Contents

RULE 502—GENERAL CONDITIONS

Section 256. Rule 502—General Conditions to be MetSecurities and Exchange Commission

¶1500 [Integration]

Question 256.01

Question: An issuer conducts offering A under Rule 504 that concludes in January. Seven months later the issuer commences offering B under Rule 506. During that seven-month period, the issuer's only offers or sales of securities are made in offering C under an employee benefit plan C. Must the issuer integrate A and B?

Answer: No. Rule 502(a) specifically provides that A and B will not be integrated. Rule 502(a), however, does not provide a safe harbor to the possible integration of offering C with either offering A or B. In resolving that question, the issuer should consider the factors listed in the Note to Rule 502(a).

Reference: Rule 502(a)

History: Issued January 26, 2009.

¶1501 [Simultaneous Offerings]

Question 256.02

Question: Would simultaneous offerings by affiliated issuers, such as a corporate general partner and its limited partnership, selling their securities as units in a single plan of financing for the same general purpose be considered to be an integrated offering?

Answer: Yes. See the *Intuit Telecom Inc.* no-action letter (Mar. 24, 1982) issued by the Division.

Reference: Rule 502(a)

History: Issued January 26, 2009.

¶1502 [Most Recent Fiscal Year]

Question 256.03

Question: May the reference in Rule 502(b)(2)(ii)(A) to the annual report to shareholders for the "most recent fiscal year" include the annual report prepared for the previous year?

Answer: Yes, provided that delivery of the annual report for the present year is not yet required under Exchange Act Rules 14a-3 or 14c-3, and the prior year's report meets the requirements of Rule 14a-3 or 14c-3.

Reference: Rule 502(b)

History: Issued July 1997; modified January 26, 2009.

¶1503 [Previous Fiscal Year]

Question 256.04

Question: A reporting company with a fiscal year ending on December 31 is making a Regulation D offering in February. The company has filed all the material required to be filed under Sections 13, 14 and 15(d) of the Exchange Act in the last 12 calendar months. It does not have an annual report to shareholders, an associated definitive proxy statement, or a Form 10-K for its most recently completed fiscal year. The issuer's last registration statement was filed more than two years ago. What is the appropriate disclosure under Regulation D?

Answer: The issuer may base its disclosure on the most recently completed fiscal year for which an annual report to shareholders or Form 10-K was timely distributed or filed. The issuer should supplement the information in the report used with the information contained in any reports or documents required to be filed under Sections 13(a), 14(a), 14(c) and 15(d) of the Exchange Act since the distribution or filing of that report and with a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished. See Rule 502(b)(2)(ii)(C).

Reference: Rule 502(b)

History: Issued January 26, 2009.

¶1504 [Non-Accredited Investors]

Question 256.05

Question: If the issuer is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, what information does Regulation D require to be delivered to non-accredited investors in a Rule 505 or 506 offering?

Answer: In these types of offerings, Rule 502(b)(2)(ii) of Regulation D sets forth two alternatives for disclosure: the issuer may deliver certain recent Exchange Act reports (the annual report, the definitive proxy statement, and, if requested, the Form 10-K) or it may provide a document containing the same information as in the Form 10-K or Form 10 under the Exchange Act or in a Form S-1 or Form S-11 registration statement under the Securities Act. In either case, the rule calls for the delivery of certain supplemental information.

Reference: Rule 502(b)

History: Issued January 26, 2009.

¶1505 [Opinion of Counsel]

Question 256.06

Question: Under Rule 502(b)(2)(iii), an issuer that must provide a disclosure document, whether it is a reporting or non-reporting issuer, is required to identify and make available those exhibits that would accompany the registration form or report upon which the disclosure document is modeled. Does a Regulation D issuer have to make available an opinion of counsel as to the legality of the securities being issued and, if there are representations made as to material tax consequences, a supporting opinion of counsel regarding such tax consequences?

Answer: Yes.

Reference: Rule 502(b)

History: Issued July 1997; modified January 26, 2009.

¶1506 [Opinion as to Validity]

Question 256.07

Question: In an offering under Regulation D, must the opinion of counsel regarding the legality of the issuance of the securities contain an opinion as to whether the issuer has a valid claim to the Regulation D exemption?

