

SEC RULE 148: THE EXCEPTION TO THE GENERAL SOLICITATION OR ADVERTISING PROHIBITION WHEN RAISING CAPITAL THROUGH PRIVATE PLACEMENTS

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In our “Raising Capital through Private Placements: Deal Points,” Section I (“Raising Capital,” available at [Kurtin PLLC Raising Capital](#)), we briefly discussed the limited exceptions to the general rule prohibiting general solicitation and advertising in the offer and sale of securities pursuant to the private placement exemptions from section 5 of the U.S. Securities Act of 1933, as amended (the “Securities Act”), which governs the initial issuance of securities, unless an exemption from registration is available. Until 2021, Regulation D, Rule 506(c) was the most significant exception to the private placement general solicitation and advertising prohibition. However, Rule 506(c)’s limitation on sales to “Accredited Investors” (also discussed in “Raising Capital,” and the more stringent due diligence requirements for Rule 506(c) certifying Accredited Investor status and associated increased costs have hampered its popularity compared to Rule 506(b) of Reg. D, for which all general solicitation and advertising had been prohibited. Since 2021, however, new U.S. Securities and Exchange Commission (“SEC”) Rule 148,¹ also briefly reviewed in “Raising Capital,” has offered a limited means of conducting some general solicitation and advertising through what are called “Demo Days” and “Test-the-Waters” activities for not only Rule 506(b), but Reg. D, Rule 504, Reg. A/A+, Reg. CF (Crowdfunding) and other exemptions as well.

Rule 148 provides that a communication in connection with the offer and sale of unregistered securities will not be deemed a prohibited general solicitation or advertising if made in connection with a seminar or meeting in which more than one securities issuer participates, if the gathering is sponsored by an institution of higher education, state or local government, nonprofit organization or angel investor group, incubator or accelerator, subject to several conditions, including:

- There can be no advertising for the seminar or meeting that references a specific offering of securities by an issuer;
- The seminar/meeting sponsor (whether university, government, angel investor group composed of Accredited Investors, incubator, accelerator, etc.) does not:
 - make investment recommendations or provide investment advice to attendees;
 - engage in investment negotiations between issuer presenters and investor attendees;
 - charge attendees fees (other than reasonable administrative fees)

¹ 17 CFR §230.148 (86 FR 3594, Jan. 14, 2021).

- receive any compensation for making introductions between attendees and issuers or for assisting in their subsequent negotiations; or
 - receive any compensation that would require the sponsor to register as a broker-dealer or investment advisor.
- Any information regarding an offering of securities by an issuer that is communicated or distributed in connection with the seminar/meeting is limited to a notification that the issuer is in the process of offering securities or planning to do so, the type and amount of securities being offered, the intended use of proceeds of the offering, and the unsubscribed amount of the offering; and
- If the event allows attendee online participation, online participation must be limited to individuals who are members of or associated with the sponsoring organization, who the sponsor reasonably believes are Accredited Investors, or who have been invited to the seminar meeting by the sponsor based on industry or investment-related experience and disclosed in public communications about the event.

While Rule 148 does not provide the same breadth of general solicitation permission for Rule 506(b) and other exemptions as is permitted under Rule 506(c), it does allow a meaningful access to the potential public investor pool with which the securities issuer does not have a pre-existing relationship or access through a broker-dealer, placement agent or investment banker combined with the relatively lower cost and greater flexibility of Rule 506(b) and the other exemptions to which Rule 148 applies compared to the greater cost and stricter regime of Rule 506(c), and can be used to give the Rule 506(b) or other exempt offering greater public exposure to the potential investor pool than the issuer might otherwise have.

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