SEC Loosens Restrictions on Exempt Securities Offerings

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SEC LOOSENS RESTRICTIONS ON EXEMPT SECURITIES OFFERINGS
By: George Lee and Kylie Jennings

Every securities offering must either be registered with the SEC or qualify for a registration exemption. Because of the expense and regulatory burdens of a registered public offering, smaller companies must rely on one of the exemptions provided by SEC rules. The SEC recently amended its rules and provided helpful guidance to make it easier for small companies to raise capital. Among other things, the new rules and guidance (1) increase the amounts that can be raised using Crowdfunding and Regulation A, (2) allow certain preliminary communications to potential investors, (3) ease certain disclosure requirements to non-accredited investors under Rule 506(b), and (4) provide safe harbors to avoid integration of offerings. Most of the amendments became effective on March 15.

Crowdfunding

The new Crowdfunding rules:

- Increase the offering limit from $1.07 million to $5 million in a 12-month period;
- Remove investment limits for accredited investors; and
- Extend temporary pandemic relief from certain requirements for small Crowdfunding by eligible businesses.

Regulation A

The amendments:

- Increase the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million; and
- Increase the maximum offering amount for secondary sales under Tier 1 of Regulation A from $15 million to $22.5 million.

Preliminary Communications

The amended rules will allow companies to “test the waters” by communicating with potential investors to determine their interest in a future offering without having to worry that the communications would be considered general solicitation. These communications are limited to a generic solicitation of interest prior to determining the terms of the offering or the exemption that will be relied on. In addition, written materials must contain certain legal disclaimers and still must comply with state law requirements.

Companies can also participate in “demo days” sponsored by colleges, universities, state or local government, non-profit organizations, incubators, or angel investors. This allows businesses to provide information about existing or future offerings to potential investors with certain restrictions.

Offerings to Non-Accredited Investors under Reg. D

Traditionally, attorneys have advised against including non-accredited investors in offerings under Rule 506(b) of Regulation D due to the onerous disclosure requirements, including audited financial statements (please see our article on accredited investors in this newsletter). By relaxing certain financial statement requirements, the amendments align these requirements with those under Regulation A based on the size of the offering:

- For offerings up to $20 million, the requirements for Tier 1 Regulation A offering would apply, which *do not require* audited financial statements.
- For offerings of more than $20 million, the requirements for Tier 2 Regulation A offerings would apply.

Integration Safe Harbors

Finally, the SEC has updated its guidance on integration of offerings. Previously, the rule of thumb was that offerings made within six months of each other could be viewed as a single offering, which could jeopardize a private placement exemption if one of the offerings involved general solicitation.

The new amendments relax the previous guidance by adding four non-exclusive safe harbors. The most significant change allows an issuer to commence a new offering 30 calendar days after the termination or completion of another offering without triggering integration.

These specific rules and safe harbors can be complex, and this alert is meant to provide an overview of the changes the SEC has made to the exempt offering rules. Should you have any questions regarding the updated rules in general or any of these particular issues, please contact George Lee.

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