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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 227, 229, 230, 239, 240, 249, 270, and 274

[Release Nos. 33-10884; 34-90300; IC-34082; File No. S7-05-20]

RIN 3235-AM27

Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to facilitate capital formation and increase opportunities for investors by expanding access to capital for small and medium-sized businesses and entrepreneurs across the United States. Specifically, the amendments simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation while preserving or enhancing important investor protections. The amendments also seek to close gaps and reduce complexities in the exempt offering framework that may impede access to investment opportunities for investors and access to capital for businesses and entrepreneurs.

DATES: *General:* This final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Exceptions: 1. Revised 17 CFR 227.100(b)(7) (amendatory instruction 2), previously effective until Sept. 1, 2021 at 85 FR 27132, May 7, 2020, is now effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], to March 1, 2023.

2. Newly redesignated and revised 17 CFR 227.201(aa) (amendatory instruction 4) is effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], and remains effective until September 1, 2021.

3. 17 CFR 227.201(bb) (amendatory instruction 5) and 17 CFR 227.301(e) (amendatory instruction 10) are effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], to March 1, 2023.

4. Amendments to 17 CFR 227.303(g) (amendatory instruction 11) and 17 CFR 227.304(e) (amendatory instruction 12) are effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], and remain effective until September 1, 2021

5. The amendments to the introductory paragraph in the Optional Question and Answer Format for an Offering Statement of Form C (referenced in § 239.900) are applicable from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], to March 1, 2023.

FOR FURTHER INFORMATION CONTACT: Anthony Barone or John Byrne, Special Counsel, Office of Small Business Policy, or Steven G. Hearne, Senior Special Counsel, Office of Rulemaking, at (202) 551-3460, Division of Corporation Finance; Jennifer Songer, Branch Chief, or Lawrence Pace, Senior Counsel, at (202) 551-6999, Investment Adviser Regulation Office, Division of Investment Management; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to:

Commission Reference		**CFR Citation (17 CFR)**
Regulation Crowdfunding	Rules 100 through 504	§§ 227.100 through 227.504
	Rule 100	§ 227.100
	Rule 201	§ 227.201
	Rule 203	§ 227.203
	Rule 204	§ 227.204
	Rule 206	§ 227.206
	Rule 301	§ 227.301
	Rule 303	§ 227.303
	Rule 304	§ 227.304
	Rule 503	§ 227.503
		§ 227.504
Securities Act of 1933 (Securities Act)[1]	Rule 147	§ 230.147
	Rule 147A	§ 230.147A

[1] 15 U.S.C. 77a *et seq*.

	Rule 148	§ 230.148
	Rule 152	§ 230.152
	Rule 155	§ 230.155
	Rule 241	§ 230.241
Regulation A	Rules 251 through 263	§§ 230.251 through 230.263
	Rule 251	§ 230.251
	Rule 255	§ 230.255
	Rule 259	§ 230.259
	Rule 262	§ 230.262
Regulation D	Rules 500 through 508	§§ 230.500 through 230.508
	Rule 500	§ 230.500
	Rule 502	§ 230.502
	Rule 504	§ 230.504
	Rule 506	§ 230.506
Regulation S-K	Items 10 through 1305	§§ 229.10 through 229.1305
	Item 601	§ 229.601
	Form S-6	§ 239.16
	Form N-14	§ 239.23
	Form 1-A	§ 239.90
	Form C	§ 239.900
Securities Exchange Act of 1934 (Exchange Act)[2]	Rule 12g-6	§ 240.12g-6
	Rule 12g5-1	§ 240.12g5-1
	Form 20-F	§ 249.220f
	Form 8-K	§ 249.308
Investment Company Act of 1940 (Investment Company Act)[3]	Rule 3a-9	§ 270.3a-9
	Form N-8B-2	§ 274.12
Securities Act and Investment Company Act	Form N-1A	§§ 239.15A and 274.11A
	Form N-2	§§ 239.14 and 274.11a-1
	Form N-3	§§ 239.17a and 274.11b
	Form N-4	§§ 239.17b and 274.11c
	Form N-5	§§ 239.24 and 274.5
	Form N-6	§§ 239.17c and 274.11d

Table of Contents

I. INTRODUCTION AND BACKGROUND

II. DISCUSSION OF FINAL AMENDMENTS

A. Integration

1. Integration Principles and Application (Rule 152(a) General Principle and Introductory Language to Rule 152)

2. Integration Safe Harbors

3. Commencement, Termination, and Completion of Offerings (Rules 152(c) and 152(d))

[2] 15 U.S.C. 78a *et seq*.

[3] 15 U.S.C. 80a-1 *et seq*.

4. Conforming Amendments to Securities Act Exemptions
B. General Solicitation and Offering Communications
1. Exemption from General Solicitation for "Demo Days" and Similar Events
2. Solicitations of Interest
3. Other Regulation Crowdfunding Offering Communications
C. Rule 506(c) Verification Requirements
1. Proposed Amendments
2. Comments
3. Final Amendments
D. Harmonization of Disclosure Requirements
1. Rule 502(b) of Regulation D
2. Proposed Amendments to Simplify Compliance with Regulation A
3. Confidential Information Standard
E. Offering and Investment Limits
1. Regulation A
2. Rule 504
3. Regulation Crowdfunding
F. Regulation Crowdfunding and Regulation A Eligibility
1. Regulation Crowdfunding Eligible Issuers
2. Regulation Crowdfunding Eligible Securities
3. Regulation A Eligibility Restrictions for Delinquent Exchange Act Filers
G. Bad Actor Disqualification Provisions
1. Proposed Amendments
2. Comments
3. Final Amendments
III. OTHER MATTERS
IV. ECONOMIC ANALYSIS
A. Broad Economic Considerations
B. Baseline
C. Economic Effects of the Final Amendments
1. Integration
2. General Solicitation and Offering Communications
3. Rule 506(c) Verification Requirements
4. Disclosure Requirements
5. Offering and Investment Limits
6. Eligibility Requirements in Regulation Crowdfunding and Regulation A
7. Bad Actor Disqualification Provisions
V. PAPERWORK REDUCTION ACT
VI. FINAL REGULATORY FLEXIBILITY ANALYSIS
VII. STATUTORY AUTHORITY

I. INTRODUCTION AND BACKGROUND

On March 4, 2020, the Securities and Exchange Commission (the "SEC" or "Commission") proposed amendments to simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation while preserving or enhancing important investor protections.[4] Specifically, the Commission proposed amendments that (1) address the ability of issuers to move from one exemption to another, (2) set clear and consistent rules governing offering communications between investors and issuers, (3) address potential gaps and inconsistencies in our rules relating to offering and investment limits, and (4) harmonize certain disclosure requirements and bad actor disqualification provisions.

The Securities Act requires that every offer[5] and sale of securities be registered with the Commission, unless an exemption from registration is available. The Securities Act, however, also contains a number of exemptions from its registration requirements and authorizes the Commission to adopt additional exemptions. Section 3 of the Securities Act generally provides exemptions that are based on characteristics of the securities themselves.[6] Section 4 of the Securities Act identifies transactions that are exempt from the registration requirements.[7] In addition, Section 28 of the Securities Act authorizes the Commission to exempt other persons, securities, or transactions to the extent necessary or appropriate in the public interest and consistent with the protection of investors.[8] The current exempt offering framework is complex and made up of differing, exemption-specific requirements and conditions. The scope of the exempt offering framework has evolved over time through Commission rules and legislative

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4 *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33-10763 (Mar. 4, 2020) [85 FR 17956 (Mar. 31, 2020)] ("Proposing Release").

5 *See* 15 U.S.C. 77b(a)(3) (noting that an offer includes every attempt to dispose of a security or interest in a security, for value; or any solicitation of an offer to buy a security or interest in a security).

6 *See* 15 U.S.C. 77c. However, some Section 3 exempted securities are identified based on the transaction in which they are offered or sold. For example, Section 3(b)(1) of the Securities Act authorizes the Commission to exempt certain issues of securities where the aggregate amount offered does not exceed $5 million. 15 U.S.C. 77c(b)(1).

7 *See* 15 U.S.C. 77d.

8 15 U.S.C. 77z-3.

changes, including most recently through the Jumpstart Our Business Startups Act of 2012 ("JOBS Act"),[9] the Fixing America's Surface Transportation Act of 2015,[10] and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018.[11] On June 18, 2019, the Commission issued a concept release that solicited public comment on possible ways to simplify, harmonize, and improve the exempt offering framework under the Securities Act to promote capital formation and expand investment opportunities while maintaining appropriate investor protections.[12] While commenters on the Concept Release expressed many perspectives on what changes would best serve the interests of emerging companies raising capital, a consistent theme in many comments was that many elements of the current structure work effectively and a major restructuring is not needed.[13]

Building on the comments received in response to the Concept Release and other comments and recommendations received from the SEC Small Business Capital Formation Advisory Committee, the SEC Investor Advisory Committee, the annual Government-Business Forums on Small Business Capital Formation (each a "Small Business Forum"), and other market participants, the Commission proposed a set of amendments that would generally retain the current exempt offering structure and reduce potential friction points. The proposed amendments were intended to facilitate capital formation while preserving and in some cases

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[9] Pub. L. No. 112-106, 126 Stat. 306 (2012). The JOBS Act, among other things: (1) Directed the Commission to revise Rule 506 to eliminate the prohibition against general solicitation or general advertising for offers and sales of securities to accredited investors (*See* Section 201(a)(1)); (2) Added Section 4(a)(6) [15 U.S.C. 77d(a)(6)] and Section 4A [15 U.S.C. 77d-1(b)] to the Securities Act and directed the Commission to issue rules to permit certain crowdfunding offerings (*See* Section 302); and (3) Directed the Commission to expand Regulation A (*See* Section 401).

[10] Pub. L. No. 114-94, 129 Stat. 1312 (2015).

[11] Pub. L. No. 115-174, 132 Stat. 1296 (2018).

[12] *See* Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33-10649 (June 18, 2019) [84 FR 30460 (June 26, 2019)] ("Concept Release").

[13] *See, e.g.*, Letter from AngelList Advisors, LLC dated Sept. 25, 2019; Letter from CrowdCheck, Inc. dated Oct. 30, 2019; and Letter from Crowdfund Capital Advisors dated Sept. 24, 2019, in response to the Concept Release, *available at* https://www.sec.gov/comments/s7-08-19/s70819.htm. *See also* Recommendation of the SEC Small Business Capital Formation Advisory Committee regarding the exemptive offering framework (Dec. 13, 2019), *available at* https://www.sec.gov/spotlight/sbcfac/recommendation-harmonization-general-principles.pdf ("2019 Small Business Advisory Committee Recommendation on the Exemptive Offering Framework"); and Report of the 2019 SEC Government-Business Forum on Small Business Capital Formation (Dec. 2019), *available at* https://www.sec.gov/files/small-business-forum-report-2019.pdf ("2019 Forum Report").

enhancing investor protections. The proposed amendments were further intended to address gaps and complexities in the exempt offering framework and help provide viable alternatives to the dominant capital raising tools.

We received many comment letters on the Proposing Release expressing a range of views.[14] We also received comments and recommendations on the Proposing Release from the SEC Small Business Capital Formation Advisory Committee[15] and the 2020 Small Business Forum.[16] After considering the public comments received and the other comments and recommendations, we are adopting the amendments substantially as proposed but with certain modifications in response to commenters' feedback. We believe that the final rules will facilitate the use of the exempt offering framework, particularly by smaller issuers.[17] We acknowledge concerns about and recommendations relating to transparency and investor protections in the private securities marketplace.[18] We further acknowledge concerns that by encouraging exempt offerings, these amendments could reduce incentives for issuers to conduct registered public offerings. However, we estimate, as discussed further in Section IV (Economic Analysis) below, that while these amendments may encourage more exempt offerings, these offerings will have only a marginal impact on the number of registered

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[14] Unless otherwise indicated, comments cited in this release are to comment letters received in response to the Proposing Release, which are available at https://www.sec.gov/comments/s7-05-20/s70520.htm.

[15] *See* Letter from SEC Small Business Capital Formation Advisory Committee dated May 28, 2020 ("SEC SBCFAC Letter").

[16] *See* Final Report of the 2020 SEC Government-Business Forum on Small Business Capital Formation (June 2020), *available at* https://www.sec.gov/files/2020-oasb-forum-report-final_0.pdf ("2020 Forum Report").

[17] We are mindful of concerns expressed in the Recommendation of the SEC Small Business Capital Formation Advisory Committee regarding how our capital markets are serving underrepresented founders and investors (Aug. 26, 2020), available at https://www.sec.gov/spotlight/sbcfac/underrepresented-founders-recommendation.pdf. The recommendation states that minority- and women-owned businesses and funds face barriers to entry due to less access to capital than their peers. We believe that the amendments adopted in this release will enable small businesses generally to access capital through exempt offerings more effectively and we encourage further specific, tangible suggestions for action by the Commission and are committed to continued engagement on this topic.

