

PUBLICATION

SEC Implements JOBS Act to Allow General Solicitation in Regulation D Offerings

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The U.S. Securities and Exchange Commission has issued regulations implementing the portion of the Jumpstart Our Business Startups Act (JOBS Act), enacted more than a year ago, allowing an issuer enjoying exemption from registration under Rule 506 of Regulation D under the Securities Act of 1933 to engage in general solicitation and advertising even in the United States. The SEC news release, with links to the regulations and related discussion, can be found [here](#).

Several aspects of the rule are worth particular note in the EB-5 context.

1. The rule will become effective 60 days from being published in the federal register, so around mid-September of this year, and general solicitations under Reg D before then are prohibited.
2. The new exemption is separate from the existing and continuing Reg D exemption that prohibits general solicitation but does not dictate specific methods for verifying accreditation status.
3. The rules do not require confirming that potential investors are accredited before soliciting them through general means—that would be nonsensical—instead they require verification of purchasers before they actually subscribe. This allows issuers of EB-5 investors, for instance, to put advertisements in U.S. and worldwide foreign language newspapers, on U.S. college campuses, etc., but it will not be sufficient for the subscriber's parents to be accredited, which means that a gifted investor may need to be gifted a full \$1 million even if the investment will be only \$500,000.
4. The required methods to verify that a purchaser is accredited are as follows, the first two of which are not well calibrated for foreign purchasers:
 - Reviewing copies of any IRS form (W-2, 1099, K-1, 1040) that reports the income of the purchaser and obtaining a written representation from the purchaser that the purchaser will likely continue to earn the necessary income in the current year.
 - Reviewing assets statements (bank statements, brokerage statements, CDs, tax assessments, and independent appraisals) and liabilities statements (a consumer report from at least one of the nationwide consumer reporting agencies) and a written representation from the purchaser that all liabilities have been disclosed; or
 - 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.

Determining how to verify the accredited status of foreign investors, few of whom would have filed tax forms with the U.S. Internal Revenue Service or would be susceptible to a meaningful credit report from a U.S. credit reporting agency, will be one of the most significant challenges for EB-5 issuers.

5. Issuers may still rely on Regulation S in lieu of the Regulation D safe harbor or may conduct concurrent offshore offerings in compliance with Regulation S and domestic offerings in compliance with Regulation D, Rule 506.
6. In a separate final rule, the SEC now bans any person that is a "bad actor" or who is affiliated with a bad actor from relying on the Regulation exemption. Acts that result in a person being deemed a bad actor include criminal convictions in connection with the purchase or sale of a security; court injunctions and restraining orders; CFTC and other financial regulators' final orders; certain SEC disciplinary orders; SEC cease-and-desist and stop orders; suspension or expulsion from membership in a self-regulatory organization; and U.S. Postal Service false representation orders. Persons subject to this rule include the issuer directors, certain officers, general partners, and managing members of the issuer; 20-percent beneficial owners; promoters; investment managers and principals of pooled investment funds; persons compensated for soliciting investors; and the general partners, directors, officers, and managing members of any compensated solicitor. The disqualification applies only for events that occur after the effective date of the rule, but events occurring before that date must be disclosed to investors.
7. The SEC has also proposed a new rule that would change Form D filing requirements and certain disclosures made in offering memorandums. Adoption of the proposed rule will affect the disclosures that are made as well as the timing on filing the Form D prior to the sale of securities. Failure to timely file a Form D would result in an issuer becoming ineligible to rely on Regulation D for a year.
8. Allowing general solicitation under Reg D does not exempt anyone from the rules against misleading investors. Advertising naturally tends toward slick "puffing" language. The SEC probably will be looking for examples of overstatement to target for enforcement.
9. Allowing general solicitation under Reg D does not exempt issuers from prohibitions on using unregistered brokers. Many EB-5 issuers who have become accustomed to using foreign sales agents under Reg S exemption for purely foreign offerings may be tempted to use those same or other unregistered agents for general solicitation for investors who will not qualify under Reg S, and this is prohibited. For instance, if an issuer used a foreign agent who solicited prospective investors at a seminar outside the U.S., and one of the investors has a child in school or work in the U.S., that child may be tainted by the solicitation through an unregistered broker and should not be subscribed in the U.S. under the new Reg D channel otherwise allowing general solicitation. Likewise, an EB-5 issuer cannot use unregistered sales agents to make presentations to prospective investors on college campuses in the U.S. (although in limited circumstances the issuer's own employees may be able to make the presentations).