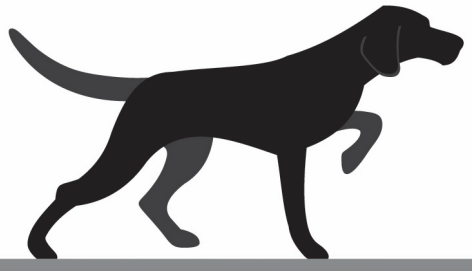

# General Solicitation and General Advertising

**Overview**

Rule 502(c) ("Rule 502(c)") of the Securities Act of 1933, as amended (the "Securities Act"), prohibits an issuer from offering or selling securities by any form of general solicitation or general advertising when conducting certain offerings exempt from registration under the safe harbors provided under Regulation D of the Securities Act. Many have felt that, over the years, this prohibition has impaired capital formation and that it would be more appropriate to regulate actual sales rather than offers. In order to address this, Congress passed the Jumpstart Our Business Startups Act (the "JOBS Act") directing the Securities and Exchange Commission (the "SEC") to relax the prohibition against general solicitation and general advertising for certain offerings made in reliance on Rule 506 of the Securities Act ("Rule 506"). The amendments to Rule 506 adopted by the SEC became effective in July 2013. The amendments implemented a bifurcated approach, allowing for private placements to be conducted in reliance on Rule 506(b) without general solicitation and general advertising and for certain exempt offerings to be conducted using general solicitation or general advertising in reliance on Rule 506(c). However, as an additional investor protection measure, an issuer relying on the Rule 506(c) exemption and using general solicitation must limit sales to accredited investors and must take reasonable steps to verify that all purchasers of the securities are accredited investors.[1]

An issuer might seek to rely on Section 4(a)(2) of the Securities Act ("Section 4(a)(2)"), which provides an exemption from the registration requirements under Section 5 of the Securities Act for a transaction undertaken by an issuer that does not involve a public offering. An issuer also might rely on the Rule 506(b) safe harbor under the Securities Act, which is a nonexclusive safe harbor, and/or Section 4(a)(2) if it does not use general solicitation. However, an issuer that relies on Rule 506(c) would not be able to rely on the Section 4(a)(2) statutory private placement exemption should the issuer fail to meet a condition of the Rule 506(c) exemption. Following the July 2013 effective date of the Rule 506 amendments creating the bifurcated approach to the exemptions, there was increased interest in the types of communications that may constitute "general solicitations," despite the fact that the SEC's amendments did not make any change to the communications rules.

Neither the JOBS Act nor SEC rules and regulations have explicitly defined the terms "general solicitation" or "general advertising." However, Rule 502(c) provides some guidance by listing examples of communications that may be viewed as general solicitation and general advertising, including (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 meetings whose attendees have been invited by any general solicitation or general advertising." Over the years, through a series of no-action letters, the SEC Staff has provided guidance regarding the types of communications that would be viewed as constituting a general solicitation. Following the July 2013 effective date of Rule 506(c), the SEC Staff also released certain Compliance and Disclosure Interpretations ("C&DIs") that essentially affirmed and restated the guidance contained in the prior 40 years of no-action letters. Consistent with prior guidance, the C&DIs make clear that the SEC Staff would consider the nature and "breadth" of a communication, based on such factors as the number of people who have received the communication, the relationship of those persons to the issuer or the issuer's agent, the financial sophistication of such persons, and the physical form of the materials containing the communication.[2] We summarize the guidance below.

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[1] Effective Mar. 15, 2021, and under new Rule 506(c)(2)(ii)(E), an issuer may establish that an investor for whom an issuer has previously taken reasonable steps to verify status as an accredited investor under Rule 506(c)(2)(ii) remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation that it continues to so qualify and the issuer is not aware of any information to the contrary. The issuer may rely on this representation for a period of five years from the date of the original determination.

[2] See SEC Division of Corporation Finance Compliance and Disclosure Interpretations, Securities Act Rules (updated Aug. 6, 2015), at Question 256.26 [herein, "C&DI"].

