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## The False Promise of Publicly Offered Private Placements

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# THE FALSE PROMISE OF PUBLICLY OFFERED PRIVATE PLACEMENTS

*Manning Gilbert Warren III\**

## INTRODUCTION

THREE years ago Congress radically altered the Securities Act of 1933<sup>1</sup> (1933 Act), which for some eighty years had required the registration of all public offerings of securities.<sup>2</sup> In its enactment of Title II of the Jumpstart Our Business Startups Act<sup>3</sup> (JOBS Act), Congress ordered the Securities and Exchange Commission (SEC) to expand its Rule 506<sup>4</sup> private placement exemption to exempt from registration all public offerings of securities that are sold only to *accredited investors*.<sup>5</sup> This necessitated an amendment to the statutory private placement exemption at Section 4(a)(2)<sup>6</sup> of the 1933 Act, which the Supreme Court long ago held inapplicable to *offerings* made to the general public or to even a single offeree who does not have *access* to the type of information registration would provide.<sup>7</sup> The SEC in adopting the original Rule 506

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1. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a *et seq.* (2012)) [hereinafter 1933 Act].

2. 1933 Act § 5 (codified at 15 U.S.C. § 77e) (“It shall be unlawful for any person, directly or indirectly, to . . . offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . . .”)

3. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in scattered sections of 15 U.S.C.) [hereinafter JOBS Act]. *See generally* Manning Gilbert Warren III, *The Role of the States in the Regulation of Private Placements*, 102 Ky. L.J. 971, 971–73 (2014) [hereinafter Warren, *Role of the States*].

4. 17 C.F.R. § 230.506 (2013).

5. JOBS Act § 201(a)(1) (mandating that the SEC revise its rules “to provide that the prohibition against general solicitation or general advertising . . . shall not apply to offers and sales of securities made pursuant to section 230.506, provided that all purchasers of securities are accredited investors”). An “accredited investor” means: (a) certain banks, brokers or dealers, insurance companies, investment companies, or private business development companies; (b) an organization or trust with greater than \$5,000,000 in assets that was not formed for the purpose of acquiring securities; (c) the issuer’s director, officer, or partner; (d) an individual with a net worth in excess of \$1,000,000; (e) an individual with more than \$200,000 in individual income in each of the two previous years and who reasonably expects to earn at least that income in the current year; (f) a trust holding greater than \$5,000,000 in assets that was not formed for the purpose of acquiring securities; and (g) any entity where all equity owners are accredited investors. 17 C.F.R. § 501(a).

6. 1933 Act § 4(a)(2) (codified at 15 U.S.C. § 77d(a)(2)).

7. *See* SEC v. Ralston-Purina, 346 U.S. 119, 124–25 (1953).

exemption specifically conditioned the availability of the exemption on the absence of any general advertising or general solicitation.<sup>8</sup> Indeed, the use of any form of general solicitation in connection with a private placement of securities would violate Section 5 of the 1933 Act's registration requirement.<sup>9</sup> Congress in the JOBS Act unraveled the 1933 Act's legislative construct by amending the statute to add Section 4(b),<sup>10</sup> providing that securities sold under Rule 506 (as revised pursuant to the JOBS Act) "shall not be deemed public offerings under the federal securities laws as a result of general advertising or general solicitation."<sup>11</sup> As discussed above, Congress mandated the SEC adopt a Rule 506 exemption that would not be subject to the traditional ban on general solicitation so long as the securities were sold only to *verified* accredited investors.<sup>12</sup> The SEC was understandably unenthusiastic but, nevertheless, followed its orders and bifurcated Rule 506 into two distinct exemptions.<sup>13</sup> The SEC retained the traditional Rule 506 exemption as Rule 506(b),<sup>14</sup> under which general solicitation continues to be prohibited, and created a new Rule 506(c),<sup>15</sup> under which general solicitation is permitted.<sup>16</sup> As directed by Congress, the SEC for the first time has allowed companies relying on the Rule 506(c) exemption to offer their securities to the general public, provided that they sell those securities only to independently verified accredited investors.<sup>17</sup>

Passed with bipartisan support and with great fanfare, Title II of the JOBS Act, originally titled, The Access to Capital for Jobs Creators Act,<sup>18</sup> was ostensibly designed to promote job creation by allowing small businesses to raise capital by going directly to the general public.<sup>19</sup> Now, under the new Rule 506(c) exemption, businesses of all sizes may market their securities to the general population, whether through Super Bowl ads, Facebook, television infomercials, websites, billboards, or any other

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8. 17 C.F.R. § 230.502(c) (The issuer shall not "offer or sell the securities by any form of general solicitation or general advertising, including . . . (1) [a]ny advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast . . . ; and (2) [a]ny seminar or meeting whose attendees have been invited by any general solicitation or general advertising[.]"'); *see also* Manning Gilbert Warren III, *Review of Regulation D: The Present Exemption Regimen for Limited Offerings Under the Securities Act of 1933*, 33 AM U. L. REV. 355, 376 (1984).

