Facilitating Capital Raising: The SEC's 2020 Amendments to the Exempt Offering Framework

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I. INTRODUCTION

In 2020, the Securities and Exchange Commission (SEC or Commission) passed several amendments to the exempt offering framework.[1] The Commission adopted amendments to Rule 506(b), Rule 506(c), Rule 504, Tier 2 of Regulation A, and Regulation Crowdfunding.[2] Furthermore, the Commission adopted a more expansive definition of "accredited investor,"[3] revamped the integration framework,[4] and approved "test-the-waters" and "demo days" communications.[5] This article provides a general overview and analysis of these amendments.

II. RULES & AMENDMENTS

A. *Rule 241—"Test-the-Waters" Communications*

The Commission adopted new Rule 241 which permits an issuer to use generic solicitation of interest materials for a prospective offering of securities *before* making a determination as to which exemption the issuer will rely on in conducting such offering.[6] The Commission believes that Rule 241 allows "issuers to gauge market interest, tailor the size and other terms of the offering (possibly with input from potential investors), and reduce the costs of conducting an exempt offering."[7] Under Rule 241, an issuer or its representatives may communicate orally or in writing to determine whether there is any interest in a contemplated exempt offering.[8] Although not an offer to sell under Section 5 of the Securities Act, such communications are deemed an offer for sale under the antifraud provisions of the federal securities laws.[9] When engaging in these test-the-waters communications, issuers and their representatives may not solicit or accept money or any

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other consideration or commitment from any person.[10] Only at the time that a subject issuer makes a determination as to which exemption it will rely on and the offering has commenced in a compliant manner with respect to the chosen exemption may such issuer solicit or accept money for the offered securities.[11]

To rely on Rule 241, an issuer must set forth four specific disclosures in its test-the-water communications.[12] These disclosures inform investors of the limitations of a generic solicitation of interest communication. First, that the issuer is considering an offering of securities exempt from Securities Act registration, but has not yet determined which exemption the issuer intends to rely on for the prospective offer and sale of securities.[13] Second, that "[n]o money or other consideration is being solicited, and if sent in response, [such consideration] will not be accepted."[14] Third, that "[n]o 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."[15] And fourth, that "[a] person's indication of interest involves no obligation or commitment of any kind."[16]

For a Regulation A or Regulation Crowdfunding offering, the subject issuer is required to make these Rule 241 generic solicitation materials "publicly available as an exhibit to the offering materials filed with the Commission if the Regulation A or Regulation Crowdfunding offering is commenced within 30 days of the generic solicitation."[17] The Commission believes that this requirement will induce issuers to use solicitation materials with sufficient caution.[18] As discussed in the Integration of Offering section below,[19] the thirty-day time period was chosen because once thirty days elapse following a terminated or completed generic solicitation, "that offer would not be subject to integration with a [specified] subsequent . . . offering [such as a Regulation Crowdfunding offering] in accordance with new Rule 152(b)(1)."[20] Furthermore, the Commission also adopted a requirement that an issuer provide any non-accredited purchaser with all "written generic solicitation of interest materials used under new Rule 241 if the issuer sells securities under Rule 506(b) within 30 days of the generic solicitation of interest . . . ."[21]

B. *Rule 148—"Demo Days" Communications*

"Demo days" are events that are organized by groups or entities such as universities, angel investors, local governments, and nonprofit organizations that invite issuers to present their businesses to prospective investors with the objective of securing investments.[22] The new Rule 148 does not permit broad substantive communications about a prospective securities offering at a "demo day" event. Rather, the rule provides prospective issuers "the flexibility to [communicate at Demo Day events] that they are seeking capital without uncertainty as to whether they have jeopardized their ability to rely on a certain exemption from registration."[23]

Communications made pursuant to Rule 148 do not constitute general solicitation. As Rule 148 provides: "A communication will not be deemed to constitute general solicitation or general advertising if 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, [s]tate or local government or instrumentality thereof, nonprofit organization, or angel investor group, incubator, or accelerator."[24] Under Rule 148, the term "angel investor group" means "a group of accredited investors that holds regular meetings and has defined processes and procedures for making investment decisions, either individually or among the membership of the group as a whole, and is neither associated nor affiliated with brokers, dealers, or investment advisers."[25]