**General Solicitation: Establishing a Pre-Existing, Substantive Relationship**

A communication by an issuer or a person acting on an issuer's behalf with a prospective investor with which the issuer or its agent has a pre-existing substantive relationship does not constitute a general solicitation.[3]

*What is a Pre-Existing Relationship?*

SEC Staff guidance explains that a relationship is "pre-existing" if it was formed prior to the commencement of the issuer's securities offering or was "established through either a registered broker-dealer or investment adviser prior to the registered broker-dealer's or investment adviser's participation in the offering."[4] The SEC Staff further clarified that whether a relationship is pre-existing depends largely on whether there is "sufficient time between establishment of the relationship and the making of an offer so that the offer is not considered made by general solicitation or advertising."[5]

Such relationships must exist independently from any investment discussions. In a no-action letter involving an investment bank, E.F. Hutton & Co. ("*E.F. Hutton*"), the SEC Staff clarified that, although E.F. Hutton had expressed its intent to send offering materials to investors with whom it had established prior business relationships in connection with specific investment procedures it had developed, it was unclear whether these relationships were formed as a result of discussions unrelated to general solicitation conducted in connection with the proposed offering.[6] Similarly, in another instance, the SEC Staff determined a communication made by a selling agent on behalf of a trust to the trust's customers constituted general solicitation, because neither the selling agent nor the trust had shown that it had formed relationships with the customers prior to the trust's securities offering.[7]

*How Does One Establish a Pre-Existing Relationship?*

The SEC Staff has noted there is no minimum waiting period required to demonstrate that a relationship is pre-existing, but, rather, "the relationship must be established prior to the time the registered broker-dealer or investment adviser began participating in the offering."[8] Many funds conduct continuous offerings, making it difficult to know exactly when an offering begins for all interested investors, so the SEC Staff has established that the timing is determined on a per-investor basis. In *Lamp Technologies, Inc.*, the SEC Staff determined that posting private fund investment information to a password-protected website was not general solicitation, because, in that case, the fund instituted a 30-day waiting period for each investor before the investor could participate in an offering.[9] Likewise, the SEC Staff has determined that requiring investors to undergo a vetting process[10] or complete a time-intensive questionnaire[11] (rather than imposing a specified waiting period) may evidence that a relationship was pre-existing.

*What is a Substantive Relationship?*

A relationship is considered "substantive" if the issuer or its agent "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."[12] To further clarify, the SEC Staff has indicated that the "quality of the relationship between the issuer (or its agent) and an investor" is the critical factor in evaluating whether a substantive relationship exists.[13] The quality of the relationship depends on the

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[3] *Id.* at Question 256.26.
[4] *Id.* at Question 256.29.
[5] *E.F. Hutton & Company*, SEC No-Action Letter (Dec. 3, 1985) [herein, "*E.F. Hutton*"].
[6] *Id.*
[7] *Webster Management Assured Return Equity Management Group Trust*, SEC No-Action Letter (Nov. 11, 1986).
[8] *E.F. Hutton, supra* note 4.
[9] See *Lamp Technologies, Inc.*, SEC No-Action Letter (May 29, 1997) [herein, "*Lamp Technologies*"].
[10] *Citizen VC, Inc.*, SEC No-Action Letter (Aug. 6, 2015) [herein, "*Citizen VC*"].
[11] *H.B. Shaine & Co., Inc.*, SEC No-Action Letter (May 1, 1987) [herein, "*H.B. Shaine*"].
[12] C&DI, *supra* note 1 at Question 256.31.
[13] *Citizen VC, supra* note 9.



ability of the issuer or its agent to obtain sufficient information in order to evaluate a prospective investor's financial ability and sophistication.

The SEC Staff has noted that self-certification by a person as to his/her status as an accredited or sophisticated investor is not sufficient to establish a relationship that is "substantive."[14] In *E.F. Hutton*, the SEC Staff determined that providing a questionnaire and new client intake form to prospective investors alone was not sufficient to establish a substantive relationship, even if the information collected was relevant to establishing the investors' financial ability, because the forms relied entirely on the responses of the individual investors and therefore constituted self-certification.[15] By contrast, the SEC Staff found that adding a subsequent "relationship-establishment period" to a generic questionnaire would be sufficient to establish a substantive relationship, because the addition of the former would allow an issuer to further evaluate the individual investors' sophistication without relying solely on self-certification.

