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# JOBS Act Update

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## When a "Public Offering" Is *Not* a "Public Offering": The SEC Rule Proposal Eliminating the Ban on General Solicitation and Advertising in Securities Offerings

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**Introduction**

On April 5, 2012, the Jumpstart Our Business Startups Act (the "**JOBS Act**") was enacted. The stated objective for the JOBS Act is to improve access to the public capital markets for startup and emerging companies and thus increase job creation and economic growth in the United States.

Title II of the JOBS Act ("**Title II**") mandated the Securities and Exchange Commission (the "**Commission**") to amend applicable rules within 90 days of its enactment (*i.e.*, July 5, 2012) in order to eliminate the prohibitions against general solicitation or general advertising (collectively, "**General Solicitation**") in Rule 506 of Regulation D[1] ("**Rule 506**") under the Securities Act of 1933, as amended (the "**Securities Act**"), and under Rule 144A under the Securities Act[2] ("**Rule 144A**"). These changes are intended to allow issuers to advertise broadly when conducting private placements and thus enable them directly to reach a greater number of potential investors at lower costs without an intermediary, subject to certain requirements, as described more fully below. For a complete overview of all provisions of the JOBS Act, please click here[3].

On August 29, 2012, the Commission issued Release No. 33-9354[4] (the "**Release**") which, belatedly, proposed a new Rule 506(c) ("**Proposed Rule 506(c)**") and an amendment to Rule 144A (collectively, the "**Proposed Rules**") to implement Title II. The Proposed Rules would:

(i) Create Proposed Rule 506(c) which does not prohibit General Solicitation for offers and sales of securities that otherwise comply with Rule 506, provided that all purchasers of the securities are "accredited investors" *and* the issuer takes "reasonable steps to verify" that the purchasers are "accredited investors;"

(ii) Amend Form D[5] to add a check box to indicate whether an offering is being conducted pursuant to Proposed Rule 506(c); and

(iii) Amend Rule 144A to allow securities resold pursuant to Rule 144A to be offered to persons other than "qualified institutional buyers"[6] ("**QIBs**"), including by way of General Solicitation, provided that the securities are sold only to persons that the seller (or any person acting on behalf of the seller) "reasonably believes" are QIBs.

Comments on the Proposed Rules are due on or before October 5, 2012. A more comprehensive summary of the Proposed Rules is annexed hereto.

**Controversy Surrounding the Rulemaking Process and the Scope of Proposed Rule 506(c)**

The significance of the reforms contained in Title II, its implications for the investment management industry, and the capital markets, generally, is illustrated by the statements made by individual Commissioners at the Open Meeting at which the Proposed Rules were approved and the substance of the Release itself[7]. Although Commissioners Gallagher and Paredes voted in favor of the Proposed Rules, they expressed great disappointment and frustration that the proposal brought before the Commission were proposed rules, not interim final rules, as had been anticipated[8]. Moreover, Commissioner Walter, who voted in favor of the Proposed Rules, and Commissioner Aguilar, who voted against the Proposed Rules, expressed disappointment that Proposed Rule 506(c) is narrow in scope and does not address various substantive issues raised in comment letters to the Commission. Such issues include: (i) amending the definition of accredited investor to require consideration of the investor's financial sophistication; and (ii) amending Form D notice requirements to enhance the timing and content of the form. Chairman Schapiro, who voted in favor of the Proposed Rules, acknowledged that there are "very real concerns about the potential impact of lifting the ban on general solicitation[,] many thoughtful letters [have been submitted] suggesting both specific and broad reforms to Rule 506 offerings and Regulation D more generally" and "it will be incredibly important for the Commission to take a thorough look at the private placement market in the future." She concluded, however, that "at this point it is appropriate that [the Commission] undertake this more narrow mandate that Congress placed upon [the Commission] through the JOBS Act."

As a further indication of the controversy surrounding the Proposed Rules, in addition to providing a detailed, lengthy analysis of each of its provisions and the rationale for the approach taken, the Release solicits comments on sixteen topics, including more than forty separate open-ended questions, only four of which exclusively concern the proposed amendment to Rule 144A.

