

SEC Allows Companies to Conduct a Generally Solicited Securities Offering Immediately Following a Privately-Solicited Offering

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by Christopher L. Doerksen

On November 17, 2016, the SEC issued a new interpretation stating that a company may conduct a generally solicited offering of securities under Rule 506(c) immediately following a completed securities offering made in reliance upon Rule 506(b), without invalidating the prior offering. The SEC's new interpretation will give companies more flexibility in their financing plans, allowing them to potentially take advantage of the best of both exemptions. Many investors and companies prefer to participate in Rule 506(b) offerings, because these offerings do not require the investor to provide the company with detailed tax or other financial information in order to verify that the investor is an accredited investor, and do not require the company to due diligence the investor's claim of accredited investor status. However, companies may not always be able to raise sufficient funds from investors that are already known to the company. Under the new interpretation, a company could complete tranche 1 of a financing with known investors, without engaging in general solicitation, in reliance upon Rule 506(b), relying on representations from the investors that they are accredited investors, and then following the closing of that tranche, begin to generally solicit investors that are not already known by the company, for tranche 2 of the financing in reliance upon Rule 506(c), requiring only the investors in tranche 2 to provide the more detailed tax or financial information required to verify their claim of accredited investor status. The company would still need to satisfy the other requirements of Rule 506(c), and would need to consider whether any offerings subsequent to the Rule 506(c) offering could potentially be "integrated" with the Rule 506(c) offering.

The full text of the SEC's interpretation is provided below:

Question 256.34

Question: An issuer has been conducting a private offering in which it has made offers and sales in reliance on Rule 506(b). Less than six months after the most recent sale in that offering, the issuer decides to generally solicit investors in reliance on Rule 506(c). Are the factors listed in the Note to Rule 502(a) the sole means by which the issuer

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determines whether all of the offers and sales constitute a single offering?

Answer: No. Under Securities Act Rule 152, a securities transaction that at the time involves a private offering will not lose that status even if the issuer subsequently decides to make a public offering. Therefore, we believe under these circumstances that offers and sales of securities made in reliance on Rule 506(b) prior to the general solicitation would not be integrated with subsequent offers and sales of securities pursuant to Rule 506(c). So long as all of the applicable requirements of Rule 506(b) were met for offers and sales that occurred prior to the general solicitation, they would be exempt from registration and the issuer would be able to make offers and sales pursuant to Rule 506(c). Of course, the issuer would have to then satisfy all of the applicable requirements of Rule 506(c) for the subsequent offers and sales, including that it take reasonable steps to verify the accredited investor status of all subsequent purchasers. [November 17, 2016]