

SEC Adopts Rules to Improve the Framework for Exempt Offerings

January 20, 2021

In November 2020, the U.S. Securities and Exchange SEC (the “SEC”) adopted new rules to simplify and improve the framework for offerings exempt from SEC registration. These rule changes reduce regulatory friction and expand access to capital for small and medium-sized businesses and entrepreneurs.[1] Generally, the rules are effective March 15, 2021.

These amendments are the second set of rule changes intended to improve and update the framework for exempt offerings. The first set of rule changes expanded the definition of “accredited investor” and qualified institutional buyer”. Together these rule changes will allow more individuals and institutions to invest in exempt offerings under an improved, streamlined regulatory framework.

I. Summary

The amendments address:

(1) “Testing-the Waters” Generic Solicitation of Interest and “Demo Day” Communications; General Solicitation: The new rules permit an issuer to use generic solicitation materials to “test-the-waters” for an exempt offer of securities before determining which exemption will be used. The new rules permit crowdfunding issuers to “test-the-waters” before they file an offering document the same way Regulation A issues can. The new rules also provide an exemption for certain communications for demo days and similar events from general solicitations or general advertising.

(2) Integration: Integration relates to whether two seemingly separate offerings are treated as one integrated offering, which could destroy the exemptions being relied on because each of the exemptions has different conditions. This threat of integration affects the ability of issuers to conduct two or more offerings simultaneously, move from one exemption to another, or between registered and exempt offerings. The SEC replaced the outdated five-factor test, with a general integration principle that looks at the particular facts and circumstances of two or more offerings along with four specific safe harbors to enable issuers to move from one exemption to another.

(3) Rule 506(c) Verification: For offerings under Rule 506(c), which permits general solicitation, the issuer must take reasonable steps to verify that each purchaser is an accredited investor. The amendments add an additional safe harbor, verification method that, in effect, provides a five-year time-limit for a prior verification.

(4) Regulation D Financial Information: The amendments change the financial statements that must be provided in a Rule 506(b) private offering to non- accredited investors. The new requirements align the Rule 506(b) financial statements with financial statements that must be provided to investors in Regulation A offerings. The new financial statement requirements are as follows:

(a) For offerings up to \$20 million: Consolidated balance sheets of the issuer for the two previous fiscal years; consolidated statements of comprehensive income, cash flows, and stockholders’ equity of the issuer; not more than nine months old. These do not have to be audited statements

(b) For offerings over \$20 million: Two years audited financial statements (if the issuer is more than two-years old).

(5) Confidential Information Standard: The amendments change the standard for when redaction of confidential information is permitted in an SEC filing. Issuers may now redact information that is not material that the issuer treats as confidential, and issuers no longer have to demonstrate that disclosure of the confidential information would cause competitive harm.

(6) Increased Offering and Investment Limits in Offerings under Regulation A, Regulation Crowdfunding and Rule 504: The SEC increased the offering limits for:

(a) Regulation A, Tier 2, from \$50 million to \$75 million;

(b) Regulation A for secondary sales under Tier 2, from \$15 million to \$22.5 million; and

(c) Regulation Crowdfunding, from \$1.07 million to \$5 million.

The SEC also increased the Regulation Crowdfunding investor investment limits.

We have attached as Table 1 an overview of the most commonly used exemptions from registration, as amended by the new rules under the release.

II. General Solicitation and Offering Communications

The SEC has controlled publicity efforts in exempt offerings through its definition of the term “offer”, which the SEC has interpreted very broadly. The SEC has taken the position that publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer.” This has extended the SEC restrictions on publicity to the terms “general solicitation” and “general advertising”, which are not defined. Examples of general solicitation and general advertising include advertisements published in newspapers and magazines, communications broadcast over television and radio, and seminars where attendees have been invited by general solicitation or general advertising, and other uses of publicly available media, such as unrestricted websites.

Section 4(a)(2) of the Securities Act exempts from registration “transactions by an issuer not involving any public offering,” but does not define the phrase. This is the “classic” private placement exemption. Whether a transaction is one not involving any public offering is essentially a question of fact and necessitates a consideration of the surrounding circumstances, including factors such as the relationship between the offerees and the issuer, and the nature, scope, size, type, and manner of the offering. The SEC adopted Rule 506 of Regulation D in 1982 as a non-exclusive safe harbor under Section 4(a)(2), to provide objective standards on which an issuer could rely to meet the requirements of the Section 4(a)(2) exemption, including a prohibition on the use of general solicitation to market the securities.