There are several requirements that must be met to rely on Rule 148.[26] First, more than one issuer must participate in the "demo day" event for Rule 148 to apply.[27] Second, no advertising for the meeting may reference a specific offering of securities by the issuer.[28] Third, the sponsor of the meeting must not: "(i) Make investment recommendations or provide investment advice to attendees of the event; (ii) Engage in any investment negotiations between the issuer and investors attending the event; (iii) Charge attendees of the event any fees, other than reasonable administrative fees; (iv) Receive any compensation for making introductions between event attendees and issuers or for investment negotiations between such parties; and (v) Receive any compensation with respect to the event that would require registration of the sponsor as a broker or a dealer under the Securities Exchange Act of 1934 or an investment adviser under the Investment Advisers Act of 1940."[29] Fourth, "[t]he type of information regarding an offering of securities by the issuer that is communicated or distributed by or on behalf of the issuer in connection with the event is limited to a notification that the issuer is in the process of offering or planning to offer securities, the type and amount of securities being offered, the intended use of proceeds of the offering, and the unsubscribed amount in an offering."[30] Fifth, if the event permits prospective investors to attend virtually, online participation for such event must be limited to: "(i) Individuals who are members of, or otherwise associated with the sponsor organization; (ii) Individuals that the sponsor reasonably believes are accredited investors; [and] (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."[31]

C. *Expansion of Accredited Investor Status*

The Commission adopted several amendments to the "accredited investor" definition, including additional categories of qualifying natural persons and an expansion of the types of entities that may qualify as accredited investors.[32] Then SEC Chairman Jay Clayton stated: "For the first time, individuals will be permitted to participate in our private capital markets not only based on their income or net worth, but also based on established, clear measures of financial sophistication."[33] The Commission believed that relying solely on financial thresholds has the effect of restricting access to investment opportunities for individuals who possess the expertise and knowledge to sufficiently evaluate the merits and risks of potential investments.[34]

A category of qualified individuals that has been added to the definition of "accredited investor" under Rule 501 of Regulation D includes persons holding in good standing specified professional certifications and designations or, alternatively, credentials from an accredited educational institution.[35] Regarding this category, the Commission may designate by order certifications, designations, or credentials that it determines appropriate using the nonexclusive list of attributes set forth in the revised definition of accredited investor.[36] Pertinent attributes are whether: "(i) The certification, designation, or credential arises out of an examination or series of examinations administered by a self-regulatory organization, or other industry body, or is issued by an accredited educational institution; (ii) The examination or series of examinations is designed to reliably and validly demonstrate an individual's comprehension and sophistication in the areas of securities and investing; (iii) Persons obtaining such certification, designation, or credential can reasonably be expected to have sufficient knowledge and experience in financial and business matters to evaluate the merits and risks of a prospective investment; and (iv) An indication that an individual holds the certification or designation is either made publicly available by the relevant self-regulatory organization or other industry body or is otherwise independently verifiable."[37] The Commission approved the Series 7 (General Securities Representative license), Series 82 (the Private Securities Offerings Representative license), and Series 65 (the Licensed Investment Adviser Representative) as the initial certifications, designations, or credentials set forth pursuant to Rule 501(a)(10).[38]

A second category of qualifying natural persons which was added are "knowledgeable employees" of private investment funds.[39] This category encompasses, among others, directors, executive officers, general partners, trustees, advisory board members, affiliated persons of the fund who oversee the fund's investments, and employees of the fund (who are not performing solely clerical, secretarial, or administrative functions) who have participated in the investment activities of the fund for at least twelve months.[40] The Commission believed that such employees have sufficient experience and access to information required to make informed investment decisions about the fund's offerings, reasoning that allowing such employees to invest in the funds where they are employed may align their interests with other investors in the fund.[41]

Although not a separate category in itself, the Commission now allows an individual to include joint income from his or her spousal equivalent under Rule 501(a)(6) and when determining net worth under Rule 501(a)(5).[42] "Spousal equivalent" is defined under the adopted amendment as "a cohabitant occupying a relationship generally equivalent to that of a spouse."[43] Thus, under the new rules, a natural person may achieve accredited investor status by having joint income with his or her spousal equivalent in excess of $300,000 in each of the two most recent years and a reasonable expectation of reaching such income in the current year,[44] or having joint net worth with one's spousal equivalent exclusive of their primary residence in excess of $1 million.[45]

