



ACA Flash

Rule 506(b) Is Unchanged, But May Not Be As Useful

Dear ACA Member,

I want to follow up on the media release and materials sent yesterday as a call to action against the onerous new SEC rules lifting the ban on general solicitation for companies seeking investment from accredited investors. This rule, known as 506(c), requires issuers to take reasonable steps to verify that all investors are accredited. Those steps include requiring the investor to provide income and/or net worth data to the issuer or its agent. The decades-old practice of self-certification will no longer be accepted under this standard. As we said, this is a very big deal – that could literally kill most angel investment.

Many of you have been rapid responders – and this info is now being widely circulated across social media, blogs and newswires. This is a great start to a campaign which we believe must succeed, as it is fundamental to the future viability of angel investing. Thank you, and keep it up!

A number of you have asked whether it will still be possible for issuers to make “quiet offerings,” without general solicitation, and whether accredited investors can still self-certify in this case as we do currently. The answer to this is “yes” – if the issuer has been very careful about not conducting any activity that might be construed as general solicitation. The SEC now calls this Rule 506(b).

The problem lies with the broad definition of general solicitation. Every pitch contest, open business school competition, listing on a funding website, news article or blog mentioning fundraising falls under the rubric of general solicitation. Angels want to see the most promising startups – and these are the very ones that are most likely to have sought and received some form of public recognition. As a result, more and more deals are likely to be offered under Rule 506(c) than ever before.

Many legal advisors are indicating they will have issuers use 506(c) because the penalties for failing to make that election include barring the issuer from raising funds under Form D for a year. These and other new proposed requirements for issuers to submit all solicitation materials to the SEC, and to add specified legends (which themselves are longer than a 140-character Tweet!), will make navigating the new rules a complicated process for angels and start-ups alike, for a long time to come.

ACA is continuing to work with the SEC, legislators, and other organizations to advance an acceptable solution that would afford ACA member angel groups some sort of safe harbor to self-certify (so no financial documents). Our goal is to get a no-action letter or other clarifying statement from the SEC. We will send you additional tools and materials to support this fight, and we will be working with a great vendor (and start-up) on tools that will make it easy to contact your Congressional delegation. We know that Congress is interested in our view and did not intend for the JOBS Act to hurt the interests of small businesses or angel investors. Their goal, and ours, is to give small business greater access to capital so jobs can be created.

While the SEC rule on general solicitation is final, the fight continues to ensure that angel investors can keep on fueling the innovation economy and entrepreneurial success.

Many thanks for your support

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