9. *See* 1933 Act § 5 (codified at 15 U.S.C. § 77e (2012)).

10. 1933 Act § 4(b) (codified at 15 U.S.C. § 77d(b) (2012)); *see* JOBS Act § 201(b)(2).

11. 1933 Act § 4(b).

12. *See supra* note 5. The SEC eliminated the prohibition against general solicitation, provided that the issuer take reasonable steps to verify that purchasers are accredited investors. Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Exchange Act Release No. 69959, 78 Fed. Reg. 44,771, 44,773 (July 10, 2013) [hereinafter SEC Final Rules].

13. *Id.*

14. 17 C.F.R. § 230.506(b).

15. § 230.506(c).

16. *Id.*

17. *Id.*

18. Access to Capital for Jobs Creators Act, H.R. 2940, 112th Cong. (1st Sess. 2011).

19. *See id.*

media, without registration or any other regulatory scrutiny by the SEC.<sup>20</sup> Because Congress has deemed all securities offered in reliance on (and in compliance with)<sup>21</sup> Rule 506 to be “covered securities,”<sup>22</sup> securities offered under the new Rule 506(c) are similarly free from otherwise applicable state registration requirements.<sup>23</sup> The JOBS Act, as implemented, simply extends Rule 506’s preemptive effect from *privately* offered Rule 506(b) securities to *publicly* offered Rule 506(c) securities.

One might surmise that when the new Rule 506(c) became effective on September 23, 2013, the floodgates would open. Small businesses, which claimed that for decades their access to capital was regularly denied by federal securities regulation, would bring all their pent-up demand for capital to the general public. The general public would be besieged by issuers ranging from legitimate enterprises to boiler rooms operating out of cheap motels. In reality, the floodgates did not open. The vast majority of issuers and their counsel have continued to rely on the traditional Rule 506(b) private offering exemption and have largely refrained from using the Rule 506(c) public offering exemption.

In this article, I will address the false promise of this new regime exempting publicly offered private placements from regulatory scrutiny. I will first discuss a Form D survey that I conducted to measure the securities market’s response to the Rule 506(c) opportunity. In this survey, I reviewed Form D data generated since Rule 506(c)’s inception that reflects the comparable use of the Rule 506(b) and (c) exemptions. I will then identify and discuss factors that may have contributed to issuers’ reluctance to rely on the Rule 506(c) exemption for their private offerings, despite its amplification of the potential market for their securities. I will also address the results of my recent survey of securities lawyers whose practices involve assisting their issuer clients in conducting private placements of securities. I undertook the survey primarily to measure the relative significance of factors that may have limited usage of the new exemption. I will conclude that while exempt securities offerings may one day be commonly offered to the general public—perhaps through Ama-

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20. The SEC, as a matter of practice, has not monitored Form D filings made with respect to Rule 506 and other Regulation D offerings. The SEC’s Office of Inspector General (OIG) reported that the SEC “does not generally take action when [it] learn[s] that issuers have not complied with the requirements of the Regulation D exemptions.” U.S. Sec. & Exch. Comm’n Off. Inspector Gen., *Regulation D Exemption Process v* (2009), available at <http://www.sec.gov/oig/reportspubs/459.pdf>. The SEC “does not substantially review the more than 20,000 Form D filings that it receives annually.” *Id.* According to Brian Lane, former Director of the SEC’s Division of Corporation Finance, “the whole idea of a private placement is that it doesn’t get SEC review.” Maria Lokshin, *Capital Formation, Split Clears JOBS Act Advertising Rule, Issues Proposal on Enhanced Requirements*, 45 SEC. REG. & L. REP. (BNA) 1285, 1286 (July 15, 2013).

21. The vast majority of courts have held that any issuer claiming a Rule 506 exemption for its securities offering must satisfy its burden of proof on its claim of exemption and on the affirmative defense of preemption by establishing that it has, in fact, complied with the conditions of the exemption. *See, e.g., Brown v. Earthboard Sports, USA, Inc.*, 481 F.3d 901 (6th Cir. 2007); *see also Buist v. Time Domain Corp.*, 926 So. 2d 290 (Ala. 2005).

22. 1933 Act § 18(a) (codified at 15 U.S.C. § 77r(b) (2012)).

23. *Id.*

zon.com-like platforms—that day is a long way off. For now, reluctance factors ranging from traditional deal structures to regulatory uncertainties will continue to suppress usage of the new rule. Despite its promise, the advent of the publicly offered private placement exemption has not yet reshaped the private placement landscape or provided greater access to capital.

