

Alerts & Publications

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SEC Eliminates Ban on Advertising Private Investment Offerings

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The Securities and Exchange Commission (“SEC”) adopted Rule 506(c) yesterday, which permits the use of general solicitation and general advertising in offers and sales of securities under Rule 506 of Regulation D. The new rule requires that all purchasers of securities be accredited investors and that the issuer take reasonable steps to verify that the purchasers are accredited investors. In addition to adopting Rule 506(c), the SEC adopted Rule 506(d) to disqualify felons and other “bad actors” from participating in Rule 506 offerings.

The SEC also proposed amendments to Regulation D, Form D, and Rule 156 of the Securities Act, which are designed to expand the information requirements for Form D. The proposed amendments would further require filing Form D prior to the beginning of any general solicitation under new Rule 506(c), as well as filing an amendment to the previously filed Form D after the final closing. Notably, the proposed rules would prohibit the use of new Rule 506(c) if an issuer fails to comply with Form D requirements. Issuers would be required to include legends in their general solicitation materials that would inform investors of risks. The SEC also proposed a temporary rule that would require issuers to provide general solicitation materials to the SEC, and it proposed to amend Rule 156 to apply the Rule’s anti-fraud guidance to sales literature used by private funds relying on new Rule 506(c).

Please note that clients may not immediately rely on the new rules, which do not become effective until 60 days after publication in the Federal

Register. Furthermore, because of the extensive regulatory implications of the SEC's actions today, we are carefully reviewing the SEC's releases. The impact of the newly adopted and proposed rules will significantly alter the way in which private funds are marketed in the United States. As such, clients should not undertake any general solicitation or advertising at this time. A more detailed analysis of the final and proposed rules will be forthcoming.

In other words, if you are a general partner raising a fund that is relying on Rule 506 or Section 4(a)(2) of the Securities Act for an exemption from registration of the offering, you may not change your marketing and solicitation practices to engage in general solicitation or general advertising. At this time, you must continue to comply with the existing prohibition on such activity when offering your limited partnership interests.

O'Melveny & Myers LLP is assisting private fund clients with analyzing and complying with the new rules. Please contact the attorneys listed on this Client Alert or your O'Melveny & Myers LLP counsel for questions regarding the information discussed herein.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Heather Traeger, an O'Melveny partner licensed to practice law in the District of Columbia and Texas, Kris Easter, an O'Melveny counsel licensed to practice law in Texas, and Matthew Cohen, an O'Melveny associate licensed to practice law in the District of Columbia and California, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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