

Legal Update

Exempt Offering Framework Amendments

On November 2, 2020, the U.S. Securities and Exchange Commission (SEC) voted to adopt amendments proposed in March 2020 that harmonize and modernize the exempt offering framework (referred to as the Amendments). As with several other recent votes to adopt rule proposals, the SEC Commissioners split their vote, with two Commissioners voting against the Amendments.

As we have noted in many prior client alerts, the amount of capital raised in exempt offerings in the United States vastly exceeds the amount raised in SEC-registered offerings. In its proposing release, the SEC noted that in 2019, registered offerings accounted for \$1.2 trillion of new capital, compared to \$2.7 trillion that was estimated to have been raised in exempt offerings. Given that the statistics collected and analyzed by the SEC's Division of Economic Risk and Analysis (DERA) rely on Form D filings, it is likely that the amounts attributable to exempt offerings are grossly understated for several reasons, including that many exempt offerings made to institutional accredited investors are made in reliance on the statutory private placement exemption in Section 4(a)(2) of the Securities Act of 1933, as amended (the Securities Act). Emerging companies continue to rely on successive rounds of private placements to fund their growth and continue to defer their initial public offerings or achieve other exit strategies for their investors. As a result, exempt offerings have become increasingly important to the capital markets. The framework relating to offering exemptions has come together over many years through the adoption of various safe harbors, including those under Regulation D of the Securities Act, and those that have developed following the enactment in 2012 of the Jumpstart Our Business Startups (JOBS) Act. In June 2019, the SEC issued its Concept Release on Harmonization of Securities offering Exemptions (Concept Release) in which it sought public comment on a wide range of matters relating to various securities exemptions, resale exemptions, and alternatives that might facilitate greater retail participation in the private markets. As noted earlier, in March 2020, before the pandemic took hold, as an initial response to the comments received in connection with the Concept Release, the SEC proposed various amendments to the exempt offering framework. The Amendments are briefly summarized below.

Integration

For years, the securities law concept of “integration,” or the notion that securities offerings occurring in close proximity to one another should be analyzed and assessed in order to determine whether the offerings were independent of one another or really one integrated offering, has been a preoccupation for companies and their counsel. The SEC’s interpretative guidance, which has been referred to as the “five factor” test, was highly dependent on the specific facts and circumstances and there was never any clarity or consensus relating to which of the factors should be ascribed the greatest weight. Over time, the SEC provided additional integration guidance in a proposing release in 2007, as well as in Staff guidance, and the SEC adopted a number of integration safe harbors. In the various adopting releases relating to offering exemptions that followed the JOBS Act (for example, in the adopting releases relating to Regulation A, Regulation Crowdfunding, and Rule 147 and 147A), the SEC provided additional integration guidance and these rules included their own integration safe harbors.

The Amendments include a new, simpler approach to integration consisting of four non-exclusive safe harbors guided by several overriding principles.

This simpler approach is set forth in a new Rule 152, which replaces current Rule 152 and Rule 155. The provisions of Rule 152 will not have the effect of avoiding integration for any transaction or series of transactions that are part of a scheme to evade the Securities Act registration requirements. Instead of embedded integration provisions, Regulation D, Regulation A, Regulation Crowdfunding, and Rules 147 and 147A now contain references to new Rule 152.

Guiding Principles for Integration Analysis

Rule 152(a) sets out the general principle, which provides that for all offerings not covered by one of the safe harbors contained in Rule 152(b), offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that each offering either complies with the registration requirements of the Securities Act, or an exemption from registration that is available for the particular offering.

Rule 152(a)(1) codifies the SEC guidance from 2007 and the Staff interpretations and relates to exempt offerings as to which general solicitation is not permitted. In this case, the issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either (1) did not solicit such purchaser through the use of general solicitation; or (2) established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

Rule 152(a)(2) addresses two or more concurrent exempt offerings permitting general solicitation. In this case, the issuer's general solicitation offering materials for one offering that includes information about the material terms of a concurrent offering under another exemption may constitute an “offer” of the securities in such other offering. Therefore, in addition to satisfying the conditions of the particular exemption, the offer must comply with all the requirements for, and restrictions on, offers under the exemption being relied on for such other offering, including any necessary legends or communications restrictions.