[18] *See* Letter from North American Securities Administrators Association, Inc. dated October 21, 2020 ("NASAA Letter II"). NASAA Letter II recommended requiring the filing of a Form D concurrent with the beginning of a general solicitation, expanding the Form D to capture additional information about the offering, the filing of a closing Form D amendment, and certain legends for Rule 506(c) offerings. While we did not propose and are not adopting these recommended changes, we are committed to continued engagement to enhance small business capital formation and investor protection.

offerings.[19] Commenters' views on different aspects of the proposed amendments, as well as their effects, are discussed topically below.

II. DISCUSSION OF FINAL AMENDMENTS

We are amending the exempt offering framework to close gaps and reduce complexities that may impede access to capital for issuers and thereby limit investment opportunities, while preserving or enhancing important investor protections. The amendments generally:

- Modernize and simplify the Securities Act integration framework for registered and exempt offerings;
- Set clear and consistent rules governing offering communications between issuers and investors;
- Increase offering and investment limits for certain exemptions; and
- Harmonize certain disclosure requirements and bad actor disqualification provisions.

Table 1 summarizes key characteristics of the most commonly used exemptions[20] from registration, as amended by this release.[21]

Table 1: Overview of Capital-Raising Exemptions

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing Requirements	Restrictions on Resale	Preemption of State Registration and Qualification

[19] *See* discussion of the Broad Economic Considerations in Section IV.A. below, noting among other things that the amendments with the greatest potential to expand the use of individual exemptions affect the smallest market segments (Regulation Crowdfunding and Regulation A), whose issuers tend to be at a much earlier stage of development than those that conduct a traditional initial public offering. In addition, based on data collected on Regulation D offerings from 2009 through 2019, given the small size of a typical Regulation D issuer and offering, the amendments, including the adoption of a new comprehensive integration framework, are unlikely to reduce the incentives or need of issuers contemplating registered offerings. *See* i*nfra* note 596, *infra* Table 7 and related discussion.

[20] Commission rules also provide exemptions for certain offerings where the purpose of the offering is other than to raise capital. For example, 17 CFR 230.701 ("Rule 701") exempts certain sales of securities made to compensate employees, consultants, and advisors.

[21] Generally, Table 1 is organized by typical offering size from largest to smallest. The information in this table is not comprehensive and is intended only to highlight some of the more significant aspects of the current rules. Certain regulatory exemptions from registration provide specific frameworks or safe harbors to comply with statutory exemptions. For example, offers and sales of securities by an issuer that satisfy the conditions in paragraphs (b) and (c) of Rule 506 are deemed to be transactions not involving any public offering within the meaning of Section 4(a)(2) of the Securities Act [15 U.S.C. 77d(a)(2)]. *See* 17 CFR 230.506(a). Similarly, Rule 147 provides a safe harbor under Section 3(a)(11) of the Securities Act [15 U.S.C. 77c(a)(11)]. In contrast, for example, Rule 147A is a stand-alone exemption promulgated by the Commission pursuant to its authority under Section 28 of the Securities Act [15 U.S.C. 77z-3]. *See* 17 CFR 230.147A(a).

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing Requirements	Restrictions on Resale	Preemption of State Registration and Qualification
Section 4(a)(2)	None	No	None	Transactions by an issuer not involving any public offering. *See SEC v. Ralston Purina Co*.	None	Yes. Restricted securities	No
17 CFR 230.506(b) ("Rule 506(b)" of Regulation D)	None	No	"Bad actor" disqualifications apply	Unlimited accredited investors Up to 35 sophisticated but non-accredited investors in a 90-day period	17 CFR 239.500 ("Form D")	Yes. Restricted securities	Yes
17 CFR 230.506(c) ("Rule 506(c)") of Regulation D	None	Yes	"Bad actor" disqualifications apply	Unlimited accredited investors Issuer must take reasonable steps to verify that all purchasers are accredited investors*	Form D	Yes. Restricted securities	Yes
Regulation A: Tier 1	$20 million	Permitted; before qualification, testing the waters permitted before and after the offering statement is filed	U.S. or Canadian issuers Excludes blank check companies, registered investment companies, business development companies, issuers of certain securities, certain issuers subject to a Section 12(j) order, and Regulation A and Exchange Act reporting companies that have not filed certain required reports. "Bad actor" disqualifications apply* No asset-backed securities.	None	Form 1-A, including two years of financial statements Exit report	No	No
Regulation A: Tier 2	$75 million			Non-accredited investors are subject to investment limits based on the greater of annual income and net worth, unless securities will be listed on a national securities exchange	Form 1-A, including two years of audited financial statements Annual, semi-annual, current, and exit reports	No	Yes
Rule 504 of Regulation D	$10 million	Permitted in limited circumstances	Excludes blank check companies, Exchange Act reporting companies, and investment companies "Bad actor" disqualifications apply	None	Form D	Yes. Restricted securities except in limited circumstances	No
Regulation Crowdfunding; Section 4(a)(6)	$5 million	Testing the waters permitted before Form C is filed Permitted with limits on advertising after Form C is filed Offering must be conducted on an internet platform through a registered intermediary	Excludes non-U.S. issuers, blank check companies, Exchange Act reporting companies, and investment companies "Bad actor" disqualifications apply	No investment limits for accredited investors Non-accredited investors are subject to investment limits based on the greater of annual income and net worth	Form C, including two years of financial statements that are certified, reviewed or audited, as required Progress and annual reports	12-month resale limitations	Yes
Intrastate: Section 3(a)(11)	No Federal limit (generally, individual State limits between $1 and $5 million)	Offerees must be in-state residents.	In-state residents "doing business" and incorporated in-state; excludes registered investment companies	Offerees and purchasers must be in-state residents	None	Securities must come to rest with in-state residents	No
Intrastate: Rule 147	No Federal limit (generally, individual State limits between	Offerees must be in-state residents.	In-state residents "doing business" and incorporated in-state;	Offerees and purchasers must be in-state residents	None	Yes. Resales must be within	No

Type of Offering	Offering Limit within 12-month Period	General Solicitation	Issuer Requirements	Investor Requirements	SEC Filing Requirements	Restrictions on Resale	Preemption of State Registration and Qualification
	$1 and $5 million)		excludes registered investment companies			State for six months	
Intrastate: Rule 147A	No Federal limit (generally, individual State limits between $1 and $5 million)	Yes	In-state residents and "doing business" in-state; excludes registered investment companies	Purchasers must be in-state residents	None	Yes. Resales must be within State for six months	No

We discuss specific aspects of the final amendments in detail below.

A. Integration

The integration doctrine seeks to prevent an issuer from improperly avoiding registration by artificially dividing a single offering into multiple offerings such that Securities Act exemptions would apply to the multiple offerings that would not be available for the combined offering.[22] The Securities Act integration framework for registered and exempt offerings consists of a mixture of rules and Commission guidance for determining whether multiple securities transactions should be considered part of the same offering. As the number of exemptions from registration available to issuers has evolved over time, the integration framework has grown more complex.[23]

The Commission first articulated the integration concept in 1933 and further developed it in two interpretive releases issued in the 1960s.[24] The interpretive releases state that determining whether a particular securities offering should be integrated with another offering requires an analysis of the specific facts and circumstances of the offerings. The Commission identified the following five factors to consider in determining whether the offerings should be integrated: (1) Whether the different offerings are part of a single plan of financing; (2) Whether

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[22] *See, e.g.*, Revisions of Limited Offering Exemptions in Regulation D, Release No. 33-8828 (Aug. 3, 2007) [72 FR 45116 (Aug. 10, 2007)] ("Regulation D 2007 Proposing Release"), at Section II.C.1.

[23] *See* Proposing Release, at Section II.A.

[24] *See* Release No. 33-97 (Dec. 28, 1933); Section 3(a)(11) Exemption for Local Offerings, Release No. 33-4434 (Dec. 6, 1961) [26 FR 11896 (Dec, 13, 1961)] ("Section 3(a)(11) Release"); and Non-Public Offering Exemption, Release No. 33-4552 (Nov. 6, 1962) [27 FR 11316 (Nov. 16, 1962)] ("Non-Public Offering Exemption Release").

the offerings involve issuance of the same class of security; (3) Whether the offerings are made at or about the same time; (4) Whether the same type of consideration is to be received; and (5) Whether the offerings are made for the same general purpose.[25]

In adopting Regulation D in 1982, the Commission relied on the five-factor test in establishing a framework used to determine whether two offerings that fall outside of the 17 CFR 230.502(a) ("Rule 502(a)") safe harbor should be integrated and treated as one offering.[26] The Rule 502(a) safe harbor provided that offers and sales more than six months before a Regulation D offering or more than six months after the completion of a Regulation D offering will not be considered part of the same offering. This provided issuers with a bright-line test on which they could rely to avoid the integration of multiple offerings. However, for offerings occurring within six months of each other, the determination as to whether separate sales of securities were part of the same offering (*i.e.*, were considered integrated) depended on the particular facts and circumstances of the offerings, including an analysis of the five-factor test.[27]

In 2007, the Commission issued guidance setting forth a framework for analyzing the integration of simultaneous registered and private offerings, where the five-factor test does not apply.[28] The Commission noted that the determination as to whether the filing of a registration statement should be considered to be a general solicitation or general advertising[29] that would affect the availability of the Section 4(a)(2) exemption for a concurrent private placement should be based on a consideration of whether the investors in the private placement were

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[25] *See* Section 3(a)(11) Release; and Non-Public Offering Exemption Release.

[26] *See* Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales, Release No. 33-6389 (Mar. 8, 1982) [47 FR 11251 (Mar. 16, 1982)] ("Regulation D Adopting Release"). *See also* Rule 502(a).

[27] Notwithstanding the fact that Rule 502(a) only applies to Regulation D offerings, the integration framework in Rule 502(a)—including the use of the five-factor test for determining the integration of offerings occurring within six months of each other—is often referred to when considering integration issues arising in other exempt offerings that do not have their own integration guidelines, such as Section 4(a)(2).

[28] *See* Regulation D 2007 Proposing Release, at Section II.C.1.

[29] *See* Section II.B. *infra* for a discussion of the terms "general solicitation" and "general advertising." In this release, we sometimes refer to both general solicitation and general advertising as they relate to an offer of securities as "general solicitation."

solicited by the registration statement or through some other means that would not foreclose the availability of the Section 4(a)(2) exemption.[30]

More recently, in connection with the Regulation A and Regulation Crowdfunding rulemakings in 2015 and the Rule 147 and Rule 147A rulemaking in 2016, the Commission set forth a facts-and-circumstances integration framework in the context of concurrent exempt offerings.[31] The facts-and-circumstances integration framework applies to situations where one offering permits general solicitation and the other does not, as well as situations where both offerings rely on exemptions permitting general solicitation. Under this analysis, where an integration safe harbor is not available, integration of concurrent or subsequent offers and sales of securities with any offering conducted under Regulation A, Regulation Crowdfunding, Rule 147, or Rule 147A will depend on the particular facts and circumstances, including whether each offering complies with the requirements of the exemption on which the particular offering is relying.[32]

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[30] *See* Regulation D 2007 Proposing Release. The Commission stated that issuers should analyze whether the offering is exempt under Section 4(a)(2) "on its own," including whether securities were offered and sold to the private placement investors through the means of a general solicitation in the form of the registration statement. The Commission provided the following examples: If an issuer files a registration statement and then seeks to offer and sell securities without registration to an investor who became interested in the purportedly private placement offering by means of the registration statement, then the Section 4(a)(2) exemption would not be available for that offering. If the prospective private placement investor became interested in the concurrent private placement through some means other than the registration statement that was consistent with Section 4(a)(2), such as through a substantive, pre-existing relationship with the issuer or direct contact by the issuer or its agents outside of the public offering effort, then the filing of the registration statement generally would not impact the potential availability of the Section 4(a)(2) exemption for that private placement and the private placement could be conducted while the registration statement for the public offering was on file with the Commission. Similarly, if the issuer is able to solicit interest in a concurrent private placement by contacting prospective investors who (1) were not identified or contacted through the marketing of the public offering, and (2) did not independently contact the issuer as a result of the general solicitation by means of the registration statement, then the private placement could be conducted in accordance with Section 4(a)(2) while the registration statement for a separate public offering was pending. *See id.*

[31] *See* Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), Release No. 33-9741 (Mar. 25, 2015) [80 FR 21805 (Apr. 20, 2015)] ("2015 Regulation A Release") at Section II.B.5; Crowdfunding, Release No. 33-9974 (Oct. 30, 2015) [80 FR 71387 (Nov. 16, 2015)] ("Crowdfunding Adopting Release") at Section II.A.1.c; and Exemptions to Facilitate Intrastate and Regional Securities Offerings, Release No. 33-10238 (Oct. 26, 2016) [81 FR 83494 (Nov. 21, 2016)] ("Intrastate and Regional Offerings Release") at Section II.B.5.

