

“Quiet Period”: A Lei dos EUA

Quiet Period

- **Recent Potential “Gun-Jumping” Violations**
- **Quiet Period: Private Offerings**
- **Case Studies**

Recent Potential “Gun-Jumping” Violations

- **Company**
 - Google, Inc.
- **Date of prospectus**
 - August 18, 2004
- **Date of communication**
 - Interview conducted April 2004 and article published in Playboy Magazine prior to pricing
- **Substance of communication**
 - Larry Page and Sergey Brin spoke extensively about Google’s business.”
- **Effect**
 - Disclosed potential violation of Section 5 of 1933 Act as a risk factor in Prospectus. Also urged investors to review ONLY offering circular and corrected factual errors in Playboy article.

Recent Potential “Gun-Jumping” Violations

- **Company**

- **Salesforce.com**

- **Date of prospectus**

- **June 22, 2004**

- **Date of communication**

- **New York Times article published May 9, 2004**

- **Substance of communication**

- **The article, entitled “It’s not Google. It’s That Other Big I.P.O.,” included information about the offering and the company. Marc Benioff, Chairman of the Board and CEO, was quoted throughout the article regarding the development of the company and business strategy.**

- **Effect**

- **“Cooling off” period.**
- **Disclosed potential violation of Section 5 of 1933 Act as a risk factor in Prospectus.**

Private Offering Exemptions

- **Regulation D / Rule 144A**

- **Regulation D: Exemption from the registration requirements of the Securities Act for transactions by an issuer not involving any public offering**
- **Rule 144A: Resale exemption for transactions not involving any public offering**
- **No offers through general solicitation or general advertising**

- **Regulation S**

- **Exemption from the registration requirements of the Securities Act for transactions conducted outside of the U.S.**
- **No directed selling efforts**

General Solicitation and General Advertising

- **Offer = Any communication that conditions the Market in the U.S.**
- **Terms: General Solicitation and General Advertising Not Defined in Regulation D**

“Neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

**--Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and
--Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising.**

--Publication by Issuer that is U.S. Reporting Company of Notice pursuant to Rule 135(c) is not general solicitation or general advertising:

Rule 135(c) Notice includes:

--Name of Issuer

--The title, amount and basic terms of the securities offered, the amount of the offering, if any, made by selling security holders, the time of the offering and a brief statement of the manner and purpose of the offering without naming the underwriters

General Solicitation and General Advertising

- **Specific prohibitions:**

- Published or broadcast communications
- Meetings or seminars with invitation by general solicitation or general advertising

- **Strict construction:**

- Public communications prohibited
- Private communications permitted

Require a substantive pre-existing relationship between the investor or potential investor and an offering participant that pre-dates the commencement of offering activities

Pre-existing relationship exists ? a technical matter that depends on the facts and circumstances

General Solicitation and General Advertising

- **Analyze facts and circumstances**

In general, an issuer may:

- Hold stockholder meetings as scheduled and answer shareholders' inquiries
- Send out customary quarterly, annual and other periodic reports to stockholders, and publish proxy statements and send out dividend notices
- Make announcements to the press with respect to factual business and financial developments *i.e.*, entering into new contracts, settling strikes, opening new plants, etc.
- Answer unsolicited telephone inquiries from stockholders, financial analysts and the press concerning factual information
- Observe an "open door" policy in responding to unsolicited inquiries concerning factual matters from stockholders, financial analysts and stockholders who have a legitimate interest in the corporation's affairs

- **Issuers should avoid:**

- Release of forecasts, projections, or predictions relating but not limited to revenues, income, or earnings per share
- Release of estimates or opinions concerning the value of the issuer's securities

General Solicitation and General Advertising (continued)

▪ Practical effects

- No press releases referring to securities offering or including forward-looking information or valuations of securities
- No press interviews discussing issuer's prospects or potential securities offerings are discussed
- No meetings with potential investors in which issuer's prospects or potential securities offerings are discussed unless the issuer or offering participant has a pre-existing relationship with the potential investor

▪ Safe harbors

- Rule 135c – communications with limited information about an unregistered offering by a reporting company
- Communication must not be used for the purpose of conditioning the market in the U.S. for the offered securities
- Rule 135e – (i) press conferences outside the U.S., (ii) meetings between journalists and representatives of the issuer outside the U.S., and (iii) press related materials released outside of the U.S., at or in which a proposed offering of securities that is not being, or to be, conducted solely in the U.S. is discussed, subject to specific legending requirements

No Directed Selling Efforts

Activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the U.S. for the securities being offered

- **Specific prohibition**

- **Placing an advertisement in a publication with a general circulation in the U.S. that refers to the offering of securities**