Non-exclusive Integration Safe Harbors

New Rule 152(b) provides the four non-exclusive integration safe harbors shown below.

Safe Harbor 1, Rule 152(b)(1)	Any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, would not be integrated with such other offering; provided, that, for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of Rule 152(a)(1) apply (i.e., the purchasers either were not solicited through the use of general solicitation or established a substantive relationship with the issuer prior to the commencement of the offering for which general solicitation is not permitted).
Safe Harbor 2, Rule 152(b)(2)	Offers and sales made in compliance with Rule 701, pursuant to an employee benefits plan, or in compliance with Regulation S would not be integrated with other offerings.
Safe Harbor 3, Rule 152(b)(3)	An offering for which a Securities Act registration statement has been filed would not be integrated if made subsequent to: (1) a terminated or completed offering for which general solicitation is not permitted; (2) a terminated or completed offering for which general solicitation is permitted and made only to qualified institutional buyers (QIBs) and institutional accredited investors (IAIs), or (3) an offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the commencement of the registered offering.
Safe Harbor 4, Rule 152(b)(4)	Offers and sales made in reliance on an exemption for which general solicitation is permitted would not be integrated if made subsequent to any terminated or completed offering.

When is an offering commenced and when is it terminated or completed for purposes of addressing integration concerns?

As adopted, Rule 152 lists non-exclusive factors to consider for assessing when an offering is deemed to have been “commenced” and whether an offering is deemed to have been “terminated or completed.”

Rule 152(c) identifies the following factors to consider in determining when an offering will be deemed to be commenced for purposes of both the general principle of integration in Rule 152(a) and the safe harbors in Rule 152(b).

- An issuer or its agents may commence an offering in reliance on Rule 241 on the date the issuer first made a generic offer soliciting interest in a contemplated securities offering for which the issuer had not yet determined the exemption under the Securities Act for which such offering would be conducted.
- An issuer or its agents may commence an offering in reliance on Section 4(a)(2), Regulation D or Rule 147 or 147A on the date the issuer first made an offer of its securities in reliance on these exemptions.
- An issuer or its agents may commence an offering in reliance on Regulation A on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on Rule 255 or the public filing of a Form 1-A offering statement.

- An issuer or its agents may commence an offering in reliance on Regulation Crowdfunding on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on Rule 206, or the public filing of a Form C offering statement.
- An issuer or its agents may commence an offering in reliance on or registration statements filed under the Securities Act (1) for a continuous offering that will commence promptly on the date of initial effectiveness, on the date the issuer first filed its registration statement for the offering with the SEC and (2) for a delayed offering, on the earliest date on which the issuer or its agents commenced public efforts to offer and sell the securities, which could be evidenced by the earlier of the first filing of a prospectus supplement with the SEC describing the delayed offering, or the issuance of a widely disseminated public disclosure, such as a press release, confirming the commencement of the delayed offering.

Rule 152(d) describes the following non-exclusive list of factors for consideration in determining when an offering is deemed to be terminated or completed.

- An offering made under Section 4(a)(2), Regulation D or Rule 147 or 147A is considered “terminated or completed,” on the later of the date: (1) the issuer entered into a binding commitment to sell all securities to be sold under the offering (subject only to conditions outside of the issuer’s control); or (2) the issuer and its agents ceased efforts to make further offers to sell the issuer’s securities under such offering.
- An offering made under Regulation A is considered “terminated or completed” upon: (1) withdrawal of an offering statement under Rule 259(a) of Regulation A; (2) the filing of a Form 1-Z with respect to a Tier 1 offering; (3) declaration by the SEC that the offering statement has been abandoned under Rule 259(b) of Regulation A; or (4) the date after the third anniversary of the date the offering was initially qualified on which the issuer is prohibited from continuing to sell securities using the offering statement, or any earlier date on which the offering terminates by its terms.
- An offering under Regulation Crowdfunding would be considered “terminated or completed” upon the deadline of the offering identified in the offering materials pursuant to Rule 201(g) of Regulation Crowdfunding, or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under Rule 304(b) of Regulation Crowdfunding.
- Offerings for which a Securities Act registration statement has been filed will be considered for these purposes “terminated or completed,” upon (1) the withdrawal of the registration statement after an application is granted or deemed granted under Rule 477; (2) the filing of a prospectus supplement or amendment to the registration statement indicating that the offering, or particular delayed offering in the case of a shelf registration statement, has been terminated or completed; (3) entry of an order by the SEC declaring that the registration statement has been abandoned under Rule 479; (4) the date, after the third anniversary of the initial effective date of the registration statement, on Rule 415(a)(5) prohibits the issuer from continuing to sell securities using the registration statement, or any earlier date on which the offering terminates by its terms; or (5) any other factors that indicate that the issuer has abandoned or ceased its public selling efforts in furtherance of the offering, or particular