[32] For a concurrent offering under Rule 506(b), purchasers in the Rule 506(b) offering could not be solicited by means of a general solicitation used in connection with an offering under Regulation A (including any "testing-the-waters" communications), Regulation Crowdfunding, or Rule 147 or 147A. The issuer would need to establish that purchasers in the Rule 506(b) offering were solicited through other means. For example, the issuer may have had a pre-existing substantive relationship with such purchasers. *See* 2015 Regulation A Release, at Section II.B.5; Crowdfunding Adopting Release, at Section II.A.1.c; and Intrastate and Regional Offerings Release, at Section II.B.5.

We believe that statutory and regulatory changes to the Securities Act exemptive structure, including those arising from the JOBS Act, developments in the capital markets, and the evolution of communications technology make it necessary and appropriate for the Commission to modernize and simplify the Securities Act integration framework for registered and exempt offerings and its application throughout the Securities Act rules. New Rule 152 builds on the approach to integration in the Commission's recent rulemakings and provides a comprehensive integration framework composed of a general principle of integration, as set forth in new 17 CFR 230.152(a) ("Rule 152(a)"), and four safe harbors applicable to all securities offerings under the Securities Act, including registered and exempt offerings, as set forth in new 17 CFR 230.152(b) ("Rule 152(b)").

Tables 2(a) and 2(b) provide an overview of the general integration principle and safe harbors in new Rule 152, each discussed in more detail below.

Table 2(a): Overview of the General Integration Principle in New Rule 152[33]

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.
Application of the General Principle to an exempt offering prohibiting general solicitation 17 CFR 230.152(a)(1) ("Rule 152(a)(1)")	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 prior to the commencement of the exempt offering prohibiting general solicitation.
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.

[33] Revised introductory language has been added to new Rule 152 clarifying that the plan or scheme to evade the registration requirements language applies to the entire rule, and not just the safe harbors, as proposed. Specifically, the new introductory language states that because of the objectives of Rule 152 and the policies underlying the Securities Act, the provisions of the rule will not have the effect of avoiding 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 registration requirements of the Securities Act.

17 CFR 230.152(a)(2) ("Rule 152(a)(2)")	

Table 2(b): Overview of the Integration Safe Harbors in New Rule 152[34]

Non-Exclusive Integration Safe Harbors in new Rule 152(b)	
Safe Harbor 1 17 CFR 230.152(b)(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 17 CFR 230.152(b)(2) ("Rule 152(b)(2)")	Offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with 17 CFR 230.901 through 230.905 ("Regulation S") will not be integrated with other offerings.
Safe Harbor 3 17 CFR 230.152(b)(1) ("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 ("QIBs") and institutional accredited investors ("IAIs"); 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. See 17 CFR 230.144(a)(1) for the definition of "qualified institutional buyer," and 17 CFR 230.501(a)(1), (2), (3), (7), (8), (9), (12), and (13) for a list of entities that are considered "institutional accredited investors."
Safe Harbor 4 17 CFR 230.152(b)(1) ("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.

1. Integration Principles and Application (Rule 152(a) General Principle and Introductory Language to Rule 152)

a. Proposed Amendments

[34] No integration analysis under Rule 152(a) is required if any of the non-exclusive safe harbors in Rule 152(b) apply. In addition, the revised introductory language to new Rule 152 clarifies that the plan or scheme to evade the registration requirements language encompasses the entire rule, including the safe harbors.

The Commission proposed to revise the integration framework by establishing a general principle of integration in a revised Rule 152 that would require an issuer to consider the particular facts and circumstances of each offering, including whether 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.[35] The general principle of integration, as set forth in proposed Rule 152(a), would be available for all offers and sales of securities not covered by one of the four safe harbors set forth in proposed Rule 152(b).

The Commission also proposed to include two provisions applying the general integration principles that would supplement and provide greater specificity and guidance in applying the facts-and-circumstances analysis. Proposed Rule 152(a)(1) would codify and build on Commission guidance[36] setting forth a framework for analyzing how an issuer can conduct simultaneous registered and private offerings by providing that for an exempt offering for which general solicitation is not permitted, offers and sales would not be integrated with other offerings if the issuer has a reasonable belief, based on the facts and circumstances, that the purchasers in each exempt offering were not solicited through the use of general solicitation, or the purchasers in each exempt offering established a substantive relationship with the issuer (or person acting on the issuer's behalf) prior to the commencement of the offering prohibiting general solicitation. Proposed Rule 152(a)(2) would clarify that for an exempt offering permitting general solicitation that includes information about the material terms of a concurrent exempt offering also permitting general solicitation, the offering materials must comply with all the requirements for, or restrictions on, offers under each exemption, including any legend requirements or communications restrictions.

In addition, consistent with the introductory language of Rule 155, the introductory language in proposed Rule 152 specified that the four proposed safe harbors would not be

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[35] This proposed facts-and-circumstances analysis of integration would replace the traditional five-factor test first articulated by the Commission in 1962.

[36] *See* Regulation D 2007 Proposing Release, at Section II.C.1.

available to any issuer 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 registration requirements of the Securities Act.

b. Comments

i. Integration Framework and Establishment of General Principle of Integration

Consistent with comments that we received on the Concept Release[37] and recommendations of the annual Small Business Forums[38] that generally supported clarifying and modernizing the existing integration standards, many commenters supported the proposal to provide a comprehensive integration framework applicable to all securities offerings under the Securities Act, including registered and exempt offerings, by establishing a general principle of integration and four safe harbors in new Rule 152.[39] These commenters generally supported the

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[37] *See*, *e.g.*, Letter responding to the Concept Release from Davis Polk & Wardwell LLP dated Sept. 24, 2019; Letter responding to the Concept Release from Dechert LLP dated Sept. 24, 2019; Letter responding to the Concept Release from CrowdCheck dated Oct. 30, 2019 ("CrowdCheck Concept Release Letter"); and Letter responding to the Concept Release from Securities Industry and Financial Markets Association dated Sept. 24, 2019. *See also* 2019 Small Business Advisory Committee Recommendation on the Exemptive Offering Framework (stating "Integration should be revised so that the exemptions can be better utilized."). *But see* Letter responding to the Concept Release from Public Investors Advocate Bar Association dated Sept. 24, 2019 (positing that shortening the six month period in Rule 502(a) would "serve to promote" Ponzi schemes); and Letter responding to the Concept Release from North American Securities Administrators Association dated Oct. 11, 2019 (positing that "loosening" integration safe harbors would "increase the likelihood of regulatory arbitrage or create gaps in the investor protection landscape"). Comment letters received in response to the Concept Release are available at https://www.sec.gov/comments/s7-08-19/s70819.htm.

[38] *See* Final Report of the 2016 SEC Government-Business Forum on Small Business Capital Formation (Mar. 2017), available at https://www.sec.gov/info/smallbus/gbfor35.pdf ("2016 Forum Report"); Final Report of the 2017 SEC Government-Business Forum on Small Business Capital Formation (Mar. 2018), available at https://www.sec.gov/files/gbfor36.pdf ("2017 Forum Report"); and Final Report of the 2018 SEC Government-Business Forum on Small Business Capital Formation (June 2019), available at https://www.sec.gov/info/smallbus/gbfor37.pdf ("2018 Forum Report") (all three forums recommending that the Commission clarify the relationship between exempt offerings in which general solicitation is not permitted and exempt offerings in which general solicitation is permitted, and that Rule 152 applies to a Rule 506(c) offering so that an issuer using Rule 506(c) may subsequently engage in a registered public offering without adversely affecting the Rule 506(c) offering exemption). *See also* 2019 Forum Report (recommending using consistent terms in exempt offering rules for ease of understanding, as well as bright line rules and examples).

[39] *See, e.g.*, Letter from Geraci LLP dated May 29, 2020 ("Geraci Law Letter"); Letter from Ketsal dated June 30, 2020 ("Ketsal Letter"); Letter from Netcapital Funding Portal Inc. dated May 31, 2020 ("Netcapital Letter"); Letter from Republic dated June 1, 2020 ("Republic Letter"); Letter from Sō.Capital Inc. dated June 1, 2020 ("Sō.Capital Letter"); Letter from William Hubbard, Hubbard Business Counsel dated June 1, 2020 ("W. Hubbard Letter"); Letter from David R. Burton, Senior Fellow in Economic Policy, The Heritage Foundation dated June 1, 2020 ("D. Burton Letter"); Letter from CrowdCheck Inc. dated June 11, 2020 ("CrowdCheck Letter"); Letter from Shearman & Sterling LLP dated June 18, 2020 ("Shearman & Sterling Letter"); Letter from Institute for Portfolio Alternatives dated June 25, 2020 ("IPA Letter"); and Letter from Federal Regulation of Securities Committee, the Private Equity and Venture Capital Committee, and the Commercial Finance Committee of the Business Law Section of the American Bar Association dated July 27,

Commission's proposal to create one broadly applicable framework to clarify the ability of issuers to engage in contemporaneous or close in time offerings under independent exemptions or pursuant to an effective registration statement. Several of these commenters stated that the structure of proposed Rule 152 would make clear the interaction between the integration provisions in proposed Rule 152(a) and the non-exclusive safe harbors in proposed Rule 152(b).[40] The SEC Small Business Capital Formation Advisory Committee also supported the proposed integration framework, specifically stating their belief that the new general principle of integration and the four proposed non-exclusive safe harbors would reduce the complexities across the offering framework by consistently defining and clarifying integration.[41]

A number of commenters opposed the proposed integration framework.[42] Some of these commenters expressed concerns that the proposed amendments would reduce the need or incentive for companies to go public[43] or allow issuers to evade the registration requirements of the Securities Act.[44] Two of these commenters also raised concerns about potential abuse of the

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2020 ("ABA Letter"). One commenter supporting the proposal suggested that the proposal would provide clarifying guidance that would enable issuers to raise capital in reliance on Rule 506(c) which may reduce the disparity between the amount of capital raised in reliance on Rule 506(b) versus Rule 506(c). *See* Letter from Fried, Frank Harris Shriver & Jacobson LLP dated June 1, 2020 ("Fried Frank Letter").

40 *See, e.g.*, W. Hubbard Letter; D. Burton Letter; and ABA Letter (stating that the proposed structure would add clarity, reduce complexity and provide greater confidence to issuers in planning and choosing their capital raising options). *But see* CrowdCheck Letter (recommending that specific fact patterns be included in the safe harbors rather than in the provisions that apply the general principle).

41 *See* SEC SBCFAC Letter.

42 *See* Letter from Better Markets, et al. dated June 2, 2020 ("Better Markets Letter"); Letter from Consumer Federation of America dated June 4, 2020 ("CFA Letter"); Letter from CFA Institute dated June 12, 2020 ("CFA Institute Letter"); Letter from Robert E. Rutkowski dated June 4, 2020 ("R. Rutkowski Letter"); Letter from Rutheford B. Campbell, Jr. dated Aug. 3, 2020 ("R. Campbell Letter"); Letter from Committee on Securities Law of the Business Law Section of the Maryland State Bar Association dated June 1, 2020 ("Md. St. Bar Assoc. Letter"); and Letter from Council of Institutional Investors dated May 28, 2020 ("CII Letter") (expressing concern that the proposed integration framework and expansion of the safe harbors would weaken the integration doctrine and result in the inclusion of large numbers of non-accredited investors in exempt offerings). *See also* Letter from North American Securities Administrators Association, Inc. dated June 1, 2020 ("NASAA Letter") (stating its objection to a 30-day safe harbor in proposed Rule 152(b)(1), although not objecting to the goal of harmonizing the integration regime and the safe harbors in proposed Rule 152(b)(2) through (4)).

43 *See* CFA Letter (stating its concern that the amendments could result in issuers being able to raise unlimited amounts of capital from an unlimited number of investors through exempt offerings, without ever needing to go through the registration process). *See generally* CFA Institute Letter; and R. Rutkowski Letter.

