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Show Me the Money: SEC Eases Path to Publicly Offer Private Placements

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On March 12, 2025, the Staff of the Securities and Exchange Commission (the "SEC") issued updated guidance easing the way for companies and funds to publicly offer "private placements."

Regulation D under the Securities Act of 1933, as amended (the "Securities Act")[1] provides a safe harbor from the registration requirements of the Securities Act. Offerings pursuant to Regulation D are commonly referred to as "private placements" because Rule 502(c) of Regulation D prohibits "general solicitation or general advertising" with an important exception. In 2012, following Congressional direction in the Jumpstart Our Business Startups (JOBS) Act of 2012,[2] the SEC added Rule 506(c) to Regulation D to permit the use of general solicitation in Rule 506 offerings if all of the purchasers are accredited investors and if the issuer takes "reasonable steps to verify" the accredited investor status of the purchasers.

Under Rule 506(b), which allows exempt offerings without regard to the dollar amount of the offering but does not permit the use of general solicitation, an issuer can rely on an investor's self-certification of accredited investor status. In contrast, Rule 506(c), which allows exempt offerings without regard to the dollar amount of the offering and permits the use of general solicitation, provides a number of examples of non-exclusive and non-mandatory methods through which an issuer will be deemed to have taken reasonable steps to verify that a natural person is an accredited investor.[3] All of these examples require the purchaser to provide personal financial information (e.g., bank or brokerage statements) or verification from a knowledgeable third party (e.g., the purchaser's accountant or broker). None of the examples allows a purchaser to "self-certify" its accredited investor status. Although the

1 15 U.S.C. §§ 77a-77aa.

2 Jumpstart Our Business Startups (JOBS) Act of 2012 (Pub. Law 112-140)(2012).

3 Natural persons qualify as accredited investors if they have either (i) annual income exceeding $200,000 (or $300,000 combined with a spouse or spousal equivalent) in each of the prior two years, with a reasonable expectation of the same income level in the current year or (ii) a net worth exceeding $1 million, either alone or with a spouse or spousal equivalent, excluding the value of their primary residence (though certain mortgage debt may affect this calculation). In a recent speech, SEC Chairman Designate Uyeda noted that current financial thresholds were adopted in 1982 and discussed the possibility of changing the definition of accredited investor saying " . . . we should consider new approaches to defining the pool of investors that can invest in private companies."

examples are non-exclusive methods for verifying accredited investor status, many issuers have been reluctant to use other verification methods, especially self-certification, which has resulted in issuers spending time and money reviewing such information.

The private capital markets have not made broad use of Rule 506(c) in part because market participants have found its verification steps to be intrusive for investors and cumbersome for issuers. Moreover, the SEC has provided relatively little helpful guidance outside of the enumerated steps in the Rule itself.

On March 12, 2025, the SEC updated Compliance & Disclosure Interpretations ("C&DI") 256.35[4] and 256.36[5] in connection with the release of a related no-action letter.[6] In C&DI 256.35, the Staff stated that if an issuer does not satisfy any of the "non-exclusive and non-mandatory" verification safe harbors in Rule 506(c)(2)(ii), then it can apply "the reasonableness standard directly to the specific facts and circumstances presented by the offering and the investors." Among the factors the issuer should consider, according to the updated C&DI, are (i) the nature of the purchaser and the type of accredited investor that the purchaser claims to be, (2) the amount and type of information that the issuer has about the purchaser, and (3) the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

In C&DI 256.36, the Staff stated that an issuer "may be able to reasonably conclude that reasonable steps to verify have been taken when an offering requires a high minimum investment amount." The C&DI notes that the SEC had opined in the release[7] adopting the Rule 506(c) that "[i]if the terms of the offering require a high minimum investment amount and a purchaser is able to meet those terms, then the likelihood of that purchaser being an accredited investor may be sufficiently high such that, absent any facts that indicate that the purchaser is not an accredited investor, it may be reasonable for the issuer to take fewer steps or, in certain cases, no additional steps to verify accredited investor status other than to confirm that the purchaser's cash investment is not being financed by a third party."[8]

