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Practice Pointers on: Navigating the Securities Act's Prohibition on General Solicitation and General Advertising

The Jumpstart Our Business Startups Act (the "JOBS Act") included a measure directing the Securities and Exchange Commission (the "SEC" or "Commission") to relax the prohibition against general solicitation and general advertising pursuant to Rule 502(c) ("Rule 502(c)") under Regulation D ("Reg D") of the Securities Act of 1933, as amended (the "Securities Act"), for certain Rule 506 offerings. In July 2013, the SEC adopted final rules establishing that an issuer relying on Rule 506(c) may engage in general solicitation "provided that the sales are limited to accredited investors and an issuer takes reasonable steps to verify that all purchasers of the securities are accredited investors."[1]

Section 4(a)(2) of the Securities Act ("Section 4(a)(2)") provides an exemption from the registration requirements under Section 5 of the Securities Act for a transaction undertaken by an issuer that does not involve any public offering. An issuer may rely on Rule 506(b) under the Securities Act and/or Section 4(a)(2) if it does not use general solicitation. The JOBS Act did not address the meaning of "general solicitation" under the Securities Act. However, since the new rules required issuers and other market participants to consider whether in connection with a proposed offering they would rely on Section 4(a)(2)/Rule 506(b) or on the new Rule 506(c), renewed attention was placed on the types of communications that may constitute a "general solicitation."

The SEC has not explicitly defined the terms "general solicitation" or "general advertising" under Reg D. However, Rule 502(c) lists several examples of general solicitation and general advertising, including (1) "any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio"[2] and (2) "any seminar or meetings whose attendees have been invited by any general solicitation or general advertising."[3] These are communications that are not targeted or directed to a specific individual or to a particular audience, but rather broad-based communications that may reach potential investors not known to the issuer or its financial intermediary. Over time, the SEC Staff has provided guidance, mainly through no-action letters and more recently through Compliance and Disclosure Interpretations ("C&DIs"), regarding the types of communications that would be viewed as a "general solicitation."

Below we summarize the guidance.

A. General solicitation

Pre-Existing, Substantive Relationships

A communication made by an issuer or its agent to an investor with which either has a pre-existing, substantive relationship would not constitute a "general solicitation."[4]

The Meaning of "Pre-Existing."

The SEC Staff has explained that a "pre-existing" relationship is one that the issuer has formed with a prospective 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's or investment adviser's participation in the offering."[5]

In *E.F. Hutton & Co.*, the SEC Staff explained that whether a relationship was pre-existing hinged largely on whether there was "sufficient time between establishment of the relationship and an offer so that the offer is not considered made by general solicitation or advertising."[6] E.F. Hutton & Co. ("E.F. Hutton"), an investment bank, intended to send to certain prospective offerees pre-offering materials and/or private offering memoranda in accordance with specific investor selection procedures that it had developed.[7] These prospective offerees were those with whom E.F. Hutton had established a prior business relationship or whom had indicated in writing that they desired to form such a relationship. The SEC Staff found that E.F. Hutton had failed to address whether its relationships with the proposed offerees were pre-existing, because it was unclear whether the relationships were the result of general solicitation in connection with a current offering.[8] Similarly, in *Webster Management Assured Return Equity Management Group Trust*, the SEC Staff

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[1] Securities and Exchange Commission, "Eliminating the Prohibition on General Solicitation and General Advertising in Certain Offerings," SEC Open Meeting (July 10, 2013), *available at* https://www.sec.gov/news/press/2013/2013-124-item1.htm.
[2] 17 C.F.R. § 230.502(c)(1).
[3] 17 C.F.R. § 230.502(c)(2).
[4] *See* SEC Division of Corporation Finance Compliance and Disclosure Interpretations, Securities Act Rules (updated Aug. 6, 2015), at Question 256.26. *See also E.F. Hutton & Company*, SEC No-Action Letter (Dec. 3, 1985) ("In determining what constitutes a general solicitation the [SEC Staff] has underscored the existence and substance of prior relationships between the issuer or its agents and those being solicited") (referred to herein as "*E.F. Hutton & Co.*").
[5] C&DI, *supra* note 4 at Question 256.29.
[6] *E.F. Hutton*, *supra* note 4.
[7] *Id.*
[8] *Id.*

found that because a selling agent had contacted potential customers on behalf of a trust, customers with whom neither the selling agent nor the trust had formed any relationship prior to the commencement of the trust's securities offering, the arrangement constituted a general solicitation.[9]

The Meaning of "Substantive."

