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SEC Lifts Ban On General Solicitation For Certain Private Offerings, Disqualifies "Bad Actors" From Participating In Regulation D Private Offerings And Proposes Rules To Assist In Monitoring Market Practices

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The Securities and Exchange Commission has adopted major amendments to the private placement safe harbor under Rule 506 of Regulation D and to Rule 144A under the Securities Act of 1933 (the "Securities Act"). The amendments will allow general advertising and general solicitation of investors for the first time in certain Rule 506 and Rule 144A offerings,[1] and will disqualify certain "bad actors" from relying on Rule 506.[2] The Rule 506 private placement safe harbor is the most widely used exemption from Securities Act registration[3] and is relied upon by numerous issuers, including many private investment funds, and these changes over time may have a major impact on how such issuers offer their securities to investors. The SEC has also proposed to make a number of other modifications to Regulation D, to Form D (which is filed to claim the safe harbor exemption under Rule 506) and to Rule 156 under the Securities Act in an effort to better enable the SEC to evaluate and regulate the securities market now that the ban on general advertising and general solicitation has been lifted.[4]

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The amendments to Rule 506 of Regulation D and Rule 144A to allow advertising and general solicitation, and the disqualification of certain "bad actors" from participating in a Rule 506 offering, are effective September 23, 2013. The comment period for the companion proposal to further modify Regulation D, Form D and Rule 156 closes September 23, 2013.

Background

Rule 506 of Regulation D provides a safe harbor from registration under the Securities Act for private placements under Section 4(a)(2) of the Securities Act. Issuers relying on the safe harbor may make sales of an unlimited dollar amount of securities, without registration, to an unlimited number of accredited investors[5] and to a maximum of 35 non-accredited investors, provided that, under the Rule's current form, issuers do not engage in advertising or general solicitation to market the securities, appropriate resale limitations are imposed and other conditions of the Rule are met.[6] Rule 506 in its current form does not impose any bad actor disqualification requirements. In addition, because securities sold under Rule 506 are "covered securities" under Section 18(b)(4)(E) of the Securities Act, offerings pursuant to Rule 506 have the benefit of a preemption of substantive state securities law requirements.[7]

Rule 144A is a non-exclusive safe harbor exemption from the registration requirements of the Securities Act for resales of certain restricted securities to qualified institutional buyers ("QIBs").[8]

Elimination Of The General Solicitation And Advertising Restrictions

Rule 506

In April 2012, Congress passed the JOBS Act, Section 201(a)(1) of which directs the SEC to amend Rule 506 to provide that the prohibition against general solicitation or general advertising in Rule 502(c) shall not apply to offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors, and the issuer takes reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the SEC. By requiring the SEC to remove this general solicitation or advertising restriction, Congress sought to make it easier for companies to find investors and thereby raise capital.[9]

In August 2012, in order to comply with that congressional mandate, the SEC proposed new subsection (c) to Rule 506, providing that the prohibition against general solicitation or general advertising would not apply to an offering made pursuant to the Rule so long as all purchasers of the securities in that offering are accredited investors.[10] As proposed, Rule 506(c) also required that an issuer wishing to rely on the Rule take "reasonable steps" to verify the accredited investor

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status of purchasers. As adopted, Rule 506(c) provides a "principles based" standard for determining what constitutes "reasonable steps."[11] Consistent with the proposing release, whether the steps taken are "reasonable" will be an objective determination by the issuer (or those acting on its behalf) in the context of the particular facts and circumstances of each purchaser and transaction. Reasonable steps to verify accredited investor status would involve a number of interconnected factors, including the nature of the purchaser and the type of accredited investor that the purchaser claims to be; the amount and type of information that the issuer has about the purchaser; and the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

In addition, in response to comments to the proposal, Rule 506(c) as adopted provides a list of non-exclusive methods that will be deemed reasonable for verifying accredited investor status for natural persons. The methods described in Rule 506(c) include reviewing copies of any IRS form that reports the income of the purchaser for the two most recent years along with obtaining a written representation that the purchaser will likely continue to earn the necessary income in the current year, and receiving a written confirmation from a registered broker-dealer, SEC-registered investment adviser, licensed attorney or certified public accountant that such entity or person has taken reasonable steps to verify the purchaser's accredited status within the prior three months and has determined such purchaser is an accredited investor.