Answer: No.

Reference: Rule 502(b)

History: Issued July 1997; modified January 26, 2009.

¶1507 [Limited Partnerships]

Question 256.08

Question: What type of information specified in Rule 502(b)(2) is an issuer required to furnish for any corporate general partner in a Regulation D offering where the issuer is a limited partnership?

Answer: The issuer should furnish for any corporate general partner an audited balance sheet as of the most recently completed fiscal year.

Reference: Rule 502(b)

History: Issued July 1997; modified January 26, 2009.

¶1508 [Tax Basis Financials]

Question 256.09

Question: Under Rule 502(b)(2)(i)(B)(2) and (3), if a limited partnership issuer cannot obtain the required financial statements for a Regulation D offering without unreasonable effort or expense, it may provide tax basis financials. Do these provisions also apply to the financial statements required in a Regulation D offering for general partners as well as properties to be acquired?

Answer: Yes.

Reference: Rule 502(b)

History: Issued July 1997; modified January 26, 2009.

¶1509 [Investment Companies]

Question 256.10

Question: What are the information delivery requirements under Rule 502(b) for an investment company excluded from registration by virtue of Section 3(c) of the Investment Company Act of 1940 that sells securities to non-accredited investors relying on Rule 506?

Answer: Such a company must furnish to non-accredited investors, to the extent material to an understanding of the company, its business, and the securities being offered:

- the same kind of non-financial information as would be required in a registration statement under the Securities Act for a registered investment company on a form that it would be entitled to use if it were registering the offering under the Securities Act, such as a registration statement on Form N-1A, or Form N-2; and
- financial statement information equivalent to that required of operating companies under Rule 502(b)(2)(i)(B).

Reference: Rule 502(b)

History: Issued January 26, 2009.

¶1510 [Electronic Delivery]

Question 256.11

Question: May an issuer of securities provide the disclosure required by Rule 502(b) by means of electronic delivery, such as an email message with electronic attachments?

Answer: Yes. Rule 502(b) requires only that the disclosures be "furnished." It contains no requirement that the disclosures be provided or delivered using a particular medium. The Commission's views regarding the use of electronic delivery are provided in Securities Act Release No. 7856 (Apr. 28, 2000).

Reference: Rule 502(b)

History: Issued January 26, 2009.

¶1511 [Short-Form Offering Memorandum]

Question 256.12

Question: An issuer furnishes potential investors a short form offering memorandum in anticipation of actual selling activities and the delivery of an expanded disclosure document later. Does Regulation D permit the delivery of disclosure in two installments?

Answer: So long as all the information is delivered a reasonable amount of time before sale, the use of a fair and adequate summary followed by a complete disclosure document is permitted under Regulation D. Disclosure in such a manner, however, should not obscure material information.

Reference: Rule 502(b)

History: Issued January 26, 2009.

¶1512 [Audited Balance Sheets]

Question 256.13

Question: Under Rule 502(b)(2)(i)(B), for a non-reporting issuer that has been formed with minimal capitalization immediately before a Regulation D offering, must the Regulation D disclosure document contain an audited balance sheet for the issuer?

Answer: In analyzing this or any other disclosure question under Regulation D, the issuer starts with the general rule that it is obligated to furnish the specified information "to the extent material to an understanding of the issuer, its business, and the securities being offered." Thus, in this particular case, if an audited balance sheet is not material to the investor's understanding, then the issuer may elect to present an alternative to its audited balance sheet.

Reference: Rule 502(b)

History: Issued January 26, 2009.

¶1513 [Form S-1]

Question 256.14

Question: Rule 501(b)(2)(ii)(B) refers to the information contained "in a registration statement on Form S-1." Does this requirement envision delivery of Parts I and II of the Form S-1?

Answer: No, only Part I.

Reference: Rule 501(b)

History: Issued January 26, 2009.

¶1514 [Canadian Issuers]

Question 256.15

Question: May a Canadian issuer filing under the MJDS use its most recent filing on Form 40-F, F-9 or F-10 to satisfy the information requirements of Rule 502(b)?

