Concurrent Public Offerings and Private Placements

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Why is this topic important?

- Companies may wish to execute a concurrent public offering and private placement for many reasons, including the length of time it takes to execute a public offering
- The SEC's guidance on this topic has changed and been clarified over time
- Consequences of getting it wrong:
  - Delayed or withdrawn IPO
  - Violations of Section 5
  - Rescission rights for purchasers of company stock
  - Enforcement action with the SEC
  - Integration

What are the issues?

- Under Section 5 of the Securities Act of 1933, as amended ("Securities Act"), every "offer" of securities requires a registration or exemption from registration
- "Offer" is broadly defined under Section 2(a)(3) of the Securities Act and therefore the private offering could be considered a violation of Section 5 (or "gun jumping") by offering securities for sale prior to the filing of a registration statement for the public offering
- Filing a Form S-1 to register for the public can by itself be viewed as "general advertising" which negates the availability of most private placement exemptions

Integration

- The SEC's integration doctrine was developed to prevent the circumvention of the registration requirements through the separation of a single non-exempt offering into several exempt offerings
- Historically, the SEC considered concurrent offerings a potential integration issue and developed a 5 factor test for whether offerings should be integrated
  - (1) different offerings are part of a single plan of financing;
  - (2) the offerings involve issuance of the same class of security;
  - (3) the offerings are made at or about the same time;
  - (4) the same type of consideration is to be received in each offering; and
  - (5) the offerings are made for the same general purpose

Black Box and Squadron Ellenoff No-Action Letters

- In the *Black Box Incorporated* no-action letter ("*Black Box*"), the SEC took the position that the offer and sale of convertible debentures to a limited number of purchasers in a private placement transaction need not be integrated with a concurrent registered offering of common stock
  - The private offering contemplated by Black Box was expected to involve 35 or fewer purchasers, consisting of qualified institutional buyers and a small number of large institutional accredited investors
- The SEC narrowed its Black Box position in the *Squadron, Ellenoff, Pleasant & Lehrer* no action letter ("*Squadron Ellenoff*")

Integration Exceptions

- Rule 502(a) – provides a six-month safe harbor wherein multiple private offerings that are conducted at least six (6) months apart will not be integrated
  - A private offering that is conducted at least six (6) months before or after a registered or exempt public offering will not be integrated with the public offering
- Rule 152 – provides a safe harbor for issuers undertaking a registered public offering after conducting a private offering
  - As interpreted by the SEC, a completed private offering will not be integrated with a subsequently commenced registered public offering

Integration Exceptions cont.

- Rule 155 – provides a safe harbor for abandoned private and public offerings
  - Generally, the rule allows: (i) a public offering immediately following an abandoned private offering and (ii) a private offering thirty (30) days after an abandoned public offering, without integrating the public and private offerings in either situation
  - Note that Rule 155 does not replace, but rather supplements, the five-factor test that will be used whenever the safe harbor is inapplicable.
    - For example, the five-factor test, rather than Rule 155, would apply when evaluating whether two or more private offerings should be integrated with each other

SEC Clarifies Applicable Guidance

- Compliance and Disclosure Interpretations: Securities Act Sections 139.25 (Nov. 26, 2008) – the SEC indicated that the five-factor integration analysis does not apply to the situation in which an issuer is conducting concurrent private and public offerings and instead refers to Release 33-8828
- SEC's Release 33-8828 (Aug. 3, 2007) – clarifies that in appropriate circumstances, there can be a side-by-side private offering under Securities Act Section 4(a)(2) or the Securities Act Rule 506 safe harbor with a registered public offering without having to limit the private offering as set forth in *Black Box* and *Squadron Ellenoff*
  - The filing of the registration statement does not eliminate the company's ability to conduct a concurrent private offering, whether it is commenced before or after the filing of the registration statement

Concurrent Public and Private Offering General Solicitation Guidance

- SEC Release 33-8828 focuses on **how the investors in the private offering are solicited**, whether by the registration statement or through some other means that would not otherwise foreclose the availability of the Section 4(a)(2) exemption:
  - If the investors in the private offering become interested in the private offering by means of the registration statement, then the registration statement will have served as a general solicitation for the securities being offered privately and Section 4(a)(2) would not be available
  - If the investors in the private offering become interested in the private offering through some means other than the registration statement (for example: a substantive, pre-existing relationship between the investors and the company), then the registration statement would not have served as a general solicitation for the private offering and Section 4(a)(2) would be available, assuming the offering is otherwise consistent with the exemption

JOBS Act

- New Rule 506(c) allows for general solicitation and advertising in conducting an exempt offering
  - As a result, the filing of a registration statement in connection with a concurrent public offering would not invalidate the exemption (provided all sales under the 506(c) offering are to accredited investors)
  - Alternatively, a registrant could use Section 4(a)(2) for its private placement and rely on the guidance in the SEC's Release No. 33-8828 to concurrently conduct a public offering
- New Section 5(d) of the Securities Act permits registrants to "test the waters" and conduct pre-filing meetings with qualified institutional buyers or institutional accredited investors
  - Meetings that comply Section 5(d) of the Securities Act are no longer "gun jumping" violations

Key Takeaways

- Concurrent public offerings and private placements are subject to the SEC's general solicitation guidance in Release 33-8828 which is more pragmatic and flexible than the five factor integration rules and the *Black Box* and *Squadron Ellehnoff* No-Action Letters
- Each offering must satisfy the applicable private placement exemption or public offering registration rules
  - Make sure to keep appropriate separation between the two sets of offerees and a focus on how these sets of offerees are being solicited
- It is also critical to keep good records regarding the process, including how potential investors were solicited, steps taken to verify accredited investor status, etc.

Thank you!

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