The definition of accredited investor under Regulation D includes a person who the issuer "reasonably believes" comes within one of a number of specified categories. Thus, so long as the issuer has such a "reasonable belief," the fact that a person did not meet the required criteria will not cause the issuer to lose the benefit of the safe harbor exemption.[12]

Issuers conducting Regulation D offerings under Rule 506 without the use of general solicitation or general advertising can continue to conduct securities offerings in the same manner and will not be subject to the new verification rule.

In addition, securities sold under Rule 506(c) are "covered securities" under Section 18(b)(4)(E) of the Securities Act, and have the benefit of a preemption of substantive state securities law requirements.[13]

Rule 144A

As noted above, Rule 144A of the Securities Act is a non-exclusive safe harbor exemption from the registration requirements of the Securities Act for resales of certain restricted securities to QIBs. The SEC has also adopted amendments to Rule 144A to allow general solicitation and advertising in such offerings, provided the securities are sold only to persons that the seller, and any person acting on behalf of the seller, reasonably believes is a QIB.

Form D

Form D, the notice that issuers must file with the SEC when selling securities without registration in reliance on Regulation D, will be revised to add a separate box for issuers to check when they are claiming the new Rule 506(c) exemption that permits general solicitation or general advertising.

Commodity Exchange Act Limitations

The sponsor or operator of a private investment fund (such as a hedge fund or a private equity fund) that trades commodity interests[14] must either register with the Commodity Futures Trading Commission ("CFTC") as a commodity pool operator ("CPO") or satisfy the criteria for an exemption from CPO registration. Private fund CPOs that register with the CFTC generally operate their funds pursuant to CFTC Rule 4.7. That rule, among other things, requires the offering of the fund's interests to be exempt from registration under the Securities Act. Private fund CPOs that wish to be exempt from registration with the CFTC generally operate their funds pursuant to CFTC Rule 4.13(a)(3). In addition to permitting only a *de minimis* level of commodity interest trading, that rule, among other things, prohibits interests in the fund from being marketed to the public in the United States. When Rule 4.7 was adopted in 1992, it was intended to be generally consistent with Regulation D, notwithstanding Rule 4.7's more restrictive investor suitability criteria. Rule 4.13(a)(3), which was adopted in 2003, generally requires investors to be accredited investors as defined in Regulation D. Thus, each of these rules was, in part, modeled on Regulation D.

Although the JOBS Act mandated that the prohibition on general solicitation and advertising for certain Regulation D offerings be eliminated by the SEC, it did not include any similar mandate with respect to the CEA or the CFTC regulations.

In July 2012, the Managed Funds Association ("MFA") petitioned the CFTC to amend Rules 4.13(a)(3) and 4.7 to ensure consistency with the JOBS Act and securities regulations. At this time there is no clarity as to whether that petition will be acted upon favorably.

Practical Consequences

The ability to advertise and generally solicit pursuant to an offering under Rule 506(c) will allow issuers to reach a much wider group of investors. However, issuers using advertising or general solicitation in their offerings will need to adopt more rigorous procedures to confirm that all investors that actually invest are accredited investors, or the safe harbor under Rule 506 would not be available for the entire offering and would possibly trigger rescission rights in favor of investors. Additionally, if Rule 506 were not available, the securities would not be "covered securities" and the result could be non-compliance with state securities laws and consequent civil and criminal penalties and rights of rescission.

Additionally, even though the preemption of state securities laws will apply for Rule 506 offerings involving general solicitation, such offerings may require additional filings with state regulators, since many current state securities law exemptions require that there be no general solicitation.

Disqualification Of Bad Actors From Rule 506

The SEC also adopted, effective September 23, 2013, a separate amendment to Rule 506 that will disqualify issuers from relying on Rule 506, if certain persons involved with the offering by the issuer are subject to specified disqualifying events. These disqualification provisions will apply whether or not the offering will involve general solicitation under new Rule 506(c) described above.

Scope of the New Disqualification Provisions

The Rule 506 disqualification provisions were adopted in most part as proposed in May 2011, but with some important changes, including revisions to the list of persons subject to a "disqualifying event" that would cause an issuer to lose the ability to rely on Rule 506. As

adopted, the Rule now also includes investment managers[15] to pooled investment fund issuers and their principals, which were not specifically included in the proposal. Additionally, only executive officers[16] of an issuer and any other officers involved in the offering, not all officers of the issuer as originally proposed, will subject an issuer to disqualification. Instead of including owners of 10 percent or more of the issuer's equity securities, as had been proposed, the disqualification provisions as adopted will apply only to owners of 20 percent or more of the issuer's voting equity securities, calculated on the basis of voting power.