Answer: Yes. Although Rule 502(b)(2)(ii)(D) permits a foreign private issuer to use its most recent Form 20-F or Form F-1 to meet Rule 502's information requirements, but does not mention the MJDS forms, an MJDS filer may use its most recent filing on Form 40-F, F-9 or F-10 to satisfy Rule 502(b)(b)'s information requirements.

Reference: Rule 502(b)

History: Issued March 1999; modified January 26, 2009.

¶1515 [Product Advertising]

Question 256.16

Question: Does Rule 502(c)(c), which prohibits general solicitation and general advertising in connection with the offer and sale of securities, bar product advertising?

Answer: Rule 502(c) does not bar product advertising, although such advertising is not permitted under the rule when it involves the solicitation of an offer to buy a security. Whether or not particular product advertising constitutes a solicitation in contravention of Rule 502(c) depends on the facts and circumstances.

Reference: Rule 502(c)

History: Issued July 1997; modified January 26, 2009.

¶1516 [Press Release]

Question 256.17

Question: A reporting company proposes to offer securities under Regulation D. Because of the size and price of the offering, the company feels compelled by Section 10(b) of the Exchange Act to issue a press release discussing the offering. Would such a press release by the issuer constitute general solicitation or general advertising, activities which are not permitted by Rule 502(c) in connection with most Regulation D offerings?

Answer: The company should refer to the Rule 135c safe harbor for reporting issuers giving notice of proposed unregistered offerings.

Reference: Rule 502(c)

History: Issued July 1997; modified January 26, 2009.

¶1517 [Solicitation Limited to Accredited Investors]

Question 256.18

Question: If a solicitation were limited to accredited investors, would it be deemed in compliance with Rule 502(c)?

Answer: The mere fact that a solicitation is directed only to accredited investors will not mean that the solicitation is in compliance with Rule 502(c). Rule 502(c) relates to the nature of the offering, not the nature of the offerees.

Reference: Rule 502(c)

History: Issued January 26, 2009.

¶1518 [Proxy Statement]

Question 256.19

Question: An issuer is preparing a private placement in reliance on Rule 506. The offering will require the issuance of more than 20% of the outstanding stock of the corporation, triggering an NYSE shareholder approval requirement. Thus, the issuer must file a proxy statement at the same time as the beginning of the offering. At the time of filing the proxy statement, the offering will not be subscribed. Would the information about the private placement required in the proxy statement by the NYSE rule and Item 11 of Schedule 14A violate the ban on general solicitation in Rule 502(c)?

Answer: The issuer may seek to rely upon the safe harbor in Rule 135c when filing the proxy statement with the Commission that includes information about the private placement as required by the NYSE rule and Item 11 of Schedule 14A. If the proxy statement disclosure about the private placement does not satisfy the requirements of Rule 135c(a), then the disclosure will violate the ban on general solicitation in Rule 502(c). In general, issuers should be mindful that, unless the closing of the offering and the solicitation of shareholder votes are timed correctly, the information about the private placement included in the proxy statement could be viewed as conditioning the market for the securities offered in the private placement.

Reference: Rule 502(c)

History: Issued January 26, 2009.

¶1519 [Resale]

Question 256.20

Question: An investor in a Regulation D offering wishes to resell the securities within three months after the offering. The issuer has agreed to register the securities for resale. Will the proposed resale under the registration statement violate Rule 502(d)?

Answer: No. The function of Rule 502(d) is to restrict the unregistered resale of securities. Where the resale will be registered, however, such restriction is unnecessary.

Reference: Rule 502(d)

History: Issued January 26, 2009.

¶1520 [Private Money Market Funds]

Question 256.21

Question: A "private" money market fund undertakes to comply with Rule 2a-7 under the Investment Company Act in order to permit registered investment companies to invest in the fund under Rule 12d1-1 under the Investment Company Act in excess of the limits set forth in Section 12(d) of the Investment Company Act. Pursuant to Rule 2a-7(c)(12), a "private" money market fund is required to post monthly on its publicly available web site specific information about securities in its portfolio as well as the weighted average maturity and weighted average life maturity of its portfolio. Would compliance with the conditions of this web posting requirement cause the fund to violate the prohibition on general solicitation and advertising in Rule 502(c) under the Securities Act? The fund relies on the exception provided in Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act to the definition of "investment company" in Section 3(a) of that Act. Sections 3(c)(1) and 3(c)(7) both require that a fund not make or propose to make a public offering of its securities.

