

# RAISING CAPITAL FOR REAL ESTATE INVESTORS

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REGULATION D RULE 506(B)  
VS. REGULATION D RULE 506(C)

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Foster  
Garvey

# COMPARISON CHART

	Rule 506(b)	Rule 506(c)
Dollar Limit:	No limit	No limit
Manner of Offering:	Limited marketing directly to known investors without "general solicitation" (substantial pre-existing relationship); no internet solicitation (although online intermediaries may be used)	No limitations on solicitation, can be marketed over the internet; TV, advertisements and solicitation on social media permitted
Eligible Issuers:	Both SEC registered and private companies can use exemption (U.S. and foreign)	Both SEC registered and private companies can use exemption (U.S. and foreign)
Eligible Investors:	Up to 35 non-accredited investors permitted; no limits on accredited investors	Only accredited investors may buy
Ascertaining Accredited Investor Status:	Accredited investors typically self certify accredited status through an investor questionnaire	Issuers must take reasonable steps to "verify" accredited status; may use various methods; non-exclusive list of methods that may be relied on as meeting requirements
Filing Requirement:	File Form D with the SEC not later than 15 days after first sale	File Form D with the SEC 15 days before use of general solicitation
Restrictions on Resale:	Restricted securities	Restricted securities
Blue Sky Exemption:	No need to comply with state blue sky laws	No need to comply with state blue sky laws
Limits on Investment Amount:	None	None
Types of Security:	No limitations	No limitations
Structure of Investment:	Special purpose vehicles can be used as intermediary for holdings by accredited investors, but not non-accredited investors	Special purpose vehicles can be used as intermediary for holdings by accredited investors
Disclosure:	Private Placement Memorandum typically used although not required if all investors are accredited; online offerings typically more flexible	Private Placement Memorandum typically used, but disclosure is driven by market demands and liability concerns

## Rule 506(b)

## Rule 506(c)

Use of offering materials outside of mandated disclosure.	Mandated disclosure only if non-accredited investors involved (but same disclosure should be given to all investors)	Not required
Financial Statements:	Financial statements required if non-accredited investors: Offerings to \$2m: audited balance sheet Offerings to \$7.5m: f/s for smaller reporting companies, audited unless unreasonable expense (in which case balance sheet must be audited) Offerings above \$7.5m: f/s mandated for reporting companies, audited unless unreasonable expense (in which case balance sheet must be audited)	Not required
SEC Review:	No review by SEC	No review by SEC
Ongoing Disclosure:	None	None
Liability:	Liability under general Section 17/Rule 10b-5 anti-fraud provisions for any person making untrue statements; state law liability; potential "willful participant" liability for intermediary	Liability under general Section 17/Rule 10b-5 anti-fraud provisions for any person making untrue statements; state law liability; potential "willful participant" liability for intermediary
Register under 34 Act	Registration required if 2,000 holders of record of equity securities or 500 non-accredited holders	Registration required if 2,000 holders of record of equity securities
Intermediaries:	Intermediaries not required; any intermediaries used must be registered broker dealers or entities exempt from B/D registration (such as VC Funds or bulletin boards)	Intermediaries not required; any intermediaries used must be registered broker dealers or entities exempt from B/D registration (such as VC Funds or bulletin boards)
"Bad Actor" Rules:	Offering cannot be made if "Bad Actor" involved; issuer must take "reasonable care" to exclude Bad Actors, may use questionnaires	Offering cannot be made if "Bad Actor" involved; issuer must take "reasonable care" to exclude Bad Actors, may use questionnaires

# THREE IMPORTANT DISTINCTIONS BETWEEN REGULATION D RULE 506(B) AND REGULATION D RULE 506(C)

## INFORMATION

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If all the investors are accredited, there is no difference between Rule 506(b) and Rule 506(c). If there is even one non-accredited investor in a Rule 506(b) offering, the issuer must provide much more information.

## ADVERTISING

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In a Rule 506(b) offering an issuer can advertise only the issuer's brand; however, in a Rule 506(c) offering an issuer can advertise the specific deal. An issuer undertaking a 506(b) offering can use their website to attract investors who sign up and go through a know-your-customer process following SEC guidelines. That involves the issuer having the investor complete questionnaires, speaking with the investor on the phone a couple times, and learning about his or her investment experience and knowledge – in short, developing a relationship between the issuer and the potential investor. Then, and only then, can the issuer show the investor actual investments.

In contrast, an issuer making an investment offering on their website under Rule 506(c) can show actual investments to everyone visiting the website.

## ACCREDITED INVESTOR VERIFICATION

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In a Rule 506(b) offering, the issuer may take the investor's word that he, she, or it is accredited, unless the issuer has reason to believe the investor is lying. In a Rule 506(c) offering, the issuer must take reasonable steps to verify that every investor is accredited. The SEC's regulations allow an issuer to rely on primary documents from an investor like tax returns, brokerage statements or W-2s, but they also allow the issuer to rely on a letter from the investor's lawyer, accountant or broker. We recommend to our clients that they obtain a certification letter from the investor's lawyer, accountant or broker, rather than handle the verification process themselves. Alternatively, issuers can use a third-party service such as VerifyInvestor.

## ABOUT THE AUTHOR

As a results-oriented dealmaker, Jason enjoys creating solutions that bring together great people, projects and capital.

When working on sophisticated business and financing transactions, Jason focuses on the big picture to ascertain his clients' strategic business direction and formulate risk mitigation strategies to protect corporate capital and profitability. His extensive experience includes advising businesses, lenders, investors, startups, and real estate investment companies and developers across the United States, on business transactions from formation to exit, acquisition, due diligence, real estate securities offerings, joint ventures, disposition and financing of real estate.

Passionate about real estate investing, Jason frequently speaks, writes and teaches on the topic, and is also a real estate investor himself. He has authored two books about private money lenders and is working on an eBook focusing on real estate syndication. Jason leads Foster Garvey's Real Estate Funds & Syndications Team.

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