A. Generic Solicitation of Interest Exemption

Under new Rule 241, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated offering of securities exempt from registration under the Securities Act. The new rule allows an issuer to gauge market interest in an exempt securities offering before incurring the expense of preparing and conducting an offer, which enables it to tailor the size and terms of the offering (possibly with input from potential investors) and to reduce the cost of conducting an exempt offering.

1. The conditions of the rule are as follows:

a. No Exemption Chosen.

The issuer cannot have already identified the specific exemption from registration on which it intends to rely for the subsequent offering.

b. No Money or Binding Commitments.

No solicitation or acceptance of money or other consideration nor any commitment, binding or otherwise, from any person is permitted until the issuer determines the exemption it will rely on and commences the offering in compliance with that exemption.

c. Legends.

The generic testing-the-waters materials must provide specified disclosures notifying potential investors about the limitations of the generic solicitation. The issuer's communications must state that: (i) The issuer is considering an offering of securities exempt from registration under the Securities Act, but has not determined a specific exemption from registration the issuer intends to rely on for the subsequent offer and sale of the securities; (ii) No money or other consideration is being solicited, and if sent in response, will not be accepted; (iii) No offer to buy the securities can be accepted and no part of the purchase price can be received until the issuer determines the exemption under which the offering is intended to be conducted and, where applicable, the filing, disclosure, or qualification requirements of such exemption are met; and (iv) A person's indication of interest involves no obligation or commitment of any kind.

2. Permitted Reply Information

The communication may include a means for a person to indicate interest in a potential offering, and an issuer may require the indication to include the person's name, address, telephone number, and/or email address.

The Rule provides an exemption from registration only for 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 of the federal securities laws.

3. May Be General Solicitation

Depending on the method of dissemination of the information, the generic testing-the-waters offer itself may be considered a general solicitation. Rule 241 provides an exemption from registration only for the generic solicitation of interest not for a subsequent offer or sale. If the generic solicitation is done in a way that would constitute general solicitation, and the issuer ultimately decides to conduct an unregistered offering under an exemption that does not permit general solicitation, the issuer will need to assess whether that solicitation and the subsequent private offering will be integrated, thereby making unavailable an exemption that does not permit general solicitation.

An issuer will not be able to follow a generic solicitation of interest that constituted a general solicitation with an offering under an exemption that does not permit general solicitation, such as Rule 506(b), unless the issuer has a reasonable belief, based on the facts and circumstances, for each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either did not solicit such purchaser through the use of general solicitation or established a substantive relationship with such purchaser before the commencement of the exempt offering prohibiting general solicitation. For example, an issuer may reasonably conclude on its own that "testing-the-waters" activity is limited to QIBs and IAs would not constitute general solicitation depending on the facts and circumstances, or, the issuer could wait 30 days after terminating testing-the-waters before commencing a private offering. The best practical solution may be not to rely on Rule 241 and instead conduct the testing-the-waters in a manner that does not constitute general solicitation.

4. Non-Accredited Investors

If an issuer sells securities under Rule 506(b) to any purchaser that is not an accredited investor within 30 days of the generic solicitation of interest, it must provide such purchaser with a written communication used under Rule 241 a reasonable time before sale. This requirement

applies whether or not the issuer engaged in general solicitation through its communications under Rule 241 and whether or not the generic solicitation would be subject to integration with the Rule 506(b) offering.

5. No State Blue Sky Exemption

Rule 241 does not preempt any state blue sky laws for these offers.

B. Exemption from General Solicitation for “Demo Days” and Similar Events

New Rule 148 provides that certain “demo day” communications would not be deemed general solicitation or general advertising. A communication will not be a general solicitation if it is made in connection with a seminar or meeting in which more than one issuer participates that is sponsored by a college, university, or other institution of higher education, a State or local government or instrumentality of a state or local government, a nonprofit organization, or an angel investor group, incubator, or accelerator.

