

SEC Lifts Ban on General Solicitation in Private Placements

The Securities and Exchange Commission today published [final rules](#) eliminating the prohibition against general solicitation and general advertising in certain securities offerings, as mandated by Section 201(a) of the JOBS Act. The final rules permit issuers to use general solicitation and general advertising to offer securities under Rule 506 of Regulation D, provided that the issuer takes “reasonable steps to verify” that the purchasers are accredited investors. In adopting new Rule 506(c), the SEC reaffirmed that private funds will be permitted to engage in general solicitation in compliance with the new Rule without losing the exclusion from the definition of “investment company” under either Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940. The rules also provide that securities may be offered under Rule 144A by means of general solicitation or general advertising as long as the securities are sold only to qualified institutional buyers (QIBs) or persons the seller reasonably believes are QIBs. The new rules will go into effect 60 days after publication in the Federal Register.

The SEC also published for comment [proposed rule amendments](#) that would impose additional obligations on offerings conducted pursuant to Regulation D. These proposed amendments are designed to allow the SEC to evaluate changes in the private placement market and address any concerns that may arise in connection with lifting the ban on general solicitation. The proposed rules contemplate, among other things, that issuers would be required (i) to notify the SEC both before general solicitation begins in reliance on new Rule 506(c) and after the closing of a Regulation D private placement, (ii) to submit to the SEC written general solicitation materials containing appropriate legends to the SEC and (iii) to refrain from relying on Rule 506 for one year if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering. In addition, the proposed amendments to Rule 156 would extend the antifraud guidance contained in the rule to the sales literature of private funds.

Removing the prohibition against general solicitations in Rule 506 and Rule 144A offerings will permit issuers to use a number of previously unavailable solicitation and advertising methods when seeking potential investors, which should be welcome news to all those seeking capital. However, because the Congressional mandate only applies to Rule 506 and not more broadly to Section 4(a)(2) offerings, the SEC retains broad authority to impose additional obligations in order to obtain the benefit of the safe harbor. Today’s publication of the proposing release amending Regulation D begins that process. Nevertheless, we believe lifting the ban on general solicitation will have a significant impact on private fundraising efforts.

This alert does not address private funds. Ropes & Gray will shortly release a separate alert addressing in greater detail the implications of these new and proposed rules on private funds.

For further information, please contact your usual Ropes & Gray attorney.