44 *See, e.g.*, CFA Letter (stating that "the original goal of preventing issuers from artificially separating related transactions into multiple offerings to avoid the registration requirement is gone under this approach, so long as the individual offerings each satisfy a particular exemption"); and R. Rutkowski Letter (suggesting that the proposal would allow issuers to avoid registration requirements by dividing large financings into multiple smaller exempt offerings).

general principle by an issuer identifying investors through a general solicitation in one offering and then selling securities to those investors in an offering for which general solicitation is prohibited.[45] Another commenter recommended that the integration analysis should involve two separate determinations: whether offerings are functionally the same offering should be determined first; followed by an analysis of whether the integrated offerings satisfy the requirements of an exemption.[46]

Several commenters who supported the concept of revising the integration framework offered alternative approaches to the proposal.[47] One of these commenters stated the current integration doctrine should be replaced with general anti-evasion principles and noted its potential adverse effect on early-stage companies.[48] Another commenter recommended elimination of the current integration doctrine and expressed concern that it has negative effects, particularly for small companies that commonly rely on Section 4(a)(2), Rule 504 or Rule 506(b) for their offerings.[49]

Some commenters specifically supported our proposal to replace the five-factor test with the Commission's more recent approach to integration adopted in 2015 and 2016 rulemakings involving Regulation A, Regulation Crowdfunding and Rules 147 and 147A, namely whether 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

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45 *See, e.g.*, CFA Letter; and Md. St. Bar Assoc. Letter. *But see* IPA Letter; and Fried Frank Letter (stating that an offering made more than 30 days after the termination of another offering should not be integrated, regardless of whether the purchasers in the exempt offering may have been solicited using general solicitation).

46 *See* Md. St. Bar Assoc. Letter.

47 *See* CrowdCheck Letter; Letter from John R. Clarke, dated May 30, 2020 ("J. Clarke Letter") (stating that the integration framework should be replaced with a filing requirement describing all historical and current exempt and registered offerings made by the issuer); and Letter from Invesco Ltd. dated June 1, 2020 ("Invesco Letter") (recommending a single safe harbor permitting offerings "so long as those offerings are reasonably conducted commensurate with the requirements under such rules").

48 *See* CrowdCheck Letter (stating that, although the proposed rule "is a distinct improvement on the current state of affairs," they would prefer for the Commission to "eliminate the concept of integration altogether and rely on general anti-evasion principles").

49 *See* R. Campbell Letter (stating that the integration doctrine "drives up offering costs and provides no protection for investors" and "its pernicious effects fall most heavily on small issuers"). This commenter raised a concern that, as proposed with its references to purchasers in "each exempt offering," the requirements of Rule 152(a)(1) would rarely be met for offerings under Section 4(a)(2), Rule 504, or Rule 506(b)).

offering.[50] Other commenters specifically recommended retaining the current five-factor test.[51] One commenter questioned the need for the proposed new framework, stating that it was not aware of significant problems in applying the current five-factor test,[52] while another commenter stated its concern that the proposal could permit concurrent and serial offerings that are clearly part of a single plan of financing to avoid integration.[53]

ii. Introductory Language of Rule 152

One commenter suggested that the Commission expand the introductory language to the proposed rule, concerning a "plan or scheme to evade the registration requirements of the Act" to include not just the rule's safe harbors, as proposed, but rather the entire rule, including the rule's general principle of integration.[54] This commenter also suggested that the Commission provide examples of facts and circumstances that might be relevant in applying the general principle of integration set forth in proposed Rule 152(a).[55]

iii. Provisions Applying the General Principle (Rules 152(a)(1) and 152(a)(2))

Commenters requested clarification and suggested modifications concerning the guidance on the general principle of integration provided in proposed Rule 152(a)(1)(i) and proposed Rule 152(a)(1)(ii).[56] Some of these commenters asked the Commission to revise new 17 CFR 230.152(a)(1)(i) ("Rule 152(a)(1)(i)") and 17 CFR 230.152(a)(1)(ii) ("Rule 152(a)(1)(ii)") to address an application of the general principle for concurrent exempt offerings

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50 *See* ABA Letter; J. Clarke Letter; CrowdCheck Letter; Geraci Letter (suggesting that it is difficult for issuers to determine whether subsequent offers might be integrated into a single offering under the five-factor test of integration); and W. Hubbard Letter (suggesting that the five-factor test may continue to be useful in limited situations).

51 *See* CFA Letter; and Md. St. Bar Assoc. Letter.

52 *See* Md. St. Bar Assoc. Letter.

53 *See* CFA Letter (stating that the purpose of integration is to look at the totality of a financing scheme rather than different components in isolation). *See also* R. Rutkowski Letter (stating that the proposed integration framework greatly weakens the integration doctrine by permitting issuers to conduct multiple exempt offerings regardless of whether such offerings are part of a single plan of financing, so long as each offering qualifies for an exemption from Securities Act registration requirements and is separated by at least 30 days).

54 *See* Md. St. Bar Assoc. Letter.

55 *See id* (questioning the need for the reference to "facts and circumstances").

56 *See, e.g.*, Md. St. Bar Assoc. Letter; Fried Frank Letter; IPA Letter; ABA Letter; CFA Letter; Invesco Letter; and CrowdCheck Letter.

where general solicitation is prohibited for one or more, but not all, such offerings.[57] Commenters also stated their concerns that an issuer could identify investors through a general solicitation and then sell to such investors in a subsequent private offering, and sought clarification of the application of proposed Rule 152(a)(1)(i) and (ii) to exempt offerings prohibiting general solicitation.[58] Another commenter recommended that the application of proposed Rule 152(a)(1)(i) and (ii) be tied to the particular purchaser, rather than "purchasers."[59] One commenter requested that the Commission clarify the application of proposed Rule 152(a)(1) to whether an offering permitting general solicitation would be integrated with an investor's secondary offering in reliance on Section 4(a)(7) of the Securities Act.[60] Another commenter suggested that a "certification from the investor that the investor did not become aware of a potential Rule 506(b) investment through a general solicitation" should satisfy an issuer's obligation under Rule 152(a)(1) to have, based on the facts and circumstances, a reasonable belief that the investor in the Rule 506(b) offering was not solicited through the use of general solicitation.[61] In contrast, some commenters suggested that the prohibition on general solicitation in exempt offerings should be eliminated.[62]

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[57] *See* Md. St. Bar Assoc. Letter (requesting clarification as to whether Rule 152(a)(1), as proposed, would codify Commission guidance first issued in 2007, involving one offering where general solicitation is permitted and a private offering where general solicitation is not permitted); Fried Frank Letter (stating that "[t]he Commission should revise Rule 152(a)(1) to clarify that, so long as its conditions are satisfied, an issuer may concurrently engage in an offering in reliance on Rule 506(b) and another offering in reliance on Rule 506(c)."); IPA Letter (recommending that the requirement not be applicable to "each exempt offering" but to "each exempt offering that prohibits the use of general solicitation"); and ABA Letter (recommending revisions to paragraphs (i) and (ii) of Rule 152(a)(1), as proposed, "[s]ince these Rule 152(a)(l) tests are intended to apply only to exempt offerings for which general solicitation is not permitted, but may be used in the context of concurrent or successive offerings with one exempt offering permitting general solicitation (such as Rule 506(c)) and the other prohibiting general solicitation (such as Rule 506(b))"). *See also* 2016 Forum Report; 2017 Forum Report; and 2018 Forum Report (all three forums recommending that the Commission clarify the relationship of exempt offerings in which general solicitation is not permitted with Rule 506(c) offerings involving general solicitation).

[58] *See e.g.*, CFA Letter; and Md. St. Bar Assoc. Letter.

[59] *See* ABA Letter ("An issuer should be able to rely on Rule 152(a)(l) if the issuer has a reasonable belief, based on the facts and circumstances, that each purchaser (rather than 'purchasers') in such exempt offering (rather than 'each exempt offering') either (i) was not solicited through the use of general solicitation in connection with the offerings not permitting general solicitation that are being analyzed or (ii) established a substantive relationship with the issuer before the offer was made (rather than 'commenced') to that purchaser.").

[60] *See* Fried Frank Letter.

[61] *See* IPA Letter.

[62] *See* Invesco Letter (suggesting eliminating the prohibition on general solicitation "or combining the safe harbors laid out in Rules 506(b) and (c) to permit open communications about an offering when targeted at a

Other commenters requested clarifications and modifications with respect to proposed Rule 152(a)(2), concerning an exempt offering permitting general solicitation that includes information about the material terms of a concurrent offering under another exemption also permitting general solicitation. One commenter recommended revising the rule to clarify whether the requirement in proposed Rule 152(a)(2) that the offering materials mentioning the terms of the other concurrent offering must comply with "the requirements of each exemption" refers solely to the offering materials, or to the offering in general.[63] This commenter also expressed concern that this aspect of the proposal may contradict the general principle that each exempt offering should be analyzed individually for compliance only with its claimed exemption.[64] Another commenter stated its specific concerns about potential difficulties issuers may have in complying with Rule 152(a)(2) in connection with concurrent Regulation A and Regulation Crowdfunding offerings.[65]

c. Final Amendments

After considering the comments, we are adopting a new comprehensive integration framework, in new Rule 152,[66] substantially as proposed, but with modifications in response to comments received. In addition to introductory anti-evasion language, new Rule 152(a) sets

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limited group of purchasers at a higher eligibility level than the minimums provided for in the 'accredited investor' definition."); and IPA Letter (stating that the prohibition on general solicitation in an exempt offering is archaic, and there are a variety of ways that investor protections can be built into securities offerings "without regulating how the investor became aware of the offering.").

63 *See* Md. St. Bar Assoc. Letter.

64 *See id.*

65 *See* CrowdCheck Letter (stating that when a Form C discusses the material terms of a concurrent Regulation A offering that has been qualified, it is problematic for the issuer to file on EDGAR a Form C with a live active hyperlink to the Regulation A offering circular in order to satisfy the issuer's delivery obligation under Regulation A, and also noting that a Form 1-A filed with the Commission that discusses the material terms of a Regulation Crowdfunding offering would not comply with the limitations on advertising in Rule 204 of Regulation Crowdfunding).

66 Revised Rule 152 as adopted will replace current Rules 152 and 155 concerning the integration of non-public and public offerings and references to Rule 152 will replace the integration provisions of Regulation D, Regulation A, Regulation Crowdfunding, and Rules 147 and 147A. Consistent with current Rule 155, new Rule 152 specifies that the provisions of the rule are not available to any issuer 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 registration requirements of the Securities Act. As a result of the amendments, Rule 155 will be removed and reserved.

forth a general principle of integration, and applies the general principle to two specific fact patterns, if the four safe harbors set forth in new Rule 152(b) do not apply.

i. Introductory Language

We are adopting the introductory language of Rule 152 substantially as proposed to describe what is provided in the rule and caution issuers that Rule 152 may not be used as part of a plan or scheme to evade the registration requirements of the Securities Act. As suggested by a commenter, we have revised the introductory language to encompass all of the provisions of the rule, not just the provisions of the safe harbors. Therefore, the provisions of Rule 152 will not have the effect of avoiding 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 registration requirements of the Securities Act. We believe this change adds important clarity about the availability of Rule 152 as a basis for concluding that two or more offerings will not be integrated in certain situations by making it clear that, although it may be possible to structure two or more offerings such that they appear to technically comply with the terms of applicable exemptions, if that structuring is part of a plan or scheme to evade the registration requirements of the Securities Act, the offerings would still be subject to integration.

ii. Integration Framework and General Principle

The general principle of integration we are adopting in Rule 152(a) looks to the particular facts and circumstances of each offering.[67] Specifically, the general principle provides that, for all offerings not covered by a safe harbor in Rule 152(b), offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that

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[67] Consistent with the discussion in the Proposing Release and to provide further clarification, we note that the focus of this rulemaking effort is capital-raising offerings. However, the new rules that we adopt in this release, especially new Rule 152, apply equally to a series of transactions, whether registered or exempt from Securities Act registration, that involve one or more business combination transactions and/or capital-raising transactions that occur concurrently or close in time. The new rules that we adopt in this release do not otherwise alter or affect the current regulatory scheme that governs communications made in connection with business combination transactions, such as 17 CFR 230.162, 17 CFR 230.165, and 17 CFR 230.166, which were adopted in recognition of the special nature of business combination transactions (such as mergers, recapitalizations, and acquisitions). *See* Regulation of Takeovers and Security Holder Communications, Release No. 33-7760 (Oct. 22, 1999) [64 FR 61408 (Nov. 10, 1999)].

each offering either complies with the registration requirements of the Securities Act, or that an exemption from registration is available for the particular offering.

We continue to believe that providing additional clarity on how securities offerings interrelate, including the relationship between exempt and registered offerings, and when two or more securities offerings will be considered integrated as one offering, will reduce perceived risk among issuers when considering and planning possible capital raising alternatives, while preserving investor protections built into the respective offering exemptions. We are not persuaded by commenters who raised concerns that our proposed integration framework may promote greater reliance on exempt offerings and thereby reduce the need or incentive for issuers to undertake registered public offerings.[68] Rather, we are of the view that the greater clarity that the integration framework will provide on how securities offerings interrelate: (1) will facilitate capital-raising in exempt markets when using the public markets is not practical, and (2) will provide issuers the flexibility to choose between types of offerings, which may encourage more issuers to raise more capital in our securities markets, including in both exempt and registered offerings.[69] Because the amended framework will provide certainty to an issuer conducting exempt and registered offerings close in time, it may ultimately result in more issuers undertaking the risks, time, and expense of conducting a registered public offering. It may also facilitate some small issuers in raising enough external financing to develop their business model and scale up to a point where they may become viable candidates for a

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[68] *See* CFA Letter; and R. Rutkowski Letter. *See also* Md. St. Bar Assoc. Letter.