delayed offering in the case of a shelf registration statement, which could be evidenced by a Form 8-K or by the issuance of widely disseminated public disclosure informing the market that the offering, or particular delayed offering, in the case of a shelf registration statement, has been terminated or completed.

Amendments to Rule 506

Offers and sales of securities by an issuer that satisfy the conditions in Rule 506(b) are deemed to be exempt transactions not involving any public offering within the meaning of Section 4(a)(2) of the Securities Act. The Amendments modify Rule 506(b) to limit the number of non-accredited investors that may participate in such offerings to no more than 35 within a 90-calendar-day period. This amendment is designed to prevent issuers from using the new 30-day integration safe harbor described above to conduct a distribution of securities to 35 unique non-accredited investors every month.

Verification of Investor Status in Rule 506(c) Offerings

Rule 506(c) permits issuers to generally solicit and advertise an offering so long as the issuer takes reasonable steps to verify that all purchasers in the offering are accredited investors. The Amendments add a new item to the non-exclusive list in Rule 506(c) that allows an issuer to establish that an investor for which the issuer previously took reasonable steps to verify status as an accredited investor remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation to that effect and the issuer is not aware of information to the contrary. In a change from the proposed amendments, the SEC added a five-year time limit in the final rule on the ability of the issuer to rely on the earlier verification.

General Solicitation

Rule 506(b) prohibits the use of general solicitation to market an issuer's securities. The Amendments added new Rule 148 which provides that certain "demo day" communications will not be deemed to constitute a general solicitation for purposes of Rule 506(b). As adopted, an issuer will not be deemed to have engaged in general solicitation if the communications are made in connection with a seminar or meeting sponsored by a college, university, or other institution of higher education, a State or local government, a nonprofit organization, or an angel investor group, incubator or accelerator.

The new rule limits the information conveyed at the event regarding the offering of securities by or on behalf of the issuer to the following:

- Notification that the issuer is in the process of offering or planning to offer securities;
- The type and amount of securities being offered;
- The intended use of the proceeds of the offering; and
- The unsubscribed amount in an offering.

The new rule requires that more than one issuer participate in the event and that the sponsor of the event not be permitted to:

- Make investment recommendations or provide investment advice to attendees of the event;

- Engage in any investment negotiations between the issuer and investors attending the event;
- Charge attendees of the event any fees, other than reasonable administrative fees;
- Receive any compensation for making introductions between event attendees and issuers, or for investment negotiations between the parties; or
- Receive any compensation with respect to the event that would require it to register as a broker or dealer under the Securities Exchange Act of 1934, as amended (Exchange Act), or as an investment adviser under the Investment Advisers Act of 1940.

Additionally, online participation in the event must be limited to: (i) individuals who are associated with the sponsor; (ii) individuals that the sponsor reasonably believes are accredited investors; or (iii) individuals who have been invited to the event based on industry or investment-related experience reasonably selected by the sponsor in good faith and disclosed in the public communications about the event.

Solicitations of Interest

The Amendments adopt a new offering exemption that does not preempt state securities laws for issuers that use generic solicitation of interest materials pursuant to the conditions of new Rule 241. Under new Rule 241, an issuer (or a person authorized to act on the issuer's behalf) may engage in efforts to determine whether there is interest in a contemplated exempt offering of securities without deciding what exemption is being relied upon ahead of time. No solicitation or acceptance of any commitment, binding or otherwise, from any person will be permitted until the issuer makes a determination as to the exemption on which it intends to rely.

