July 17, 2013

How will the SEC's New Reg D Rules Affect Offerings by Private Funds?

On July 10, 2013, the U.S. Securities and Exchange Commission (the "SEC") approved final rules that eliminate the prohibition against general solicitation and general advertising (collectively referred to herein as "general solicitation") in certain offerings of securities pursuant to Rule 506 of Regulation D ("Reg D") and Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"). The SEC also approved final rules disqualifying felons and other "bad actors" from Rule 506 offerings, and proposed related amendments to Reg D, Form D and Rule 156 under the Securities Act. The final rules become effective 60 days after publication in the Federal Register (with an estimated effective date of September 13, 2013). The proposed amendments will be open for comment for a period of 60 days after publication.

I. Rules Permitting General Solicitation in Private Offerings

The final rules create a new form of offering under Rule 506(c) that permits issuers to use general solicitation in connection with the sale of securities in private placements if: (i) the purchasers of all securities are "accredited investors;"[1] and (ii) the issuer takes reasonable steps to verify that the purchasers are accredited investors. The new rules leave intact Section 4(a)(2) of the Securities Act (which exempts from registration transactions by an issuer "not involving any public offering") and existing Rule 506(b) (which provides a safe harbor under Section 4(a)(2) for offerings conducted without general solicitation).

Although new Rule 506(c) allows for the use of advertising in connection with fundraising activities, there are certain limitations for private funds relying on Rule 506(c):

- the inability to rely on §4(a)(2) as an alternative for inadvertent failure to comply with Rule 506(c);
- increased compliance burdens and costs due to the new verification of accredited investor status requirements;
- proposed filing of an initial Form D prior to commencing any general solicitation and heightened disclosure requirements;
- greater risk of running afoul of the anti-fraud rules while engaging in general solicitation activities; and
- lack of harmonization with the exemptions contained in CFTC Rules 4.7(b) and 4.13(a)(3) (which include restrictions against "marketing to the public").

[1] The final rules do not change the definition of "accredited investor" in Rule 501 of Reg D, and do not eliminate the integration requirement of Rule 502(a) or the restrictions on resale in Rule 502(d).

Comparison between Existing Rule 506(b) and New Rule 506(c)			
	Rule 506(b) Offerings	**Rule 506(c) Offerings**	**Considerations**
Investor Communications	No general solicitation: • Generally, issuers may approach prospective investors only if there is a substantive pre-existing relationship. • No advertisements, articles, notices or other communications published in any newspaper, magazine or similar media (including the internet) or broadcast over television or radio. • No public seminars or meetings.	General solicitation permitted: • Issuers permitted to approach prospective investors even without a substantive pre-existing relationship. • Advertisements, articles, notices or other public communications permitted. • Public seminars and meetings permitted.	Communications under both 506(b) and 506(c) are subject to the general anti-fraud provisions of federal securities laws and the Advisers Act. Greater risk of running afoul of the anti-fraud rules while engaging in general solicitation activities under 506(c), such as live speaking engagements.
Investor Qualifications	Accredited investors; up to 35 non-accredited investors permitted (subject to certain sophistication and information delivery requirements).	All investors must be accredited investors (either as a matter of fact or because the issuer reasonably believes so at the time of sale).	Ability to take in non-accredited investors not likely to be a decisive factor in choosing 506(b) or 506(c). According to the adopting release, only 8% of offerings by pooled investment funds from 2009-2012 included non-accredited investors.
Investor Verification Requirements	Self-certification (*i.e.*, representations and questionnaires in subscription documents) of accredited investor status permitted.	Issuer must take "reasonable steps" to verify accredited investor status. No self-certification of accredited investor status.	Increased compliance burdens and costs due to verification of accredited investor status likely for 506(c) offerings; possible reluctance by investors to provide personal documentation/information.
Filings and Timing	Initial Form D due no later than 15 calendar days after the first sale of securities in the offering. Issuer required to check box indicating reliance on 506(b).	As proposed, initial Form D due no later than 15 calendar days before commencing general solicitation; additional information required on Form D; certain disclosures and legends required in written general solicitation materials; submission of such materials to the SEC on a temporary basis. Issuer required to check box indicating reliance on 506(c).	Proposed timing and nature of filings and heightened disclosures under 506(c) make it unlikely that an issuer could rely on 506(b) initially and then later amend its Form D to rely on 506(c). If issuer does not file Form D before engaging in general solicitation, issuer has failed to comply with proposed 506(c) filing requirement and since issuer has engaged in general solicitation, issuer is precluded from relying on 506(b) and Section 4(2).
Investment Company Act	Harmonization with federal securities laws not involving a "public offering," including Sections 3(c)(1) and 3(c)(7) of the ICA.	Harmonization with federal securities laws not involving a "public offering," including Sections 3(c)(1) and 3(c)(7) of the ICA.	Same analysis for 506(b) and 506(c).
Regulation S	Concurrent offshore offerings conducted in compliance with Reg S not integrated with domestic offerings conducted in compliance with 506(b).	Concurrent offshore offerings conducted in compliance with Reg S not integrated with domestic offerings conducted in compliance with 506(c).	Same analysis for 506(b) and 506(c).
Blue Sky	Blue Sky regime and analysis remains unchanged.	Issuers cannot take advantage of state securities exemptions from notice filings and fees for securities offered without the use of general solicitation.	Further Blue Sky analysis required in 506(c) offerings (possible notice filings and fees) in states that have exemptions based upon private offerings where general solicitation is not permitted.
Commodity Exchange Act/CFTC/ NFA	Harmonization with exemptions under CFTC Rules 4.7(b) and 4.13(a)(3) which do not permit "marketing to the public," as well as Section 4(m) of the CEA, which is conditioned upon an advisor not holding itself out to the public as a CTA.	CFTC has not finalized new rules harmonizing its exemptions with Rule 506(c).	506(c) offerings not able to rely on exemptions under CFTC Rules 4.7(b) and 4.13(a)(3); may be subject to registration, as well as rules and regulations of the CFTC and NFA.

