

PUBLICATION

SEC Eliminates Prohibition on General Solicitation/Advertising in Certain Offerings

July 11, 2013

On July 10, 2013, the Securities and Exchange Commission (SEC) adopted final rules to remove the prohibition on general solicitation and general advertising for certain securities offerings to make it easier for companies to find investors and raise capital. The final rules implement Section 201(a) of the Jumpstart Our Business Startups Act (JOBS Act) by amending Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933. The amendment permits an issuer to engage in general solicitation or general advertising in offering and selling securities pursuant to Rule 506, provided that, (i) all purchasers of the securities are accredited investors and (ii) the issuer takes reasonable steps to verify that such purchasers are accredited investors.

While issuers will be able to widely solicit and advertise for potential investors, the JOBS Act required the SEC to adopt rules that require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors. Under existing Rule 501 of Regulation D, a person qualifies as an accredited investor if he or she has either:

- An individual net worth or joint net worth with a spouse that exceeds \$1 million at the time of purchase, excluding the value (and any related indebtedness) of a primary residence, or
- An individual annual income that exceeded \$200,000 in each of the two most recent years or a joint annual income with a spouse exceeding \$300,000 for those years, and a reasonable expectation of the same income level in the current year.

In response to the JOBS Act requirement, the SEC's final rules provide a non-exclusive list of methods that issuers may use to satisfy the verification requirement for individual investors, including the following:

- Reviewing copies of any IRS form that reports the income of the purchaser and obtaining a written representation that the purchaser will likely continue to earn the necessary income in the current year.
- Receiving a written confirmation from a registered broker-dealer, SEC-registered investment adviser, licensed attorney or certified public accountant that such entity or person has taken reasonable steps to verify the purchaser's accredited status.

The existing provisions of Rule 506 as a separate exemption are not affected by the final rule. Issuers conducting Rule 506 offerings without the use of general solicitation or general advertising can continue to conduct securities offerings in the same manner and aren't subject to the new verification rule.

In addition to amending Rule 506, the final rule amends Form D, which is the notice that issuers must file with the SEC when they sell securities under Regulation D. The revised Form D will require issuers to indicate whether they are relying on the provision that permits general solicitation or general advertising in a Rule 506 offering.

Under a separately adopted final rule, an issuer will not be able to rely on the Rule 506 exemption if the issuer or any other person covered by the rule had a "disqualifying event." Under the final rule, "disqualifying event" includes:

- Criminal convictions;
- Court injunctions and restraining orders;
- Final orders;
- Certain SEC disciplinary orders;
- SEC cease-and-desist orders;
- SEC stop orders;
- Suspension or expulsion; or
- U.S. Postal Service false representation orders.

The disqualification would apply only for events that occur after the effective date of the rule. Events that occurred before the effective date of the rule must be disclosed to investors.

The final rule and form amendments will become effective 60 days after publication in the Federal Register.

If you have questions about the SEC's final rules and amendments and how they may affect your future securities offerings, please contact your Baker Donelson attorney or a member of the Firm's Securities group or the Firm's Emerging Companies Team.