As adopted, the Rule 506 disqualification provisions will apply if any of the following persons are subject to a "disqualifying event":

- The issuer, including its predecessors and any affiliated issuers.[17]
- Directors, executive officers, other officers involved in making the securities offering, general partners and managing members of the issuer.
- Beneficial owners of 20 percent or more of the issuer's outstanding voting equity securities calculated based on voting power.
- Promoters[18] connected with the issuer at the time of sale.
- Persons that have been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities, as well as the general partners or managing members of any such solicitor; directors, executive officers, or other officers participating in the offering of any such solicitor or the general partner or managing member of any such solicitor.
- Investment managers of issuers that are pooled investment funds, as well as the general partners or managing members of any such investment manager; directors, executive officers, or other officers participating in the offering of any such investment manager or the general partner or managing member of any such investment manager.

As adopted, a "disqualifying event" would include:

- Criminal convictions, court injunctions or restraining orders in connection with (i) the purchase or sale of a security or (ii) the making of a false filing with the SEC, or (iii) arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities.[19]
- Final orders of state securities, insurance, banking, savings association or credit union regulators, federal banking agencies, the CFTC or the National Credit Union Administration that at the time of sale either bar the person from (i) associating with an entity regulated by such regulators, (ii) engaging in the business of securities, insurance or banking or (iii) engaging in savings association or credit union activities, or that are based on a law or regulation which prohibits fraudulent, manipulative or deceptive conduct and are entered within 10 years before the sale of the securities.
- Certain SEC disciplinary orders relating to brokers, dealers, municipal securities dealers and investment advisers and their associated persons, which would be disqualifying for as long as the order is in effect.
- SEC orders entered within five years before the proposed sale of securities, that at the time of the sale, order persons to cease and desist from violation of any scienter-based anti-fraud provisions of the federal securities laws or regulations or Section 5 of the Securities Act.
- Suspension or expulsion from membership in, or suspension or bar from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade, which would be disqualifying for the period of suspension, expulsion or bar.
- Having filed (as registrant or issuer), or having been named as an underwriter in, any registration statement or Regulation A offering statement filed with the SEC that, within five years before the proposed sale, was subject to a stop or refusal order or order suspending a Regulation A exemption, or at the time of sale being subject to an investigation or proceeding to determine whether such a stop order or suspension order should be issued.
- U.S. Postal Service false representation orders entered within five years before the proposed sale of securities, or at the time of such proposed sale subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the U.S. Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

Change in the Treatment of Pre-Existing Disqualifying Events

As proposed, convictions, suspensions, injunctions and orders pre-dating the enactment of the Dodd-Frank Act would be disqualifying. As adopted, the Rule 506 disqualification provisions will only disqualify persons who are subject to a listed event that occurs on or after September 23, 2013. *However, events prior to that date that would otherwise be disqualifying must still be disclosed to investors in writing within a reasonable time prior to sale of the offered securities.*

Reasonable Care Exception

The Rule provides an exception from disqualification when the issuer can show it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed.

Waivers

The adopted Rule also includes a provision whereby issuers may seek waivers of the disqualification from the SEC's director of the Division of Corporation Finance. As adopted, the Rule also provides an automatic waiver if the court or regulator issuing the relevant order, judgment or decree advises the SEC in writing that the disqualification from a Rule 506 offering is not warranted.

Form D Amendment

The signature block of Form D will be amended to contain a certification that the offering is not disqualified.

Practical Consequences

Because a disciplinary event involving one or more offering participants can disqualify an offering, many offerings may lose the ability to rely on Rule 506 in the future. Registered broker-dealer firms and their employees are often subject to disqualifying events and therefore will not be able to act as solicitors for Rule 506 offerings without waivers. Issuers (and investment managers in the case of pooled investment funds) will also need to inquire about the disciplinary history of their directors, executive officers and officers participating in the offering and other offering participants, as well as any existing or potential owner of 20 percent of the voting equity of an issuer, before relying on Rule 506.

Any issuer unable to rely upon the Rule 506 safe harbor that seeks, in the alternative, to qualify under the statutory exemption for private offerings in Section 4(a)(2) of the Securities Act will need to exercise extreme caution, since the scope of that exemption as interpreted by the courts and the SEC over the years is sub-

stantially more limited and its contours much less clearly defined than Rule 506.

