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Pre-Solicitation Materials in a Regulation D Offering: How to Gauge Investor Interest Without Tripping the Rules

A practical guide to "testing the waters," promotional investor calls, and the line between lawful interest-gauging and a deal-killing general solicitation

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At a Glance: Can You Talk to Investors Before the Packet Is Ready?

- **Yes — but how you do it controls everything.** The federal securities laws give you several lawful ways to gauge interest before you deliver a full investor packet.
- **Rule 241** lets a Reg D issuer "test the waters" before choosing an exemption — with a required legend and no money accepted.
- **The 506(b) trap:** if your pre-solicitation is a general solicitation, you generally cannot later sell to those investors under Rule 506(b).
- **A promotional call works** — if it stays within the same guardrails as your written materials and you keep records of who you spoke with and why.

The Question We Keep Hearing

Founders and fund sponsors regularly ask a version of the same question: *"Before I spend the time and money to assemble a full private placement memorandum, subscription agreement, and investor questionnaire, can I float the idea to a few prospects and see if there is any appetite?"* The answer is generally yes. The securities laws recognize that no one wants to build an entire offering for a deal nobody wants. But the methods you use to gauge that interest are tightly regulated, and the wrong move can quietly disqualify the exemption you were counting on.

This alert explains what "pre-solicitation" or "testing-the-waters" materials are, what they may and may not contain, and whether you can use them alongside a promotional investor call to explain a deal before sending the full packet. It is written principally for issuers and sponsors, with notes on what investors should expect to receive.

What "Pre-Solicitation" Really Means

"Pre-solicitation" is not a defined term in the securities rules — it is shorthand for communications made *before* you formally offer securities, intended to gauge whether prospective investors might be interested. The regulators call this **"testing the waters"** or a **"solicitation of interest."** The animating idea is simple: let an issuer measure demand without first having to commit to a particular exemption or prepare a full offering package.

The critical legal backdrop is the prohibition on **general solicitation and general advertising** that applies to traditional private placements under Rule 506(b) and Section 4(a)(2).[1] Public-facing marketing — mass emails, social posts, open webinars, press — is a general solicitation. The testing-the-waters rules carve out specific, conditioned ways to communicate that either avoid that label or live under a different exemption altogether.

Three Lanes for Gauging Interest

There is no single “pre-solicitation” rule. There are three distinct frameworks, and which one you use depends on the kind of offering you ultimately contemplate.

Framework	Who you may approach	What it lets you do — and the catch
Rule 241 (Reg D)	Anyone — no relationship or accreditation screen required	Gauge interest before you pick an exemption. Requires the prescribed legend; no money may be accepted. **If the 241 outreach is itself a general solicitation, you cannot then sell to those people under 506(b).**
Rule 255 (Reg A)	The general public	Test the waters before or after filing Form 1-A. Requires the prescribed legend; written materials are filed as an exhibit.
Rule 163B (registered)	QIBs and institutional accredited investors only	Test the waters for a registered (public) offering. No legend or filing required; communications must not conflict with the registration statement.

Table 1. The three testing-the-waters frameworks. Rule 241 is the one most relevant to a contemplated Regulation D private placement.[2]

Rule 241: Testing the Waters for a Reg D Deal

For a contemplated Regulation D private placement, the relevant tool is **Rule 241**. Adopted as part of the SEC’s 2020 exempt-offering reforms and effective March 15, 2021, Rule 241 lets an issuer — or someone authorized to act for it — communicate, orally or in writing, to determine whether there is any interest in a contemplated exempt offering *before deciding which exemption to rely on.*[3] You can solicit interest from anyone; there is no pre-existing-relationship or accreditation screen at this stage.

That latitude comes with conditions. No money or other consideration may be solicited or accepted. The communication is treated as an *offer* for purposes of the anti-fraud laws, so everything you say must be accurate and not misleading. And every written solicitation must carry the prescribed Rule 241 legend, prominently displayed.[4]

The required Rule 241 legend reads, in substance:

Required Rule 241 Legend

“The issuer is conducting a solicitation of interest in a potential offering under Rule 241 of Regulation D. No money or other consideration is being solicited and if sent in response, will not be accepted. No offers to buy the securities can be accepted, and no part of the purchase price can be received, until a notice of this offering is filed with the Commission and only through an agent authorized by the issuer.”