A relationship is "substantive" where the issuer (or its agent) "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."[10] Self-certification by a person regarding his or her status as an accredited or sophisticated investor, alone, is not sufficient to establish a substantive relationship.[11]

In *Citizen VC, Inc.*, the SEC Staff asserted that the "quality of the relationship between the issuer (or its agent) and an investor" is the critical factor for evaluating whether a substantive relationship exists.[12] The SEC Staff indicated that the quality of the relationship depends on whether the issuer (or its agent) has sufficient information to evaluate a prospective offeree's financial circumstances and sophistication. The SEC Staff found that Citizen VC, Inc. ("Citizen VC") was able to establish a substantive relationship with prospective investors through the implementation of its policies and procedures, including the completion of a generic online "accredited investor" questionnaire (*i.e.*, a self-certification of accreditation) and a subsequent "relationship establishment period," both of which were designed specifically to evaluate the prospective investor's sophistication and ability to understand the nature and risks of the potential offering.[13]

In *E.F. Hutton & Co.*, the SEC Staff found that a substantive relationship had been partially created between E.F. Hutton and prospective investors, to whom E.F. Hutton intended to mail pre-offering materials and/or private offering memoranda related to real property investments. E.F. Hutton had put in place procedures that would ensure that the offering materials were sent only to prospective offerees with whom Hutton had established a prior business relationship in the past or had indicated (in writing) that they desired to enter into such a business relationship.[14] The SEC Staff determined that E.F. Hutton had failed to establish the existence of a substantive relationship with investors that had merely indicated in response to a questionnaire (the "Suitability Questionnaire") and new client intake form (the "New Account Form") that they desired to form such a relationship. While the information obtained from the Suitability Questionnaires and New Account Forms was relevant for evaluating the sophistication and financial circumstances of each client, the form relied entirely on the responses of the individual investor and, therefore, constituted self-certification.

Establishing a Pre-Existing, Substantive Relationship.

The SEC Staff has stated that there is no minimum waiting period required to demonstrate the existence of a relationship. The issuer must establish a relationship prior to the commencement of an offering. Where a relationship is established through either a 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."[15] Often private funds conduct "continuous offerings," and, in these cases, the pre-existing, substantive relationship would be established prior to the offering made to each investor, rather than the first offering made to the first investor. In *Lamp Technologies, Inc.*, the SEC Staff determined that the posting of private fund investment information on a password-protected website managed by Lamp Technologies, Inc. ("Lamp Technologies") did not constitute general solicitation.[16] Subscribers could only gain access to the private fund information on the website after (1) completing a generic questionnaire that would enable Lamp Technologies to form a reasonable basis on which to decide whether the prospective subscriber was an accredited investor and (2) paying a subscription fee to use the website. After satisfying these two requirements, a subscriber would receive a password granting him or her access to the information posted on the website. A subscriber would not be permitted to invest in any posted fund on the website for 30 days following the subscriber's qualification in order to ensure that the subscriber did not take part in an offering that was commenced prior to the establishment of a substantive, pre-existing relationship. In reaching its conclusion that the website did not constitute general solicitation, the SEC Staff noted that the 30-day waiting period would ensure that subscribers "[did] not join to invest in any particular private fund."[17]

In *Citizen VC*, the SEC Staff found that the policies and procedures set forth by Citizen VC to ensure that there was a pre-existing, substantive relationship were sufficient for purposes of satisfying the requirements under Rule 502(c), notwithstanding the fact that there was no waiting period required before prospective investors could utilize Citizen VC's website to make investments.[18] However, the SEC

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[9] *Webster Management Assured Return Equity Management Group Trust*, SEC No-Action Letter (Nov. 11, 1986).
[10] C&DI, *supra* note 4 at Question 256.31.
[11] *Id.*
[12] *Citizen VC, Inc.*, SEC No-Action Letter (Aug. 6, 2015).
[13] *Id.* For further information on the policies and procedures implemented by Citizen VC, please see the section titled "Use of Questionnaires and Electronic Media" below.
[14] *E.F. Hutton*, *supra* note 4.
[15] *Id.*
[16] *See Lamp Technologies, Inc.*, SEC No-Action Letter (May 29, 1997) (referred to herein as "*Lamp Technologies*").
[17] *Id.*
[18] *See Citizen VC*, *supra* note 12.