**"Reasonable Steps to Verify" Accredited Investor Status and the "Reasonable Belief" Standard Under Rule 506**

Perhaps the most significant issue under Proposed Rule 506(c) is the distinction between actions that will suffice as "reasonable steps to verify" that a prospective purchaser is an "accredited investor" and, in light of this standard, what will suffice as a basis for a "reasonable belief" that a prospective purchaser is an "accredited investor."

A number of commentators expressed concern that "unduly prescriptive or burdensome rules for verifying a purchaser's accredited investor status," among other things, "could lead to reluctance on the part of issuers to access the relevant capital markets, or would contravene the purposes of the JOBS Act."

In order to address this concern and, at the same time, the desire to provide objective standards that could reduce uncertainty, the Commission stated that: "Whether the steps taken are 'reasonable' would be an ***objective*** determination, based on the particular facts and circumstances of each transaction"[9] (*emphasis added*), but explained that an issuer would have a great deal of flexibility and could exercise a great degree of subjectivity in determining how to make this "objective" determination:

> We believe that, at present, proposing to require issuers to use specified methods of verification would be impractical and potentially ineffective in light of the numerous ways in which a purchaser can qualify as an accredited investor, as well as the potentially wide range of verification issues that may arise, depending on the nature of the purchaser and the facts and circumstances of a particular Rule 506(c) offering. We are also concerned that a prescriptive rule that specifies required verification methods could be overly burdensome in some cases, by requiring issuers to follow the same steps, regardless of their particular circumstances, and ineffective in others, by requiring steps that, in the particular circumstances, would not actually verify accredited investor status[10].

As noted in the Release[11], a number of commentators also raised concerns that the "reasonable steps to verify" requirement could be "interpreted as precluding the use of the "reasonable belief" standard in Rule 501(a) which provides maximum flexibility to issuers.

A critical element of the regulatory analysis set forth in the Release is the recognition that Title II did not amend the definition of "accredited investor" in Rule 501(a): "Accredited investor" shall mean any person who comes within any of the following categories ***or*** who the issuer ***reasonably believes*** comes with any of the following categories, at the time of the sale of the securities to that person." (*Emphasis added*.) Rather, Title II added a new requirement that an issuer must satisfy if it does not wish to be bound by the prohibition on General Solicitation. Accordingly, issuers continue to have the ability to rely upon their own "reasonable belief" regarding a purchaser's status as an accredited investor.

Entirely consistent with this analysis, the Commission assured issuers that:

"If a person who does not meet the criteria for any category of accredited investor purchases securities in a Rule 506(c) offering, we believe that the issuer would not lose the ability to rely on the proposed Rule 506(c) exemption for that offering, so long as 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."[12]

This makes sense since if an issuer satisfies the requirement that it has taken reasonable steps to verify that a purchaser is an accredited investor, it also should have established the basis for a reasonable belief that a purchaser is an accredited investor. However, if the new "reasonable steps to verify" requirement is to be meaningful, just because an issuer has a reasonable belief that a purchaser is an accredited investor should not mean that in all instances the issuer will have, *de facto*, satisfied such requirement.[13]

An issuer that wishes to include up to 35 non-accredited investors in an offering pursuant to Rule 506(b) will continue to be subject to the Regulation D prohibition on General Solicitation, but will not be subject to the requirement of Proposed Rule 506(c) that it take "reasonable steps to verify" that all purchasers are accredited investors - *de facto* a less burdensome standard for an issuer that limits the scope of its offering.

**Unresolved Issues and Concluding Observations**

*Private Funds and Harmonization of Title II with Regulations of the Commodity Futures Trading Commission*

As discussed in detail in the Annex, the Commission confirmed in the Release that since Title II provides that "[o]ffers and sales exempt under [Rule 506] shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation . . . the effect of [Title II] is to permit privately offered funds to make a general solicitation under amended Rule 506 without losing either of the exclusions [of Section 3(c)(1) and Section 3(c)(7)] under the Investment Company Act."[14]

The definition of "Federal securities laws," however, does not include the Commodity Exchange Act and, accordingly, concerns have arisen that the regulatory relief provided under certain regulations adopted by the Commodity Futures Trading Commission on which managers of privately offered funds rely[15] will continue to be available to them if the fund offers interests through any form of General Solicitation.[16] Specifically, CFTC Regulation 4.13(a)(3) provides an exemption from registration to a commodity pool operator that makes offerings in commodity pools, if, among other things, they are "offered and sold without marketing to the public in the United States." CFTC Regulation 4.7 provides relief from certain onerous disclosure and other requirements for registered commodity pool operators if, among other things, participations in a commodity pool are offered and sold in an offering that "qualifies for exemption from the registration requirements of the Securities Act pursuant to section [4(a)(2) thereof] or pursuant to Regulation S [and] any bank registered as a commodity pool operator in connection with [a] collective trust fund whose securities are . . . offered and sold, without marketing to the public . . . ."