*How Does One Establish a Substantive Relationship?*

An offeror or its agent can establish a pre-existing substantive relationship with a potential purchaser or investor after it has determined the level of sophistication and accreditation of the potential investor. Such procedures must thoroughly and adequately gauge investor sophistication.

For broker-dealers, extensive verification measures must be established in relation to customers.[16] Implicit in broker-dealer interactions with customers lies an obligation to deal fairly with customers and to provide advice appropriate to the clients, which, according to the SEC Staff, inherently "implies that a substantive relationship exists between a broker-dealer and customers."[17] Similarly, as a fiduciary, an investment adviser has the responsibility to adequately advise its clients. Likewise, the fiduciary duty necessitates an inquiry into that client's financial situation and investment objectives that would satisfy the requirements of a pre-existing, substantive relationship.[18]

In contrast, for issuers who lack such an implicit duty, forming substantive relations with potential investors may be less organic and presumably more difficult.[19] Issuers can successfully demonstrate a substantive relationship with their investors by proving that their investors meet specific suitability standards and that they had a good faith belief that each proposed offeree was sophisticated and able to evaluate the risks and merits of a potential investment.[20] Issuers may find establishing a substantive relationship especially challenging in the context of a private offering over the internet.[21] Therefore, the SEC Staff has determined that, for an internet-based offering, an issuer would need "to consider whether it has sufficient information about particular offerees" and "to use that information to appropriately evaluate the financial circumstances and sophistication of the prospective offerees prior to commencing the offering."[22]

*When Must One Form a Substantive Relationship With a Given Investor?*

A pre-existing, substantive relationship must be fully formed prior to the commencement of the offering. Although both a broker-dealer and an investment adviser must cultivate such a relationship merely before "the time the registered broker-dealer or investment advisor has begun participating in the offering," an issuer must establish the substantive relationship prior to the

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[14] *Id.*
[15] *E.F. Hutton*, *supra* note 7.
[16] C&DI, *supra* note 11 Question 256.32.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Woodtrails – Seattle*, *Ltd,* SEC No-Action Letter (Aug. 9, 1982) [herein, "*Woodtrails – Seattle*"].
[21] *Id.*
[22] C&DI, *supra* note 15.



commencement of the offering. However, for "continuous offerings" conducted by private funds, the pre-existing, substantive relationship can commence prior to the specific offering to a given investor.[23]

The SEC Staff has determined that a waiting period is neither necessary nor sufficient, finding a substantial vetting process undertaken to ensure investor sophistication before the presentation of an investment opportunity sufficient.[24] In contrast, the SEC Staff has declined to endorse a pre-existing, substantive relationship despite the use of a waiting period between vetting the investor and presenting the investment opportunity.[25] Nonetheless, the existence of a waiting period can serve to bolster the legitimacy of the authentication procedure.[26] The implementation of a "waiting period" might arise as a natural by-product of, rather than a concrete requirement to, an adequate and thorough vetting procedure. For example, in *Lamp Technologies, Inc.*, the SEC Staff characterizes the posting of private fund investment information on a password-protected website not as general solicitation, because subscribers could only gain access to offering information after *Lamp Technologies, Inc.* could review the results of a mandatory, generic questionnaire and ascertain the sophistication and accreditation of the prospective subscriber.[27]

**General Solicitation: Determining the Nature and Breadth of the Communication**

Another factor in determining whether an offeror or its agents has engaged in general solicitation focuses on an evaluation of the nature and breadth of the communication itself. Typically, the medium of dissemination and the number of recipients, as well as the type of information contained in a communication, bear on whether the offeror has attempted to widely advertise or publicize a given offering.

