

Client Alert

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SEC Adopts Final Rules Permitting General Solicitation and General Advertising in Private Offerings

The SEC recently adopted two final rules that have the potential to significantly impact private securities offerings conducted under Rule 506 of Regulation D under the Securities Act of 1933. The final rules adopted by the SEC:

- Implement Section 201(a) of the JOBS Act to permit issuers to engage in general solicitation or general advertising in conducting private offerings of securities to accredited investors under Rule 506; and
- Implement Section 926 of the Dodd-Frank Act by disqualifying issuers and certain other market participants from relying on Rule 506 if felons and other “bad actors” are participating in the Rule 506 offering.

The amendment permitting general solicitation is intended to bolster the ability of issuers to raise capital through private securities offerings. To address concerns raised by commenters regarding this lifting of the ban on general solicitation and to enhance the SEC’s ability to evaluate the development of market practices in Rule 506 offerings, the SEC also adopted certain proposed amendments to Regulation D and Form D discussed further below.

Final Rules

Permitting General Solicitation and General Advertising in Private Offerings¹

New Rule 506(c) permits issuers to use general solicitation and general advertising in an offering of their securities, so long as:

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¹ Issuers can continue to conduct private offerings without the use of general solicitation under the existing provisions of Rule 506.

- The issuer takes reasonable steps to verify that the investors in the offering are “accredited investors”; and
- All purchasers of the securities are accredited investors or the issuer reasonably believes that the investors are accredited investors at the time of sale of the securities.²

In terms of the reasonable steps an issuer must take to verify an investor’s status as an accredited investor, the SEC takes the position that issuers must make an objective assessment in view of the facts and circumstances of each purchaser and transaction. Among the factors issuers should consider are:

- The nature of the purchaser and the type of accredited investor that the purchaser claims to be;
- The amount and type of information that the issuer has about the purchaser; and
- The nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

The SEC has provided a safe harbor in the final rule by listing specific examples of what constitutes reasonable steps for verifying the accredited investor status of individual investors. The following is a *non-exclusive* list of verification methods that may be used by an issuer:

- Reviewing IRS forms that report the income of the purchaser for the two most recent years, and obtaining a written representation that the purchaser has a reasonable expectation of reaching the same income level during the current year;
- In verifying whether an individual is an accredited investor on the basis of net worth, reviewing one or more of the following types of

² Under existing Rule 501, the following individuals fall into the category of an “accredited investor”:

- An individual whose net worth, or joint net worth with his or her spouse, exceeds \$1 million (excluding the value of the person’s primary residence and related indebtedness, up to the estimated fair market value of the primary residence); and
- An individual whose annual income exceeded \$200,000, or whose joint annual income with his or her spouse exceeded \$300,000, in each of the two previous years, and who has a reasonable expectation of earning the same income in the current year.

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documentation, dated within the past three months, and obtaining a written representation that all liabilities necessary to make a determination of net worth have been disclosed: bank statements, brokerage statements, CDs and appraisal reports for determining assets, and credit reports for determining liabilities; and

- Obtaining written confirmation from a registered broker-dealer, an SEC-registered investment adviser, a licensed attorney, or a certified public accountant that the issuer has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that the purchaser is an accredited investor.

The SEC also amended Form D to include a separate box for issuers to check if they are claiming the new Rule 506 exemption that permits general solicitation.

This rule amendment will become effective on September 23, 2013.

Excluding Felons and Other “Bad Actors” From Rule 506 Offerings

The SEC also adopted new Rule 506(d) preventing felons and other “bad actors” from availing themselves of the Rule 506 exemptions for securities offerings. The new rule provides that an issuer cannot rely on Rule 506 if the issuer, or any other person covered by the rule (which includes the issuer’s directors, executive officers, officers participating in the offering and 20% beneficial owners), experienced a “disqualifying event”. A disqualifying event includes:

- Criminal convictions or court orders in connection with the purchase or sale of a security or making a false filing with the SEC;
- Final orders from the CFTC or certain other agencies that bar the issuer from associating with a regulated entity or engaging in the business of securities, insurance or banking, or that are based on fraudulent, manipulative or deceptive conduct;
- Certain SEC disciplinary orders relating to brokers, dealers, investment companies and investment advisers;
- SEC cease-and-desist orders; and
- Suspension or expulsion from a self-regulatory organization, such as a stock exchange.

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However, the final rule provides an exception from disqualification if the issuer can show it did not know, and, in the exercise of reasonable care,

could not have known, that a covered person with a disqualifying event participated in the offering.

The new rule only applies to disqualifying events that occur after the effective date of the rule, although matters that existed before that time are required to be disclosed to investors.

This rule amendment will become effective on September 23, 2013.

Proposed Rule

Proposed Rules Imposing Additional Requirements on Issuers Engaging in General Solicitation

The SEC has proposed amendments to Regulation D and Form D, among others, to address concerns that have been raised relating to the use of general solicitation in private offerings. If adopted, the proposed rules would require issuers to:

- File a Form D at least 15 calendar days before engaging in general solicitation for a Rule 506 offering;
- Amend the Form D within 30 days after completing an offering to update the filing and indicate that the offering has ended; and
- Provide additional information on the Form D, including the issuer's website, a description of the offered securities, the types of investors in the offering, the intended use of proceeds, the types of general solicitation used, the methods used to verify the accredited investor status of investors, and other expanded information on the issuer.

The proposed rules, if adopted, would disqualify an issuer from relying on Rule 506 for future offerings for a one-year period if the issuer did not comply, within the last five years, with the Form D filing requirements in a Rule 506 offering. The one-year period would start to run once all required Form D filings have been made. The proposed rules do, however, include provision for a cure period and the ability to request a waiver from the SEC.

Finally, the proposed rules require written general solicitation materials used by an issuer (1) to include certain legends and other disclosures and (2) to be submitted to the SEC, no later than their date of first use, through an intake page on the SEC's website. The latter requirement would be temporary, expiring two years after the rule's effective date, and materials submitted to the SEC in this manner would not be publicly available.

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The proposed rules are currently subject to a 60-day public comment period.

Please contact the Olshan attorney with whom you regularly work or the attorney listed below if you have any questions regarding the new and proposed rules.

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