

General Solicitation and Startup Capital Raising: Guidance and Questions

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A discussion of the law, guidance and open questions on what activities constitute general solicitation or advertising in the context of transactions relying on the Rule 506 safe harbor from Securities Act registration. This Practice Note examines practical implications of these questions in the context of startup and emerging company capital raising.

Startups and emerging companies raising capital through private sales of securities have historically relied heavily on Rule 506 of Regulation D under the Securities Act of 1933. Companies that offer securities in accordance with the restrictions and conditions of Rule 506 can feel confident that their offerings are exempt from SEC registration, and the securities offered are "covered securities" under the National Securities Markets Improvement Act of 1996 (NSMIA) and exempt from the most burdensome requirements of state blue sky laws. Historically, one of the conditions of the rule was that an issuer could not offer its securities through general solicitation or general advertising. While Rule 506 was a popular capital-raising tool despite the ban on general solicitation, the years leading up to the passage of the JOBS Act saw a growing perception that the ban made it unnecessarily difficult for small companies to raise capital.

As part of its package of reforms to the federal securities laws, the JOBS Act required the SEC to amend Rule 506 to allow issuers to use general solicitation to market Rule 506 offerings, subject to additional conditions. The SEC carried out this mandate by adopting Rule 506(c), which became effective in 2013. An issuer raising capital in a Rule 506 transaction now has two choices:

- The pre-JOBS Act Rule 506 exemption (Rule 506(b)). An issuer relying on Rule 506(b) is, as ever, banned from using general solicitation to market its offering.
- New Rule 506(c), which allows the issuer to market its offering through general solicitation. However, Rule 506(c) has some additional requirements and restrictions that can add complexity and cost to the capital raising process and limit the issuer's flexibility.

An issuer cannot be coy about its choice. It must check a box on its Form D filing indicating whether it is relying on Rule 506(b) or Rule 506(c).

To decide if the additional costs and complexities of a generally solicited Rule 506(c) offering are worth it, an issuer must get a handle on what exactly it gains by relying on Rule 506(c). That is, it should understand what activities are considered general solicitation and banned in a traditional 506(b) offering, but permitted in a Rule 506(c) offering. Depending on the issuer's particular situation, these additional permitted activities may be very valuable to the issuer, or not valuable at all.

Apart from this, following the adoption of Rule 506(c), a concern emerged that long-standing practices that developed when general solicitation was completely banned might be subject to closer regulatory scrutiny now that Regulation D provided a legitimate path for the use of general solicitation. In response to this concern and other questions about general solicitation, in August 2015 the SEC issued additional staff guidance on general solicitation.

This Note reviews the law and guidance on what activities the ban on general solicitation prohibits. It considers how the law and guidance applies to some familiar scenarios in the startup and emerging company capital raising process.

This Note does not discuss how the rules and guidance governing general solicitation apply in particular to SEC reporting companies. It also does not discuss implications of conducting a Rule 506 offering in the US simultaneously with an offshore offering in reliance on Regulation S. For convenience, this Note refers to both general solicitation and general advertising simply as general solicitation.

RENEWED FOCUS ON WHAT "GENERAL SOLICITATION" MEANS

Since the adoption of Rule 506(c), companies planning Rule 506 transactions and their counsel have increasingly been focused on law and guidance laying out what activities the SEC considers to be "general solicitation." Companies want to understand what additional marketing options they have in Rule 506(c) offerings in exchange for tougher requirements (see *Implications of Using General Solicitation*). In response to this, in August 2015, the SEC staff issued guidance clarifying its view on the meaning of general solicitation in common contemporary contexts (see *2015 Guidance on General Solicitation*).

IMPLICATIONS OF USING GENERAL SOLICITATION

Regulation D transactions recently have been by far the most common type of securities offerings in the US capital markets, with most capital raised in Rule 506 transactions (see *Capital Raising in the U.S.: An*



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Analysis of Unregistered Offerings Using the Regulation D Exemption, 2009-2012, July 2013). Rule 506 has been popular in part because it allows issuers to raise an unlimited amount of capital (other exemptions have a cap). Also, securities issued in Rule 506 transactions are covered securities under NSMIA. This means Rule 506 offerings are not subject to US state securities registration and qualification requirements. This saves companies a great deal of transactional complexity and expense.

Recognizing this, and seeking to avoid "fixing" something that was not broken, when the SEC carried out its JOBS Act mandate to revise Rule 506 to allow general solicitation, it was careful to preserve the pre-JOBS Act Rule 506 safe harbor (as Rule 506(b)). There are several reasons an issuer may prefer to rely on Rule 506(b) despite the fact it prohibits general solicitation while Rule 506(c) allows it.