The SEC has established a number of safe harbors that expressly permit issuers to communicate certain information that does not pertain to a specific security or offering and pursuant to which such communications would not be viewed as "offers." For example, an offeror may communicate regularly released "factual information" pertaining to an issuer's business, products or services (as well as ordinary advertisements for such products or services that do not constitute an offer) and financial condition.[28] Additionally, the SEC has extended the safe harbor for regularly released "forward-looking" information that merely provides guidance regarding an issuer's revenue, income, earnings and dividends.[29] The SEC has defined "regularly released" information to include information "released or disseminated [in a manner] consistent in material respects with similar past releases or disseminations."[30] Nonetheless, neither offerors nor their agents may communicate predictions, projections, forecasts or opinions concerning an offering or information that could serve to "condition the public mind or arouse public interest in a securities offering."[31]

*How Many Recipients May Exist Before a Communication is Deemed a "General Solicitation"?*

The availability of a private placement exemption generally does not depend on the number of offerees, and no recipient threshold exists to classify a given communication as general solicitation. Nonetheless, the number of recipients of a given communication can

[23] *E.F. Hutton*, *supra* note 14.
[24] *Citizen VC, Inc.*, *supra* note 9 (finding that the procedures set forth by *Citizen VC* established a preexisting, substantive relationship despite the lack of a waiting period before investors could use the website to make investments as the investment opportunity became available only after Citizen VC's rigorous vetting process).
[25] *AgriStar Global Networks, Ltd.*, SEC No-Action Letter (Feb. 9, 2004) [herein, "*AgriStar*"].
[26] *H.B. Shaine & Co.*, *supra* note 10 (finding that the circulation of a generic questionnaire did not constitute general solicitation partly because of the time that would elapse before the presentation of the investment opportunity); *Woodtrails – Seattle*, *supra* note 19.
[27] *Lamp Technologies*, *supra* note 8.
[28] C&DI, *supra* note 21 at Question 256.25; 17 C.F.R. § 230.168(a)-(d); 17 C.F.R. § 230.169(a)-(d).
[29] 17 C.F.R. § 230.168(a)-(d).
[30] The SEC has acknowledged that "regularly released" encompasses no minimum time period and can include one previously released report. *See* Securities Offering Reform, Release No. 33-8591 (Jul. 19, 2015), at 64, available at: https://bit.ly/3g7kt31.
[31] C&DI, *supra* note 27 at Question 256.24; SEC Release No. 33-5180, 1971 WL 120474, at *2 (Aug. 20, 1971) ("Further, care should be exercised so that, for example, predictions, projections, forecasts, estimates and opinions concerning value are not given with respect to such things, among others, as sales and earnings and value of the issuer's securities").

be a relevant factor.[32] The SEC Staff has noted that the "greater number of persons without financial experience, sophistication or any prior personal or business relationship with the offeror that are contacted by an offeror (or its agent) . . . through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation."[33] The analysis remains focused on whether the communications are directed at persons with whom the issuer or its agent has a pre-existing substantive communication.

*Do Written Materials Distributed to Potential Investors Constitute General Solicitation*?

An offeror or its agents may distribute written materials to potential investors that are not intended to, and do not, have the effect of swaying investor decision-making with regard to an upcoming investment opportunity. Historically, the SEC Staff has granted no-action relief for offerors or their agents delivering newsletters and guides composed from public information.[34] In these contexts, the SEC Staff noted that materials derived entirely from public record or even mainly from public research materials and public reports, and that omit substantive investment analysis and issuer information, could be spared the label of "general solicitation."

In contrast, the SEC Staff has found that distributed printed materials that may influence the investment calculus of a potential investor may constitute "general solicitation." These can be printed materials that don't merely contain "data and calculations" but specifically provide "additional background on principals of the offering, the marketability of the investment, and any possible economic, corporate, tax or legal ramification" as a means of solicitation.[35] Similarly, publishers may not set forth evaluations of an investment opportunity. Still, the boundary between "reciting public, factual information" and "providing a substantive evaluation" of an impending offering remains unclear. Where a publication has both provided factual information relating to an offering without an evaluation but employed suggestive information regarding the publication and the issuer, the SEC Staff may be unable to ascertain whether dissemination of the material would constitute a general solicitation.[36]

