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You May Be Free to Solicit and Advertise on Social Media Certain Private Securities Offerings...But Should You Jump at the Opportunity?

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The SEC has adopted new rules lifting the ban on general solicitation and advertising in connection with certain private offerings of securities. These changes were adopted July 10, 2013, and become effective September 23, 2013. Although companies seem to now have additional options for offering securities—including through their social media channels—great care should be taken before and while doing so.

Small companies previously had to rely on traditional registration exemptions from securities laws to raise capital. Commonly, such companies relied on Rule 506 of Regulation D under § 4(2) of the Securities Act of 1933, as amended. Rule 506 permits securities to be offered only to "accredited investors" and up to 35 non-accredited investors, and does not allow securities to be offered by means of general solicitation or general advertising.

This changed after the adoption of the Jumpstart Our Business Startups Act (JOBS Act) on April 5, 2012. The JOBS Act is intended to reduce the burden on companies to raise capital through securities offerings, including IPOs and private offerings.

As part of the JOBS Act, Congress directed the SEC to adopt rules to permit general solicitation or general advertising in offerings made under:

1. Rule 506 of Regulation D, so long as each purchaser of the issuer's securities meets the definition of an **accredited investor**. Under the Securities Act, accredited investors (i) have $5 million or more in net assets, or (ii) are individuals with a net worth of at least $1 million or an annual net income of at least $200,000.
2. Rule 144A of the Securities Act, provided that the securities are sold only to **qualified institutional buyers** (QIBs). QIBs are corporate entities that own and invest, on a discretionary basis, at least $100 million in securities.
3. The new rules will significantly open up the avenues that may be used under Rule 144A and Rule 506 to market securities, including use of social media, the Internet, and general email distributions.

However, verifying accredited investor status under new Rule 506 could limit the potential of this new access if the verification process proves to be overly burdensome, expensive, and time consuming.

There are increased concerns relating to communications made using social media than with other forms of communication due to the speed and reach of social media. Thus, issuers must closely scrutinize such communications during the time of any securities offerings so as to not run afoul of the SEC rules.

Clearly, general solicitation or general advertising distributed over social media should be made with at least as much care as if distributed through other means of communication.

About Debra Hatter

Debra Hatter has nearly 20 years of experience representing public and private companies, financial sponsors and underwriters in corporate finance, M&A, divestitures, joint ventures and strategic transactions in a diverse range of industries including, the restaurant and food services, technology, energy, media, telecommunications, chemical, retail, financial,

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