Concurrent Public Offerings and Private Placements

February 16, 2017

Steve Bochner
Corporate

Megan Baier
Corporate

The materials in this presentation, and the opinions expressed in this webinar, are those of the authors and speakers, respectively, and do not necessarily reflect the opinions of the companies or institutions with which such authors or speakers are affiliated. In addition, neither these materials nor the views expressed in this webinar are intended to constitute legal advice as to any particular situation.
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  - Delayed or withdrawn IPO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!

Steve Bochner
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
sbochner@wsgr.com
Office: (650) 354-4110

Megan Baier
Wilson Sonsini Goodrich & Rosati
1301 Avenue of the Americas
New York, New York 10019
mbaier@wsgr.com
Office: (212) 497-7736