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# SEC Lifts Ban on General Solicitation in Private Placements

July 11, 2013

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The U.S. Securities & Exchange Commission (Commission) adopted rules on July 10, 2013 eliminating the ban on general solicitation and advertising in certain private offerings, as required by Section 201(a)(1) of the Jumpstart Our Business Startups Act (JOBS Act). Simultaneously, the Commission adopted rules that disqualify felons and other "bad actors" from participating in private placements under certain circumstances and proposed rules to provide additional investor protections in private offerings that use general solicitation and advertising. The final rules will take effect 60 days after their publication in the federal register and the proposed amendments to the private offering rules are subject to a 60-day comment period.

**Eliminating the Prohibition on General Solicitation and Advertising in Certain Offerings**

The Commission approved final rules eliminating the ban on general solicitation under Rule 506 of Regulation D of the Securities Act of 1933 (the Securities Act) Since it was originally adopted, the Securities Act has banned general solicitation of investors in private securities offerings. In April 2012, Congress passed the JOBS Act, mandating that the Commission eliminate the general solicitation

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ban where sales are limited to “accredited investors” and the issuer has taken steps to verify that all purchasers of the securities are accredited investors.

Under the final rules, the determination as to the steps taken to verify an accredited investor is an objective assessment by the issuer. However, the final rules include a non-exclusive list of methods that issuers may use to satisfy the verification requirement for individual investors, including reviewing copies of tax returns or receiving a written confirmation from a registered broker-dealer, SEC-registered investment advisor, licensed attorney, or certified public accountant stating the entity or person has taken reasonable steps to verify the purchaser’s accredited investor status. Further, under the new rules, issuers may conduct offerings without the use of general solicitation or advertising in the same manner as they have done historically. The new rules also amend Rule 144A under the Securities Act, providing that securities may be offered pursuant to Rule 144A to persons other than qualified institutional buyers (QIBs), including by means of general solicitation, provided that the securities are sold only to persons the seller and any person acting on behalf of the seller reasonably believe are QIBs.

One of the issues under consideration at the open meeting of the Commission at which these rules were adopted was whether adopting these rules while not simultaneously adopting additional investor protection measures was appropriate. Commission Chair Mary Jo White stated, “In my view, given the explicit language of the JOBS Act as well as the statutory deadline that passed last July, the Commission should act without any further delay. That does not mean, however, that the Commission should not take steps to pursue additional investor safeguards if and where such measures become necessary once the ban on general solicitation is lifted.” Notwithstanding, Commissioner Luis Aguilar, who voted against the rules proposal, stated that the new rules should only

be adopted concurrently with rules that promote investor protection and provide regulators with the tools they need to police the market effectively. He stated, “Adopting [these new rules] today, while relying on future speculative actions to implement common sense improvements needed to protect investors, is no way to run a railroad.”

**Disqualification of Felons and Other “Bad Actors” from Rule 506 Offerings**

The Commission also unanimously approved new rules disqualifying “bad actor” participation in private offerings using general solicitation. These new rules were mandated under Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under the new rules, if an executive officer, officer who participates in the offering, or beneficial owner of more than 20% of the entity’s securities is convicted as a felon or commits other “bad acts” enumerated in the rule, the entity is barred from using general solicitation in a Rule 506 offering. The new rule contains an exception from disqualification if the issuer can show that it did not know, and in the exercise of reasonable care, could not have known, that the covered person with the disqualifying event participated in the offering. Importantly, this new rule will only apply to disqualifying events that occur after the effective date of the new rules. However, matters that existed before the effective date of the new rules must be disclosed to investors.

**Proposed Amendments to Private Offering Rules**

The Commission further proposed amendments to Regulation D, Form D, and Rule 156 under the Securities Act. These amendments are intended to enhance the Commission’s ability to assess developments in the private placement market now that the rules to lift the ban on general solicitation have been adopted. In particular, the Commission has stated that the proposal would improve the Commission’s ability to evaluate the development of

market practices in Rule 506 offerings and would address certain concerns raised by investors related to issuers engaging in general solicitation.

Some of the measures contained in the proposed rules include:

- expanding the information that issuers must include on a Form D so the Commission has more information about the issuers and offerings in today's market and requiring that an issuer be disqualified from using Rule 506 for a period of time if the issuer does not comply with the Form D filing requirements
- requiring issuers to file the Form D before the general solicitation begins, so the Commission has timely information about issuers that are using general solicitation in conjunction with Rule 506
- requiring issuers to file a Form D when an offering is completed, so the Commission has a more complete picture of final offerings
- putting in place an effective mechanism for requiring compliance with Form D
- requiring legends on general solicitation materials that would inform potential investors of risks as well as the statutory mandate that sales are limited to accredited investors
- requiring issuers to submit written general solicitation materials to the Commission, on a temporary basis
- amending Securities Act Rule 156 to apply its guidance to sales literature used by private funds generally soliciting investors under the new rules

In dissent, Commissioners Troy Paredes and Daniel Gallagher argued that the proposed rules would unduly burden and restrict the capital formation process, undermining the JOBS Act goal of spurring the economy and job creation.

This article contains a high-level overview of the final and proposed rules adopted on July 10, 2013 by the Commission. We will publish a more detailed article on these final and proposed rules in the near future. In the meantime, if you have any questions, please contact the authors or your Akerman securities attorney.

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