

Private Placement of Restricted Securities Outside Regulation D

The specific requirements to be satisfied in establishing an exemption under Section 4(2) for a private placement are not stated in that section of the Securities Act of 1933. By studying SEC interpretations and court decisions dealing with Section 4(2), the basic requirements which a private placement must meet can be determined. They are summarized below:

1. All the offerees and purchasers must have access to the same kind of information concerning the issuer which would appear in an SEC registration statement, and these persons must be able to comprehend and evaluate such information. It must be kept in mind that any offer to an offeree who would not qualify, as well as a sale to a purchaser who would not qualify, may destroy the private placement exemption and result in a violation of Section 5 of the 1933 Act.
2. The issuer and any parties acting for the issuer, including the broker-dealer, must take all reasonable steps to insure that the information given to the offerees and purchasers is complete and accurate. This is "due diligence." All information passed on in the course of the private placement, either orally or by memorandum (or offering circular), is subject to the anti-fraud provisions of the federal securities laws. The fact that the offering memorandum is not reviewed by the SEC does not lower the standards for accuracy which would be applicable to any registered offering.
3. All of the offerees must have access to meaningful current information concerning the issuer. The fact that an offeree has considerable financial resources or is a lawyer, accountant or businessperson, and thus may be considered sophisticated, does not eliminate the need for appropriate information to be made available.
4. While there is no specific limitation on the number of offerees, the greater the number of offerees, the greater the likelihood that the offering will not qualify for the exemption. In this connection, a private placement cannot be the subject of advertising, general promotional seminars or public meetings in connection with the offering. This limitation does not preclude meeting with offerees to discuss the terms of the offer or to present information concerning the issuer or the offer. After the private placement has been completed, a general announcement (such as a tombstone ad) concerning it may be made if this is desired.
5. Purchasers in a private placement must acquire the securities for investment and not for the purpose of further distribution. If the purchaser acts in such a manner so as to participate in distribution of the securities to the public, either directly or indirectly as a link between the issuer and the public, he or she will be deemed to be an underwriter and the selling broker-dealer and other participants in the distribution, including the issuer, will be in violation of Section 5 of the 1933 Act. Each of the purchasers must intend to acquire for investment at the time the securities are purchased. Whether or not investment intent was present will be determined from all the circumstances surrounding the acquisition. Such circumstances would include the financial capability of the purchaser to hold the securities for the long term and whether the purchaser signed a letter of investment intent. The amount of time the securities have been held (the holding period) is one of the factors in a hindsight determination that an investment intent existed at the time of purchase. A two-year holding period is deemed to be the bare minimum.

What is readily apparent from the foregoing is that current and accurate information about the offerees in a private placement transaction is absolutely essential for the making of judgments as to suitability, ability to evaluate an offering, and investment intent.