



JOBES Act Lifts Ban on “General Solicitation or Advertising” in Certain Private Offerings and Resales

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The Jumpstart Our Business Startups Act (the “JOBS Act”) passed by Congress and signed into law by the President on April 5, 2012, directs the U.S. Securities and Exchange Commission (the “SEC”) to issue regulations that remove the existing prohibition against general solicitation or advertising:

- In private placements that are exempt from registration under Rule 506, if the securities are sold only to accredited investors; and
- In private resales of restricted securities exempt under Rule 144A, if the securities are sold only to persons reasonably believed to be qualified institutional buyers (“QIBs”).

Both revisions will permit securities to be **offered** to anyone through general solicitation or general advertising without losing the applicable exemption, as long as the securities are **sold** only to accredited investors (in private placements under Rule 506) or to QIBs (in resales of restricted securities under Rule 144A).

The JOBS Act is expected to have a broad and sweeping impact on the way capital is raised by professional venture capital funds, private equity funds, and hedge funds.

Changes to Rule 506 for Private Placements

Rule 506 of Regulation D provides a safe-harbor for an exemption, from the registration requirement for offers and sales of securities under the Securities Act of 1933 (the “Securities Act”), for the private placement of an unlimited amount of securities to an unlimited number of accredited investors and up to 35 non-accredited investors (provided that each of them, alone or with a purchaser representative, is financially sophisticated). Securities issued under Rule 506 are “restricted” and may be resold in a registered offering, another exempt offering, or under the resale Rules 144 or 144A (discussed below). They are also “covered” securities, so this exemption preempts state “blue sky” registration (but not notice filing) requirements.

Among the current conditions for the Rule 506 exemption is Rule 502(c), which prohibits an issuer of securities, or any person acting on its behalf, from offering or selling the securities by any form of **general solicitation or general advertising**, including:



- Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and
- Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising.

The JOBS Act requires the SEC, within 90 days, to modify Rule 506 so that compliance with the prohibition against general solicitation or advertising in Rule 502(c) will no longer be required for private placements under Rule 506 to be exempt from registration, as long as all purchasers of the securities are accredited investors. The modified rule must also require issuers to take reasonable steps to verify that all of the purchasers of securities are accredited investors, using methods to be determined by the SEC.

Changes to Rule 144A Resales to QIBs

Rule 144A under the Securities Act provides a safe-harbor for the exemption from registration in Securities Act Section 4(1) for transactions by persons other than issuers, underwriters, or dealers. Under Rule 144A, a non-issuer that resells restricted securities only to QIBs is deemed not to be engaged in a “distribution” and thus not an underwriter, so the Section 4(1) exemption applies. Because QIBs own and invest on a discretionary basis at least \$100 million in securities of non-affiliated issuers, they are thought to be able to fend for themselves without needing the disclosures and other protections of registered offerings, so selling securities to them does not involve a public offering. Frequently, an issuer first sells securities (under the Rule 506 safe-harbor for the Securities Act Section 4(2) private placement exemption) to one or more investment banks, which are technically not “underwriters” because they then immediately resell the securities to QIBs under the Rule 144A safe-harbor.

Among the current conditions for the Rule 144A safe-harbor is the requirement in Section (d)(1) that securities sold under Rule 144A may be **offered** or sold only to a person reasonably believed to be a QIB.

The JOBS Act requires the SEC, within 90 days, to modify Rule 144A to provide that securities sold under Rule 144A may be offered to persons other than QIBs, including by means of general solicitation or general advertising, as long as the securities are sold only to persons reasonably believed to be QIBs.

Additional Lathrop Gage alerts discuss other important provisions of the JOBS Act. To discuss this alert or any securities law matter, please contact your Lathrop Gage attorney or any of the attorneys listed on this alert.