ALERT MEMORANDUM

SEC Harmonizes Regulation and Improves Access to Capital in Private Markets

November 16, 2020

On November 2, 2020, the Securities and Exchange Commission voted 3-2 to adopt amendments to "simplify, harmonize, and improve certain aspects" of the framework for offerings exempt from Securities Act registration.[1] The amendments largely track the March 2020 proposing release,[2] with a few key and welcome changes, and cover a number of areas, including integration, general solicitation and offering communications, and Rule 506(c) verification requirements.

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The amendments mark the second set of rule changes adopted as part of a broader SEC initiative to update the exempt offering framework, as laid out in the SEC's 2019 concept release.[3] The first set of rule changes, which will become effective December 8, 2020, modernize and expand the definition of "accredited investor" and "qualified institutional buyer."[4] Taken together, the rule changes will allow a broader range of individuals and institutions to invest in offerings under a more streamlined exempt offering framework, and clarify the rules around properly conducting private placements.

The amendments will generally become effective 60 days after the date of publication in the Federal Register. The SEC did not indicate that voluntary early adoption of the rule would be permitted.

[1] Release No. 33-10844 (November 2, 2020), available here.
[2] Release No. 33-10763 (March 4, 2020), available here. You can read our alert memo on the proposing release here.
[3] Release No. 33-10649 (June 18, 2019), available here.
[4] Release No. 33-10824 (August 26, 2020), available here. You can read our alert memo on the final rules here.

We discuss below selected key aspects of the amendments, including certain changes from the proposed rules. We have also attached as Annex A an overview of the amended exempt offering framework that was included in the adopting release.

I. Integration

Background

The SEC first articulated the concept of integration in 1933 and subsequently developed various approaches for determining when multiple offerings should be treated as a single offering, including the well-known five-factor test in Regulation D,[5] the 2007 guidance for analyzing the integration of simultaneous registered and private offerings[6] and the integration framework for concurrent exempt offerings developed as part of promulgating Regulation A and Crowdfunding rules in 2015 and Rules 147 and 147A in 2016.[7]

The amendments build on and simplify these concepts by establishing a general principle of integration for all securities offerings that looks to facts and circumstances, supplemented by four non-exclusive safe harbors to address specific situations.[8]

General Principle (New Rule 152(a))

Under new Rule 152(a), for all offerings not covered by a safe harbor in new Rule 152(b), offers and sales are ***not*** integrated if, based on the facts and circumstances, the issuer can establish that each offering either complies with the registration requirements of the Securities Act or that an exemption from registration is available for the particular offering. Although the amendments involved some modifications from the proposed rules, these were generally straightforward clarifying changes made in response to comments received.

— ***If General Solicitation is NOT Permitted (New Rule 152(a)(1)):*** 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:

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

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

— ***If General Solicitation IS Permitted (New Rule 152(a)(2)):*** For two or more concurrent exempt offerings permitting general solicitation, in addition to satisfying the requirements of the particular exemption relied on, general solicitation

[5] The five factors are whether: (i) the different offerings are part of a single plan of financing; (ii) the offerings involve issuance of the same class of security; (iii) the offerings are made at or about the same time; (iv) the same type of consideration is to be received; and (v) the offerings are made for the same general purpose. Note to Rule 502(a).

[6] The guidance provided that the filing of a registration statement should not be considered general solicitation that undermines the availability of the Section 4(a)(2) exemption for a concurrent private placement if the private placement investors were not solicited by the registration statement. A prospective investor could become interested in the concurrent private placement through a "pre-existing, substantive relationship" with the issuer, or direct contact by the issuer or its agents outside the public offering effort. SEC Release No. 33-8828 (August 3, 2007), at Section II.C.1, available here.

[7] The framework focuses on facts and circumstances, including each offering complying with the requirements of the relevant exemption. SEC Release No. 33-9741 (March 25, 2015), at Section II.B.5, available here; SEC Release No. 33-9974 (October 30, 2015), at Section II.A.1.c, available here; and SEC Release No. 33-10238 (October 26, 2016), at Section II.B.5, available here.

