CLIENT ALERT

SEC Simplifies Exempt Offering Framework

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The Securities and Exchange Commission recently adopted amendments intended to simplify, harmonize and improve the exempt securities offering framework to promote capital formation while preserving or enhancing investor protections.[1] Among other changes, the amendments intend to (1) modernize and simplify the integration framework for registered and exempt offerings under the Securities Act, establishing guidelines that make it easier for issuers to move from one type of offering to another; (2) set clear and consistent rules governing offering communications between issuers and investors; (3) increase the current offering and investment limits for Regulation A, Regulation Crowdfunding and Rule 504 offerings; and (4) harmonize certain disclosure requirements and bad actor disqualification provisions.

The amendments are a continuation of recent SEC actions, such as expanding “testing the waters” communications and adding new categories of accredited investors and qualified institutional buyers, that expand the availability of private investments to facilitate capital formation.[2] These latest amendments to the exempt offering framework, which were adopted “substantially” as proposed, in many instances codify the existing exempt offering framework that has evolved over time, as the SEC and many commenters believe that a major restructuring of the rules was not needed. See Appendix 1, which summarizes the most commonly used exemptions from registration, as amended by the new rules.

The amendments, which are summarized below, become effective 60 days following publication in the Federal Register, except for the extension of the temporary Regulation Crowdfunding provisions, which are effective immediately upon

[1] See SEC Release Nos. 33-10884; 34-90300, *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, November 2, 2020, available here.

[2] See, for example, our client memoranda *SEC Extends “Testing the* Waters*” Exemption to All Companies* (October 8, 2019), available here, and *SEC Expands the Definitions of Accredited Investor and Qualified Institutional Buyer* (September 2, 2020), available here.

publication in the Federal Register.

Integration Framework

The integration doctrine seeks to prevent an issuer from improperly avoiding registration by artificially dividing a single offering into multiple offerings so that Securities Act exemptions would apply to the multiple offerings that would not be available for the combined offering. New Rule 152 adopted by the SEC seeks to simplify the increasingly complex integration framework by providing four non-exclusive safe harbors from integration, as well as establishing a general principle-based approach regarding integration to determine whether an exemption is available for an offering if the safe harbors do not apply. As a result, issuers will be better able to proceed with a private offering following termination or completion of a public offering, or with a public offering following termination or completion of a private offering.

Non-Exclusive Integration Safe Harbors in New Rule 152(b)	
Safe Harbor 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, will 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)[3] shall apply.
Safe Harbor 2	Offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan or in compliance with Regulation S (offshore offerings) will not be integrated with other offerings.
Safe Harbor 3	An offering for which a Securities Act registration statement has been filed will not be integrated if it is made subsequent to: (i) a terminated or completed offering for which general solicitation is not permitted; (ii) a terminated or completed offering for which general solicitation is permitted that was made only to qualified institutional buyers ("QIBs") and institutional accredited investors ("IAIs"); or (iii) 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	Offers and sales made in reliance on an exemption for which general solicitation is permitted will not be integrated if made subsequent to any terminated or completed offering.

If none of the safe harbors apply, new Rule 152(a) provides a "facts and circumstances" principle-based approach.[4] Offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that each

[3] See the paragraph on the following page, which describes the reasonable belief the issuer must have under this section with respect to each purchaser in the exempt offering prohibiting general solicitation.

[4] This new rule replaces the SEC's existing "five-factor" test for determining whether offerings should be integrated.

offering either complies with the registration requirements of the Securities Act or that an exemption from registration is available for the particular offering.

To make this determination for an exempt offering prohibiting general solicitation, an issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the offering, that the issuer (or any person acting on the issuer's behalf) *either*:

(i) did not solicit such purchaser through the use of general solicitation; or

(ii) had established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

For concurrent exempt offerings that each allow general solicitation, in addition to satisfying the requirements of the particular exemption relied on, general solicitation offering materials for one offering that include information about the material terms of a concurrent offering under another exemption may constitute an offer of the securities in such other offering. Therefore, 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 legend requirements and communications restrictions.

Commencement and Termination of Offerings

To help clarify when offerings commence, terminate or are completed under the new rule, Rule 152 includes definitions for such terms and provides several non-exclusive factors applicable to different types of offerings to help issuers determine whether an offering has commenced, terminated or been completed.

