

April 11, 2012

The JOBS Act was signed into law by President Obama on April 5, 2012. Although the primary effect of the JOBS Act is to ease certain regulatory requirements on emerging growth companies (*see here and here*), we highlight below two key provisions of the JOBS Act that are particularly relevant to managers of private investment funds.

## Elimination of the prohibition against general solicitation and general advertising for private offerings under Regulation D

### Overview

Under current law, a fund manager who is making a private offering of fund interests typically seeks to avoid SEC registration of such offering by relying on the exemption provided by Rule 506 of Regulation D of the Securities Act of 1933. The current version of Rule 506 of Regulation D prohibits a fund manager from making a "general solicitation" and general advertising of the offering. This generally means that, prior to a new fund's final closing, the fund manager must avoid communications about the fund to the press and/or the general public. It also generally means that the fund manager must have a "pre-existing relationship" with each potential investor in the new fund before offering a fund interest to such potential investor.

The JOBS Act eliminates Regulation D's current restriction against general solicitation for a private offering that is made solely to "accredited investors", and directs the SEC to release new rules to implement the change.

### Effective date

The JOBS Act directs the SEC to issue final rules to eliminate Regulation D's restriction against general solicitation within 90 days of the JOBS Act's enactment.

### Impact and further considerations

Subject to other applicable laws, the elimination of the general solicitation restriction means that fund managers may be able to speak to the press and the public regarding their fund offerings, and may be able to publish information on publicly accessible websites to help market the fund offering. In addition, fund managers should no longer be required to have a "pre-existing relationship" with potential investors in their fund.

Although the elimination of the general solicitation restriction is a welcome change, it is not formally effective until final rules from the SEC are issued; fund managers should continue to exercise caution with respect to public statements about fund offerings until the final rules are issued. In addition, fund managers should continue to be vigilant in maintaining the accuracy and truthfulness of any communications with prospective investors, as the general anti-fraud rules imposed by the securities laws continue to apply and may become more relevant as public communication regarding fund offerings becomes more common.

It should also be noted that a private fund relying on either Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act for exemption from registration as an investment company must comply with the Investment Company Act's prohibition on making a "public offering" of fund interests, and final guidance from the SEC regarding the elimination of the general solicitation restriction may also address this Investment Company Act rule.

## Increase of investor headcount from 500 to 2,000

### Overview

Prior to the JOBS Act, private investment funds relying on Section 3(c)(7) of the Investment Company Act could only have up to 500 investors without registering as a public reporting company under the Securities Exchange Act of 1934. The JOBS Act significantly increases this threshold to 2,000 investors before registration under the Securities Exchange Act of 1934 is required.

### **Effective date**

The increased 2,000 investor threshold is effective as of April 5, 2012.

### **Impact and further considerations**

Private investment funds relying on Section 3(c)(7) of the Investment Company Act can now accept up to 2,000 total investors while still being exempt from registration under the Securities Exchange Act of 1934. It should be noted, however, that private investment funds that rely on Section 3(c)(1) of the Investment Company Act are still limited to having 100 beneficial owners, as the JOBS Act did not change current rules that apply to such funds.

### **Conclusion**

If you have any questions regarding the JOBS Act, please contact a member of your Cooley team and look for future *Alerts* as we continue to monitor further developments.

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