

## Updated Guidance Regarding New Private Placement Rules

On September 23, 2013, new Rule 506(c) of Regulation D and amendments to Rule 144A under the Securities Act of 1933 became effective. The rules potentially have a significant impact on the manner in which private placements of securities may be conducted. This week, the SEC's Division of Corporation Finance updated its Compliance and Disclosure Interpretations to give guidance for these new rules.

### Introduction

Prior to new Rule 506(c), an issuer could sell securities to accredited investors and up to 35 persons who were not accredited investors who meet certain "sophistication" requirements, provided that the offer or sale was not made through any form of general solicitation or general advertising. New Rule 506(c) permits an issuer to engage in general solicitation in offering and selling securities pursuant to Rule 506, as long as, among other things, (1) all purchasers in the offering are accredited investors, and (2) the issuer takes reasonable steps to verify their accredited investor status. The SEC identifies several factors that the issuer can use to verify accredited investor status, including a [non-exclusive list of verification methods](#).

The SEC revised Rule 144A(d)(1) under the Securities Act to provide that securities sold pursuant to Rule 144A may be offered to persons other than Qualified Institutional Buyers (QIBs), including by means of a general solicitation, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a QIB.

The CDIs can be found at [www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#260-05](http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#260-05) and [www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#138-03](http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#138-03).

### Summary of New CDIs

#### **CDIs for Rule 506(c)**

- If an issuer filed a Form D for a Rule 506 offering before September 23, 2013, and decides to continue that offering after September 23, 2013 in accordance with Rule 506(c), the issuer must amend the previously-filed Form D to indicate reliance on the Rule 506(c) exemption.
- An issuer may still rely on Rule 506(c) if a person who does not meet the criteria for any category of accredited investor purchases securities in the offering, as long as the issuer took reasonable steps to verify that the purchaser was an accredited investor and had a reasonable belief that such purchaser was an accredited investor at the time of the sale of securities.
- An issuer may not rely on Rule 506(c) if it did not take reasonable steps to verify the accredited investor status of the purchasers in the offering, even if all purchasers meet the accredited investor standards.
- An issuer may satisfy the verification requirement by either using the principles-based method of verification or relying upon one of the specific, non-exclusive verification methods listed in the rule.

If an issuer uses one of the non-exclusive verification methods listed, however, it must satisfy the specific requirements of that method.

- The verification method pertaining to written confirmations from attorneys or certified public accountants includes attorneys or certified public accountants licensed or duly registered, as the case may be, in good standing in a foreign jurisdiction, not solely a jurisdiction within the United States.
- The verification method pertaining to existing investors covers investors who purchased securities in the same issuer's Rule 506(b) offering as accredited investors prior to September 23, 2013 and continue to hold such securities; it does not apply to new issuers that have the same sponsor as the issuer in which the investor purchased securities in a prior Rule 506(b) offering.
- An issuer that commenced a Rule 506(c) offering, but did not engage in any form of general solicitation, may later decide to rely on Rule 506(b) instead, as long as the conditions of Rule 506(b) have been satisfied with respect to all sales of securities that have occurred in the offering, and any previously filed Form D is appropriately amended.
- An issuer that commenced a Rule 506(b) offering may determine, prior to any sales of securities, to rely on Rule 506(c) instead, as long as the conditions of Rule 506(c) are satisfied with respect to all sales of securities in the offering, and any previously filed Form D is appropriately amended.
- If the conditions of Rule 506(c) are not met in a purported Rule 506(c) offering, the Securities Act Section 4(a)(2) private offering exemption is not available if the issuer has engaged in general solicitation.

### **CDIs for Amended Rule 144A**

- In Rule 144A offerings in which securities were initially sold to financial intermediaries in transactions exempt under Securities Act Section 4(a)(2) or Regulation S, the general solicitation may be conducted by the issuer as well as initial purchasers involved in the Section 4(a)(2) or Regulation S transaction and other distribution participants.
- The amendments to Rule 144A permitting the use of general solicitation do not change how directed selling efforts under Regulation S are analyzed in concurrent Rule 144A and Regulation S offerings.

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