



PERMITTING GENERAL SOLICITATION AND GENERAL ADVERTISING: PROPOSED SEC RULES AFFECTING RULE 506 OFFERINGS

The Jumpstart Our Business Startups Act (the "Jobs Act"), adopted April 5, 2012, requires the Securities and Exchange Commission (the "Commission") to amend restrictions on general solicitation or general advertising in connection with securities offerings under Rule 506 ("Rule 506") of Regulation D of the Securities Act of 1933, which regulates the private placement of investment securities (a "Rule 506 Offering"). On August 29, 2012 the Commission announced proposed rules affecting Rule 506 Offerings (the "Rules"). The Rules are available to the public and the Commission will seek public comment for 30 days. The Commission will then review the comments and determine whether to adopt the Rules. This memorandum is a summary of the Rules. A copy of the Rules is available here: <http://sec.gov/rules/proposed/2012/33-9354.pdf>.

Issuers conducting Rule 506 Offerings would be permitted under the Rules to use general solicitation and general advertising in connection with such offerings, but only if (i) all investors in the offering are "accredited investors" as defined by the Commission and (ii) the issuer takes reasonable steps to verify that all investors are accredited. The Rules do not amend the definition of who qualifies as an accredited investor. The definition of "accredited investor" is available here: <http://www.sec.gov/answers/accred.htm>.

The Rules require that issuers of securities take reasonable steps to verify that each investor is accredited when conducting Rule 506 offerings involving general solicitation or general advertising. Reasonableness under the Rules is determined based on the specifics of the offering. As described by the Commission, such factors may include, without limitation: (i) the nature of the purchaser, including the type of accredited investor the purchaser of the security claims to be; (ii) the amount and type of information the issuer has about the purchaser; and (iii) the nature of the offering, including the manner of solicitation or advertising, any minimum investment amounts, and the terms of payment. The Commission suggests that one way to verify "accredited investor" status may be a reasonable reliance upon third-party verification that an investor is accredited, such as verification from a broker-dealer, attorney or accountant. If an issuer determines that a person is likely to be an accredited investor, based on a review of the facts and circumstances relating to each investor and each transaction, then the issuer reasonably could take fewer steps to verify that the person is accredited. As highlighted by the Commission, an issuer has the burden of demonstrating that it is entitled to rely on an exemption from registration and therefore it is important that issuers retain adequate records documenting the process used to verify that an investor is accredited.

The Rules would preserve the existing portions of Rule 506 as an exemption. Issuers conducting Rule 506 Offerings made without the use of general solicitation or general advertising would not be subject to the new provisions relating to verification of persons as accredited investors as required under the Rules, although the issuer must, as in the past, have a reasonable belief that the investor is accredited.

In connection with the Rules, the Commission is proposing to amend Form D, the form that must be filed with the Commission with respect to Regulation D by any issuer offering or selling securities without registering the offering with the Commission. The revised Form D would include a new disclosure section, requiring issuers to affirm whether they will be claiming the new provisions of the Rule 506 exemption permitting general solicitation and advertising and requiring the issuer to take reasonable verification steps.

The Rules are not effective until adopted by the Commission and should not be relied upon by issuers. This memorandum is not legal advice, is only a summary, and is intended for informational purposes only. Persons interested in learning more about how the Rules may impact them are encouraged to contact legal counsel.

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