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REGULATION D CHANGES WOULD EXPAND MARKETING TO WEALTHIER INVESTORS

The Securities and Exchange Commission has proposed revisions to its Regulation D under the Securities Act of 1933 that, if adopted, would permit limited advertising in securities offerings made to “large accredited investors,” a new category of offerees under the Regulation. The Commission proposed new Rule 507 on August 3, 2007, in its Release Nos. 33-8828 and IC-27922 (the “Release”). The period for public comment ended on October 9, 2007. Over 50 comment letters were received by the Commission, which are available for review on the SEC’s website.

Rule 507 is restricted to offers and sales to “large accredited investors,” defined to include individuals with \$2.5 million or more in investments or an annual income of at least \$400,000 (\$600,000 with spouse). The “accredited investor” test would continue to be \$1 million of net worth or an annual income of \$200,000 (or \$300,000 with spouse). The revisions introduce an “investments” test for large accredited investors in lieu of the existing “net worth” test for accredited investors.

Legal entities would be required to have at least \$10 million in investments to qualify as a large accredited investor. The accredited investor test for legal entities is \$500,000 or more. Legal entities not now subject to dollar-amount thresholds to qualify as accredited investors, e.g., government-regulated entities, would not be subject to dollar thresholds to qualify as large accredited investors.

Public announcements of Rule 507 offerings would be permitted in tombstone-like advertisements. An advertisement could only be made in written form and its content would be limited to the name and address of the issuer, a description of the issuer’s business in 25 words or less, a brief description of the securities offered, the definition of a large accredited investor, suitability standards and issuer contact information.

Issuers will only be able to sell to large accredited investors in Rule 507 transactions. There is no “up to 35 non-accredited investors” allowance as in Rule 506 of the Regulation. Running Rule 507 and Rule 506 offerings side-by-side risks loss of the exemptions because the offerings might be integrated.

Securities sold under Rule 507 would be considered “covered securities” under Section 18 of the 1933 Act, and, therefore, be primarily regulated at the federal level. The integration safe harbor for all Regulation D offerings is reduced to 90 days between offerings from the current six month period.

The Release notes that Rule 507 is being proposed pursuant to the SEC’s general exemptive authority under Section 28 of the 1933 Act, rather than Section 4(2) of the 1933 Act that exempts from registration transactions not involving any public offering. As a consequence, the Release points out, “pooled investment vehicles” that rely on the exclusion from the definitions of an “investment company” provided in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act would not be able to rely on the “limited advertising” to be allowed under proposed Rule 507.

The Investment Company Institute’s comment letter dated October 9, 2007, states that it “strongly opposes [the limited advertising provision of proposed Rule 507] because it represents a dangerous erosion of long-established line between public and private offerings.” Moreover, the Institute states, “the [SEC] has failed to demonstrate that allowing limited advertisements for private securities offerings is necessary or appropriate in the public interest and consistent with the protection of investors.”

It remains to be seen whether and the extent to which the Commission may reconsider its proposal. Other commentators welcome the expansion of marketing alternatives. And Rule 507 may particularly appeal to insurance company issuers of retirement oriented products who seek more efficient targeting of wealthier niche buyers.

We will keep you updated on developments. In the meantime, for additional information, please contact Peter E. Panarites at (202) 965-8141 or pep@jordenusa.com.

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