Additionally, a private offering outside of Rule 506 would not have the benefit of the preemption of substantive state securities law requirements and thus would be subject to applicable state-specific disclosure, filing and investor suitability standards. Such an offering would also be subject in many states to review on the merits by state regulators, which could result in state-mandated changes to the terms of the offering or, in certain cases, an inability to make the offering in one or more states.

Proposed Amendments To Rule 506 Of Regulation D And To Form D

In addition to the adoption of changes to Rule 506 to allow advertising and general solicitation of offerings, and to disqualify "bad actors," the SEC has proposed amendments to the filing and information requirements of Form D and related rules intended to enhance the SEC's understanding of the Rule 506 market, to more effectively assess the effects of allowing advertising and general solicitation on investor protection and capital formation, and to assist the enforcement efforts of both federal and state regulators. However, it is important to note that a number of these proposed changes would apply to all Regulation D Rule 506 offerings and not only those offerings that are conducted using advertising and general solicitation under Rule 506(c).

As more fully described below, the proposed changes include: (i) the filing of a Form D in Rule 506(c) offerings before the issuer engages in advertising or general solicitation and the filing of a closing amendment to Form D after the termination of any Rule 506 offering; (ii) requiring an issuer to include additional information on the Form D in connection with its Regulation D offering; (iii) disqualifying an issuer from relying on Rule 506 for future offerings for one year if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with Form D filing requirements in a Rule 506 offering; (iv) requiring written general solicitation materials used in Rule 506(c) offerings to include certain legends and other disclosures; (v) applying the anti-fraud provisions of Rule 156 of the Securities Act to the sales literature of private funds; and (vi) requiring the submission, on a temporary basis, of written advertising or general solicitation materials used in Rule 506(c) offerings to the SEC.

Revised Timing of Form D Filings in Connection with Rule 506 Offerings

Rule 506 currently requires the filing of a Form D within 15 calendar days of the first sale. The proposal would amend Rule 503 of Regulation D to require: (i) the filing of an advance Form D with limited information no later than 15 calendar days in advance of the first use of general solicitation or advertising in a Rule 506(c) offering; (ii) the filing of a Form D amendment providing all information required by Form D within 15 calendar days after the date of first sale of securities in the Rule 506(c) offering; and (iii) the filing of a closing Form D amendment within 30 calendar days after the termination of any Rule 506 offering.

New Information Requirements for Form D

The SEC has proposed to amend Form D to require additional items of information[20] including: (i) when the issuer is conducting a Rule 506(c) offering, in addition to the information currently required for "related persons"[21] of the issuer on Form D, the name and address of any person who directly or indirectly controls the issuer; (ii) issuers would no longer be able to check "decline to disclose" with respect to their revenues or net asset value if they either make such information publicly available, fail to keep such information confidential or include such information in general solicitation materials for a Rule 506(c) offering; (iii) instead of reporting only the number of accredited investors and non-accredited investors that have purchased in the offering, issuers would be required to indicate if they are natural persons or legal entities and the amount raised from each category of investor; (iv) the percentage of the offering proceeds from a Rule 506 offering that will be used for specified purposes; (v) the categories each investor came within to qualify as an accredited investor (income, net worth, director/executive officer, other basis); (vi) if the issuer used a registered broker-dealer in connection with the offering, whether any general solicitation materials were filed with the Financial Industry Regulatory Authority, Inc.; (vii) in the case of a pooled investment fund advised by an investment adviser registered with, or reporting as an exempt reporting adviser to, the SEC, the name and SEC file number of each investment adviser who functions directly or indirectly as a promoter of the issuer; (viii) for Rule 506(c) offerings, the types of general solicitation or advertising used or to be used (e.g., mass mailings, emails, public websites, social media, print media and broadcast media); and (ix) for Rule 506(c) offerings, the methods used or to be used to verify accredited investor status.[22]

Disqualification for Noncompliance with Form D Filing Requirements

Currently, the late filing of Form D does not preclude reliance on the Rule 506 safe harbor. The proposal would amend Rule 507 of Regulation D to disqualify an issuer from relying on Rule 506 for one year for any new offerings if the issuer, or any predecessor or affiliate of the issuer, did not comply, within the last five years, with all of the Form D filing requirements in a Rule 506 offering.[23] However, non-compliance prior to the effective date of the adoption of the proposed rule would not result in a disqualification. The SEC is also proposing a cure period of 30 days for late Form D filings, so that a filing made within the cure period would not constitute a Rule 503 filing deadline violation. However, an issuer could only use the cure period once per offering. An issuer that has failed to comply with Rule 503 would be able to apply for a waiver under Rule 507 upon a showing of "good cause."[24]

