Brownstein Hyatt Farber Schreck

News

November 9, 2020

SEC Amends Rules to Harmonize, Simplify and Improve Exempt Offering Framework

On Nov. 2, 2020, the Securities and Exchange Commission ("SEC") approved rule amendments "to harmonize, simplify, and improve the multilayer and overly complex exempt offering framework," available **here**. The amendments impact securities offering under Regulation A, Regulation Crowdfunding and Regulation D, among other exemptions, and would be of interest to those engaged in exempt securities offerings.

Unless otherwise noted, references below to statutory sections are references to the Securities Act of 1933 (the "Securities Act") and references below to rules are references to rules promulgated under the Securities Act.

Background

Offers and sales of securities must be registered under the Securities Act or qualify for an exemption from such registration requirements. The Securities Act contains exemptions from its registration requirements and also authorizes the SEC to adopt additional exemptions. Conducting a registered offering is relatively costly and requires the issuer to be a public reporting company. Exempt offerings are important to both public and private companies. In its March 2020 proposing release, available **here**, the SEC noted that registered offerings accounted for $1.2 trillion or 30.8% of new capital in 2019, compared to an estimated $2.7 trillion or 69.2% through exempt offerings. The amendments are intended to facilitate capital formation for issuers (in particular smaller issuers) and access to investment opportunities for investors. The amendments follow the SEC's June 2019 concept release, available **here**.

Amendments to Regulation A

Increased Offering Amount

The SEC raised the maximum offering amount per 12 months for Tier 2 offerings from $50 million to $75 million for primary offerings and from $15 million to $22.5 million for resale offerings.

Change to Eligible Issuers

Currently, Regulation A requires that an issuer conducting a Regulation A offering must have filed with the SEC all reports required to be filed, if any, pursuant to Rule 257 for the past two years before filing an offering statement, but there is no requirement for such issuer to have filed all reports under the Securities Exchange Act of 1934 (the "Exchange Act") if it is an Exchange Act registrant. The SEC amended Regulation A to require issuers subject to the reporting requirements of Exchange Act Section 13 or Section 15(d) to have filed all of their required reports for the past two years to be eligible to conduct a Regulation A offering.

Permitting Redaction of Confidential Exhibits to Form 1-A without Confidential Treatment Request

The SEC amended Item 17 of Form 1-A to provide issuers with the option to file redacted material contracts and plans of acquisition, reorganization, arrangement, liquidation, or succession, consistent with the recent amendments to

Items 601(b)(2) and (10) of Regulation S-K. Regulation A issuers still have the option to submit an application for confidential treatment to redact immaterial confidential information pursuant to the existing confidential treatment application process, which remains unchanged. Under the new standard, issuers are permitted to redact information that the issuer both customarily and actually treats as private and confidential, and which is also not material. Additionally, issuers can redact information that "would constitute clearly unwarranted invasion of personal privacy."

Public Release of Prior Non-Public Materials

Current rules require that Regulation A non-public offering statements, amendments and correspondence be filed as an exhibit to a publicly filed offering statement at least 21 calendar days before the qualification of the offering statement. The SEC amended Item 17.16(a) of Form 1-A to allow issuers to satisfy their public filing requirement by logging into their EDGAR account, selecting materials previously submitted non-publicly, and releasing them for public dissemination.

Permitting Incorporation by Reference of Previously Filed Financial Statements

The SEC amended Form 1-A to allow an issuer to incorporate by reference previously filed financial statements into a Regulation A offering circular, so long as such issuer satisfies eligibility standards similar to the requirements for such incorporation by reference in Form S-1. For example, issuers that have reporting obligations under Rule 257 or the Exchange Act must be current in their reporting obligation. In addition, issuers are required to make incorporated financial statements readily available and accessible on a website maintained by or for the issuer and to disclose in the offering statement that such financial statements will be provided upon request.

Issuers conducting ongoing offerings need to continue to file post-qualification amendments to Form 1-A annually to include the financial statements that would be required to be included in a Form 1-A as of such date. These financial statements could be either filed with such post-qualification amendment or incorporated by reference to a previously filed periodic or current report.