[8] To implement the changes described in Section I of this alert memo, conforming amendments will be made to various rules under the Securities Act. Existing Rule 152, which provides the definition of "transactions by an issuer not involving any public offering" in Section 4(a)(2), will be entirely replaced and superseded by new Rule 152. Rule 155, which concerns the integration of abandoned offerings, will be superseded by new Rule 152 and will accordingly be removed and reserved. Rule 502(a), Rule 251(c), Rule 147(g) and Rule 147A(g) will be amended to provide a cross-reference to new Rule 152 to determine whether offers and sales should be integrated.

offering materials for one offering that includes information about the material terms of a concurrent offering under another exemption may constitute an offer of securities in that other offering.[9] In that case, the offer made in one offering must comply with all the requirements for the other offering, including any legend requirements and communications restrictions.

Application

The general principle applies where an issuer is, for example, conducting an IPO alongside a Rule 506(b) offering, or a Rule 506(c) offering followed by a Rule 506(b) offering within 30 days. The offerings would not be integrated if the investors in the Rule 506(b) offering were not solicited through the registration statement or general solicitation from the Rule 506(c) offering, or if the investors had a pre-existing, substantive relationship with the issuer (or person acting on the issuer's behalf) before the commencement of the Rule 506(b) offering that was established otherwise than through the offering permitting general solicitation. Offerings separated by more than 30 days are discussed below under "Safe Harbor 1."

— ***Pre-Existing, Substantive Relationship.*** The amendments allow a purchaser with which the issuer or person acting on its behalf has a substantive relationship that pre-exists an offering in reliance on an exemption prohibiting general solicitation to participate in that offering, notwithstanding the issuer also conducting a recent (within 30 days) or concurrent registered offering or exempt offering permitting general solicitation, as long as that relationship was not established through that recent or concurrent offering. Investors with which the issuer has such a pre-existing substantive relationship may include the issuer's existing or prior investors, investors in prior deals of the issuer's management, friends or family of the issuer's control persons or customers with which a registered broker-dealer or investment adviser had established such a substantive relationship.

The adopting release reiterates that:

- A "pre-existing" relationship is one that an issuer or, alternatively, another person – e.g., a registered broker-dealer or an investment adviser – has formed with an offeree before the commencement of the offering.
- A "substantive" relationship is one in which the issuer (or a person acting on its behalf, such as a registered broker-dealer or investment adviser) has sufficient information to evaluate, and does, in fact, evaluate, an offeree's financial circumstances and sophistication, in determining his, her or its status as an eligible investor.
- Self-certification alone (by checking a box) without any other knowledge of a person's financial circumstances or sophistication is not sufficient to form a "substantive" relationship for these purposes.
- Persons acting for an issuer other than registered broker-dealers and investment advisers may form a pre-existing, substantive relationship with an offeree. SEC staff interpretations on whether a "pre-existing, substantive relationship" exists have generally turned on procedures established by broker-dealers in connection with their customers. This is because traditional broker-dealer relationships require that a broker-dealer deal fairly with, and make suitable recommendations to, customers, which implies that a substantive relationship exists between the two. The existence of a sufficient relationship to avoid general solicitation, however, always depends on the particular facts and circumstances, and it is therefore possible that a third party other than a broker-

[9] As noted in the adopting release, this also means that if a permissible general solicitation for one offering describes the material terms of a concurrent or subsequent offering for which general solicitation is not allowed, the solicitation may violate the prohibition on general solicitation in the concurrent or subsequent offering.

dealer or investment adviser could establish such a relationship.

- Issuers may develop pre-existing, substantive relationships with offerees. However, in the absence of a prior business relationship or a recognized legal duty to offerees, it is likely more difficult for an issuer to establish a pre-existing, substantive relationship, especially when contemplating or engaged in an offering over the internet (or other means of unrestricted communication). Issuers would have to consider not only whether they have sufficient information about particular offerees, but also whether they in fact use that information appropriately to evaluate the financial circumstances and sophistication of the offerees before commencing the offering.

