



Alerts

SEC Adopts Exempt Offering Rule Changes That Increase Offering Limits and Harmonize Exempt Offerings

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Hinshaw Alert

The Securities and Exchange Commission (SEC) on November 2, 2020, adopted a set of amendments to simplify and improve the exempt offering framework. The amendments are designed to make it easier for issuers to access the capital markets and to provide additional investment opportunities for investors.

The amendments, among other things, increase the offering limits in offerings relating to Regulation A, Regulation Crowdfunding, and Rule 504 of Regulation D.

These amendments will be effective in early January of 2021.

Regulation A

Current Offering Limits

On March 25, 2015, the SEC adopted rules that significantly expanded and revised Regulation A, creating two tiers of Regulation A offerings:

- Tier One: Securities offerings of up to \$20 million in a 12-month period, including sales for the account of selling securityholders equal to \$6 million or 30% of the aggregate offering price—whichever is less—including sales by the issuer.
- Tier Two: Securities offerings of up to \$50 million in a 12-month period, including sales for the account of selling securityholders equal to \$15 million or 30% of the aggregate offering price—whichever is less—including sales by the issuer.

The portion of the aggregate offering price attributable to the securities of selling securityholders may not exceed 30% of the aggregate offering price of a particular offering in:

1. The issuer's first offering pursuant to Regulation A; or
2. Any subsequent Regulation A offering that is qualified within one year of the qualification date of the issuer's first offering.

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New Offering Limits

The amendments increase the maximum offering amount under a Tier 2 offering from \$50 million to \$75 million and increase the maximum amount of secondary sales from \$15 million to \$22.5 million.

Crowdfunding

Current Offering and Investment Limits

The crowdfunding rules contain the following thresholds and limits:

- The aggregate amount of securities that may be sold by a company within a 12-month period in crowdfunding transactions may not exceed \$1.07 million.
- During any 12-month period, the aggregate amount of securities sold to any investor **by all companies in crowdfunding transactions** must not exceed the greater of:
- \$2,200 or 5% of the **lesser** of the investor's annual income or net worth, if either the annual income or the net worth of the investor is less than \$107,000;
- 10% of the **lesser** of the investor's annual income or net worth, if **both** the annual income or net worth of the investor is equal to or more than \$107,000; and
- a maximum aggregate amount of \$107,000 for all crowdfunding purchases in the 12-month period.

The investor-purchase limits are calculated on all crowdfunding purchases made by an investor during any 12-month period. Thus, an investor's purchases **in all crowdfunding transactions during such period must be aggregated** (and not just from the current offering in which the investor is participating).

The net-worth and annual-income tests are calculated using the accredited-investor tests contained in Rule 501 of Regulation D.

New Offering and Investment Limits

The amendments increase the maximum offering limits under Regulation Crowdfunding from \$1.07 million for a 12-month period to \$5 million.

In addition, they eliminate the purchase limitations for accredited investors. Accredited investors will be able to purchase any amount of securities in a crowdfunding offering and are not subject to the 12-month period rule.

The amendments allow non-accredited investors to purchase during any 12-month period:

- The **greater** of \$2,200, or 5% of the **greater** of the investor's annual income or net worth, if **either** the investor's annual income or net worth is less than \$107,000; or
- 10% of the **greater** of the investor's annual income or net worth, not to exceed an amount sold to the investor of \$107,000 in all transactions during a 12-month period, if **both** the investor's annual income and net worth are equal to or more than \$107,000.

As a consequence, a non-accredited investor satisfying the requirements of the second bullet point above will be able to purchase up to \$107,000 in all crowdfunding offerings in which the investor participates during a 12-month period.

Temporary Relief for Certain Crowdfunding Offers

The SEC extended temporary relief until August 28, 2022, of certain financial-statement-review requirements for issuers offering \$250,000 or less of securities in a crowdfunding offering.



Rule 504

Current Offering Limits

Rule 504 permits sales of up to \$5 million of securities during any 12-month period.

New Offering Limits

The amendments increase Rule 504's maximum offering limits from \$5 million to \$10 million during any 12-month period.

Safe Harbor Exemptions

The SEC's integration rules and guidance seek to prevent an issuer from avoiding the 1933 Securities Act registration requirements by artificially dividing a single offering into multiple offerings. This division allows an issuer to rely on different exemptions for multiple offerings that would be unavailable if the offerings were combined.

The SEC's integration rules and guidance, however, present problems for issuers legitimately using multiple private offering exemptions, either concurrently or within close proximity to each other. The SEC may determine that one or more of the exemptions do not apply when the offerings are viewed as being "integrated" for purposes of analyzing compliance, which could cause the issuer to lose that exemption.

To assist issuers in avoiding integration problems, the new SEC rule (Rule 152) provides four simple, non-exclusive safe harbors from integration. The new rule provides that:

- 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 (s); provided that:
- In the case where an exempt offering for which general solicitation is prohibited follows by 30 calendar days or more an offering that allows general solicitation, the issuer has 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 did not solicit such purchaser through the use of general solicitation or established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation;
- Offers and sales made in compliance with Rule 701, pursuant to an employee benefits plan, or 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:
- A terminated or completed offering for which general solicitation is not permitted;
- A terminated or completed offering for which general solicitation is permitted that was made only to qualified institutional buyers and institutional accredited investors; or
- An offering for which general solicitation is permitted that terminated or was completed more than 30 calendar days prior to the commencement of the registered offering; and
- 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.

Test the Waters and Demo Day Communications

Regulatory restrictions have been placed on communications to potential investors in exempt offerings. Such restrictions limit an issuer's ability to reach such investors.



The amendments revise the SEC's offering communications rules by:

- Permitting an issuer to use generic solicitation-of-interest materials to "test the waters" for an exempt offer of securities prior to determining which exemption it will use for the sale of the securities (Rule 241), thus avoiding the costs and time spent developing offering materials that might not be used;
- Permitting Regulation Crowdfunding issuers under Rule 206 to "test the waters" prior to filing an offering document with the SEC in a manner similar to current Regulation A and allowing them to have oral communications with prospective investors after filing, as long as the communications are made in compliance with Rule 204; and
- Providing that certain "demo day" communications will not be deemed general solicitation or general advertising (Rule 148). Demo days include meetings or seminars at which issuers present their proposals to potential investors.

Regulation Crowdfunding and Regulation A Eligibility

The amendments permit the use of certain special purpose vehicles that function as a conduit for investors to facilitate investing in Regulation Crowdfunding offerings.

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:

- Reduce the financial information that must be provided to non-accredited investors in Rule 506(b) private placements so that they match the financial information that issuers must provide to investors in Regulation A offerings;
- Add a new item to the non-exclusive list of verification methods in Rule 506(c), which may be used by an issuer to determine whether a prospective investor is an accredited investor;
- Simplify certain requirements for Regulation A offerings where compliance with Regulation A is more complex or difficult than for registered offerings, such as the redaction of confidential information in material contracts, and establish greater consistency between Regulation A and registered offerings; and
- Harmonize the bad-actor disqualification provisions in Regulation D, Regulation A, and Regulation Crowdfunding so each has the same lookback period.