



Client Alert

Contact Attorneys Regarding
This Matter:

Joseph Alley, Jr.
404.873.8688 - direct

Robert F. Dow
404.873.8706 - direct

Stephen D. Fox
404.873.8528 - direct

Lynn S. Scott
404.873.8510 - direct

Gregory M. Chait
404.873.8622 - direct

Lorelei D. Cisne
404.873.8748 - direct

Matthew T. Harris
404.873.8118 - direct

E. Terrell Gilbert, Jr.
404.873.7018 - direct

Arnall Golden Gregory LLP
Attorneys at Law
171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031
404.873.8500
www.agg.com

SEC Issues Proposed Rules Allowing General Solicitation in Private Offerings Pursuant to Section 201(a) of the JOBS Act

The Jumpstart Our Business Startups Act, generally referred to as the JOBS Act, was signed into law on April 5, 2012. The new legislation is intended to facilitate capital formation for smaller companies. Section 201(a) of the JOBS Act required the Securities and Exchange Commission (SEC) to adopt rules to permit general solicitation and advertising in offerings under Rule 506 of Regulation D and under Rule 144A. On August 29, 2012, the SEC approved a release of proposed rules to implement Section 201(a). A copy of the release may be found on the SEC's web site at <http://www.sec.gov/rules/proposed/2012/33-9354.pdf>. The SEC has allowed for a comment period of 30 days on the proposed rules. Below is a brief summary of the most significant aspects of the proposed rules.

General Solicitation under the Proposed Rules

The proposed rules affect offerings under Rule 506 of Regulation D and Rule 144A. In the past, because offerings under these exemptions were considered private by nature, such offerings could not be conducted using general solicitation and advertising. The proposed rules, if adopted, would permit general solicitation and advertising. The proposed rules would:

- Create a new Rule 506(c) to permit general solicitation and advertising in Rule 506(c) offerings provided that all purchasers are reasonably believed to be "accredited investors" as defined in Rule 501 of Regulation D.
- Require issuers relying on Rule 506(c) to take reasonable steps to verify that all purchasers are accredited investors (see discussion below).
- Revise Form D to require the issuer to check a box if it is relying on Rule 506(c).
- Have no effect on offerings under Rules 504 or 505 of Regulation D
- Allow issuers to continue to use existing Rule 506 without any general solicitation or advertising if it wants to sell to unaccredited investors.
- Allow securities to be offered pursuant to Rule 144A to persons other than "Qualified Institutional Buyers" as defined in Rule 144A ("QIBs"), including by means of general solicitation, provided that the securities are only sold to persons that the seller reasonably believes to be QIBs.

The proposed Rule 506(c) and amendment to Rule 144A will not be effective and available to issuers until the SEC adopts a final release, sometime after the comment period.

Verifying Accredited Investor Status

In requiring the issuer to take reasonable steps to verify that purchasers are accredited investors, the SEC stated that “reasonableness” would be an objective determination, based on the facts and circumstances. The issuer must look at a number of factors, including:

- The nature of the purchaser.
- The type of accredited investor the purchaser claims to be.
- The amount and type of information that the issuer has about the purchaser.
- The nature of the offering, such as the manner in which the purchaser was solicited.
- The terms of the offering, such as a minimum investment amount.

The release includes a discussion of the application of these factors. The SEC noted that if the issuer has actual knowledge that the purchaser is an accredited investor, it may not need to take any additional steps at all. In addition, the SEC declined to include a prescriptive list of procedures needed to establish that the steps were reasonable. However, the SEC reminded issuers that the burden of proving eligibility for the exemption is on the issuer. We expect that the comment process and the final rules will provide additional guidance as to what will constitute reasonable steps.

The Effect of the Proposed Rules on Private Funds

The proposal also included some guidance regarding privately offered funds, such as hedge funds and private equity funds. Such funds frequently use Rule 506 to offer securities, and they also frequently rely on exclusions from registration under the Investment Company Act provided by Sections 3(c)(1) and 3(c)(7) of that Act. Those exclusions are unavailable if the fund makes a “public offering” of its securities. Section 201(b) of the JOBS Act provides that offerings under the revised Rule 506 would not be treated as public offerings under the Federal securities laws as a result of general advertising and general solicitation. Although Section 201(b) does not explicitly mention the Investment Company Act, the SEC states that it believes that the effect of Section 201(b) is to permit private funds to use Rule 506(c) with general solicitation without losing the Investment Company Act exclusions.

Arnall Golden Gregory LLP serves the business needs of growing public and private companies, helping clients turn legal challenges into business opportunities. We don't just tell you if something is possible, we show you how to make it happen. Please visit our website for more information, www.agg.com.

This alert provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice.