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SEC Amendments to Exempt Offering Rules Become Effective

The Securities and Exchange Commission ("*SEC*") recently adopted final rules (the "*Final Rules*") to amend the "patchwork" framework for exempt securities offerings.[1] The Final Rules largely adopt and supplement the amendments as proposed[2] and became effective on March 15, 2021. In adopting the Final Rules, the SEC aims to (1) simplify the complex exempt offering framework, (2) clarify the ability of issuers to move from one exemption to another, and (3) promote capital formation while maintaining protections for investors. This memorandum summarizes the more significant aspects of the Final Rules.

I. Final Rules

A. New Integration Framework

The Final Rules include a new Rule 152, which simplifies the previous five-factor test[3] for determining whether an issuer's private and public offerings will be integrated. This new Rule 152 replaces the prior Rules 152 and 155. The new Rule 152(a) provides that two or more offerings (other than those covered under safe harbors set forth in Rule 152(b)) will not be integrated if, based on the facts and circumstances, the issuer is able to establish that each offering complies with the registration requirements of the Securities Act of 1933, as amended (the "***Securities Act***"), or that an exemption from registration applies.

Integration of Offerings Prohibiting General Solicitation. Under new Rule 152(a)(1), which concerns exempt offerings that prohibit general solicitation (*e.g.*, private offerings), any such offering will not be integrated if an issuer reasonably believes, based on the facts and circumstances, as to each purchaser in the offering that the issuer (or anyone acting on its behalf) either:

- did not solicit such purchaser using general solicitation; or
- established a substantive relationship with such purchaser prior to commencement of the offering (the "***Integration Test***").

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[1] For the full text of the final rule and the related SEC release, see Securities and Exchange Commission, Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33-10884, available at https://www.sec.gov/rules/final/2020/33-10884.pdf (November 2, 2020) [hereinafter, the "Adopting Release"]. Unless otherwise specified, all quoted statements in this memorandum are taken from the Adopting Release.

[2] For the full text of the proposing release, see Securities and Exchange Commission, Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33-10763, available at https://www.sec.gov/rules/proposed/2020/33-10763.pdf (March 4, 2020) [hereinafter, the "Proposing Release"]. Our memorandum discussing the proposed amendments is available here.

[3] Previously, under Rule 502(a), in determining whether a particular offering should be integrated with another, a company should have considered five factors: whether (i) the sales are part of a single plan of financing, (ii) the sales involve the issuance of the same class of securities, (iii) the sales have been made at or about the same time, (iv) the same type of consideration is being received, and (v) the sales are made for the same general purpose.

Integration of Offerings Allowing General Solicitation. Rule 152(a)(2) addresses whether multiple offerings will be integrated when there are concurrent exempt offerings that each allow general solicitation (*e.g.*, 144A offerings). Under this Rule, if the general solicitation offering materials for one offering include material information about the terms of a concurrent offering under another exemption, the first offering must comply with all of the requirements and restrictions (including legends and communications) applicable under the exemption being relied upon in such other offering.

Safe Harbors. Notably, the Final Rules include the four non-exclusive safe harbors from integration originally proposed in the Proposing Release, which are summarized below. Accordingly, if any of the safe harbors apply, the integration analysis is not required.

- Rule 152(b)(1): An offering will not be integrated with another offering made more than 30 days before the commencement of such offering or 30 days after the termination or completion of such offering provided that, for an exempt offering that does not permit general solicitation, the Integration Test is satisfied.
- Rule 152(b)(2): Offers and sales made in compliance with Rule 701 or Regulation S or pursuant to an employee benefit plan will not be integrated with other offerings.
- Rule 152(b)(3): An offering for which a registration statement has been filed under the Securities Act would not be integrated if it is conducted after: (1) a terminated or completed offering that does not permit general solicitation, (2) a terminated or completed offering that permits general solicitation and is made exclusively to qualified institutional buyers and/or institutional accredited investors, or (3) an offering that permits general solicitation which was terminated or completed more than 30 days before the commencement of such offering.
- Rule 152(b)(4): Offers and sales made in reliance on an exemption that permits general solicitation will not be integrated if made subsequent to an offering that has been terminated or completed.

Commencement, Termination and Completion of Offerings. The Adopting Release acknowledges that although several rules refer to the commencement or completion of exempt and registered offerings, the terms are not defined under the Securities Act. Because the availability of certain non-exclusive safe harbors depends on when the offering commences or terminates, Final Rules 152(c) and 152(d) offer a list of non-exclusive factors to help issuers make both determinations. The Adopting Release makes clear that Rules 152(c) and 152(d) are "factors to consider, rather than definitions."