The conditions of the exemption are as follows:

1. The advertising for the event may not reference any specific offering of securities by an issuer and the information conveyed at the event regarding any offering of securities by or on behalf of the issuer is limited to: (i) notification that the issuer is in the process of offering or planning to offer securities; (ii) the type and amount of securities being offered; (iii) the intended use of the proceeds of the offering; and (iv) the unsubscribed amount in an offering.
2. For communications at demo days to be covered, the Sponsor may not: (i) Make investment recommendations or provide investment advice to attendees; (ii) Engage in any investment negotiations between the issuer and investors attending the event; (iii) Charge attendees any fees, other than reasonable administrative fees; (iv) Receive any compensation for making introductions between attendees and issuers, or for investment negotiations between the parties; or (v) Receive any compensation for any other activity that would require it to register as a broker or dealer under the Exchange Act, or as an investment adviser under the Advisers Act.
3. Online participation in the event must be limited to: (i) individuals who are members of, or otherwise associated with the sponsor organization (for example, members of an angel investor group of students, faculty, or alumni of a college or university); (ii) individuals that the sponsor reasonably believes are accredited investors; or (iii) 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.[3]

III. Integration: New Rule 152

The integration doctrine seeks to prevent an issuer from avoiding registration by artificially dividing a single non-exempt offering into multiple exempt offerings. New Rule 152 provides an integration framework for all offerings, registered and exempt. It is composed of a general integration principle of new Rule 152(a), that looks to facts and circumstances and four safe harbors apply to specific situations. The new Rule 152 replaces the five-factor test with the SEC’s more modern approach to integration, which among other things reduces the time period outside of which separate offers would not be considered integrated from six months to thirty days. Attached as Exhibit 2 are Tables 2(a) and 2(b), which provide an overview of the general integration principle and safe harbors in new Rule 152, each of which is discussed in more detail below.

A. Rule 152(a) General Principle

The Rule 152(a) general principle provides that, for all offerings not covered by a safe harbor in Rule 152(b), offers and sales will not be integrated if, based on the particular 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.

1. For Exempt Offerings When General Solicitation is NOT Permitted

(Rule 152(a)(1)) Rule 152(a)(1) provides that for an exempt offering for which general solicitation is not permitted, offers and sales would not be integrated with other offerings close in time if the issuer has a reasonable belief, based on the facts and circumstances for each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or its agent) either:

- a. Did not solicit such purchaser through the use of general solicitation; or
- b. Established a substantive relationship with the purchaser before the commencement of the exempt offering prohibiting general solicitation.

2. For Exempt Offerings When General Solicitation IS Permitted (Rule 152(a)(2))

For two or more concurrent offerings each relying on a Securities Act exemption permitting general solicitation,[4] in addition to satisfying the requirements of the particular exemption relied on general solicitation offering materials for one offering (the “first offering”) that includes information about the material terms of a concurrent offering (the “second offering”) under another exemption may constitute an “offer” of the securities in that other (second) offering. Therefore, the first offer must also comply with all the requirements for, and restrictions on, offers under the exemption being relied on for that other offering, including any necessary legends or communications restrictions for that other (second) offer.[5]

3. How the Rule Works

Under the new Rule 152(a), issuers may conduct at the same time (or within 30 days), a Rule 506(c) offering (which permits general solicitation) and a Rule 506(b) private placement (which prohibits general solicitation), or any other combination of offerings, involving an offering prohibiting general solicitation and another offering permitting general solicitation, such as registered offering, without integration, so long as the Rule 152(a)(1) and the other conditions of the applicable exemptions are satisfied.[6] That is, the offerings would not be integrated if the purchasers in the Rule 506(b) offering were not solicited through the use of the general solicitation, or the issuer established a substantive relationship with the purchaser before the Rule 506(b) offering commenced.[7]

4. Pre-Existing Substantive Relationship

New Rule 152(a)(1)(ii) allows a purchaser with whom the issuer or person acting on its behalf has a pre-existing, substantive relationship to participate in the offering that prohibits general solicitation even though the issuer is conducting a concurrent offering that permits general solicitation as long as that relationship was not established through that concurrent offering. The existence of such a relationship before the commencement of an offering is one means, but not the exclusive means, of demonstrating the absence of a general solicitation in a Regulation D offering.

