FORUM FOR US SECURITIES LAWYERS IN LONDON

Via Email: rule-comments@sec.gov

June 29, 2012

U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Attention: Ms. Elizabeth M. Murphy, Secretary

Re: Request for Public Comments on SEC Regulatory Initiatives Under the JOBS Act

Dear Ms. Murphy:

This letter is submitted on behalf of the Forum for U.S. Securities Lawyers in London (the "*Forum*") with respect to the rules the Securities and Exchange Commission (the "*Commission*") is required to adopt pursuant to the Jumpstart Our Business Startups Act of 2012 (the "*JOBS Act*"). This letter is submitted in response to the Commission's request for public comments relating to the JOBS Act rulemaking.[1]

The Forum is a trade association representing U.S.-qualified lawyers and market participants in the London capital markets. It has more than 1,500 members including U.S.-qualified lawyers from over 45 law firms and 30 financial institutions in the London capital markets, as well as market participants such as securities exchanges, settlement systems and registrars. Founded in 2006, the Forum is an independent, self-funded organization dedicated to addressing issues relating to the application of and compliance with U.S. securities laws in the London and other international capital markets.

The Forum thanks the Commission for this opportunity to comment on the rulemaking the Commission is required or authorized to undertake in connection with the JOBS Act. We believe that our comments reflect the Congressional aims of the statute to maintain investor protections while facilitating capital formation for EGCs, easing the burdens on issuers and other offering participants and shifting the focus of regulation away from offers to sales of securities. We hope that the comments herein will serve as helpful suggestions for the Commission in its formulation of JOBS Act rules and guidance.

On May 15, the Forum held a roundtable discussion in London, which was attended by over 20 of our members representing law firms, financial institutions and market participants, in order to discuss the JOBS Act. The comments in this letter reflect the views expressed by our members, both at a roundtable and via written comments, on the effect certain provisions of the JOBS Act are likely to have on the London capital markets. The comments support some of those which were included in: (i) the letter to the Commission from the Securities Industry and Financial Markets Association, or SIFMA, dated April 27, 2012 (the "*SIFMA Letter*"); (ii) the letter to the Commission from the American Bar Association Federal Regulation of Securities Committee dated April 30, 2012 (the "*ABA Letter*"); and (iii) the letter from the New York City Bar's Committee on Securities Regulation dated May 4, 2012 (the "*NY City Bar Letter*").

[1] http://sec.gov/spotlight/jobsactcomments.shtml

FORUM FOR US SECURITIES LAWYERS IN LONDON

Summary of Comments

The following is a summary of our comments:

1. The Commission should confirm that the revisions to Rule 506 ("*Rule 506*") under the Securities Act of 1933, as amended (the "*Securities Act*") and Rule 144A under the Securities Act ("*Rule 144A*") contained in Section 201 of the JOBS Act with respect to general solicitation and general advertising will not affect an issuer's ability to avail itself of Regulation S. In light of Section 201, we also respectfully suggest an amendment to the current definition of "directed selling efforts."

2. The Commission should confirm that the use of general solicitation and general advertising is also permitted in any private placement in reliance on Section 4(2) of the Securities Act ("*Section 4(2)*") made solely to qualified institutional buyers ("*QIBs*") or accredited investors, as the case may be.

3. The new "reasonable belief" standard for determining that purchasers are QIBs under Rule 144A should be extended to determining accredited investor status under Rule 506.

4. The Commission should clarify the issue of integration of Rule 506 and Rule 144A offerings as a result of the revisions to these provisions related to pre-marketing permitting general solicitation and general advertising in connection with an offering.

5. We would be grateful if the Commission could confirm any effect the Section 201 changes to general solicitation and general advertising will have on the permitted activities of unregistered foreign broker-dealers under Rule 15a-6 ("*Rule 15a-6*") under the Securities Exchange Act of 1934, as amended (the "*Exchange Act*").

