

SNOWBOARDERS, SURFERS AND SECURITIES SOLICITATION

The Jumpstart Our Business Startups Act (JOBS Act) directed the SEC to amend Rule 506 of the Securities Act of 1933 thereby allowing advertising of offerings. With the lifting of the 80-year-old ban on general solicitation, various private issuers — including hedge funds, private equity funds and start-up companies — are free to advertise. But restrictions still apply, and not all companies are rushing to Madison Avenue.

Mostly Website Promotion

A \$4.3 billion dollar Midwest hedge fund has placed a full page ad in a trade publication featuring snowboarders atop a mountain celebrating a victory with the tag line below reading “Performing in All Conditions.” Another hedge fund has posted a three-minute clip on its website featuring a surfer fine-tuning a surf board while the fund founders compare “catching the energy of the wave” with their own management style. So far, most solicitation consists of beefing up company website content as opposed to utilizing other advertising media.

Limitations Apply

Private issuers may publicly discuss investment opportunities and also publicize past performance — which previously had been prohibited. However, such issuers may still only sell such securities to “accredited investors,” meaning an individual whose net worth is in excess of \$1 million and/or an annual income in excess of \$200,000. For charitable organizations or family trusts, the asset threshold is \$5 million.

Burden of Proof on the Issuer

Under the former policy, the investor would simply check off a box verifying that he or she was an accredited investor. However, under the new rules, the issuer is required to take “reasonable steps” to verify investor accreditation, which may include review of tax returns or bank account statements.

SEC Form D Applies

Issuers engaging in general solicitation are required to file Form D with the SEC at least 15 days prior to the beginning of general solicitation and also to file an amended Form D within 30 days after the offering is terminated. Failure to abide by the Form D filing requirements could result in an SEC-imposed ban on securities issuance for a year or more.

The Pros and Cons

Advocates of general solicitation point out that disclosing past performance publicly will enhance issuer accountability as well as assist in creating a better educated investor. Opponents fear that advertising to the general public might lead to victimization of the more vulnerable, financially unsophisticated investor who could be swayed by a slick advertising campaign.

“Branding,” Not “Advertising”

Hedge fund solicitation — once the purview of golf club tips and private parlor meetings — will likely take advantage of this game-changing rule due to greatly increased competition. GreenPoint Legal can assist your organization in navigating these new regulatory waters.