With respect to entities, entities that now qualify as accredited investors under Regulation D include registered investment advisors,[46] rural business investment companies (RBICs),[47] limited liability companies (LLCs) with total assets exceeding $5 million,[48] family offices with assets under management exceeding $5 million and which are directed by a person having the requisite knowledge and experience in financial and business affairs to assess the merits and risks of the contemplated investment,[49] family clients of qualifying family offices,[50] and any other entity that is not formed for the specific objective of acquiring the securities offered that owns investments exceeding $5 million.[51] Regarding the catchall "any entity meeting an investments-owned test," the Commission envisioned this category to capture "Indian tribes, labor unions, governmental bodies and funds, and entities organized under the laws of a foreign country," stating that "the intent of this new category is to capture all entity types not already included in the definition of accredited investor as well as those entity types that may be created in the future."[52]

D. *Rule 506 of Regulation D—2020 Amendments*

1. *Traditional Rule 506(b)*

Rule 506(b) of Regulation D provides an issuer exemption from registration with no monetary ceiling.[53] Although no limit on the number of offerees exists, under the exemption, no advertising or general solicitation is permitted.[54] Pursuant to Rule 506(b), subject to specified qualification criteria, thirty-five non-accredited investors may purchase securities in an applicable offering, with no limit on the number of accredited investors who may acquire securities in such offering.[55] If any non-accredited investors acquire such securities, specified disclosure must be made to each non-accredited investor. Issuers also must reasonably believe that each non-accredited purchaser (or its designated representative) has sufficient knowledge or experience in financial affairs to be capable of evaluating the risks and merits of the prospective investment.[56]

In view of the SEC's expansion of the integration safe harbor pursuant to revised Rule 152, the Commission amended Rule 506(b) by placing a further condition on offerings made to non-accredited purchasers.[57] Under the amendment, there must be no more than (or the issuer must reasonably believe there are no more than) thirty-five non-accredited investors who purchase securities from the subject issuer in Rule 506(b) offerings during any ninety-calendar-day period—regardless how many Rule 506(b) offerings the issuer elects to conduct during such timespan.[58] This 90-day limitation was promulgated in tandem with the new integration provisions under Rule 152 so that issuers cannot undertake consecutive Rule 506(b) offerings on a near-monthly basis in reliance on Rule 152's thirty-day safe harbor. Without this limitation, issuers apparently could engage in twelve Rule 506(b) offerings, each having 35 non-accredited purchasers, in roughly a 12-month period, thereby amounting to 420 such non-accredited purchasers at the end of this period. Seeking to minimize this consequence, the Commission adopted the 35 numerical limitation during a ninety-day period.[59]

2. *JOBS Act—Rule 506(c) 2020 Amendments*

Rule 506(c) of Regulation D provides an exemption from registration with no monetary ceiling under which issuers may engage in general solicitation and advertising, so long as all purchasers of the subject securities are accredited investors.[60] Issuers are required to take reasonable steps to verify that purchasers of the securities are accredited investors.[61] Such reasonable steps of verifying an accredited investor's status include: (1) reviewing an Internal Revenue Service form that reports the income of the investor for the two most recent years and obtaining a written representation from such person that he or she reasonably expects to reach the requisite income level during the current year; (2) reviewing the investor's bank statements, brokerage statements, certificates of deposits, appraisal reports, and like documentation in order to verify such person's net worth; and (3) obtaining a written confirmation from the investor's registered broker-dealer, registered investment advisor, licensed attorney, or certified public accountant that such person within the prior three months "has taken reasonable steps to verify that the purchaser is an accredited investor . . . and has determined that such purchaser is an accredited investor."[62]

Under the 2020 amendments, the Commission added another method by which an issuer may verify the accredited status of a purchaser in Rule 506(c) offerings.[63] For investors that the issuer had previously taken reasonable steps to verify as an accredited investor, issuers may now confirm such investor's accredited status by obtaining a written representation from such person at the time of sale that it remains an accredited investor, provided that the issuer is not aware of information to the contrary.[64] This new verification method will suffice for a period of five years from the date the person was previously verified as an accredited investor.[65] The Commission sought to reduce the cost and burden of verification for those issuers that conduct multiple Rule 506(c) offerings over time.[66] The addition of this verification method in no way displaces the "principles-based method for verification" adopted by the SEC at the time of Rule 506(c)'s promulgation which sets forth non-exclusive factors that issuers should undertake in order to satisfy the reasonable verification obligation.[67]

