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Four Ways to Avoid General Solicitation in Private Offerings

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You are the founder of a startup. After working in “stealth mode” for months and bootstrapping (i.e., self-funding) along the way, you finally launch your new company. Shortly thereafter, a handful of customers sign up for beta tests and pilots. There’s market fit, customer adoption and your company is poised for significant growth. You are ready to tell your compelling story and start raising seed capital to grow your business. So, why wait? You compose a tweet announcing your startup to the world and inviting interested investors to reach out to you.

Not so fast.

By sending that tweet, you are engaging in a public solicitation for investments. Whether you intend to sell convertible notes, Simple Agreement for Future Equity (SAFEs) or preferred stock to raise capital (collectively known as “securities” in legal parlance), any offer of such securities must either be (a) registered with the Securities and Exchange Commission (SEC) or (b) exempt from registration based on one or more statutory exemptions. While the SEC has made it easier for companies to raise capital through public solicitation in the last few years, either by modifying existing exemptions or adopting new ones, it can be more expensive and time-consuming to use such exemptions. Moreover, once you select an exemption that allows public solicitation and you publicly solicit investments, you are automatically excluded from other private exemptions that might be far cheaper and easier to comply with. To avoid locking yourself into a costly public solicitation exemption, begin your fundraising by relying on a private exemption. (You can always change to a public solicitation later.)

To raise funds under a private offering exemption, SEC rules prohibit the use of “general solicitation” or “general advertising” in connection with such offerings. The terms “general solicitation” and “general advertising” are not defined in the rules, but guidance can be found in court cases and case-by-case “no-action” letters from the SEC. Subsequently, here are four steps you can take now to avoid a general solicitation on your private offering.

1. **Refrain from Advertising**

   Avoid any kind of traditional advertising such as announcements in newspapers, magazines or “similar media”, or broadcasts over television or radio. Today, the term “similar media” would certainly include Twitter, Facebook or any other social media platforms, as well as podcasts and mass emails.

2. **Keep It Off Your Website**

   You might not think your company website would constitute a form of “advertising,” but that’s how the SEC sees it when it comes to the private exemption. Avoid any kind of announcements or posts that would include any solicitations for “interested investors” to “contact management for more information”, “ask us about our offering” and similar enticements.

3. **Choose Your Meetings Carefully**

   While you’re undoubtedly excited to tell the world about your offering, it’s best to avoid doing so in a meeting where the attendees have been invited by general solicitation or general advertising. For example, if you are pitching your company at a demo day, seminar or other public event, you should drop the last slide on your pitch deck regarding your fundraising round. However, the SEC has specifically recognized the long-standing practice whereby groups of experienced, sophisticated investors, such as “angel investors”, share information about offerings through their network and that introductions to the group are not general advertising. On this basis, if you have a relationship with a member of a private, selective, invite-only angel group and you are introduced to this group and/or invited to pitch, this is typically not considered general solicitation.

4. **Limit Fundraising to a Small Circle**

   Perhaps the best way to avoid general solicitation or general advertising in connection with your offering is to limit your fundraising activities to discussions with investors whom you have a so-called “pre-existing” and “substantive” relationship. A relationship with a potential investor is “pre-existing” if it was formed prior to discussing your offering and is “substantive” if you have enough knowledge to evaluate the potential investor’s status as an accredited investor. Investors with whom you have a pre?existing, substantive relationship may include your existing or prior investors, investors in your prior companies or your friends and family.

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