Publication with a general circulation in the U.S. is a technical matter

- **But subject to safe harbors**

- **Relationship with general solicitation and general advertising**

- **Regulation S may be relied upon even if coincident offers and sales are made in accordance with Regulation D / Rule 144A within the U.S.**
- **Private communications in the U.S. with the effect of conditioning the market in the U.S. for the private offering will not be deemed directed selling efforts**

No Directed Selling Efforts (continued)

▪ **Selected safe harbors**

- Legally required advertisements, with legends
- Tombstone advertisement with limited information in certain publication with a general circulation in the United States
- Bona fide visits to real estate, plants or other facilities located in the U.S. conducted for a prospective investor by an issuer
- Rule 135 – communications with limited information about a proposed registered offering
- Rule 135c – communications with limited information about an unregistered offering by a reporting company
- Rule 135e – (i) press conferences outside the U.S., (ii) meetings between journalists and representatives of the issuer outside the U.S., and (iii) press related materials released outside of the U.S., at or in which a proposed offering of securities that is not being, or to be, conducted solely in the U.S. is discussed, subject to specific legending requirements

Case Study 1: Quarterly Conference Call

- **Public company in Brazil is contemplating public or private offering in the U.S.**
- **Public company in Brazil regularly issues press release regarding quarterly results and host conference call with analysts discussing quarter results. Cannot mention offering.**
- **Issue: Does releasing results and discussing results with analysts constitute conditioning the market in the U.S. for the securities offering?**
- **Considerations:**
 - Registered Offering*
 - **Is the issuer a WKSI?**
 - **Is press release and conference call more than 30 days prior to filing registration statements?**
 - **Is the issuer a reporting issuer or have a world-wide float of its common equity with a value of at least US\$700 million?**

Case Study 1: Quarterly Conference Call (continued)

■ Considerations:

Registered Offering

- Does the communication include only factual business information (i.e., no forward-looking statements) destined for customers/suppliers vs. investors?

Private Offerings and “Non-Reporting Issuers”

- Is press release distributed only outside the U.S.?
- Does the communication have the effect of conditioning the market in the U.S. for the offered securities?

Case Study 2: Annual Industry Conference

- **Public company in Brazil is contemplating public or private offering in the U.S.**
- **Public company in Brazil has been invited to present at an investment bank's annual industry conference**
- **Issue: Does making presentation at the conference constitute conditioning the market in the U.S. for the securities?**
- **Considerations:**
 - Registered Offering*
 - **Is the issuer a WKSI?**
 - **Is the conference more than 30 days prior to filing registration statements?**
 - **Is the issuer a reporting issuer or does the issuer have a world-wide float of its common equity with a value of at least US\$700 million?**

Case Study 2: Annual Industry Conference (continued)

▪ Considerations:

Private Offerings and “Non-Reporting Issuers”

- **Does the presentation at the conference have the effect of conditioning the market in the U.S. for the offered securities?**
 - Is invitation solicited or unsolicited?
 - Are forward looking statements included?
 - Is proposed securities offering mentioned?
 - If the invitation is unsolicited, a presentation limited to regularly released factual business information may not be deemed to have the effect of conditioning the market in the U.S. for the offered securities
 - If the invitation is solicited, the invitation may be deemed to have been solicited to enable the issuer to condition the market in the U.S. for the offered securities
 - Inclusion of forward-looking statements in the presentation may be deemed to have the effect of conditioning the market in the U.S. for the offered securities
 - Reference to a proposed securities offering in the presentation is likely to be deemed to have the effect of conditioning the market in the U.S. for the offered securities

Case Study 3: One-on-One Meetings with Investors

- **Public company in Brazil is contemplating public or private offering in the U.S.**
- **Public company in Brazil has a history of making investor relations visits with significant securities holders in Brazil, the U.S. and other jurisdictions**
- **Issue: Does having one-on-one meetings with investors constitute conditioning the market in the U.S. for the securities?**

- **Considerations:**

- Registered Offering

- **Is the issuer a WKSI?**
 - **Are the presentations made more than 30 days prior to filing registration statements?**
 - **Is the issuer a reporting issuer or does the issuer have a world-wide float of its common equity with a value of at least US\$700 million?**

- **Particular caution should be exercised that:**

- The issuer disseminates only the type of information previously released or disseminated in the ordinary course of its business
 - The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations

Case Study 3: One-on-One Meetings with Investors (continued)

- **Considerations:**

- Private Offerings and “Non-Reporting Issuers”*

- **Does the meeting have the effect of conditioning the market in the U.S. for the offered securities?**

- Registered Offering*

- **Is the meeting solicited or unsolicited?**

- Private Offering*

- **If the communication is made in the context of a private offering, it may be permitted, if private and pre-existing relationship**

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