A “pre-existing” relationship as one that the issuer has formed with an offeree before the commencement of the offering or, alternatively, that was established through another person (for example, a registered broker-dealer or investment adviser) before that person’s participation in the offering.[8] 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 or her status as an accredited or sophisticated investor.

Generally, whether a “pre-existing, substantive relationship” exists turns 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, and thus, implies that a substantive relationship exists between the broker-dealer and its customers. However, the presence or absence of a general solicitation is always dependent on the facts and circumstances of each particular case. Thus, there may be facts and circumstances in which a third party, other than a registered broker-dealer, could establish a “pre-existing, substantive relationship” sufficient to avoid a “general solicitation.”

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. 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.

Investors with whom the issuer has a pre-existing substantive relationship may include the issuer’s existing or prior investors, investors in prior deals of the issuer’s management, or friends or family of the issuer’s control persons. Similarly, such investors may also include customers of a registered broker-dealer or investment adviser with whom the broker-dealer or investment adviser established a substantive relationship before the participation in the exempt offering by the broker-dealer or investment adviser.

Self-certification alone (by checking a box) without any other knowledge of a person’s financial circumstances or sophistication would not be sufficient to form a “substantive” relationship for these purposes.

B. General Anti-Evasion Provision

The introductory language to the rule provides that although it may be possible to structure two or more offerings such that they appear to technically comply with the terms of applicable exemptions, if that structuring is part of a plan or scheme to evade the registration requirements of the Securities Act, the offerings would still be integrated even if the offerings technically fit within one of the four safe harbors below.

C. Integration Safe Harbors (New Rule 152(b))

Rule 152(b) provides four non-exclusive safe harbors from integration for offers and sales meeting the conditions of the relevant safe harbor.

1. 30-Day Integration Safe Harbor (Rule 152(b)(1))

This safe harbor applies to both registered offerings and exempt offerings. Rule 152(b)(1) provides that any offering terminated or completed more than 30 calendar days before the commencement of another offering, or commenced more than 30 calendar days after the termination or completion of another offering, will not be integrated with the other offering.^[9] This rule shortens the prior integration safe harbor from six months to 30 days outside of which other offerings will not be integrated.

However, for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more after an offering that allows general solicitation, the issuer must have a reasonable belief, that either: (i) each purchaser was not solicited through the use of general solicitation, or (ii) the issuer (or its agent) established a substantive relationship with such purchaser before the commencement of the exempt offering prohibiting general solicitation.

If an issuer waits less than 30 days after terminating or completing an offering before commencing a subsequent offering, and therefore cannot rely on the safe harbor in Rule 152(b)(1), it may still avoid integration if it meets the terms and conditions of the general principle of integration in Rule 152(a).

Limit on Non-Accredited Investors

In light of new Rule 152(b)(1) and its 30 day safe harbor, for a Rule 506(b) offering, the SEC changed the number of non-accredited investors purchasing in Rule 506(b) offerings to no more than 35 within a 90 calendar day period.

A. Rule 701, Employee Benefit Plans and Regulation S (Rule 152(b)(2))

Under Rule 152(b)(2), all offers and sales made in compliance with Rule 701, under an employee benefit plan, or in compliance with Regulation S, will not be integrated with other concurrent offerings.

For Regulation S offerings, Rule 152(b)(2) provides that offshore transactions made in compliance with Regulation S will not be integrated with contemporaneous registered domestic offerings or exempt domestic offerings. However, care must still be taken that general solicitation for exempt U.S. offerings are not directed selling efforts precluded under Regulation S, which would depend on the facts and circumstances of a particular situation. For example, the use of the same website to solicit U.S. investors under Rule 506(c) and offshore 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 such situations, the issuer should take steps to distinguish the Regulation S and domestic offering materials, pursuant to previous SEC guidance.^[10]

B. Subsequent Registered Offerings (Rule 152(b)(3))

Under Rule 152(b)(3), an offering for which a Securities Act registration statement has been filed will not be integrated if it is made after: (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 but made only to Qualified Institutional Buyers (i.e., Rule 144A "QIBs") and Institutional Accredited Investors (i.e., Reg. D entities, "IAs"), or (iii) any offering for which general solicitation is permitted that terminated or completed more than 30 calendar days before the registered offering. This permits capital raising around the time of an IPO, which can help issuers obtain funds during the IPO process.

