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SEC Answers Latham's Call To Free Up Private Capital

By **Jessica Corso**

Law360 (March 12, 2025, 8:29 PM EDT) -- Staff at the U.S. Securities and Exchange Commission issued guidance Wednesday that could allow accredited investors to self-certify their ability to participate in private securities offerings, a move that Latham & Watkins LLP said represents a "new era" for capital fundraising.

The SEC's Division of Corporation Finance, through its Office of Small Business Policy, answered a Latham request to make it easier for issuers to advertise to potential investors by permitting those investors to submit written representation of their ability to participate in private offerings.

That self-certification, coupled with a minimum investment of at least $200,000, could allow a company looking to raise funds to "reasonably conclude" that an investor is accredited and therefore able to participate in the offering, the SEC said.

The guidance was issued in response to a letter sent to the division by four Latham securities practitioners March 6. The letter asked commission staff to concur with the attorneys' view of the conditions required for an issuer to prove it has taken reasonable steps to verify that an investor meets the requirements to purchase securities in a private company.

Investors are considered accredited if they meet certain wealth or financial sophistication metrics, which can include an annual income of over $200,000 per year or a net worth of over $1 million.

In a client alert posted online following the issuance of Wednesday's guidance, Latham said the clarity the staff has provided around the accredited investor rule opens a "new era" for private capital fundraising.

The guidance "will facilitate new approaches to raising capital in the private markets, including fundraising by private fund sponsors and other private capital participants," the firm said.

Latham partner Nadia Sager called the guidance a "game changer" for private companies that have been stymied over the past decade in their attempts to solicit funds from a greater pool of investors, including large institutional investors.

Under the Jumpstart Our Business Startups Act, Congress directed the SEC to allow private companies to more broadly advertise to investors as long as they took "reasonable steps to verify purchasers' accredited investor status."

When the SEC finalized a rule in 2013 that implemented the congressional mandate, it provided a "non-exhaustive list" of ways for a company to verify an investor's accreditation, including by potentially reviewing an individual's paystubs or an organization's IRS disclosures.

Latham said Wednesday that companies have been reluctant to make use of the solicitation rule, however, due to concerns that the verification process was "cumbersome for issuers and intrusive for investors."

Sager said she and her Latham colleagues have seen the SEC's advertising rule "languish in the market for the last decade" because large investors didn't feel it was worth it for them to prove their status if they could just invest their money elsewhere.

The firm's letter to the SEC "was really born out of experiences we were having with clients" who kept running up against the inability to raise capital through advertising, Sager said. She added that the firm decided to submit the letter now due to the more business-friendly environment at the SEC following President Donald Trump's inauguration.

The firm pointed to comments made by Republican SEC Commissioner Hester Peirce in a November 2024 statement that issuers were only able to raise $169 billion annually through the general solicitation rule versus the $2.7 trillion raised from accredited investors with whom the company already has an established relationship.

The commissioner wondered at the time whether the SEC should allow investors to self-certify their status to get around the cost and legal risks associated with verifying an investor's accreditation.

Latham applauded the "bright-line" approach laid out by commission staff Wednesday, which the firm said will allow companies to advertise to a greater number of potential investors.

The guidance "eliminates the uncertainty for market participants in implementing reasonable steps to verify accredited investor status, without imposing additional burdens that may slow the offering process or be viewed as intrusive to investors," the firm's client alert said.

In addition to a high minimum investment amount and self-certification, SEC staff said an issuer would also have to verify that it had "no actual knowledge of any facts that indicate … that any purchaser is not an accredited investor" or that the investment is being financed by a third party.

Commission staff also noted that its response to Latham was "not a rule, regulation, or statement of the commission, and the commission has neither approved nor disapproved its content."

"This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person," according to the staff.

The commission said in a 2023 report that income restrictions are one way to protect investors in a private marketplace where there is not much information available about the companies raising capital although the new Republican majority has suggested lowering those income requirements in order to free up capital for early-stage companies.

House Republicans have also put forth proposals that would expand the accredited investor definition.

--Editing by Kristen Becker.