Answer: The fund will not be deemed to violate the prohibition on general solicitation and advertising by posting information on its web site in compliance with Rule 2a-7 for purposes of permitting registered investment companies to invest in the fund under Rule 12d1-1 in excess of the limits set forth in Section 12(d) of the Investment Company Act, so long as the fund posts only the information required by the rule and does not use its web site to offer or sell securities or in a manner that is deemed to be general solicitation or advertising for offers or sales of its securities.

Reference: Rule 502(c); Investment Company Act Section 3(c)

History: Issued August 11, 2010.

¶1521 [Information to Non-Accredited Investors]

Question 256.22

Question: If an acquiror seeks written consents from the target's shareholders, which include non-accredited investors, to approve a business combination transaction involving the issuance of securities in reliance on Rule 505 or 506 of Regulation D, when must the financial statement and other information specified in Rule 502(b)(2) be provided to those target shareholders that are non-accredited investors?

Answer: Rule 502(b)(1) requires such information to be delivered to non-accredited investors in "a reasonable amount of time prior to sale." The delivery of a written consent constitutes the "sale" of securities in an offer conducted in reliance on Rule 505 or 506. Accordingly, to comply with the timing requirement set forth in Rule 502(b)(1), an acquiror issuing securities in a Rule 505 or Rule 506 offering must provide the disclosure required by Rule 502(b)(2) to non-accredited investors in a reasonable amount of time prior to obtaining any written consents from them.

Reference: Rule 502(b).

History: Issued May 16, 2013.

¶1522 [General Solicitation]

Question 256.23

Question: Rule 502(c) prohibits an issuer or any person acting on the issuer's behalf from offering or selling securities by any form of general solicitation or general advertising when conducting certain offerings in reliance on Regulation D. Does the use of an unrestricted, publicly available website to offer or sell securities constitute a general solicitation for purposes of Rule 502(c)?

Answer: Yes. As the Commission stated in Securities Act Release No. 7856 (Apr. 28, 2000), the use of an unrestricted, publicly available website constitutes a general solicitation and is not consistent with the prohibition on general solicitation and advertising in Rule 502(c) if the website contains an offer of securities. However, Rule 506(c) — which does not require compliance with Rule 502(c) — may be available to issuers when offering or selling securities through unrestricted, publicly available websites or other forms of general solicitation.

Reference: Rule 502(c); Rule 506.

History: Issued August 6, 2015.

¶1523 [Information Dissemination]

Question 256.24

Question: What information can an issuer widely disseminate about itself without contravening Rule 502(c)?

Answer: Information not involving an offer of securities may be disseminated widely without violating Rule 502(c). For example, factual business information that does not condition the public mind or arouse public interest in a securities offering is not an offer and may be disseminated widely. Information that involves an offer of securities through any form of general solicitation would contravene Rule 502(c).

Reference: Rule 502(c).

History: Issued August 6, 2015.

¶1524 [Factual Business Information]

Question 256.25

Question: What is factual business information?

Answer: What constitutes factual business information depends on the facts and circumstances. Factual business information typically is limited to information about the issuer, its business, financial condition, products, services, or advertisement of such products or services, provided the information is not presented in such a manner as to constitute an offer of the issuer's securities. Factual business information generally does not include predictions, projections, forecasts or opinions with respect to valuation of a security, nor for a continuously offered fund would it include information about past performance of the fund. (Release No. 33-5180).

Reference: Rule 500.

History: Issued August 6, 2015.

¶1525 [Pre-Existing Relationships]

Question 256.26

Question: Does an offer of securities in a Regulation D offering to a prospective investor with whom the issuer, or a person acting on the issuer's behalf, has a pre-existing, substantive relationship constitute a general solicitation in contravention of Rule 502(c)?

Answer: No. The existence of such a pre-existing, substantive relationship is one means, but not the exclusive means, of demonstrating the absence of a general solicitation in a Regulation D offering. *See* Securities Act Release No. 6825 (Mar. 15, 1989), at fn. 12. Accordingly, an offer of the issuer's securities to the person with whom the issuer, or a person acting on its behalf, has such a relationship would not constitute a general solicitation and, therefore, would not be in contravention of Rule 502(c).