Notwithstanding the SEC's failure to address the treatment of inadvertent publicity during the pendency of an offering that does not permit general solicitation (so-called "foot faults"), we believe the principle embodied in Rule 152(a) supports the conclusion that it should be permissible to make sales to investors with which an issuer had a substantive relationship before the commencement of such an offering regardless of any inadvertent publicity.[10]

— ***Other Approaches to Overcome General Solicitation.*** The SEC reiterated that a pre-existing, substantive relationship is ***not*** the exclusive means of demonstrating the absence of a general solicitation. For example, an issuer could sell exclusively to investors whom the issuer or its agents contact outside the issuer's public offering or other general solicitation activity.[11]

— ***Anti-Evasion Provision.*** The provisions of new Rule 152 will not have the effect of avoiding integration for any transaction or series of transactions that, although in technical compliance with the rule, are part of a plan or scheme to evade the registration requirements of the Securities Act. The proposed rules had only included this anti-evasion provision with respect to the safe harbors in Rule 152(b), but in response to comments, the SEC moved this language to the introductory paragraph of Rule 152 for clarity. In response to commenter concerns, the SEC also noted that an issuer may not engage in an offering that permits general solicitation for the purpose of identifying investors for a then-contemplated subsequent offering prohibiting general solicitation. Doing so would violate the anti-evasion provision.

- For concurrent offerings or other offerings separated by 30 days or less, which are therefore unable to rely on the 30-day safe harbor discussed below, if an offering pursuant to an exemption that does not permit general solicitation is being conducted concurrently with or after an offering that does permit general solicitation, an issuer must limit offerees in the offering not permitting general solicitation to those with which they had a substantive relationship pre-existing the commencement of that offering and requires that the relationship not have been established through the recent or concurrent offering permitting general solicitation.

Safe Harbors (New Rule 152(b))

Safe Harbor 1 (New Rule 152(b)(1)): Consistent with the proposed rules, new Rule 152(b)(1) provides that

[10] In this regard, we believe inadvertent publicity should not be disqualifying and should be distinguishable from the intentional publicity found by the SEC to violate Section 5 of the Securities Act in KCD. See *In the Matter of the Application of KCD Financial Inc.* SEC Release No. 80340 (March 29, 2017).

[11] Although the SEC did not repeat its guidance from the proposing release, a communication is more likely to be part of a general solicitation as more persons without financial experience, sophistication or any prior personal or business relationship with are contacted through impersonal, non-selective means of communication. Likewise, issuers that contact one or more experienced, sophisticated members of a group of angel investors through a referral from another member of such group may be able to establish a reasonable belief that other offerees in the network have the necessary financial experience and sophistication.

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 the other offering.

— ***Elimination of Six-Month Rule.*** In light of changes to markets, technology and the securities laws over time, the six-month period in certain existing integration safe harbors will be eliminated in favor of a 30-day rule that applies to all offerings. Although some commenters voiced their concern that the 30-day time period is too short, with several suggesting that a 90-day period would be more appropriate, the SEC ultimately concluded that 30 days provides a sufficient length of time to impede what integration seeks to prevent: improperly avoiding registration by artificially dividing a single offering into multiple offerings.

— ***Covers both Registered and Unregistered Offerings.*** The new safe harbor will apply both to offerings for which a registration statement has been filed and to exempt offerings.

— ***Exempt Offerings Not Permitting General Solicitation.*** For an exempt offering for which general solicitation is not permitted that follows by more than 30 calendar days an offering that allows general solicitation, the general principle of new Rule 152(a)(1) will apply. The proposed rule had included similar but not identical language to new Rule 152(a)(1), and in response to comments about these inconsistencies, the amendments just refer to Rule 152(a)(1). The issuer therefore must have a reasonable belief, based on the facts and circumstances, that each purchaser in the exempt offering prohibiting general solicitation was not solicited through general solicitation by the issuer or someone acting on the issuer's behalf, or that the issuer or that person established a substantive relationship with the purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

- The SEC stressed that this safe harbor may not be used to circumvent the prohibition on general solicitation. Like any anti-evasion principle, the test here is whether the offering that permits general solicitation is being conducted in good faith – *i.e.*, is a *bona fide* offering – and not for the purpose of finding prospective investors for a then-contemplated, subsequent offering that does not permit general solicitation. With that exception, we believe it is clear that the new rules are not intended to preclude the participation of purchasers originally contacted through general solicitation activities that occurred more than 30 days before an offering not permitting general solicitation, as long as the issuer (or a person acting on its behalf) established a substantive relationship with any such purchaser prior to the commencement of the exempt offering not permitting general solicitation.[12] This contrasts with the situation discussed above, where if the safe harbor is not available, such relationship must be established otherwise than through recent general solicitation activities.

— ***Cap on Non-AIs.*** As proposed, to prevent serial Rule 506(b) offerings to up to 35 non-accredited purchasers (non-AIs) each month, the number of non-AI purchasers permitted in all Rule 506(b) offerings within a 90-day period will be capped at 35.