A Rule 506(c) issuer must take "reasonable steps" to verify that all investors in its offering are accredited investors (AIs). The SEC has issued detailed guidance on this standard. For a discussion of the guidance, see *Practice Note, JOBS Act: Regulation D and Rule 144A General Solicitation Summary: Guidance on Reasonable Steps Standard* (<http://us.practicallaw.com/1-518-7172#a969314>). Before the JOBS Act, and currently in Rule 506(b) offerings, issuers may get comfortable that investors are AIs on the basis of self-certification by the investor (for example, questionnaires in which investors self-report their income or net worth). SEC guidance makes clear this type of self-certification by investors does not, standing alone, satisfy Rule 506(c)'s reasonable verification standard. Instead, issuers or someone acting on their behalf must generally request and review evidence of investors' income or net worth. This requirement is an additional administrative burden on an issuer, creating additional costs such as:

- Attorney's fees.
- Fees of a third-party accrediting service.
- Record-keeping costs.

The requirement may alienate some investors. Perhaps understandably, an investor asked to provide her tax returns or Form W-2s, or bank statements and credit reports, to the founder of a new enterprise may balk and back out of a deal. The verification process could be a speed bump in an offering seeking to close quickly.

Rule 506(b) is a non-exclusive safe harbor. This means that if an issuer fails to satisfy the rule's requirements for a technical reason, the issuer may still be able to claim its offering was exempt under Section 4(a)(2) of the Securities Act. However, since general solicitation is incompatible with the Section 4(a)(2) exemption, an issuer that uses general solicitation in reliance on Rule 506(c) does not have this fall-back option (*Question 260.13, SEC Compliance and Disclosure Interpretations: Securities Act Rules* (Securities Act Rules C&DIs)).

The SEC has also proposed to amend Rule 506 and Form D to impose additional requirements on all Rule 506 offerings. The additional requirements fall harder on Rule 506(c) offerings. For example, the amendments would require a Rule 506(c) issuer to:

- File an advance Form D at least 15 days before any general solicitation (instead of the current requirement, 15 days after the first sale).
- Submit general solicitation materials to the SEC.
- Include specific mandated legends on the materials.

These requirements may be difficult or impossible to comply with in practice. For a discussion of the proposed amendments, see *Practice Note, Section 4(a)(2) and Regulation D Private Placements: The SEC's Proposed Changes to Evaluate General Solicitation Amendments to Rule 506* (<http://us.practicallaw.com/8-382-6259#a995555>).

While all investors in a Rule 506(c) offering must be AIs, Rule 506(b) technically permits sales to 35 or fewer "sophisticated" non-AIs. This means non-AI friends and family cannot purchase securities in a Rule 506(c) offering. This is unlikely to be a significant disadvantage to Rule 506(c) since in practice most Rule 506(b) offerings are limited to AIs. Rule 506(b) requires comprehensive disclosure in an offering involving even one non-AI (by contrast, there are no specific disclosure obligations in an offering exclusively to AIs).

2015 GUIDANCE ON GENERAL SOLICITATION

The JOBS Act did not change the meaning of the term general solicitation or make the ban on general solicitation in Rule 506(b) offerings any stricter. Rule 506(c) did, however, create a legitimate path for companies to use general solicitation in Rule 506 private placements, and companies must disclose on Form D whether they have done so.

This caused some market participants to worry that long-standing practices that developed when general solicitation was completely banned might become subject to closer regulatory scrutiny. For example, some questioned whether practices such as demo days (events sponsored by startup accelerators featuring startup companies that often are simultaneously seeking to promote their business generally and raise capital) might garner regulatory attention.

In response to this concern and other questions, in August 2015 the SEC staff issued new compliance and disclosure interpretations that:

- Reaffirm certain long-standing SEC guidance on general solicitation.
- Provide new guidance on how the ban on general solicitation applies in certain common contemporary contexts, such as angel networks and demo days.

(*Questions 256.23 through 256.33, Securities Act Rules C&DIs*). This guidance is discussed throughout this Note.

GENERAL SOLICITATION BAN

The ban on general solicitation in Rule 506(b) offerings is found in Rule 502(c). Rule 502(c) does not define general solicitation, but it does provide examples of it. The rule states, in relevant part:

"[N]either the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following: (1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and (2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising;..."

SEC guidance explains the Rule 502(c) ban can be understood by asking two separate questions about a communication:

- Is the issuer or someone acting on its behalf using the communication to offer or sell securities?
- Is the communication a general solicitation or general advertisement?

(*SEC Release No. 33-6455 (Mar. 3, 1983), at III.C. and Question 256.24, Securities Act Rules C&DIs*).

This guidance explains that a communication does not violate the Rule 502(c) ban if either of these questions can be answered in the negative. This means that communications an issuer makes around the time of a Rule 506(b) capital raising must be either:

- Not offers of securities.
- Permitted private offers of securities (meaning offers made without any general solicitation).