Q: ***Under Rule 506(c), may statements be made to the press and other media (including television) about a particular offering of a private fund or other issuer? Will the content of advertisements and public statements be subject to regulation?***

A: Yes. There are no explicit restrictions on the form or content of communications that can be made to prospective investors. Accordingly, advertisements, articles, email solicitations and other communications made by means of television, print, radio or online media are all acceptable forms of general solicitation under Rule 506(c).

However, any such communications will remain subject to the general anti-fraud provisions of the federal securities laws, including Section 10(b) and Rule 10b-5 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), Section 17(a) of the Securities Act and, for investment advisers, Section 206 of the Investment Advisers Act of 1940, as amended (the "Advisers Act"). In practice, it may be difficult for an issuer to advertise effectively while still complying with the anti-fraud rules, particularly with respect to communications made by means of live speaking engagements, television or radio.

Q: ***Would an issuer need to take any additional steps under Rule 506(c) to verify that purchasers in an offering are all accredited investors?***

A: In most cases, yes. Rule 506(c) requires the issuer to take "reasonable steps to verify" that its securities are ultimately sold only to accredited investors. Rule 506(c) does not require issuers to use specified methods of verification and instead sets forth a principles-based method of verification. In determining the reasonableness of steps taken to verify investor status, issuers should consider various objective facts and circumstances of each transaction, including the representations of a potential investor, the amount and type of information that the issuer has about each potential investor, the approach used to solicit investors and the terms of the offering, such as a minimum investment amount. Issuers are likely to face increased compliance burdens and costs relating to such verifications, as well as possible reluctance from investors who are concerned with providing private and personally identifiable information.

The table below lists examples of certain verification methods, and the circumstances under which each could potentially suffice as "reasonable steps."

Determining of "Reasonable Steps" for Verification of Accredited Investor Status	
Source of information regarding investor status	**Additional "reasonable steps" required?**
Investor questionnaires in subscription documents	Additional verification methods required (either pursuant to guidance provided in the adopting release or the non-exclusive list of verification methods for natural persons described below). Self-certification is not a sufficient means of verification.

Determining of "Reasonable Steps" for Verification of Accredited Investor Status	
Minimum investment amount	If an investor is able to satisfy a minimum investment amount requirement that only accredited investors could reasonably be expected to meet, in most cases an issuer would need only to verify that the investor is able to meet the requirement upon becoming a participant in the offering without financing from the issuer or a third party.
Verification of investor status by a third party	If the issuer has a reasonable basis to rely on verification from a third party such as a broker-dealer, attorney or accountant, such verification alone may constitute sufficient reasonable steps in some cases.
Publicly available information	If, for example, an individual investor is a named executive officer of a company that has disclosed the investor's compensation for the last three consecutive fiscal years in public filings, in many cases, no additional steps would be required.
Actual knowledge	If an issuer has actual knowledge that a purchaser is an accredited investor, no additional steps would be necessary.