Safe Harbor 2 (New Rule 152(b)(2)): Offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with Regulation S will not be integrated with other offerings. This safe harbor codifies the long-standing position of the SEC that offshore transactions made in compliance with Regulation S will not be integrated

[12] As the SEC said in note 75 to the adopting release, an issuer "may not conduct a Rule 506(c) general solicitation in order to identify potential investors for the Rule 506(b) offering. In that instance, such Rule 506(b) offering may be deemed to be commenced at the time of such solicitation under new Rule 152(c)."

with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.

- ***Proposed Changes to Regulation S Not Adopted.*** The proposing release would have made certain restrictive amendments to Regulation S. Our view, as discussed in our prior alert memo, was that the proposed amendments were both unnecessary and inconsistent with prior SEC guidance on Regulation S. After considering the comments received, including those in the comment letter from the Securities Industry and Financial Markets Association (SIFMA),[13] which we assisted in preparing and which was cited several times in this section of the adopting release, the SEC decided not to adopt these proposed amendments.
- ***Caution Still Warranted.*** Offering participants still must consider whether general solicitations for exempt offerings in the United States could be considered directed selling efforts precluding reliance on Regulation S for a concurrent offering. As stated in the adopting release, compliance 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. For example, the SEC noted that the use of the same website to solicit U.S. investors under Rule 506(c) and investors under Regulation S could raise concerns about the issuer's compliance with the prohibition on directed selling efforts in Regulation S, because the offering material on the website could be deemed to have the effect of conditioning the market in the United States. In this situation, the issuer should take steps to distinguish the domestic and Regulation S offering materials, consistent with prior SEC discussion.[14]

Safe Harbor 3 (New Rule 152(b)(3)): An offering for which a Securities Act registration statement has been filed will not be integrated if made subsequent to:

- ***Completed Offerings without General Solicitation.*** A terminated or completed offering for which general solicitation is not permitted.
- ***Completed Offerings to QIBs and IAIs with General Solicitation.*** A terminated or completed offering for which general solicitation is permitted and made only to QIBs and IAIs.
- ***Completed Offering with General Solicitation Completed more than 30 Days in Advance***. An offering for which general solicitation is permitted that was terminated or completed more than 30 calendar days prior to the commencement of the registered offering.

The adopting release reiterates that capital raising around the time of a public offering, particularly an IPO, can be critical to ensuring the issuer has sufficient funds to continue operating while the public offering process is ongoing. This safe harbor was adopted as proposed.

Safe Harbor 4 (New Rule 152(b)(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. The adopting release reiterates that offers and sales preceding exempt offerings that allow general solicitation generally are not the type of transaction that conditions the market for the subsequent offering. This safe harbor was adopted as proposed.

Commencement, Termination and Completion of Offerings (New Rules 152(c) and 152(d))

The proposed rules had contemplated providing fixed definitions for when an offering is terminated or completed for the purposes of applying the general integration principle and safe harbors discussed above. However, in response to commenter feedback

[13] SIFMA Comment Letter on Proposed Rule on Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets (June 1, 2020), available here.

[14] Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore, Release No. 33-7516 (March 23, 1998), available here.

requesting guidance on when an offering is commenced and concern that a fixed definition may not capture all circumstances, the amendments substantially modified the proposed rules and added new Rules 152(c) and (d), providing a non-exclusive list of factors to consider in determining when an offering of securities is commenced and terminated or completed, respectively. The SEC stated that it believes this will provide more flexibility in applying the new rules to particular scenarios and should make the overall framework more workable.

New Rule 152(c) provides that an offering of securities will be deemed commenced at the time of the first offer of securities in the offering by an issuer or its agents, and new Rule 152(d) provides that an offering will be deemed terminated or completed when an issuer or its agents cease efforts to make further offers to sell the issuer's securities in the offering. Each rule then includes a non-exclusive list of factors to consider.

— ***Treatment of Exempt Offerings Generally.*** In the case of offerings under Section 4(a)(2) or Regulation D, an offering is commenced on the date the issuer first made an offer in reliance on either of these exemptions and terminated either when (i) the issuer enters into a binding commitment to sell all securities to be sold under the offering or (ii) the issuer or its agents cease efforts to make further offers to sell the issuer's securities in the offering. The adopting release further clarifies that an issuer has the flexibility to terminate an offering of securities in reliance on one exemption and simultaneously commence an offering of the same securities in reliance on another exemption, so long as the issuer has ceased efforts to make further offers to sell the issuer's securities under the exemption relied on for the terminated offering.