Nevertheless, a written communication that is delivered as part of a routine advertisement campaign does not constitute general solicitation.[37] Such exempt advertisements, including factual reports pertaining to the business or announcements of upcoming products and services, are routinely circulated as part of the ordinary course of business and will not constitute general advertising or general solicitation.[38] Whether a written communication constitutes normal, permitted advertisement or general, prohibited advertisement depends heavily on the extent of offeror involvement in the distribution of the publication. Previously, in cases such as *Richard Daniels* and *Tax Investment Information Corp.,* the SEC Staff has acknowledged the extent of an issuer's participation in the

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[32] Securities Act Release No. 33-6339, n.30 (Aug. 7, 1981) (". . . depending on the actual circumstances, offering[s] made to such large numbers of purchasers may involve a violation of the prohibition against general solicitation and general advertising"); SEC, Staff Report, Implications of the Growth of Hedge Funds, at 15 n.44 (Sep. 2003), available at: https://bit.ly/3z8u5n1 (repeating the same cautionary note, originally included in the Regulation D proposing release, that offerings made to large numbers of purchasers may involve a violation of the prohibition on general solicitation and general advertising).

[33] C&DI, *supra* note 30 at Question 256.27.

[34] *Richard Daniels*, SEC No-Action Letter (Dec. 19, 1984) (addressing a newsletter that contained information derived from public records that provided only information from the partnership certificate, such as the partnership name, address, type of business, previous activity and capital contributions, without any analysis of an offering); *Nancy Blasberg*, SEC No-Action Letter (Jul. 12, 1986) (extending no-action relief for a guide released on outstanding securities, composed from public reports and research materials that contained mainly "general terms and features," with limited information on issuers).

[35] *Tax Investment Information Corp.*, SEC No-Action Letter (Dec. 19, 1984); *J.D. Manning, Inc.*, SEC No-Action Letter (Feb. 27, 1986) (denying no-action relief in the context of a periodic newsletter distributed mainly to prospective investors that provided a list and description of certain closely held businesses predicted to initiate private placements).

[36] *Oil and Gas Investor,* SEC No-Action Letter (Sep. 9, 1983) (finding that the SEC Staff was unable to ascertain whether a magazine comprised of general, public information constituted general advertising due to the suggestiveness of the language).

[37] 17 C.F.R. § 230.168(a)-(d); 17 C.F.R. § 230.169(a)-(d).

[38] *Id.*



creation or dissemination of a given publication to indicate an intention to influence the perception of potential investors and thus whether it rises to "general solicitation."

When neither an offeror nor its agent supplies the information for the publication and no current or contemplated offering exists, the communication is unlikely to reflect an intention to advertise the particular transaction and will probably constitute ordinary advertising.[39] Nonetheless, Rule 135(c) of the Securities Act provides a safe harbor for an offeror publishing a barebones announcement of an upcoming offering to the public, even in the context of an unregistered, private offering.[40]

*Do Communications on Demo Days Constitute General Solicitations?*

On "demo days," issuers present their businesses to prospective investors.[41] New Rule 148, effective March 15, 2021, provides that communications at a "demo day" will not be deemed to constitute a general solicitation if such communications are made to a specific audience, follow particular restrictions on the form of delivery and follow particular restrictions on the content of the delivery. A communication made in connection with a seminar or meeting in which more than one issuer participates that is sponsored by a college, university or other institution of higher education; a state or local government or instrumentality of a state or local government; a nonprofit organization; or an angel investor group, incubator or accelerator will not be deemed a general solicitation provided that:

- the communications on the demo day must not reference a specific offering or security of the issuer;
- the sponsor must not:
    - make investment recommendations or provide investment advice to attendees,
    - engage in investment negotiations with attendees,
    - charge attendees any fees beyond reasonable administrative fees,
    - receive any compensation for making introductions or for investment negotiations between attendees and issuers, and
    - receive any compensation for the event that would require it to register as a broker dealer under the Exchange Act or as an investment adviser under the Advisers Act. [42]

Any "angel investor groups" that receive the communication must have defined processes and procedures for making investment decisions, which do not need to be recorded in writing.[43] The issuer may only provide a notification that the issuer is in the process of offering or planning to offer securities, the type and amount of securities to be offered, the intended proceeds of the securities to be offered, and the unsubscribed amount in an offering.[44] If the demo day is held virtually, online participants must include only: (a) individuals who are members of or otherwise associated with the sponsor organization; (b) individuals who the sponsor reasonably believes are accredited investors; or (c) individuals who were invited to the event by the sponsor based on industry or investment-related experience, reasonably selected in good faith, and disclosed in the public communications about the event.[45]

[39] 17 C.F.R. § 230.135c(a)-(c).
[40] *Id.*
[41] SEC Release No. 33-10884(B)(1).
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.



