

CORPORATE**SEC ADOPTS LONG-AWAITED FINAL RULE REMOVING BAN ON GENERAL SOLICITATION IN RULE 506 PRIVATE OFFERINGS**

On July 10, 2013, the SEC adopted a “game changing” new final rule that lifts an 80-year-old ban on general solicitation and advertising for certain private securities offerings. Previously, investors conducting private offerings under Rule 506 of Regulation D were prohibited from engaging in general solicitation. From a practical standpoint, this meant that businesses were required to establish a preexisting relationship with potential investors before making a Rule 506 offering and were prohibited from advertising the offering through public means such as the internet, printed publications or radio.

Under the new rule, entrepreneurs will be able to use public advertising methods to reach a broader group of potential investors, making it easier to raise capital and grow their businesses. This marked change has the potential to revolutionize the way private securities offerings are conducted, and the rule becomes effective in approximately 60 days.

Qualification Under the New Rule

To be able to solicit and advertise private securities offerings under the SEC’s new rule, a business will have to meet three requirements:

- First, the business must be relying on the Rule 506 securities registration exemption. Under the Rule 506 exemption, a business is not required to register its securities offering with the SEC if, among other requirements, it raises capital solely from accredited investors or up to 35 non-accredited investors. Accredited investors, in turn, are individuals or institutions that meet certain income or net worth thresholds.
- Second, all purchasers of the advertised securities must be accredited investors or the business must reasonably believe that the purchasers are accredited investors at the time of the sale of the securities. In other words, while businesses may sell securities to as many as 35 non-accredited investors under the Rule 506 exemption, all purchasers under the new rule must be accredited investors.
- Third, the business must take reasonable steps to verify that the purchasers are accredited investors. The business will be required to consider the background, facts and circumstances of each purchaser by, for instance, reviewing IRS forms that report the purchasers’ incomes, obtaining written representations from the purchasers about their incomes or receiving written confirmation from a licensed attorney, broker-dealer, investment advisor or other appropriate person that they have taken appropriate steps to verify the accredited status of the investor.

If a business meets all three requirements, it will be able to widely solicit and advertise for potential investors, regardless of whether the business has preexisting relationships with the potential investors. In practice, for example, businesses will be able to conduct their Rule 506 offerings entirely over the internet through general solicitation as long as they take reasonable steps to verify that the purchasers are accredited investors. Businesses conducting Rule 506 offerings without the use of general solicitation or general advertising are not subject to these new requirements.

Proposed Additional Administrative Requirements

In connection with these final rules permitting general solicitation, the SEC has also proposed some additional administrative requirements to enhance the SEC’s ability to assess developments in the private placement market. Under the proposed rules, businesses engaging in general solicitation would be required to file their Form Ds—the required Rule 506 offering notice—at least 15 calendar days before engaging in solicitation and to update the Form Ds to indicate that the offerings have ended within 30 days of their completion.

Businesses would also be required to include certain legends or cautionary statements in any written general solicitation materials to inform potential investors that the offering is limited to accredited investors and that certain risks may be associated with such offerings. Further, the proposal would require that general solicitation materials be submitted to the SEC through an intake page on the SEC website.

Under the proposal, businesses that fail to comply with the Form D filing requirements would be disqualified from using the Rule 506 exemption for one year.

These proposed requirements are now subject to a 60-day public comment period.

Rule 506 Disqualifying Events

Lastly, in a related development, the SEC also adopted a new final rule that prevents businesses from relying on the Rule 506 exemption if it or other persons covered by the rule, including directors, officers, managing members, promoters and investment managers, had a “disqualifying event.”

Under the rule, a “disqualifying event” includes criminal convictions in connection with the purchase or sale of a security, court injunctions and restraining orders in connection with the purchase or sale of a security, certain SEC disciplinary orders and SEC cease-and-desist orders, among other events.

When the time is right for your business, Dickinson Wright can help you navigate this new regulatory framework for private securities

offerings. Please contact any member of the securities practice team or your regular Dickinson Wright attorney for guidance.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of corporate law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered here.

FOR MORE INFORMATION CONTACT:



Bradley J. Wyatt is a Member in Dickinson Wright's Ann Arbor office. He can be reached at 734.623.1905 or bwyatt@dickinsonwright.com.



Michael T. Raymond is a Member and Corporate Practice Department Manager in Dickinson Wright's Troy office. He can be reached at 248.433.7273 or mraymond@dickinsonwright.com.

Jared A. Smith an associate in Dickinson Wright's Troy office also contributed to this alert.