New Disclosure Requirements for Rule 506(c) Offerings

Proposed new Rule 509 would require issuers to include prescribed legends in any written communication that constitutes a general solicitation in any offering conducted in reliance on Rule 506(c) ("written general solicitation materials"). Private funds would also be required to include a legend disclosing that the securities being offered are not subject to the protections of the Investment Company Act of 1940 ("Investment Company Act") and additional disclosures in written general solicitation or advertising materials that include performance data so that potential investors are aware that there are limitations on the usefulness of such data and that provide context to understand the data presented.[25] Although a failure to include these legends and new disclosures would not under this proposal be a condition to the Rule 506(c) exemption, issuers would be disqualified from relying on Rule 506 for future offerings if such issuer, or any predecessor or affiliate

of the issuer, has been subject to any order, judgment or court decree enjoining such person for failure to comply with Rule 509.

Anti-fraud Provisions in Rule 156 Applicable to Private Funds

The proposal, if adopted, would provide that sales literature offered by private funds[26] (whether or not a general solicitation or advertising is used) would be subject to the anti-fraud provisions of Rule 156 of the Securities Act. Rule 156 provides guidance to investment companies as to certain general factors that could cause a statement to be misleading, as well as circumstances where representations about past or future investment performance and statements involving a material fact about the characteristics or attributes of an investment company could be misleading. Existing anti-fraud provisions of other securities laws, including state blue sky laws, will also continue to apply to private fund general solicitation and advertising material. The SEC is also seeking comment on additional manner and content restrictions on written general solicitation and advertising materials used by private funds.

Submission of Written General Solicitation Materials

Proposed new Rule 510T would require issuers, on a temporary basis, to submit any written general solicitation or advertising materials used in their Rule 506(c) offerings to the SEC no later than the date of the first use of these materials. Such materials would be submitted electronically to the SEC and would not be available to the public. Although failure to comply with new proposed Rule 510T would not be a condition to the Rule 506(c) exemption, issuers would be disqualified from relying on Rule 506 for future offerings if such issuer, or any predecessor or affiliate of the issuer, has been subject to any order, judgment or court decree enjoining such person for failure to comply with Rule 510T.

Practical Consequences

If these changes are adopted as proposed, issuers relying on Rule 506 for offerings will be subject to additional filing requirements, and to penalties for late filings, even in Rule 506 offerings made without advertising or general solicitation. In voting against these proposed amendments at the SEC's open meeting, Commissioners Paredes and Gallagher expressed concern that the addition of all the new filing, compliance and disclosure requirements would be contrary to the intent of Congress in the JOBS Act to promote capital formation by mandating that the SEC allow advertising and general solicitation in Rule 506 offerings.

Comment Requested

The SEC has specifically requested comment on over 100 points in the Proposing Release, including the mechanics and timing of the proposed new advance and closing filing requirements for Form D, their applicability to Rule 506 offerings not generally solicited, the new Form D content, new penalties for failure to file timely and the new legend and disclosure requirements, among others.

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1 Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings. SEC Release 33-9415 (July 10, 2013) *available at* http://www.sec.gov/rules/final/2013/33-9415.pdf. These changes to Rule 506 of Regulation D and Rule 144A were mandated by Section 201(a) of the Jumpstart Our Business Startups Act, Pub. L. No. 112-106, §201, 126 Stat. 306, 313-15 (2012) (the "JOBS Act"). *See also* Willkie Farr & Gallagher LLP, "SEC Proposes Rules Easing Prohibition On General Solicitations" (Sept. 4, 2012), available here.

2 Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings. SEC Release 33-9414 (July 10, 2013) *available at* http://www.sec.gov/rules/final/2013/33-9414.pdf. Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1851-52 (2010) (the "Dodd-Frank Act"), required the SEC to adopt rules that would deny the exemption in Rule 506 of Regulation D to any securities offering in which certain felons and other "bad actors" are involved. The SEC first proposed disqualification provisions over two years ago. *See* SEC Release No. 33-9211 (May 25, 2011) *available at* http://www.sec.gov/rules/proposed/2011/33-9211.pdf, 76 Fed. Reg. 31518 (June 1, 2011). *See also* Willkie Farr & Gallagher LLP, "SEC Proposes To Disqualify Certain Persons From Reliance On Private Placement Safe Harbor" (Jun. 15, 2011), available here.

