

General Solicitation: Can I Generally Solicit My Offering?

There is a lot of confusion in the early stage company ecosystem about general solicitation.

When you are trying to sell shares in your company (or a convertible note, or convertible equity), how much can you say about that in the media? Can you post something on Facebook? On Twitter? On LinkedIn? How about emailing a large group of people who you are connected with through LinkedIn? Can you do that?

How about standing up in a room full of strangers, and pitching your deal to them? Can you do that?

What if a reporter calls? Can you talk to the reporter about your fundraising efforts?

In general, for most companies--the answer is: Don't do any of these things. For most companies raising money in a securities offering, the answer is--do not generally solicit your offering. Do not post anything on Twitter, Facebook, LinkedIn. Do not email hundreds of people in an email distribution list about your offering. Do not stand up in a room full of strangers and pitch your offering.

The reason? Because most companies raising money are relying on a securities law exemption, Rule 506(b), which prohibits general solicitation. Rule 506(b) is the most commonly relied upon securities law exemption for companies raising money. Why is it so popular? Because as long as you take money from only accredited investors, you can raise as much money as you like without registered offering level disclosure, and you do not have any pre-sale filings to make with securities regulators. Instead, you have one form to file with the securities regulators--the Form D--and it is due within 15 days of taking funds. But the big catch for 506(b) offerings is that no general solicitation is allowed.

Why Not Just Use Rule 506(c)?

Rule 506(c) allows general solicitation. So you might wonder--why not just use Rule 506(c)? There are a few different reasons you might not want to use Rule 506(c)--even if it is a possibility.

1. You will not have a fall back securities law exemption under Section 4(a)(2) if you generally solicit. Section 4(a)(2) of the Securities Act of 1933, as amended, provides an exemption for offerings that are not public offerings. A generally solicited Rule 506(c) offering cannot, if it fails to meet the 506(c) requirements, qualify as not a public offering under Section 4(a)(2). See [Question 260.13](#).
2. Rule 506(c) requires you collect additional verification information from your investors. Meaning, you have to ask your investors for copies of their personal tax returns or financial statements if you generally solicit. Most companies want to avoid this.

3. Rule 506(c) offerings are more likely to draw regulatory scrutiny. You have to tell the securities regulators you are engaging in a Rule 506(c) offering when you file your Form D.

What I am seeing right now is that most companies are not going the Rule 506(c) route. Instead, most are sticking with the old-fashioned pathway--Rule 506(b).

What is General Solicitation?

What is general solicitation?

The SEC has provided guidance on what constitutes general solicitation. [Rule 502 of Regulation D](#) contains the following explanation:

(c) Limitation on manner of offering. Except as provided in § 230.504(b)(1) or § 230.506(c), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

- (1) **Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio;** and
- (2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising; Provided, however, that publication by an issuer of a notice in accordance with § 230.135c or filing with the Commission by an issuer of a notice of sales on Form D (17 CFR 239.500) in which the issuer has made a good faith and reasonable attempt to comply with the requirements of such form, shall not be deemed to constitute general solicitation or general advertising for purposes of this section; Provided further, that, if the requirements of § 230.135e are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this section.

New SEC Guidance

On August 6, 2015, the SEC issued new Compliance & Disclosure Interpretations on General Solicitation. I have included links to each of the new C&DI questions below.

- C&DIs - Securities Act Rules (UPDATED 08/06/2015)
Section 256. Rule 502 — General Conditions to be Met
- [New Question 256.23](#)
 - [New Question 256.24](#)
 - [New Question 256.25](#)

- [New Question 256.26](#)
- [New Question 256.27](#)
- [New Question 256.28](#)
- [New Question 256.29](#)
- [New Question 256.30](#)
- [New Question 256.31](#)
- [New Question 256.32](#)
- [New Question 256.33](#)

I have quoted all of this guidance in full in a prior blog post. I would encourage you to read the guidance if you are conducting a Rule 506(b) offering. It is helpful guidance.

What did I like best about the guidance?

I liked how the SEC defined the terms "pre-existing, substantive relationship."

Pre-existing means the relationship existed before the offering started.

Substantive means you have the ability to judge the offeree's sophistication. In the words of the SEC:

A "substantive" relationship is one in which the issuer (or a person acting on its behalf) has sufficient information to evaluate, and does, in fact, evaluate, a prospective offeree's financial circumstances and sophistication, in determining his or her status as an accredited or sophisticated investor.

Per the SEC, you cannot simply have someone check a box on a form indicating that they are an accredited investor and in that way alone have formed a "substantive" relationship with them, without any other knowledge of that person's financial circumstances or sophistication. In the SEC's words:

Self-certification alone (by checking a box) without any other knowledge of a person's financial circumstances or sophistication is not sufficient to form a "substantive" relationship.

What Should You Do?

If you are raising money in a Rule 506(b) offering, I would recommend you read the SEC's guidance carefully. Coach your entire team on these rules, so that you don't inadvertently have someone make a mistake responding to a media call.

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