Most kinds of communications discussed in this Note are clearly offers of securities, and the key question is whether they were made publicly in a general solicitation. However, for some types of communications made around the time of a capital-raising transaction, the key question is whether the communication is an offer of securities as opposed to a routine, factual business communication related to the issuer's operations (see "*Offer*" under the *Federal Securities Law*).

"OFFER" UNDER THE FEDERAL SECURITIES LAW

Under the federal securities law, offer is a term of art encompassing many types of communications beyond the obvious. Section 2(a)(3) of the Securities Act defines "offer to sell," "offer for sale" and "offer" to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value."

As a practical matter, this means that many communications that are not offers of securities under contract law are deemed to be offers under the securities law. For example, an ad in the paper saying, "Stock, \$1 a share," would be an offer under the securities law, even though under the contract law of most states, it would be considered merely an invitation to begin negotiations. A company that merely mentions the fact that it is doing an offering has, under some circumstances, made an offer under the securities laws.

More troubling is that even communications that do not mention the issuer's securities or offering may also be deemed offers. A long-standing SEC position is that these kinds of communications are offers if they may have the effect of conditioning the market or arousing public interest in an issuer or its securities (*SEC Release No. 33-3844 (Oct. 8, 1957), at pg. 2*). For further discussion of this, see *Product Advertising and Business Announcements* and *Demo Days, Pitch Events and Other Meet-ups*.

LAW AND GUIDANCE APPLICABLE TO SPECIFIC KINDS OF COMMUNICATIONS

A company probably wants to avoid the additional burdens of Rule 506(c) if it does not need or want to use general solicitation as part of its securities offering. At the beginning of the capital raising process, a company should identify the communications it plans to use. If the company and its counsel can get comfortable that they all fall outside the definition of general solicitation, it may make the most sense for the company to rely on Rule 506(b) for its offering.

Unfortunately, there is no one place to look for guidance on whether a communication would likely be deemed an offer of securities by means of a general solicitation. Instead, companies and their counsel must look to:

- The language of Rule 502(c).
- SEC guidance, particularly compliance and disclosure interpretations, no-action letters, interpretive releases and rulemaking releases.

This section discusses guidance on the Rule 502(c) ban relevant to selected circumstances that may arise in the context of a startup or emerging company capital raising transaction.

One theme running throughout the guidance is that determining whether a communication is an offer by general solicitation is always a highly fact-specific task. Therefore, this discussion is intended only as a starting point for thinking through this issue. In addition, while practitioners look to them for guidance, no-action letters are only confirmations by the SEC staff that it would not recommend enforcement action against a specific party based on the facts stated in the request. The staff often does not specify which facts are key to a grant of no-action relief, and the staff reserves the right to change the positions reflected in past no-action letters.

PRIVATE DISCUSSIONS WITH SPECIFIC INDIVIDUALS OR ENTITIES

One way a growing enterprise might look for investors is by privately approaching individuals or representatives of entities like venture capital firms. A company might approach people face-to-face, by calling them on the telephone or in a private e-mail or private social media message. Is this general solicitation? Does the company need to rely on Rule 506(c) if it does this kind of thing?

The answer is that it depends on whether and how the company knows the people it approaches **before** it approaches them for a securities offering. SEC guidance has established the principle that approaching specific individuals about a securities offering is not a general solicitation if, before the individuals are approached, they have a substantive relationship with the person approaching them (see *Substantive Preexisting Relationship* and *Working through Broker-dealers, Investment Advisers and Other Third Parties*).

Recent guidance also clarifies that a company may not be engaged in general solicitation if it is connected with potential investors through certain informal investor networks (see *Informal Networks and Other Contacts*).

Substantive Preexisting Relationship

What is a substantive relationship? In 2015 guidance, the SEC stated that a substantive relationship is:

"one in which the issuer (or a person acting on its behalf) has sufficient information to evaluate, and does, in fact, evaluate, a prospective offeree's financial circumstances and sophistication, in determining his or her status as an accredited or sophisticated investor."

(*Question 256.31, Securities Act Rules C&DIs*).

The 2015 guidance reaffirms a line of no-action letters from the 1970's and 80's, in which the SEC stated that a previous relationship with an offeree of securities is substantive if it allows the offeror "to be aware of the financial circumstances or sophistication" of the offeree (*Mineral Lands Research & Mktg. Corp., SEC No-Action Letter (1985 WL 55694 (Dec. 4, 1985))*). Put differently, a relationship is substantive if, based on a past business relationship with an offeree, the offeror can form a belief that the offeree currently has such knowledge and experience in financial and business matters that the offeree is capable of evaluating the merits and risks of the prospective investment (*Woodtrails-Seattle, Ltd., SEC No-Action Letter (1982 WL 29366 (Aug. 9, 1982))*).

