



## General Solicitation May Trigger State Investment Adviser Registration in Certain States

As a consequence of the Jumpstart Our Business Startups Act (“*JOBS Act*”), beginning September 23, 2013, managers of private funds will be permitted to advertise and solicit the general public in an effort to raise capital for their private fund. While the requirements for investment adviser registration vary from state to state, **Florida, Indiana, Louisiana, Michigan, Ohio, Pennsylvania, and Tennessee** provide an exemption to fund managers that (i) have no more than a certain number of clients (generally 15) and; (ii) do not “hold themselves out” to the public as investment advisers. As of this writing we are not aware that of the securities regulators in any of these states have taken a position as to whether utilizing general solicitation constitutes “holding oneself out” as an investment adviser. However, given the plain language of the statutes, private fund managers in these states seeking to utilize 506(c) are well advised to carefully consider whether the benefit of general solicitation outweigh the licensing and compliance requirements associated with being a registered investment adviser.

### “Holding Out to the Public as an Investment Adviser”

The definition of “holding out” to the public as an investment adviser has been interpreted broadly by the SEC’s Division of Investment Management. Among the specific activities the Division has found constitute “holding oneself out” include:

- Advertising investment advisory services;
- Referring to one’s self as an “investment adviser”;
- Maintaining a listing as an investment adviser in a telephone, business, building or other directory;
- Using letterhead that indicates any investment advisory activity; or
- Letting it be known, through word of mouth or otherwise, that one is willing to provide investment advisory services

Prior to the JOBS Act, private funds could only be marketed through private placements and to those with whom the fund manager had a pre-existing relationship. By virtue of the ban on general solicitation managers went to great lengths to ensure that they did not hold themselves out to the public, by having password protected websites or never mentioning their private funds when speaking in public, for example.

### General Solicitation under Rule 506(c)

The JOBS Act amended Regulation D to include Rule 506(c), which permits private funds to generally solicit investors, provided they only accept only accredited investors, and take reasonable steps to verify their accredited investor status. While general solicitation is not defined by statute, Rule 502(c) of the Securities Act provides some examples:

- Advertisements, articles, and notes published in newspapers and magazines;
- Communications broadcast over television and radio; or
- Seminars whose attendees were invited by means of general solicitation

### Conclusion

At this point in time, regulatory authorities in Florida, Indiana, Louisiana, Michigan, Ohio, Pennsylvania, and Tennessee have not addressed whether or not general solicitation under Rule 506(c) will co-exist with



the investment adviser registration exemption requirement that managers of private funds not “hold themselves out” to the public as investment advisers. Ultimately, fund managers located in these states should be aware of the potential risk of “holding themselves out” to the public as investment advisers when generally soliciting, and should therefore consider the costs of investment adviser registration when deciding whether to generally solicit under Rule 506(c).