# SEC Issues Proposed Rules to Allow General Solicitation in Accredited Only Offerings


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On August 29, 2012, the Securities and Exchange Commission approved, by a 4-1 vote, proposed rule revisions to implement what could be the most important change required by the Jumpstart Our Business Startups (JOBS) Act: the elimination of the prohibition on general solicitation and advertising in securities offerings under Rule 506 of Regulation D sold solely to accredited investors. As directed, the proposed revisions also make clear that there is no prohibition on general solicitation in offerings under Rule 144A in which securities are sold solely to Qualified Institutional Buyers. Although the JOBS Act required the SEC to revise its rules by July 4, 2012 (90 days after the President signed the Act on April 5, 2012), and two Commissioners preferred issuing interim final rules, the SEC elected instead to follow rulemaking procedures and is soliciting comments on the proposed revisions for 30 days. See SEC Release No. 33-9354 (August 29, 2012).

***Rule 506: Reasonable Steps to Verify that Purchasers are Accredited***

The JOBS Act provides little flexibility to the SEC to address fraud concerns of investor advocacy groups by imposing additional requirements on general solicitation in Rule 506 offerings. Section 201 of the JOBS Act does, however, require the SEC's rules to provide that, in a Rule 506 offering that uses general solicitation, the issuer must take "reasonable steps to verify that all purchasers are accredited investors." Although many commentators predicted that the SEC would adopt specific requirements for verification, the proposed revisions simply repeat the language of the Act, and the proposing release makes clear that verification should be based upon the facts and circumstances of each transaction rather than rigid rules. Specific factors that the proposing release suggests an issuer might consider in verifying accredited investor status include:

- the nature of the purchaser and the type of accredited investor the purchaser claims to be;
- the amount and type of information the issuer has about the purchaser; and
- the nature of the offering, including the means of solicitation and the minimum subscription amount.

Some purchasers, the release proposes, such as broker-dealers that can be verified through FINRA broker check, are easily verified, while the status of individual purchasers who have financial privacy rights may be more difficult. The release suggests that an issuer may rely on publicly available information regarding some purchasers, such as compensation information in proxy statements, on a purchaser's W-2, on a purchaser's employment position, or on

certification from a third party such as an accountant. The release makes clear that, if an offering uses broadly disseminated general solicitation, a higher standard of verification will be required, while a lesser standard may be appropriate if the minimum investment requires a purchaser with substantial financial means.

Importantly, the proposed rule revisions make clear that verification does not override the "reasonable belief" standard contained in the Rule 501 definition of accredited investor. If an issuer takes reasonable steps to verify that a purchaser is accredited, and therefore reasonably believes the purchaser is accredited, the exemption will not be lost because the purchaser is not in fact accredited.

In what might be a signal that the SEC will more closely monitor Rule 506 offerings that use general solicitation, the proposed rules also add a box to Form D that must be checked if general solicitation is employed.

***Amended Rule 144A***

Consistent with Section 201(b) of the JOBS Act, the SEC's proposed rule revisions also eliminate references to "offer" and "offeree" in Rule 144A, making clear that Rule 144A will be available as long as the issuer reasonably believes that all purchasers are Qualified Institutional Buyers (as defined in Rule 144A), even if contacted using general solicitation.

***Consistent Treatment in Offshore Offerings and under Investment Company Act for Private Fund Formation***

Noting that most private equity funds, hedge funds and venture capital funds rely on Rule 506 for an exemption from registration under the Securities Act of 1933 in raising capital, and because Section 201(b) of the JOBS Act specifically provides that offerings that comply with amended Rule 506 are not "public offerings," the SEC made clear that the exemptions under Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act remain in place, even if general solicitation is employed by a fund in a Rule 506 offering. The SEC also confirmed prior advice that an offering in the United States under amended Rule 506 or Rule 144A employing general solicitation does not impact the ability of an issuer to conduct a concurrent offshore offering under Regulation S.

***Conclusion***

As the SEC staff had previously indicated, the proposed rule revisions leave intact the existing Rule 506 exemption for sales of securities in private offerings that do not use general solicitation and advertising, making clear that verification is not a condition to the exemption for sales of securities in those offerings and relieving issuers who conduct offerings without general solicitation of the uncertainties that the verification requirement creates. Despite these uncertainties, however, we believe that if the rule revisions are adopted as proposed, the ability to use general solicitation and advertising in offerings that require no prior review by the SEC or by state securities administrators will facilitate a significant change in the manner in which capital is raised in unregistered offerings in U.S. markets.

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