To satisfy this standard, a relationship must also be preexisting. Generally, this means that a relationship must be formed with a prospective investor **before** the beginning of the offering that the investor is being approached about. If a prospective investor is approached by a third party, such as a broker-dealer, working on behalf of a company offering securities, that third party must have formed a relationship with the prospective investor before the third party began participating in the offering. SEC guidance states that so long as a relationship with a prospective investor is formed before an offering (or third party's participation) begins, there is generally no minimum "waiting period" before the investor may be approached about the offering (*Question 256.29 and 256.30, Securities Act Rules C&DIs and Citizen VC, Inc., 2015 WL 4699193 (SEC No-action Letter Aug. 6, 2015)*).

While the substantive preexisting relationship standard leaves some questions unanswered, it is clear that cold-calling (or cold-mailing, e-mailing or social media messaging) potential investors about an offering, either at random or because they are part of a particular group, violates the ban on general solicitation (see, for example, *In the Manner of CGI Capital, SEC Release No. 33-7904 (Sept. 29, 2000)* and *Mobile Biopsy, LLC, SEC No-Action Letter (1999 WL 607850 (Aug. 11, 1999))*). This principle applies even if the cold-approaching activity is directed only at AIs (see *Question 256.18, Securities Act Rules C&DIs*).

Working through Broker-dealers, Investment Advisers and Other Third Parties

In no-action letters and other guidance, the SEC established that an issuer working with a registered broker-dealer to find investors may piggyback off that broker-dealer's substantive preexisting relationships. The SEC explained that this is because of the nature of the relationship between registered broker-dealers and their clients. Because broker-dealers are required to deal fairly with, and make suitable investment recommendations to, their clients, the broker-dealer and client relationship implies a substantive relationship exists (*SEC Release No. 33-7856, at pg. 12*).

Notably, in no-action letters, the SEC suggested that a broker-dealer could form a substantive relationship with a party by having that party complete a questionnaire with information allowing the broker-dealer to evaluate the party's sophistication and financial circumstances (*E.F. Hutton & Co. Inc., SEC No-Action Letter (1985 WL 55680 (Dec. 3, 1985))*). Letters noted these questionnaires were generic (they did not mention a specific offering), and that "sufficient" time would elapse between completion of the questionnaire and investment (see *H.B. Shaine & Co., Inc., SEC No-Action Letter (1987 WL 108648 (May 1, 1987))*). The SEC recently clarified that simply asking a party to certify that party's status as an AI or sophisticated investor by checking a box is **not** sufficient to form a substantive preexisting relationship (*Question 256.31, Securities Act Rules C&DIs*).

In 2015 guidance, the SEC staff formally acknowledged that a registered investment adviser may also, under certain circumstances, form a substantive preexisting relationship with its clients for purposes of making offers in Rule 506(b) offerings (*Question 256.28, Securities Act Rules C&DIs*).

In the same guidance, the SEC staff stated that while possible, it would be "likely more difficult" for parties other than broker-dealers and investment advisers (such as issuers themselves) to form relationships

with potential investors that could satisfy the substantive preexisting relationship standard, especially in the context of offerings made over the internet (*Question 256.32, Securities Act Rules C&DIs*). For a further discussion of this, see *Box, IPONET, Lamp and Agristar Letters*.

Informal Networks and Other Contacts

Guidance has long stated that having a substantive preexisting relationship with each person approached for an offering is not the only way for an issuer to show that it made contact without using general solicitation (*SEC Release No. 33-7856 (Apr. 28, 2000), at n. 86 and SEC Release No. 33-6825 (Mar. 14, 1989), at n. 12*). However, until recently, the SEC provided no clear guidance on other ways for an issuer to show it reached investors without general solicitation.

In 2015 guidance, the SEC acknowledged "long-standing practices" in which a company in a relationship with a sophisticated investor is referred by that individual to one or more other sophisticated investors that are members of an informal investor network (or a more formal group like an angel network). The guidance states that, depending on the circumstances, this practice may be consistent with the ban on general solicitation (*Question 256.27, Securities Act Rules C&DIs*). The guidance states, however, that generally speaking, a company is more likely to be engaging in general solicitation if it contacts potential investors:

- Through impersonal means or in a non-selective manner.
- That lack financial experience and sophistication.

While this guidance is helpful, companies should consult with counsel when they are planning to approach potential investors about an offering. A company should also be wary and consult counsel before discussing its offering with an unknown person that approaches the company about making an investment. A good rule of thumb is to assume that person could be a securities regulator.

PUBLIC WEBSITE, SOCIAL MEDIA AND PRINT OR BROADCAST MENTIONS OF THE OFFERING

A company might want to attract investors by mentioning its capital raising:

- On its public website.
- In print, online or broadcast media.
- In postings to its company social media accounts or the accounts of key employees.