Rule 241 requires the generic testing-the-waters materials to provide specified disclosures notifying potential investors about the limitations of the generic solicitation. The materials must state that:

- The issuer is considering an offering of securities exempt from registration, but has not determined a specific exemption from registration the issuer intends to rely on for the subsequent offer and sale of the securities;
- No money or other consideration is being solicited, and if sent in response, will not be accepted;
- No offer to buy the securities can be accepted, no part of the purchase price can be received until the issuer determines the exemption under which the offering is intended to be conducted, and, where applicable, the filing, disclosure or qualification requirements of such exemption are met; and
- A person's indication of interest involves no obligation or commitment of any kind.

Additionally, an issuer must provide purchasers with any written materials used under new Rule 241 if the issuer sells securities under Rule 506(b) within 30 days of the generic solicitation of interest to any purchaser that is not an accredited investor. The Rule 241 generic solicitation materials must be made publicly available as an exhibit to the offering materials filed with the SEC in connection with a

Regulation A or Regulation Crowdfunding offering commenced within 30 days of the generic solicitation.

Harmonization of Disclosure Requirements

Regulation D Offerings

For Regulation D offerings made by non-reporting companies that include non-accredited investors, the disclosure requirements have been aligned with those required in Regulation A offerings. For Regulation D offerings of up to \$20 million in securities, issuers would be required to comply with the requirements of paragraph (b) of part F/S of Form 1-A, which applied to Tier 1 Regulation A offerings.¹ For offerings of greater than \$20 million in securities, issuer would be required to provided audited financial statements and comply with the requirements of Regulation S-X similar to Tier 2 Regulation A offerings.² The issuer must furnish the non-financial statement information required by Part II of Form 1-A (if the issuer is eligible to use Regulation A) or Part I of a Securities Act registration statement on a form that the issuer would be eligible to use.

An issuer subject to the Section 13 or 15(d) reporting requirements of the Exchange Act, would be required to furnish its annual report to shareholders for the most recent fiscal year and the definitive proxy statement filed in connection with the annual report, or the most recently filed annual report on Form 10-K or registration statement.

A foreign private issuer that is not an Exchange Act reporting company would be required to provide financial statement disclosure consistent with the Regulation A requirements, either prepared in accordance with U.S. GAAP or IFRS as issued by the IASB.

Regulation A Offerings

The Amendments align a number of requirements for Regulation A offerings with those for SEC-registered offerings.

Item 17 of Form 1-A has been amended to allow companies the option to file redacted material agreements consistent with the amendments to Items 601(b)(2) and 601(b)(10) of Regulation S-K. This means that a Regulation A issuer may: (1) redact confidential information from material contracts and certain other agreements filed as exhibits without a need to submit a confidential treatment request, and (2) redact information that would constitute a clearly unwarranted invasion of personal privacy in any exhibit. With respect to the standard for confidential information, the Amendments remove the “competitive harm” requirement and now permit information to be redacted from material contracts if it is the type of information that the issuer both customarily and actually treats as private and confidential and that is also not material.

Similarly, the Amendments align the process for publicly filing draft Regulation A offering statements with those for draft Securities Act registration statements.

Also, a Regulation A issuer will be able to incorporate by reference previously filed financial statements into a Regulation A offering circular on Form 1-A if the issuer satisfies eligibility criteria. An issuer that has a reporting obligation under Rule 257 or the Exchange Act must be current in its filing obligations, and an issuer would be required to make incorporated financial statements readily available on a

website maintained by or for the issuer and disclose in the offering statement that the financial statements will be provided upon request.

The Amendments also align the abandonment provisions of Rule 259(b) with those of Rule 479 applicable to registered offerings.

Offering Thresholds and Investment Limits

The Amendments also address the offering thresholds and investment limits, as well as the eligibility criteria, for Regulation A, Regulation Crowdfunding, and Rule 504. The chart below, which is taken from the SEC’s proposing release, but updated for the Amendments, summarizes the changes.

