

**From:** Kim, Thomas  
**Sent:** Wednesday, May 09, 2012 1:20 PM GMT -04:00  
**To:** Cross, Meredith; Nallengara, Lona  
**CC:** Ingram, Jonathan; Yu, Ted; Kwon, Charles  
**Subject:** FW: Revised Draft Rule 506 Rule 144A Term Sheet

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Hi:

We met w/ Rich Levine and Aseel Rabie this morning to discuss OGC's comments on the term sheet that we received yesterday. (See below, which includes a summary of what we discussed w/r/t each point.) Their biggest comment, which they conveyed more fully at our meeting, is on process. As you may know, they have been concerned about what happens on Day 91. Can the SEC enforce the ban on general solicitation in Rule 506 offerings after it fails to meet the deadline Congress has imposed for lifting the ban on general solicitation in Rule 506 offerings? I think they're dubious as to whether we could.

OGC's idea is that, instead of following the typical proposing release/adopting release process, we consider going straight to an interim final rule within the 90 days. This interim final rule would contain language that largely tracks the statute. In the release text, we would explain our interpretation of what "verify" means and what "reasonable steps" means, and provide examples of what "methods" could be used. What would suffice would be based on a facts-and-circumstances/reasonableness standard. We could even have an instruction that says, self-certification, in and of itself, would be not be sufficient.

The interim final rule would sunset at some point in the future, such as one year or, better yet, two years later. Between now and then, we would invite comment on the interim final rule. We anticipate that these comments would be better and more useful than they would be if we didn't have an interim final rule in place because, presumably, the comments would be informed by real-life experience with the new rule. Similarly, our final final rule would also presumably be better for the same reason, as it would be informed by the comments and by the Staff's own experience with interpreting and administering and enforcing (and bringing enforcement actions with respect to) the interim final rule.

We told them that if this is the way they think we should go, we would probably all need to meet one more time, and also involve IM as well.

Thoughts?

Thx, Tom

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**From:** Fredrickson, David R.  
**Sent:** Monday, May 07, 2012 2:57 PM  
**To:** Kim, Thomas; Zepralka, Jennifer; Brown, Lillian; Brightwell, Tamara  
**Cc:** Levine, Richard A.; Rabie, Aseel  
**Subject:** RE: Revised Draft Rule 506 Rule 144A Term Sheet

Tom, et al.,

Thanks for the revised Rule 506/144A term sheet. We'd still like to discuss some of the issues we raised on the prior draft, and to understand whether the term sheet or the proposing release will address these issues. We also have questions about some of the newly added language.

Our comments are as follows:

1. The term sheet suggests in a couple of places (pp. 6 and 13-14 of the redline) that the

**From:** Kim, Thomas  
**Sent:** Friday, May 11, 2012 3:18 PM GMT -04:00  
**To:** Nallengara, Lona  
**Subject:** Rule 506 update

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Hi Lona:

Yesterday, the working group met w/ Meredith in the afternoon (I sent you the meeting invite) to discuss whether the Rule 506 amendments should be implemented w/o notice and comment, either as an interim final rule or as an interim final temporary rule. Meredith supported going straight to a final rule, as we could then have a pilot period where we could assess how issuers are verifying accredited investors and whether or not these investors are, in fact, accredited, after which point we could decide whether to adopt final final rules or amend the rule to address any concerns. She was more comfortable doing this as an interim final temporary rule, which means that it would sunset at some future date. Two years was tossed around as a possible sunset date.

We are revising the term sheet accordingly, and focusing on making the rule principles-based, with the emphasis being on "reasonable" steps in light of facts and circumstances. Basically, GC's comments on the old term sheet. Correspondingly, we're going to de-emphasize the word "verify" and so we're going to delete the discussion about the legislative history and the other federal rules that use that term and require 3d party documentation.

Just wanted to give you this update so you know what the status is.

(Bts, I did the mid-Atlantic ENF conference yesterday morning. It was actually enjoyable. About 40 regulators from the mid-Atlantic area, including our Philadelphia regional office. No members from the public. State securities regulators, the IRS, various US Atty offices.)