Mentioning an offering on a medium that is accessible to anyone, such as on an unrestricted, public website or in a newspaper or TV ad, will almost certainly be considered an offer through general solicitation. This kind of communication would be an offer made through an advertisement, notice or other communication, which is specifically prohibited by Rule 502(c). The SEC has repeatedly said that posting information about an offering on the unrestricted, publicly available internet is general solicitation (see *SEC Release No. 33-7233 (Oct. 6, 1995), at pg. 11, SEC Release No. 33-7856, at pg. 12, SEC Release No. 33-9415 (July 10, 2013), at pg. 3, Question 256.23, Securities Act Rules C&DIs*).

Using a widely-followed Facebook, LinkedIn or Twitter account to advertise or announce an offering most likely violates the ban on general solicitation. The universe of people who follow any given

social media account is smaller than the universe of people with access to an unrestricted website. However, most companies are not selective enough about their social media followers that they could argue they have a substantive preexisting relationship with each one. Furthermore, no matter how small a company's group of social media followers is, there is always the possibility that one or more of them will share or retweet a post about an offering, making it visible to an even wider audience.

SEC guidance distinguishes between posting information to a publicly accessible, unrestricted website on the one hand, and targeted electronic communications with specific individuals on the other. Certain types of targeted, private electronic communications are analogous to traditional mail (*SEC Release No. 33-7516 (Mar. 23, 1998), at pg. 3*). Depending on the circumstances, certain online communications (for example, e-mails or private Facebook messages to a particular individual) should be analyzed as private discussions with specific individuals (see *Private Discussions with Specific Individuals and Entities*). This guidance pre-dates the popular use of social media, and does not directly address it.

SEC guidance states placing offering materials on the internet is inconsistent with the Rule 502(c) ban on general solicitation, **even if** an individual must provide "various information" to access the materials. This guidance distinguishes posting offering information behind a wall on a public website from the use of a computer service to deliver offering materials to prospective investors that have already been identified without the use of general solicitation (*SEC Release No. 33-7233, at pg. 11*). For a further discussion of this, see *Online Funding Platforms*.

ONLINE FUNDING PLATFORMS

A growing enterprise seeking capital might turn to a web-based service to find investors. Recently, there has been a proliferation of services that maintain online forums in which companies seeking capital and AIs seeking investment opportunities can meet and communicate. There are different types of services of this kind operating under different legal theories.

Some of these online services contemplate that the companies and AIs connecting through them will pursue Rule 506 transactions. Of course, parties that connect through platforms can now complete their transaction in reliance on Rule 506(c) without complying with the Rule 502(c) ban on general solicitation. However, both before the adoption of Rule 506(c) and currently, parties connecting through these platforms have completed transactions in compliance with the ban. How can companies post offering information to a platform in light of the SEC position that placing offering materials on the internet (even if the materials are behind a wall that investors can only cross by providing specific information) is general solicitation?

One place to look for the answer is a line of no-action and interpretive letters that began in the mid-1990s. In 1996, the staff responded to IPONET's request for no-action relief with an interpretive letter blessing IPONET's online service that included information about Regulation D offerings on a password-protected webpage available only to AIs and sophisticated investors that had been pre-screened by the website's broker-dealer affiliate (*IPONET, SEC No-Action Letter (1996 WL 431821 (July 26, 1996))*). The following year, the SEC blessed

a similar model in a no-action letter to Lamp Technologies, Inc. (*Lamp Technologies, Inc. SEC No-action Letter (1997 WL 282988 (May 29, 1997))*). In both letters, relief was based in part on the fact that the platform operator or its affiliate had established a substantive relationship with each prospective investor through questionnaires before that party was granted access to information about specific offerings. By contrast, in 2004, the staff declined to provide no-action relief to Agristar Global Networks, Ltd., an issuer seeking to do something similar for offerings of its own securities (*Agristar Global Networks, Ltd., SEC No-Action Letter (2004 WL 299067 (Feb. 9, 2004))*). For a further discussion, see *Box, IPONET, Lamp and Agristar Letters*.

Most recently, the staff granted no-action relief to Citizen VC, Inc., an online venture capital investment platform planning to offer investments in Rule 506(b) offerings to members of Citizen VC's website (*Citizen VC, Inc., 2015 WL 4699193 (SEC No-action Letter Aug. 6, 2015)*). Citizen VC planned to offer its members interests in special purpose vehicles (SPVs), which themselves would invest in particular startups and emerging companies. Notably, Citizen VC stated in its request for relief that each SPV offered through its website would be managed by a registered or exempt investment adviser.