6. Section 105 of the JOBS Act relaxes the rules relating to research reports and other communications by analysts and broker-dealers in connection with the IPOs of EGCs and prohibits the Commission and any national securities association from imposing restrictions on certain communications including research reports. We note that these analyst and broker-dealer activities are also regulated by FINRA and urge the Commission to clarify the interaction of Section 105 with the FINRA rules applicable to such conduct.

7. The Commission should review and increase the threshold for Exchange Act registration under Rule 12g3-2(a) as its current level of 300 U.S. resident shareholders is inconsistent with the increase in the overall Section 12(g) thresholds under the JOBS Act.

8. The Commission should confirm that the use of general solicitation or general advertising in connection with a Rule 506 or Rule 144A offering will not impact an issuer's ability to take advantage of an exemption or exception under the Investment Company Act of 1940, as amended (the "*Investment Company Act*").

Comments

1. The Commission should confirm that the revisions to Rule 506 under the Securities Act and Rule 144A contained in Section 201 of the JOBS Act with respect to general solicitation and general advertising will not affect an issuer's ability to avail itself of Regulation S. In light of Section 201, we also respectfully suggest an amendment to the current definition of "directed selling efforts."

Under Section 201 of the JOBS Act, the Commission is required to: (i) revise Rule 506 to provide that securities may be offered using general solicitation or general advertising so long as the issuer takes reasonable steps to ensure that the ultimate purchasers of such securities are accredited investors; and (ii) revise Rule 144A to provide that securities may be offered using general solicitation and general advertising so long as the seller of the securities (or anyone acting on its behalf) has a reasonable belief that the purchaser is a QIB.

We note the current widespread international market practice of concurrent Regulation S offerings with private placements to U.S. investors. While we welcome the relaxation of the ban on general solicitation and general advertising, our members have expressed concern that now such permissible marketing activities conducted as part of a Rule 506 or Rule 144A offering could be construed as "directed selling efforts" under the current definition of that term in Rule 902 of Regulation S.

This issue was also highlighted in the SIFMA Letter, the ABA Letter and the NY City Bar Letter.

We expect a foreign issuer's ability to engage in general solicitation and general advertising in the United States to be beneficial to the foreign issuer in accessing the U.S. capital markets; however, it is, of course, imperative that in doing so an issuer does not jeopardize its compliance with Regulation S in connection with the same offering. As stated in the ABA Letter, when Regulation S was adopted, the adopting release provided that "permissible activities in connection with registered or exempt offerings in the United States do not constitute directed selling efforts in a contemporaneous Regulation S offering." We encourage the Commission to confirm this is the case in its proposed rules or an accompanying release setting out the revisions to Rule 144A and Rule 506.

2. The Commission should confirm that the use of general solicitation and general advertising is also permitted in any private placement in reliance on Section 4(2) made solely to QIBs or accredited investors, as the case may be.

We note as international practitioners that the so-called "private offering exemption" in Section 4(2) has been an important exemption from registration under the Securities Act in particular for offerings by non-U.S. issuers for many years.[2] Use of this general exemption reflects an established London and international market practice that has arisen under circumstances where the exemptions under Rule 144A or Regulation D were not available or practicable and it would therefore not have otherwise been possible to offer securities to U.S. investors without registration under the Securities Act.

We note the Commission's statements in Securities Act Release 4552 (November 6, 1962) regarding Section 4(2), in particular the reference to public advertising as being "incompatible with a claim of a private offering." In light of Section 201 of the JOBS Act's removal of the ban on general solicitation and

[2] We refer in this comment to traditional private placements under former Section 4(2), which has been renumbered to 4(a)(2) by Section 201(b)(1) of the JOBS Act.

general advertising for Rule 506 and Rule 144A offerings, we urge the Commission to clarify that the ban on advertising would not continue to apply to Section 4(2) private placements made solely to QIBs or accredited investors. We respectfully request that the Commission please clarify that general solicitation and general advertising carried out in connection with a private placement under Section 4(2) (whether otherwise in full compliance with Rule 144A or Regulation D or not) will not make such sale of securities be considered a public offering. We believe that such an interpretation is within the spirit of the JOBS Act.