E. *Regulation A—2020 Amendments to Tier 2*

Providing an exemption from registration for specified public offerings, Regulation A has two tiers.[68] Tier 1 allows issuers to raise up to $20 million in a twelve-month period, with no more than $6 million in sales by affiliated security-holders; such issuers must meet specified disclosure requirements and are subject to applicable state securities laws.[69] Tier 2 previously permitted issuers to raise up to $50 million in any twelve-month period, with no more than $15 million in sales by affiliated security-holders; such issuers must file audited financial statements on an annual basis with the SEC and are subject to continuous reporting requirements.[70] In 2020, the Commission amended the Tier 2 monetary limits, expanding the maximum amount that may be raised in any twelve-month period to $75 million, with no more than $22.5 million in sales by affiliated security-holders.[71] The Commission raised these limits to enable issuers that already had reached the existing offering limits to raise additional capital, as well as to attract a larger group of issuers and investors to Regulation A offerings.[72] Tier 2 offerings continue to be preempted from state securities laws registration and qualification requirements.[73]

F. *Rule 504 of Regulation D—2020 Amendments*

Rule 504 provides an exemption from registration for eligible non-reporting Exchange Act enterprises to undertake specified non-public offerings. The exemption also permits these issuers to conduct public offerings either where: (1) a subject offering is registered under state law and the issuer provides a substantive disclosure document prior to the sale of such securities; or (2) the securities are issued under a state law exemption that allows general solicitation and advertising provided that sales are made solely to accredited investors.[74] If neither of these conditions is met, Rule 504 prohibits general solicitation and advertising.[75] Previously, issuers could raise $5 million in a 12-month period under Rule 504; in 2020, the Commission elevated this ceiling, increasing the maximum amount that can be raised in a 12-month period to $10 million.[76] The Commission increased this limit in an effort to attract more issuers to use the exemption, induce more issuers to conduct regional multistate offerings that utilize state coordinated review programs, and make the exemption more cost-effective for eligible issuers by decreasing the offering costs per dollar raised.[77]

G. *Regulation Crowdfunding—2020 Amendments*

Regulation Crowdfunding provides an exemption from registration for specified offerings conducted solely through the use of the Internet.[78] Previously, the Crowdfunding exemption permitted issuers to raise up to $1.07 million during a 12-month period. The maximum amount that an investor (accredited or non-accredited) was allowed to purchase during a twelve-month period across all crowdfunding offerings could not exceed: (i) the greater of $2,200 or five percent of the lesser of the investor's annual income or net worth of such investor if either the annual income or the net worth of the investor was less than $107,000; or (ii) ten percent of the lesser of the investor's annual income or net worth, not to exceed a maximum aggregate amount of $107,000, if either the annual income or net worth of the investor were at least $107,000.[79]

The Commission amended the maximum offering amount under this exemption, increasing the limit that an eligible issuer may raise to $5 million in a twelve-month period.[80] Additionally, an accredited investor no longer is subject to a monetary ceiling that may be invested in a subject offering. Now, investment limits apply only to purchases by non-accredited investors.[81] With respect to non-accredited investors, the Commission amended the investment limits so that the greater of the purchaser's annual income or net worth is utilized when calculating the investment limits.[82] Under the 2020 amendments, the investment limits for a non-accredited investor during a 12-month period across all crowdfunding offerings, including the subject offering, shall not exceed: "(i) The greater of $2,200, or 5 percent 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 (ii) Ten percent of the greater of the investor's annual income or net worth, not to exceed an amount sold of $107,000, if both the investor's annual income and net worth are equal to or more than $107,000."[83]

The SEC chose to expand the offering limits to attract additional issuers to use the exemption and to lower the transactional costs in order to provide a more efficient capital raising option for smaller issuers.[84] The Commission removed the investment limits for accredited investors, deeming them to be unnecessary as these persons have the requisite financial sophistication to protect themselves in exempt transactions.[85] With respect to non-accredited investors, the Commission determined to allow these investors to rely on the greater of their annual income or net worth so that Regulation Crowdfunding would conform with Tier 2 of Regulation A and to provide non-accredited investors with greater flexibility in making their investment decisions.[86]

H. *Rule 152—Integration of Offerings—2020 Amendments*

Integration of offerings is the concept where seemingly separate offerings are construed as one integrated offering, which may result in the unavailability of an exemption once these purportedly separate offerings are integrated, thereby violating the Securities Act's registration requirements.[87] In 2020, the Commission revised the entire integration framework by establishing a general principle of integration in new Rule 152(a)[88] as well as setting forth four non-exclusive safe harbors in Rule 152(b).[89] Additionally, the Commission adopted cautionary introductory language to the new Rule 152, providing that any plan or scheme to evade the registration requirements of the Securities Act, although in technical compliance with Rule 152, will not avoid integration of offerings.[90]

