

SEC Proposes to Expand Private Offerings

On March 4, 2020, the Securities and Exchange Commission (SEC) proposed broad changes to the current private offering framework. Recognizing the growing market for private investments, this is the latest in a series of recent actions by the SEC (including proposals to expand “testing the waters” communications and accredited investor definitions) intended to broaden access to capital markets for issuers and access to the exempt offering market for investors.

Summary of the Proposal

The proposal seeks to streamline the current framework of rules and guidance governing exempt offerings and to broaden the availability of such offerings by:

- Streamlining and clarifying the rules governing “integration” of private and public offerings, including establishing four new safe harbors;
- Expanding general solicitation exemptions, including for “demo days”;
- Increasing the size of offerings exemptions available to issuers under Regulation A, Regulation Crowdfunding and Rule 504 offerings; and
- Harmonizing certain disclosure and eligibility requirements between exemptions.

Integration

The integration proposals would establish new Rule 152, which would replace current Rules 152 and 155. New Rule 152 would provide a general framework and four specific safe harbors and replace the current safe harbors set forth in various exemptions.

Safe Harbor 1

Offerings made more than 30 calendar days before or after any other offering would not be integrated with that offering, provided that for an exempt offering the purchasers:

- were not solicited through a general solicitation, or
- had previously established a substantive relationship with the issuer.

Safe Harbor 2

Offers and sales made in compliance with Rule 701 or Regulation S would not be integrated with other offerings.

Safe Harbor 3

A Securities Act-registered offering would not be integrated if made subsequent to:

- a terminated or completed offering for which general solicitation is not permitted;
- a terminated or completed offering for which general solicitation is permitted and made only to qualified institutional buyers and institutional accredited investors; or
- 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 would not be integrated if made subsequent to any prior terminated or completed offering.

For offerings not covered by a safe harbor, offers and sales would not be integrated if, based on the particular facts and circumstances, the issuer can establish that each offering either complies



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

General Solicitation Exemptions

The proposals would address certain long-standing issues presented with the meaning of “general solicitation” and its application to certain events, including “testing-the-waters” activities and “demo days.”

“Demo Days”

Proposed new Rule 148, which would provide that certain “demo day” communications would not be deemed general solicitation or general advertising.

- Communications made by an issuer would not to be deemed general solicitations if they were made in connection with a seminar or meeting by a college, university, or other institution of higher education, a local government, a nonprofit organization, or an angel investor group, incubator, or accelerator sponsoring the seminar or meeting.
- In order to avail itself of the exemption, the issuer would not be permitted, among other things, to make investment recommendations, engage in investment negotiations or charge fees to attend the event. In addition, advertising for the event would not be allowed to reference an offering and information conveyed at the event regarding the offering would be limited to: (i) notification of the planned offering; (ii) the type and amount of securities being offered; and (iii) the intended use of proceeds.

Solicitations of Interest

The SEC proposals would allow all issuers and those authorized to act on their behalf to gauge market interest in a registered offering through discussions with qualified institutional buyers and institutional accredited investors prior to, or following, the filing of a registration statement. Proposed Rule 241 would allow an issuer to solicit indications of interest in an exempt offering orally or in writing prior to determining which exemption it would rely upon to conduct the offering.

- Proposed Rule 241(b) would require the materials used under this exemption to bear a specified legend or disclaimer.
- Proposed amendments to Rule 502(b) would provide that an issuer that sells securities under Rule 506(b) within 30 days of the generic solicitation of interest to any purchaser that is not an accredited investor would be required to provide such purchaser with any written communication used under proposed Rule 241.
- Proposed amendments would not provide for the preemption of state securities law registration and qualification requirements for offers made under proposed Rule 241.

Regulation Crowdfunding

The SEC proposals would permit issuers to test-the-waters orally or in writing with all potential investors prior to filing a Form C with the commission under proposed Rule 206. Proposed Rule 206 would permit issuers to test-the-waters with all potential investors, but would require issuers to include certain legends in the testing-the-waters materials. Proposed amendments to Rule 204 to conditionally permit oral communications with prospective investors are permitted once the Form C is filed.

Regulation A

Proposed amendments to Form 1-A’s exhibit requirements would require an issuer to file the generic solicitation materials as an exhibit to the Form 1-A if the issuer conducts a generic solicitation of interest and then opts to rely on Regulation A for its offering within 30 days of the most recent generic solicitation communication.

Regulation D

Proposed amendments to Rule 502(b)(2)(viii) would require an issuer that uses proposed Rule 241 to conduct a generic solicitation of interest and then opts to rely on Rule 506(b) within 30 days of

the most recent generic solicitation communication and sells securities to any purchaser that is not an accredited investor, to provide the generic solicitation materials to such purchaser a reasonable time prior to sale.

Verification

The proposal would expand the methods by which an issuer may verify accredited investor status. The proposal allows an issuer to establish that an investor for which the issuer previously took reasonable steps to verify 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.

Increased Offering and Investment Exemptions

The proposal would increase the offering and investment limits allowed under Regulation A, Regulation Crowdfunding, and Rule 504 of Regulation D.

Regulation A

- Tier One Offering Limit — No changes to the offering limits were proposed.
- Tier Two Offering Limit — Would increase the maximum offering amount from \$50 million to \$75 million and increase the maximum offering amount for secondary sales from \$15 million to \$22.5 million.

Regulation Crowdfunding

- Would raise the offering limit from \$1.07 million in a 12-month period to \$5 million in a 12-month period.
- Would no longer apply any investment limits for accredited investors and allow non-accredited investors to determine their investment limit based on the greater of their annual income or net worth.

Rule 504

Would raise the offering limit from \$5 million to \$10 million in a 12-month period.

Harmonization

For Regulation D offerings by non-reporting companies that include non-accredited investors, the proposal would align the disclosure requirement with the less burdensome disclosure requirements of Regulation A. The proposal would also simplify Regulation A by aligning it with the rules for registered offerings regarding the redaction of confidential information in material contracts, providing draft offering statements to be made public on EDGAR, allowing incorporation by reference on Form 1-A, and permitting the declaration of a post-qualification amendment as abandoned.

The SEC is accepting public comments on the proposed amendments within 60 days of their publication in the Federal Register. The proposed rule can be found [here](#).