The table below lists the non-exclusive and non-mandatory methods of verifying accredited investor status for natural persons that, if used, are deemed to satisfy the verification requirement in Rule 506(c).

Verifying Accredited Investor Status for Natural Persons (Non-Exclusive List)	
Verification Basis	**Verification Method**
Income	• any IRS form that reports income (including, but not limited to, a 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); and • written representation from prospective investor that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year.
Net worth	• in the case of assets, bank statements, brokerage statements, certificates of deposit, tax assessments and appraisal reports, dated within the prior three months; • in the case of liabilities, a credit report from at least one of the nationwide consumer reporting agencies, dated within the prior three months; and • written representation from prospective investor that all liabilities necessary to make a determination of net worth have been disclosed.
Written third-party confirmation	• written confirmation from a registered broker-dealer, an SEC-registered investment adviser, a licensed attorney, or a certified public accountant that it: o has taken reasonable steps to verify that the investor is an accredited investor within the prior three months; and o has determined that such investor is an accredited investor.
Grandfather method	• self-certification by existing investors who purchased securities as accredited investors in an issuer's Rule 506(b) offering before the effective date of Rule 506(c).

The definition of accredited investor already has a reasonableness standard, which remains unchanged. Accordingly, if it is ultimately determined that a purchaser was not an accredited investor, an offering may still remain exempt from registration under Rule 506(c) if the issuer had taken reasonable steps to verify the purchaser's status and had a reasonable belief that such purchaser was an accredited investor at the time of sale.

Q: If an issuer does not engage in a general solicitation, may it still make an exempt offering under Rule 506(b) without becoming subject to the new verification requirement?

A: Yes. Issuers wishing to make exempt offerings without engaging in general solicitation may still claim the exemption under Rule 506(b).

Q: Do the final rules change any SEC filing requirements for offerings made under Rule 506(c)?

A: Yes. The final rules amend Form D by adding a separate box for issuers to check if they are relying on Rule 506(c). Section III below discusses the related proposed rules which, among other things, would require an issuer relying on Rule 506(c) to file an initial Form D no later than 15 calendar days prior to commencing general solicitation.

Q: May an issuer involved in an ongoing Rule 506(b) offering that commenced before the effective date of Rule 506(c) choose to continue the offering after the effective date in accordance with the requirements of either Rule 506(b) or Rule 506(c)?

A: Yes. An issuer may choose to continue the offering after the effective date in accordance with the requirements of either Rule 506(b) or Rule 506(c). If an issuer chooses to continue the offering in accordance with the requirements of Rule 506(c), any general solicitation that occurs after the effective date will not affect the exempt status of offers and sales of securities that occurred prior to the effective date in reliance on Rule 506(b). Moreover, pursuant to the grandfathering provisions, if an investor previously invested in an issuer's Rule 506(b) offering as an accredited investor prior to the effective date of Rule 506(c) and subscribes for additional securities in the issuer for any Rule 506(c) offering conducted by the same issuer, the issuer is deemed to satisfy the verification requirement by obtaining a certification from such investor, at the time of sale, that he or she continues to qualify as an accredited investor.

Q: After the effective date of the final rules, may an issuer initially indicate on its Form D that it is relying on Rule 506(b) and then later in time amend its Form D to rely on Rule 506(c) – possibly as a means to cure a defective Rule 506(b) offering (e.g., as a result of general solicitation activity)?

A: No. As discussed below in Section III, the SEC has proposed rules that would require an issuer relying on Rule 506(c) to make certain filings (including Form D) with the SEC prior to commencing any general solicitation, as well as certain disclosures in the written general

solicitation materials. As a result of these proposed requirements, it appears that the SEC does not intend to permit an issuer to rely on the Rule 506(c) exemption to cure a defective Rule 506(b) offering.