Permitting SEC to Declare Post-Qualification Amendment to Offering Statements Abandoned

The SEC amended the abandonment provisions of Rule 259(b) to permit the SEC to declare a post-qualification amendment to an offering statement abandoned, consistent with Rule 479, the rule applicable to registered offerings.

Change to Bad Actor Disqualification

The SEC's exempt offering framework includes rules disqualifying issuers and certain other covered persons who are "bad actors" from conducting or participating in securities offerings under Regulation A, Regulation Crowdfunding and Regulation D. While the disqualification provisions are substantially similar, the lookback period for determining whether a covered person is disqualified differs between Regulation D and the other two exemptions. To harmonize the bad actor disqualification provisions, the SEC amended the lookback requirements in Regulation A and Regulation Crowdfunding (summarized here under the Regulation A heading for convenience) to specify that a disqualifying event that occurs at any time during an offering, not only before the filing or the applicable offering statement, would disqualify the bad actor from further involvement in the offering. However, to reduce the cost of Regulation A and Regulation Crowdfunding issuers monitoring disqualification events that may affect beneficial owners during an ongoing offering, the SEC retained the disqualification lookback period through the time of filing of the applicable offering statement, rather than through the time of sale as under Rule 506(d), for disqualification events affecting beneficial owners under Regulation A and Regulation Crowdfunding.

Amendments to Regulation Crowdfunding

Increased Offering Amount

The SEC raised the maximum offering amount per 12 months from $1.07 million to $5 million for primary offerings and from $15 million to $22.5 million for resale offerings.

Changed Investor Investment Limits

The SEC eliminated investment limits for accredited investors and changed the calculation method for the investment limits for non-accredited investors in Regulation Crowdfunding offerings as follows:

Investor Type	**Current Offering Limit**	**Amended Offering Limit**
Investor with net worth or annual income of less than $107,000	Greater of (a) $2,200, or (b) lesser of (i) net worth or (ii) annual income Same limit for accredited investors	Greater of (a) $2,200, or (b) greater of (i) net worth or (ii) annual income No limit for accredited investors
Non-Accredited Investor with net worth and annual income of greater than $107,000	Greater of (a) $107,000, or (b) lesser of 10% of (i) net worth or (ii) annual income Same limit for accredited investors	Greater of (a) $107,000, or (b) greater of 10% of (i) net worth or (ii) annual income No limit for accredited investors

Change to Eligible Issuers – Use of Pooled Investment Vehicles to Invest in Crowdfunding offerings

Companies that meet the definition of an "investment company" under the Investment Company Act of 1940 (the "Investment Company Act") (or are excluded from the definition of an investment company under Section 3(b) or 3(c) of the Investment Company Act) are prohibited from using Regulation Crowdfunding. As a result, most investors hold their Regulation Crowdfunding investments personally, rather than through investment vehicles. This can lead to significant administrative burdens on issuers as a result of having numerous individuals on their capitalization table.

In response, the SEC adopted new Rule 3a-9 under the Investment Company Act to exclude from the definition of investment company a "crowdfunding vehicle" formed by a Regulation Crowdfunding issuer to serve as a conduit for investments and a co-issuer in the issuer's Regulation Crowdfunding offering, so long as the crowdfunding vehicle:

- is organized and operated for the sole purpose of directly acquiring, holding and disposing of securities issued by a single crowdfunding issuer and raising capital in one or more offerings made under Regulation Crowdfunding;
- does not borrow money and uses the proceeds from the sale of its securities solely to purchase a single class of securities of a single crowdfunding issuer;
- issues only one class of securities in one or more offerings under Regulation Crowdfunding in which the crowdfunding vehicle and crowdfunding issuer are deemed to be co-issuers under the Securities Act;
- receives a written undertaking from the crowdfunding issuer to fund or reimburse the expenses associated with its formation, operation, or winding up, receives no other compensation, and any compensation paid to

any person operating the crowdfunding vehicle is paid solely by the crowdfunding issuer;