## I. ANALYSIS OF FORM D FILINGS TO MEASURE THE RESPONSE TO RULE 506(C)

### A. ANALYSIS OF AMOUNT OF FORM D FILINGS

The effective date of Rule 506(c), September 23, 2013, marked the inaugural opportunity for issuers to use the publicly offered private placement exemption. Despite the novelty of the new exemption and its promise of greater access to capital, issuers demonstrated a strong preference for the traditional Rule 506(b) exemption. My survey of Form D filings on Rule 506(c)'s birthday revealed that only seven out of sixty-five Form D filings, or 10.77%, indicated reliance on Rule 506(c). Filings that indicated reliance on Rule 506(b) constituted 73.84% of all Form D filings made on that day. From day one, it was apparent that issuers would continue to rely primarily on the Rule 506(b) exemption. During the following eighteen months, the disparity has grown considerably sharper.

In my survey, I compared the first eighteen months of filings made by issuers in reliance on Rule 506(b) and on Rule 506(c). In compiling data from the SEC's historical archives,<sup>24</sup> I limited my search results to only Form D filings made during the period September 23, 2013, through March 31, 2015. I then separated that retrieved data by filings made in reliance on each of Regulation D's four component exemptions, Rule 504,<sup>25</sup> Rule 505,<sup>26</sup> Rule 506(b)<sup>27</sup> and Rule 506(c).<sup>28</sup> I then calculated the number of filings made under each of those exemptions and arranged that data into a chart to illustrate the frequency with which issuers have claimed those respective exemptions.

The data reviewed demonstrates that the hype expressed when Rule 506(c) was promulgated, including suggestions that these publicly offered private placements would replace initial public offerings in raising capi-

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24. U.S. SECURITIES AND EXCHANGE COMMISSION, *Historical SEC EDGAR Archive*, available at <http://www.sec.gov/cgi-bin/srch-edgar> (last accessed March 12, 2015). This analysis is based on information collected from Form D filings submitted to the SEC. However, as the SEC noted in its Adopting Release, this may not be "a complete view of the Rule 506 market, particularly with respect to the amount of capital raised." SEC Final Rules, Exchange Act Release No. 69959 at 63 (July 10, 2013). Many commentators have noted that while issuers "are required to file a Form D within 15 days of the first sale of securities," many issuers do not comply with these obligations. *Id.* at 64 & n.189; see also JOHN COFFEE, JR., & HILLARY SALE, *SECURITIES REGULATION* 374 (12th ed. 2012).

25. 17 C.F.R. § 230.504.

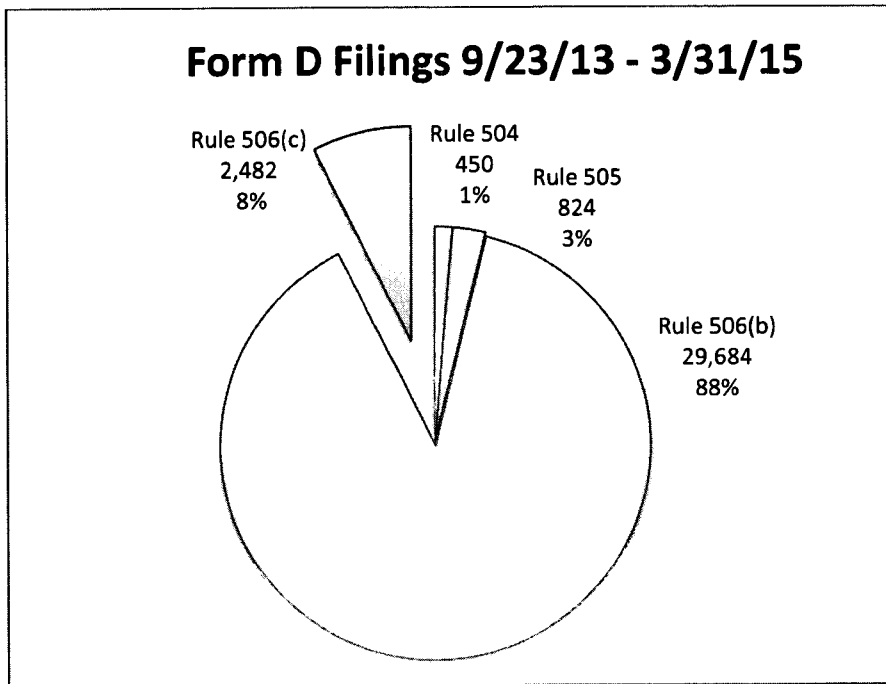
26. § 230.505.

27. § 230.506(b).

28. § 230.506(c).

tal,<sup>29</sup> has thus far been a gross exaggeration. Rule 506(c) during its inaugural eighteen months has not significantly altered the way issuers raise capital or the way they conduct their private offerings of securities. During that period issuers made 34,199 Form D filings. Of those filings, 32,166 or 94.6%, indicated issuer reliance on the Rule 506(b) or (c) exemptions. Comparison of the two Rule 506 substantive exemptions revealed that issuers relied on Rule 506(b) in 29,684 filings, or 92.28%, of all Rule 506 filings, while issuers relied on Rule 506(c) in only 2,482 filings, or 7.71%, of all Rule 506 filings. Issuer reliance on the other Regulation D exemptions was even less significant, with issuers indicating reliance on Rule 504 in only 450 filings, or 1.32%, and on Rule 505 in only 824 filings, or 2.42% of all Form D filings made during the eighteen months following of Rule 506(c)'s effective date. The chart below illustrates the strong issuer preference during the subject period for the traditional Rule 506(b) exemption for private placements.