The general principle adopted provides that if none of the four safe harbors apply, "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."[91] Under Rule 152(a)(1), for an exempt offering that prohibits general solicitation, the issuer must reasonably believe, based on the facts and circumstances, in regard to each purchaser, that the issuer or the issuer's representative either: "(i) Did not solicit such purchaser through the use of general solicitation; or (ii) Established a substantive relationship with such purchaser prior to commencement of the exempt offering prohibiting general solicitation."[92] A "*substantive relationship*" for purposes of Rule 152(a)(1)(ii) is determined by whether the issuer (or its representative) has adequate information to evaluate, and thereafter in fact evaluates, a subject offeree's financial circumstances and sophistication, in ascertaining whether such person is an accredited or sophisticated investor.[93] The Commission views a *"pre-existing relationship"* as a relationship that "the issuer has formed with an offeree prior to the commencement of the offering or, alternatively, that was established through another person (for example, a registered broker-dealer or investment adviser) prior to that person's participation in the offering."[94] "*Pre-existing substantive relationships*" accordingly tend to include existing or prior investors, investors of previous deals of the issuer's management team, family or friends of the issuer's control persons, and customers of a registered broker-dealer or investment adviser where a substantive relationship was established before the financial intermediary's participation in the exempt offering.[95]

Under new Rule 152(a)(1), issuers may permissibly conduct concurrent Rule 506(c) and Rule 506(b) offerings, provided that Rule 152(a)(1) and all other conditions of the exemption are satisfied. In this respect, significantly, under Rule 152(a), an issuer cannot engage in general solicitation under a Rule 506(c) offering to identify potential investors for a Rule 506(b) offering, and then sell to such investors in a Rule 506(b) offering—unless the issuer did not solicit the subject purchaser in the Rule 506(b) offering by means of general solicitation in the concurrent Rule 506(c) offering, or the issuer established a substantive relationship with such purchaser before commencing its Rule 506(b) offering.[96]

Under new Rule 152(a)(2), "[f]or two or more concurrent exempt offerings permitting general solicitation, in addition to satisfying the requirements of the particular exemption relied on, general solicitation 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 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."[97] Thus, for example, under Rule 152(a)(2), an issuer may conduct a Rule 506(c) offering while conducting a concurrent Regulation A or

Crowdfunding offering, so long as all of the conditions of the pertinent exemptions are met.[98] And if, for instance, the subject issuer discusses the material terms of the Regulation A offering in its general solicitation materials for its Rule 506(c) offering, Rule 152(a)(2) requires that the general solicitation conducted pursuant to Rule 506(c) comply with all applicable Regulation A requirements.[99]

Rule 152(b) provides four non-exclusive safe harbors from the integration of offerings.[100] First, the Rule 152(b)(1) safe harbor provides: "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."[101] Hence, pursuant to this safe harbor, a subject issuer must reasonably believe that, in regard to each purchaser who acquires securities in the exempt offering forbidding general solicitation, it did not solicit any such purchaser through general solicitation or it had formed a substantive relationship with such purchaser before the commencement of the exempt offering that prohibits general solicitation.[102] The Commission takes the position that this safe harbor mitigates the risk that an exempt offering allowing general solicitation may limit the protections provided by a subsequent private offering or may condition the market for a later registered offering. The safe harbor in the SEC's view enhances an issuer's flexibility to access capital when needed, while still preventing registration avoidance by "artificially dividing a single offering into multiple offerings."[103] As a last point, if an issuer waits less than thirty days after terminating or completing an offering before commencing another, the Rule 152(b)(1) safe harbor may not be invoked; nonetheless, it may still avoid integration by satisfying the terms and conditions of the general principle of integration set forth in Rule 152(a).[104]

Second, Rule 152(b)(2) provides that "[o]ffers 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."[105] The Commission believes that sales to employees and consultants pursuant to Rule 701 for compensation purposes do not generate the same degree of investor protection concerns as other offerings.[106] Furthermore, with respect to concurrent offshore offerings in compliance with Regulation S, the safe harbor codifies the SEC's long-standing position that these offerings are not integrated with compliant domestic offerings.[107] However, in situations where conditioning the market concerns arise, such as where the issuer uses the same website to solicit investors for both Regulation S and domestic offerings (such as a Rule 506(c) offering), issuers should take appropriate steps to distinguish the Regulation S and domestic offering materials.[108]