3. The new "reasonable belief" standard for determining that purchasers are QIBs under Rule 144A should be extended to determining accredited investor status under Rule 506.

We welcome the new purchaser conditions to Rule 144A in allowing general solicitation under Section 201(a)(2) as long as the "securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer." We note that Section 201(a)(1) of the JOBS Act does not incorporate the reasonable belief standard with respect to accredited investor status but would urge the Commission to adopt this standard for Rule 506. This would be consistent with the "reasonable steps" provision of Section 201(a)(2) and the commercial realities of Rule 506 placements. We also urge the Commission in developing the guidance for reasonable steps to adopt a workable standard which reflects the current market practice for such placements.

We note this concern has been expressed by other commentators including in the SIFMA Letter, the ABA Letter and the NY City Bar Letter.

4. The Commission should clarify the issue of integration of Rule 506 and Rule 144A offerings as a result of the revisions to these provisions permitting general solicitation and general advertising in connection with an offering.

We would be grateful if the Commission could please clarify the issue of integration of offerings under Rule 506 and Rule 144A when general solicitation and general advertising are used and also with respect to the "testing the waters" activities, which are now permitted under Section 105(c) of the JOBS Act for EGCs. We note that the ABA Letter also requests clarification of this issue.

We welcome this liberalization of the rules with respect to pre-marketing activities and given the uncertainty in the markets request that the Commission ensure that the relevant rules reflect current market practices including so-called "pilot fishing" and non-deal roadshows.

5. We would be grateful if the Commission could confirm any effect the Section 201 changes to general solicitation and general advertising will have on the permitted activities of unregistered foreign broker-dealers under Rule 15a-6.

The Commission should confirm whether the rules resulting from the removal of the ban on general solicitation and general advertising under Section 201 of the JOBS Act will expand permissible activities by an unregistered foreign broker-dealer who is engaging in broker-dealer activities in the United States pursuant to an exemption under Rule 15a-6.

Rule 15a-6 permits foreign broker-dealers who are not registered with the Commission to offer and sell securities to U.S. investors with certain restrictions and under certain circumstances. This exemption from registration for a broker-dealer is often the gateway a foreign issuer employs initially to gain access to a

U.S. investor base. Rule 15a-6 does not exempt a foreign broker-dealer from registration if it is effecting a securities transaction with persons from whom it solicited the transaction. We would like to raise the issue of whether lifting of the ban on general solicitation and general advertising will have any effect on unregistered foreign broker-dealers' ability to effect transactions in the United States under Rule 15a-6. We would be grateful if the Commission could clarify whether the removal of the bans on general solicitation and general advertising under the JOBS Act will be reflected in corresponding amendments to the Rule 15a-6 rules applicable to foreign broker-dealers in respect of marketing activities.

6. Section 105 of the JOBS Act relaxes the rules relating to research reports and other communications by analysts and broker-dealers in connection with the IPOs of EGCs and prohibits the Commission and any national securities association from imposing restrictions on certain communications including research reports. We note that these analyst and broker-dealer activities are also regulated by FINRA and urge the Commission to clarify the interaction of Section 105 with the FINRA rules applicable to such conduct.

The JOBS Act liberalizes certain provisions of the Securities Act and the Exchange Act which have historically been interpreted to restrict the dissemination of research and other activities of analysts and broker-dealers for equity offerings of EGCs. Section 105(a) of the JOBS Act excludes from the Securities Act definition of "offer" the research reports of broker-dealers even where they are offering participants. Section 105(b) prohibits the Commission or any national securities association from imposing restrictions on: (i) who may arrange for communications between analysts and potential investors; or (ii) analysts' communications with issuer management, even in the presence of investment bankers. Section 105(d) also prohibits the Commission or any national securities association from imposing restrictions on post offering research reports or public appearances, even prior to the expiration of an IPO lock-up agreement. These provisions indicate a strong Congressional intent to relax the rules on pre-deal research and analysts' communications with offering participants and to permit post-deal research reports and roadshows.