[69] *See, e.g.*, Netcapital Letter (suggesting that clarification and modernization of the existing integration standards is an important objective that will reduce unnecessary complexities and reduce uncertainties and risks for issuers when planning and carrying out capital raising activities). Further, based on data compiled by the Division of Economic and Risk Analysis on Regulation D issuer and offering characteristics from 2009 through 2019, extracted from Forms D filed with the Commission, we note that a registered offering likely would not be appropriate for the typical Regulation D issuer, based on the following: the median amount sold (if reported) was $1.50 million; the median offer size (if reported) was $2.25 million; the median years of a Regulation D issuer since incorporation was two years; the median issuer size (if reported) of Non-Fund Issuers (Revenue) was $1 million to $5 million; only 20% of all Regulation D offerings used an intermediary; and the average number of investors in an offering (if reported) was 10 investors. *See* Report to Congress on Regulation A / Regulation D Performance: As Directed by the House Committee on Appropriations in H.R. Rept. No. 116-122 (Aug. 25, 2020), *available at* https://www.sec.gov/files/report-congress-regulation-a-d.pdf ("Report to Congress on Regulation A / Regulation D Performance") at Table 2. *See also infra* note 596 and Table 7.

registered public offering, thereby providing Main Street investors with more registered investment options, as well as all the benefits that flow from registration.

The final rules replace the five-factor test with the Commission's more recent approach to integration adopted in rulemakings involving Regulation A, Regulation Crowdfunding, and Rules 147 and 147A. We agree with commenters who indicated that the amendments provide a clearer framework for determining whether two offerings occurring close in time may be considered as integrated than the five-factor test.[70] As noted above, we believe that our new integration framework will facilitate both exempt and registered offerings, by providing greater clarity and flexibility to issuers in choosing capital raising options to grow their businesses without compromising investor protections.

iii. Integration with Exempt Offerings Prohibiting General Solicitation (Rule 152(a)(1))

We are adopting Rule 152(a)(1) substantially as proposed, with clarifying changes in response to commenters' concerns. Accordingly, for an issuer considering the application of the general principle to an exempt offering prohibiting general solicitation and one or more other offerings, new Rule 152(a)(1) requires that 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:

- Did not solicit such purchaser through the use of general solicitation; or
- Established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

New Rule 152(a)(1) has been revised from the proposal in several ways. First, as suggested by several commenters, the language of Rule 152(a)(1) has been revised to clarify that the restrictions on the use of general solicitation only apply to the exempt offering prohibiting general solicitation that is being analyzed under the general principle, and not to

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[70] *See, e.g.*, J. Clarke Letter; CrowdCheck Letter; Geraci Letter; and W. Hubbard Letter.

"each exempt offering." We have also revised Rule 152(a)(1) to clarify that in exempt offerings prohibiting general solicitation, it is the obligation of the issuer, or any person acting on the issuer's behalf, to refrain from the use of general solicitation to solicit a purchaser.

New Rule 152(a)(1) codifies and expands on guidance the Commission first issued in 2007, and updated through 2016, which sets forth a framework for analyzing how an issuer can conduct simultaneous registered and private offerings.[71] Since the adoption of Rule 506(c) by the Commission in 2013, commenters have requested that the Commission's 2007 guidance on concurrent registered and private offerings be extended to concurrent Rule 506(c) and Rule 506(b) offerings.[72] Under the new integration principle in Rule 152(a), issuers may conduct concurrent Rule 506(c) and Rule 506(b) offerings, or any other combination of concurrent offerings, involving an offering prohibiting general solicitation and another offering permitting general solicitation, without integration concerns, so long as the provisions of Rule 152(a)(1) and all other conditions of the applicable exemptions are satisfied.[73]

In response to commenters who raised concerns that the proposed language of Rule 152(a)(1) could enable an issuer to identify investors through a general solicitation and then sell to such investors in a subsequent exempt offering prohibiting general solicitation,[74] we note the introductory language, discussed above, which clarifies that Rule 152 may not be used as part of a plan or scheme to evade the registration requirements of the Securities Act, as well as the requirement in new Rule 152(a)(1) itself, which would not allow an issuer to avoid integration of such offerings. For example, an issuer could not engage in general solicitation in an offering made in reliance on Rule 506(c) and then sell to investors in an offering made in reliance on

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[71] *See supra* text accompanying notes 28–32.

[72] *See* Fried Frank Letter; and Md. St. Bar Assoc. Letter. *See also* 2016 Forum Report; 2017 Forum Report; and 2018 Forum Report (all three forums recommended that the Commission clarify the relationship of exempt offerings in which general solicitation is not permitted with Rule 506(c) offerings involving general solicitation).

[73] We caution issuers, however, that a general solicitation permitted in connection with one offering that mentions the material terms of a concurrent or subsequent exempt offering prohibiting general solicitation may constitute an offer for the concurrent or subsequent exempt offering prohibiting general solicitation and thereby violate the prohibition on general solicitation with respect to that concurrent or subsequent offering prohibiting general solicitation. *See* Interpretive Release on Regulation D, Release No. 33-6455 (Mar. 3, 1983) [48 FR 10045 (Mar. 10, 1983)] at Section III(c).

[74] *See supra* notes 57–58.

Rule 506(b), unless either the issuer did not solicit the purchaser in the Rule 506(b) offering through the use of the general solicitation used in the Rule 506(c) offering, or the issuer established a substantive relationship with such purchaser prior to the commencement of the Rule 506(b) offering.[75]

New Rule 152(a)(1)(ii) codifies and expands the Commission's 2007 guidance that the existence of a pre-existing substantive relationship between the issuer, or its agent, and a prospective investor may be one means by which an investor may become interested in, or become aware of, a private placement conducted while a registration statement for a public offering is on file with the Commission that may be consistent with Section 4(a)(2). In response to a commenter that questioned the application of this guidance,[76] we also confirm that the existence of such a relationship prior to the commencement of an offering is one means, but not the exclusive means, of demonstrating the absence of a general solicitation in a Regulation D offering.[77] Accordingly, an offer of the issuer's securities to a person with whom the issuer, or a person acting on its behalf, has a pre-existing substantive relationship would not constitute a general solicitation, so long as the relationship was established prior to the commencement of the offering.

We reiterate the guidance provided in the Proposing Release that we generally view a "pre-existing" relationship as one 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.[78] A "substantive" relationship is one in which the issuer (or a

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[75] An issuer may not conduct a Rule 506(c) general solicitation in order to identify potential investors for the Rule 506(b) offering. In that instance, such Rule 506(b) offering may be deemed to be commenced at the time of such solicitation under new Rule 152(c).

[76] *See* Md. St. Bar Assoc. Letter.

[77] *See* Regulation D; Accredited Investor and Filing Requirements, Release No. 33-6825 (Mar. 15, 1989) [54 FR 11369 (Mar. 20, 1989)], at note 12.

[78] Certain offerings by private funds that rely on the exclusions from the definition of "investment company" set forth in Investment Company Act Sections 3(c)(1) (15 U.S.C. 80a-3(c)(1) and 3(c)(7) (15 U.S.C. 80a-3(c)(7) posted on a website or platform may be able to rely on a limited staff accommodation with respect to the timing of the formation of a relationship. *See* Division of Investment Management no-action letter to Lamp Technologies, Inc. (May 29, 1997).

person acting on its behalf, such as a registered broker-dealer or investment adviser) has sufficient information to evaluate, and does, in fact, evaluate, an offeree's financial circumstances and sophistication, in determining his or her status as an accredited or sophisticated investor.[79]

Investors with whom the issuer has a pre-existing substantive relationship may include the issuer's existing or prior investors, investors in prior deals of the issuer's management, or friends or family of the issuer's control persons. Similarly, such investors may also include customers of a registered broker-dealer or investment adviser with whom the broker-dealer or investment adviser established a substantive relationship prior to the participation in the exempt offering by the broker-dealer or investment adviser.[80]

We are not providing guidance, as requested by a commenter, with respect to the relevant facts and circumstances to be considered in applying Rule 152(a)(1). We believe it is incumbent on the issuer and its agents to consider all relevant facts and circumstances when analyzing whether the offering satisfies the requirements of Rule 152.

iv. Integration with Exempt Offerings Permitting General Solicitation (Rule 152(a)(2))

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[79] We do not believe that self-certification alone (by checking a box) without any other knowledge of a person's financial circumstances or sophistication would be sufficient to form a "substantive" relationship for these purposes. Persons other than registered broker-dealers and investment advisers may form a pre-existing, substantive relationship with an offeree as a means of establishing that a general solicitation is not involved in a Regulation D offering. Generally, whether a "pre-existing, substantive relationship" exists turns on procedures established by broker-dealers in connection with their customers. This is because traditional broker-dealer relationships require that a broker-dealer deal fairly with, and make suitable recommendations to, customers, and, thus, implies that a substantive relationship exists between the broker-dealer and its customers. We have long stated, however, that the presence or absence of a general solicitation is always dependent on the facts and circumstances of each particular case. Thus, there may be facts and circumstances in which a third party, other than a registered broker-dealer, could establish a "pre-existing, substantive relationship" sufficient to avoid a "general solicitation." *See*, *e.g.*, Use of Electronic Media, Release No. 33-7856 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)] ("Use of Electronic Media Release"). We also recognize there may be particular instances where issuers may develop pre-existing, substantive relationships with offerees. However, in the absence of a prior business relationship or a recognized legal duty to offerees, it is likely more difficult for an issuer to establish a pre-existing, substantive relationship, especially when contemplating or engaged in an offering over the internet. Issuers would have to consider not only whether they have sufficient information about particular offerees, but also whether they in fact use that information appropriately to evaluate the financial circumstances and sophistication of the offerees prior to commencing the offering.

[80] Certain investment advisers that rely on an exemption from registration under the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* ("Advisers Act") may be registered under an appropriate State authority.

We are adopting new Rule 152(a)(2), substantially as proposed, with certain clarifying revisions in response to commenters' concerns. In the context of two or more concurrent offerings each relying on a Securities Act exemption permitting general solicitation,[81] new Rule 152(a)(2) clarifies that an issuer's 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 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 necessary legends or communications restrictions.[82]

New Rule 152(a)(2) builds on the Commission guidance in its 2015 Regulation A and Regulation Crowdfunding rulemakings and in its 2016 Rule 147 and Rule 147A rulemaking to provide issuers with greater flexibility and the ability to rely on existing Securities Act exemptions more effectively without compromising the investor protections of each exemption.[83]

For example, under new Rule 152(a)(2), an issuer may undertake an offering in reliance on Rule 506(c), so long as the issuer meets all of the conditions of that exemption, including taking reasonable steps to verify that all purchasers in the Rule 506(c) offering are accredited investors, while conducting a concurrent offering in reliance on Regulation A, so long as the concurrent offering complies with all the requirements of Regulation A. If this issuer were to

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[81] For example, Rule 506(c), Regulation A, and Regulation Crowdfunding. Concurrent offerings permitting general solicitation may also include intrastate or regional offerings relying on Rules 147 and 147A or 17 CFR 230.504(b)(1)(i) ("Rule 504(b)(1)(i)"), 17 CFR 230.504(b)(1)(ii) ("Rule 504(b)(1)(ii)"), or 17 CFR 230.504(b)(1)(iii) ("Rule 504(b)(1)(iii)"), all of which permit general solicitation but also require compliance with State registration requirements or exemptions to State registration under State securities laws. However, an issuer would not be able to describe the terms of a Rule 147 offering using any form of general solicitation viewable by out-of-state residents, as this would constitute an offer by the issuer to residents residing out of the State in which the issuer has its principal place of business, which is prohibited by the Rule 147 safe harbor for a valid Section 3(a)(11) exempt offering. Two or more exempt offerings permitting general solicitation occurring close in time, but not concurrent, may be eligible for the safe harbor in new Rule 152(b)(4).

[82] For example, the limitations on advertising the terms of an offering pursuant to Rule 204 of Regulation Crowdfunding would limit the issuer's ability to reference the terms of that offering in a general solicitation in connection with a concurrent offering made pursuant to Regulation A, Rule 506(c), or Rule 147A. *See* Concept Release, at note 483. *See infra* Section II.B.3 for a discussion of revisions we are making to Rule 204 of Regulation Crowdfunding.