Staff noted that a prospective investor would only be presented with an investment opportunity after the investor had gone through Citizen VC's extensive vetting process.[19]

In *H.B. Shaine & Co., Inc.*, the SEC Staff determined that the distribution of a generic questionnaire to potential accredited and sophisticated investors by H.B. Shaine & Co., a registered broker-dealer ("H.B. Shaine"), for purposes of evaluating the prospective investors' ability to participate in future exempt offerings was neither general solicitation nor general advertising. The SEC Staff's conclusion was based partly on the fact that sufficient time would have passed between the completion of H.B. Shaine's questionnaire and the contemplation, or commencement, of any potential offering.[20]

Who May Establish a Pre-Existing, Substantive Relationship?

The existence of a pre-existing, substantive relationship often rests on whether appropriate procedures have been established by broker-dealers in connection with their customers.[21] As the SEC Staff has explained, this is due to the fact that "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."[22] Likewise, an investment adviser, as a fiduciary, would need to "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."[23]

The SEC Staff, however, has affirmed that other third parties could establish a pre-existing, substantive relationship sufficient to avoid general solicitation.[24] For example, the SEC Staff determined in *Woodtrails – Seattle, Ltd.* that an issuer, Woodtrails – Seattle, Ltd. ("Woodtrails"), had developed pre-existing, substantive business relationships with its prospective offerees, because (1) such relationships were established within the last three years, and (2) the nature of those relationships was evidenced by (i) a determination (in part) by the general partner, at the time of the original investment, that the investors met specific suitability standards and (ii) the belief by Woodtrails that each of the proposed offerees was sophisticated and fully capable of evaluating the risks and merits of a potential investment.[25]

While an issuer, as opposed to a broker-dealer or investment adviser, may establish a pre-existing, substantive relationship with a prospective investor, the SEC Staff has noted that "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."[26] Therefore, an issuer, in the context of an Internet-based offering, would need to consider whether it has sufficient information about particular offerees and use that information appropriately to evaluate the financial circumstances and sophistication of the prospective offerees prior to commencing the offering.

The Nature of the Communications

The Number of Offerees.

The availability of the private placement exemption is not based on the number of offerees; however, in assessing whether an issuer or its agent has engaged in general solicitation, the Commission and the SEC Staff have considered the breadth of the communications.[27] The SEC Staff has stated that, generally, the "greater number of persons without financial experience, sophistication or any prior personal or business relationship with the issuer that are contacted by an issuer [(or its agent)] . . . through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation."[28]

In *Woodtrails – Seattle, Ltd.*, the SEC Staff determined that Woodtrails did not generally solicit when it proposed to mail a written offer to approximately 330 persons who had previously invested in other limited partnerships sponsored by Woodtrails' general partner. Likewise, in *Michigan Growth Capital Symposium*, the SEC Staff determined that a symposium, sponsored by the University of Michigan's School of Business for the purpose of providing Michigan firms with efficient access to national private equity financing, did not involve general solicitation. In its letter to the SEC Staff, the Michigan Growth Capital Symposium noted that, like the 330 prospective investors in *Woodtrails – Seattle, Ltd*., "the number of invitees [to the Symposium] would not appear on its face to cause a

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[19] *Id.*
[20] *H.B. Shaine & Co., Inc.*, SEC No-Action Letter (May 1, 1987) (referred to herein as "*H.B. Shaine & Co.*").
[21] C&DI, *supra* note 4 at Question 256.32.
[22] *Id.*
[23] C&DI, *supra* note 4 at Question 256.28.
[24] *See* Securities Act Release No. 33-7856 (Apr. 28, 2000).
[25] *See Woodtrails – Seattle, Ltd.*, SEC No-Action Letter (Aug. 9, 1982) (referred to herein as "*Woodtrails – Seattle*").
[26] C&DI, *supra* note 4 at Question 256.32.
[27] *See* Securities Act Release No. 33-6339, n. 30 (Aug. 7, 1981) (". . . depending on the actual circumstances, offering[s] made to such large numbers of purchasers may involve a violation of the prohibitions against general solicitation and general advertising"). *See also* SEC, Staff Report, Implications of the Growth of Hedge Funds, at 15 n.44 (Sept. 2003), *available at* https://www.sec.gov/news/studies/hedgefunds0903.pdf (repeating the same caution, originally noted in the Regulation D proposing release, that offerings made to large numbers of purchasers may involve a violation of the prohibitions on general solicitation and general advertising).
[28] C&DI, *supra* note 4 at Question 256.27.

problem, given the characteristics of the attendees, their varied purposes, and sophistication and qualification of potential investors, and the unique nature of the presentations."[29]

Cold Calling.