In the Citizen VC letter, relief was based in part on the fact that Citizen VC planned to establish a substantive preexisting relationship with each of its members. It had designed detailed qualification policies and procedures designed to evaluate each prospective member's sophistication, financial circumstances and ability to understand the risks of the securities being offered. These procedures included, among other things, requiring each prospective member to complete a questionnaire designed to confirm its AI status and contacting the prospective member by phone and email. The SEC noted that the most important factor in determining whether a preexisting substantive relationship exists is the quality of that relationship, and that no specific duration of time was essential.

In granting relief to Citizen VC, the staff also noted that Citizen VC stated it would not approach site members about particular offerings until after Citizen VC had conducted its procedures and evaluations and admitted a member to the site. Citizen VC stated that its publicly-accessible homepage would include only generic information about its service, with information about particular offerings in a password-protected, members-only area.

Counsel advising an issuer raising capital through a platform should be familiar with these authorities and related SEC guidance. Even though these letters deal with the operation of the platform, ultimately it is the issuer's Rule 506(b) exemption that will be lost if it markets its offering on a platform in a manner that violates the ban on general solicitation.

The operations of these platforms raise issues under federal and state broker-dealer regulation not addressed here. For an introduction to these issues, see *Practice Note, JOBS Act: Regulation D and Rule 144A General Solicitation Summary: Exemption from Broker-Dealer Registration* (<http://us.practicallaw.com/1-518-7172#a253729>) and *Articles, Using Finders to Assist in Financings: Understanding the Risks Associated with Unregistered Broker-Dealers* (<http://us.practicallaw.com/9-507-9828>) and *Expert Q&A on Accredited Crowdfunding* (<http://us.practicallaw.com/2-532-3268>).

PRODUCT ADVERTISING AND BUSINESS ANNOUNCEMENTS

At the same time it is looking to raise capital from investors, but separately from the capital-raising process, a growing company is also usually operating its business. The company's regular operations may include:

- Marketing its products or services to customers through ads.
- Making public announcements about business events (other than capital raising), such as strategic partnerships.

These communications are clearly public ones made to an unrestricted audience. The question is whether they are offers of the issuer's securities under the securities laws' broad definition of that term (see *General Solicitation Ban*). If they are offers by general solicitation, they are not permitted in Rule 506(b) offerings because of Rule 502(c)'s ban on general solicitation.

SEC guidance states that while Rule 502(c) does not bar product advertising, product advertising is not permitted under the rule if it involves the solicitation of an offer to buy a security. The guidance states that whether particular product advertising constitutes a solicitation in contravention of the Rule 502(c) ban depends on the facts and circumstances (*Question 256.16, Securities Act Rule C&DIs*).

Addressing other types of business announcements, recent SEC guidance states that communications of factual business information that do not condition the public mind or arouse public interest in a securities offering are not offers and therefore not banned by Rule 502(c). The guidance goes on to clarify that, while the meaning of "factual business information" depends on the particular facts, it typically:

- Is limited to information about the company, its business, financial condition, products, services or advertisement of products.
- Does **not** include predictions, projections, forecasts or opinions with respect to the valuation of a security.

(*Questions 256.24 and 256.25, Securities Act Rules C&DIs*).

With this in mind, a company conducting a Rule 506(b) offering should not mention its offering in its product advertising. It should also proceed cautiously if it plans to noticeably step up its advertising just before or during a Rule 506(b) offering, or make a business-related announcement that may attract a lot of attention to the company. These activities might invite questions about whether the advertising or announcement was meant to generate, or had the effect of generating, public interest in the company's securities. A company and its counsel in this situation might consider:

- Whether the company's product advertising just before the capital raise is different in type or amount from what was normal for the company in the past. If it is, does the company have a good explanation for this unrelated to the capital raising transaction (for example, launching a new product line)?
- If the company announces a business development just before its offering, did the company make announcements about similar topics, and in the same manner, in the past?
- Whether any of the eventual investors in the capital raising transaction are likely to first become interested in investing in the company after reading or hearing the advertising or business

announcement (or whether the company already knows everyone who will probably invest in the offering before the advertising or announcement goes live).

The company and its counsel should also think very carefully before including forward-looking information, such as projections or forecasts, in other types of ordinary-course business announcements.

While it does not apply in the context of unregistered offerings, Rule 169 under the Securities Act, which offers a safe harbor for certain factual business communications by non-reporting companies in the run up to their IPO, may be useful guidance by analogy.

However, a company may want to proactively leverage stepped-up advertising for a new product, or the announcement of a major business event, to promote its offering. That company may want to mention its offering in or at the same time as these business communications. A company in this situation should consider using Rule 506(c), which would allow this.