For purposes of integration under Rule 152(a) and qualification under any of the non-exclusive safe harbors in Rule 152(b), new Rule 152(c) provides that an offering commences "at the time of the first offer of securities in the offering by the issuer or its agents" and provides the following list of non-exclusive factors for consideration:

- An offering in reliance on Rule 241 may commence 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 pursuant to which such offering would be conducted.
- An offering in reliance on Section 4(a)(2), Regulation D or Rule 147 or 147A may commence on the date the issuer first made an offer of its securities in reliance on these exemptions.
- An offering in reliance on Regulation A may commence on the earlier of the date (i) that the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on Rule 255 or (ii) of the public filing of a Form 1-A offering statement.
- An offering in reliance on Regulation Crowdfunding may commence 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 offering in reliance on a registration statement filed under the Securities Act may commence, for (1) an offering that will commence promptly on the date of initial effectiveness, on the date the issuer first filed its registration statement with the SEC or (2) a delayed offering, on the date on which public efforts to offer and sell the securities commenced, which could be evidenced by the earlier of the first filing of a prospectus supplement describing the offering or the issuance of a press release or other widely-disseminated public disclosure confirming commencement of the offering.

New Rule 152(d) provides a non-exclusive list of factors to clarify when an offering will be deemed "terminated or completed" for purposes of integration analysis and use of the safe harbors. Under this Rule, regardless of the type of offering, the termination or completion of an offering likely will occur when the "issuer and its agents cease efforts to make further offers to sell the issuer's securities under such offering." The factors are:

- An offering made in reliance on Section 4(a)(2), Regulation D or existing Rule 147 or 147A may be 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 (subject only to conditions outside of its control); or (2) the issuer and its agents ceased efforts to make further offers to sell the securities under such offering.
- An offering made in reliance on Regulation A may be considered terminated or completed upon: (1) withdrawal of an offering statement under Rule 259(a) of Regulation A; (2) filing of a Form 1-Z with respect to a Tier 1 offering under Rule 257(a); (3) declaration by the SEC that the offering statement has been abandoned under Rule 259(b); or (4) the date, after the offering statement was initially qualified, on which the issue is prohibited under Rule 251(d)(3)(i)(F) 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 may 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 registration statement has been filed may be considered terminated or completed upon (1) withdrawal of the registration statement after an application is granted or deemed granted under Rule 477; (2) filing of a prospectus supplement or amendment to the registration statement indicating that the offering, or a 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 the registration statement abandoned under Rule 479; (4) the date, more than three years after the initial effective date of the registration statement, on which the issue is prohibited under Rule 415(a)(5) 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 a particular delayed offering, which could be evidenced by filing a Form 8-K or issuing widely-disseminated public disclosure informing the market that the offering, or a particular delayed offering, has been terminated or completed.

B. General Solicitation and Offering Communications

Demo Day Communications. Rule 148 was adopted substantially as proposed, thereby excluding certain "demo day" communications from being deemed general solicitation or general advertising, including communications 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 Final Rules were modified to clarify that (1) more than one issuer must participate in the seminar or meeting in order for the new Rule 148 to apply and (2) an "angel investor group" must have defined processes and

procedures for making investment decisions. In the Adopting Release, the SEC expressly declined to expand the "angel investor group" definition to include groups associated or affiliated with brokers, dealers, or investment advisors but noted that membership in an angel investor group by individuals who are employed as brokers, dealers, or investment advisers will not, by itself, result in the angel investor group being deemed associated or affiliated with a broker, dealer, or investment advisor.

In addition, the information conveyed at such event regarding the offering by the issuer is limited to: (1) notice that the issuer is in the process of offering or planning to offer securities, (2) the type and amount of securities offered, (3) the intended use of proceeds, and (4) the unsubscribed amount of the offering. If the event is online, participation is limited to (a) individuals who are members of or associated with the sponsor organization, (b) individuals reasonably believed by the sponsor to be accredited investors, and (c) individuals invited by the sponsor "based on industry or investment-related experience reasonably selected by the sponsor in good faith and disclosed in public communications about the event."

Solicitation of Interest. New Rule 241, which was adopted substantially as proposed, exempts issuers who use generic solicitation of interest materials pursuant to the conditions of the rule from the prohibitions on offers prior to filing a registration statement in Section 5(c) of the Securities Act. The exemption from registration applies only to the generic solicitation of interest, and the solicitation will be deemed to be an offer of a security for sale for purposes of the antifraud provisions. Furthermore, "no solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until the issuer makes a determination as to the exemption on which it will rely and commences the offering in compliance with the exemption." If the issuer moves forward with an exempt offering following the generic solicitation of interest, it will be required to comply with an applicable exemption for the subsequent offering.

Rule 241 further requires that the generic testing-the-waters materials include the following disclosures to the potential investors: (1) the issuer is considering an offering of securities exempt from registration under the Securities Act but has not determined which specific exemption from registration it intends to rely on; (2) no money or other consideration is being solicited, and if any is sent in response, it will not be accepted; (3) no offer to buy the securities can be accepted, and no part of the purchase price can be received, until the issuer determines which exemption the issuer intends to rely on and, where applicable, the requirements of such exemption are met; and (4) an indication of interest involves no obligation or commitment of any kind.

In addition, amendments to Regulation A and Regulation Crowdfunding were adopted as proposed to require that generic solicitation materials be made publicly available as an exhibit to the SEC-filed offering materials if the offering is commenced within 30 days after the generic solicitation. Further, an issuer must provide purchasers with any written generic solicitation of interest materials used if the issuer sells securities under Rule 506(b) of Regulation D within 30 days of the generic solicitation of interest to any non-accredited investor.