*Impact of the Proposed Rule on United States Domiciled Private Fund Managers Who Market Interests in the United Kingdom*

The marketing of private placements in the U.K. is governed by two regulatory regimes – the Prospectus Rules[17] and the Financial Services and Markets Act 2000 ("**FSMA**"). The Prospectus Rules operate to determine whether a prospectus must be produced for the proposed offering of securities. FSMA then determines the manner in which, and to whom the securities may be promoted. A prospectus is not needed for a private placement which constitutes an "exempt public offer"[18] by virtue of one of the following requirements being met: (i) the offer is made to qualified investors only (as defined by MiFID[19]); (ii) the offer is directed at fewer than 150 people; or (iii) the offer is below certain thresholds in respect of the total consideration or denomination of securities. Notwithstanding the question of whether a prospectus is required in order to market securities, regard must always be had to the rules on financial promotions set out in section 21 of FSMA.

The Proposed Rules introduced pursuant to the JOBS Act are broadly similar to the U.K. provisions in this area, which prevent an authorized person from communicating a financial promotion unless: (i) the promotion has been approved by an authorized person; or (ii) the promotion is exempt. The notable exemptions that are particularly comparable with the Proposed Rules are set out in the FSMA (Financial Promotion Order) 2005 (the "**FPO**") and include promotions made publicly to "Sophisticated Investors,"[20] "Certified High Net Worth Individuals"[21] and "Investment Professionals."[22] Similarly to the safeguards in the Proposed Rules relating to the verification of accredited investors and the resale of securities to QIBs, the FSA has issued guidance in respect of public promotions targeting Investment Professionals which requires that, among other things, there are proper systems and procedures in place to prevent recipients other than Investment Professionals from engaging in the investment activity.

As envisaged when the JOBS Act was enacted into law, the Proposed Rules should operate to more closely align the U.S. and U.K. regulatory regimes in respect of private placements and will hopefully stimulate cross-border offerings of securities as well as improve the internal U.S. economy.

*Integration*

Notwithstanding its thoroughness, the Release does not address a number of important issues, including the concern that an issuer that conducts an offering in reliance on Rule 506(c) might be precluded from shortly thereafter conducting an offering based upon Proposed Rule 506(b) because the two offerings might be integrated for purposes of Regulation D.[23]

*State Blue Sky Laws*

The National Securities Markets Improvement Act of 1996 ("NSMIA") preempts state "blue sky" laws governing the registration and qualification of certain securities offerings, including securities offered and sold in compliance with Rule 506. NSMIA, however, expressly preserves the states' general antifraud enforcement authority and some state courts have placed the burden on the issuer to demonstrate actual compliance with Rule 506 in order for the issuer to assert that pre-emption applies to a purported Regulation D offering.[24]

**Conclusion**

The Release perpetuates the rulemaking process and has not resolved the controversies surrounding the rescission of the ban on General Solicitation under Title II. Moreover, given the concerns of individual Commissioners and the large number of issues on which further comments have been solicited, it remains to be seen whether the rulemaking process will come to a swift conclusion, with a thorough re-examination of the private placement market to be left for another day, or the desire to address all of these issues on a holistic basis will lead to further extensive delays.

**ANNEX**

## OVERVIEW OF THE PROPOSED RULES

**Proposed Amendments to Rule 506 and Form D**

Section 201(a)(1) of Title II directs the Commission to amend Rule 506 to: (i) permit General Solicitation in Rule 506 offerings if all purchasers of the securities are "accredited investors," as defined in Rule 501(a) of Regulation D; and (ii) require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors.