Q: Conversely, may an issuer initially indicate on its Form D that it is relying on Rule 506(c) and then later in time amend its Form D to rely on Rule 506(b) – possibly protecting itself from foot faults that may occur while trying to comply with Rule 506(b)'s prohibition against general solicitation?

A: Probably not. Although it appears that there is no prohibition against this practice, in light of the SEC's proposed filing and disclosure requirements discussed in Section III below, it does not appear that the SEC intended that an issuer could make such a protective filing. Importantly, once an actual general solicitation has been made in an offering, the ability to rely on Rule 506(b) is lost.

Q: May one parallel fund rely on Rule 506(b) while another parallel fund relies on Rule 506(c)? What about master/feeder structures?

A: Probably not. As a practical matter, although each parallel fund would be a separate issuer for purposes of Form D, the marketing materials for the 506(c) fund may contain numerous substantive disclosures regarding the concurrent offering of the 506(b) fund which might inadvertently cause the 506(b) fund to be deemed to have made a general solicitation. The foregoing will also likely apply to master/feeder structures where investors invest directly in either the master fund or the feeder fund.

Q: How does the change in Reg D intersect with other securities laws, such as Section 3(c)(7) or Section 3(c)(1) of the Investment Company Act of 1940, as amended (the "Investment Company Act")?

A: The Jumpstart Our Business Startups Act explicitly provides that general solicitation will not constitute a "public offering" for purposes of the federal securities laws. Private funds relying on Section 3(c)(1) or 3(c)(7) of the Investment Company Act can therefore take advantage of the ability to attract investor interest by means of general solicitation through Rule 506(c), without becoming subject to the Investment Company Act's registration requirement for funds making a "public offering."

Q: How does the change in Reg D intersect with Section 4(a)(2) of the Securities Act?

A: If an issuer that has engaged in a general solicitation inadvertently fails to comply with the Rule 506(c) exemption, it may not remedy such failure by relying on Section 4(a)(2) of the Securities Act, because public advertising will continue to be incompatible with a claim of exemption under Section 4(a)(2). In comparison, an issuer that does not engage in general solicitation but nevertheless inadvertently fails to comply with the Rule 506(b) exemption, may still be able to rely on Section 4(a)(2) provided it meets its requirements.

Q: What impact will an issuer's use of general solicitation in a domestic offering under Rule 506(c) have on the availability of the Regulation S safe harbor for a concurrent unregistered offering outside the United States?

A: None. The SEC confirmed that concurrent offshore offerings that are conducted in compliance with Regulation S will not be integrated with domestic unregistered offerings that are conducted in compliance with Rule 506(c).

Q: If an issuer engages in general solicitation or advertising for a Rule 506(c) offering, would that issuer need to register or qualify securities under state Blue Sky laws?

A: No. Issuers would not need to register[2] or qualify securities under state "Blue Sky" laws as a consequence of using the exemption in Rule 506(c), but may be subject to notice filing requirements (and possibly fees) depending on the state. Determining whether a Rule 506(c) offering triggers notice filing requirements and payment of fees will likely involve additional diligence for issuers currently relying on Blue Sky exemptions conditioned on the prohibition of general solicitation, with attention to the specific rules of each state.

Q: Would a private fund adviser still be exempt from registering as a commodity pool operator ("CPO") or a commodity trading advisor ("CTA") if the fund it advises engages in general solicitation in reliance on Rule 506(c)?

A: Not at this time. While CPOs are generally required to register with the Commodities Futures Trading Commission (the "CFTC") and comply with its rules, certain exemptions are available under CFTC Rules 4.7(b) and 4.13(a)(3) for CPOs who offer and accept investments only from accredited investors and other qualified persons without "marketing to the public." Unless and until the CFTC acts to harmonize its rules, private funds relying on these regulations would not be able to take advantage of Rule 506(c). Similarly, CTAs that rely on the exemption contained in Section 4(m) of the Commodity Exchange Act, which is conditioned upon them not holding themselves out the public as a CTA and upon their providing trading advice to no more than 15 persons, would not be able to take advantage of Rule 506(c).

Q: Would broker-dealers participating in offerings in conjunction with issuers relying on Rule 506(c) continue to be subject to Financial Industry Regulatory Authority ("FINRA") rules regarding communications with the public?