Verification Requirements. As proposed in the Proposing Release, the Final Rules add a new item to the non-exclusive list in Rule 506(c) that allows an issuer to establish the accredited status of an investor in a subsequent sale if (1) the issuer previously took reasonable steps to verify that such investor was accredited, (2) the investor provides a written representation that he, she, or it is an accredited investor, and (3) the issuer is not aware of any contradictory information. In addition, the Final Rules add a five-year limit on the ability of an issuer to rely on the earlier verification.

C. Harmonization of Disclosure Requirements

Regulation D Offerings. As proposed in the Proposing Release, amended Rule 502(b) modifies the financial information that non-reporting companies must provide to non-accredited investors and aligns these provisions with

the requirements in Regulation A. For Regulation D offerings of up to $20 million, issuers will become subject to the requirements applicable to Regulation A Tier 1 offerings set forth in paragraph (b) of Part F/S of Form 1-A. The Final Rules eliminate the previous Rule 502(b) provisions that permit an issuer, other than a limited partnership, that cannot obtain audited financial statements without unreasonable effort or expense, to provide only the issuer's audited balance sheet.

Regulation A Offerings. The Final Rules adopt the proposed amendments in the Proposing Release substantially as proposed, which includes, among others, the following:

- Item 17 of Form 1-A is amended to provide issuers with the option to file redacted material contracts and plans of acquisition, reorganization, arrangement, liquidation, or succession, consistent with the recent amendments to Regulation S-K. Issuers would be allowed to redact information that "would constitute a clearly unwarranted invasion of personal privacy" in any of the exhibits listed in Item 17 of Form 1-A.
- Incorporation by reference of previously filed financial statements into a Regulation A offering circular is allowed so long as (1) the issuer is current in its reporting obligation under Rule 257 or the Securities Exchange Act of 1934, as amended, (2) the incorporated financials are made readily available and accessible on the issuer's website, and (3) the issuer discloses in the offering statement that such financials will be provided upon request.
- Rule 259(b) is amended to grant the SEC the ability to declare a specific post-qualification amendment abandoned rather than the entire offering statement, thus aligning Rule 259(b) with Rule 479, which applies to registered offerings.

D. Increased Offering and Investment Limits

Offering Limits. The Final Rules adopt the changes to the offering limits under Regulation A, Regulation Crowdfunding, and Rule 504 of Regulation D, substantially as proposed in the Proposing Release, as summarized below:

- Regulation A (Tier 2): The offering limit is increased from $50 million to $75 million and for secondary sales, from $15 million to $22.5 million.
- Regulation Crowdfunding: The offering limit is increased from $1.07 million to $5 million.
- Rule 504 of Regulation D: The offering limit is increased from $5 million to $10 million.

Investment Limits. Under the Final Rules, accredited investors are no longer limited by any investment limits in an offering made under Regulation Crowdfunding. Further, under the Final Rules, non-accredited investors would be subject, in the case of Regulation A (Tier 2) and Regulation Crowdfunding offerings, to investment limits based on the greater of income or net worth standard. Under the current rules there are no investment limits for Regulation A (Tier 1), and Rule 504 offerings remain unaffected by the Final Rules.

II. Dissent

Although the Final Rules were adopted by a three-vote majority, Commissioners Caroline Crenshaw and (now Acting Chair) Allison Herren Lee dissented. Commissioner Crenshaw stated the amendments contribute to "the continued blurring of lines between public and private markets" and "will make it harder for regulators to police the private market and to stop improper or fraudulent offerings before it's too late,"[4] while Commissioner Lee stated in her

[4] For the full text of Commissioner Crenshaw's Public Statement, see Securities and Exchange Commission, Statement on Harmonization of Securities Offering Exemptions, available at https://www.sec.gov/news/public-statement/crenshaw-harmonization-2020-11-02 (November 2, 2020).

dissent that the Final Rules fail to substantively engage with "the crucial threshold question" of whether "the tradeoffs are – or even can be – balanced in a way that adequately protects retail investors."[5]

III. Conclusion

Notwithstanding that the SEC adopted the Final Rules in part to "simplify, harmonize, and improve" the exempt offerings framework, as can be seen in the attached Overview of Capital-Raising Exemptions included in the Adopting Release, this area remains quite complex. Issuers and their advisors should familiarize themselves with the Final Rules before commencing any offering now that they are effective. What further changes we may see in this area with a new SEC Chair remain to be seen.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com: Joseph E. Cho (associate) at 212.701.3589 or jcho@cahill.com; or Eboney J. Hutt (associate) at 212.701.3259 or ehutt@cahill.com; or email publications@cahill.com.

[5] For the full text of Commissioner Lee's Public Statement, see Securities and Exchange Commission, Statement on Amendments to Exempt Offering Framework, available at https://www.sec.gov/news/public-statement/lee-harmonization-2020-11-02 (November 2, 2020).

Overview of 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
17 CFR 230.506(b) ("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	17 CFR 239.500 ("Form D")	Yes. Restricted securities	Yes
17 CFR 230.506(c) ("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