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Distinctions without a difference for US securities?

In the United States, we've long distinguished between the requirements applicable to private offerings and those applicable to public offerings. In fact, there were clearly delineated lines that couldn't be crossed in the context of a private offering. A private offering was understood to be an offering made principally to institutional or sophisticated investors that had a pre-existing relationship with the issuer or the financial intermediary, and had access to financial or other information about the issuer. General solicitation was strictly forbidden, and the securities sold in unregistered offerings were subject to transfers restrictions such that they were not fungible with the issuer's securities trading on an exchange. Over time, the lines between private and public have become increasingly blurred. The rising popularity of hybrid offering techniques, like Pipe transactions, which have as their objective making privately offered securities more liquid and less private in character have contributed to this. Also, the holding period for restricted securities to become freely transferable has been shortened, and private secondary trading markets are becoming more important venues. Of course, the biggest changes to our first principles of securities regulation have been brought about by the JOBS Act, which permits general solicitation to be used, and permits social media and the internet to become capital raising tools for exempt offerings. So, it is easy to see that private offerings are becoming more, as it were, public.

Perhaps less attention has been focused on the inverse: public offerings becoming more private. In the exuberance following the JOBS Act, careful consideration should be given to the fact that market structure changes have led many seasoned issuers to favour offering techniques that take elements of private offerings and apply these to offerings of registered securities. The confidentially marketed public offering, or wall-crossed deal, is just the latest evolutionary development in hybrid offerings. During 2012, most follow-on offerings in the US were completed confidentially, and not broadly marketed. Marketing a public offering like a private placement addresses very real problems. An issuer must avoid announcing a potential offering, having its stock shorted, and having to pull the offering. Heightened levels of volatility over prolonged periods following the financial crisis and through the Euro crisis have also contributed to further uncertainty regarding deal execution. In a world where very little seems private any more, it may be that only public offerings will continue to become more private.

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