*Do Testing-the-Waters Communications for Exempt Offerings Constitute General Solicitations?*

Under new Rule 241, effective March 15, 2021, an issuer may engage in an exempt general solicitation of interest for an offering of securities before selecting the specific exemption under which the securities will be offered, without making an offer subject to registration under Section 5 of the Securities Act.[46] Subject to certain restrictions, an issuer, or a person acting on behalf of an issuer, may engage in communications to gauge interest in a proposed exempt offering, even if a specific exemption has not been selected.[47] Such solicitation of interest must be generic and will be considered an offer of a security for sale under the antifraud provisions of federal securities laws.[48] Until the issuer determines and complies with a particular exemption from the registration requirements for the offering, the issuer is not allowed to solicit or accept money or other consideration for the security or any other commitment.[49]

If the issuer uses generic testing-the-waters materials for exempt offerings, it must provide four disclosures to investors:

- that the issuer has not selected a specific exemption from registration for the offer and sale of the securities,
- no money or other consideration is being solicited nor will be accepted,
- no offer to buy the securities can be accepted nor purchase price can be received until an exemption is selected and, if applicable, the filing, disclosure or qualification requirements of the exemption are met, and
- the indication of interest does not involve any obligation or commitment.[50]

In addition to these disclosures, the issuer may choose to provide a way for a person to indicate interest in the potential offering, by giving the person's name, address, telephone number and email address in response to the issuer's communication.[51] Also, if a Regulation A or Regulation Crowdfunding offering is completed within 30 days of the corresponding generic testing-the-waters communication, any materials provided must be made publicly available as an exhibit to the offering materials.[52] Similarly, if a Rule 506(b) offering is completed within 30 days of the corresponding generic testing-the-waters communication, any materials provided must be made available to any purchaser that is not an accredited investor.[53]

Following the generic solicitation of interest, if the issuer proceeds with the exempt offering, the security offered must comply with the exemption that is selected, and investors must receive the benefit of investor protection that corresponds to the selected exemption.[54] If the generic solicitation of interest was undertaken in a manner that would have constituted a general solicitation, and the security is offered under an exemption that does not permit general solicitation, then the issuer must determine whether the solicitation and corresponding private, unregistered offering will be integrated.[55] In this situation, the issuer must have a reasonable belief based on the facts and circumstances that it did not solicit each purchaser through the general solicitation or it must reasonably believe, based on the facts and circumstances, that it had established a substantive relationship with each purchaser prior to the commencement of the exempt offering.[56]

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[46] SEC Release No. 33-10884(B)(2).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*



Under new Rule 206, effective March 15, 2021, issuers offering a security under Regulation Crowdfunding may test the waters orally or in writing before filing a Form C offering statement.[57] However, once the Form C is filed, any offering communications made prior to the filing must be in compliance with Regulation Crowdfunding and any solicitation materials provided must be filed with the SEC under new Rule 201(z).[58] The testing-the-waters communication materials must include disclosures through legends that provide (1) no money or other consideration is being sent and will not be accepted, (2) no offer to buy the securities can be accepted nor purchase price received until the offering statement is filed and only through an intermediary's platform and (3) a prospective purchaser's indication of interest is non-binding.[59] The testing-the-waters materials are considered offers and are subject to antifraud provisions of federal securities laws.[60]

**General Advertising**

*What Forms of Advertising Constitute Prohibited General Advertising?*

Advertisements communicated for the purpose of highlighting sales of securities or to solicit investors for a given offering constitute general advertising.[61] Furthermore, communications about an offering shared with the general public without limitation, rather than to a targeted group of sophisticated investors, will likely constitute prohibited advertising.[62]