New Rule 152(c) states that an offering of securities will be deemed to have commenced for purposes of Rule 152 at the time of the first offer of securities in the offering by the issuer or its agents, and includes a non-exclusive list of factors for commencing an offering, depending on the type of offering or communication:

- For offerings under new Rule 241 (described below), on the date the issuer first made a generic offer soliciting interest in a contemplated securities offering for which the issuer has not yet determined the exemption under the Securities Act under which the offering of securities would be conducted;
- For offerings pursuant to Section 4(a)(2), Regulation D or Rule 147 or 147A (intrastate offerings), on the date the issuer first made an offer of its securities in reliance on these exemptions; and
- For offerings pursuant to a registration statement filed under the Securities Act, 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, or
  - 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.

New Rule 152(d) states that termination or completion of an offering is likely to occur when the issuer and its agents cease efforts to make further offers to sell the issuer's securities under such offering. The rule includes a non-exclusive list of factors that should be considered in determining when an offering is deemed to be terminated or completed, including for offerings made in reliance on:

- Section 4(a)(2), Regulation D or Rule 147 or 147A, the later of (i) the issuer entering into a binding commitment to sell all securities to be sold under the offering (subject only to conditions outside of the investor's control); or (ii) the issuer and its agents ceasing efforts to make further offers to sell the issuer's securities under such offering;
- A registration statement filed under the Securities Act, upon:
  - the withdrawal of the registration statement after an application is granted under Rule 477;
  - 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;
  - the entry of an SEC order declaring that the registration statement has been abandoned under Rule 479;
  - the date, after the third anniversary of the initial effective date of the registration statement, on which 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
  - 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.

Expanded "Testing-the-Waters" Communications

The SEC also eased certain offering communications rules by (i) providing that certain "demo day" communications are not considered general solicitation or general advertising and (ii) permitting an issuer to use generic solicitation of interest materials to "test-the-waters" for an exempt offer of securities prior to determining which exemption it will use for the sale of the securities. The amendments further permit Regulation Crowdfunding issuers to "test-the-waters" before filing an offering document with the SEC in a manner similar to current Regulation A.

"Demo Day" Communications

Under new Rule 148, if the issuer's presentation at a "demo day" or similar event constitutes an offer of securities, the issuer will not be deemed to have engaged in a 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 or instrumentality, a nonprofit organization, or an angel investor group, incubator or accelerator. Any online participation

must be limited to persons associated with the sponsor organization, individuals the sponsor reasonably believes are accredited investors and invitees with industry or investment-related experience who are disclosed in public communications about the event.

To qualify under this rule, at such events a sponsor cannot, among other things, (i) make investment recommendations or provide investment advice to attendees, (ii) engage in any investment negotiations between the issuer and investors attending the event or (iii) charge attendees any fees other than reasonable administrative fees. Advertising for the event may not reference any specific offering of securities, and information conveyed at the event regarding the offering of securities must be limited to (x) notification that the issuer is in the process of offering or planning to offer securities, (y) the type and amount of securities being offered and (z) the intended use of the proceeds of the offering. The exemption provided by new Rule 148 is intended to allow issuers to discuss their business plans with potential investors at these "demo-day" events, and even to state that they are seeking capital, without potentially jeopardizing their ability to rely on certain exemptions from registration.

General Solicitation of Interest Exemption

New Rule 241 permits an issuer to use generic solicitation of interest materials for an offer of securities prior to making a determination as to the exemption under which the offering may be conducted. All such communications must be made before the issuer determines which exemption from registration it will rely upon and before the offering commences based upon such exemption. Until the issuer determines which exemption it is relying on and the offering is commenced, no money or other consideration may be solicited or accepted. Rule 241 further requires the generic "testing-the-waters" materials to provide specified disclosures notifying potential investors about the limitations of the generic solicitation. Rule 241 is intended to include appropriate investor protections and further the public interest by allowing issuers to gauge market interest, tailor the size and other terms of an offering (possibly with input from potential investors) and reduce the costs of conducting an exempt offering.

Rule 506(c) Methods of Verification

Rule 506(c) provides a principles-based method for verifying accredited investor status as well as a non-exclusive list of verification methods in order to determine whether purchasers in a Rule 506(c) offering are accredited investors. Such factors include the nature of the purchaser and the type of accredited investor, the amount and type of information the issuer has about the purchaser and the nature and terms of the offering. Under the amended rule, issuers may rely on their previous verification of a purchaser for up to five years (as long as the issuer is not aware of any information to the contrary), requiring only a written representation from the purchaser at the time of sale that it is an accredited investor. The SEC re-emphasized the use of a principles-based approach to verification, directing issuers to apply a reasonableness standard to the facts and circumstances presented by the offering and investors when determining accredited investor status.

Offering and Investment Limits

The SEC also amended the current offering and investment limits for certain exempt offerings, to facilitate capital raising. For offerings under Tier 2 of Regulation A, the amendments (i) raise the maximum offering amount from $50 million to $75 million; and (ii) raise the maximum offering amount for secondary sales from $15 million to $22.5 million.