Have a great weekend!

Tom

**From:** Cross, Meredith  
**Sent:** Wednesday, May 23, 2012 3:07 PM GMT -04:00  
**To:** Schapiro, Mary L.; Walter, Elisse; Aguilar, Luis A. (Commissioner); Paredes, Troy A.; Gallagher, Daniel; Nisanci, Didem A.; Williams, Erica Y.; Sheppard, Lesli; Leaf, Marc A.; Kimpel, Scott H.; Devine, Stephen W.  
**CC:** Cross, Meredith; Nallengara, Lona; Kim, Thomas; Yu, Ted; Cahn, Mark D.; Levine, Richard A.; Fredrickson, David R.; Lewis, Craig; Hanley, Kathleen; [REDACTED]  
**Subject:** JOBS Act rulemaking -- Draft Term Sheet for Rule 506/Rule 144A rulemaknig  
**Attachments:** Draft Rule 506 Rule 144A Term Sheet, Final.docx

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Dear Commissioners and Counsels,

Attached for your review is a draft term sheet for the rulemaking to remove the ban on general solicitation in Reg D Rule 506 offerings and to allow offers to non-QIBs in Rule 144A offerings. It also requires issuers to take reasonable steps to verify accredited investor status in generally solicited Reg D Rule 506 offerings. This rulemaking is required by Title II of the JOBS Act. As you will see, we are recommending that the Commission proceed with an interim final rule.

The JOBS Act calls for these rule amendments to be finalized by 90 days after enactment of the JOBS Act (July 4, 2012). In the interest of time, we are drafting a release based the draft term sheet. We look forward to discussing your questions and comments.

Thanks, Meredith



Draft Rule  
506 Rule  
144A Term  
Sheet,  
Final.docx  
(55 kB)

**From:** Kwon, Charles  
**Sent:** Tuesday, June 05, 2012 10:45 AM GMT -04:00  
**To:** Rabie, Aseel  
**CC:** Yu, Ted; Kim, Thomas; Ingram, Jonathan; Fredrickson, David R.  
**Subject:** 506 release - "good cause" exception under the APA

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Aseel,

As I mentioned over the phone, the following is a draft discussion of the “good cause” exception under the APA for the 506 release.

Please let me know if you have any questions. Your feedback would be much appreciated.

Thanks,  
Charles

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## **OTHER MATTERS**

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.<sup>[1]</sup> This requirement does not apply, however, if the agency “for good cause finds ... that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.”<sup>[2]</sup> The Commission, for good cause, finds that the notice and public comment procedures in advance of effectiveness of the interim final rules are impracticable, unnecessary and contrary to the public interest for the following reasons. First, we believe that the statutory language in Section 201(a) is clear and straightforward as to how to amend Rules 506 and 144A(d)(1), such that prior notice and comment are unnecessary. Second, the Commission finds that it would be impracticable to comply with the notice and comment procedures under the Administrative Procedure Act in light of the 90-day period under Section 201(a) of the JOBS Act to revise these rules. Third, in view of the clear statutory language as well as the anticipated major impact on capital-raising by issuers, we believe that it would be consistent with the public interest to use an expedited rulemaking procedure to adopt these amendments, which would, among other things, allow the Commission to begin monitoring and studying the operation and impact of these amendments.<sup>3</sup>

The Commission is requesting comments on the interim final rules and will consider any

comments that we receive in determining whether we should revise, or take any other actions with respect to, the interim final rules. The interim final rules will remain in effect until the compliance date for final rules that we may adopt further establishing the methods that issuers may use in taking “reasonable steps” to verify that purchasers of securities in a Rule 506 offering are accredited investors.

<sup>1</sup> See 5 U.S.C. 553(b).

<sup>2</sup> Id.

<sup>3</sup> Adopting the amendments to Rules 506 and 144A as interim final rules would also permit the Commission to coordinate its final rulemaking efforts in implementing Section 201(a) with any Commission rulemaking efforts to amend the definition of “accredited investor” following the GAO’s study and report on the appropriate criteria needed to qualify for accredited investor status, as required by Section 415 of the Dodd-Frank Act.