3 U.S. Sec. & Exch. Comm'n, Fact Sheet: Eliminating the Prohibition on General Solicitation and General Advertising in Certain Offerings (July 10, 2013), *available at* http://www.sec.gov/news/press/2013/2013-124-item1.htm.

4 Amendments to Regulation D, Form D and Rule 156 under the Securities Act ("Proposing Release"). SEC Release 33-9416 (July 10, 2013) *available at* http://www.sec.gov/rules/proposed/2013/33-9416.pdf.

5 As defined in Rule 501 of Regulation D.

6 Other conditions include furnishing certain financial and non-financial information to non-accredited investors and exercising reasonable care to ensure that the purchasers of the securities are not underwriters. *See* Rule 506 of Regulation D; *see also* Rule 502 of Regulation D.

7 Under sections 18(b) and (c) of the Securities Act, state securities regulators may only require an issuer relying on Rule 506 of Regulation D to file a notice with the state consisting of a copy of Form D as filed with the SEC, a filing fee and a Consent to Service of Process Form. However, an issuer unable to rely on Rule 506 of Regulation D would be subject to varying state law provisions and may even be precluded from selling to investors in a state.

8 *See* Rule 144A(a)(1) of the Securities Act (defining QIBs).

9 *Supra* note 3.

10 SEC Release 33-9354 (August 29, 2012) http://www.sec.gov/rules/proposed/2012/33-9354.pdf.

11 SEC Release 33-9415 (July 10, 2013) http://www.sec.gov/rules/final/2013/33-9415.pdf.

12 *Id.* at 43-44.

13 *Id.* at 13.

14 Prior to the implementation of the Dodd-Frank Act, the term "commodity interests" generally included futures and options on futures, but not swaps. Because commodity interests now include swaps, a private investment fund that engages in swap transactions is a commodity pool.

15 The SEC regards the term "investment manager" to include managers of pools that invest in assets other than securities, such as commodities, real estate and certain derivatives.

16 Executive officer is defined in Rule 501(f) of Regulation D.

17 The Rule does not include disqualifying events of an affiliated issuer that occurred before it was affiliated with the issuer if the affiliated entity is not (i) in control of the issuer, nor (ii) under common control with the issuer by a third party that was in control of the affiliated entity at the time of any such event.

18 As defined in Rule 405 under the Securities Act.

19 A criminal conviction must have occurred within 10 years of the proposed sale of securities (or five years, in the case of the issuer and its predecessors and affiliated issuers), while an injunction or restraining order must be in effect at the time of and have been entered within five years of the proposed sale of securities.

20 As mentioned earlier, changes to Form D have been adopted in conjunction with the final rule on lifting the ban on general solicitation, such as adding a check box to indicate whether an issuer intends to rely upon the exemption in Rule 506(c). *See* http://www.sec.gov/rules/final/2013/33-9415.pdf.

21 Related persons include executive officers, directors or promoters of the issuer or of the general partner/managing member of the issuer. *See* www.sec.gov/about/forms/formd.pdf.

22 Other proposed additional items of information include: (i) identification of the issuer's publicly accessible (Internet) website address, if any; (ii) a clarification field to be completed if the issuer checks the "Other" box; (iii) if applicable, the trading symbol and a generally available security identifier for the offered securities; and (iv) if a class of the issuer's securities is traded on a national securities exchange, ATS or any other organized trading venue, and/or is registered under the Securities Exchange Act of 1934 (the "Exchange Act"), the name of the exchange, ATS or trading venue and/or the Exchange Act file number and whether the securities being offered under Rule 506 are of the same class or are convertible into or exercisable or exchangeable for such class.

23 The one-year disqualification period would commence following the filing of all required Form D filings or, if the offering has been terminated, following the filing of a closing amendment.

24 Some examples of good cause provided by the SEC include when persons who controlled the issuer at the time of the failure to file no longer exercise influence over it, or if curing the failure is impossible (for example, because a defaulting affiliate no longer exists and therefore cannot make the missing Form D filings or amendments).

25 Such data must be as of the most recent practicable date considering the type of private fund and the media through which the data will be conveyed, and the private fund would be required to disclose the period for which performance is presented. When the performance data in the written general solicitation or advertising materials does not reflect a deduction of fees and expenses, the SEC proposes that private funds must disclose that fees and expenses have not been deducted and that if such fees and expenses had been deducted, performance might be lower than presented.

26 A private fund is an issuer that is exempt from the definition of an investment company under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act.