The materials must also tell recipients that more detailed information is available from the issuer on request, and provide contact information.[5] Keep the written solicitation materials — you must make them available to the SEC and to any prospective purchaser on request, and if you ultimately sell under Rule 506(b) to a non-accredited investor within 30 days of the solicitation, you must provide that investor with the materials you used.[6]

The 506(b) Trap Nobody Sees Coming

Here is the single most important point in this alert. Rule 241 lets you solicit interest from *anyone* — but if you do so in a manner that amounts to a **general solicitation** (for example, a public webpage, an untargeted blast, or a social post), you generally cannot then turn around and sell securities to those people under Rule 506(b), which forbids general solicitation.[7]

Whether the two are treated as one offering turns on the SEC’s **integration** framework in Rule 152. The good news is a bright-line safe harbor: offerings separated by at least **30 calendar days** generally are not integrated. But for a later exempt offering that prohibits general solicitation (like 506(b)), even after 30 days you must have a reasonable belief that you either did not solicit each purchaser through general solicitation, or established a *substantive relationship* with them before the 506(b) offering began.[8]

Practical Rule of Thumb

If you think your deal will be a 506(b) private placement, conduct your pre-solicitation the same way — to a targeted list of people with whom you have, or are building, a genuine relationship — rather than broadcasting it. If you want the freedom to advertise widely, plan for a 506(c) offering and be ready to verify that every purchaser is accredited.

Sidebar: Choosing Your Lane — Rule 506(b) vs. Rule 506(c)

Rule 506(b)	Rule 506(c)
GENERAL SOLICITATION **Prohibited** — no public marketing or advertising.	GENERAL SOLICITATION **Permitted** — you may advertise the deal openly.
WHO MAY BUY Unlimited accredited investors plus up to 35 sophisticated non-accredited investors.	WHO MAY BUY Accredited investors only.
VERIFYING ACCREDITATION Issuer may rely on investor self-certification (a reasonable-belief standard).	VERIFYING ACCREDITATION Issuer must take **reasonable steps to verify** each purchaser is accredited; self-certification is not enough.
PRE-SOLICITATION FIT Keep outreach targeted and relationship-based; a general solicitation can disqualify the offering.	PRE-SOLICITATION FIT Broad pre-solicitation is fine — but plan the verification record before you sell.
TYPICAL USE The default private placement; most friends-and-family and relationship-driven raises.	TYPICAL USE Raises that benefit from public marketing — online syndication, broad sponsor networks.

Table 2. The two Rule 506 paths. Your pre-solicitation strategy should match the exemption you intend to rely on — decide before you start the outreach.[15]

What These Materials Can — and Should — Contain

Within the guardrails above, a well-drafted pre-solicitation piece (a short "teaser," one-pager, or interest form) typically may include:

- A high-level description of the company or fund, the sponsor, and the opportunity;
- The general nature of the securities contemplated (e.g., LLC interests, preferred equity, notes) and the approximate size of the raise;
- The intended use of proceeds and a high-level business strategy;
- The required legend, prominent and unaltered; and
- A non-binding way for a recipient to indicate interest and request more information — and, for a contemplated 506(b) deal, an accreditation/relationship intake that helps you build the record you will need later.

Equally important is what they **should not** contain: no request for or acceptance of money; no subscription documents to sign; no firm "buy now" language; no guaranteed or unsubstantiated return figures; and nothing that conflicts with the offering materials you will later deliver. Because the communication is an offer under the anti-fraud rules, accuracy is not optional.[9]

Can You Use a Promotional Investor Call?

Yes — a call to walk a prospect through the deal before sending the full packet is permissible, and common. But the call is itself a *communication* subject to the same rules as your written teaser, so two questions govern it: **(1) is the call a general solicitation, and (2) what may be said on it?**

On the first question, **framing** controls. A one-to-one or small-group call with prospects you reached through a targeted, relationship-based process is generally *not* a general solicitation — consistent with how the SEC treats pre-existing, substantive relationships and informal networks of experienced investors. An open, publicly advertised webinar that anyone can join generally *is* a general solicitation, which forecloses a later 506(b) sale to those attendees and pushes you toward 506(c) (with verification) or Rule 241 discipline.[10]

On the second question, **content**, keep the call consistent with your written materials. Describe the opportunity, answer questions, and explain the structure — but do not solicit or accept funds, do not have anyone sign anything, and do not make promises (returns, timelines, guarantees) you cannot support. If you are operating under Rule 241, the call should carry the same substance as the legend: this is interest-gauging only, no money is being accepted, and nothing is binding. Treat the call as the bridge *to* the packet — not a substitute for it.

Do's and Don'ts for the Promotional Call

- **DO** keep the audience targeted and document how each person came to you.
- **DO** mirror the written teaser; state that it is interest-gauging only.
- **DON'T** accept funds, circulate subscription docs, or take commitments on the call.
- **DON'T** broadcast the call publicly if you intend to rely on 506(b).

