

JOBS ACT UPDATE - SEC FINALLY LIFTS BAN ON GENERAL SOLICITATION

A year and a half after a rare display of non-partisanship by Congress with passage of the JOBS Act, the SEC has finally lifted the ban on "general solicitation" for correctly-structured private offerings under Regulation D. This is good news for entrepreneurs wanting to raise capital, as well as lawyers like me who have been doing Reg D offerings for years and have been advocating for the removal of some roadblocks for our clients.

Now, businesses and ventures in need of financing have an exciting new method to raise funds in this tight market. Prior to this change, "private offerings" were exactly that - private and limited with no solicitation beyond pre-existing contacts. New SEC Rule 506(c) of Regulation D, effective this past September 23, 2013, allows "general solicitation" for Reg D offerings to accredited investors (however, there are some qualifiers on the extent of that solicitation).

While the general solicitation aspect of the rule has garnered significant notice (for good reason), there are other things that have to be noted as well if you undertake an offering in this manner, including a more rigid verification of accredited investors. Historically, Rule 506 accredited investor offerings relied on a representation statement signed by the investor indicating why he or she was "accredited" (typically a check-the-box format). More than that will be required now because of a heightened due diligence responsibility given the use of general solicitation. There are a variety of ways that the company can meet this requirement and we will see increased use of appropriate third-party verification in the future.

In addition, the new Form D will require a filing with the SEC before the first offering is made, instead of after the first sale, and the information required by the form will be more detailed with updating more frequent. (The SEC giveth and the SEC taketh away as well...) You can take a look at the final rule as approved at: <http://www.sec.gov/rules/final/2013/33-9415.pdf>

There are some complications and new compliance requirements but, overall, the additions to Reg D are a positive development and, if structured correctly, will finally allow a funding effort to make use of the latest media and Internet marketing venues. We already have clients will be taking advantage of this and expect it to be a preferred fundraising choice for many in the future. If you are planning a private offering, feel free to take a look at RegDLawyer.com or email me directly at dshaheen@burkreed.com. More information to follow in coming articles.