- maintains the same fiscal year-end as the crowdfunding issuer;
- maintains a one-to-one relationship between the number, denomination, type and rights of crowdfunding issuer securities it owns and the number, denomination, type and rights of its securities outstanding;
- seeks instructions from the holders with regard to: (i) the voting of the crowdfunding issuer securities and votes in accordance with such instructions, and (ii) participating in tender or exchange offers or similar transactions conducted by the crowdfunding issuer and participates in accordance with such instructions;
- receives, from the crowdfunding issuer, all disclosures and other information required under Regulation Crowdfunding and the crowdfunding vehicles promptly provides such disclosures and other information to the investors and potential investors in the crowdfunding vehicle's securities and the relevant intermediary; and
- provides to each investor the right to direct the crowdfunding vehicle to assert the rights under state and federal law that the investor would have if he or she had invested directly in the crowdfunding issuer and provides to each investor any information that it receives from the crowdfunding issuer as a shareholder of record of the crowdfunding issuer.

Crowdfunding vehicles are required to jointly file a Form C with the crowdfunding issuer, as opposed to each filing a separate Form C. However, if a crowdfunding issuer is conducting a Regulation Crowdfunding offering both through the crowdfunding vehicle and directly to investors, the crowdfunding issuer must file a separate Form C for the offering directly to investors.

The SEC also amended Exchange Act Rule 12g5-1 to provide that crowdfunding vehicles will count as a single record holder for purposes of Exchange Act Section 12(g), but only to the extent all investors in the crowdfunding vehicle are natural persons. The SEC also noted that crowdfunding vehicles will not implicate the broker-dealer registration requirements of Exchange Act Section 15(a), so long as they comply with Investment Company Act Rule 3a-9.

No Change in Eligible Securities

The SEC declined to adopt a previous proposal to harmonize the securities eligible to be offered under Regulation Crowdfunding (currently there are no restrictions) with those under Regulation A (limited to equity securities, debt securities and securities convertible or exchangeable for equity interests, including any guarantees of such securities) and declined to adopt a proposal to prohibit Simple Agreements for Future Equity (SAFEs) from being offered under Regulation Crowdfunding.

Test-the-Waters Communications

The SEC created new Rule 206 under Regulation Crowdfunding permitting Regulation Crowdfunding issuers to test-the-waters orally or in writing before filing a Form C with the SEC in a manner similar to current rules applicable to Regulation A offerings under Rule 255. Unlike Rule 255, which permits issuers to test-the-waters both before and after the filing of an offering statement with the SEC, Rule 206 only permits issuers to test-the-waters before the Form C is filed. Once the Form C is filed, any offering communications would be required to comply with the terms of Regulation Crowdfunding, including the Regulation Crowdfunding Rule 204 advertising restrictions.

Rule 206 requires issuers to include legends in the test-the-waters materials stating that:

- no money or other consideration is being solicited, and if sent, will not be accepted;
- no offer to buy the securities can be accepted and no part of the purchase price can be received until the

offering statement is filed and only through an intermediary's platform; and

- a prospective purchaser's indication of interest is non-binding.

Test-the-waters communications would be considered offers subject to the antifraud provisions of the federal securities laws.

The SEC also amended Regulation Crowdfunding Rule 201(z) to require issuers to include Rule 206 solicitation materials with the Form C that is filed with the SEC.

Other Regulation Crowdfunding Offering Communications

The SEC revised Regulation Crowdfunding Rule 204 to permit Regulation Crowdfunding issuers to communicate orally with prospective investors once the Form C is filed, so long as the communications comply with the requirements of Rule 204. A link to the intermediary's platform is only required under revised Rule 204 with respect to written Regulation Crowdfunding Rule 204 communications. The amendments also expand the information that an issuer may provide under Rule 204 to include:=

- a brief description of the planned use of proceeds of the offering; and
- information on the issuer's progress toward meeting its funding goals.

The SEC also expanded Rule 204 to specify that an issuer may provide information about the terms of a Regulation Crowdfunding offering in the offering materials for a concurrent offering so long as the information provided about the Regulation Crowdfunding otherwise complies with Rule 204.