Don't Forget State "Blue Sky" Law

Federal compliance is only half the picture. The federal testing-the-waters safe harbors do **not** preempt state blue sky law. Rule 506 securities are "covered securities," so states cannot require registration, but they retain authority over notice filings, fees, and anti-fraud enforcement.[11] New York, for instance, requires Rule 506 issuers to file Form D through the NASAA Electronic Filing Depository within 15 days of the first sale within or from New York.[12] Florida does not require a Rule 506 notice filing but still enforces its anti-fraud statute against offerings touching Florida investors.[13] Build your state analysis into the plan before you start talking to investors.

The Bottom Line

You may absolutely gauge interest before you build the full packet — that is exactly what testing-the-waters rules are for. For a contemplated Reg D deal, Rule 241 is your tool: use the legend, accept no money, tell the truth, and keep your records. A promotional call is a fine way to explain the deal first, provided it stays within the same guardrails as your written materials. The one mistake to avoid is treating pre-solicitation as license to advertise: if your interest-gauging becomes a general solicitation, you may forfeit the 506(b) exemption you were counting on. Pick your lane early, stay in it, and confirm the state filings before the first dollar comes in. When in doubt, talk to counsel *before* you start the outreach — not after.

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Endnotes

1. 17 C.F.R. § 230.502(c) (Regulation D, Rule 502(c)) (prohibiting general solicitation and general advertising in offerings relying on Rule 506(b)); Securities Act of 1933 § 4(a)(2), 15 U.S.C. § 77d(a)(2).
2. 17 C.F.R. § 230.241 (Rule 241); 17 C.F.R. § 230.255 (Rule 255); 17 C.F.R. § 230.163B (Rule 163B); Securities Act § 5(d), 15 U.S.C. § 77e(d).
3. 17 C.F.R. § 230.241(a); Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Release No. 10884 (Nov. 2, 2020), effective Mar. 15, 2021, https://www.sec.gov/files/rules/final/2020/33-10884.pdf

4. 17 C.F.R. § 230.241(b)(1) (legend) & (b)(3) (anti-fraud).
5. 17 C.F.R. § 230.241(b)(2) (statement about availability of more detailed information and issuer contact information).
6. 17 C.F.R. § 230.241(b)(5) (materials available to the Commission and to prospective purchasers on request); SEC, Facilitating Capital Formation, Small Entity Compliance Guide (Mar. 10, 2021) (issuer must provide Rule 241 materials to a non-accredited Rule 506(b) purchaser where securities are sold within 30 days of the solicitation), https://www.sec.gov/resources-small-businesses/small-business-compliance-guides/facilitating-capital-formation-expanding-investment-opportunities-improving-access-capital-private
7. O'Melveny & Myers LLP, New "Test-the-Waters" Securities Act Rule 241 (Feb. 15, 2021) (an issuer cannot identify investors through general solicitation under Rule 241 and then sell to them under an exemption that prohibits general solicitation, such as Rule 506(b)), https://www.omm.com/insights/alerts-publications/new-test-the-waters-securities-act-rule-241-available-for-all-transactionally-exempt-offerings/
8. 17 C.F.R. § 230.152(a)(1), (b)(1) (general principle of integration and 30-day safe harbor); SEC, Facilitating Capital Formation, Small Entity Compliance Guide (Mar. 10, 2021).
9. 17 C.F.R. § 230.241(b)(3) (Rule 241 solicitations subject to the anti-fraud provisions of the federal securities laws).
10. Div. of Corp. Fin., SEC, Compliance & Disclosure Interpretations, Securities Act Rules, Question 256.27 (pre-existing, substantive relationships and informal personal networks); id., Question 256.33 (Mar. 12, 2025) (whether a communication is a general solicitation is a facts-and-circumstances determination), https://www.sec.gov/files/corpfin/securities-act-rules-031225-256-33.pdf
11. National Securities Markets Improvement Act of 1996 (NSMIA), Pub. L. No. 104-290, 110 Stat. 3416; Securities Act § 18, 15 U.S.C. § 77r (preempting state registration of "covered securities," including Rule 506 securities, while preserving notice filings, fees, and anti-fraud authority).
12. 13 NYCRR 10.1(a)(3), 10.11(b); N.Y. Dep't of Law, Guidance on Mandatory Filing of Form D with Electronic Filing Depository (eff. Dec. 2, 2020).
13. Fla. Stat. § 517.301 (anti-fraud); Florida does not require a Rule 506 notice filing through the NASAA EFD, but issuers remain subject to Florida anti-fraud authority.
14. N.Y. Rules of Prof'l Conduct R. 7.1; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 848 (2010) (educational newsletters and similar communications; required "Attorney Advertising" label and disclaimer where applicable).
15. 17 C.F.R. § 230.506(b) (Rule 506(b)); 17 C.F.R. § 230.506(c) (Rule 506(c)); 17 C.F.R. § 230.501(a) (definition of accredited investor); see Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 201(a), 126 Stat. 306 (2012).