

SEC Passes Final Rules Implementing JOBS Act Amendments to Regulation D

Written by Robert G. Sawyer, Jeffrey D. Collins

July 12, 2013

On July 10, 2013, the SEC voted 4-1 to approve final rules, which included the adoption of new subsection (c) to SEC Rule 506 of Regulation D under the Securities Act of 1933, permitting the use of general solicitation and advertising in connection with certain private placements conducted under Rule 506, as contemplated by the Jumpstart Our Business Startups (JOBS) Act. Under new Rule 506(c), issuers (including hedge funds, private equity and venture capital funds and other private funds) may engage in general solicitation or advertising to attract investors, provided that (i) all purchasers of the interests are accredited investors within the meaning of Regulation D, and (ii) the issuer takes “reasonable steps to verify” the accredited status of those purchasers.

With respect to what will constitute reasonable steps to verify accredited status for purposes of Rule 506(c), the final rules largely implemented the guiding principles set out by the SEC in its previous proposals, but also offered certain non-exclusive safe harbors, previously not included and which are summarized below, upon which issuers may rely.

- **Income** – verification of a natural person being accredited by nature of income, by reviewing copies of any Internal Revenue Service form that reports income (Form W-2, Form 1099, Schedule K-1 of Form 1065, and a copy of a filed Form 1040 for the two most recent years, along with a written representation from such person that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year. If the investor qualifies as an accredited investor based on joint income with that person’s spouse, the issuer should review copies of these forms and obtain written representations by the investor and the spouse.
- **Net Worth** – verification of a natural person being accredited by nature of net worth by means of review of certain statements of assets and liabilities (bank statements, brokerage statements, and other statements of securities holdings, certificates of deposit, tax assessments and appraisal reports issued by independent third parties). Statements must be dated within the prior three months and accompanied by a representation by the prospective investor (and his or her spouse if applicable) that all liabilities necessary to make a determination of net worth have been disclosed. In addition, a consumer report/credit report from at least one of the nationwide consumer reporting agencies to further verify liabilities.
- **Third Party Verification** – verification by means of a written confirmation from a registered broker-dealer, an SEC-registered investment adviser, or a licensed attorney or certified public accountant in good standing, that such third party has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchase is an accredited investor.
- **Certification by Existing Investors** – with respect to a natural person that participated as an accredited investor in the issuer’s Rule 506 offering prior to the effective date these amendments, verification by means of certification from such investor that he or she continues to be an accredited investor.

The SEC clarified that the above safe harbors are not intended to be the sole means by which an issuer may be deemed to have taken reasonable steps to verify accredited status of an investor, reaffirming prior guidance that any determination will be made on the particular facts and circumstances, taking into account the following factors: (i) the nature of the purchaser and the type of accredited investor that the purchaser claims to be; (ii) that amount and type of information the issuer has about the purchaser, and (iii) the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as the minimum investment amount.

Special Note for Private Funds Relying on CFTC 4.13(a)(3) Exemption

For managers of private funds that currently rely on the exemption from registration as a commodity pool operator set forth in Regulation 4.13(a)(3) under the Commodity Exchange Act, please note that such exemption still requires that the fund's interests are offered and sold "without marketing to the public." While the CFTC has indicated that they are considering whether to harmonize this regulation with revisions to Rule 506, no amendment to Regulation 4.13(a)(3) has been proposed to date.

The amendments to Rule 506 will become effective 60 days following their publication in the Federal Register. Please note that the above is a summary for information purposes.

For specific questions regarding new Rule 506(c) and the use of general solicitation of advertising in connection with any offering of private fund interests or other private placement, please contact Robert Sawyer or Jeff Collins of Foley Hoag's Investment Management Group or your applicable Foley Hoag lawyer.

RELATED INDUSTRIES

- [Investment Advisers & Private Funds](#)

RELATED PRACTICES

- [Capital Markets](#)
- [Business Counseling](#)
- [SBIC](#)

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.