The SEC Staff has offered guidance on whether "cold calling" will constitute general solicitation, irrespective of whether a pre-existing, substantive relationship has been established. For example, in *Mobile Biopsy, LLC*, the SEC Staff determined that a series of "cold" communications, in which Mobile Biopsy, LLC ("Mobile Biopsy"), and its affiliated limited liability companies would contact all physicians in North Carolina for the purpose of offering securities in a proposed venture, constituted general solicitation.[30] While Mobile Biopsy asserted that limiting contact to only surgeons and radiologists "who have an interest in treating breast cancer," as well as "the practice groups and medical facilities with which such doctors are associated," was a permitted "targeted approach" under Rule 502(c), the SEC Staff nevertheless viewed the solicitation as being directed generally toward a large group of investors.[31] Similarly, in *General Solicitation Under Rule 502(c) of SEC Regulation D*, the SEC Staff explained that it would not grant no-action relief under Rule 502(c) in the case of a "cold mass mailing" to broker-dealers, investment advisers, accountants, and attorneys of a brochure summarizing a private placement memorandum in connection with a potential Rule 505 or 506 offering.[32]

Use of Questionnaires and Electronic Media

As discussed below, both the Commission and the SEC Staff have affirmed that in certain circumstances, generic print questionnaires and forms of electronic media (*e.g.*, websites) may be used to assess investor suitability prior to presenting an investment opportunity.

Print Questionnaires.

The SEC Staff has offered guidance as to whether the use of generic questionnaires that target particular types of investors will constitute general solicitation. For example, in *H.B. Shaine & Co., Inc.*, the SEC Staff noted that the distribution of generic questionnaires by H.B. Shaine to prospective accredited and sophisticated investors for the purpose of evaluating their suitability for participating in Rule 505 and Rule 506 offerings did not violate Rule 502(c)'s prohibition on general solicitation.[33] The questionnaire used by H.B. Shaine was updated annually and collected specific information regarding a prospective investor's employment history, business experience, business or professional education, investment experience, income, and net worth, as well as whether the prospective investor had the "ability to evaluate the merits and risk of venture capital investments."[34] However, instead of merely allowing a prospective investor to self-certify as a suitable investor, H.B. Shaine evaluated each of the responses to determine the prospective investor's potential as an accredited investor.

Likewise, in *Bateman Eichler, Hill Richards, Inc.*, the SEC Staff found that the mailing of a letter and suitability questionnaire (to evaluate accreditation and sophistication) by Bateman Eichler, a broker-dealer, to a limited mailing list of professionals and businesspeople on a monthly basis did not violate Rule 502(c).[35] Bateman Eichler would follow up with each investor to obtain additional personal and financial information based on the responses provided in the investor's suitability questionnaire. A respondent who satisfactorily completed the "follow-up stage" would then be placed on a list of prospective investors for future exempt offers. The SEC Staff in *Bateman Eichler* based its determination on the fact that (1) the questionnaire would be generic in nature and would not make reference to any specific investment currently offered or contemplated for offering by Bateman Eichler and (2) that Bateman Eichler would implement procedures designed to ensure that persons solicited were not offered any securities that were offered or contemplated for offering at the time of the solicitation.

However, in *AgriStar Global Networks, Ltd.*, the SEC Staff did not grant no-action relief to AgriStar Global Networks, Ltd. ("AgriStar"), in connection with AgriStar's plan to establish a database of accredited investors.[36] AgriStar intended to distribute generic questionnaires to certain U.S. farms and their owners (or operators) in order to solicit information about investors' sophistication (*e.g.*, previous investment experience, net worth, and annual income) and status as accredited investors. Such information would then be placed in a database maintained by AgriStar for future offerings. The questionnaire itself would not specifically refer to any private offerings to be made by AgriStar in the future, and AgriStar would ensure a sufficient waiting period prior to providing any potential qualified investor with any information relating to a proposed offering of AgriStar securities.[37] Unlike in *H.B. Shaine & Co.* and *Bateman Eichler*, which