Extension of Temporary Relief

The SEC extended for 18 months the existing temporary relief providing an exemption from certain Regulation Crowdfunding financial statement review requirements for issuers who conduct Regulation Crowdfunding offerings of more than $107,000, but no more than $250,000 of securities in reliance on the exemption within a 12-month period. An issuer taking advantage of this exemption may provide financial statements of the issuer and certain information from the issuer's federal tax returns, both certified by the principal executive officer, instead of financial statements reviewed by a public accountant that is independent of the issuer. This temporary relief will only apply: (i) to offerings initiated between May 4, 2020, and August 28, 2022; and (ii) only if reviewed or audited financial statements of the issuer are not otherwise available. This temporary relief will expire on March 1, 2023.

Observation Regarding Crowdfunding Intermediaries

The SEC noted that a Regulation Crowdfunding intermediary desiring to host a concurrent offering under another offering exemption would need to consider whether these additional activities could cause it to lose the exemption provided by Regulation Crowdfunding Rule 401, or otherwise become subject to broker registration requirements, noting that Regulation Crowdfunding Rule 401 only exempts a funding portal from the Exchange Act's broker registration requirement with respect to its activities as an intermediary under Securities Act Section 4(a)(6).

Amendments to Regulation D

Increased Offering Amount

The SEC raised the maximum offering amount under Rule 504 from $5 million to $10 million per 12-month period.

Changed Disclosure Requirement for Non-Accredited Investor Disclosures under Rule 502(b)

The SEC amended Rule 502(b)'s requirements governing the financial information that non-reporting companies must

provide to non-accredited investors participating in Regulation D offerings to align with the financial information that issuers must provide investors in Regulation A offerings. Historically, issuers may have been unwilling to include non-accredited investors in Rule 506(b) offerings because of the burdensome financial statement disclosures. The SEC hopes that this amendment will make issuers more willing to include non-accredited investors in offerings, which would expand investment opportunities for such investors.

After the amendment, in Regulation D offerings of up to $20 million, issuers would no longer be required to provide audited financial statements and would instead be required to comply with the requirements applicable to Tier 1 Regulation A offerings. In Regulation D offerings of greater than $20 million, issuers would be required to provide audited financial statements and comply with the requirements applicable to Tier 2 Regulation A offerings.

Change to Calculation of Non-Accredited Investors Involved in Rule 506(b) Offerings

The SEC amended Rule 506(b)(2)(i) to provide that an issuer may include no more than 35 non-accredited investors in offerings under Rule 506(b) in any 90-calendar day period.

New Accredited Investor Verification Method under Rule 506(c)

The SEC added a new non-exclusive verification method under Rule 506(c), permitting an issuer to establish that an investor the issuer previously took reasonable steps to verify as an accredited investor remains an accredited investor at the time of a subsequent sale if the issuer receives a written representation from the investor to that effect and the issuer is not aware of any information to the contrary. The previous verification must have occurred no more than five years before the subsequent written representation.

Amendments Regarding Integration of Securities Offerings

The SEC overhauled the integration framework for both registered and exempt offerings. The SEC developed the integration framework to prevent an issuer from improperly avoiding registration by artificially dividing a single securities offering into multiple offerings that each complies with a Securities Act exemption but that would not comply with a single Securities Act exemption if combined. Currently, the integration analysis involves an examination of the facts and circumstances under a complex patchwork of SEC rules and guidance, which may result in uncertainty as to whether offerings may be integrated (other than if relying on the safe harbor under Rule 502(a) of Regulation D for offerings occurring more than six months apart).

The amendments create a new Rule 152, which provides a comprehensive integration framework composed of a general principle of integration and four safe harbors applicable to all Securities Act securities offerings. New Rule 152 replaces the current integration framework found in Regulation A, Regulation Crowdfunding, Regulation D and Rules 147, 147A, 152 and 155.

The introductory language to Rule 152 provides that the rule will not work to avoid 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 Securities Act's registration requirement.

