

July 16, 2013

Legal Alert: New SEC rules affecting private offerings under Reg D

Based on the Jumpstart Our Business Startups Act of 2012 (JOBS Act), several rule changes were recently approved by the SEC. Following are summaries expected to become effective 60 days after their publication in the Federal Register, which is estimated to be on or about September 10th.

New Rule 506(c): The new rule 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: (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. The final rules set forth a non-exclusive and non-mandatory list of methods 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 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. If such "bad actors" 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 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.

For more information about these rule changes, please contact a Kirton McConkie [securities attorney from our website](#) or contact Matt Wride at (801) 426-2107.