A: Yes. Broker-dealers participating in offerings in conjunction with issuers relying on Rule 506(c) would continue to be subject to FINRA rules regarding communications with the public, which,

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[2] Because securities issued in a Rule 506 offering are "covered securities" under the Securities Act, state registration requirements for such securities are preempted by federal law.

among other things, (i) generally require all member communications to be based on principles of fair dealing and good faith, to be fair and balanced, and to provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry or service; and (ii) prohibit broker-dealers from making false, exaggerated, unwarranted, promissory or misleading statements or claims in any communications. It may be difficult to advertise effectively while still complying with these FINRA rules.

II. Rules Disqualifying Certain Private Placements Involving Bad Actors

The SEC also approved rules disqualifying certain securities offerings involving felons and other "bad actors" from relying on the safe harbor from Securities Act registration provided by Rule 506. These provisions are codified as new Rule 506(d) and Rule 506(e).

Q: Under Rule 506(d), which individuals may disqualify an issuer from relying on Rule 506 if they are the subject of a disqualifying event?

A: "Covered Persons." The following categories of persons constitute "Covered Persons" under the new Rule 506(d):

- the issuer and any predecessor of the issuer or affiliated issuer;[3]
- any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer;
- any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power;
- any investment manager to an issuer that is a pooled investment fund and any director, executive officer, other officer participating in the offering, general partner or managing member of any such investment manager, as well as any director, executive officer or officer participating in the offering of any such general partner or managing member;
- any "promoter" connected with the issuer in any capacity at the time of the sale;
- any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with sales of securities in the offering (referred to as a "compensated solicitor"); and

[3] Events relating to any affiliated issuer that occurred before the affiliation arose will not be considered disqualifying if the affiliated entity is not (i) in control of the issuer; or (ii) under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

- any director, executive officer, other officer participating in the offering, general partner, or managing member of any such compensated solicitor.

Q: How will an issuer determine which officers "participated" in the applicable offering?

A: The determination of which officers participated in an offering will be a question of fact. Participation in an offering would have to be more than transitory or incidental involvement, and could include activities such as participation or involvement in due diligence activities, involvement in the preparation of disclosure documents, and communication with the issuer, prospective investors or other offering participants.

Q: How is "voting securities" defined for purposes of beneficial ownership under Rule 506(d)?

A: In light of the range of possible structures and control arrangements among issuers relying on Rule 506, the SEC declined to adopt a specific definition of "voting securities." The adopting release indicates that the term should be applied based on whether security holders have or share the ability, either currently or on a contingent basis, to control or significantly influence the management and policies of the issuer through the exercise of a voting right. For example, securities that confer to security holders the right to elect or remove the directors (or the general partner of a partnership) or equivalent controlling persons of the issuer, or to approve significant transactions such as acquisitions, dispositions or financings, would be considered voting securities for purposes of Rule 506(d). Conversely, securities that confer voting rights limited solely to approval of changes to the rights and preferences of a class would not be considered voting securities for purposes of the Rule. In light of this guidance, most investors in typically negotiated private funds would not be considered to hold "voting securities;" however, a seed investor who has negotiated certain management rights or veto rights may come within the guidance.

Q: Which events would constitute "disqualifying events" under Rule 506(d)?

A: The following categories of events constitute "disqualifying events" under Rule 506(d):

- criminal convictions (in connection with the purchase or sale of any security; involving the making of any false filing with the SEC; or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities) within ten years before the sale of securities (or five years, in the case of issuers, their predecessors and affiliated issuers);
- court orders, judgments or decrees (in connection with the purchase or sale of any security; involving the making of any false filing with the SEC; or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities) entered within five years before such sale, that, at

the time of such sale, restrains or enjoins such person from engaging or continuing to engage in such conduct or practice;

- final orders[4] of certain state regulators (such as state securities, banking and insurance regulators) and federal regulators, including the CFTC, (if the order is based on fraudulent, manipulative or deceptive conduct, there is a ten year look-back; if the order bars a covered person from engaging in specified activities, the order would be disqualifying for as long as the bar was in effect);
- SEC disciplinary orders relating to brokers, dealers, municipal securities dealers, investment advisers and investment companies and their associated persons for so long as such orders are in effect;
- SEC cease-and-desist orders relating to violations of certain anti-fraud provisions and registration requirements of the federal securities laws entered within five years before such sale;
- suspension or expulsion from membership in, or suspension or bar from associating with a member of, a securities self-regulatory organization for the duration of the suspension or expulsion;
- SEC stop orders and orders suspending a Regulation A exemption issued within five years before such sale; and
- U.S. Postal Service false representation orders entered within five years before such sale.