DEMO DAYS, PITCH EVENTS AND OTHER MEET-UPS

Startups and emerging companies often attend events where they and peer companies present their company and products and services to attendees. Among many other possible formats, these events include:

- **Pitch events.** This term generally describes events at which emerging companies talk about their company broadly, and specifically mention a proposed or ongoing capital raising transaction.
- **Demo days.** This term generally describes events at which companies predominately talk about their products or services. There is no explicit expectation that the companies are actively looking for financing or will discuss any proposed or ongoing capital raising transaction.

Can a company participate in a pitch event or demo day consistent with the ban on general solicitation? The short answer is that it depends on how the particular event is conducted.

Rule 502(c) bans offering securities at any seminar or meeting whose attendees have been invited by any general solicitation or general advertising. Talking about a proposed or ongoing offering, as a company might be expected to do at a pitch event, is an offer of securities under the securities laws (see "*Offer*" under the *Federal Securities Law*). Therefore, if a pitch event is announced in the media or on the unrestricted internet, generally a company could not participate consistent with the ban on general solicitation. A company that wants to participate in a publicly announced pitch event should consider relying on Rule 506(c) for its offering.

There may be some unlikely circumstances in which a pitch event is specifically designed to be consistent with the ban on general solicitation (for example, a pitch event that is not announced or open to the public where pitching companies or the event organizers have a substantive, preexisting relationship with all the attendees). Recent SEC guidance clarified that the staff believes a presentation involving offers of securities at a pitch event may not violate the general solicitation ban if the event is structured to include only attendees with whom the company or organizers have a preexisting relationship, or that have been contacted through an informal

investor network (*Question 256.33, Securities Act Rules C&DIs*). For a discussion of one type of similar event that received no-action relief, see *Box, Michigan Growth No-action Letter*. For a further discussion of SEC guidance on preexisting relationships and investor networks, see *Private Discussions with Specific Individuals or Entities*.

Demo days focus on the participating companies' products and services and not on their securities offerings. If companies participating in a demo day only discuss their products and services and make no mention of their offerings, depending on the circumstances, it might be reasonable to conclude that participation does not involve the company making offers. A communication that does not involve an offer does not violate the general solicitation ban (see *Question 256.33, Securities Act Rules C&DIs*).

However, the definition of offer under the securities law is broad (see "*Offer*" *Under the Federal Securities Law*) and product advertising and other seemingly non-offering related announcements can be deemed an offer of securities. Companies and their counsel should carefully consider participation in a demo day along the same lines they would analyze product advertising and business announcements (see *Product Advertising and Business Announcements*). Rule 506(b) issuers should proceed with caution. Depending on how comfortable (or uncomfortable) a company and its counsel are about participation in a particular demo day, it might make sense for the company to skip the event or attend it and plan to rely on Rule 506(c) for its offering.

SEC FILINGS

A Rule 506 issuer is required to file Form D using the SEC's EDGAR system no later than 15 days after the first sale of securities in its offering (*Rule 503(a)*). Form D filings are accessible to anyone on the SEC's website once they are filed on EDGAR. For more information on filing Form D, see *Practice Note, Section 4(a)(2) and Regulation D Private Placements: Form D Filing* (<http://us.practicallaw.com/8-382-6259#a630542>) and *SEC: Filing and Amending a Form D Notice: A Compliance Guide for Small Entities and Others*. Under Rule 502(c), the Form D filing is not prohibited by the ban on general solicitation so long as the Form D filing is a good faith and reasonable attempt to comply with requirements (*Rule 502(c)*).

However, problems with the general solicitation ban may arise if an issuer that has filed a registration statement with the SEC for an IPO:

- Decides to abandon the registered offering and raise money in a Rule 506(b) offering instead.
- Concurrently with the public offering, also sells securities in a Rule 506(b) offering.

In both of these scenarios, under the doctrine of integration of offerings, the public communications related to the abandoned or concurrent public offering may be deemed to violate the ban on general solicitation that applies to the Rule 506(b) offering. For more information on how integration works in these contexts and safe harbors an issuer may be able to rely on, see *Practice Note, Multiple Offerings: Dealing With Integration* (<http://us.practicallaw.com/1-381-9554>).

IPONET, LAMP AND AGRISTAR LETTERS

IPONET, an affiliate of then-licensed broker-dealer W.J. Gallagher & Company, planned to invite previously unknown prospective investors to complete a questionnaire posted on IPONET's unrestricted website. The invitation to complete the questionnaire and the questionnaire were generic, meaning they did not mention any particular securities offering. IPONET sent invitations to complete questionnaires to build a customer base and database of AI and sophisticated non-AI investors for the affiliated broker-dealer.

After the affiliated broker-dealer reviewed a party's completed questionnaire and determined it was an AI or a sophisticated investor, the party would be given a password allowing it to access a restricted part of the IPONET website where information about private offerings was posted. Parties with access to the restricted part of the website could purchase securities only in offerings posted after the party was granted access. There were no mentions of issuers or specific private offerings on the unrestricted part of the website.

