

Securities Practice Group

January 21, 2021

## SEC Adopts Rules to Improve the Framework for Exempt Offerings

**Table 1: Overview of Capital-Raising Exemptions<sup>1</sup>**

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing Requirements	Restrictions on Resale	Preemption of State Registration and Qualification
Section 4(a)(2)	None	No	None	Transactions by an issuer not involving any public offering. See <i>SEC v. Ralston Purina Co.</i>	None	Yes. Restricted securities	No
17 CFR 230.506(b) (“Rule 506(b)” of Regulation D)	None	No	“Bad actor” disqualifications apply	Unlimited accredited investors  Up to 35 sophisticated but non-accredited investors in a 90-day period	17 CFR 239.500 (“Form D”)	Yes. Restricted securities	Yes
17 CFR 230.506(c) (“Rule 506(c)” of Regulation D)	None	Yes	“Bad actor” disqualifications apply	Unlimited accredited investors  Issuer must take reasonable steps to verify that all purchasers are accredited investors*	Form D	Yes. Restricted securities	Yes
Regulation A: Tier 1	\$20 million	Permitted; before qualification, testing the waters permitted before and after the offering statement is filed	U.S. or Canadian issuers  Excludes blank check companies, registered investment companies, business development companies, issuers of certain securities, certain issuers subject to a Section 12(j) order, and Regulation A and Exchange Act reporting companies that have not filed certain required reports.  “Bad actor” disqualifications apply*  No asset-backed securities.	None	Form 1-A, including two years of financial statements  Exit report	No	No
Regulation A: Tier 2	\$75 million			Non-accredited investors are subject to investment limits based on the greater of annual income and net worth, unless securities will be listed on a national securities exchange	Form 1-A, including two years of audited financial statements  Annual, semi-annual, current, and exit reports	No	Yes
Rule 504 of Regulation D	\$10 million	Permitted in limited circumstances	Excludes blank check companies, Exchange Act reporting companies, and investment companies	None	Form D	Yes. Restricted securities except in limited circumstances	No

<sup>1</sup> Table 1 is organized by typical offering size from largest to smallest. The information in this table is not comprehensive and is intended only to highlight some of the more significant aspects of the current rules.

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing Requirements	Restrictions on Resale	Preemption of State Registration and Qualification
			"Bad actor" disqualifications apply				
<b>Regulation Crowdfunding; Section 4(a)(6)</b>	\$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
<b>Intrastate: Section 3(a)(11)</b>	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
<b>Intrastate: Rule 147</b>	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
<b>Intrastate: Rule 147A</b>	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

**Table 2(a): Overview of the General Integration Principle in New Rule 152<sup>2</sup>**

Integration Principle in New Rule 152(a)	
General Principle of Integration	If the safe harbors in Rule 152(b) do not apply, in determining whether two or more offerings are to be treated as one for the purpose of registration or qualifying for an exemption from registration under the Securities Act, 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.
Application of the General Principle to an exempt offering prohibiting general solicitation  17 CFR 230.152(a)(1) (“Rule 152(a)(1)”)	The issuer must have 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:  (i) Did not solicit such purchaser through the use of general solicitation; or  (ii) Established a substantive relationship with such purchaser before the commencement of the exempt offering prohibiting general solicitation.
Application of the General Principle to concurrent exempt offerings that each allow general solicitation  17 CFR 230.152(a)(2) (“Rule 152(a)(2)”)	In addition to satisfying the requirements of the particular exemption relied on, general solicitation offering materials for one offering that include information about the material terms of a concurrent offering under another exemption may constitute an offer of the securities in such other offering, and therefore the offer must comply with all the requirements for, and restrictions on, offers under the exemption being relied on for such other offering, including any legend requirements and communications restrictions.

<sup>2</sup> Rule 152 will not permit avoiding integration for any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act. This Rule 152 anti-evasion applies to the entire rule, and not just the safe harbors.

