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## SEC PROPOSES AMENDMENTS TO RULES 506 AND 144A TO REMOVE PROHIBITION ON GENERAL SOLICITATION & GENERAL ADVERTISING

On August 29, 2012, the Securities and Exchange Commission (“SEC”) proposed amendments to Rule 506 of Regulation D and Rule 144A promulgated under the Securities Act of 1933, as amended (the “Securities Act”) to implement Section 201(a) of the Jumpstart Our Business Startups Act (“JOBS Act”).<sup>1</sup>

### *Background and Summary*

Rules 506 and 144A are safe harbors from the registration requirements of Section 5 of the Securities Act for certain offerings of securities. More particularly, Rule 506 authorizes issuers to offer and sell securities up to any amount, without registration, to an unlimited number of “accredited investors” and to no more than 35 non-accredited investors (who meet certain sophistication requirements, and provided certain other disclosure requirements that are satisfied by the issuer). Rule 144A permits the *resale* of an unlimited amount of restricted securities by non-issuers, underwriters or dealers to “qualified institutional buyers” (“QIBs”).

The proposed amendments would revise Rule 506 to remove the longstanding prohibition on the use of general solicitation and general advertising in connection with private offerings made in reliance on the Rule 506 safe harbor, provided the issuer takes *reasonable steps to verify* that the purchasers are “accredited investors.”

In addition, Rule 144A would be amended to permit resale offers to persons other than QIBs, including through the use of general solicitation, where the securities are ultimately sold only to purchasers that the seller (or the person acting on the seller’s behalf) reasonably believes are QIBs.

The SEC is soliciting public comment on these proposed rules within 30 days after publication in the Federal Register. The timing of the release of final rules implementing these proposed amendments is currently uncertain.

### *Proposed Amendment to Rule 506*

The SEC has proposed a new Rule 506(c), which would permit general solicitation by the issuer of the public at large for offerings relying on the Rule 506 safe harbor. Issuers utilizing this new safe harbor would, however, be subject to certain conditions, including that the issuer take “reasonable steps to verify” that the purchasers of the securities are accredited investors.

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<sup>1</sup> For additional information on the JOBS Act, passed on April 5, 2012, please see the Jones Walker e\*bulletin: "[Jumpstart Our Business Startups Act: A New Horizon for Emerging Businesses.](#)"



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The SEC did not specify the methods an issuer using general solicitation must employ to “verify” that a purchaser is an accredited investor. Instead, the SEC stated that the reasonableness of the steps taken by the issuer to make such a verification would be an objective determination, based on the facts and circumstances of each offering. The SEC’s release does, however, include examples that may be appropriate for issuers to consider in this context, including:

- the nature of the purchaser, including the category of accredited investor the purchaser claims to satisfy;
- the amount and type of information that is available to the issuer about the purchaser; and
- the nature of the offering, including the manner in which investors were solicited and the terms of the investment.

The SEC also is preserving the right of an issuer to conduct an offering *without* the use of general solicitation in reliance on existing Rule 506(b) and the “reasonable belief” standard in Rule 501(a) for determining when a purchaser is an accredited investor for all Rule 506 exempt offerings. By confirming the applicability of the “reasonable belief” standard to all Rule 506 exempt offerings, the SEC recognized that an issuer would not lose the right to rely on the proposed Rule 506(c) exemption, provided the issuer both took reasonable steps to verify, and had a reasonable belief, that each purchaser was an accredited investor.

#### *Privately Offered Funds*

“Privately offered funds” (e.g., hedge funds, private equity funds and venture capital funds) often utilize the safe harbor afforded by Rule 506 in conjunction with one of two common exclusions from the definition of an “investment company” under the Investment Company Act that are available only if there is no “public offering.” The SEC clarified that private funds making a general solicitation under amended Rule 506 would *not* be deemed engaged in a “public offering” of their securities for purposes of this definition (and the corresponding exclusions).

#### *Proposed Revision to Form D*

In connection with an offering of securities relying on one of the exemptions under Regulation D, an issuer is required to provide a notice of exempt offering of securities on Form D to the SEC within 15 calendar days after the first sale.

The SEC in its release proposed to add a separate check box on Form D for issuers to indicate whether the offering was conducted pursuant to Rule 506(c), noting that this information would assist in its efforts to monitor the use of general solicitation in Rule 506(c) offerings, the size of the offering market and developing practices by issuers in satisfying the “verification” requirement noted above.

#### *Proposed Amendment to Rule 144A*

The SEC also proposed to amend Rule 144A(d)(1) to eliminate the restriction on offers to persons other than QIBs. This would have the effect of permitting general solicitation in offerings conducted pursuant to Rule 144A. However, Rule



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144A(d)(1) would continue to condition the exemption on the securities being sold only to QIBs or other purchasers the seller (or any person acting on the seller's behalf) reasonably believes are QIBs.

— [Asher J. Friend](#) and [Alexandra C. Layfield](#)

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. *You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

**Curtis R. Hearn**  
Jones Walker LLP  
201 St. Charles Avenue  
New Orleans, LA 70170-5100  
504.582.8308 *tel*  
504.589.8308 *fax*  
[chearn@joneswalker.com](mailto:chearn@joneswalker.com)

## Corporate & Securities Attorneys

Allison C. Bell  
Robert B. Bieck, Jr.  
William R. Bishop  
John C. Blackman, IV  
Christopher M. Capitelli  
Robert L. Carothers, Jr.  
Robert R. Casey  
Monique A. Cenac  
Scott D. Chenevert  
Edward B. Crosland  
Donald L. Cunningham  
Allen E. Frederic, III  
Asher J. Friend  
John W. Gant, Jr.  
Kristin S. Gardner

Edward J. Garitty  
J. Andrew Gipson  
Neely Sharp Griffith  
Carl C. Hanemann  
Curtis R. Hearn  
Adelaida M. Hernandez  
William H. Hines  
Karen B. Johns  
Theodore W. Jones  
Sanford B. Kaynor, Jr.  
Linda Bounds Keng  
Craig N. Landrum  
Charles W. Lane, III  
Alexandra C. Layfield  
Andrew R. Lee

George A. LeMaistre, Jr.  
Nathan R. List  
Brooke L. Longon  
Adam N. Matasar  
Raechelle M. Munna  
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L. Keith Parsons  
Jeffrey T. Powell  
Rudolph R. Ramelli  
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Charles E. Reeves, Jr.

Peter J. Rivas  
Dionne M. Rousseau  
Amy G. Scafidel  
Britton H. Seal  
Jack H. Shannon  
Thomas B. Shepherd, III  
Kelly C. Simoneaux  
Ronald A. Snider  
Hope M. Spencer  
Michael D. Waters  
V. Walker Wells  
Neal C. Wise  
Richard P. Wolfe  
Paul O. Woodall, Jr.

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