Third, Rule 152(b)(3) provides an integration safe harbor with respect to an offering for which a registration statement has been filed under the Securities Act if made subsequent to specified other offerings. Hence, under the rule "[a]n offering for which a registration statement under the [Securities] Act has been filed will not be integrated if it is made subsequent to: (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 made only to qualified institutional buyers [QIBs] and institutional accredited investors; or (iii) An offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the commencement of the registered offering."[109] Rule 152(b)(3)(iii)'s thirty-day time frame expresses the SEC's view that this time period is adequate to allay concerns that an exempt offering may condition the market for a subsequent registered offering.[110] The key objective underlying Rule 152(b)(3) thus is to allow an issuer to conduct specified offerings shortly before its filing of a registration statement without undue risk that the offerings will be integrated.[111]

And fourth, Rule 152(b)(4) provides: "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."[112] Rule 152(b)(4) expands the prior integration safe harbors that were provided by Regulation A and Rules 147 and 147A to include offerings relying on: "[1] Regulation Crowdfunding; [2] Rules 504(b)(1)(i), (ii) and (iii) that, depending on State registration requirements, permit general solicitation; and [3] Rule 506(c)."[113] The Commission believes that an exempt offering that allows general solicitation which follows a terminated or completed offering is not susceptible to concerns that the prior offers and sales will condition the market for the subsequent exempt offering that permits general solicitation.[114]

Regarding this new integration framework, the Commission believes that this framework provides greater clarity, thus facilitating capital raising and providing issuers greater flexibility in choosing between different types of exempt offerings.[115]

III. CONCLUSION

In this article, the major amendments which the Commission adopted in 2020 have been discussed. The Commission expanded the definition of "accredited investor," promulgated rules permitting the use of "demo days" and "test-the-water" communications, revamped the integration framework, and amended various components of exemptions from registration. The exemptions amended include Rule 506(b), Rule 506(c), Regulation A, Rule 504, and Regulation Crowdfunding. In adopting these amendments, the Commission believed it was promoting capital formation and expanding investment opportunities without compromising investor protections. In due time, evidence will show whether or not the Commission was correct in its assessment.[116]

NOTES:

[1]*See* SEC Press Release No. 2020-273 (2020) (announcing amendments to the exempt offering framework), Securities Act Release No. 10884 (2020); SEC Press Release No. 2020-191 (2020) (announcing amendments to the definition of "accredited investor"), Securities Act Release No. 10824 (2020). These amendments solidify the exempt offering focus of the SEC's agenda whereby far new capital is raised in exempt as compared to registered offerings. *See* Bauguess, et al., SEC Division of Econ. & Risk Analysis, "Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2017, at 9 (2018). Not all SEC Commissioners voted for the amendments. *See* Statement by Commissioner Lee on Amendments to the Exempt Offering Framework, Harvard Law School Forum on Corporate Governance (Nov. 3, 2020) (concluding that "these rules continue the steady erosion of the traditional and important boundaries between the public and private markets which further disincentivizes public offerings and threatens investor protection in both markets").

[2]SEC Press Release No. 2020-273 (2020); Securities Act Release No. 10884 (2020).

[3]SEC Press Release No. 2020-191 (2020); Securities Act Release No. 10824 (2020).

[4]SEC Press Release No. 2020-273 (2020); Securities Act Release No. 10884 (2020).

[5]SEC Press Release No. 2020-273 (2020); Securities Act Release No. 10884 (2020).

[6]17 C.F.R. § 230.241(a).

[7]Securities Act Release No. 10884, *supra* note 1, at 90.

[8]17 C.F.R. § 230.241(a).

[9]*Id.*

[10]*Id.*

[11]*Id.*

[12]*Id.* at § 230.241(b).

[13]*Id.* at § 230.241(b)(1).

[14]*Id.* at § 230.241(b)(2).

[15]*Id.* at § 230.241(b)(3).

[16]*Id.* at § 230.241(b)(4).

[17]Securities Act Release No. 10884, *supra* note 1, at 93, *citing*, Rule 201(z), 17 C.F.R. § 227.201(z), and Paragraph 13 of Form 1-A, Part III, Item 17.

[18]Securities Act Release No. 10884, *supra* note 1, at 93–94.