Specifically, in the context of a private placement, the SEC Staff has noted that whether an advertisement can be considered a tombstone (*i.e.*, whether it merely announces the completion of a private placement) will depend on whether the tombstone advertisement is employed for the purpose of offering or selling a security.[63] For an advertisement published in connection with an isolated offering where the announcement does not directly influence a current or subsequent offering, the communication would be deemed a permitted tombstone.[64] Conversely, for an announcement that is proffered during the release of an ongoing program of private placements or limited offerings and each announcement could serve as an advertisement of any particular offering, the SEC Staff is likely to view the communication as general advertising.[65]

*Can an Offeror Distribute Questionnaires?*

The SEC Staff has permitted offerors and their agents to distribute generic print and electronic questionnaire for the purpose of verifying investor accreditation prior to the invitation of an investment opportunity. Generally, the SEC Staff has declined to find questionnaires that have been generic in nature, without reference to specific private offerings or current investment offerings, distributed to professionals, businesspeople or those reasonably perceived to be sophisticated, and for the purpose of verifying

[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Gerald F. Gerstenfeld*, SEC No-Action Letter (Dec. 3, 1985) [herein, "*Gerald F. Gertenfeld*"] (finding that an advertisement published in *The Wall Street Journal* might constitute general advertising if sent simultaneously with an ongoing or expected offering); *Aspen Grove*, SEC No-Action Letter (Dec. 8, 1982) [herein, "*Aspen Grove*"] (finding that the delivery of several brochures with an advertisement in a trade journal is used for the purpose of soliciting investor interests and thus constitutes general advertising).
[62] *Gerald F. Gerstenfeld*, *supra* note 40; *Aspen Grove*, *supra* note 43 (finding the advertisement of a limited partnership for thoroughbred horses to be general advertising because of its placement in a trade journal that was "visible, without limitation, to any member of the public").
[63] *Alma Securities Corporation*, SEC No-Action Letter (Aug. 2, 1982).
[64] *Id.*
[65] *Id.*



investor accreditation, as general advertising.[66] Nonetheless, the conclusion likely would be different if the questionnaires were distributed by an issuer rather than by a broker-dealer, since it would be presumed that the issuer intends to conduct an offering.[67]

*Can an Offeror Engage in the Cold Calling of Potential Investors?*

Usually, an offeror cannot engage in the "cold calling" of potential investors. Irrespective of whether a pre-existing, substantive relationship has been established, any communication generally directed toward a large group of investors may be viewed as general advertising.[68] An offeror may, however, engage in cold calling by limiting contact through a "targeted approach" or by contacting a certain group of recipients with a known interest, which can be reasonably viewed as accredited and sophisticated.[69]

*Does the Use of Electronic Media or the Internet Constitute General Advertising?*

The use of electronic media or the internet to solicit investors will likely be considered general advertising unless certain precautionary measures are employed. The SEC Staff has determined that an "offer conducted through an offeror's unrestricted, publicly available website would constitute general advertising, even if the website required various forms of information from a prospective investor prior to displaying any offering materials."[70] Although the SEC Staff has allowed offerors to distribute electronic questionnaires that are generic in nature without reference to a particular investment opportunity and sent to potential accredited investors for the purpose of gauging investor accreditation through electronic mediums such as a website, it has nonetheless determined that websites that widely and publicly invite individuals to qualify as accredited investors may amount to general advertising.[71] The SEC Staff later echoed this sentiment and noted that a website that solely requires self-certification of accreditation will not be able to benefit from the Rule 506(b) safe harbor; rather, an offeror must "additionally implement policies that implement policies that ensure a comprehensive review of the accreditation and qualifications of any potential investor prior to any offering through a website or other electronic media outlets."[72]

*Does Interaction with an "Angel Investor Network" Constitute General Advertising?*

Communications made through an "angel investor network" may constitute general advertising. These networks exist as channels through which sophisticated individuals, or "angel investors," exchange information about investment opportunities and that expand through the "snowballing" introduction of other members to the network.[73] The SEC Staff has explained that whether an offeror's solicitation of an angel investor network equates to "general advertising" will be determined, in light of the circumstances, on a case-

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[66] *H.B. Shaine & Co.*, *supra* note 25 (determining that the distribution of generic questionnaires that collected information about employment history, business experience, business or professional education, investment experience, income, and net worth, did not constitute general advertising); *Bateman Eichler, Hill Richards, Inc.*, SEC No-Action Letter (Dec. 3, 1985) (finding that the mailing of a letter and suitability questionnaire to a limited number of professionals for the purpose of evaluating investor accreditation did not constitute general advertising); Securities Act Release No. 33-10238 (Oct. 26, 2016).