**Table 2(b): Overview of the Integration Safe Harbors in New Rule 152<sup>3</sup>**

<b>Non-Exclusive Integration Safe Harbors in new Rule 152(b)</b>	
<p>Safe Harbor 1</p> <p>17 CFR 230.152(b)(1) ("Rule 152(b)(1)")</p>	<p>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 such other offering; provided that, for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of Rule 152(a)(1) shall apply.</p>
<p>Safe Harbor 2</p> <p>17 CFR 230.152(b)(2) ("Rule 152(b)(2)")</p>	<p>Offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with 17 CFR 230.901 through 230.905 ("Regulation S") will not be integrated with other offerings.</p>
<p>Safe Harbor 3</p> <p>17 CFR 230.152(b)(1) ("Rule 152(b)(3)")</p>	<p>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 that was made only to qualified institutional buyers ("QIBs") and institutional accredited investors ("IAIs"); or (iii) an offering for which general solicitation is permitted that terminated or completed more than 30 calendar days before the commencement of the registered offering. See 17 CFR 230.144(a)(1) for the definition of "qualified institutional buyer," and 17 CFR 230.501(a)(1), (2), (3), (7), (8), (9), (12), and (13) for a list of entities that are considered "institutional accredited investors."</p>
<p>Safe Harbor 4</p> <p>17 CFR 230.152(b)(1) ("Rule 152(b)(4)")</p>	<p>Offers and sales made in reliance on an exemption for which general solicitation is permitted will not be integrated if made after any terminated or completed offering.</p>

<sup>3</sup> No integration analysis under Rule 152(a) is required if any of the non-exclusive safe harbors in Rule 152(b) apply. However, a plan or scheme to evade the registration requirements language covers the entire rule, including the safe harbors.

**Table 3: Summary of Types of Offerings Not Integrated Under the Safe Harbor**

Offering 1	Offering 2
<p>Any offering, which includes:</p> <p>Exempt offering permitting general solicitation, including:</p> <ul style="list-style-type: none"> <li>• Regulation A</li> <li>• Regulation Crowdfunding</li> <li>• Rule 147 or 147A</li> <li>• Rules 504(b)(1)(i), (ii), or (iii)</li> <li>• Rule 506(c)</li> </ul> <p>Exempt offering prohibiting general solicitation, including:</p> <ul style="list-style-type: none"> <li>• 17 CFR 230.504(b)(1)</li> <li>• Rule 506(b)</li> <li>• Section 4(a)(2)</li> </ul> <p>Securities Act registered offering</p>	<p>Exempt offering permitting general solicitation, including:</p> <ul style="list-style-type: none"> <li>• Regulation A</li> <li>• Regulation Crowdfunding</li> <li>• Rule 147 or 147A</li> <li>• Rules 504(b)(1)(i), (ii), or (iii)</li> <li>• Rule 506(c)</li> </ul>

**Table 4: Current Regulation A Financial Statement Requirements**

<b>Offering Size</b>	<b>Financial Statement Information Required</b>	<b>Age of Financial Statements</b>	<b>Audit Required</b>
Up to \$20 million (Tier 1):	<p>Consolidated balance sheets of the issuer for the two previous fiscal year ends (or for such shorter time that the issuer has been in existence);</p> <p>Consolidated statements of comprehensive income, cash flows, and stockholders' equity of the issuer; and</p> <p>Financial statements of guarantors and issuers of guaranteed securities, affiliates whose securities collateralize an issuance, significant acquired or to be acquired businesses and real estate operations, and pro forma information relating to significant business combinations</p>	Not more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months	No, unless issuer has already obtained an audit for another purpose
Up to \$50 million (Tier 2):	Financial statements in compliance with Article 8 of Regulation S-X	Not more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months	Yes (but see paragraph (c) in Part F/S of Form 1-A noting that interim financial statements need not be audited)

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