  - The adopting release notes that private communications between an issuer (or its agents) and prospective investors in an exempt offering in which general solicitation is prohibited, such as under Rule 506(b) or Section 4(a)(2), may be considered a commencement of an offering if such private communication involves an offer of securities. This is in contrast to the treatment of testing-the-water communications under Rule 163B for registered offerings (discussed below).

— ***Treatment of Registered Offerings.*** The proposed rules had contemplated that a registered offering would not be terminated or completed until the applicable registration statement was withdrawn, abandoned or expired, or until the issuer indicated that the offering is terminated or completed and deregistered any unsold securities registered under the registration statement. In response to comments – including a concern that if a registered offering off a shelf registration statement were deemed commenced when the shelf was filed, the 30-day safe harbor would be essentially unavailable for the life of the shelf – the SEC sensibly took a more nuanced approach in the final amendments. A note to new Rule 152(c), also not contemplated in the proposing release, further provides a welcome confirmation of the treatment of Rule 163B activities.

- **Treatment of Continuous Offerings**

  - ***Commencement of Continuous Offerings.*** Under new Rule 152(c), a continuous offering that promptly commences on the date of initial effectiveness will likely be deemed to commence on the date the issuer first filed its registration statement for the offering with the SEC.
  - ***Termination of Continuous Offerings***. Under new Rule 152(d), completion or termination of a continuous offering that promptly commences on the date of initial effectiveness could be evidenced by the filing of a prospectus supplement or amendment indicating that the offering has been terminated or completed, or other factors that indicate that an issuer has abandoned or ceased its public selling efforts in furtherance of the offering, such

as a Form 8-K or widely disseminated public disclosure informing the market of the offering's completion or termination. Completion or termination of the offering may also occur as a result of an offering terminating by its terms or the withdrawal, abandonment or expiration (after the third anniversary of the initial effective date) of the registration statement.

- **Treatment of Shelf Offerings**
  - ***Commencement of Delayed (Shelf) Offerings.*** Under new Rule 152(c), a delayed shelf offering would likely be deemed to commence when the issuer or its agents commence public efforts to offer and sell the securities. Commencement of delayed offerings could be evidenced by the earlier of the filing of a prospectus supplement describing the offering or the issuance of a widely disseminated public disclosure confirming the commencement of the offering.
  - ***Termination of Delayed (Shelf) Offerings.*** Under new Rule 152(d), completion or termination of a particular delayed shelf offering may be evidenced by the same factors as those for continuous offerings. However, in response to the commenter concerns noted above, the adopting release confirms that a particular delayed offering may be deemed terminated or completed even though the issuer's shelf registration statement may still have unused capacity or securities available to offer and sell in a later delayed registered offering. Since particular delayed offerings may now be deemed terminated or completed for the purposes of new Rule 152, this change will allow shelf registration statements to rely on the 30-day safe harbor of new Rule 152(b)(1).
- **Testing-the-Waters ("TTW") under Rule 163B.** Due to their non-public nature, TTW communications under Rule 163B will not be considered the commencement of a registered public offering for purposes of new Rule 152.

II. General Solicitation and Offering Communication

TTW for Exempt Offerings

The amendments expand TTW to exempt offerings by adding a new Rule 241, which was adopted substantially as proposed. The new rule allows an issuer to solicit indications of interest in a contemplated exempt offering orally or in writing prior to determining which exemption it would rely on to conduct the offering.

— ***No Exemption Chosen Yet.*** The SEC adopted as proposed the condition that the rule cannot be used if the issuer has already decided on an applicable exemption.

— ***Legend.*** A legend is required to be provided, indicating that: (1) the issuer is considering an exempt offering, but has not determined a specific exemption on which to rely; (2) no money or other consideration is being solicited or will be accepted; (3) no sales will be made or commitments to purchase accepted until the issuer determines the exemption and any required filing, disclosure or qualification requirements are met; and (4) any indication of interest is non-binding. These solicitations will be deemed offers for purposes of the federal securities laws' antifraud provisions.

