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SEC Adopts Revisions to Regulation D and Rule 144A Allowing for General Solicitation and General Advertisement

July 12, 2013

Reflecting what Chairman Mary Jo White called a “significant change” to the private securities marketplace as a result of the JOBS Act, on July 10, 2013, the Securities and Exchange Commission took the following actions:

- Adopted revisions to Regulation D and Rule 144A allowing for general solicitation and advertising in certain offers and sales of securities, as mandated by Title II of the JOBS Act. Please see our prior client alert [here](#) for a discussion of the proposing release regarding these revisions;
- Adopted rule amendments that disqualify felons and other “bad actors” from participating in Rule 506 offerings, as mandated by Section 926 of Dodd-Frank; and

Proposed additional amendments to Regulation D to enhance the Commission’s ability to gather information about Rule 506 offerings conducted pursuant to general solicitation.

Revisions to Rule 506 of Regulation D

New Rule 506(c) of Regulation D, originally proposed in August 2012, provides that the prohibition against general solicitation and general advertising contained in Rule 502(c) of Regulation D no longer applies to offers and sales of securities made pursuant to the exemption in new Rule 506(c), so long as the issuer takes reasonable steps to verify that all purchasers of the securities are accredited investors and the issuer

reasonably believes all of those purchasers to be accredited investors.

Consistent with the requirements of Section 201(a) of the JOBS Act, new Rule 506(c) requires that an issuer take reasonable steps to verify that the purchasers of the securities are accredited investors. The Commission stated that whether the steps taken are “reasonable” will be an objective determination by the issuer (or those acting on its behalf) in the context of the particular facts and circumstances of each purchaser and transaction.

The issuer has the burden of demonstrating that its offering is entitled to an exemption from registration, and it will be important to maintain adequate records regarding steps taken to verify that a purchaser was an accredited investor. The adopting release provides both a principles-based method of verification and a list of non-exclusive methods of verifying accredited investor status.

Principles-based verification

Some principles that issuers may consider when determining the reasonableness of the steps taken to verify that a purchaser is an accredited investor include:

- The nature of the purchaser and the type of accredited investor the purchaser claims to be (e.g., a broker-dealer, bank, or individual investor, etc.);
- The amount and type of information the issuer obtains regarding the purchaser;
- The nature of the offering (i.e., the manner in which potential purchasers were attracted to or solicited to participate in the offering); and
- The terms of the offering (e.g., whether there is a high minimum purchase amount, etc.).

Non-exclusive list of verification methods

- According to the non-exclusive list of verification methods set forth in the adopting release, an issuer may verify accredited investor status by:
- Reviewing copies of any Internal Revenue Service form that reports income for the two most recent years, along with a written representation by the investor of similar projected income status for the upcoming year;
- Reviewing one of the following forms along with a written representation by the investor that all liabilities relevant to net worth have been disclosed: (assets): bank statements or statements of securities holdings, certificates of deposit, tax assessments, and satisfactory independent appraisal reports; (liabilities): consumer report from national consumer reporting agencies;
- Obtaining written confirmation that one of the following persons has taken reasonable steps to verify accredited investor status within the prior three months: registered broker-dealer, SEC-registered investment adviser, licensed attorney, or certified public accountant; or
- Solely with regard to persons who previously invested in an issuer’s Rule

506(b) offering as accredited investors prior to the effective date of Rule 506(c) and who remain investors of the issuer, obtaining certification from such persons at the time of sale that he or she qualifies as an accredited investor.

Pursuant to comments received regarding implementation of Section 201(a) of the JOBS Act, the Commission clarified that new Rule 506(c) will not alter the “reasonable belief” standard in the Rule 501(a) definition of an accredited investor. Accordingly, the Rule 506(c) exemption will be available where the issuer has taken reasonable steps to verify that all purchasers are accredited investors and the issuer has a reasonable belief that all purchasers are accredited investors at the time of sale.

The Commission otherwise preserved the preexisting Rule 506 exemption. This exemption permits issuers to offer and sell securities to a limited number of sophisticated non-accredited investors in exempt transactions that do not involve general solicitation or general advertising, and is located in new Rule 506(b).

New Rule 506(c) will become effective 60 days after publication in the *Federal Register*.

The full text of the adopting release may be viewed [here](#).

Revisions to Rule 144A(d)(1)

The revisions to Rule 144A(d)(1) are substantially the same as previously proposed and provide that securities sold pursuant to Rule 144A may be sold to QIBs by means of general solicitation or general advertising, provided that “the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer.”

The standards for reasonably determining whether a purchaser is a qualified institutional buyer (“QIB”), contained in Rule 144A(d), remain unchanged.

The revisions are effective 60 days after publication in the *Federal Register*.

The full text of the adopting release may be viewed [here](#).

Adoption of “Bad Actor” Prohibition pursuant to Section 926 of Dodd-Frank

Separately, the Commission unanimously adopted new Rule 506(d) that disqualifies “felons” and other “bad actors” from participating in Rule 506 offerings. These amendments implement Section 926 of the Dodd-Frank

Act and were first proposed in May 2011. The provisions are substantially similar to Rule 262 of Regulation A, and also provide an expanded list of disqualifying events including certain actions by state regulators.

However, the prohibitions only apply when the “bad actor” triggering event occurs after new Rule 506(d) becomes effective. “Bad actors” participating in Rule 506 offerings whose triggering event occurred prior to the effective date of new Rule 506(d) will instead be required to provide mandatory, written disclosure of such “bad actor” events at “a reasonable time prior to sale.”

New Rule 506(d) will become effective 60 days after publication in the *Federal Register*.

The full text of this adopting release may be viewed [here](#).

Proposal of Additional Revisions to Regulation D

The Commission also proposed by a vote of 3-2, but did not adopt, rule amendments that would expand the disclosure requirements associated with Form D in an effort to expand the information available in evaluating the market for Rule 506 offerings. These proposed rule amendments would require:

- Expanded Form D disclosure, including information on the securities, purchaser, planned use of proceeds, and types of solicitation and verification methods used;
- Filing of Form D in Rule 506(c) offerings at least 15 calendar days prior to the beginning of a general solicitation;
- Filing of a closing amendment to Form D within 30 calendar days after termination of any Rule 506 offering;
- Legends and other disclosures in general solicitation materials used in Rule 506(c) offerings that inform investors of investment risks as well as the exclusive availability of offerings to accredited investors;
- Disqualification of any issuer from relying on Rule 506 for one year for future offerings if the issuer, or any predecessor or affiliate, did not comply within the last 5 years with all of the Form D filing requirements in a Rule 506 offering; and
- Extension of antifraud guidance in Rule 156 to sales literature of private funds.

In addition, the Commission proposed a temporary rule (that would expire two years after its effective date) that would require the submission of written general solicitation materials used in Rule 506(c) offerings to the Commission.

Comments are due on these proposed rules within 60 days after publication in the *Federal Register*.

The full text of the proposing release is available [here](#).

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For more information regarding this guidance please contact your regular O'Melveny & Myers LLP attorney or the authors of this release.

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