[67] *AgriStar*, *supra* note 24 (denying no-action relief for the circulation of a questionnaire that was generic in nature and content and that lacked any reference to a specific private offering or investment opportunity, because AgriStar was operating in its capacity as an issuer rather than as a broker-dealer).

[68] *Mobile Biopsy, LLC*, SEC No-Action Letter (Aug. 11, 1999) (characterizing a series of cold communications to all in-state physicians to offer securities in a proposed venture as general advertising).

[69] *Id.*

[70] Securities Act Release No. 3-17512 (Mar. 29, 2017); Securities Act Release No. 33-7233 (Oct. 6, 1995), reaffirmed in *IPONET*, SEC No-Action Letter (July 26, 1996) [herein, "*IPONET*"] (finding that a registered broker-dealer did not engage in general advertising when it invited prospective investors to complete a generic questionnaire on its website, without referencing a particular offering or investment opportunity, in order to build a customer base and act as a barrier to sophisticated investment information); C&DI, *supra* note 33 at Question 256.23 (". . . the use of an unrestricted, publicly available website constitutes a general advertising and is not consistent with the prohibition on general advertising in Rule 502(c) if the website contains an offer of securities").

[71] *IPONET*, *supra* note 49; Securities Act Release No. 33-7856 (May 4, 2000).

[72] See *Citizen VC*, *supra* note 23.

[73] *Id.* at Question 256.27.



by-case basis.[74] Membership in these networks can serve as a means of establishing investor accreditation for the process of formulating a pre-existing, substantive relationship. The SEC Staff has implicitly permitted an offeror or its agents to presume the financial sophistication of potential investors by the nature of their membership in a given angel investor network. In other words, the offeror or its agents can rely on this association to establish a "reasonable belief" of sophistication despite the lack of further verification.[75]

*Can an Issuer Engage in Advertising Related to a Regulation Crowdfunding Offering?*

An issuer may engage in oral communications with prospective investors following the filing of a Form C for a Regulation Crowdfunding offering only if the communications meet the following requirements: (1) such communication must direct the investor to the intermediary's platform and (2) such communication must comply with information restrictions.[76] The information provided in the communication is restricted to a statement that the issuer is conducting an offering pursuant to Section 4(a)(6) of the Securities Act, the terms of the offering[77] (including the amount of securities offered, the nature of the securities, the price of the securities and the closing date of the offering period),[78] the name of the intermediary through which the offering is being conducted, the address of the issuer, the telephone number of the issuer, the website of the issuer, the email address of a representative of the issuer, a brief description of the business of the issuer,[79] a link directing the potential investor to the intermediary's platform (if the communications are in writing),[80] a brief description of the planned use of proceeds, and information about the issuer's progress toward meeting its funding goals.[81] Moreover, the issuer must identify itself as the issuer in all communications.[82] Also, persons acting on behalf of the issuer must state their relationship to the issuer.[83]

An issuer may provide information about the terms of a Regulation Crowdfunding offering in the offering materials for a concurrent offering.[84] Such information must follow the above limitations. However, if a link is required, it does not need to be provided as a live hyperlink.[85]

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[74] *Id.*
[75] *Id.*
[76] 17 C.F.R. §227.204(b)
[77] *Id.*
[78] Instruction to 17 C.F.R. §227.204
[79] *Id.*
[80] SEC Release No. 33-10884(B)(3).
[81] *Id.*
[82] 17 C.F.R. §227.204(c)
[83] *Id.*
[84] SEC Release No. 33-10884(B)(3).
[85] *Id.*


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