While we welcome these relaxed rules applicable to the publication of research and other communications by analysts and broker-dealers both before and after the IPO, we note that the FINRA rules covering these subjects have not been modified accordingly. We would like to highlight in this context the rules applicable to sales literature under NASD Rule 2210 and requirements under NASD Rule 2711, whose provisions restricting analysts' activities in respect of research reports and communications to prospective investors, including research "blackout periods," we assume to be overridden by Section 105(d) of the JOBS Act. Of particular concern in this area are communications to prospective investors in the presence of investment banking personnel and issuer management.

It is also unclear whether general solicitation materials as permitted by the new provisions of the JOBS Act will constitute sales literature and advertisements under NASD Rule 2210 and will need to comply with the approval, record keeping and content standards set forth in Rule 2210. We request that the Commission provide further clarification on these points.

Further, we would be grateful if the Commission could confirm the effect of these changes on the Global Research Analyst Settlement of 2003 (the "*Settlement*"), including whether Section 105 abrogates such Settlement. We respectfully suggest that the Commission could provide greater clarity on this point by issuing a rule that supersedes parts of the Settlement which are inconsistent with the JOBS Act. We note that the SIFMA Letter also makes this comment.

7. The Commission should review and increase the threshold for Exchange Act registration under Rule 12g3-2(a) as its current level of 300 U.S. resident shareholders is inconsistent with the increase in the overall Section 12(g) thresholds under the JOBS Act.

We urge the Commission to take this opportunity to review the 300 U.S. resident shareholder threshold in Rule 12g3-2(a) under the Exchange Act. The general shareholder threshold for Exchange Act registration has been increased under the JOBS Act.

Section 501 of the JOBS Act has amended Section 12(g)(1) of the Exchange Act to require registration by non-bank issuers having assets in excess of $10 million in respect of a class of equity securities held by either 2,000 persons or 500 persons who are not accredited investors. As these new thresholds implemented by the JOBS Act are higher than the 300 shareholder threshold in Rule 12g3-2(a), we respectfully request the Commission to modify that threshold to bring it into line with amended Section 12(g)(1).

8. The Commission should confirm that the use of general solicitation or general advertising in connection with a Rule 506 or Rule 144A offering will not impact an issuer's ability to take advantage of an exemption or exception under the Investment Company Act.

Certain exemptions under the Investment Company Act are heavily relied upon by issuers in the London capital markets. Of particular concern to our members is the availability of Section 3(c)(7) for non-U.S. companies seeking exemption from registration under Investment Company Act when selling securities to U.S. investors. Therefore, we would be grateful if the Commission could confirm in its rules or accompanying release that exemptions and exceptions available under the Investment Company Act will continue to be available to issuers that use general solicitation or general advertising in connection with offerings under Rule 506 or Rule 144A and that such offerings will not constitute "public offerings" for purposes of the Investment Company Act as the result of any general solicitation or general advertising.

We note that the ABA Letter echoes this concern in asking for reassurance that the use of general solicitation or general advertising will not make a Rule 144A transaction a public offering under the Investment Company Act.

Conclusion

We would be pleased to respond to any enquiries regarding this letter or our views on the JOBS Act generally. Please contact Daniel Winterfeldt at CMS Cameron McKenna (Tel: +44 (0) 20 7367 2700 or email: daniel.winterfeldt@cms-cmck.com) or Edward Bibko at Baker & McKenzie (Tel: +44 (0) 20 7919 1343 or email: edward.bibko@bakermckenzie.com) if you have any enquiries in relation to this letter. We look forward to providing additional comments once the proposed rules required under the JOBS Act are released.

Respectfully submitted,

The Forum for US Securities Lawyers in London