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[29] *Michigan Growth Capital Symposium*, SEC No-Action Letter (May 4, 1995). *But see Mineral Lands Research & Marketing Corporation*, SEC No-Action Letter (Dec. 4, 1985) (where the SEC Staff did not make a determination as to whether the fact that a class of offerees was limited to only 600 existing clients was material to determining if general solicitation had occurred).
[30] *Mobile Biopsy, LLC*, SEC No-Action Letter (Aug. 11, 1999) (referred to herein as "*Mobile Biopsy*").
[31] *Id.*
[32] *General Solicitation Under Rule 502(c) of SEC Regulation D*, SEC No-Action Letter (Jan. 16, 1990).
[33] H.B. Shaine & Co., *supra* note 20.
[34] *Id.*
[35] *Bateman Eichler, Hill Richards, Inc.*, SEC No-Action Letter (Dec. 3, 1985) (referred to herein as "*Bateman Eichler*").
[36] *AgriStar Global Networks, Ltd.*, SEC No-Action Letter (Feb. 9, 2004) (referred to herein as "*AgriStar*").
[37] *Id.*

involved similar questionnaires, AgriStar was operating in its capacity as an issuer and not a broker-dealer.

Electronic Media and Websites.

Both the Commission and the SEC Staff have clarified when use of electronic media and the Internet will constitute a general solicitation. In October 1995, the Commission explained that an offer conducted through an issuer's unrestricted, publicly available website would violate Rule 502(c), even if the website required various forms of information from a prospective investor prior to displaying any offering materials.[38] This was reaffirmed by the SEC Staff in August 2015.[39] However, in *IPONET*, the SEC Staff found that W.J. Gallagher & Company, Inc. ("Gallagher"), a registered broker-dealer, and its affiliate, IPONET, did not engage in general solicitation when Gallagher invited prospective investors to complete a questionnaire on IPONET's website for the purpose of building a customer base and database of accredited and sophisticated investors.[40] The SEC Staff noted that its conclusion was based on the fact that:

- the invitation to complete the questionnaire and the questionnaire itself would be generic in nature and would not reference any specific transactions posted or to be posted on the password-protected page of IPONET;
- IPONET's password-protected page would be available to a particular investor only after Gallagher made the determination that the particular potential investor was accredited or sophisticated; and
- a prospective investor could purchase securities only in transactions that were posted on the password-protected page of IPONET after the investor's qualification with IPONET.

In May 2000, however, the SEC Staff limited the scope of *IPONET*, noting that certain third-party service providers (that were neither registered broker-dealers nor affiliated with broker-dealers) had deviated substantially from the facts in *IPONET* by establishing websites that generally invite prospective investors to qualify as accredited or sophisticated as a prelude to participation; they also failed to require that prospective investors complete questionnaires needed to form a reasonable belief regarding their accreditation or sophistication.[41] Accordingly, the SEC Staff asserted that "these web sites, particularly those allowing for self-accreditation, raise significant concerns as to whether the offerings that they facilitate involve general solicitations."[42]

Notwithstanding these concerns, the SEC Staff again found in *Citizen VC* that a website could be used to both evaluate the suitability of prospective investors and provide investors with investment opportunities without contravening Rule 502(c).[43] Citizen VC intended to implement policies and procedures that would enable Citizen VC to thoroughly evaluate the sophistication of any potential investor before enabling him or her to use its website for investment opportunities. The policies and procedures included both an online questionnaire–which served the purpose of self-certification of accreditation–and a "relationship establishment period." As part of the relationship establishment period, Citizen VC would undertake several actions to establish a substantive relationship, including obtaining details related to the investor's prior investment experience and sophistication, and evaluating an investor's suitability and accuracy of information provided through the use of third-party credit reporting services. Accordingly, *Citizen VC* establishes that a website that solely requires self-certification of accreditation or sophistication will likely not satisfy the requirements under Rule 502(c). Instead, an issuer (or its agent) must also implement policies that ensure a comprehensive review of the accreditation and qualifications of any potential investor prior to making any offering through the use of a website or other form of electronic media.

Compilation of Information Related to Private Offerings

The SEC Staff has, on several occasions, articulated its views on whether the distribution of a compilation of information related to private issuers and offerings, including in the form of a newsletter, guide, magazine, or written analysis, constitutes general solicitation.