*Eliminating the Prohibition Against General Solicitation*

Proposed Rule 506(c) would provide that the prohibition against General Solicitation contained in Rule 502(c) of Regulation D shall not apply to offers and sales of securities made pursuant to Rule 506 if all of the following conditions are met:

- The issuer must take reasonable steps to verify that purchasers are accredited investors;
- All purchasers must be accredited investors, either because they meet the definition of accredited investor or the issuer reasonably believes that they do at the time of the sale of the securities; and
- All terms and conditions of Rule 501 and Rules 502(a) and 502(d) must be satisfied.

Existing Rule 506 is a non-exclusive safe harbor under Section 4(a)(2) (formerly Section 4(2)) of the Securities Act. It exempts transactions by an issuer from the registration requirements of Section 5 of the Securities Act without any limitation on the offering amount to an unlimited number of accredited investors and to no more than 35 non-accredited investors who meet certain "sophistication" requirements. The Rule 506 safe harbor is currently available only if the issuer, or any person acting on its behalf, does not engage in any form of General Solicitation in offering or selling securities.

Proposed Rule 506(c) would not affect the ability of issuers to conduct Rule 506 private placements without the use of General Solicitation.

*Reasonable Steps to Verify Accredited Investor Status*

Proposed Rule 506(c) would require issuers using General Solicitation to "take reasonable steps to verify" that the purchasers of the offered securities are accredited investors. This requirement is intended to reduce the risk that the use of General Solicitation under Proposed Rule 506(c) may result in sales to investors who are not, in fact, accredited investors. Proposed Rule 506(c) provides the following examples of factors that issuers could consider when determining whether the steps taken to verify accredited investor status are "reasonable" under the particular facts and circumstances of each transaction:

- Nature of the Purchaser and Types of Accredited Investor the Purchaser Claims It Is:
  The definition of "accredited investor" in Rule 501(a) enumerates eight categories of accredited investors. "Accredited investors" include: (i) natural persons based on their net worth or annual income; (ii) institutions based on their status or a combination of their status and the amount of their total assets; and (iii) natural persons or institutions that the issuer reasonably believes come within one of the eight categories. The Commission acknowledged that taking reasonable steps to verify the accredited investor status of natural persons would present greater practical difficulties than institutions, partly due to natural persons' privacy concerns about disclosing personal financial information.

- Amount and Type of Information that Issuer Has About the Purchaser:
  The more information an issuer has indicating that a prospective purchaser is an accredited investor, the fewer steps it would be required to take, and vice versa. Examples of the types of information that issuers could review or rely upon would include: (i) publicly available information in filings with a federal, state or local regulatory body; (ii) third-party information that provides reasonable evidence that a person meets the definition of accredited investor; and (iii) verification of a person's status as an accredited investor by a third party, such as a broker-dealer, attorney or accountant, so long as the issuer has a reasonable basis to rely on such third-party verification; and

- Nature and Terms of the Offering:
  With respect to the nature of the offering (*e.g.*, how the issuer publicly solicits purchasers to participate in the offering), the Release provides an example that a website available to the general public or a widely disseminated email or social media solicitation would require an issuer to take greater verification steps than a database of pre-screened accredited investors created and maintained by a reasonably reliable third party such as a registered broker-dealer. With respect to the terms of the offering (*e.g.*, as a minimum investment amount), the Commission agreed with certain commentators' views that a purchaser's ability to meet a sufficiently high minimum investment amount that only accredited investors could reasonably be expected to meet could be taken into account in verifying accredited investor status without any additional step, provided the issuer confirms that the purchaser's cash investment is not being financed by the issuer or any other third party and there are no other facts that may indicate that the purchaser is not an accredited investor.

The Commission rejected the choice to provide uniform or specified verification methods in order that issuers and market participants can benefit from the flexibility to adopt different verification methods reasonable under the particular facts and circumstances, accommodate changing market practices, implement innovative ways to meet the verification requirement (*e.g.*, third-party databases of accredited investors) and ultimately allow issuers to select the most cost-efficient verification method for each offering based on the particular facts and circumstances of the offering and the investors. Many practices currently used by issuers in connection with existing Rule 506 offerings would satisfy the proposed verification requirement under Proposed Rule 506(c).

Issuers would need to retain adequate records to document all verification steps taken since the existing federal securities law requires any issuer claiming an exemption from the Section 5 registration requirements under the Securities Act to prove that it is entitled to such exemption.