Q: Will there be any exceptions or waivers granted under Rule 506(d)?

A: Yes, as described below:

- *Reasonable Care Exception*: An issuer will not lose the Rule 506 safe harbor, despite the existence of a disqualifying event, if the issuer can show that it did not know and, in the exercise of "reasonable care," could not have known of the disqualification. For continuous, delayed or long-lived offerings (such as those conducted by hedge funds and private equity funds), reasonable care includes updating the factual inquiry on a reasonable basis. The frequency and degree of updating will depend on the circumstances of the issuer, the offering and the participants involved, but in the absence of facts indicating that closer monitoring would be required (*i.e.*, notice that a covered person is the subject of a judicial or regulatory proceeding), the SEC would expect that periodic updating could be sufficient which could be through contractual covenants from covered persons to provide bring-down of representations, questionnaires and certifications, negative consent letters, periodic re-checking of public databases, and other steps, depending on the circumstances.

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4 A "final order" does not require that the order be non-appealable.

- *Waiver for Good Cause Shown*: The SEC's Director of the Division of Corporation Finance may grant a waiver if he or she determines that the issuer has shown good cause that it is not necessary under the circumstances that the registration exemption be denied.
- *Waivers Based on Determination of Issuing Authority*: Disqualification will not arise if, before the relevant Rule 506 sale is made, a state court or regulatory authority entered a relevant order, judgment or decree; and advises in writing, whether in such relevant judgment, order or decree or separately to the SEC or its staff, that disqualification under Rule 506 should not arise.

Q: What are an issuer's disclosure obligations regarding disqualifying events?

A: An issuer will not be disqualified for triggering events that occurred before the effective date of the rule; however, under newly adopted Rule 506(e), matters that existed before the effective date of the rule and would otherwise be disqualifying are subject to a mandatory, written disclosure requirement to investors. The SEC expects that issuers will give reasonable prominence to the disclosure to ensure that information about pre-existing bad actor events is appropriately presented in the total mix of information available to investors. The disclosure requirement in new Rule 506(e) will apply to all offerings under Rule 506, regardless of whether purchasers are accredited investors. Issuers will be required to provide disclosure "a reasonable time prior to sale," which is the same timing that currently applies to disclosures to non-accredited investors under Rule 502(b)(1). Rule 506(e) does, however, provide that the failure to furnish required disclosure on a timely basis will not prevent an issuer from relying on Rule 506 if the issuer establishes that it did not know, and in the exercise of reasonable care could not have known, of the existence of the undisclosed matter or matters. This reasonable care exception to the disclosure requirement requires factual inquiry.

Q: Will any certification be required about compliance with Rule 506(d)?

A: Yes, the signature block of Form D will contain a certification confirming that the offering is not disqualified from reliance on Rule 506 for one of the reasons stated in Rule 506(d).

III. Proposed Amendments to Reg D, Form D and Rule 156

The SEC also proposed amendments to Reg D, Form D and Rule 156 to enhance the SEC's ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise in connection with permitting issuers to engage in general solicitation under new Rule 506(c).

Q: Under the proposed amendments, when must Form D be filed?

A: An issuer relying on Rule 506(c) would be required to file an initial Form D no later than 15 calendar days before commencing general solicitation. An issuer would also be required to file a

final amendment to Form D within 30 calendar days after the termination of any Rule 506 offering.

Q: Do the proposed amendments require any additional information to be provided in Form D?

A: Yes. The SEC proposes to revise Form D to require the issuer to submit additional information, including, (i) the issuer's website address, industry group, trading symbol and security identifier; (ii) anticipated use of gross proceeds; (iii) number of investors; and (iv) for pooled investment funds advised by investment advisers registered with, or reporting as exempt reporting advisers to, the SEC, the name and SEC file number for each investment adviser who functions directly or indirectly as a promoter of the issuer. In certain cases, "promoter" may pick up seed sponsors/investors, as the definition includes any person who takes initiative in founding and organizing the business or enterprise of an issuer or any person who, in connection with such founding and organizing, receives in consideration of services and/or property, 10% or more of any class of securities of the issuer or 10% or more of the proceeds from the sale of any class of such securities. In addition, with respect only to 506(c) offerings, revised Form D would require disclosure regarding (x) the types of general solicitation used; (y) the methods used to verify accredited investor status; and (z) identifying information of any person who controls the issuer.