[83] *See* 2015 Regulation A Release, at Section II.B.5; Crowdfunding Adopting Release, at Section II.A.1.c; and Intrastate and Regional Offerings Release, at Section II.B.5.

discuss in its Rule 506(c) general solicitation materials the material terms of the Regulation A offering, new Rule 152(a)(2) would require the Rule 506(c) general solicitation to comply with all the requirements for offers under Regulation A, including all necessary legends and comply with any restrictions on the use of general solicitation imposed on issuers making offers under Regulation A.[84] Similarly, an issuer undertaking a Rule 506(c) offering concurrently with a Regulation Crowdfunding offering must make sure that any general solicitation materials used in connection with the Rule 506(c) offering that mention the material terms of the Regulation Crowdfunding offering comply with the off-portal offering limitations in Rule 204 of Regulation Crowdfunding.[85]

2. Integration Safe Harbors

The Commission proposed new Rule 152(b) which would provide four non-exclusive safe harbors from integration. For offers and sales meeting the conditions of these safe harbors, the issuer would not need to conduct any further integration analysis. A number of commenters supported the proposed safe harbors,[86] indicating that the safe harbors would provide clarity and bright line rules to simplify compliance.[87] Some commenters recommended expanding on the proposed safe harbors.[88]

Several commenters, however, opposed one or more of the proposed safe harbors.[89] Some of these commenters expressed particular concern that the revisions could lead to more

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[84] Rule 255 of Regulation A requires certain statements in any communications constituting offers made in reliance on Regulation A. Any such legends or statements need not be included in the issuer's Rule 506(c) general solicitation materials if such materials do not mention the material terms of the other concurrent offering.

[85] *See infra* Section II.B.3 for a discussion of revisions adopted to Rule 204 of Regulation Crowdfunding.

[86] *See* Fried Frank Letter; Geraci Law Letter; W. Hubbard Letter; Letter from Raise Green Inc., and New Haven Community Solar, LLC dated June 1, 2020 ("Raise Green & New Haven Comm. Solar Letter"); D. Burton Letter; and Shearman & Sterling Letter.

[87] *See, e.g.*, ABA Letter (supporting harmonization of the rules for both exempt and registered offerings and simplifying the integration analysis); Geraci Law Letter; and Raise Green & New Haven Comm. Solar Letter.

[88] *See* Fried Frank Letter (recommending an additional safe harbor providing that any offering commenced in reliance on an exemption that does not permit general solicitation can be continued in reliance on an exemption that does permit general solicitation); and Shearman & Sterling Letter (recommending revisions to the proposed safe harbors to cover shelf registration statements and the exercise of outstanding warrants or the conversion of convertible or exchangeable securities).

[89] *See, e.g.*, NASAA Letter; CFA Letter; Better Markets Letter; Md. St. Bar Assoc. Letter; and CII Letter.

frequent offerings involving non-accredited investors.[90] One commenter expressed concern that a 30-day integration safe harbor could render the integration doctrine a nullity.[91]

Some commenters expressed concern with the proposed approach to expanding the integration framework or offered alternatives for how to expand the integration framework.[92] One commenter recommended use of a single integration safe harbor that would permit issuers intending to conduct distinct offerings under different Securities Act rules to treat them as separate so long as those offerings are reasonably conducted commensurate with the requirements of such rules.[93]

a. 30-day Integration Safe Harbor (Rule 152(b)(1))

Current Securities Act integration safe harbors generally provide for a six-month safe harbor time period, outside of which other offerings will not be integrated or considered as part of the same offering.[94]

i. Proposed Amendments

The Commission proposed Rule 152(b)(1) to shorten the six-month time period to 30 days and harmonize current Securities Act exemptions by providing the same 30-day safe harbor time period throughout the Securities Act's integration provisions. The proposed safe

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90 *See, e.g.*, CII Letter; and NASAA Letter.

91 *See* NASAA Letter.

92 *See, e.g.*, CrowdCheck Letter (expressing concern that the focus on the safe harbors may lead to issuers relying on the safe harbors instead of the general principles); Invesco Letter; W. Hubbard Letter (recommending a safe harbor for all offers or sales to investors with whom the issuer has a pre-existing substantive relationship, but opposing a safe harbor for all offerings limited to qualified institutional buyers and accredited investors that would exclude non-accredited investors); and J. Clarke Letter (recommending a safe harbor for issuers that comply with a new recommended disclosure that integrates Form D, Form C, and an issuer's offering statements).

93 *See* Invesco Letter.

94 *See* Rule 502(a), 17 CFR 230.251(c) ("Rule 251(c)"), 17 CFR 230.147(g) ("Rule 147(g)"), and 17 CFR 230.147A(g) ("Rule 147A(g)"). These rules rely on a six-month time period, but include exceptions for certain offers and sales under specific exemptions or circumstances. For example, Rule 502(a) excludes offers or sales of securities under an employee benefit plan as defined in 17 CFR 230.405 ("Rule 405"). In addition, Rules 251(c), 147(g), and 147A(g) all exclude from integration all prior offers and sales of securities without regard to a time period so long as the prior offers and sales have terminated. Under Rules 147, 147A, and 251, subsequent offers and sales will not be integrated with offers and sales that are registered under the Securities Act, exempt from registration under Rule 701, Regulation A, Regulation S, or Section 4(a)(6) of the Securities Act, or made pursuant to an employee benefit plan. Further, generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offers and sales of securities being made outside the United States in compliance with Regulation S. *See, e.g.,* 17 CFR 230.500(g) ("Rule 500(g)") and Note to Rule 502(a).

harbor would apply to both offerings for which a registration statement has been filed under the Securities Act and exempt offerings.[95] Specifically, the proposed safe harbor in Rule 152(b)(1) would provide that any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, will not be integrated with the other offering, provided that for an exempt offering for which general solicitation is not permitted, the proposed safe harbor would require either: (i) that the purchasers were not solicited through the use of general solicitation, or (ii) that the issuer established a substantive relationship with the purchasers prior to the commencement of the offering.

In conjunction with this safe harbor, the Commission also proposed to amend 17 CFR 230.506(b)(2)(i) ("Rule 506(b)(2)(i)") to address the concern that a 30-day safe harbor could result in some issuers seeking to undertake serial Rule 506(b) offerings each month, selling to up to 35 unique non-accredited investors in each offering, potentially resulting in unregistered sales of securities to hundreds of non-accredited investors in a year. As proposed, where an issuer conducts more than one offering under Rule 506(b), the number of non-accredited investors purchasing in all such offerings within 90 calendar days of each other would be limited to 35.[96]

In addition, because proposed Rule 152(b)(1) would generally supersede the specific requirements in Rule 155 relating to the integration of abandoned offerings with subsequent offerings, the Commission proposed to remove and reserve Rule 155.[97]

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[95] Both this proposed safe harbor and the safe harbor in proposed Rule 152(b)(3)(iii) would apply to a registered offering made more than 30 calendar days after the termination or completion of any other offering.

[96] Proposed Rule 506(b)(2)(i) provides that there are no more than, or the issuer reasonably believes that there are no more than, 35 purchasers of securities from the issuer in offerings under this section in any 90 calendar day period. Under 17 CFR 230.501(e), only non-accredited investors are included in computing the number of "purchasers."

[97] 17 CFR 230.155(b) ("Rule 155(b)") and 17 CFR 230.155(c) ("Rule 155(c)") provide safe harbors for integration of abandoned offerings. Specifically, Rule 155(b) provides that an abandoned private offering of securities will not be considered part of an offering for which the issuer later files a registration statement if the offering meets certain enumerated conditions, including that the issuer does not file the registration statement until at least 30 calendar days after termination of all offering activity in the private offering, unless the issuer and any person acting on its behalf offered securities in the private offering only to persons who were (or who the issuer reasonably believes were) accredited investors or who satisfy the knowledge and experience standard of Rule 506(b)(2)(ii). Rule 155(c) provides a similar safe harbor for a registered offering followed by

ii. Comments

Some commenters supported,[98] and others opposed,[99] proposed Rule 152(b)(1). Some commenters supporting the 30-day safe harbor expressed their belief that 30 days was sufficient to mitigate concerns that an exempt offering may condition the market for a subsequent offering or undermine the protections of a subsequent exempt offering.[100] Another commenter stated that a 30-day time period is consistent with market practice in registered offerings to address gun-jumping concerns.[101] One supportive commenter suggested that the Commission clarify that "the 30-day period before and the 30-day period after each offering—have to be free of offers in all cases."[102] Commenters opposed to the proposed 30-day safe harbor expressed concern that the 30 day time period was too short.[103] Many of these commenters recommended a 90-day safe harbor.[104]

Commenters addressing the proposal to revise Rule 506(b) to limit the total number of non-accredited investors purchasing in such offerings to 35 persons within 90 calendar days

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a private offering of securities subject to a similar set of enumerated conditions, including that neither the issuer nor any person acting on the issuer's behalf commences the private offering earlier than 30 calendar days after the effective date of withdrawal of the registration statement.

98 *See, e.g.*, J. Clarke Letter; Republic Letter; Letter from Securities Industry and Financial Markets Association dated June 1, 2020 ("SIFMA Letter"); W. Hubbard Letter; D. Burton Letter; CrowdCheck Letter; and Shearman & Sterling Letter.

99 *See, e.g.*, Letter from Silicon Prairie Holdings, Inc. dated May 31, 2020 ("Silicon Prairie Letter"); NASAA Letter; Md. St. Bar Assoc. Letter; Letter from Americans for Financial Reform Education Fund dated June 1, 2020 ("AFREF Letter"); CFA Letter; R. Campbell Letter; and R. Rutkowski Letter.

100 *See, e.g.*, Shearman & Sterling Letter; and SIFMA Letter (suggesting a 30-day cooling off period is appropriate given changes to markets, technologies and the securities laws since the six-month time frame was adopted).

101 *See* CrowdCheck Letter.

102 *See* ABA Letter (suggesting clarification that the 30-day separation period be "applied separately to *each* other offering potentially subject to integration, on an individualized basis, with a 30-day separation required between each pair of offerings relying on this provision.").

103 *See, e.g.*, Silicon Prairie Letter; NASAA Letter; Md. St. Bar Assoc. Letter; AFREF Letter; CFA Letter; and R. Rutkowski Letter.

104 *See* Silicon Prairie Letter (suggesting that 30 days is not enough time to assess an offering); NASAA Letter (expressing concern that the 30-day safe harbor would render integration a nullity); Md. St. Bar Assoc. Letter (suggesting that 90 days would more effectively impede issuers from improperly avoiding registration by artificially dividing a single offering into multiple offerings); CFA Letter (citing to the Regulation D 2007 Proposing Release, at note 135, and noting that for issuers that provide quarterly reports, the 90-day requirement would provide transparency and time for investors and the market to take into account the offering and its results); AFREF Letter; CFA Letter; and R. Rutkowski Letter.

were divided in their support for,[105] or opposition to,[106] the proposed amendments. One commenter stated that limiting sales to non-accredited investors to no more than 35 in any 90-day period will encourage issuers seeking capital from non-accredited investors to use Regulation Crowdfunding and Regulation A.[107] Another commenter suggested shortening the time period or increasing the number of non-accredited investors in the proposal.[108]

Commenters were also divided in their support for,[109] or opposition to,[110] conditioning the availability of the 30-day safe harbor on the requirement that, for an exempt offering for which general solicitation is not permitted, the issuer did not solicit the purchasers in such offering through the use of general solicitation or that the issuer established a substantive relationship with the purchaser prior to commencement of the offering for which general solicitation is not permitted. One commenter opposed to these requirements suggested that the effects of any offers made more than 30 days prior to or after the commencement of another offering would be sufficiently diluted by intervening market developments so as to render an integration analysis unnecessary.[111] This commenter further stated that an issuer should be able to rely on the general principle without having to wait 30 calendar days from the termination of the prior offering if the issuer has a reasonable belief, based on the facts and circumstances, that purchasers in an exempt offering for which general solicitation is not permitted were either not solicited through general solicitation or had a pre-existing relationship with the issuer or person

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[105] *See, e.g.*, Md. St. Bar Assoc. Letter (supporting the proposal but acknowledging a preference for a 90-day, safe harbor); and CFA Letter (contending that the speed with which information is disseminated for a small, private company has not increased in the way it has for public companies and that while the markets have changed a great deal since the 1980s, today's markets do not look all that different than they did in 2007, when the Commission rejected a 30-day cooling off period for Regulation D offerings).

[106] *See, e.g.*, Ketsal Letter (recommending eliminating the limit on sales to non-accredited investors); and Letter from Darshun N. Kendrick dated May 14, 2020 (suggesting the proposed amendment would not help with clarifying or streamlining the rules).

[107] *See* Republic Letter.

[108] *See* W. Hubbard Letter.

[109] *See, e.g.*, CrowdCheck Letter; J. Clarke Letter; and W. Hubbard Letter (recommending allowing a limited number of investors to be solicited through general solicitation in a twelve month period).