Figure 1



I also filtered the Form D data reviewed to compare the number of *unique* issuer filings under each of the Regulation D substantive exemptions. This was done to measure the actual number of issuers asserting reliance on one of these exemptions without regard to the number of

29. Yin Wilczek, *Advertised Private Offerings Will Surpass IPOs, Crowdfunded Securities, Lawyers Say*, 45 SEC. REG. & L. REP. (BNA) 1773, 1773 (Sept. 30, 2013).

Form D filings made by those issuers. During the eighteen-month period, 25,851 unique issuers relied on the Rule 506(b) exemption, while 2,193 unique issuers relied on the Rule 506(c) exemption. This demonstrates that only a small percentage of issuers are repeat players in the private capital market.

## B. CAPITAL RAISED THROUGH FORM D FILINGS

Next, I analyzed the amount of capital raised by issuers in reliance on the Rule 506(b) and Rule 506(c) exemptions in the first eighteen months since the SEC promulgated Rule 506(c), from September 23, 2013, through March 31, 2015. While Title II of the JOBS Act was premised on the mysterious notion that its new generally solicited private offering would significantly increase the size of private markets, my analysis of the capital raised has returned results that dispute this premise.<sup>30</sup> In the first eighteen months, issuers sold over \$880 billion in Regulation D securities claiming the Rule 506(b) or 506(c) exemptions.

Looking further into the capital sold under Regulation D offerings, it is evident that 506(c) offerings constitute only a small portion of the private market. As shown in Table 1, *infra*, Rule 506(c) offerings made up 7.42% of all Regulation D offerings from September 23, 2013 through March 31, 2015, but only represented 2.5% of the aggregate dollar amount sold under Rule 506.<sup>31</sup> Issuers sold over \$22 billion in securities under Rule 506(c) in the first eighteen months, but Rule 506(b) offerings surpassed the value of Rule 506(c) offerings 38 times over. The data revealed that issuers sold over \$858 billion under Rule 506(b) during that same period.<sup>32</sup> Accordingly, Rule 506(b) offerings constitute 88.77% of all Regulation D offerings, but over 97% of the capital raised. The vast discrepancies between the aggregate dollar amount of capital raised compared to the number of Rules 506(b) and (c) offerings further evidence that Rule 506(b) continues to dominate the private market.

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30. In 506(c)'s first year, from September 23, 2013 through September 22, 2014, issuers sold over \$690 billion in all Regulation D securities, which was lower than the previous three-year average. This suggests that the JOBS Act has not yet increased the size of the private markets in the way Congress had anticipated. JOSEPH SULLIVAN, EQUITY CROWDFUNDING UNDER TITLE II OF THE JOBS ACT: THE FIRST YEAR 4 (Offerboard White Papers Oct. 2013).

31. *Id.* This study only measures the amount of capital that has been reported and raised as of the date of filing. Any capital raised after filing, which may have been reported on an amended filing, is not included. According to Sullivan, Rule 506(c) offerings also "have the lowest percentage of funds committed at the time of the filing—15.9% compared to 73.2% for 506(b) offerings." *Id.* at 5. This discrepancy in committed funds may result because: (a) of the nature of general solicitation, (b) issuers register "earlier in the process because they collect funds immediately, rather than waiting to collect funds once there is a critical mass, as is often done in the 506(b) process[.]" or (c) 506(c) offerings generally have a "lower minimum investment size." *Id.* It should be noted that the author's data points did not add up to the correct totals, so while my study used the individual numbers for the count of offerings sold, the amount offered, and the amount sold for each Regulation D offering, my total values are different than what the author's data points reflect.

32. *Id.* at 4.

Table 1  
Number and Amount of Offerings Sold by Exemption<sup>33</sup>

	Number of Offerings	% of Total Offerings	Amount of Capital Sold	Capital Sold as % of Total Rule 506
Rule 506(b)	29,684	88.77%	\$858,598,349,179	97.48%
Rule 506(c)	2,482	7.42%	\$ 22,219,096,239	2.52%
<b>Total</b>	<b>32,166</b>		<b>\$ 880,817,445,418</b>	

## II. ANALYSIS OF RULE 506(C) RELUCTANCE FACTORS

My analysis of the Form D data obviously begs the question: Why are issuers and their counsel so reluctant to fulfil Rule 506(c)'s promise? After all, they have been positioned by the JOBS Act and the SEC's promulgation of Rule 506(c) to raise unlimited amounts of capital, with no formal disclosure requirements and with no presale regulatory scrutiny, by offering securities to billions of offerees to attract purchases from millions of accredited investors. Since the promulgation of Rule 506(c) on July 10, 2013, I have made continual, informal inquiries to practicing securities counsel to answer this perplexing question. The explanatory factors I have been provided may be briefly listed as follows:

- (1) Issuers and their counsel attest to the availability of sufficient capital to fund their offerings without resort to general solicitation.<sup>34</sup>
- (2) Issuers and their counsel have found the traditional Rule 506(b) model to be highly practicable and reliable private placement structure and that familiarity provides for an understandable best practices inertia.<sup>35</sup>
- (3) Issuers and their counsel are profoundly reluctant to offer securities to *accredited strangers*, as opposed to investors with whom they have preexisting personal and business relationships.<sup>36</sup>
- (4) Issuers and their counsel are uncomfortable with the regulatory uncertainties presented by Rule 506(c)'s requirements that the accredited investor status of their investors must be *verified* by third

33. This number may be slightly understated or overstated because companies are not required to file an amended Form D unless the amount sold is greater than 10% of the amount offered. The data is merely to establish an overview of capital sold under the various exemptions.

34. See Preqin Ltd., *JOBS Act – How Will Hedge Fund Managers Respond?*, HEDGE FUND SPOTLIGHT 6 (Apr. 2014) (some investors can access sufficient capital from their established pool of investors), available at [https://www.preqin.com/docs/newsletters/hf/Preqin\\_Hedge\\_Fund\\_Spotlight\\_April\\_2014.pdf](https://www.preqin.com/docs/newsletters/hf/Preqin_Hedge_Fund_Spotlight_April_2014.pdf).

35. One attorney has noted that many issuers appear hesitant to engage in a Rule 506(c) offering due both to greater familiarity with Rule 506(b) and a misunderstanding of Rule 506(c)'s requirements. Phillip R. Sanders, *Understanding the New Rule 506(c) Exemption*, 42 SEC. REG. L. J. 347, 368 (2014).

36. Karlee Weinmann, *5 Reasons Funds Won't Touch JOBS Act Marketing Rules*, LAW360 (Apr. 10, 2014), available at <http://www.law360.com/articles/526895/5-reasons-funds-won-t-touch-jobs-act-marketing-rules>.



parties,<sup>37</sup> as opposed to the traditional self-certifications accepted in Rule 506(b) offerings.<sup>38</sup>

(5) Issuers and their counsel are also fearful of their investors' privacy concerns regarding the required revelation of confidential financial information,<sup>39</sup> particularly since most privately placed investment opportunities, under Rule 506(b), do not require this disclosure.<sup>40</sup>

(6) Issuers and their clients are concerned about the uncertainties presented by the SEC's proposed amendments related to the Rule 506(c) exemption, including, among other things, the proposal that marketing materials be filed with the SEC,<sup>41</sup> that enhanced disclosures be made in the Form D Notice of Sales,<sup>42</sup> that Form D filings must be made in advance of the first sale,<sup>43</sup> and that failing to file a Form D could disqualify issuers from future reliance on the exemption.<sup>44</sup>

(7) Issuers and their clients would prefer to avoid the more intense regulatory scrutiny that the SEC has indicated it will direct toward generally solicited private placements.<sup>45</sup>

(8) Securities counsel have raised concerns over numerous potential regulatory and civil liability issues, including the compliance risks under foreign regulatory regimes with conflicting regulatory requirements and the risk that Rule 506(c) offerings may expose issuers to

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37. John Filar Atwood, *Verification Requirement is Driving Companies Away from Rule 506(c) Offerings*, SEC TODAY, 2014 WL 6630145 (Nov. 24, 2014); see also DEALFLOW.COM, ONLINE DEAL MKTG. OUTLOOK FOR Q2 2014 13, (Dealflow White Paper (Apr. 2014)), available at [https://dealflow.com/whitepapers/Dealflow\\_White\\_Paper\\_Q1\\_2014.pdf](https://dealflow.com/whitepapers/Dealflow_White_Paper_Q1_2014.pdf).

38. 17 C.F.R. § 230.506(b) (2013); see also Atwood, *supra* note 37.

39. Sanders, *supra* note 35, at 366 (privacy concerns may be a strong deterrent to potential purchasers in deciding whether to invest in a private offering).

40. Rule 506(b), as the exemption of choice for private placements of securities, only requires that issuers "reasonably believe" the accredited investor status of their investors, generally based on self-certification by those investors in investor questionnaires and subscription agreements. 17 C.F.R. § 230.501(a) (2013) (defining "accredited investor" as any person who comes within the stated categories or who the issuer reasonably believes comes within any of those categories). Rule 506(b), unlike Rule 506(c), does not impose an independent verification requirement. Consequently, investors, faced with numerous investment opportunities under Rule 506(b) that do not implicate privacy concerns, may be unwilling to invest in Rule 506(c) investment opportunities that do. Moreover, the SEC has noted that issuers should have their own regulatory concerns about collecting information that may be subject to federal and state privacy and data security requirements. SEC Final Rules, Exchange Act Release No. 69959, at 15 n.118 (July 10, 2013).

