MARINO PARTNERS LLP

Marino Market Minutes

Spring 2017

Contents

Commercial Finance
Hedge Fund Formation
Corporate
Real Estate
Trust & Estate Planning

Follow Us on Twitter and LinkedIn!

914-368-4525
www.marinollp.com

Events Calendar

7th Annual Canadian Alternative Investment Forum
Thursday, April 6th, 2017
150 King Street West, 27th Floor
Toronto, Ontario MSH 1J9
RSVP: tbrown@introcap.com

Marino Meet & Greet in Honor of Armed Forces Day
Thursday, May 18th, 2017
5:30-8:30 pm
Office of Marino Partners, 15 Fisher Lane, White Plains, NY 10603
RSVP: pwilson@marinollp.com

The Miracle League of Westchester Golf Outing
Monday, June 26th, 2017
Sunningdale Country Club, 300 Underhill Road , Scarsdale, NY 10583
For more information contact: rmonzon@mlway.org

THE FIRST 100 DAYS (AS OPPOSED TO THE SECOND, THIRD OR FOURTH 100)

By Paul Marino

Terms such as the "First 100 Days" and "micro-aggressions" have entered the lexicon almost as fast as Fake News and it's a disturbing trend. People do not want to acknowledge that we live in an information driven society (*i.e.*, Internet) where everything is disseminated digitally and instantly and its past time to understand that what you say is memorialized and that your **words matter**.

I know what you're thinking, did I not just write an article titled, "Sticks and Stones"—disparaging people who live in fear of words and allow themselves to be controlled by some Orwellian language? Yes, indeed, I did. And I still believe that as a society we should not allow ourselves to be controlled or limited by words that other people (who in fact generally do not speak for a majority of the people) deem inappropriate/wrong. Why? First, because freedom of speech, good bad or otherwise is an important part of creativity, creative destruction and overall free thinking (free speech correlated to free thinking—what a groundbreaking idea). But this is a topic I already covered.

What I am focused on now is the idea that thoughts, as articulated by the words they represent, are cemented as either good or bad within a 12 hour news-cycle and this is problematic.

Second, other than the 10 Commandments, society has been fairly fluid in its societal norms and without free speech and activity (with some modicum of civility, please), society does not push forward on initiatives, "see the light", or move towards a harmonization of humanity (which is of course the ultimate goal).

Lastly, at what point did we stop being American and started becoming some faction of a faction and defined by what we believe or say and not by our actions? We are in a period of time that is reminiscent of the fights amongst Protestant groups.

I propose that the same is true for the allegations that news is fake and the fake news that is really fake (I guess that would really be fake news—but the other news is real not fake news but instead mostly fake or slightly fake and/or real). Either way, the free press is an integral part of our society and when it functions on its highest level it serves as a truth-seeking missile delivering a payload of facts and impartially.

What Really Matters:

Some of our clients believe that government should only concern itself with the well being of its constituents, others believe business is the most important concern; but for me, the pursuit of happiness is what government must protect. It's what Thomas Jefferson concerned himself with the most as he pondered what the nascent country should seek to ensure. Jefferson was not seeking to build a country of people who just wanted to "party like it's 1799"; but instead create a government construct that would enable people to pursue what made them the happiest (i.e., if you want to be a farmer, be a farmer, an engineer, an engineer, etc.). As caretakers to the vision of the founders, I believe Jefferson had it right—we need to keep government in check and make sure it's working for its citizens and ensuring that those citizens have the ability to pursue their happiness as that is their G-d given right.

Private Equity:

It would seem that private equity is starting to be dissected by the regulatory bodies. With fees coming under scrutiny and valuations continuing to be scrutinized, private equity has either become too successful or too notorious or maybe both. If you are a private equity fund or an aspiring private equity manager, a word to the wise: invest in compliance and stay in front of regulation and away from the headlines—in this environment, headline risk is often worse than bad returns.

Cont'd on Page 2

Cont'd From Page 1

What Marley told Scrooge:

As anyone who knows me will tell you, I am always thinking about business (sometimes excited, sometimes concerned, often panicking, but always thinking). How we can help our clients and how we can grow, what's the best path ahead, where do we want to be and how can we work backwards from that point to achieve that goal? In reality, the biggest concern is always my people as it is a privilege and honor to employ them and be a part of their lives. It's because of the foregoing that I always love this scene from a Christmas Carol—it's what we should all be focused on all the time—and we shouldn't be expecting the government or anyone else to deliver it—we must make it our business:

> Scrooge, trembling with fear and beginning to share in Marley's guilt, says: "But you were always a good man of business, Jacob." Upon which the Ghost cried out in anguish:
>
> Business! Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were all my business. The dealings of my trade were but a drop of water in the comprehensive ocean of my business!

