

SEC APPROVES NEW RULES LIFTING BAN ON GENERAL SOLICITATION IN PRIVATE OFFERINGS

Corporate & Securities Alert
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As directed under Title II of the JOBS Act, on Wednesday, July 10, the SEC approved long-awaited amendments to Rule 506 of Regulation D and Securities Act Rule 144A, allowing for general solicitation in private placements conducted thereunder. The final rules were adopted largely as proposed. The SEC also proposed several changes to Regulation D to help it assess developments in the private placement market in light of these new rules. In addition, the SEC adopted the “bad actor” disqualification provisions that were mandated under the Dodd-Frank Act.

Under “New 506,” issuers are permitted to use general solicitation and general advertising to offer their securities provided that:

- The issuer takes reasonable steps to verify that the investors are accredited investors.
- All purchasers of the securities fall within one of the categories of persons who are accredited investors under Rule 501 of Regulation D, or the issuer reasonably believes that the investors fall within one of the categories at the time of the sale of the securities.

Although the determination of what constitutes reasonable steps is an objective, facts and circumstances assessment, the final rules do provide the following nonexclusive list of methods an issuer may use to satisfy this requirement:

- Reviewing copies of any IRS form that reports the income of the purchaser and obtaining a written representation that the purchaser will likely continue to earn the necessary income in the current year.
- Receiving a written confirmation from a registered broker-dealer, SEC-registered investment adviser, licensed attorney, or certified public accountant that such entity or person has taken reasonable steps to verify the purchaser’s accredited status.

The SEC has also indicated that some of the relevant factors an issuer should consider in making this determination include:

- The nature of the purchaser and the type of accredited investor the purchaser claims to be.

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

Note that the existing Rule 506 exemption is still available. Issuers that continue to utilize “Old 506” without the use of general solicitation are not subject to the verification requirements of the new rule. And the ban on general solicitation remains intact for private placements under Section 4(a)(2) of the Securities Act.

In a step in the opposite direction, the SEC has proposed changes to Regulation D to assist it in assessing developments in the private placement market under the new regime. These proposals include the following:

- Filing Form D at least 15 calendar days *before* engaging in general solicitation for the offering (with an update to this form to be filed within 30 days of completing the offering).
- Requiring additional disclosures on Form D for Rule 506 offerings, including expanded information on the issuer, the offered securities, the purchasers and the use of proceeds; and for “New 506” offerings, confirmation regarding the types of general solicitation used and the methods used to verify the accredited investor status of investors.
- Disqualifying issuers who fail to file Form D from using the Rule 506 exemption in new offerings for one year.
- Requiring legends and disclosures in written general solicitation materials.
- Submission of general solicitation materials to the SEC for the next two years.

As mandated under Section 926 of the Dodd-Frank Act, the SEC also adopted provisions that disqualify “bad actors” with criminal convictions or who are subject to injunctions or court orders involving the purchase or sale of securities, among other “disqualifying events,” from using the Rule 506 exemption. This disqualification applies to all Rule 506 offerings, including those under the “New 506,” and covers issuers and their directors, executive officers and 20 percent owners, and persons compensated for soliciting investors, among others. Note that this disqualification applies only to events occurring after effectiveness of this rule.

Lifting the ban on general solicitation signals the end of an era in securities law. With more than half of the capital raised in the United States coming from the private market and the continued sluggishness in the market for initial public offerings, the impact of these new rules on how private securities offerings are conducted is expected to be significant.

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