— ***May be General Solicitation.*** Depending on the method of dissemination of the information, TTW may be considered a general solicitation.

- In these circumstances, before conducting an unregistered offering that does not allow general solicitation, the issuer would need to assess whether the solicitation and subsequent offering should be integrated, rendering the exemption for the second offering unavailable.
- Even in this case, however, the issuer may be able to rely on the safe harbor for an

offering that does not permit general solicitation if the issuer waits 30 days following termination of the TTW activity before commencing the private offering. The issuer would still need to ensure that offerees contacted in the private offering were either not solicited by means of the general solicitation or that it had established a substantive relationship with such offerees prior to the commencement of such offering. As discussed above, an issuer cannot identify investors through TTW that constitutes general solicitation and then sell to those investors in a subsequent exempt offering not permitting general solicitation.

- The SEC stated in the adopting release an issuer may reasonably conclude on its own, depending on the facts and circumstances, that TTW activity limited to QIBs and IAIs would not constitute general solicitation. This supports what is likely to be the best practical approach to TTW in the exempt offering context, which is ***not*** to rely on Rule 241 in light of its burdensome conditions, and instead conduct TTW in a manner that does not constitute general solicitation.

— ***TTW Materials to Non-AIs.*** If the issuer sells securities under Rule 506(b) within 30 days of the generic solicitation to any purchaser that is not an AI, the issuer will be required to provide the purchaser with any written TTW materials a reasonable time before the sale. This requirement will apply whether or not the issuer engaged in general solicitation through its communications under new Rule 241 and whether or not the generic solicitation is subject to integration with the Rule 506(b) offering.

— ***No Blue Sky Preemption.*** Rule 241 also does not preempt state "blue sky" laws. This is consistent with the approach taken for Regulation A Tier 1 offerings, where concerns were raised by state regulators about TTW provisions in that context. The SEC noted that in light of the novel nature of this new exemption and the concerns for potential misuse, it believes that a more measured approach of not providing preemption is warranted at this time.

Demo Days and Similar Events

The amendments add Rule 148 under the Securities Act, which provides that certain "demo day" communications will not be deemed general solicitation. The rule applies to communications made in connection with a seminar or meeting in which more than one issuer participates that is sponsored by an institution of higher education, state or local government or instrumentality thereof, nonprofit organization, or angel investor group, incubator, or accelerator, provided that advertising for the event does not reference any specific offering and information communicated or distributed in connection with the event regarding any offering is limited to a notification that an offering is being planned, the type and amount of securities being offered, the intended use of proceeds and the unsubscribed amount in an offering.[15]

Additionally, for communications at a demo day to be covered, the sponsor is prohibited from:

— making investment recommendations or providing investment advice to attendees;

— engaging in any investment negotiations between the issuer and investors attending the event;

[15] Although Rule 148 was adopted substantially as proposed, several changes were made in response to comments received. The changes from the proposed rules include: (i) the requirement that more than one issuer participate in the demo day (a change made to prevent events that are essentially a sales pitch for the securities of one issuer, characterized as a "demo day"); (ii) the addition of state governments, as well as instrumentalities of state and local governments, to the list of eligible sponsors; and (iii) allowing issuers to include in the notification the unsubscribed amount in an offering.

— charging attendees any fees, other than reasonable administrative fees; and
— receiving any compensation for making introductions or investment negotiations, or any other activity that would require registration as a broker or dealer under the Exchange Act or as an investment adviser under the Advisers Act.

Finally, the SEC revised the proposed rules to place certain additional restrictions on online participation if the event allows attendees to participate virtually, citing concern that these events may allow broad offering-related communications to non-accredited investors. Under the amendments, online participation must be limited to:

— individuals who are members of, or otherwise associated with, the sponsor organization;
— individuals who the sponsor reasonably believes are AIs; or
— individuals who have been invited to the event by the sponsor based on industry or investment-related experience reasonably selected by the sponsor in good faith and disclosed in the public communications about the event.

III. Rule 506(c) Verification Requirements

Rule 506(c) allows general solicitation so long as the issuer takes "reasonable steps to verify" (RSTV) purchasers' AI status. Although the rule's verification methods are non-exclusive, the adopting release recognizes that the rule may be encouraging market participants to treat them as exclusive, and that some market participants have viewed the methods as onerous. In response, the SEC added a new item to the non-exclusive list: an issuer can establish that an investor as to whom the issuer previously used RSTV to verify AI status remains an AI at 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 rules, in response to commenter concerns, the SEC added a five-year time limit for reliance on a prior verification.

