



SEC Amends Regulation D to Permit General Solicitation and General Advertising; Makes and Proposes Additional Rule Changes

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Regulation D Amendment

Yesterday, July 10, 2013, the Securities and Exchange Commission (the “SEC”) voted to lift the long-standing ban on the use of general solicitation and general advertising in certain private securities offerings. This change, which will go into effect in slightly more than 60 days, opens the door for issuers, including private funds (e.g., hedge funds, private equity funds and other unregistered investment vehicles) and growing companies, to, among other things:

- advertise and/or issue press releases in newspapers, magazines and trade journals;
- use social media and the internet effectively;
- participate in industry events; and
- include substantive information on their publicly accessible websites.

Presently, these activities are not permitted in connection with offerings made pursuant to Regulation D under the Securities Act of 1933, as amended (the “Securities Act”). Most offerings of securities by private funds, growth-stage companies and other smaller issuers are made in reliance on Rule 506 of Regulation D, which permits issuers to offer their securities to investors without Securities Act registration. One of the conditions to an offering pursuant to Rule 506 of Regulation D is that the offering may not be made by means of a “general solicitation” or “general advertising.”

Although not defined in Regulation D, “general solicitation” and “general advertising” include:

- any advertisement, article, notice or other communication published in any newspaper, magazine or similar media;
- any broadcast over television or radio;
- any seminar or meeting whose attendees have been invited by any general solicitation or general advertising; and
- other uses of publicly available media, such as unrestricted websites.

The SEC's rule change will amend Rule 506 by adding new paragraph (c) ("[Rule 506\(c\)](#)"), which will permit issuers to make securities offerings under Regulation D that are not subject to the ban on general solicitation if:

- all purchasers of the securities are, or the issuer reasonably believes that they are, "accredited investors" as defined in Rule 501 of Regulation D at the time of the sale of the securities; and
- the issuer takes reasonable steps to verify that purchasers of the securities are accredited investors.

In adopting this rule change, the SEC has taken a significant step towards permitting general solicitation in connection with certain offerings but has, in connection with those offerings, increased the burden on issuers to verify that purchasers are accredited investors. Those issuers who engage in general solicitation will need to take additional steps beyond those presently provided for in most purchaser questionnaires in order to verify purchasers' status. Issuers will still be able to conduct offerings pursuant to Rule 506(b) of Regulation D that are subject to the prohibition against general solicitation and do not require verification of accredited investor status as the extent that will be required by Rule 506(c). The SEC's fact sheet with respect to Rule 506(c), as well as the release accompanying its adoption, are available on the SEC's website. (See [Fact Sheet](#) and [Adopting Release](#).) Rule 506(c) will go into effect 60 days after publication in the Federal Register.

Disqualification Rules

The SEC also adopted amendments to Rule 501 and Rule 506 under Regulation D that disqualify an issuer from making an offering under Rule 506 if the issuer or certain other parties have had any "disqualifying event." Disqualifying events include, among others, certain criminal convictions, certain court injunctions and restraining orders and a variety of disciplinary actions and orders. (See [Fact Sheet](#) and [Adopting Release](#).) These rules will go into effect 60 days after publication in the Federal Register.

Additional Proposed Rule Changes

In connection with the newly adopted rules, the SEC has also proposed, but has not yet adopted, amendments to Regulation D, Form D and Rule 156 under the Securities Act that would require issuers that intend to rely on Rule 506(c) to provide additional information to enable the SEC to monitor securities offerings made in reliance on that rule. (See [Fact Sheet](#) and [Proposing Release](#).) Highlights of these proposed changes include:

- a requirement that Form D be filed at least 15 calendar days before engaging in general solicitation for the offering;
- inclusion of certain legends or cautionary statements in any written general solicitation materials used in a Rule 506(c) offering;
- submission of written general solicitation materials to the SEC through an intake page on the SEC website; and
- disqualification from using the Rule 506 exemption for issuers that fail to file Form D.

These changes will be subject to public comment, and may be significantly revised, prior to their adoption.

We will be carefully reviewing the newly adopted rules and their adopting releases, and following the progress of the proposed rule changes. If you have any questions regarding the matters described above, please do not hesitate to reach out to your regular contacts at Finn Dixon & Herling LLP.

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