



## FORUM FOR US SECURITIES LAWYERS IN LONDON

**Via Email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)**

October 5, 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 JOBS Act Provision about General Solicitation and Advertising in Securities Offerings

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 proposed (the “*Proposed Rules*”) by the Securities and Exchange Commission (the “*Commission*”) with respect to general solicitation and general advertising in securities offerings as mandated under the provisions of 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 on the Proposed Rules.

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 Proposed Rules issued by the Commission under the JOBS Act. We believe that our comments reflect the Congressional aims of the statute to maintain investor protections while 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 finalizing the rules relating to general solicitation and advertising under the JOBS Act. The comments in this letter reflect the views expressed by our members via written comments and discussions on the effect the Proposed Rules are likely to have on the London capital markets. This letter includes a repeat of some comments provided by the Forum in its letter to the Commission dated June 29, 2012, which were not addressed in the Proposed Rules and on which the Forum is seeking guidance and clarification.



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### Summary of Comments

The following is a summary of our comments:

1. The Forum agrees with the approach taken by the Commission in the Proposed Rules and believes that the Proposed Rules carry out the Congressional intent of Section 201(a) of the JOBS Act.
2. 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.
2. 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*”).
3. 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*”).
4. The Forum would be grateful if the Commission could provide guidance in the final rules being issued to assist issuers with currently ongoing transactions that will be closing after the final rules are issued.

### Comments

- 1. The Forum agrees with the approach taken by the Commission in the Proposed Rules and believes that the Proposed Rules carry out the Congressional intent of Section 201(a) of the JOBS Act.**

The Forum believes that the Proposed Rules will be effective in carrying out the intent of Section 201(a) of the JOBS Act. In particular, the Forum is pleased that the Proposed Rules do not require a bright line test with respect to the accredited investor verification process. Further, the Forum is grateful that the Proposed Rules confirm that conducting an offering under the new Rule 506(c) will not affect an issuer’s ability to also offer securities under Regulation S.

- 2. 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



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EGCs. We note that the letter to the Commission from the American Bar Association Federal Regulation of Securities Committee dated April 30, 2012 (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.

**2. We would be grateful if the Commission could confirm any effect the lifting of the ban on general solicitation and general advertising in the Proposed Rules would have on the permitted activities of unregistered foreign broker-dealers under Rule 15a-6.**

The Commission should confirm whether the Proposed Rules 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 Proposed Rules will be reflected in corresponding amendments to the Rule 15a-6 rules applicable to foreign broker-dealers in respect of marketing activities.

**3. 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.

**4. We would be grateful if the Commission could provide guidance in the final rules being issued to assist issuers with currently ongoing transactions that will be closing after the final rules are issued.**



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As the Commission is aware, there will be issuers offering securities under Regulation D whose offerings will be ongoing when the final rules become effective. The Forum would be grateful if the Commission could include guidance in the instance where an issuer has begun its marketing prior to the issuance of the final rules, but no sales will take place until after the issuance of the final rules.

### **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](mailto:daniel.winterfeldt@cms-cmck.com)) or Edward Bibko at Baker & McKenzie (Tel: +44 (0) 20 7919 1343 or email: [edward.bibko@bakermckenzie.com](mailto:edward.bibko@bakermckenzie.com)) if you have any enquiries in relation to this letter.

Respectfully submitted,

The Forum for US Securities Lawyers in London