[110] *See, e.g.*, Fried Frank Letter (recommending not integrating offerings after 30 days regardless of whether the purchasers may have been solicited using general solicitation); Shearman & Sterling Letter; and IPA Letter (suggesting that the proposed amendment would address the integration concern, but not the general solicitation concern).

[111] *See* Shearman & Sterling Letter.

acting on its behalf.[112] Another commenter expressed concern that an issuer relying on the exemptions provided by Section 4(a)(2), Rule 504, and Rule 506(b) would not likely be able to satisfy the conditions to the availability of the 30-day safe harbor as proposed.[113]

Some commenters also recommended that the Commission harmonize the provisions in the general principle of integration in proposed Rule 152(a)(1) with the similar provision in the safe harbor in proposed Rule 152(b)(1), or provide an explanation of how they differ.[114] These commenters stated their belief that, although paragraph (a)(1) and the proviso in paragraph (b)(1) of proposed Rule 152 have an almost identical standard, unlike the general principle of integration in proposed Rule 152(a)(1), the 30-day safe harbor in paragraph (b)(1) omits the "reasonable belief" standard, as well as the provision allowing a "person acting on the issuer's behalf," to establish a pre-existing substantive relationship with the purchaser.[115]

Some commenters recommended alternative approaches to the proposal, such as: eliminating the prohibition on general solicitation in Rule 506(b), or combining the exemptions laid out in Rules 506(b) and (c) to permit open communications to a more limited group of purchasers at a higher eligibility level;[116] or permitting serial offerings pursuant to a new reporting form for exempt offerings.[117]

iii. Final Amendments

After considering the comments received, we are adopting the 30-day non-exclusive safe harbor in Rule 152(b)(1) with modifications consistent with certain commenters' suggestions. We are also harmonizing current Securities Act exemptions by replacing their existing integration provisions with a reference to Rule 152. This safe harbor will apply to both

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[112] *See id. See also* ABA Letter (recommending that both Rule 152(a)(1) and Rule 152(b)(1) "be tied to the particular purchaser," rather than "purchasers").

[113] *See* R. Campbell Letter (stating amending proposed Rule 152 "to provide clear and complete two-way safe harbor integration protection for all exemptions…is especially important for the exemptions used by small businesses, including the exemptions provided by Section 4(a)(2), Rule 504 and Rule 506(b)").

[114] *See, e.g.*, Md. St. Bar Assoc. Letter; and Shearman & Sterling Letter (suggesting that as proposed, the non-solicitation and pre-existing relationship conditions to the availability of the 30-day safe harbor are stricter than the corresponding requirements in the general principle of integration).

[115] *Id.*

[116] *See* Invesco Letter.

[117] *See* J. Clarke Letter.

offerings for which a registration statement has been filed under the Securities Act and exempt offerings.[118]

Several commenters stated that a 90-day safe harbor may be more effective at preventing issuers from attempting to improperly avoid Securities Act registration by artificially dividing a single offering into multiple offerings such that Securities Act exemptions would apply to the multiple offerings that would not be available for the combined offering. However, we believe that a 30-day time frame is sufficient to mitigate concerns that an exempt offering may condition the market for a subsequent registered offering or undermine the protections of a subsequent exempt offering. In light of the changes in technology, the markets, and the securities laws since the adoption of Regulation D in 1982, we believe that a 30-day safe harbor time period will enhance an issuer's flexibility and expand the capital-raising options available to issuers under the Securities Act to access capital when needed, while still providing a sufficient length of time to impede what integration seeks to prevent: improperly avoiding registration by artificially dividing a single offering into multiple offerings.

We are also not persuaded by commenters that suggested that a 90-day time frame is preferable because it would allow needed time for investors and the market to assess an offering, in light of the accelerating speed and consumption of electronically disseminated information in today's financial marketplace, and especially the rapidly evolving informational environment since the adoption of a six-month safe harbor in Regulation D in 1982.[119] Because of this informational access, we also think it likely that the effects of any offers made more than 30 days prior to or after commencement of another offering would be sufficiently diluted by intervening market developments so as to render an integration analysis unnecessary.

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[118] Both this safe harbor and the safe harbor in 17 CFR 230.152(b)(3)(iii) ("Rule 152(b)(3)(iii)") may apply to a registered offering made more than 30 calendar days after the termination or completion of any other offering.

[119] *See* Regulation D Adopting Release, at text accompanying note 18. *See also* Proposed Revisions of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, Release No. 33-6339 (Aug. 7, 1981) [46 FR 41791 (Aug. 18, 1981)], at Section V.C.1 (referring to uniform six month safe harbor provisions in now rescinded 17 CFR 230.146(b)(1) and 17 CFR 230.242(b)).

Further, as proposed, we are shortening the current six-month time frame in Rules 502(a), 251(c), 147(g), and 147A(g) to 30 days by replacing these existing integration provisions with references to Rule 152.[120] We believe that the 30-day safe harbor time period we are adopting in Rule 152(b)(1) is appropriate throughout the exemptions under the Securities Act. We note that a 30-day safe harbor time period is consistent with several current integration provisions that also require 30-day minimum waiting periods between offerings. For example, in conjunction with certain other requirements, existing Rule 155 requires an issuer to wait at least 30 days between an abandoned private offering and a subsequent registered offering,[121] or an abandoned registered offering followed by a subsequent private offering.[122] Similarly, 17 CFR 230.255(e) ("Rule 255(e)"), 17 CFR 230.147(h) ("Rule 147(h)") and 17 CFR 230.147A(h) ("Rule 147A(h)") currently provide safe harbors from integration, if an issuer waits at least 30 days between the last solicitation of interest in a subsequently abandoned Regulation A offering, or the last offer made pursuant to Rule 147 or Rule 147A, and the filing of a registration statement for a subsequent offering.

One commenter stated that a comparison with the 30-day safe harbors set forth in Rule 155, Rule 147(h), Rule 147A(h) and Rule 255(e) was not an appropriate justification for decreasing all integration safe harbors to 30 days, but we believe that in light of the changes in technology, the markets, and the securities laws over time, the existing safe harbor time periods need to be shortened and updated to account for the increasing speed and consumption of electronically disseminated information in today's financial marketplace. As a result, we believe that the current six-month safe harbor time period in Rules 502(a), 251(c), 147(g), and 147A(g) is longer than necessary to protect investors and could inhibit issuers, particularly smaller issuers, from meeting their capital raising needs.[123]

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[120] *See infra* Section II.A.4.

[121] *See* Rule 155(b). As discussed below, new Rule 152(b)(1) supersedes existing Rule 155, which is being removed and reserved.

[122] *See* Rule 155(c).

[123] Smaller issuers may face capital raising challenges because they are seeking relatively small amounts of capital. *See, e.g.*, Transcript of SEC Small Business Capital Formation Advisory Committee (Nov. 12, 2019),

As proposed, we are also removing and reserving Rule 155. The new safe harbors in Rule 152(b) will apply when determining whether integration of abandoned offerings with subsequent offerings is required, superseding the current requirements of Rule 155. Specifically, for an abandoned private offering followed by a registered offering that would currently be covered by Rule 155(b), an issuer could look to the safe harbors in new Rule 152(b)(1) or Rule 152(b)(3). For an abandoned registered offering followed by a private offering that would currently be covered by Rule 155(c), an issuer could look to the safe harbors in new Rule 152(b)(1) or Rule 152(b)(4). As a result, we believe the lists of conditions in Rules 155(b) and (c) are no longer warranted and may be eliminated without compromising investor protections for the same reasons that support our determination to reduce the integration safe harbors from six months to 30 days.

In addition, we are adopting as proposed an amendment to Rule 506(b) to limit the number of non-accredited investors purchasing in Rule 506(b) offerings to no more than 35 within a 90 calendar day period. As we stated in the Proposing Release, we are mindful that a shortened integration time frame could allow issuers to undertake serial Rule 506(b) exempt offerings each month to up to 35 non-accredited investors in reliance on a 30-day safe harbor, resulting in unregistered sales to a significant number of non-accredited investors in a year.[124] Several commenters echoed this concern.[125] As the Commission stated in 2007, we believe that improper reliance on exemptions from registration harms investors by depriving them of the benefits of full and fair disclosure and the civil remedies that flow from registration.[126] While recent data suggests that shortening the safe harbor to 30-days is not likely to result in a large

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available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-111219.pdf, at 15–62 (discussing the fact that transaction costs make raising amounts under $750,000 "not worth it"); and Transcript of SEC Small and Emerging Companies Advisory Committee (Feb. 15, 2017), *available at* https://www.sec.gov/info/smallbus/acsec/acsec-transcript-021517.pdf, at 144–145 (indicating that it is easier for issuers to access $100 million of capital than amounts under $10 million).

[124] *See* Proposing Release, at text accompanying note 93. *See also* Regulation D 2007 Proposing Release, at Section II.C.1.

[125] *See* Better Markets Letter; CFA Letter; CFA Institute Letter; CII Letter; R. Rutkowski Letter; and Md. St. Bar Assoc. Letter.

[126] *See* Regulation D 2007 Proposing Release, at Section II.C.1.

increase in the number of non-accredited investors participating in Rule 506(b) offerings,[127] 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.

Finally, in a change from the proposal, we are replacing the conditions set forth in proposed Rule 152(b)(1), which were similar, but not identical, to the conditions in proposed Rule 152(a)(1) with language clarifying 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. This means that such an 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 did not solicit such purchaser through the use of general solicitation, or established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

We also stress that this safe harbor may not be used as a means to circumvent the prohibition on general solicitation in an exempt offering to which such prohibition applies. That is, regardless of whether an issuer meets the requirements of the 30-day safe harbor from integration, an issuer conducting an offering of securities under an exemption prohibiting general solicitation, such as Rule 506(b), must still ensure that it has not engaged in a general solicitation, and meets the other terms and conditions of the relevant offering exemption. We are not persuaded by commenters who recommended that such conditions to the availability of

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[127] Based on the analysis of Form D data on initial Form D filings, we estimate that, in 2019 among all Rule 506(b) offerings by issuers other than pooled investment funds, between approximately 4.45 percent and 9 percent of offerings included non-accredited purchasers. This estimated range is based on Division of Economic and Risk Analysis staff analysis of data in initial Form D filings, excluding pooled investment funds. In particular, the 4.45 percent estimate is based on offerings that report that at least one non-accredited investor already has invested in the offering as of the Form D filing and may represent a lower bound because it relies on available Form D filings, and because a final Form D upon the conclusion of an offering is not required to be filed. If we also include Rule 506(b) offerings on Form D that accept non-accredited investors but reported having zero non-accredited investors in the initial filing, the estimated percentage of offerings involving accredited investors during 2019 is approximately 9 percent, which may be viewed as an upper bound estimate.

the 30-day safe harbor are not necessary, given the requirements of the specific exemptions relied on.[128]

We also note that if an issuer waits less than 30 days after terminating or completing an offering before commencing a subsequent offering, and therefore cannot rely on the safe harbor in Rule 152(b)(1), it may still avoid integration if it meets the terms and conditions of the general principle of integration in Rule 152(a).

b. Rule 701, Employee Benefit Plans and Regulation S (Rule 152(b)(2))

Certain Commission rules currently provide that offers and sales of securities made pursuant to Rule 701 and other employee benefit plans will not be integrated with certain other offerings.[129] Similarly, the Commission has stated that offshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.[130]

i. Proposed Amendments

The Commission proposed Rule 152(b)(2) to provide a non-exclusive safe harbor for all offers and sales made in compliance with Rule 701,[131] pursuant to an employee benefit plan, or

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[128] *See* Shearman & Sterling Letter (stating that an issuer should not have to comply with the conditions to the 30-day safe harbor, because "an issuer would still need to comply with the exemption relied upon in connection with the subsequent offering, but not as part of the integration analysis.").

[129] The safe harbor integration provisions in current Rule 251(c), Rules 147(g), and 147A(g) for these offers or sales do not cover offers or sales concurrent with another offering. *See also* 17 CFR 230.701(f) ("Rule 701(f)"). However, the six-month safe harbor in Rule 502(a) provides an exception to the required six-month separation between offerings for offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D that occur during the six-month time periods under an employee benefit plan, as defined in Rule 405 under the Securities Act.

[130] *See* Offshore Offers and Sales, Release No. 33-6863 (Apr. 24, 1990) [55 FR 18306 (May 2, 1990)] ("Offshore Offers and Sales Release") at Section III.C.1.

