

The JOBS Act and General Solicitation: Impact on Private Offerings During the Period Prior to SEC Rulemaking

14 Law Firm Consensus Report

President Obama today signed into law the Jumpstart Our Business Startups Act (JOBS Act). Title II of the JOBS Act affects offerings by issuers pursuant to Regulation D under the Securities Act, as well as resales under Securities Act Rule 144A. In particular:

- Section 201(a)(1) of the JOBS Act directs the Securities and Exchange Commission (SEC) to amend Rule 506 to make the prohibition against general solicitation or general advertising contained in Rule 502(c) inapplicable to offers and sales under Rule 506, provided that all purchasers are accredited investors.
- Section 201(a)(2) requires the SEC to revise Rule 144A to provide that securities sold under Rule 144A may be offered to persons other than qualified institutional buyers (QIBs), including by means of general solicitation or general advertising, provided that securities are only sold to persons reasonably believed to be QIBs.
- Section 201(b) amends Section 4 of the Securities Act to provide that offers and sales exempt under Rule 506 as revised by Section 201 “shall not be deemed public offerings under the Federal securities laws” as a result of general advertising or general solicitation.

Section 201(a) requires the SEC to amend both Rule 506 and Rule 144A not later than 90 days after enactment of the JOBS Act. The following questions and answers reflect the current understanding of the undersigned law firms regarding transactions taking place during the period prior to the date the SEC’s amendments of Rule 506 and Rule 144A implementing Section 201(a) take effect (the interim period).

Q: Do the current versions of Rule 506 and Rule 144A remain in effect during the interim period?

Yes. The JOBS Act directs the SEC to amend Rule 506 and Rule 144A within 90 days, but does not modify the current text of these rules.

Q: Should market practices in connection with offerings relying on these safe harbors change during the interim period?

We anticipate that market participants relying on the Rule 506 and Rule 144A safe harbors will generally continue to implement customary procedures for these offerings until the SEC revises Rule 506 and Rule 144A, particularly in view of the private right of action under Section 12(a)(1) of the Securities Act. Rule 506 and Rule 144A provide non-exclusive safe harbors, and attempted compliance with these provisions does not act as an exclusive election or preclude the potential availability of other exemptions from registration under the Securities Act.

In practice, we expect market participants to continue to satisfy the applicable conditions of safe harbors such as:

- *Rule 135c (notice of certain proposed unregistered offerings);*
- *Rule 152 (definition of “transactions by an issuer not involving any public offering” in Section 4(2), for certain transactions); and*
- *Rule 155 (integration of abandoned offerings).*

In addition, we expect market participants to continue to follow the applicable terms of interpretive guidance such as:

- *the SEC’s guidance contained in Release No. 33-8828 (August 3, 2007) regarding the integration of concurrent public and private offerings and general solicitation;*
- *the SEC Staff’s guidance in Securities Act Sections Compliance and Disclosure Interpretations Question 139.25; and*
- *the views expressed by the Division of Corporation Finance no-action letters to Black Box Incorporated (June 26, 1990) and Squadron, Ellenoff, Plesent & Lehrer (Feb. 28, 1992).*

None of the firms subscribing to this report intends thereby to give legal advice to any person. The undersigned firms recommend that counsel be consulted with respect to matters addressed in this report.

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Cleary Gottlieb Steen & Hamilton LLP
Cravath, Swaine & Moore LLP
Davis Polk & Wardwell LLP
Latham & Watkins LLP
Mayer Brown LLP
Morrison & Foerster LLP
O’Melveny & Myers LLP
Ropes & Gray LLP
Shearman & Sterling LLP
Sidley Austin LLP
Simpson Thacher & Bartlett LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Sullivan & Cromwell LLP
Wilson Sonsini Goodrich & Rosati, PC