Reference: Rule 502(c).

History: Issued August 6, 2015.

¶1526 [Absence of Pre-Existing Relationship]

Question 256.27

Question: Are there circumstances under which an issuer, or a person acting on the issuer's behalf, can communicate information about an offering to persons with whom it does not have a pre-existing, substantive relationship without having that information deemed a general solicitation?

Answer: Yes. The staff is aware of long-standing practices where issuers and persons acting on their behalf are introduced to prospective investors who are members of an informal, personal network of individuals with experience investing in private offerings. For example, we acknowledge that groups of experienced, sophisticated investors, such as "angel investors," share information about offerings through their network and members who have a relationship with a particular issuer may introduce that issuer to other members. Issuers that contact one or more experienced, sophisticated members of the group through this type of referral may be able to rely on those members' network to establish a reasonable belief that other offerees in the network have the necessary financial experience and sophistication. Whether there has been a general solicitation is a fact-specific determination. In general, the greater the number of persons without financial experience, sophistication or any prior personal or business relationship with the issuer that are contacted by an issuer or persons acting on its behalf through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation.

Reference: Rule 500.

History: Issued August 6, 2015.

¶1527 [Investment Advisers]

Question 256.28

Question: Is someone other than a broker-dealer able to form a pre-existing, substantive relationship with a prospective offeree as a means of establishing that a general solicitation is not present in a Regulation D offering?

Answer: Yes. We believe investment advisers registered with the Securities and Exchange Commission may be able to form a pre-existing relationship with prospective offerees that are clients of the adviser. As fiduciaries, such advisers owe their clients the duty to provide only suitable investment advice. To fulfill the obligation, an adviser must make a reasonable determination that the investment advice provided is suitable for the client based on the client's financial situation and investment objective, such that a substantive relationship could exist.

Reference: Rule 500.

History: Issued August 6, 2015.

¶1528 [Pre-Existing]

Question 256.29

Question: What makes a relationship "pre-existing" for purposes of demonstrating the absence of a general solicitation under Rule 502(c)?

Answer: A "pre-existing" relationship is one that the issuer has formed with an offeree prior to the commencement of the securities offering or, alternatively, that was established through either a registered broker-dealer or investment adviser prior to the registered broker-dealer or investment adviser participation in the offering. *See, e.g.*, the *E.F. Hutton & Co.* letter (Dec. 3, 1985).

Reference: Rule 502(c).

History: Issued August 6, 2015.

¶1529 [Minimum Waiting Period]

Question 256.30

Question: Is there a minimum waiting period required for an issuer, or a person acting on its behalf, to establish a pre-existing, substantive relationship with a prospective offeree in order to demonstrate that a general solicitation is not involved?

Answer: No. While there is no minimum waiting period, the issuer must establish such a relationship prior to the commencement of the offering, or, if the relationship was established through either a registered broker-dealer or investment adviser, the relationship must be established prior to the time the registered broker-dealer or investment adviser began participating in the offering. The staff, however, has allowed a limited accommodation for offerings by private funds that rely on the exclusions from the definition of "investment company" set forth in Investment Company Act Section 3(c)(1) andSection 3(c)(7) of the Investment Company Act. This limited accommodation permits an individual who qualifies as an accredited or sophisticated investor to purchase, after the end of a waiting period, securities in private fund offerings that were posted on a website platform prior to the investor's subscription to the platform, in view of the fact that private fund offerings are made on a semi-continuous basis (quarterly or annually). See the *Lamp Technologies, Inc.* letter (May 29, 1997).

Reference: Rule 502(c).

History: Issued August 6, 2015.

¶1530 [Substantive]

Question 256.31

Question: What makes a relationship "substantive" for purposes of demonstrating the absence of a general solicitation under Rule 502(c)?

Answer: A "substantive" relationship is one in which the issuer (or a person acting on its behalf) has sufficient information to evaluate, and does, in fact, evaluate, a prospective offeree's financial circumstances and sophistication, in determining his or her status as an accredited or sophisticated investor. Self-certification alone (by checking a box) without any other knowledge of a person's financial circumstances or sophistication is not sufficient to form a "substantive" relationship.

