

SEC Issues Guidance Regarding New General Solicitation Rules

On November 13, 2013, the Division of Corporation Finance of the Securities and Exchange Commission (the “SEC”) issued new Compliance and Disclosure Interpretations (“CDIs”) providing guidance regarding new rules allowing for general solicitation in private offerings. The new guidance will be of interest to any private fund sponsor engaged in or contemplating engaging in general solicitation in connection with a private fund offering under new Rule 506(c) under Regulation D, and to sponsors wishing to transition between a traditional Rule 506(b) offering and a general solicitation offering under Rule 506(c), or from a Rule 506(c) offering to an offering under Securities Act Section 4(a)(2).

New Rule 506(c) allows an issuer offering securities in reliance on Rule 506 to engage in general solicitation provided that, among other things, all purchasers are accredited investors and the issuer takes reasonable steps to verify each purchaser’s accredited investor status. The rule also provides a list of non-exclusive verification methods. The new CDIs pertaining to Rule 506(c) clarify that:

- An issuer that commenced an offering intending to rely on Rule 506(c), but did not engage in any form of general solicitation in connection with the offering, may subsequently determine to rely on Rule 506(b) for the offering so long as the conditions of Rule 506(b) have been satisfied. Similarly, an issuer that commenced an offering in reliance on Rule 506(b) may determine, prior to any sales of securities in the offering, to rely on Rule 506(c) for the offering so long as the conditions of Rule 506(c) have been satisfied. To the extent the issuer has already filed a Form D indicating its prior reliance on a different exemption under Rule 506, it must amend the Form D.
- An issuer does not lose the ability to rely on Rule 506(c) for an offering if a person who is not an accredited investor purchases securities in the offering, provided that the issuer took reasonable steps to verify that the purchaser was an accredited investor and had a reasonable belief that such purchaser was an accredited investor at the time of the sale of securities.
- An issuer may not rely on Rule 506(c) if it did not take reasonable steps to verify the accredited investor status of purchasers, even if all purchasers were, in fact, accredited investors.
- An issuer may satisfy the verification requirements of Rule 506(c) either by using a principles-based method of verification, or by relying upon one of the specific, non-exclusive verification methods provided in the rule. Although the use of the verification methods enumerated in the rule is not required, an issuer that chooses to use one of these methods must satisfy all of the specific requirements of that method (e.g., if an issuer chooses to verify the accredited investor status of a purchaser in a Rule 506(c) offering by using the net worth verification method enumerated in the rule, the issuer must, as provided in the rule, review the relevant documentation dated within three months prior to the sale of securities. If the documentation is more than three months old, the issuer may not rely on the net worth verification method enumerated in the rule, but may instead use a principles-based method of verification).
- The verification method in Rule 506(c) pertaining to written confirmations from attorneys and certified public accountants is still available even if the attorney or accountant is only licensed or registered in a non-U.S. jurisdiction.
- The verification method in Rule 506(c) pertaining to existing investors is limited to verification of existing investors who purchased securities in the same issuer’s Rule 506(b) offering as accredited investors prior to the effective date of Rule 506(c) and continue to hold such securities. As a result, a sponsor to a new fund may not rely on the grandfathered verification method in Rule 506(c) for investors that purchased securities in Rule 506(b) offerings of the sponsor's prior funds.

- Where an issuer purporting to make a Rule 506(c) offering fails to meet the conditions of that exemption, the issuer may still fall back on the statutory exemption provided in Section 4(a)(2) of the Securities Act, provided that it has not engaged in general solicitation. In this regard, the SEC staff does not view the JOBS Act general solicitation provisions as having implicitly amended Section 4(a)(2).

The new CDIs pertaining to Rule 506 are available [here](#). Please contact your usual Ropes & Gray advisor with any questions about these CDIs.