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[1] See 5 U.S.C. 553(b).

[2] Id.

**From:** Schapiro, Mary L.  
**Sent:** Tuesday, August 07, 2012 4:32 PM GMT -04:00  
**To:** Nisanci, Didem A.; Williams, Erica Y.; McHugh, Jennifer B.; Cross, Meredith; Marlin, Myron L.  
**CC:** Walter, Elisse  
**Subject:** Re: general solicitation ban rulemaking

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I know we spent an hour discussing this yesterday but they are making me very worried. Is there really a problem with a short comment period? I know, i know we went through all of that....

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**From:** Nisanci, Didem A.  
**Sent:** Tuesday, August 07, 2012 04:10 PM  
**To:** Schapiro, Mary L.; Williams, Erica Y.; McHugh, Jennifer B.; Cross, Meredith; Marlin, Myron L.  
**Subject:** Fw: general solicitation ban rulemaking

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**From:** Barbara Roper [REDACTED]  
**Sent:** Tuesday, August 07, 2012 03:23 PM  
**To:** Nisanci, Didem A.  
**Subject:** general solicitation ban rulemaking

Didem,

By now I imagine you have heard from SEC staff who attended last week's JOBS Act Implementation roundtable at the Treasury Department about how strongly investor representatives at that meeting opposed the reported plan to adopt the rule eliminating the general solicitation ban in private offerings as an interim final or temporary rule. We have strong objections to this approach based on both substance and process, which we will detail in a forthcoming letter to the Commission. (A letter is currently being drafted and is likely to be finalized by early next week at the latest.) It will call on the Commission to subject this and all future JOBS Act rulemakings to the full public proposal-and-comment process required under the Administrative Procedures Act. I wanted to give you a heads up that this is coming, that it is a very important issue for a number of investor groups including CFA, and that groups who were present at last week's meeting are prepared to be quite aggressive in voicing our concerns.

Barb

**Barbara Roper**  
*Director of Investor Protection*  
*Consumer Federation of America*

[REDACTED]

**From:** Schapiro, Mary L.  
**Sent:** Tuesday, August 07, 2012 5:05 PM GMT -04:00  
**To:** Cross, Meredith  
**Subject:** Please don't forward

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I look forward to talking tomorrow. I have 2 worries - one is that if these guys (CFA, et al) feel this strongly, it seems like we should give them a comment period. Its not really asking for much... The other is that I don't want to be tagged with an Anti-Investor legacy. In light of all that's been accomplished, that wouldn't be fair but it is what will be said given how high emotions run on anything related to the JOBS Act. Doesn't seem worth it for an extra 45 days of process....

**From:** Schapiro, Mary L.  
**Sent:** Wednesday, August 08, 2012 7:40 PM GMT -04:00  
**To:** Cross, Meredith; Williams, Erica Y.; Cahn, Mark D.  
**Subject:** Fw: I am furious

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This did not go well.

----- Original Message -----

From: Gallagher, Daniel  
Sent: Wednesday, August 08, 2012 07:19 PM  
To: Schapiro, Mary L.  
Subject: I am furious

I just got word about the latest change to general solicitation. It is not acceptable. I have been operating in good faith, reviewing the multiple proposals sent to me for consideration this month, and I continue to find shifting sands. A "proposal" on general solicitation could have been done months ago, and indeed should have been done years ago. Meredith and Lona made it crystal clear to me on Monday that there is no need for a proposal because we know what the comments will be. And so, I spent hours working on how to accommodate your desire for a study within an interim final rule, and we did so -- just to find out now that you have changed your mind again.

Against the backdrop of a potential open meeting on money market funds that may be just an exercise of you "getting us on the record" as you told me two weeks ago and as was reported in the WSJ today, I can only assume that you have no desire to proceed in good faith as we consider critically important rules in an unreasonable schedule you have set for this month. I will proceed accordingly.