Reference: Rule 502(c).

History: Issued August 6, 2015.

¶1531 [Other Substantive Relationships]

Question 256.32

Question: Can anyone other than registered broker-dealers and investment advisers form a pre-existing, substantive relationship with a prospective offeree as a means of establishing that a general solicitation is not involved in a Regulation D offering?

Answer: Yes. The Commission has stated that:

> Generally, staff interpretations of whether a "pre-existing, substantive relationship" exists have been limited to procedures established by broker-dealers in connection with their customers. This is because traditional broker-dealer relationships require that a broker-dealer deal fairly with, and make suitable recommendations to, customers, and, thus, implies that a substantive relationship exists between the broker-dealer and its customers. [The Commission has] long stated, however, that the presence or absence of a general solicitation is always dependent on the facts and circumstances of each particular case. Thus, there may be facts and circumstances in which a third party, other than a registered broker-dealer, could establish a "pre-existing, substantive relationship" sufficient to avoid a "general solicitation." [Securities Act Release No. 7856 (Apr. 28, 2000)]

The staff has also recognized particular instances where issuers have developed pre-existing, substantive relationships with prospective offerees. *See, e.g.*, the *Woodtrails — Seattle, Ltd.* letter (Aug. 9, 1982). However, in the absence of a prior business relationship or a recognized legal duty to offerees, we believe it is likely more difficult for an issuer to establish a pre-existing, substantive relationship, especially when contemplating or engaged in an offering over the Internet. Issuers would have to consider not only whether they have sufficient information about particular offerees, but also whether they in fact use that information appropriately to evaluate the financial circumstances and sophistication of the prospective offerees prior to commencing the offering. Issuers may therefore wish to consider whether conducting the offering under Rule 506(c) would provide greater certainty that an exemption may be available for the offering.

Reference: Rule 506(c).

History: Issued August 6, 2015.

¶1532 [Demo Day or Venture Fair]

Question 256.33

Question: Does a demo day or venture fair necessarily constitute a general solicitation for purposes of Rule 502(c)?

Answer: No. Whether a demo day or venture fair constitutes a general solicitation for purposes of Rule 502(c) is a facts and circumstances determination. Of course, if a presentation by the issuer does not involve an offer of a security, then the requirements of the Securities Act are not implicated. Where a presentation by the issuer involves an offer of a security, the presentation at a demo day or venture fair may not constitute a general solicitation if, for example, attendance at the demo day or venture fair is limited to persons with whom the issuer or the organizer of the event has a pre-existing, substantive relationship or have been contacted through an informal, personal network as described in Question 256.27. If potential investors are invited to the presentation by the issuer or a person acting on its behalf by means of a general solicitation and the presentation involves the offer of a security, Rule 506(c) may be available if the issuer takes reasonable steps to verify that any purchaser is an accredited investor and the purchasers in the offering are limited to accredited investors.

Reference: Rule 502(c); Rule 506(c).

History: Issued August 6, 2015.

¶1533 [Single Offering]

Question 256.34

Question: An issuer has been conducting a private offering in which it has made offers and sales in reliance on Rule 506(b). Less than six months after the most recent sale in that offering, the issuer decides to generally solicit investors in reliance on Rule 506(c). Are the factors listed in the Note to Rule 502(a) the sole means by which the issuer determines whether all of the offers and sales constitute a single offering?

Answer: No. Under Securities Act Rule 152, a securities transaction that at the time involves a private offering will not lose that status even if the issuer subsequently decides to make a public offering. Therefore, we believe under these circumstances that offers and sales of securities made in reliance on Rule 506(b) prior to the general solicitation would not be integrated with subsequent offers and sales of securities pursuant to Rule 506(c). So long as all of the applicable requirements of Rule 506(b) were met for offers and sales that occurred prior to the general solicitation, they would be exempt from registration and the issuer would be able to make offers and sales pursuant to Rule 506(c). Of course, the issuer would have to then satisfy all of the applicable requirements of Rule 506(c) for the subsequent offers and sales, including that it take reasonable steps to verify the accredited investor status of all subsequent purchasers.

Reference: Rule 152; Rule 506.

History: Issued November 17, 2016.