41. Amendments to Regulation D, Form D, and Rule 156, Securities Act Release No. 9416, Exchange Act Release No. 69,960, 78 Fed. Reg. 44,806, 44,815 (July 24, 2013) [hereinafter SEC Proposed Rules].

42. *Id.* at 44,830.

43. *Id.* at 44,811.

44. *Id.* at 44,833; see Atwood, *supra* note 37. Annemarie Tierney, General Counsel, SecondMarket Holdings, has stated that the "overhang" of the proposed Regulation D amendments have made Rule 506(c) unattractive. *Id.*

45. Weinmann, *supra* note 36.

strict liability under Section 12(a)(2) of the 1933 Act.<sup>46</sup>

While these factors are hardly exhaustive, they do suggest a profound reluctance on the part of issuers and their counsel to wander an uncharted course.

To explore the reluctance of securities counsel to advise their issuer clients' reliance on the Rule 506(c) exemption, I developed a brief survey of attorneys in the United States who specialize in private placements of securities. In this survey I asked these securities lawyers to respond to three basic questions. The first asked if the attorney had advised any client issuer to claim reliance on the Rule 506(b) exemption for any private placement offering since the inception of Rule 506(c). The second asked whether the attorney had advised any client issuer to claim reliance on the Rule 506(c) exemption since its inception. The final question asked the attorney to select from a brief list the factors that underlie any preference for Rule 506(b) over Rule 506(c). The factors were presented as follows:

1. Availability of adequate capital from accredited investors without resort to general solicitation.
2. Satisfaction with the existing Rule 506(b) standards.
3. Uncertainties presented by the Rule 506(c) verification requirement.
4. Investor reluctance to disclose confidential financial information to issuer clients.
5. Client reluctance to offer securities to accredited strangers versus investors with whom the attorney or issuer has a preexisting relationship.
6. Uncertainties presented by the SEC's proposed amendments related to the Rule 506(c) exemption, including the proposed requirement that the issuer file marketing material with the SEC.
7. Other.

I distributed this survey to private placement attorneys across the country. In response to the first question, 90% of the respondent attorneys affirmed that they had utilized the Rule 506(b) exemption on their clients' behalf in the previous eighteen months. Curiously, approximately 25% in response to the second question, indicated they had utilized the Rule 506(c) exemption during the same period, significantly greater than the 7.71% of Regulation D offerings indicated by the Form D survey. Of course, the ratio of Rule 506(c) Form D filings measured a definitive ratio based on specific data not influenced by other external factors. In addition, the attorney response rate was approximately 14%, while the Rule

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46. Although the Supreme Court in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), held that the express civil remedy provided at § 12(a)(2) of the 1933 Act did not apply to private placements conducted pursuant to § 4(a)(2), it is far from clear that the Court's rationale would extend to Rule 506(c)'s publicly offered private placement exemption. Shortly after the SEC promulgated Rule 506(c), one prominent securities lawyer conceded that the courts might ultimately conclude that *Gustafson* does not apply to Rule 506(c) offerings. See Wilczek, *supra* note 29.

506(c) to Rule 506(b) ratio of Form D filings was based on all documents filed during the subject period.

The attorneys' responses to the third question confirmed the relevancy of the various factors that have resulted in a practical resistance to the temptations of Rule 506(c). Approximately 80% of respondents affirmed that their issuer clients had access to adequate capital from accredited investors without any resort to general solicitation. Some 70% of respondents expressed satisfaction with the preexisting Rule 506(b) regulatory requirements in conducting private placements, following a variant of "if it isn't broken, don't fix it." They indicated that they would continue to advise their issuer clients to use the Rule 506(b) exemption because they were both experienced in and satisfied with this regulatory model.

The reluctance factors related to the new Rule 506(c) accredited investor verification requirements and their investor privacy implications were viewed by securities lawyers as obstacles to the utilization of the new exemption. Under Rule 506(b), issuers and their counsel have long relied on investor *self-certification*<sup>47</sup> as satisfying the rule's "reasonable belief" standard.<sup>48</sup> The new Rule 506(c) retains the reasonable belief standard but also independently requires the issuer to take *reasonable steps to verify* accredited investor status.<sup>49</sup> Approximately 65% of respondents indicated concerns over compliance with the verification requirement. The SEC, in its adopting release, refused to prescribe uniform verification methods for issuers.<sup>50</sup> The resultant uncertainties would relate, of course, to the SEC's provision of verification methodology options, ranging from a rather vague principles-based approach<sup>51</sup> to four specific, non-exclusive methods of verifying accredited investor status for natural persons.<sup>52</sup> In addition, issuers and their counsel must also monitor accredited investor verification outcomes for *staleness* issues under the SEC's three-month staleness standard.<sup>53</sup> With regard to the privacy implications of the new verification requirement, 45% of respondents to the attorney survey indi-

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47. See SEC Final Rules, Exchange Act Release No. 69959, 78 Fed. Reg. 44,771, at 44,782; Bruce Davis, *Public Advertising of Private Investment Offerings: The Operation and Issues in Post-JOBS Act Regulation D*, 13 U.C. DAVIS BUS. L.J. 295, 303 & n.18 (2013); see also Letter from Michael Flannigan, Executive Vice-President, BrokerBank Securities, Inc., to Elizabeth M. Murphy, Sec'y, Sec. Exch. Comm'n (July 10, 2012), available at <https://www.sec.gov/comments/jobs-title-ii/jobstitleii-43.pdf> (claiming that self-certification has been "followed by the industry for decades").