Q: Do the proposed amendments impose any additional penalties for failing to file a Form D pursuant to the requirements of Rule 503?

A: Yes. An issuer would be disqualified automatically from using Rule 506 in any new offering for one year if the issuer, or any predecessor or affiliate of the issuer, failed to comply, within the past five years, with Form D filing requirements in a Rule 506 offering. Disqualification would arise only with respect to non-compliance that occurred after the effectiveness of the proposed amendments. The SEC also proposes to include a five-year rolling window, so that non-compliance that occurred more than five years before the commencement of a Rule 506 offering would not trigger disqualification, even if the required Form D filings had not been made. The look-back period would not extend past the effective date of the rule. The automatic disqualification would be subject to a cure period for late filings and to the waiver provisions of Rule 507.

Q: Do the proposed amendments impose any new requirements relating to the written content of general solicitation materials?

A: Yes. An issuer would be required to include certain prominent legends in all written general solicitation materials.[5]

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[5] Specifically, the legends would state that (i) the securities may be sold only to accredited investors; (ii) the securities are being offered in reliance on an exemption from the registration requirements of the Securities Act and are not required to comply

Q: Do the proposed amendments impose any such requirements specifically with respect to the written general solicitation material of private funds?

A: Yes. Private funds would be required to include a legend on any written general solicitation materials that the securities offered are not subject to the protections of the Investment Company Act.

In addition, any written general solicitation materials of private funds that include performance data would be required to include a legend containing certain disclosures.[6] The proposed rule would also require the legend to provide contact information where an investor may obtain current performance data.

Q: How do the proposed amendments affect any requirements under the Securities Act?

A: Rule 156 under the Securities Act (which currently applies only to registered funds) would be amended to extend the guidance contained in the rule to the sales literature of private funds. Rule 156 provides guidance on the types of information in investment company sales literature that could be misleading for purposes of the federal securities laws, including Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. The proposed amendments would apply to all private funds.

Q: Do the proposed amendments require the submission of written general solicitation materials to the SEC?

A: Yes. Under proposed temporary Rule 510T (which would expire two years after its effective date), an issuer conducting a Rule 506(c) offering would be required to submit to the SEC (no later than the date of first use of such materials in the offering) any written general solicitation materials prepared by or on behalf of the issuer and used in connection with the offering. Such materials would not be filed through EDGAR, nor would they be made publicly available on the SEC's

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with specific disclosure requirements that apply to registration under the Securities Act; (ii) the SEC has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials; (iii) the securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and (iv) investing in securities involves risk, and investors should be able to bear the loss of their investment.

6 Specifically, the legend would disclose that (i) performance data represents past performance; (ii) past performance does not guarantee future results; (iii) current performance may be lower or higher than the performance data presented; (iv) the private fund is not required by law to follow any standard methodology when calculating and representing performance data; (v) the performance of the fund may not be directly comparable to the performance of other private or registered funds; and (vi) if applicable, that fees and expenses have not been deducted and that if such fees and expenses had been deducted, performance may be lower than presented.

website. Written general solicitation materials submitted to the SEC would not be treated as being "filed" or "furnished" for purposes of the Securities Act or Exchange Act, including the liability provisions of those Acts. Verbal communications used to solicit potential purchasers through Rule 506(c) offerings would not be subject to proposed Rule 510T.

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For a copy of the rules, see SEC Adopting Release No. 33-9415, "Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings" (July 10, 2013) at http://www.sec.gov/rules/final/2013/33-9415.pdf; SEC Adopting Release No. 33-9414, "Disqualification of Felons and Other 'Bad Actors' from Rule 506 Offerings" (July 10, 2013) at http://www.sec.gov/rules/final/2013/33-9414.pdf; and SEC Proposing Release No. 33-9416, "Amendments to Regulation D, Form D and Rule 156 under the Securities Act" (July 10, 2013) at http://www.sec.gov/rules/proposed/2013/33-9416.pdf.

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

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