In *Richard Daniels*, the SEC Staff found that the dissemination of a newsletter on a subscription basis, which set forth information derived entirely from public records filed in the office of the Arizona Secretary of State concerning Arizona limited partnerships, would not violate Rule 502(c). Richard Daniels, the publisher of the newsletter, intended the newsletter to provide pertinent information contained in each certificate of limited partnership filed during the previous month, including: (i) the partnership name; (ii) names and addresses of general and limited partners; (iii) the type of partnership business; and (iv) the amount of initial and deferred capital contributions, as well as a summary of the previous month's limited partnership activity in Arizona (*e.g.*, the total number of limited partnerships formed and total capital raised). In reaching its conclusion, the SEC Staff noted that: (1) all Arizona limited partnerships would be included in the newsletter; (2) no analysis would be conducted of any issuer or any offering; and (3) neither the issuers listed in the newsletter nor any person acting on the issuers' behalf would be responsible for the preparation of or payment for the materials

[38] *See* Securities Act Release No. 33-7233 (Oct. 6, 1995).
[39] C&DI, *supra* note 4 at Question 256.23 (". . . 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").
[40] *IPONET*, SEC No-Action Letter (July 26, 1996) (referred to herein as "*IPONET*").
[41] *See* Securities Act Release No. 33-7856 (May 4, 2000).
[42] *Id.*
[43] *See Citizen VC*, *supra* note 12.

included in the publication.[44]

In *Nancy Blasberg*, the SEC Staff determined that the distribution of a guide, which set forth information concerning outstanding securities of selected companies–derived mainly from public resources (*e.g.*, public research materials and public reports) and information on issuing companies provided in response to requests made to such issuing companies–would not violate Rule 502(c). The guide included the general "terms and features of most outstanding private-placed or closely-held preferred stocks of utility, financial and transportation companies."[45] The SEC Staff based its conclusion largely on the fact that the guide would only "contain certain limited information [on issuers]" and "in no case would [the guide's creator] be in the employ of, or acting as agent for, any issuer contained in the guide."[46]

However, in *Tax Investment Information Corp.*, the SEC Staff found that the Tax Investment Information Corporation's ("TIIC") distribution of a circular, the *Tax Investment Letter*, to practicing accountants and attorneys regarding private placement offerings in Louisiana constituted general solicitation.[47] Unlike in *Richard Daniels* and *Nancy Blasberg*, the SEC Staff found that TIIC's review and analysis of private placements in the *Tax Investment Letter* did not equate to the mere "assimilation of data and calculations."[48] On the contrary, TIIC's written analysis would specifically provide "background data on the principals involved in the offering, the marketability of the investment and any other additional comments felt pertinent to the economic and/or tax ramifications of the investment."[49] The SEC Staff reached a similar conclusion in *J.D. Manning, Inc.*, in which J.D. Manning, Inc. ("J.D. Manning") planned to publish a periodic newsletter containing a list and description of close-held businesses that may have expected to make exempt private securities offerings to raise capital in the future.[50] Businesses choosing to participate in the newsletter would prepare materials for inclusion and pay for its publication. Subscribers of the newsletter would consist primarily of prospective investors and support service firms (*e.g.*, accountants, attorneys, financial institutions, etc.). J.D. Manning would solicit subscribers through either the use of print media or personal sales/speaking engagements. The SEC Staff especially noted that the newsletter constituted general solicitation because it would contain "the estimated amount of capital which may be raised [by participating businesses] within 12 months following publication."[51] Therefore, although none of the participating businesses were in the process of offering securities at the time of publication, these businesses could still raise capital shortly thereafter, which made the publication a general solicitation.

The SEC Staff has at times also found that it was unable to make a determination as to whether a publication containing a compilation of information related to certain private offerings violated Rule 502(c). For example, in *Oil and Gas Investor*, the SEC Staff found that it was unable to determine whether *Oil and Gas Investor* magazine, a publication that would contain factual information relating to offerings, registered and unregistered, of securities in oil and gas drilling programs, constituted general solicitation.[52] The magazine would only contain "bare-bones factual information relating to available [oil drilling] programs, both public and private" (*e.g.*, unit price, minimum subscriptions, aggregate amount of the offerings, and terms of the offerings), based on the magazine publisher's review of SEC filings and direct inquiries of companies known to sponsor oil and gas programs.[53] The publisher attempted to distinguish the magazine from *Tax Investment Information Corp.*, because, unlike the *Tax Investment Letter*, *Oil and Gas Investor* magazine "[could not] be used to induce others to make an investment since it [did] not contain a recommendation or purpose to set forth an evaluation upon which to base an investment decision."[54] However, the SEC Staff concluded that it was unable to make a determination under Rule 502(c) because there were unanswered questions regarding "the exact language of particular published material" and the issuers' role, if any, "regarding the publication of information concerning the offering of its securities."[55]

