

# SEC Adopts Significant Changes in Regulation of Exempt Offerings (UPDATED)

## WRITTEN BY

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The Securities and Exchange Commission on November 2, 2020, by a 3 to 2 vote, adopted significant changes to the rules governing capital raising through private offerings and other offerings exempt from registration under the Securities Act of 1933. The adopting release (available [here](#)) indicates that these changes are designed “to harmonize, simplify, and improve ... the exempt offering framework” and “to promote capital formation and expand investment opportunities while preserving and improving important investor protections.” The changes also are designed to reduce the friction between different offerings under integration principles. The new rules are effective 60 days after publication in the Federal Register.

The changes made by the new rules, along with the recently expanded definition of “accredited investor” (see our description [here](#)), will significantly enhance the ability of companies to use exempt offerings to raise capital as an alternative to registered offerings. The Commission also has [recently proposed](#) to adopt a conditional exemption from broker-dealer regulation for individuals serving as “finders” for companies seeking to raise funds.

## Changes to Offering Exemptions

The SEC has made changes to broaden certain of the existing exemptions in a number of ways:

- *Offering limits.* The amount that may be offered under the three exemptions that currently are capped are increased as follows: (i) the Regulation A Tier 2 primary offerings limit is increased from \$50 million to \$75 million and the secondary sales limit is increased from \$15 million to \$22.5 million; (ii) the Regulation Crowdfunding limit is increased from \$1.07 million to \$5 million; and (iii) the Regulation D Rule 504 limit is increased from \$5 million to \$10 million.
- *Investor limits.* The investment limits for investors in Regulation Crowdfunding offerings are loosened by eliminating those limits for accredited investors and by allowing non-accredited investors to rely on the greater of their annual income or net worth in calculating the limit.
- *Offering communications.* The restrictions on offering communications resulting from the ban on “general solicitation” are eased by permitting use of limited materials to “test-the-waters” before deciding which exemption to use for sales. The changes also exempt “demo day” communications from being a general solicitation.
- *Other specific changes.* The eligibility of issuers to use Regulation A and Regulation Crowdfunding is expanded. The information requirements for non-accredited investors permitted in Rule 506(b) private offerings are reduced by aligning them with those for Regulation A offerings, which most notably will permit many issuers to use unaudited financial statements in offerings up to \$20 million. The Rule 506(c) accredited investor verification safe harbor is expanded by allowing an issuer to rely on a written representation by an investor whose status as an accredited investor was verified within the prior five years. Some common provisions, including bad actor disqualification, has been made more consistent across exemptions.
- *Regulation S directed selling efforts.* Instead of adopting amendments to Regulation S as proposed, the SEC

reaffirmed its position that general solicitation permitted in a domestic offering will not be considered to be “directed selling efforts” in connection with a Regulation S offering if the general solicitation was not undertaken for the purpose of conditioning the market in the United States for the securities offered in the Regulation S offering.

### Integration of offerings

The new rules go a long way toward reducing the uncertainty and legal risk associated with the integration of otherwise separate offerings by establishing a general principle that no integration is required if each offering, based on its particular facts and circumstances, meets the requirements for an exemption or complies with the registration requirements. They also provide several safe harbors as follows:

- Offerings separated by 30 days (a reduction from the existing six-month separation period) would not be integrated, provided in the case of an exempt offering that does not permit general solicitation that follows an offering that permits general solicitation the issuer has a reasonable belief that each purchaser was not solicited through general solicitation or had a preexisting substantive relationship with the purchaser. However, there may not be more than 35 non-accredited investors in offerings under Rule 506(b) during a 90-day period.
- As now in effect, a firewall would exist for Rule 701 and Regulation S offerings so that neither would be integrated with other offerings.
- Offerings for which a registration statement has been filed would not be integrated if made after termination or completion of an offering for which general solicitation is not permitted or, if the terminated or completed offering permitted general solicitation, if it was made only to qualified institutional buyers or institutional accredited investors or was terminated or completed more than 30 days before commencement of the registered offering.
- Exempt offerings using permitted general solicitation made after other terminated or completed offerings for which general solicitation is not permitted will not be integrated to defeat those other offerings.

### Alternatives to Registration Chart

We have updated the Alternatives to Registration Chart we have co-authored for many years to reflect the revisions to the exempt offering framework adopted by the SEC. The new Chart can be found at [this link](#), with printing instructions at [this link](#).

### Conclusion

The revisions adopted by the SEC will facilitate the ability of companies to raise capital in the private markets. This will be especially significant for smaller and medium-size companies for which the public markets may not be a viable alternative, including those companies for which venture and other institutional private funding may not be available. The revisions also will simplify the ability to do contemporaneous and sequential offerings by eliminating uncertainties in complying with securities law requirements. Taken as a whole, the new rules represent a significant development in the regulation of exempt securities offerings.

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If you have any questions about the rule changes or related topics, your regular Locke Lord contact or any of the authors can discuss these matters with you.

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