

New Securities Rules Take Effect to Improve Exempt Offerings

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Amendments recently took effect to “address gaps and complexities” in the exempt offering framework that impede access to capital for issuers and access to investment opportunities for investors.” This Alert provides a brief summary of these amendments.

Offering and Investment Limits

- Rule 504 of Regulation D: the maximum offering amount was raised from \$5 million to \$10 million;
- Regulation A: the maximum offering amount under Tier 2 was raised from \$50 million to \$75 million and the maximum offering amount for secondary sales under Tier 2 was raised from \$15 million to \$22.5 million; and
- Regulation Crowdfunding: the offering limit was raised from \$1.07 million to \$5 million; investment limits for investors were removed for accredited investors; and the calculation of investment limits for non-accredited investors was changed to the greater of their annual income or net worth.

Pre-Offering Communications

- Generic solicitation of materials to “test-the-waters” are now permitted before the issuer determines which exemption to use (Rule 241);
- Regulation Crowdfunding issuers are now permitted to “test-the-waters” before filing an offering document; and
- Certain “demo days” communications are now permitted (Rule 148).

Integration Framework (new Rule 152 replaced old Rules 152 and 155)

New, non-exclusive safe harbors:

The amendments provide for the following new safe harbors:

- Offerings made more than 30 days before the commencement or after the completion/termination of any other offering would not be integrated, provided that where an exempt offering for which general solicitation is prohibited (such as Rule 506(b) offerings) is more than 30 days after an offering that allows general solicitation (such as Rule 506(c) offerings), 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: (i) did not solicit such purchaser through a general solicitation, or (ii) had a prior substantive relationship with such purchaser prior to the offering prohibiting general solicitation.

- Offers and sales made in exempt offerings for which general solicitation is permitted would not be integrated if made after a completed/terminated offering.
- Offers and sales made pursuant to employee benefit plans under Rule 701 of the Securities Act or in offshore offerings in compliance with Regulation S will not be integrated with other offerings.
- An offering for which a Securities Act registration statement has been filed will not be integrated if it is made subsequent to: (i) an offering for which general solicitation is not permitted; (ii) an offering for which general solicitation is permitted that was made only to qualified institutional and institutional accredited investors; or (iii) an offering for which general solicitation is permitted that was completed/terminated more than 30 days prior to the commencement of the registered offering.

General Principles If Safe Harbors Not Available

- Two or more offerings will not be integrated if the issuer can determine, under the specific facts and circumstances, that each offering either complies with the registration requirements of the Securities Act or qualifies for an exemption from registration. New Rule 152(a) sets forth the following guidelines to make this determination: (i) in determining whether to integrate an exempt offering that prohibits general solicitation with an exempt offering that permits general solicitation or with a registered public offering, the issuer must reasonably believe that each purchaser in the offering that prohibits general solicitation (whether exempt or registered), the issuer either (a) did not solicit such purchaser through a general solicitation, or (b) had a substantive relationship with such purchaser prior to the commencement of the exempt offering that prohibits general solicitation; and (ii) if an issuer is conducting two or more exempt offerings that permit general solicitation and the general solicitation materials for the offerings make reference to the other offerings, each offering must comply with its particular exemption requirements and the exemption requirements for each other offering.

Commencement and Completion/Termination of Offerings

- In general, an offering has commenced upon the first offer of securities by the issuer or its agents and an offering is considered to be completed or terminated when the issuer and its agents cease efforts to make further offers to sell the issuer's securities. Rules 152 (c) and (d) set forth factors (not definitions) to consider when determining if an offering has commenced or been completed/terminated pursuant to offerings under Rule 241, Section 4(a)(2), Regulation D, Rule 147 or 147A, Regulation A, Regulation Crowdfunding or a registered offering.

Eligibility under Regulation Crowdfunding and Regulation A

- The rules now permit the use of certain special purpose vehicles (SPVs) that function as a conduit for investors to facilitate investing in Regulation Crowdfunding issuers; and

- The amendments impose eligibility restrictions on the use of Regulation A by issuers that are delinquent in their Exchange Act reporting obligations.

Other Improvements

The amendments also:

- change the financial information to non-accredited investors in Rule 506(b) private placements to align with the financial information required under Regulation A;
- add another example of how to confirm that investors are accredited under Rule 506(c) private placements that permit general solicitation;
- simplify certain requirements for Regulation A offerings and establish greater consistency between Regulation A and registered offerings; and
- harmonize the bad actor qualification provisions in Regulations A, D, and Crowdfunding.

For questions regarding the revisions to exempt offerings, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



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