[19]*See infra* notes 87–115 and accompanying text.

[20]Securities Act Release No. 10884, *supra* note 1, at 94.

[21]*Id.*

[22]*Id.* at 76.

[23]*Id.* at 85.

[24]17 C.F.R. § 230.148(a).

[25]*Id.* at § 230.148(a)(5).

[26]*Id.* at § 230.148(a)(1)–(4).

[27]*Id.* at § 230.148(a).

[28]*Id.* at § 230.148(a)(1).

[29]*Id.* at § 230.148(a)(2)(i)–(v).

[30]*Id.* at § 230.148(a)(3).

[31]*Id.* at § 230.148(a)(4)(i)–(iii). "In contrast to an online event, the number of potential investors who can attend an in-person 'demo day' event is limited to factors such as venue size, administrative capacity, and distance from the event." Securities Act Release No. 10884, *supra* note 1, at 84.

[32]Securities Act Release No. 10824 (2020); SEC Press Release No. 2020-191 (2020).

[33]SEC Press Release No. 2020-191 (2020).

[34]*Id.*

[35]17 C.F.R. § 230.501(a)(10).

[36]*Id*. at 230.501(a)(10)(i)–(iv).

[37]*Id.*

[38]Securities Act Release No. 10824, *supra* note 32, at 29.

[39]17 C.F.R. § 230.501(a)(11). The term "knowledgeable employee" is defined in Rule 3c-5(a)(4) under the Investment Company Act (generally, inter alia, encompassing an executive officer, director, general partner, trustee, advisory board member of the company (or an affiliated management person of such company), and an employee of the company (or an affiliated management person of such company) who substantively and regularly participates in the investment activities of the company or specified other companies for at least 12 months).

[40]Securities Act Release No. 10824 (2020), *supra* note 32, at 35–36, 38.

[41]*Id*. at 39.

[42]17 C.F.R. § 230.501(a)(5), (a)(6).

[43]*Id*. at § 230.501(j).

[44]*Id*. at § 230.501(a)(6).

[45]*Id*. at § 230.501(a)(5).

[46]*Id*. at § 230.501(a)(1).

[47]*Id*. This term is defined in Section 384A(14) of the Consolidated Farm and

Rural Development Act, 7 U.S.C. § 2009cc, to mean "a company that is approved by the Secretary of Agriculture and has entered into a participation agreement with the Secretary." Securities Act Release No. 10824, *supra* note 32, at 46. As stated by the SEC, "RBICs are intended to promote economic development and the creation of wealth and job opportunities in rural areas and among individuals living in such areas." *Id.*

[48]17 C.F.R. § 230.501(a)(3).

[49]*Id*. at § 230.501(a)(12). Generally, family offices are "entities established by families to manage their assets, plan for their families' financial future, and provide other services to family members." Securities Act Release No. 10824, *supra* note 32, at 56. Note that for accredited investor status, a family office may "not [be] formed for the specific purpose of acquiring the securities offered." Rule 501(a)(12)(ii), 17 C.F.R. § 230.501(a)(12)(ii).

[50]17 C.F.R. § 230.501(a)(13).

[51]*Id*. at § 230.501(a)(9).

[52]Securities Act Release No. 10824, *supra* note 32, at 50, 55. The Commission was criticized for its refusal to raise the monetary thresholds for accredited investor status by the two dissenting SEC Commissioners. *See* Commissioners Lee and Crenshaw, Joint Statement on the Failure to Modernize the Accredited Investor Definition (Aug. 26, 2020).

[53]*See* Rule 506(b), 17 C.F.R. § 230.506(b); Marc I. Steinberg, *Understanding Securities Law* 61 (7th ed. 2018).

[54]*See* sources *supra* note 53.

[55]*Id.*

[56]*Id.*

[57]Securities Act Release No. 10884, *supra* note 1, at 43–44.

[58]17 C.F.R. § 230.506(b)(2)(i).

[59]*See* Securities Act Release No. 10884, *supra* note 1, at 44 (stating that "we have determined that the rule change will prevent issuers from using the new 30-day safe harbor to effectively conduct a public distribution of securities to non-accredited investors").

[60]Rule 506(c), 17 C.F.R. § 230.506(c). *See* Steinberg, *supra* note 53, at 64–66.

[61]*Id*. *See* Securities Act Release No. 9415 (2013).

[62]Rule 506(c)(2)(ii)(A) to (C), 17 C.F.R. § 230.506(c)(2)(ii)(A) to (C).

