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A Major Change for Traditional Private Placements: General Solicitation and General Advertising Coming Soon

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On April 5, 2012, President Obama signed into law the JOBS (Jumpstart Our Business Startups) Act (H.R. 3606), a package of bills aimed at easing the regulatory burdens on private and newly public companies during the capital-raising process. One part of the JOBS Act will remove the ban on general solicitation and general advertising for private offerings of securities under Rule 506 of Regulation D. In addition to easing regulation of these private offerings, removing the ban will likely facilitate the raising of early-stage capital online.

The Securities and Exchange Commission (SEC) will have 90 days to publish rules that will govern the new Rule 506. Rule 506, which contains no limits on offering size, is the most widely relied upon rule used for private offerings that are exempt from registration under Section 4(2) of the Securities Act of 1933.

Currently, it is generally accepted that due to the ban on general solicitation and general advertising, Rule 506 offerings must rely on the premise that sales and offerings of unregistered securities are being made to those investors for which the issuer or intermediary has a preexisting relationship. Once the SEC's revised rules go into effect, issuers will no longer need this preexisting relationship to solicit investors under Rule 506. The only significant limitation is that all purchasers must be “accredited investors.” At this point in time, it is unclear what limits, if any, the SEC may impose on “advertising.”

We believe the new Rule 506 will facilitate raising capital online. Undoubtedly, it will make private offerings less burdensome and should pave the way to make capital raising easier for early-stage companies.

Unlike crowdfunding, in a Rule 506 private placement there is no limitation on the size of the offering or how much one individual can invest. Further, no broker or intermediary is required under the law, as enacted. The SEC may, however, add requirements regarding the use of broker dealers and/or intermediaries. By limiting the purchasers to “accredited investors,” Congress did stop short of “democratizing” the capital-raising process for all potential investors. For individuals, “accredited investors” generally include investors with at least $1 million in net worth, individually or jointly with a spouse (excluding the equity value of the primary residence), and/or at least $200,000, individually, or $300,000, jointly with a spouse, in annual income for at least two years.

We will keep you posted on the final SEC rules, which should be published within the next 90 days.

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