*Reasonable Belief that All Purchasers are Accredited Investors*

Section 201(a)(2) of Title II, in mandating amendments to Rule 144A, specifically incorporates a "reasonable belief" standard for determining whether a purchaser is a QIB. In contrast, section 201(a)(1) of Title II, in mandating amendments to Rule 506, does not explicitly refer to a "reasonable belief" standard for determining whether a purchaser is an accredited investor. To allay concerns raised by certain commentators, the Commission re-affirmed the ability of issuers to use the existing reasonable belief standard set forth in the definition of "accredited investor" in Rule 501(a) for determining accredited investor status under Rule 506.

*Form D Check Box for Proposed Rule 506(c) Offerings*

Form D is a notice of sale that an issuer is required to file with the Commission following the sale of securities pursuant to Regulation D. A separate field or check box is proposed to be added to Item 6 of Form D for issuers to indicate specifically whether they are relying on the Proposed Rule 506(c) exemption. This additional information is anticipated to enable the Commission to monitor the use of Proposed Rule 506(c) and the size of this market.

*Specific Issues for Privately Offered Funds*

Privately offered funds, such as hedge funds, private equity funds and venture capital funds, typically rely on Sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, as amended (the "**Investment Company Act**"), in order to avoid registration thereunder. Sections 3(c)(1) and 3(c)(7), respectively, exclude from the definition of "investment company" any issuer whose outstanding securities (other than short-term paper) are beneficially owned by no more than 100 persons and any issuer whose outstanding securities are owned exclusively by "qualified purchasers," as defined in the Investment Company Act, at the time of purchase of such securities. Both Sections 3(c)(1) and 3(c)(7) are not available to issuers that are making a public offering or proposing to make a public offering of securities.

Section 201(b) of Title II states that offers and sales made in reliance on Proposed Rule 506(c) shall not be deemed public offerings under the "Federal securities laws" as a result of General Solicitation. Based upon this provision, in order to allay the concerns of certain commentators, the Release confirms the Commission's historical position that Rule 506 transactions are considered non-public offerings for purposes of Sections 3(c)(1) and 3(c)(7) and that Proposed Rule 506(c) would permit privately offered funds to engage in General Solicitation without losing their ability to rely upon either Section 3(c)(1) or 3(c)(7).

**Proposed Amendment to Rule 144A**

Section 201(a)(2) of Title II requires the Commission to permit offers of securities pursuant to Rule 144A to be made to persons other than QIBs including through general solicitation, or advertising, provided that the securities are sold only to persons that the seller (or any person acting on behalf of the seller) reasonably believes are QIBs.

Rule 144A provides a non-exclusive safe harbor exemption from the registration requirements of the Securities Act for resales to QIBs of certain "restricted securities," as defined in Rule 144(a)(3) under the Securities Act. Although Rule 144A is available solely for resale transactions, issuers utilize Rule 144A for capital-raising by way of a primary offering by an issuer to one or more initial purchasers in a transaction that is exempt from registration pursuant to Section 4(a)(2) of the Securities Act or Regulation S, followed by the immediate resale of those securities by the initial purchasers to QIBs in reliance on Rule 144A or Regulation S. Although Rule 144A does not explicitly prohibit general solicitation or advertising, offers of securities under Rule 144A at present must be limited to QIBs, which, *de facto*, has the same effect.

The Proposed Rules would amend Rule 144A (d)(1) to remove the requirement that securities be offered only to QIBs, but would not change the requirement that the securities be sold only to QIBs or to purchasers that "the seller and any person acting on behalf of the seller reasonably believe" are QIBs.

**No Integration with Regulation S Offerings**

The requirement in Section 201(a) of Title II to allow the use of General Solicitation under Rule 506 and Rule 144A have raised questions about whether the use of General Solicitation should be available to offshore offerings in accordance with Regulation S under the Securities Act ("**Regulation S**"). Currently, Regulation S provides a safe harbor for securities offers and sales outside the United States if the securities are sold in an offshore transaction and there are no directed selling efforts in the United States. U.S. and non-U.S. companies frequently rely on the Regulation S safe harbors for the offshore portion of the global offerings of securities in connection with the concurrent offering in the U.S. in reliance on Rule 144A or Rule 506.

The Commission reiterated in the Release its historical approach to concurrent Regulation S and Rule 144A/Rule 506 offerings and confirmed that concurrent Regulation S offshore offerings would not be integrated with U.S. unregistered offerings made in accordance with Rule 506 or Rule 144A, as proposed to be amended.