The IPONET interpretive letter states that neither the invitation to complete a questionnaire, nor the posting of information about private offerings on the restricted part of website, would violate the general solicitation ban. In a 2000 interpretive release, the SEC suggested that key facts in the IPONET letter were the involvement of the broker-dealer affiliate, and that the broker-dealer established, through generic questionnaires, a substantive preexisting relationship with all parties granted access to information about specific offerings (*SEC Release No. 33-7856 (Apr. 28, 2000), at pg. 12 and n. 88*).

The following year, Lamp Technologies, Inc. sought and was granted relief that its similar service for information about Rule 506 private investment company (hedge fund) offerings was consistent with the general solicitation ban. As in IPONET, parties were granted access to a restricted website only after completing generic questionnaires and cleared as AIs. In Lamp, a party could not invest in any of the private hedge fund offerings posted on the restricted website until 30 days after it obtained access.

Notably, Lamp was not a broker-dealer. However, in the 2000 interpretive release, the SEC stated that while there may be a circumstance in which a non-broker-dealer third party can play the role of a broker-dealer in establishing substantive preexisting relationships with investors, the Lamp letter is limited to the private investment company context. According to this guidance, the Lamp letter did not extend the substantive preexisting relationship doctrine beyond the registered broker-dealer context generally (*SEC Release No. 33-7856 (Apr. 28, 2000), at pg. 12 and n. 88*).

In 2015 guidance, however, the staff explicitly acknowledged that registered investment advisers may also form a substantive preexisting relationship with their clients. The staff also granted no-action relief to an online venture capital platform offering interests in SPVs managed by a registered or exempt investment adviser to site members (see *Working through Broker-dealers, Investment Advisers and Other Third Parties and Online Funding Platforms*).

In 2004, and without explaining the reason, the SEC denied no-action relief to Agristar Global Networks, Ltd. Agristar proposed to develop a database of AIs for the purpose of making later offers of Agristar securities to them. Agristar asked the staff to assure it that its plan would not violate the general solicitation ban. Agristar proposed to send generic questionnaires to the owners of farms taken from a database Agristar had developed as part of its core business operations as a satellite-based communications company linking commercial farms and ranches with companies the farms and ranches transacted business with. The questionnaires were designed to determine if these parties were AIs. Once Agristar determined a party was an AI and a sufficient waiting period had elapsed, Agristar proposed to offer Agristar securities to these parties.

Seemingly consistent with the Agristar letter, 2015 guidance stated that "it is likely more difficult" for a company itself to develop a substantive preexisting relationship with prospective investors, especially in the context of securities offerings conducted over the internet. The guidance suggests that companies in these circumstances should consider relying on Rule 506(c) for their offering (*Question 256.32, Securities Act Rules C&DIs*).

MICHIGAN GROWTH NO-ACTION LETTER

In the Michigan Growth Capital Symposium no-action letter (*Michigan Growth Capital Symposium, SEC No-Action Letter (1995 WL 264883 (May 4, 1995))*), the staff provided no-action relief on the question of whether companies presenting at a symposium would be violating the general solicitation ban.

The symposium, which had taken place each year since 1979, was organized by academics from the University of Michigan for the express purpose of providing Michigan companies with access to national private equity firms. Each year, approximately 20 selected companies that believed they would need capital the near future were invited to make presentations about their plans, products and financial needs to attendees. No financing details were included in the presentation. Attendees could visit with the presenters after their presentations. In the past, private placement memos occasionally changed hands in these private meetings, although they were not distributed widely outside private meetings.

Private equity attendees of the conference were sophisticated corporate entities with the primary objective of investing in and development of emerging companies. Other attendees included representatives of:

- Banks.
- Insurance companies.
- State and local economic development agencies.
- Law and accounting firms.
- Operating companies.

Key aspects of the symposium cited in the SEC's no-action response included:

- Only non-reporting companies not in the process of completing an IPO were allowed to participate. The participating companies were chosen by a university professor who was one of the symposium organizers.
- The professor sometimes had provided consulting services to some of the presenters. However, the consulting was limited to advising on corporate structure weaknesses, improving business plans and available venture capital sources. These consultations involved less than 5% of presenter companies over the years.
- The symposium was publicized through targeted mailings to known AIs, limited generic advertising in the *Venture Journal* and by word of mouth from prior attendees.
- The symposium did not arrange prior contacts between presenter firms and attendees.
- No specific financing details were part of the presentations made at the symposium. The symposium agreed that going forward, no private placement materials would be distributed at the symposium, even in private meetings.
- Besides providing assistance in preparing the presentation, the symposium and professor offered no other service, and received no compensation from presenters or attendees except for fees associated with the conduct of the symposium. No conditional fees or brokerage-type commissions were charged to any participant.

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