



CORPORATE FINANCE CLIENT ALERT

July 11, 2013

SEC Adopts General Solicitation and Bad Actor Rules for Private Offerings

The Securities and Exchange Commission (the “SEC”) on July 10, 2013 adopted amendments to Rule 506 of Regulation D, as directed by the Jumpstart Our Business Startups Act (the “JOBS Act”), to permit general solicitations or general advertising in offerings made under Rule 506, provided that all purchasers of the offered securities are accredited investors (as defined in Rule 501(a) of Regulation D). In addition, the SEC also adopted amendments to Form D and, separately, adopted rules to disqualify certain securities offerings from reliance on Rule 506 where “bad actors” are involved.

To implement the general solicitation rule change, the SEC adopted new Rule 506(c), which permits the use of general solicitation to offer and sell securities under Rule 506 provided that the following conditions are satisfied:

- the issuer must take reasonable steps to verify that the purchasers of the securities are accredited investors;
- all purchasers of securities must be accredited investors, either because they come within the definition thereof in Rule 501(a) or because the issuer reasonably believes that they come within the definition, at the time of sale of the securities; and
- all terms and conditions of Rule 501 and Rules 502(a) (integration of offerings) and 502(d) (limitations on resale) must be satisfied.

In adopting Rule 506(c), the SEC also preserved the existing Rule 506(b) to allow issuers to continue to conduct Rule 506 offerings without the use of general solicitation. The SEC also provided general guidance as to the “reasonable steps” necessary to verify accredited investor status as well as the “reasonable belief” necessary to determine that all investors are accredited investors.

The SEC rules adopted with respect to “bad actors” generally define the persons subject to the rule (“Covered Persons”), as well as the disqualifying events which would preclude use of Rule 506 in securities offerings involving either Rule 506(b) or 506(c). It should be noted that

Covered Persons include, in addition to issuers, officers, directors and similar persons, the following:

- any promoter connected with the issuer in any capacity at the time of sale;
- any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with the sale of securities in the offering; and
- any director, officer, general partner or managing member of any such compensated solicitor.

The Covered Person definition thus includes, among others, registered broker-dealers, finders and foreign consultants. In addition, a disqualifying event which occurred prior to the effective date of the new rule will not preclude use of Rule 506, but instead will require reasonably prominent disclosure of such event in the offering materials. As a result, each of these new rules will require a significant amount of additional due diligence and record keeping to properly conduct Rule 506 offerings.

The new rules will become effective 60 days after publication by the SEC in the Federal Register.

Additional Information

For more information on this and other corporate finance questions, please contact your Kutak Rock attorney, or one of the corporate finance attorneys listed below.

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