For offerings under Regulation Crowdfunding, the amendments: (i) raise the offering limit from $1.07 million to $5 million; (ii) remove the investment limits for accredited investors and amend the limits for non-accredited investors to the ***greater*** of their annual income or net worth (as opposed to the previous "lesser of" standard); and (iii) extend for 18 months the existing temporary relief (adopted this past May to facilitate capital raises by small businesses impacted by the COVID-19 pandemic) to exempt from certain Regulation Crowdfunding financial statement review requirements for issuers offering $250,000 or less of securities in reliance on the exemption within a 12-month period.

For offerings under Rule 504 of Regulation D, the amendments raise the maximum offering amount from $5 million to $10 million.

Bad Actor Disqualifications

The amendments also harmonize the bad actor disqualification provisions in Regulation D, Regulation A and Regulation Crowdfunding by adjusting the lookback requirements in Regulation A and Regulation Crowdfunding to include the time of sale in addition to the time of filing. The revised lookback period, which looks to both the time of filing of the offering document and the time of sale, is intended to improve investor protections by further limiting the role of "bad actors" in exempt offerings and reducing the chance that investors may unknowingly participate in securities offerings involving offering participants who have engaged in fraudulent activities or violated securities or other laws or regulations.

If you have any questions regarding this client alert, please contact the following attorney or the Willkie attorney with whom you regularly work.

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Appendix 1

Overview of SEC Capital-Raising Exemptions

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing Requirements	Restrictions on Resale	Preemption of State Registration and Qualification
Section 4(a)(2)	None	No	None	Transactions by an issuer not involving any public offering. *See SEC v. Ralston Purina Co*.	None	Yes. Restricted securities	No
Rule 506(b) of Regulation D	None	No	"Bad actor" disqualifications apply	Unlimited accredited investors Up to 35 sophisticated but non-accredited investors in a 90-day period	Form D	Yes. Restricted securities	Yes
Rule 506(c) of Regulation D	None	Yes	"Bad actor" disqualifications apply	Unlimited accredited investors Issuer must take reasonable steps to verify that all purchasers are accredited investors	Form D	Yes. Restricted securities	Yes
Regulation A: Tier 1	$20 million	Permitted; before qualification, testing the waters permitted before and after the offering statement is filed	U.S. or Canadian issuers Excludes blank check companies, registered investment companies, business development companies, issuers of certain securities, certain issuers subject to a Section 12(j) order, and Regulation A and Exchange Act reporting companies that have not filed certain required reports "Bad actor" disqualifications apply No asset-backed securities	None	Form 1-A, including two years of financial statements Exit report	No	No
Regulation A: Tier 2	$75 million			Non-accredited investors are subject to investment limits based on the greater of annual income and net worth, unless securities will be listed on a national securities exchange	Form 1-A, including two years of audited financial statements Annual, semi-annual, current and exit reports	No	Yes
Rule 504 of Regulation D	$10 million	Permitted in limited circumstances	Excludes blank check companies, Exchange Act reporting companies, and investment companies "Bad actor" disqualifications apply	None	Form D	Yes. Restricted securities except in limited circumstances	No
Regulation Crowdfunding; Section 4(a)(6)	$5 million	Testing the waters permitted before Form C is filed Permitted with limits on advertising after Form C is filed Offering must be conducted on an internet platform through a registered intermediary	Excludes non-U.S. issuers, blank check companies, Exchange Act reporting companies, and investment companies "Bad actor" disqualifications apply	No investment limits for accredited investors Non-accredited investors are subject to investment limits based on the greater of annual income and net worth	Form C, including two years of financial statements that are certified, reviewed or audited, as required Progress and annual reports	12-month resale limitations	Yes

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing Requirements	Restrictions on Resale	Preemption of State Registration and Qualification
Intrastate: Section 3(a)(11)	No Federal limit (generally, individual state limits between $1 and $5 million)	Offerees must be in-state residents	In-state residents "doing business" and incorporated in-state; excludes registered investment companies	Offerees and purchasers must be in-state residents	None	Securities must come to rest with in-state residents	No
Intrastate: Rule 147	No Federal limit (generally, individual state limits between $1 and $5 million)	Offerees must be in-state residents	In-state residents "doing business" and incorporated in-state; excludes registered investment companies	Offerees and purchasers must be in-state residents	None	Yes. Resales must be within state for six months	No
Intrastate: Rule 147A	No Federal limit (generally, individual state limits between $1 and $5 million)	Yes	In-state residents and "doing business" in-state; excludes registered investment companies	Purchasers must be in-state residents	None	Yes. Resales must be within state for six months	No