C. Offers or Sales Before Exempt Offerings Permitting General Solicitation (Rule 152(b)(4))

Under 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 after any other terminated or completed offering. Offers and sales that precede exempt offerings that permit general solicitation generally are not the type of offerings that condition the market for the subsequent offering.

The SEC provided guidance concerning an issuer's ability to rely on Rule 152(b)(4) for an offering that was commenced under an exemption that does not permit general solicitation, but that the issuer wishes to continue under an exemption that does permit general solicitation. An issuer may rely on the safe harbor in new Rule 152(b)(4) if, for example, the issuer commences an offering under Rule 506(b) and thereafter engages in general solicitation in reliance on Rule 506(c) so long as once the issuer engages in general solicitation, it relies on Rule 506(c) for all subsequent sales, thereby effectively terminating the Rule 506(b) offering, including by selling exclusively to accredited investors and taking reasonable steps to verify the accredited investor status of each purchaser. The use of general solicitation in reliance on Rule 506(c) will not affect the exempt status of prior offers and sales of securities made in reliance on Rule 506(b). It is also not necessary for an issuer to use different offering materials for offerings that rely on different exemptions, so long as the issuer satisfies the disclosure and other requirements of each applicable exemption.

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

New Rule 152 provides a non-exclusive list of factors to consider (rather than fixed definitions) in determining when an offering will be deemed to be commenced, terminated or completed, for purposes of both the general principle of integration under Rule 152(a) and the safe harbor rules under Rule 152(b).

New Rule 152(c) states that an offering of securities will be deemed to commence for purposes of Rule 152 at the time of the first offer of securities in the offering by the issuer or its agents.

For determining when an offering commences, the non-exclusive list of factors covers registered and exempt offerings, noting that an issuer or its agents may commence an offering in reliance on:

1. Rule 241, (Solicitation of Interest) 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;
2. Section 4(a)(2), Regulation D, (Exempt Offerings) on the date the issuer first made an offer of its securities in reliance on these exemptions;
3. A registration statement filed under the Securities Act for:

(a) A continuous offering that will commence promptly 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, or

(b) 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: (a) the first filing of a prospectus supplement with the SEC describing the delayed offering, or (b) the issuance of a widely disseminated public disclosure, such as a press release, confirming the commencement of the delayed offering.

Due to their non-public nature, communications between an issuer, or its agents and underwriters, and QIBs and IAs, including those that would qualify for the “testing-the-waters” safe harbor in Rule 163B, will not be considered as the commencement of a registered public offering for purposes of new Rule 152. In contrast, the commencement of private communications between an issuer, or its agents, including private placement 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 as the commencement of the non-public exempt offering for purposes of new Rule 152, if such private communication involves an offer of securities.

New Rule 152(d) provides a non-exclusive list of factors that should be considered in determining when an offering is deemed to be “terminated or completed.” Rule 152(d) states that termination or completion of an offering is likely to be deemed to occur when the issuer and its agents cease efforts to make further offers to sell the issuer’s securities under such offering.

1. An offering made in reliance on Section 4(a)(2), Regulation D, would be considered “terminated” or “completed” on the later of the date:

(a) The issuer entered into a binding commitment to sell all securities to be sold under the offering (subject only to conditions outside of the investor’s control^[11]); or

(b) The issuer and its agents ceased efforts to make further offers to sell the issuer’s securities under such offering;

2. An offering made pursuant to a registration statement filed under the Securities Act would be considered “terminated” or completed”, on:

(a) The withdrawal of the registration statement after an application is granted or deemed granted under Rule 477;

(b) 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;

(c) The entry of an order of the SEC declaring that the registration statement has been abandoned under Rule 479;

(d) 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

(e) 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, which could be evidenced by:

i. The filing of a Current Report on Form 8-K; or

ii. The issuance of a widely disseminated public disclosure by the issuer, or its agents, informing the market that the offering, or particular delayed offering, in the case of a shelf registration statement, has been terminated or completed.

Issuers may terminate an offering of securities in reliance on one exemption and simultaneously commence an offering of the same securities in reliance on another exemption if an issuer and its agents ceased efforts to make further offers to sell the issuer's securities under the exemption for the terminated offering.