The following table summarizes the general 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.
Rule 152(a)(1) – Application of the General Principle to an exempt offering prohibiting general solicitation	The issuer must have 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: (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. Under this principle, an issuer may conduct an offering prohibiting general solicitation concurrently with another offering permitting general solicitation without integration concerns so long as the conditions are satisfied. With respect to the condition in clause (ii) above, the SEC reiterated its long-standing position that self-certification alone (by checking a box) without any other knowledge of an investor's financial circumstances or sophistication would not be sufficient to form a "substantive" relationship for these purposes.
Rule 152(a)(2) – Application of the General Principle to concurrent exempt offerings that each allow general solicitation	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.

The following table summarizes the safe harbors in new Rule 152(b). No integration analysis is required under Rule 152(a) if one of the non-exclusive safe harbors in Rule 152(b) applies.

Safe harbor 1 – Rule 152(b)(1)	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.
Safe harbor 2 – Rule 152(b)(2)	Offers 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 (regardless of when the offerings occur, including concurrent offerings). In this context, the SEC also clarified that general solicitation activity for exempt domestic offerings would not preclude reliance on Regulation S for concurrent offshore offerings, and reaffirmed its existing guidance with respect to concurrent Regulation S and domestic offerings.
Safe harbor 3 – Rule 152(b)(3)	An offering for which a Securities Act registration statement 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 that was made only to qualified institutional buyers and institutional accredited investors; 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.
Safe harbor 4 – 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 subsequent to any terminated or completed offering (exempt offerings permitting general solicitation include Regulation A, Regulation Crowdfunding, Securities Act Rule 147 and Rule 147A, Rules 504(b)(1)(i), (ii) or (iii), and Securities Act Rule 506(c)).

The timing of the commencement and termination of a particular securities offering is important for purposes of new Rule 152. Rule 152(c) provides that an offering is deemed to have commenced at the time of the first offer of securities in the offering by the issuer or its agents, and includes a non-exclusive list of factors that should be considered in determining when an offering is deemed to have commenced. An issuer or its agents may commence an offering in reliance on:

- Rule 241, 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;
- Section 4(a)(2), Regulation D, or Rule 147 or 147A, on the date the issuer first made an offer of its securities in reliance on these exemptions;
- Regulation A, on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on Rule 255, or the public filing of a Form 1-A offering statement;
- Regulation Crowdfunding, on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on new Rule 206, or the public filing of a Form C offering statement; and

- A registration statement filed under the Securities Act for:
    - a continuous offering that will commence promptly on the date of initial effectiveness, on the date the issuer first filed its registration statement for the offering with the SEC, or
    - 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 (i) the first filing of a prospectus supplement with the SEC describing the delayed offering, or (ii) the issuance of a widely disseminated public disclosure, such as a press release, confirming the commencement of the delayed offering.

The SEC noted that communications between an issuer, or its agents and underwriters, and qualified institutional buyers and institutional accredited investors, including those that would qualify for the 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 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.

Similarly, new Rules 152(d) provides that termination or completion of an offering is deemed to have occurred when the issuer and its agents cease efforts to make further offers to sell the issuer's securities under such offering, and includes a non-exclusive list of factors to consider in determining when an offering is deemed to be terminated or completed, including for offerings made in reliance on:

- Section 4(a)(2), Regulation D or Rule 147 and 147A, on the later of: (i) the date the issuer entered into a binding commitment to sell securities under the offering (subject only to conditions outside of the investor's control); or (ii) the date the issuer and its agents ceased efforts to make further offers to sell the issuer's securities;
- Regulation A, (i) upon the withdrawal of an offering statement; (ii) upon the filing of Form 1-Z with respect to a Tier I offering; (iii) upon the declaration by the SEC that the offering statement has been abandoned under Rule 259(b); or (iv) the date, after the third anniversary of the date the offering statement was initially qualified, on which Rule 251(d)(3)(i)(F) prohibits the issuer from continuing to sell securities using the offering statement, or any earlier date on which the offering terminates by its term;
- Regulation Crowdfunding, on the deadline of the offering identified in the offering materials, or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under Regulation Crowdfunding Rule 304(b); and
- A registration statement, (i) upon the withdrawal of the registration statement after the SEC grants an application under Rule 477; (ii) upon the filing of a prospectus supplement or amendment to the registration statement indicating that the registered offering has been terminated or completed; (iii) the entry of a SEC order declaring that the registration statement has been abandoned under Rule 479; (iv) 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 (v) any other factors that indicate that the issuer has abandoned or ceased its public selling efforts in furtherance of the offering, which could be evidenced by the filing of a Current Report on Form 8-K or the issuance of a widely disseminated public disclosure informing the market that the offering has been terminated or completed.