[63]Securities Act Release No. 10884, *supra* note 1, at 107–108.

[64]17 C.F.R. § 230.506(c)(2)(ii)(E).

[65]*Id.*

[66]Securities Act Release No. 10884, *supra* note 1, at 108.

[67]*Id.* at 109. *See* Securities Act Release No. 9415 (2013). The following non-exclusive factors should be considered by an issuer under the principles-based method of verification: "[1] The nature of the purchaser and the type of accredited investor that the purchaser claims to be; [2] The amount and type of information that the issuer has about the purchaser; and [3] 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." Securities Act Release No. 10884, *supra* note 1, at 109.

[68]Rules 251-263, 17 C.F.R. § 230.251 to.263. *See* Steinberg, *supra* note 53, at

81–82.

[69]*See* sources cited *supra* note 68.

[70]*Id*.

[71]Rule 251(a)(2), 17 C.F.R. § 230.251(a)(2).

[72]Securities Act Release No. 10884, *supra* note 1, at 134.

[73]*Id*. at 136.

[74]Rule 504(b), 17 C.F.R. § 230.504(b). *See* Steinberg, *supra* note 53, at 76–77.

[75]*See* sources cited *supra* note 74; Securities Act Release No. 7644 (1999).

[76]Rule 504(b)(2), 17 C.F.R. § 230.504(b)(2).

[77]Securities Act Release No. 10884, *supra* note 1, at 139.

[78]*See* § 4(a)(6) of the Securities Act; Securities Act Release No. 9974 (2015) (adopting Regulation CF).

[79]Sections 4(a)(6)(B), 4A(h) of the Securities Act; Securities Act Release No. 9974 (2015). *See* 17 C.F.R. § 227.100(a)(2) (2017) (adjusting the offering limit from $1 million to $1.07 million in 2017 to reflect changes in the Consumer Price Index as called for by Section 4A(h) of the Securities Act).

[80]17 C.F.R. § 227.100(a)(1).

[81]*Id*. at § 227.100(a)(2).

[82]*Id*. at § 227.100(a)(2)(i)–(ii). *See* Securities Act Release No. 10884, *supra* note 1, at 146.

[83]17 C.F.R. § 227.100(a)(2)(i) to (ii).

[84]Securities Act Release No. 10884, *supra* note 1, at 147–149.

[85]*Id*. at 153–154.

[86]*Id*. at 154–155.

[87]*See* Steinberg, *supra* note 53, at 96–98.

[88]17 C.F.R. § 230.152(a).

[89]*Id.* at § 230.152(b)(1)–(4).

[90]*Id.* at § 230.152 (introductory language).

[91]*Id.* at § 230.152(a).

[92]*Id.* at § 230.152(a)(1)(i)–(ii).

[93]Securities Act Release No. 10884, *supra* note 1, at 31.

[94]*Id.*

[95]*Id.* at 31–32.

[96]*Id*. at 29–30.

[97]17 C.F.R. § 230.152(a)(2).

[98]Securities Act Release No. 10884, *supra* note 1, at 33–34.

[99]*Id.*

[100]17 C.F.R. § 230.152(b)(1) to (4).

[101]*Id*. at § 230.152(b)(1) (emphasis in original).

[102]*Id*. at §§ 230.152(a)(1), 230.152(b)(1). *See* Securities Act Release No. 10884, *supra* note 1, at 44–45.

[103]Securities Act Release No. 10884, *supra* note 1, at 41.

[104]*Id*. at 45.

[105]17 C.F.R. § 230.152(b)(2).

[106]Securities Act Release No. 10884, *supra* note 1, at 50–51.

[107]*Id*. at 51.

[108]*Id* at 52–53.

[109]17 C.F.R. § 230.152(b)(3).

[110]Securities Act Release No. 10884, *supra* note 1, at 57.

[111]*Id.* at 56–57.

[112]17 C.F.R. § 230.152(b)(4).

[113]Securities Act Release No. 10884, *supra* note 1, at 59.

[114]*Id*. at 60.

[115]*Id*. at 26–28.

[116]In two recent books, one of the authors criticized the SEC's undue zeal for enhancing capital raising to the detriment of investor protection. *See* Marc I. Steinberg, *The Federalization of Corporate Governance* (Oxford Univ. Press 2018); Marc I. Steinberg, *Rethinking Securities Law* (Oxford Univ. Press 2021).