A particular delayed offering may be deemed terminated or completed, even though the issuer's shelf registration statement may still have unused capacity, or an aggregate amount of securities available to offer and sell in a later delayed registered offering.

IV. Rule 506(c) Verification Requirements

Rule 506(c) permits issuers to generally solicit and advertise an offering, provided that all purchasers in the offering are accredited investors, the issuer takes reasonable steps to verify that purchasers are accredited investors, and certain other conditions in Regulation D are satisfied.

The SEC added a new item to the non-exclusive list of verification methods that an issuer may use. An issuer may establish that an investor that the issuer previously took reasonable steps to verify as an accredited investor in accordance with Rule 506(c)(2)(ii) remains an accredited investor at the time of a subsequent sale if the investor provides a written representation that the investor continues to qualify as an accredited investor and the issuer is not aware of information to the contrary. However, there is a five-year time limit on the ability of issuers to rely on a prior verification.

The SEC reaffirmed and updated its prior guidance for the principles-based method for verification, and in particular what may be considered "reasonable steps" to verify an investor's accredited investor status. The following factors are among those an issuer should consider:

a. The nature of the purchaser and the type of accredited investor that the purchaser claims to be;

b. The amount and type of information that the issuer has about the purchaser; and

c. 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.^[12]

In some circumstances, the reasonable steps 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 his or her accredited 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. That same representation from an investor may not meet the “reasonable steps” requirement if the issuer has no other information about the investor or has information that does not support the view that the investor was an accredited investor.

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 the investors. However, the SEC reiterated that an issuer will not be considered to have taken reasonable steps to verify accredited investor status if it, or those acting on its behalf, require only that a person check a box in a questionnaire or sign a form, absent other information about the purchase indicating accredited investor status.

Cont.: [Table Overview and Summary PDF](#).

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[1] SEC Release No. 33-10884 (November 2, 2020).

[2] “Angel investor groups,” besides consisting of only accredited investors and holding regular meetings are required to have “defined processes and procedures” for investment decisions, but these processes and procedures are not required to be written. Additionally, the group may not be associated or affiliated with brokers, dealers or investment advisers.

[3] Issuers may continue to rely on the SEC’s previously issued guidance, and not be subject to the conditions of Rule 148, including the limit on communications, if the organizer of the event has limited participation in the event to individuals or groups of individuals with whom the issuer or the organizer has a pre-existing substantive relationship or that have been contacted through an informal, person network of experienced, financially sophisticated individuals.

[4] Concurrent offerings permitting general solicitation include Rule 506(c), Regulation A, and Regulation Crowdfunding and intrastate or regional offerings under Rules 147 and 147A or Rule 504(b)(1)(i), Rule 504(b)(1)(ii), Rule 504(b)(1)(iii).

[5] For example, the limitations on advertising the terms of an offering under Rule 204 of Regulation Crowdfunding would limit the issuer’s ability to reference the terms of that offering in a general solicitation in connection with a concurrent offering made under Regulation A, Rule 506(c), or Rule 147A.

[6] However, a general solicitation permitted in connection with one offering that mentions the material terms of a concurrent or subsequent exempt offering prohibiting general solicitation may constitute an offer for the concurrent or subsequent exempt offering prohibiting general solicitation and thereby violate the prohibition on general solicitation for that concurrent or subsequent offering prohibiting general solicitation.

[7] 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).

[8] Certain offerings by private funds that rely on the exclusions from the definition of “investment company” set forth in Investment Company Act Sections 3(c)(1) and 3(c)(7) posted on a website or platform may be able to rely on a limited staff accommodation concerning the timing of the formation of a relationship. See Division of Investment Management no-action letter to Lamp Technologies, Inc. (May 29, 1997).

[9] Under Rules 147, 147A, and 251, subsequent offers and sales will not be integrated with offers and sales that are registered under the Securities Act, exempt from registration under Rule 701, Regulation A, Regulation S, or Section 4(a)(6) of the Securities Act, or made under an

employee benefit plan. Further, generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offers and sales of securities being made outside the United States in compliance with Regulation S.

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

[11] By limiting the conditions to those outside the investor's control, an issuer may take the position that an offering is terminated or completed at a point in time before the actual closing of the transaction, so long as the only remaining conditions are solely within the issuer's control.

[12] See *id.* at Section II.B.3.a.

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