Amendments Regarding Offering Communications – Generally

Whether a communication constitutes an "offer" under the Securities Act is crucial for purposes of determining whether the Securities Act registration requirement has been implicated (i.e., whether the offer must be registered or made under an available exemption from the registration requirement). It is particularly important in the context of offers that are conveyed through general solicitation because such offers are more likely to be required to be registered because of the restrictions imposed by available exemptions permitting general solicitation. The SEC revised existing offering communications rules, by:

- providing that certain "demo day" communications will not be deemed general solicitation or general advertising;
- permitting an issuer to use generic solicitation of interest materials to "test-the-waters" for an exempt offer of securities before determining which exemption it will use for the sale of the securities;
- permitting Regulation Crowdfunding issuers to "test-the-waters" before filing a Form C with the SEC in a manner similar to current rules applicable to Regulation A offerings (described above); and
- permitting Regulation Crowdfunding issuers to communicate orally with prospective investors once the Form C is filed, so long as the communication complies with the requirements of Regulation Crowdfunding Rule 204 (described above).

"Demo Day" Communication – New Rule 148

New Rule 148 provides that an issuer will not be deemed to have engaged in general solicitation if communications are made in connection with a seminar or meeting ("demo day" or "event") hosted or sponsored by: (i) a college, university, or other institution of higher education; (ii) a state or local government or instrumentality of a state or local government; (iii) a nonprofit organization; or (iv) an angel investor group, incubator, or accelerator (an "Eligible Sponsor"). To qualify as an Eligible Sponsor, an angel investor group must have defined processes and procedures for investment decisions, but they do not have to be in writing.

The SEC declined to include in the list of Eligible Sponsors private funds, venture forums, venture capital associations, trade associations, professional organizations, and groups associated or affiliated with brokers, dealers, or investment advisers. Nevertheless, the SEC notes that some of these excluded organizations may be deemed Eligible Sponsors under one of the stated categories, for example, if an organization is organized as a nonprofit organization. The SEC also noted that membership in angel investor groups by brokers, dealers, or investment advisers will not, by itself, result in the angel investor group being deemed to be associated or affiliated with brokers, dealers, or investment advisers for the purpose of new Rule 148.

Further, new Rule 148 provides certain restrictions for Eligible Sponsors and issuers. An Eligible Sponsor is not permitted to:

- make investment recommendations or provide investment advice to attendees of the event;
- engage in any investment negotiations between the issuer and investors attending the event;
- charge attendees of the event any fees, other than reasonable administrative fees;
- receive any compensation for (i) making introductions between event attendees and issuers, or (ii) investment negotiations between the parties; or
- receive any compensation with respect to the event that would require it to register as a broker or dealer

under the Exchange Act, or as an investment adviser under the Investment Advisers Act of 1940.

The SEC declined to provide rules as to whether the administrative fees charged by the sponsor are reasonable, but emphasized that the limitation should be construed consistent with the SEC's goal of limiting the potential for a sponsor to profit from its involvement. This limitation does not prevent an Eligible Sponsor from collecting membership dues or similar fees.

Additionally, more than one issuer must participate in the event, and the advertising for the event may not reference any specific offering of securities by the issuers presenting at such event.

If an issuer desires to convey information about a securities offering at a demo day, the information conveyed must be 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 the proceeds of the offering; and
- the unsubscribed amount of the offering.

The SEC emphasized that Rule 148 is not intended to allow issuers to broadly communicate about securities offerings at a demo day but instead providing enough flexibility to note issuers' need to raise capital in connection with discussing business plans without jeopardizing their ability to rely on a certain registration exemption.