The adopting release also reaffirmed the SEC's guidance, discussed and updated in the proposing release, on the principles-based method of verification. The SEC noted that it continues to believe the following factors are among those that should be considered:

— ***Nature of the Purchaser.*** The nature of the purchaser and the type of AI that the purchaser claims to be.
— ***Amount and Type of Information.*** The amount and type of information that the issuer has about the purchaser.
— ***Nature of the Offering.*** The nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

The SEC acknowledged comments suggesting various other verification methods but declined to expand the list, citing a concern that a significant expansion of the list could further undermine the use of the principles-based method of verification. The SEC further reiterated that issuers are not required to use any of the methods set forth in the non-exclusive list and can apply the reasonableness standard directly to the specific facts and circumstances presented by the offering and investors in question.

The SEC also reiterated its view that there may be circumstances where the RSTV determination may not be substantially different from an issuer's development of a "reasonable belief" for Rule 506(b) purposes. For example, an issuer's receipt of a representation from an investor as to its AI status could meet the "reasonable steps" requirement if the issuer reasonably takes into consideration a prior substantive relationship with the investor or other facts that make apparent the accredited status of the investor. However, the SEC also reiterated that requiring an investor to simply check a box in a questionnaire would not be sufficient unless the issuer or its agent has additional relevant information indicating accredited investor status.

IV. SEC Views

The SEC was again divided on whether to adopt the amendments, as it has been in most of its significant recent rulemaking, including the changes to the AI

definition. Chairman Clayton emphasized how an overhaul of the exempt offering framework was long overdue, and praised the SEC's recommendation as being remarkable in its scope, efficiency and importance. Commissioner Peirce expressed a preference for additional relaxation of the restrictions, such as elimination of the cap on the number of non-AI purchasers permitted in all Rule 506(b) offerings within a 90-day period, broadening the scope of information that may be communicated in "demo days" and removal of the five-year time limit on the ability of issuers to rely on a prior verification of AI status. Commissioner Roisman, while supporting the amendments, noted that the SEC should see how market participants respond and where further changes or refinements might be helpful.

Commissioners Lee and Crenshaw dissented, delivering statements that focused on the lack of protection for retail investors and the absence of meaningful analysis on the consequences of the shift of capital to the private market in recent years. The two Democratic Commissioners also disagreed with the majority's view that the amendments would enhance investor opportunity, disputing the characterization that retail investors would find better opportunities in the private markets. Commissioner Lee also objected to new Rule 152's general framework of integration, arguing that the new rule, by eliminating any real analysis of whether separate offerings should be considered functionally the same, threatens to effectively nullify the integration doctrine.

V. Confidential Information Standard

In addition to amendments pertaining to the exempt offering framework, the SEC also amended Items 601(b)(2) and (b)(10) of Regulation S-K to (i) remove the requirement that information redacted from material contracts filed with the SEC must be likely to cause competitive harm to the registrant if publicly disclosed and (ii) replace it with a standard that permits registrants to redact information if it is the type of information that the registrant both customarily and actually treats as private and confidential. The requirement that the redacted information also must not be material is retained. These amendments bring the standard for redaction under Items 601(b)(2) and (b)(10) in line with the definition of "confidential" under Exemption 4 of the Freedom of Information Act established by the Supreme Court in *Food Marketing Institute v. Argus Leader Media*[16] and will eliminate potential confusion created by a disconnect between the standard to redact information in reliance on Item 601(b)(2) or (b)(10) and to request confidential treatment under Rule 24b-2 under the Exchange Act and Rule 406 under the Securities Act.

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[16] *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019).

ANNEX A – Overview of Amended Capital-Raising Exemptions[17]

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing or Disclosure 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 Aligned disclosure requirements for non-accredited investors with Regulation A offerings	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 reporting issuers that have not filed certain required reports	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

[17] Overview is copied from the adopting release for reference.

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing or Disclosure Requirements	Restrictions on Resale	Preemption of State Registration and Qualification
			"Bad actor" disqualifications apply No asset-backed securities				
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
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

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing or Disclosure Requirements	Restrictions on Resale	Preemption of State Registration and Qualification
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