	Offering Limits		Investment Limits	
	Current Rules	Final Rules	Current Rules	Final Rules
Regulation A: Tier 1	\$20 million	\$20 million	None	None
Regulation A: Tier 2	\$50 million	\$75 million	<i>Accredited investors:</i> no limits <i>Non-Accredited Investors:</i> limits based on the greater of an income or net worth standard	<i>Accredited investors:</i> no limits <i>Non-Accredited Investors:</i> limits based on the greater of an income or net worth standard
Regulation Crowdfunding	\$1.07 million	\$5 million	<i>All investors:</i> limits based on the lesser of an income or net worth standard	<i>Accredited investors:</i> no limits <i>Non-Accredited Investors:</i> limits based on the greater of an income or net worth standard
Rule 504 of Regulation D	\$5 million	\$10 million	None	None

Regulation Crowdfunding and Regulation A Eligibility

Currently, an issuer may not use a special purpose vehicle that invests in a single company, or an SPV, that is an investment company (or a company excluded from the definition of an investment company under Section 3(b) or 3(c) of the Investment Company Act of 1940 (the Investment Company Act) to conduct a Regulation Crowdfunding offering. To address this issue, the Amendments added Rule 3a-9 under the Investment Company Act in order to exclude from the definition of “investment company” a crowdfunding vehicle meeting certain conditions. The vehicle is intended to function as a financing conduit that directly acquires, holds, and disposes of securities issued by a single crowdfunding issuer and raising capital in one or more offerings made in compliance with Regulation Crowdfunding. The SEC did not adopt the amendments that had been proposed that would have aligned the types of securities that may be offered in a Regulation Crowdfunding offering with those that may be offered in reliance on Regulation A. The chart below, which is taken from the proposing release, but updated for the Amendments, provides a summary of the changes.

	Eligible Issuers	
	Current Rules	Final Rules
Regulation Crowdfunding	Excludes special purpose vehicles	Permits crowdfunding vehicles
Regulation A	Excludes issuers that have not filed required reports in the two prior years under Regulation A	Excludes issuers that have not filed required in the two prior years under Regulation A or Section 13 or 15(d) of the Exchange Act

In addition, the SEC adopted amendments that permit oral communications in the Regulation Crowdfunding offerings once the Form C is filed, so long as the communications comply with the requirements of Rule 204. The amendments also include a number of other changes to the permitted communications in the context of a Regulation Crowdfunding Offering.

Regulation S Reoffers

The SEC had proposed amendments to the definition of “directed selling efforts” in Rule 902 of Regulation S and changes to the reoffer provision of Regulation S. The SEC did not adopt the proposed amendments to Regulation S. Instead, the SEC in the adopting release for the Amendments reaffirms its view that general solicitation in respect of domestic exempt offerings does not preclude reliance on Regulation S for a concurrent offshore offering. The adopting release notes that “[c]ompliance with the terms of both Regulation S and another applicable exemption, such as Rule 506(c), will depend on the facts and circumstances of a particular situation.”

Bad Actor Provisions

The Amendments harmonize the bad actor disqualification provisions in Regulation A, Regulation Crowdfunding, and Regulation D by adopting the same lookback period with respect to disqualifying events.

Practical Considerations

For private and public companies, perhaps the most significant changes brought about by the Amendments are those relating to the integration framework. It is very helpful that the SEC has acknowledged that the pace of capital markets activity is such that the relevant period for the integration analysis should be shortened. The shortening from six months to 30 days for the relevant period to consider when securities offerings are undertaken in close proximity to one another will be very helpful to market participants. Likewise, the four integration related safe harbors provide additional guidance and a more unified approach to the integration analysis.

The Amendments will be effective 60 days after publication in the Federal Register, except for the extension of the temporary Regulation Crowdfunding provisions, which will be effective upon publication in the Federal Register.

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Endnotes

- ¹ A consolidated balance sheet of the issuer for the two previous fiscal year ends (or such shorter time as the issuer has been in existence), consolidated statements of comprehensive income, cash flows and stockholders' equity of the issuer, and financial statements of guarantors to the extent applicable, which financial statement cannot be as of more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months. These financial statement need not be audited unless the issuer has already obtained an audit for another purpose.
- ² Audited financial statements in compliance with Article 8 of Regulation S-X, as of a date not more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months.



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