Seminars, Demo Days, and Venture Fairs

The Commission and the SEC Staff have also offered guidance regarding an issuer's participation in a "seminar" and whether this would constitute a general solicitation. Prior to 2013, the SEC Staff's interpretation of what constituted a permissible "seminar" rested largely on its 1995 determination in *Michigan Growth Capital Symposium*.[56] In *Michigan Growth Capital Symposium*, the SEC Staff was asked to determine whether a symposium, co-sponsored by the University of Michigan and the Office for the Study of Private Equity Finance ("OSPEF") of its School of Business, which functioned as a vehicle to provide Michigan firms with efficient access to the national private equity finance markets, was engaged in general solicitation. Only private companies that were selected by the director of the OSPEF could present at the symposium. The SEC Staff found that the symposium did not violate Rule 502(c) because: (1) the symposium was publicized through targeted mailing to "known accredited investors, limited generic advertising in the Venture Journal

[44] *Richard Daniels*, SEC No-Action Letter (Dec. 19, 1984) (referred to herein as "*Richard Daniels*").
[45] *Nancy Blasberg*, SEC No-Action Letter (July 12, 1986) (referred to herein as "*Nancy Blasberg*").
[46] *Id.*
[47] *Tax Investment Information Corp.*, SEC No-Action Letter (Dec. 19, 1984).
[48] *Id.*
[49] *Id.*
[50] *J.D. Manning, Inc.*, SEC No-Action Letter (Feb. 27, 1986).
[51] *Id.*
[52] *Oil and Gas Investor*, SEC No-Action Letter (Sept. 9, 1983).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Michigan Growth Capital Symposium*, *supra* note 29.

and by word of mouth by prior attendees"; (2) the symposium did not arrange any prior contacts between presenter firms and attendees, no specific financing details were presented by any company, and no private placement materials were distributed; and (3) neither the symposium nor the director of the OSPEF (i) provided any other services, beyond limited consulting services, to any participating company or (ii) received any compensation from presenters or attendees of the symposium, including any conditional fees or brokerage-type commissions (except for fees associated with the conduct of the symposium).

In August 2015, the SEC Staff explained that an issuer's presentation may not constitute general solicitation if attendance at the demo day or venture fair is limited to persons with whom the issuer or the organizer has pre-existing, substantive relationships or who have been contacted through a personal network of individuals with experience investing in private offerings. [57]

Angel Investor Networks

The SEC Staff also addressed whether an issuer's interactions with an "angel investor network" would constitute a general solicitation. For example, sophisticated individuals, 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 of the network.[58] However, even where an issuer is unsure as to the level of sophistication of a particular offeree who is part of such a network, the SEC Staff noted that an issuer who interacts with members of the network 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. Nevertheless, whether an issuer's interaction with angel investor networks constitutes general solicitation will still be evaluated on a case-by-case basis.

B. General Advertisements

The SEC Staff has additionally provided helpful guidance as to when an advertisement constitutes "general advertising." In *Gerald F. Gerstenfeld*, the SEC Staff found that a syndicator's intention to publish an advertisement in the *Wall Street Journal*–for the purposes of indicating that the syndicator was selling securities in private placements and inviting members of the public to call or write to the syndicator for additional information–would constitute a general advertisement if published while the syndicator was in the process of offering and selling securities.[59] The general advertisement in *Gerald F. Gerstenfeld* was not limited to a targeted group of sophisticated investors, but instead would have been shown to the general public without limitation. The SEC Staff additionally noted that the advertisement would even constitute a prohibited general advertisement even if securities were not being sold at the time of the advertisement's publication, as long as the syndicator expected in the near future to offer and sell securities.

In *Alma Securities Corporation*, the SEC Staff assessed whether "tombstone" advertisements that merely announce the completion of private placements constitute general advertising.[60] While the SEC Staff did not express a definitive view, it did nevertheless provide several factors to consider. The SEC Staff affirmed that the critical determining factor is whether the tombstone advertisement is used to offer or sell securities.[61] An advertisement would likely violate Rule 502(c) where a sponsor or issuer conducts an ongoing program of private or limited offerings, and the tombstone announcements for the completion of each individual offering could be used to solicit investors to the program as a whole.[62] Conversely, the publication of a tombstone announcement in connection with an isolated offering where the advertisement would have no immediate or direct bearing on contemporaneous or subsequent offers or sales of securities would likely not constitute a general advertisement.[63]

In *Aspen Grove*, the SEC Staff found the proposed use of a promotional brochure, as well as a magazine advertisement by Aspen Grove, a limited partnership formed for the purpose of boarding, breeding, breaking, and training thoroughbred horses, constituted general solicitation and general advertising.[64] Aspen Grove intended to solicit interests in the limited partnership through (1) the mailing of a brochure to members of the Thoroughbred Owners and Breeders Association, (2) the distribution of brochures at a local sale for horse owners, and (3) the placement of an advertisement in *The Blood Horse*, a trade journal for readers specifically interested in race horses.[65] The SEC Staff found that the advertisement in *The Blood Horse* constituted a general advertisement because the journal was visible, without limitation, to any member of the public.