In the related no-action request, the proposed minimum investment amount was $200,000 for individuals and $1,000,000 for entities.[9] The Staff noted that the investment would be accompanied by written representations from each purchaser as to (1) its status as an accredited investor (under Rule 501(a)(5) or (a)(6) if it is a natural person or under Rule 501(a)(3), (7), (8), (9) or (12) if it is a legal entity), and (2) the fact that the purchaser's minimum investment amount (and, for a purchaser that is a legal entity relying on the accredited investor status of all of their equity owners, the minimum investment amount of each of the purchaser's equity owners) is not financed in whole or in part by any third party for the specific purpose of making the particular investment in the issuer. Finally, the

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4 SEC Compliance and Disclosure Interpretation 256.35.

5 SEC Compliance and Disclosure Interpretation 256.36.

6 SEC No-Action Letter[,] *Latham & Watkins LLP* (March 12, 2025).

7 Release No. 33-9415, Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings (July 10, 2013).

8 Securities Act Release No. 9415 (July 10, 2013).

9 Under Regulation D, legal entities qualify as accredited investors if they have either total assets exceeding $5 million or equity owners who are all accredited investors.

no-action position requires that the issuer not have actual knowledge of any facts that the representations were untrue.

With respect to the requirement that the minimum investment amount not be financed by a third party, the no-action request explained that a purchaser would be able to obtain, consistent with its representation, capital through one or more (i) financing programs, including a secured credit facility, that has purposes other than solely making the particular investment in the issuer or (ii) binding commitments or financing arrangements to the purchaser that predate the commencement of the exempt offering. Importantly, the no-action position allows funds above the minimum required investment (either by the purchaser in the issuer or by the equity owners of the purchaser in the purchaser) to be financed.

With respect to the minimum investment amount, the no-action request explained that the minimum investment amount would include investment amounts made pursuant to a binding commitment to invest a minimum amount in one or more installments, as and when called by the issuer, such as are common with investment commitments to funds.

We believe the updated guidance is particularly useful in a few specific situations. The first is where an issuer commences a traditional Rule 506(b) offering and inadvertently engages in general solicitation activities. The issuer may be able to rely on Rule 506(c) if it either required the minimum investment amounts allowed by the updated guidance or declines to accept subscriptions below such minimum investment amounts. The second is where the issuer commences a traditional Rule 506(b) offering but wants to use general advertising to raise additional funds. In such a case, under Rule 152[10] and C&DI 256.34,[11] the "offers and sales of securities made in reliance on Rule 506(b) prior to the general solicitation would not be integrated with subsequent offers and sales of securities pursuant to Rule 506(c)." The new C&DI will also be helpful in the case of any issuer that commences a traditional Rule 506(b) offering but fails one of the conditions and has to rely on the general private placement exemption of Section 4(a)(2) of the Securities Act,[12] which would not be available if the issuer engaged in general solicitation. Self-certification for purposes of a 506(c) offering may give issuers more confidence that investors are accredited investors and that the issuers don't need to rely on Section 4(a)(2) as a backup. Finally, the updated guidance will be useful for foreign issuers that are able to use general advertising and want to raise capital without registration in the United States and without concern that the foreign general advertising will taint the issuer's reliance on Rule 506.

Whether the updated guidance will turbo boost the use of Rule 506(c) by issuers or funds in other situations remains to be seen. Companies with solid business plans and funds or managers with strong track records may choose to continue raising funds the "old fashioned way" to avoid the potential stigma of having to "advertise for investors." In any event, the updated guidance is certainly welcome and may be an indication of the SEC's new senior leadership's focus on attempting to ease the burden for companies looking to raise capital.

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10 17 C.F.R. §130.152.

11 SEC Compliance and Disclosure Interpretation 256.34.

12 15 U.S.C. §77d(a)(2).

If you have any questions regarding this client alert, please contact the Willkie attorney with whom you regularly work.

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