
July 10, 2013

SEC Approves Rules Affecting Private Offerings Under Regulation D

- **New Rule 506(c):** Earlier today, the SEC approved final rules implementing Section 201(a) of the JOBS Act which eliminates the prohibition against “general solicitation and general advertising” in certain securities offerings conducted pursuant to Rule 506 of Regulation D and Rule 144A under the Securities Act. The final rules create new Rule 506(c), which provides an additional exemption from registration for offerings marketed using general solicitation or general advertising, provided that: (i) the issuer takes reasonable steps to verify that the purchasers of the securities are “accredited investors”; and (ii) all of the ultimate purchasers of the securities are accredited investors, either because they come within one of the enumerated categories of persons that qualify as accredited investors, or the issuer reasonably believes that they do, at the time of sale. The determination of the reasonableness of the steps taken to verify an accredited investor is an objective assessment by an issuer. However, the final rules set forth a non-exclusive and non-mandatory list of methods that are deemed to satisfy the verification requirement for purchasers who are natural persons, i.e., documentation of income or net worth.
- **New Rule 506(d):** The SEC also approved final rules to disqualify securities offerings involving certain felons and other “bad actors” from reliance on the exemption from Securities Act registration pursuant to Rule 506 as mandated by Section 926 of the Dodd-Frank Act. If such “bad actors” (which, importantly, now include investment managers and principals of private investment funds) are the subject to certain “disqualifying events”, then they will disqualify an issuer from relying on Rule 506. Disqualification will not arise as a result of triggering events that occurred before the effective date of the rule; however, matters that existed before the effective date of the rule and would otherwise be disqualifying are subject to a mandatory disclosure requirement to investors.
- **Proposed Form D Amendments:** Finally, the SEC proposed certain amendments to Regulation D, Form D and Rule 156 under the Securities Act. The proposed amendments are intended to enhance the SEC’s ability to evaluate changes in the market and to address the development of practices in Rule 506 offerings. The SEC proposed amendments to Form D that would require additional information from issuers, i.e., the types of general solicitation used and the methods used to verify the accredited investor status of investors. An issuer relying on new Rule 506(c) would also be required to file a Form D with the SEC no later than 15 days prior to commencing a Rule 506(c) offering -- and an amended Form D within 30 days following the completion of the offering. The SEC also proposed disqualifying issuers from relying on Regulation D for one year if they fail to file Form D. Additional legends and disclosures would be required in all offering materials relying on Rule 506(c). In

addition, the SEC is proposing on a temporary basis (expiring two years after the effective date of the rule), that an issuer relying on Rule 506(c) would be required to file all general solicitation materials with the SEC. Under the proposed rules, guidance under Rule 156 under the Securities Act on when information in sales literature by an investment company registered with the SEC could be fraudulent or misleading for purposes of the federal securities laws would be extended to the sales literature of private funds. Importantly, this provision would apply to all private funds whether or not they are engaged in general solicitation activities.

The final rules adopted today become effective 60 days after their publication in the Federal Register (which we estimate to be on or about September 10th). The proposed rules are now open for comment for 60 days.

We will publish a more comprehensive analysis of the rules shortly.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Yvonne Y. F. Chan
212-373-3255
ychan@paulweiss.com

Udi Grofman
212-373-3918
ugrofman@paulweiss.com

Robert M. Hirsh
212-373-3108
rhirsh@paulweiss.com

Michael S. Hong
212-373-3788
mhong@paulweiss.com

David S. Huntington
212-373-3124
dhuntington@paulweiss.com

Marco V. Masotti
212-373-3034
mvasotti@paulweiss.com

Raphael M. Russo
212-373-3309
rrusso@paulweiss.com

Philip A. Heimowitz
212-373-3518
pheimowitz@paulweiss.com

Amran Hussein
212-373-3580
ahussein@paulweiss.com

Stephanie R. McCavitt
212-373-3558
smccavitt@paulweiss.com

Jennifer A. Spiegel
212-373-3748
jspiegel@paulweiss.com