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[1] 17 C.F.R. §230.501 *et seq.* Regulation D under the Securities Exchange Act of 1934, as amended, provides a non-exclusive safe harbor exemption from the registration requirements of the Securities Act of 1934, as amended, for certain limited offerings and sales of securities.

Rule 502(c) of Regulation D lists examples of general solicitation and general advertising, including advertisements published in newspapers and magazines, communications broadcast over television and radio, and seminars whose attendees have been invited by general solicitation or general advertising. By interpretation, the Commission has confirmed that other uses of publicly available media, such as unrestricted websites, also constitute general solicitation and general advertising.

[2] 17 C.F.R. §230.144A. Rule 144A provides a non-exclusive safe harbor exemption from the registration requirements of the Securities Act for resales of certain "restricted securities," as defined in Rule 144(a)(3), to "qualified institutional buyers," as defined in Rule 144A(a)(1) of the Securities Act. *See* Note 6, *infra*, and Annex, "Proposed Amendment to Rule 144A."

[3] A copy of the JOBS Act, other Orrick client memos on various aspects of the JOBS Act, as well as links to various announcements, guidance and interpretations by the Commission (including the procedures for confidential submission of draft registration statements), can be found on our website.

[4] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 77 Fed. Reg. 54,464, 54,467 (proposed August 29, 2012) (to be codified at 17 C.F.R. pts. 230 and 239) [hereinafter The Proposing Release].

[5] 17 C.F.R. §239.500. Form D is a notice of sale required to be filed with the Commission by an issuer claiming an exemption under Regulation D within 15 days after the first sale of securities thereunder.

[6] "Qualified institutional buyer" means: (i) any of certain enumerated entities such as insurance companies or employee benefits plans, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the entity; (ii) certain dealers; (iii) certain investment companies; (iv) any entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of

other qualified institutional buyers; and (v) certain banks.

[7] Statements by the Chairman and Commissioners are available at http://www.sec.gov/news/speech.shtml.

[8] *See also, e.g.,* letter to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, from Paul Schott Stevens, President and CEO, Investment Company Institute, re: comments on SEC regulatory initiatives under Title II of the JOBS Act (May 21, 2012), available at http://www.ici.org/pdf/26174.pdf.

[9] The Proposing Release, *supra* note 4, at 54,467.

[10] *Id.* at 54,470–71.

[11] *Id.* at 54,471.

[12] *Id.* at 54,471–72.

[13] *See id.* at 54,469, 54,473.

[14] *Id.* at 54,472.

[15] *See* Edward G. Eisert and Evelyn S. Grant, "New CFTC Regulatory Regime for Private Fund Managers," Orrick Client Alert, August 27, 2012, available at http://www.orrick.com/fileupload/4877.htm.

[16] *See* letter to David A. Stawick, Secretary, Commodity Futures Trading Commission, from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association, re: harmonization of compliance obligations and the Jumpstart Our Business Startups Act and CFTC Regulations (July 17, 2012), available at https://www.managedfunds.org/wp-content/uploads/2012/07/CFTC-JOBS-Act-final-7-17-12.pdf.

[17]The Prospectus Rules as at August 2012 are available at http://media.fsahandbook.info/pdf/PR.pdf.

[18] Prospectus Rule 1.2.1 and section 86 FSMA.

[19] Markets in Financial Instruments Directive (2004/39/EC).

[20] Article 50(1) FPO ("Self-Certifying Sophisticated Investors" is defined in Article 50A(1) of the FPO).

[21] Article 48(2) FPO.

[22] Article 9(5) FPO.

[23] For discussion of these issues, *see* Edward G. Eisert, Tony A. Katz, Evelyn Grant and Hannah Mahon, "Jumpstart Our Business Startups Act – Implications for Sponsors of Venture Capital, Private Equity and Hedge Funds," Orrick Client Alert, April 6, 2012.

[24] *See, e.g.,* Risdall v. Brown-Wilbert, Inc., 753 N.W.2d 723 (S.Ct. MN, July 31, 2008), Nolfi v. Ohio Kentucy Oil Corp. *et al.*, 2008 U.S. Dist. Lexis 39284, (May 12, 2008).