48. Davis, *supra* note 47.

49. 17 C.F.R. § 230.506(c) (2013). The SEC emphasized that the verification requirement is an independent requirement of the Rule 506(c) exemption and "must be satisfied even if all purchasers happen to be accredited investors." SEC Compliance and Disclosure Interpretations, Question 260.07 (last accessed June 19, 2015), available at <http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.

50. See SEC Final Rules, Exchange Act Release No. 69959, 78 Fed. Reg. 44,771, at 44,780 (July 10, 2013).

51. *Id.* at 44,800.

52. *Id.* at 44,780.

53. *Id.* at 44,781. The SEC has indicated that the relevant documentation relied upon under its specific verification methods must be dated within the prior three months of the sale of securities. SEC Compliance and Disclosure Interpretations, Question 260.08 (Nov. 13, 2013).

cated their fears of investor reluctance to disclose their confidential financial information to either issuers or third parties as part of the verification process. This disclosure burden may, in turn, chill investor interest in Rule 506(c) offerings since, as previously discussed, approximately 90% of private placements are conducted in reliance on Rule 506(b) which completely avoids this burden by permitting accredited investors to self-certify their accredited investor status.

The respondents also expressed significant concerns regarding the extension of their client issuers' private offerings to the universe of accredited investors. Some 30% of respondents indicated their reluctance to offer their clients' securities to accredited strangers. As stated previously, 80% of respondents affirmed that their client issuers had access to adequate capital from accredited investors with whom they already had pre-existing business relationships, and, accordingly, did not recognize the need for general solicitation. These respondents' concerns certainly accord with my own observations that "most securities lawyers believe it is not beneficial to their clients' interests to recruit anonymous accredited investors,"<sup>54</sup> reflecting their tendency "to be very cautious about investors who may have the money but have little experience in making money and losing money in private equity deals."<sup>55</sup>

Finally, approximately 25% of the respondents expressed their preference for the Rule 506(b) exemption because of the uncertainties surrounding Rule 506(c), given its relatively recent adoption, and, of course, the uncertainties presented by the regulatory overhang of amendments related to Rule 506(c) that were proposed by the SEC at the time of its adoption.<sup>56</sup> These proposed amendments have been languishing now for almost two years, and the SEC has not provided any definitive timeline for their adoption.<sup>57</sup> Securities attorneys are understandably reluctant to

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54. Warren, *Role of the States*, *supra* note 3, at 1004.

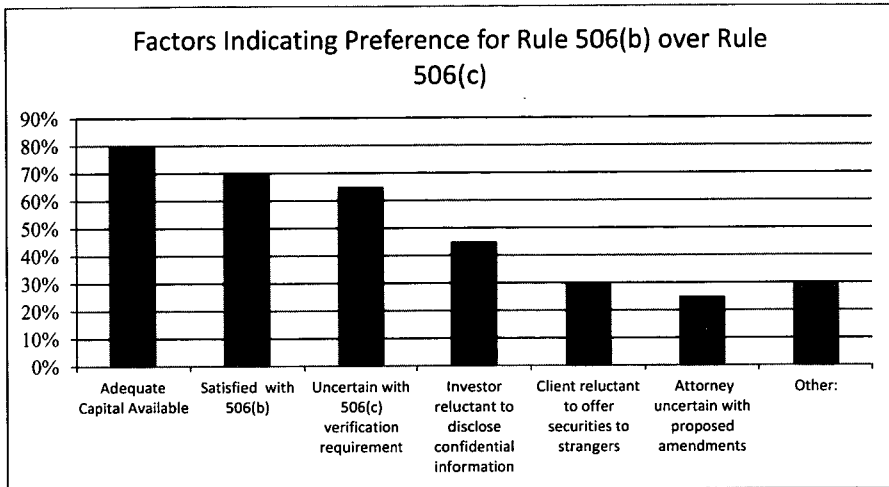
55. *Id.*

56. SEC Proposed Rules, Exchange Act Release No. 69,960, 78 Fed. Reg. 44,806, at 44,814 (July 24, 2013). The SEC proposed the requirement that issuers include specific information on their Form D regarding the "types of general solicitation used[.]" and to add a new Rule 509, which would require investors to include "legends in any written general solicitation materials used in a Rule 506(c) offering" and include even more disclosures for "private funds if such materials include performance data." *Id.* The SEC proposed additional amendments including: (1) amending Rule 503 to require issues to file an "Advance Form D" before engaging in general solicitation, and then requiring them to file an amendment in which they must provide the remaining information required by Form D within 15 calendar days after the first sale of securities, *id.* at 44,812; (2) amending Rule 503 to require the issuers to file a "final amendment to Form D within 30 calendar days after the termination of any offering conducted in reliance on Rule 506[.]" *id.*; (c) revising Form D to require issuers to include specific information regarding the methods the issuers used to verify the status of the accredited investors, *id.* at 44,814; (d) amending Rule 507 to include the automatic disqualification of issuers from using Rule 506 in any subsequent new offering for one year if the issuer, or any predecessor of the issuer, "did not comply, within the past five years, with Form D filing requirements in a Rule 506 offering[.]" *id.* at 44,817.

