

Client Alert

Brave New World? New SEC General Solicitation Rules Go Effective

September 27, 2013. This is the first week of effectiveness for the U.S. Securities and Exchange Commission's new rules that permit, within parameters, the general solicitation of prospective investors in certain securities offerings conducted without SEC registration.

Prior to the new rules becoming effective, an issuer wanting to market its securities broadly was required to register the offering with the SEC, and the disclosure materials used to market the offering had to meet extensive SEC disclosure rules and survive weeks, and sometimes months, of SEC review and securities issuer revision. While some offerings could be conducted without SEC review, in most cases applicable rules prohibited those offerings from being marketed to prospective investors through the use of "general solicitation" or "general advertising". As a result, the utility of these exemptions to companies or funds wishing to issue equity, debt or other securities to a broad investor base has been hampered, because prospective investors cannot be found through the use of newspaper ads, email blasts, websites, billboards and similar forms of public advertising typically used in other product markets to connect willing sellers and willing buyers.

However, as of this week, the old prohibitions against general solicitation have been greatly relaxed. While all of the prior methods of securities offerings are still available, securities issuers, and the banks and other professionals they often hire to help sell their securities, may now advertise to and solicit purchases on a mass or public basis, so long as they ultimately sell the securities only to investors who meet specific SEC financial sophistication criteria, and otherwise comply with certain additional restrictions. In particular, securities can be offered to anyone through general solicitation, so long as they are ultimately sold only to "accredited investors" ("AIs") in conformance with Rule 506 of Regulation D under the Securities Act of 1933 (the "Securities Act"), or "qualified institutional buyers" ("QIBs") in conformance with Rule 144A under the Securities Act. AIs include, among others, individuals with more than \$1 million in net worth (excluding primary residence) or more than \$200,000 in annual income in each of the last two years (or \$300,000 with a spouse), and companies with more than \$5 million in assets. QIBs include, among others, institutions with investments in securities of at least \$100 million.

In a previous Client Alert, dated July 11, 2013, we described the technical rules that must be followed in order to generally solicit in these types of offerings, whether the securities issuer is an operating company or a private equity, hedge or other investment fund. (To view that Client Alert, click [here](#).) We

predicted that market practices concerning the use of general solicitation would develop slowly once the new rules had taken effect. As of this week, the new rules have taken effect. What now?

Evidence of the brave new world can be seen in various places. For example, the web-based financing portal AngelList, which helps raise money for private companies, now starts its home page with the headline “Tell the world you're raising money”, and AngelList and similar sites WeFunder and Rock the Post all provide public access to “teaser” information about particular companies offering securities (although to purchase such securities, prospective investors must go through filtering pages to verify their AI status). On the other hand, the financing portal FundersClub has announced that it will “defer participation in general solicitation until it is a clear win for investors and startups,” stating that “top VCs, top incubators and accelerators . . . currently regard public fundraising as a question mark. Many are actively . . . cautioning investors against companies who've participated in public fundraising . . .”. FundersClub claims it has already seen instances “where opportunities made available this week via general solicitation are being offered at different terms compared to what institutional investors like FundersClub are buying in at or seeing privately, with no disclosure made to the public investors that they are receiving worse terms.”

As a result, after the first week of the new general solicitation regime, we must stick to our prior prediction: market practices concerning the use of general solicitation will develop slowly. Companies and funds should be aware of the new offering options that the general solicitation rules offer, but also weigh the new potential benefits against their costs, and keep in mind that “old style” Rule 506 and Rule 144A offerings, without general solicitation, still remain available for fundraising.

If you have any questions concerning the new general solicitation rules, please feel free to view our previous Client Alert, [here](#), and to contact the Morrison Cohen attorneys named below (or your usual Morrison Cohen contacts):

Randi Mason
Corporate, M&A
212-735-8643

rmason@morrisoncohen.com

Richard Baumann
Corporate, Securities
212-735-8834

rbaumann@morrisoncohen.com

Jessica Levin
Corporate, Private Funds
212-735-8753

jlevin@morrisoncohen.com