Accordingly, whether a communication made by a newspaper, news service, or other third party constitutes general advertising will largely depend on the involvement of the issuer (or its agent) and the timing of an offering. Where an issuer (or its agent) neither sponsors nor participates in an advertisement (*i.e.*, by offering information to be provided in the communication), and there is no concurrent or contemplated offering, the communication will likely not constitute general advertising. Moreover, an advertisement that

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[57] C&DI, *supra* note 4 at Question 256.33.
[58] *Id.* at Question 256.27.
[59] *Gerald F. Gerstenfeld*, SEC No-Action Letter (Dec. 3, 1985).
[60] *Alma Securities Corporation*, SEC No-Action Letter (Aug. 2, 1982).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Aspen Grove*, SEC No-Action Letter (Dec. 8, 1982).
[65] *Id.*

constitutes an ordinary-course business communication (*e.g.*, factual business information or an announcement of new products and services) will likely fall outside of the prohibition on general advertising.[66] Even where an SEC-reporting issuer is contemplating an unregistered offering, the SEC has carved out a safe harbor under Rule 135c under the Securities Act, which enables the issuer to publish a notice (*e.g.*, a news release or other written communication) concerning the offering to the public.[67]

C. Factual Information

In August 2015, the SEC Staff reaffirmed that issuers may widely disseminate information not involving an offer of securities and still comply with Rule 502(c), including "factual information" about the issuer that "does not condition the public mind or arouse public interest in a securities offering."[68] The SEC Staff explained that "factual information" will be evaluated on a case-by-case basis, but typically should be limited to general information about the issuer's: (a) business; (b) financial condition; (c) products; and/or (d) services, as well as advertisements of such products or services, provided that such information is not presented in such a manner as to constitute an offer of the issuer's securities.[69] However, such information does not generally include any: (1) predictions; (2) projections; (3) forecasts; or (4) opinions concerning value.[70] The meaning of "factual information" in the context of general solicitation can also be gleaned by analogizing to the safe harbors provided under Rule 168[71] and Rule 169[72] under the Securities Act. The SEC has established that both SEC-reporting and non-SEC reporting companies may, under Rule 168 and Rule 169, respectively, communicate "factual business information" (*e.g.*, factual information about the issuer and its financial developments and advertisements or information about the issuer's products) and "forward-looking information" (*e.g.*, projections of the issuer's revenues, income (loss), earnings (loss) per share, and dividends) to investors without being deemed an offer under Section 5 under the Securities Act, provided that certain requirements are satisfied.[73] Most notably, both rules contain a "regularly released" element, specifying that the "timing, manner, and form in which the [factual business or forward-looking] information is released or disseminated [must be] consistent in material respects with similar past releases or disseminations."[74] While the Commission has acknowledged that the safe harbors under Rule 168 and Rule 169 do not establish or require any minimum time period to be deemed "regularly released," the SEC has noted that one prior release or dissemination could be sufficient to establish a track record.[75]

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[66] *See* Section C, *infra*, for a discussion on "factual information."
[67] *See* 17 C.F.R. § 230.135c(a)-(c).
[68] C&DI, *supra* note 4 at Question 256.24.
[69] C&DI, *supra* note 4 at Question 256.25.
[70] *Id. See also* SEC Release No. 33-5180, 1971 WL 120474, at *2 (Aug. 20, 1971) ("Further, care should be exercised so that, for example, predictions, projections, forecasts, estimates and opinions concerning value are not given with respect to such things, among others, as sales and earnings and value of the issuer's securities.").
[71] *See* 17 C.F.R. § 230.168.
[72] *See* 17 C.F.R. § 230.169.
[73] *See generally* 17 C.F.R. § 230.168(a)-(d); 17 C.F.R. § 230.169(a)-(d).
[74] *See id.*
[75] *See* Securities Offering Reform, Release No. 33-8591 (July 19, 2015), at 64, *available at* https://www.sec.gov/rules/final/33-8591.pdf.