57. SEC Chair Mary Jo White, in a March 21, 2014 address, stated that finalization of the proposed rules to monitor the new general solicitation regime would be her "top priority" for 2014. See Wilczek, *supra* note 29; see also Rob Tricchinelli, *Investors and Investing*,

modify their clients' financing strategies by resorting to generally solicited Rule 506(c) offerings shadowed by SEC threats to superimpose burdensome additional disclosure requirements and other regulations.<sup>58</sup> The chart below illustrates the attorney responses to the reluctance factors set forth in the survey.

Figure 2



My survey of practicing securities lawyers demonstrates their general reluctance to advise reliance by their client issuers on the new Rule 506(c) exemption for publicly offered private placements of securities. The survey questions were quite basic and, perhaps, should have addressed other reluctance factors as well. The survey did not address, for example, strong issuer preferences for the confidentiality of their private offerings. Issuers would understandably prefer, if not insist, that their confidential business plans—including their need for private capital and their proposed use of that capital—not be disclosed to the public at large, and particularly, their competitors. In addition, public disclosure of their offerings through general solicitation may well place them in the regulatory spotlight of both state and federal regulatory agencies. The North American Securities Administration Association (NASAA) and its member state regulatory agencies have strongly expressed their antipathy to the Rule 506(c) regime.<sup>59</sup> The SEC has repeatedly expressed its policy of

*Levin, Other Dems Want Investor Protection in General Solicitations of Private Offerings*, 46 SEC. REG. & L. REP. (BNA) 1872 (Sep. 29, 2014).

58. See generally SEC Proposed Rules at 44,806.

59. Letter from Jack Herstein, President, N. Am. Sec. Administrators Ass'n, to Elizabeth M. Murphy, Sec'y, Sec. Exch. Comm'n 4 (July 3, 2012), available at <http://www.nasaa.org/wp-content/uploads/2011/07/Initial-NASAA-Comments-to-SEC-re-JOBS-Act-Rulemaking.pdf>; see also Jack Herstein, *Election-year Politics Trump Investor Protection*, THE HILL (Mar. 15, 2012, 8:52 PM), available at <http://thehill.com/blogs/congress-blog/politics/216339-election-year-politics-trump-investor-protection>.

special vigilance in monitoring its use by issuers.<sup>60</sup> Issuers are unlikely to be enthusiastic about becoming the lone buck in a treeless meadow.

### III. CONCLUSION

Congress, through Title II of the JOBS Act, forced the SEC to adopt a Rule 506 exemption from registration for securities offerings advertised to the entire universe of offerees. Despite the fierce resistance of state regulators and investor protection advocates,<sup>61</sup> Congress thought it was a good idea for the promotion of greater access to capital for our nation's small and large businesses alike. In the eighteen month period since the SEC reluctantly adopted the new Rule 506(c) exemption for publicly offered private placements, only a relative paucity of issuers have taken advantage of Congress's beneficence.

In this article, I have addressed the false promise of Rule 506(c). My survey of Form D data for that eighteen-month period leads to the inescapable conclusion that Rule 506(c) has not yet received the anticipated robust reception in the securities marketplace. Instead, the traditional Rule 506(b) exemption for offerings that are not generally solicited remains the predominant exemption of choice for an overwhelming majority of private placement issuers. After my review of the Form D data, I then explored the numerous reluctance factors that might explain Rule 506(c)'s lukewarm reception. I then discussed my survey of securities lawyers whose practices include representation of private placement issuers. The vast majority of these attorneys have thus far found Rule 506(c) to be of fairly limited utility to their clients. Based on my review of the Form D data and the responses from active securities counsel, I have concluded that for *bona fide* issuers, represented by competent securities counsel, the Rule 506(b) exemption for *private* placements provides the most satisfactory exemption from registration. While Rule 506(c) might be hailed as the ultimate platform for accredited investor crowdfunding, it has yet to achieve its promise.

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60. See SEC Proposed Rules, Exchange Act Release No. 69,960, 78 Fed. Reg. 44,806, at 44,814 (July 24, 2013).

61. See Letter from Michael Flannigan, Executive Vice President, BrokerBank Securities, Inc., to Elizabeth M. Murphy, Sec'y, Sec. Exch. Comm'n (July 10, 2012), available at <https://www.sec.gov/comments/jobs-title-ii/jobstitleii-43.pdf>.