Question of the Ages: Why Can't the Knicks Win:
Good Management Always Wins and Winning requires Good Management- 'nuff said.

GENERAL SOLICITATIONS: MAKING MULTIPLE OFFERS

By Alexandra Lyras

This article is part two of a two part series regarding general solicitations under Section 4(2) of the Securities Act of 1933, as amended (the "**Securities Act**"). Part one reviewed types of offerings pursuant to Rule 506(b) and Rule 506(c) under the Securities Act. This part two will review switching types of offerings and making multiple offers.

1. Switching Types of Offerings or Making Multiple Offers. The Securities and Exchange Commission (the "**SEC**") released a series of Compliance and Disclosure Interpretations (the "**Interpretations**") addressing the new exemption under Rule 506(c) (the "**General Solicitation Exemption**"). The Interpretations include guidance on switching an offering relying on Rule 506(b) to an offering relying on Rule 506(c) and vice-versa. Whether an issuer may switch to one exemption after initially relying on the other is based on whether the issuer's offering still meets the conditions required by the switch and exemption ultimately to be used. If an issuer begins an offering intending to rely on Rule 506(c), it would be permitted to rely on Rule 506(b) instead so long as it has not engaged in any form of general solicitation and met the other requirements imposed by Rule 506(b). Conversely, an issuer initially intending to rely on Rule 506(b) for an offering may subsequently decide to rely on Rule 506(c) for that offering, so long as the offering meets all the conditions imposed by Rule 506(c).

When switching the types of offerings or making multiple different types of offers in a short time, issuers should also be aware of the integration doctrine. If applicable, multiple offerings will be considered one offering to determine if a safe harbor or exemption still applied. Under the JOBS Act, integration becomes important in the following situations:

- An issuer uses general solicitation under Rule 506(c) and a short time later attempts to do an offering under 506(b) or Section 4(a)(2).
- An issuer uses general solicitation under Rule 506(c) and also commences a public offering within a short period of time.
- Completed Rule 506(b) or Section 4(a)(2) private offerings are followed by offerings using general solicitation under Rule 506(c) or are attempted concurrently.

It may be possible for an issuer to first do a 506(b) privately, close the transaction, and then do a separate 506(c) offering with general solicitation. In this instance, the issuer could use self-certification for the investors where there is a pre-existing relationship, but the issuer could also subsequently reach new investors using general solicitation. This course of action is dependent on avoiding "integration" of the two offerings, a topic outside the scope of this memo.

Issuers should be aware that in promulgating the General Solicitation Exemption, the SEC did not address the existing integration safe harbors or provide much guidance on Rule 506(b) and Rule 506(c) offerings occurring in close proximity to one another. Not enough is known at this time about the position the SEC will ultimately take regarding integration of offerings under the JOBS Act.

For these reasons, if an issuer began its offering under the 506 (b) exemption and wanted to continue the offering under the 506(c) exemption, we would advise going back to the existing investors to verify their status as accredited investors by utilizing one of the verification methods outlined above.

2. Amending Form D. Lastly, the Interpretations confirms that to the extent the issuer already filed a Form D indicating its reliance on Rule 506(b), it must amend the Form D to indicate its reliance on Rule 506(c) instead, as that decision represents a change in the information provided in the previously-filed Form D.

There is no substitute for experience

HOLDING COMPANIES AND INADVERTENT AND TRANSIENT INVESTMENT COMPANIES

By Robert Cromwell

Operating a Business vs. Managing an Investment Fund. Our clients typically know exactly where they stand when it comes to regulation by the Investment Company Act of 1940 (the "**1940 Act**"): Either they are operating a business or they are managing an investment fund (which could be a registered mutual fund or ETF, or a private investment fund that relies on the 1940 Act Section 3(c)(1) or 3(c)(7) exclusions from investment company status).

Holding Companies with Non-Subsidiary Investments. But sometimes this distinction between operating a business and managing an investment fund is not as clear. When our clients utilize a holding company structure to invest in and operate multiple businesses, and some of these are not majority-owned subsidiaries (for example, a "club deal" or a joint venture) they may run into the possibility of becoming an "inadvertent investment company". This possibility arises when majority-owned subsidiaries represent less than 60% of a holding company's assets. (The definition of "majority-owned subsidiary" for this purpose is covered below.)