Finally, for demo days that are conducted, in whole or in part, in a virtual format, online participation in the event must be limited to: (i) individuals who are members of, or otherwise associated with the Eligible Sponsor; (ii) individuals that the Eligible Sponsor reasonably believes are accredited investors; or (iii) individuals who have been invited to the event by the Eligible Sponsor based on industry or investment-related experience reasonably selected by the Eligible Sponsor in good faith and disclosed in the public communications about the event.

Instead of relying on new Rule 148, issuers may continue to rely on prior SEC guidance regarding demo day-related communication, if the organizer of the event has limited participation in the event to persons with whom the issuer or the organizer has a pre-existing substantive relationship or that have been contacted through an informal, personal network of experienced, financially sophisticated individuals.

Test-the-Waters Communications Generally – New Rule 241

New Rule 241 permits an issuer and persons authorized to act on behalf of an issuer to use generic solicitation of interest materials to "test-the-waters" for an exempt offer of securities before determining which exemption it will use for the sale of the securities. However, once the issuer determines the exemption under which the offering will be conducted, the issuer must comply with the specific terms of the exemption being relied upon, including investor protections included in such exemption. An issuer may not solicit or accept money or commitments (binding or otherwise) until the issuer has determined what exemption it will rely on and commenced the offering in compliance with the exemption. However, a test-the-water communication may include a means for a person to indicate interest in a potential offering and an issuer may require such indication to include the person's name, address, telephone number, and/or email address.

Rule 241 requires that the materials used bear a legend or disclaimer notifying potential investors that:

- 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;

- no money or other consideration is being solicited, and if sent in response, will not be accepted;
- 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
- a person's indication of interest involves no obligation or commitment of any kind.

Finally, exempt offerings commenced within 30 days of the generic solicitation of interests have additional requirements. In addition to any information currently required to be disclosed under Regulation A and Regulation Crowdfunding, the generic solicitation materials must be made publicly available as an exhibit to the offering materials filed with the SEC, if the Regulation A or Regulation Crowdfunding offering is commenced within 30 days of the generic solicitation. Further, if the issuer sells securities under Rule 506(b) within 30 days of the generic solicitation of interest to any purchaser that is not an accredited investor, the issuer would be required to provide such non-accredited investor with any written communication used under new Rule 241 (regardless of whether the issuer engaged in general solicitation through its Rule 241 communication and whether or not the generic solicitation would be subject to integration with the Rule 506(b) offering).

Generic solicitation of interests under Rule 241 would be considered "offers" for purposes of the antifraud provision of the federal securities laws and also may be considered a general solicitation, depending on method of dissemination. If the Rule 241 communication is made in a manner constituting 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 analyze whether that solicitation and the subsequent private offering will be integrated, thereby making unavailable an exemption that does not permit general solicitation.

What Now?

Several of the amendments should have a practical positive impact on capital formation efforts. The increased offering limits under Rule 504 and Regulation Crowdfunding, and the other amendments to Regulation Crowdfunding, should make both offering types more attractive to issuers. Further, the new offering communication rules will allow issuers greater flexibility to gauge interest in a planned securities offering and to seek feedback on terms, structure and related matters before launch, which should save both time and money for issuers. Lastly, the new integration framework is a welcome harmonization and update of the current complex patchwork of rules and guidance to reflect current market realities and needs. The integration safe harbors will create certainty for issuers generally, and the reduction of the current six-month integration period under Regulation D to 30 days will create greater flexibility for issuers.

Effective Time

The amendments will become effective 60 days after publication in the *Federal Register* (which had not occurred at the date of this summary), except for the extension of the temporary Regulation Crowdfunding provisions, which will be effective upon publication in the *Federal Register*.

Rikard D. Lundberg
Shareholder
rlundberg@bhfs.com
303.223.1232

Trayton D. Oakes
Associate
toakes@bhfs.com
303.223.1295

Marcela A. Dye
Associate
mdye@bhfs.com
303.223.1117

Brownstein Hyatt
Farber Schreck

This document is intended to provide you with general information regarding SEC rule changes. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.