attention paid by regulators (possibly including state regulator) to the content of such materials. As advertising practices develop in Rule 506(c) offerings, particular practices, such as disparities in approach to depictions of performance, ultimately may cause the SEC and FINRA to provide more specific guidance on this topic, whether through interpretative releases or rule proposals, or perhaps in the enforcement action process if abuses are perceived to have occurred.

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[23] Under that provision, an "advertisement" is any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers: (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

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