What's the Problem With Being an Investment Company? An investment company that is not exempt from the 1940 Act is required to register under the 1940 Act and is subject to detailed board governance requirements, limits on borrowing and issuance of senior securities, and numerous internal controls requirements developed for investment funds that are severely constraining and impractical for an operating company to implement. For privately owned businesses, the question of investment company status frequently arises in loan agreements or investment documents when the lender or investor requests a representation and warranty, and sometimes a legal opinion, that the business is not an investment company. The typical scenario in which the Securities and Exchange Commission ("**SEC**") raises this question is when a business files its registration statement for an IPO, and after reviewing the company's balance sheet, the staff of the SEC asks the company's legal counsel to "please explain why registrant is not an investment company".

The 40% Threshold. Most businesses will determine their investment company status by looking to Section 3(a)(1)(C) of the 1940 Act, which provides, in part, that a business will be classified as an investment company if it "owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such [business'] total assets (exclusive of Government securities and cash items) on an unconsolidated basis". (For companies in the financial industry, such as broker-dealers, the SEC has necessarily developed separate rules to determine status as an investment company.) For the business operator utilizing a holding company structure, the key to this test for determining investment company status is that the term "investment securities" excludes holdings of majority-owned subsidiaries, as long as the subsidiary itself is not an investment company and not relying on the Section 3(c)(1) or 3(c)(7) exclusions from investment company status. For this purpose, a company's status as a "majority-owned subsidiary" is based on the holding company owning a majority of such company's voting securities. (The U.S. Congress having based this definition on holding a majority voting interest rather than a majority economic interest is consistent with the Congress' purpose of distinguishing between an operating company and an investment company, and this focus on voting ownership instead of economic ownership can be useful for a business operator in planning to avoid investment company status.)

Process for Monitoring the 40% Threshold. For businesses that utilize a holding company structure, with a mix of majority-owned subsidiaries and "other" operations (e.g., club deals or joint ventures), periodically measuring the value of these investments for purposes of monitoring investment company status becomes important. Based on court decisions related to the definition of "value" in the 1940 Act as applied to investment companies in this context, value is measured on a quarterly basis, with intra-quarter acquisitions measured at cost. So, if the value of the "other" operations is meaningful, and especially as the value begins to approach the 40% threshold, a practice of measuring quarterly the value of the balance sheet assets that are "investment securities" relative to the total assets of the business (excluding Government securities and cash) becomes an important control process.

An Alternative to the 40% Threshold. Some holding companies may take control positions in underlying companies without taking ownership of a majority of the company's voting securities. Rule 3a-1 adopted by the SEC provides leeway for a holding company to operate in this manner while avoiding investment company status. (For example, if the holding company owns at least 25% of an underlying company's voting securities, and no other person controls as large a block of voting securities or otherwise controls the underlying company, this often would constitute a control investment, and Rule 3a-1 may apply such that the holding company is not an investment company.) Rule 3a-1 also may be available to provide relief for a company that holds more than 40% but less than 45% "investment securities." Reliance on Rule 3a-1 is quite fact specific, and generally is a more high-maintenance endeavor compared to simply staying on the good side of the "greater than 40% investment securities" threshold.

Transient Investment Companies. The "transient" investment company scenario typically arises when a business startup raises

Cont'd on Page 4

Cont'd From Page 3

capital with a plan to acquire an operating business, or when an existing business sells a significant portion of its business assets, and parks the proceeds in investment securities (other than Government securities and cash items) on a temporary basis, pending deployment or redeployment in business operations. The SEC has addressed this type of scenario by adopting a rule that permits such a business (subject to specified conditions) to hold the investment securities for up to a year without being tagged as an investment company. (While this article focuses on businesses that operate through a holding company structure, the transient investment company scenario can arise for any business—no holding company required.)

Conclusion. This article just scratches the surface when it comes to describing all the permutations and scenarios that can arise with investment company status. But, for most businesses that operate through a holding company structure, with a mix of majority-owned subsidiaries and "other" operations (e.g., club deals or joint ventures), awareness of the 40% investment securities threshold, and how to measure it on an on-going basis, provides the tools to perform basic monitoring sufficient to ascertain that the holding company is not close to the threshold.

Marino News!

George Kontogiannis is not only one of our esteemed lawyers, he is also the President of the White Plains Rotary Club. George is pictured here with Marc Karell who spoke on "9 *Purely Business Reasons to go Green*". George says, "Going green is not just an environmental or politically correct thing to do, but can also lead to energy costs savings for your company, and more dollars in your pocket."

THE MIRACLE LEAGUE OF WESTCHESTER

GOLF OUTING

Monday, June 26, 2017

Sunningdale Country Club
300 Underhill Rd. Scarsdale, NY 10583

Honorees: Paul and Rachel Marino

There is no substitute for experience