[131] The Rule 701 exemption is only available to issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act. *See* 17 CFR 230.701(b). The proposed safe harbor is in accord with Rule 701(f), which provides that an offering under Rule 701 will not be integrated with any other offering, as offers and sales exempt under Rule 701 are deemed to be a part of a single, discrete offering and are not subject to integration with any other offers or sales, whether registered under the Securities Act or otherwise exempt from the registration requirements of the Securities Act.

made in compliance with Regulation S,[132] regardless of when these offerings occur, including offers and sales made concurrently with other offerings.[133]

In conjunction with the proposed safe harbor, the Commission proposed to amend the definition of "directed selling efforts" in 17 CFR 230.902 ("Rule 902" of Regulation S) in order to address concerns raised by market participants about whether it is possible to conduct concurrent Regulation S and Rule 506(c) offerings, particularly when the offerings are conducted using the internet, and if so, how to comply with the requirement that separate offering materials be used in each offering. Under the proposal, an issuer that engages in general solicitation activity under an exemption that allows general solicitation would not be considered to have engaged in "directed selling efforts" in connection with an offering under Regulation S, if the general solicitation activity is not undertaken for the purpose of conditioning the market in the United States for any of the securities being offered in reliance on Regulation S. This would be a narrowing of the current definition of "directed selling efforts," which covers any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for the Regulation S securities.[134]

The Commission also proposed Rule 906 of Regulation S, applicable to securities offered and sold in a transaction subject to the conditions of 17 CFR 230.901 or 903, that would require an issuer that engages in general solicitation activity covered by the proposed exclusion from the definition of "directed selling efforts" to prohibit resales to U.S. persons (or for the account or benefit of a U.S. person) of the Regulation S securities for a period of six months from the date of sale, except for sales to QIBs or IAIs. The proposed six-month limitation on

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[132] Proposed Rule 152(b)(2) would codify the position that "[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act." *See* Offshore Offers and Sales Release, at Section III.C.1.

[133] The safe harbor integration provisions in current Rule 251(c), Rules 147(g) and 147A(g) for these offers or sales do not cover offers or sales concurrent with another offering.

[134] *See* 17 CFR 230.902(c)(1).

resales would apply regardless of the Regulation S category applicable to the securities, and notwithstanding, and in addition to, any applicable distribution compliance period.

ii. Comments

Commenters that addressed the proposal supported adopting the integration safe harbor for all offerings made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with Regulation S, as proposed in Rule 152(b)(2).[135] No commenters opposed these proposed amendments. Several commenters asked the Commission to specifically reference Rule 701 in Rule 152(b)(2).[136]

Several commenters supported codifying an explicit integration safe harbor for offers and sales made in compliance with Regulation S.[137] One of these commenters stated that including this safe harbor in proposed Rule 152 would enhance legal certainty and promote more efficient capital raising.[138]

Some commenters, however, opposed the proposed revisions to the definition of "directed selling efforts" in Regulation S to exclude activities that are "reasonably expected" to condition the U.S. market for the Regulation S securities.[139] One of these commenters questioned the feasibility of determining what activities would condition the market, and what problems preventing such activities would avoid.[140] Another of these commenters raised concerns that the proposed changes would restrict the current market practice of concurrently

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135 *See, e.g.*, J. Clarke Letter; Md. St. Bar Assoc. Letter (noting that the rationale for exempting offers and sales under Rule 701 is also applicable to offers and sales under employee benefit plans generally); W. Hubbard Letter; D. Burton Letter; CrowdCheck Letter; Shearman & Sterling Letter; and NASAA Letter.

136 *See, e.g.*, W. Hubbard Letter; D. Burton Letter (suggesting that referencing Rule 701 clarifies the Commission's intent with respect to the application of the integration doctrine to offerings under that rule); and CrowdCheck Letter.

137 *See, e.g.*, SIFMA Letter; Shearman & Sterling Letter; Md. St. Bar Assoc. Letter; and ABA Letter (supporting the codification, in proposed Rule 152(b)(2), of the Commission's guidance in the 1990 Regulation S Adopting Release that "[o]ff shore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.") (*citing* Offshore Offers and Sales Release, at Section III.C.1).

138 *See* Shearman & Sterling Letter.

139 *See* Shearman & Sterling Letter; ABA Letter; and CrowdCheck Letter.

140 *See* CrowdCheck Letter.

making Regulation S and 17 CFR 230.144A ("Rule 144A") offers.[141] This commenter also raised concerns about the discussion in the Proposing Release with respect to widely accessible internet or similar communications in connection with concurrent Regulation S and Rule 506(c) offerings, noting that the conclusion that such communications would be deemed directed selling efforts would effectively preclude combining an exempt offering that permits general solicitation with a contemporaneous offshore offering under Regulation S.[142]

One commenter expressed support for an amendment to Rule 902 as a means to address uncertainty among market participants regarding whether it is possible to conduct concurrent Regulation S and Rule 506(c) offerings, but recommended that the rule expressly provide that the prohibition on directed selling efforts is not applicable when the Regulation S offering is made concurrently with an offering in reliance on an exemption that permits general solicitation, so long as the issuer does not engage in such general solicitation for the purpose of conditioning the market in the United States for any securities being offered in reliance on Regulation S or registered under the Securities Act.[143] Other commenters stated that they had not experienced significant uncertainty in determining the absence or presence of directed selling efforts in connection with exempt offerings permitting general solicitation.[144]

Commenters were divided in their support for,[145] or opposition to,[146] the proposed Rule 906 resale restrictions. Some commenters opposing the proposed amendment expressed concern that it would be difficult to implement or add unnecessary complexity to Regulation

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[141] *See* Shearman & Sterling Letter (expressing concern that if communications that may be considered general solicitation in Rule 144A offerings are presumed to constitute directed selling efforts that trigger a six-month distribution compliance period, issuers would in many cases have to forgo the concurrent offshore offering because imposing a distribution compliance period is often not practicable).

[142] *See id.*

[143] *See* Fried Frank Letter (recommending that the Commission clarify that the issuer is not required to provide evidence for its intent, and also recommending that the Commission state that concurrent Rule 506(c) and Regulation S offerings will not be integrated even if the issuer uses the same (or substantially identical) offering materials).

[144] *See* Shearman & Sterling Letter; and CrowdCheck Letter.

[145] *See* Md. St. Bar Assoc. Letter (expressing support for the proposal to codify a safe harbor for offers and sales made in compliance with Regulation S and noting with favor proposed Rule 906 as a means to prevent flowback of securities to the United States); and Republic Letter (supporting the proposal as a whole with respect to Regulation S offerings).

[146] *See* J. Clarke Letter; SIFMA Letter; Fried Frank Letter; CrowdCheck Letter; and Shearman & Sterling Letter.

S.[147] Commenters also noted that the existing distribution compliance period in Regulation S already protects against the risk of flowback of Regulation S securities to the United States.[148] Another commenter opposing the proposed rule recommended that the resale limitation should limit resales in the first year to QIBs and IAIs to align the rule with Regulation Crowdfunding.[149]

iii. Final Amendments

After considering the comments, we are adopting new Rule 152(b)(2), to provide a non-exclusive safe harbor for all offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with Regulation S, regardless of when these offerings occur, including offers and sales made concurrently with other offerings. For the reasons discussed below, we have decided not to adopt the proposed changes to Regulation S itself.

Offers and sales pursuant to Rule 701 and employee benefit plans are limited to investors, such as employees, consultants, and advisors, with whom the issuer has written compensation plans or agreements. We continue to believe, given the relationship between these investors and the issuer, that these offers and sales do not raise the same level of investor protection concerns as offerings to other investors.

With respect to Regulation S offerings, Rule 152(b)(2) codifies the long-standing Commission position that "[o]ffshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act."[150] Therefore, as noted in the Proposing Release, concurrent offshore offerings that are conducted in compliance

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[147] *See, e.g.*, ABA Letter; SIFMA Letter (expressing concern that issuers and other offering participants would find the requirements of proposed Rule 906 burdensome and difficult to implement, and would simply avoid relying on exemptions that allow for general solicitation); and CrowdCheck Letter.

[148] *See* SIFMA Letter (stating its belief that proposed Rule 906 is unnecessary and inconsistent with prior Commission guidance on Regulation S, and that Regulation S already applies a distribution compliance period to protect against flowback that is calibrated, in duration and certain other respects, based on the likelihood of flowback); CrowdCheck Letter (questioning whether flowback was likely to occur given the resale restrictions); and ABA Letter.

[149] *See* J. Clarke Letter.

[150] *See* Offshore Offers and Sales Release, at Section III.C.1.

with Regulation S are not currently, and will not be, integrated with registered domestic offerings or domestic offerings that are conducted in compliance with any exemption.[151] When determining the availability of this safe harbor, it will still be necessary to assess each transaction separately for compliance with the applicable exemption.

In light of certain perceived concerns about the ability of an issuer to conduct concurrent Regulation S and Rule 506(c) offerings, particularly when the offerings are conducted using the internet, we proposed an amendment to the definition of "directed selling efforts" in Rule 902, and related proposed Rule 906, which would have applied to issuers relying on the amended definition. After considering the comments received, we have determined not to adopt the proposed amendments to Regulation S. We are persuaded by commenters who asserted that the existing regulatory framework appropriately addresses concerns relating to the risk of flowback of Regulation S securities to the United States or the use of general solicitation in an exempt offering to condition the market in the United States for the Regulation S securities and acknowledge commenters who expressed concern that the proposal may disrupt existing market practices.

In light of the concerns expressed by commenters about the implications of the proposed amendments and the related discussion in the Proposing Release, we are also clarifying that we do not believe that general solicitation activity for exempt domestic offerings would preclude reliance on Regulation S for concurrent offshore offerings, and reaffirm our existing guidance with respect to concurrent Regulation S and domestic offerings.[152]

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[151] In addressing the offshore transaction component of the Regulation S safe harbor, the Commission stated, "Offers made in the United States in connection with contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors." *Id.* at note 36. Likewise, in addressing directed selling efforts, the Commission stated, "Offering activities in contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors." *Id.* at note 47. *See also* Rule 500(g) of Regulation D (formerly Preliminary Note No. 7 to Regulation D) ("Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States."); and Note to Rule 502(a) ("Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S.").

[152] *See id.*

We are aware that issuers have conducted domestic exempt or registered offerings concurrently with a Regulation S offering under our existing guidance. Compliance with the terms of both Regulation S and another applicable exemption, such as Rule 506(c), will depend on the facts and circumstances of a particular situation. For example, the use of the same website to solicit U.S. investors under Rule 506(c) and offshore investors under Regulation S could raise concerns about the issuer's compliance with the prohibition on directed selling efforts in Regulation S because the offering material on the website could be deemed to have the effect of conditioning the market in the United States. In such situations, we believe an issuer can take certain steps to distinguish the Regulation S and domestic offering materials, as the Commission has previously discussed.[153]

c. Subsequent Registered Offerings (Rule 152(b)(3))

Existing Rule 152 provides that the phrase "transactions by an issuer not involving any public offering" in Section 4(a)(2) shall be deemed to apply to transactions that did not involve any public offering at the time of the unregistered offering even if the issuer decides subsequently to make a public offering and/or files a registration statement. In 2007, the Commission clarified that an issuer's contemplation of filing a Securities Act registration statement at the same time that it is conducting an unregistered offering under Section 4(a)(2) would not cause the Section 4(a)(2) exemption to be unavailable for that unregistered offering.[154] So long as all of the applicable requirements of the exemption prohibiting general solicitation were met for offers and sales that occurred prior to the use of general solicitation in connection with the registered public offering, the offers and sales of the exempt offering prohibiting general solicitation would not be integrated with the subsequent registered

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[153] *See* Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore, Release No. 33-7516 (Mar. 23, 1998) [63 FR 14806 (Mar. 27, 1998)].

[154] *See* Regulation D 2007 Proposing Release, at text accompanying note 124. *See also* Concept Release, at text accompanying note 499.

offering.[155] Once the public offering is commenced or the registration statement is filed, the safe harbor in existing Rule 152 is no longer available for any concurrent or subsequent offers or sales made in connection with an exempt offering prohibiting general solicitation.

i. Proposed Amendments

The Commission proposed Rule 152(b)(3) to provide a non-exclusive safe harbor for certain offerings made prior to the commencement of an offering for which a Securities Act registration statement has been filed, thus permitting companies to conduct certain offerings shortly before the filing of a Securities Act registration statement without concern that the two offerings would be integrated. Proposed Rule 152(b)(3)(i) would provide that an offering for which a Securities Act registration statement has been filed will not be integrated with terminated or completed offerings for which general solicitation is not permitted. Proposed Rule 152(b)(3)(ii) would provide that an offering for which a Securities Act registration statement has been filed will not be integrated with a terminated or completed offering for which general solicitation is permitted made only to QIBs and IAIs. Finally, proposed Rule 152(b)(3)(iii) would make clear that an offering for which a registration statement has been filed will not be integrated with any offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the registered offering.

ii. Comments

No commenters opposed the safe harbor in proposed Rule 152(b)(3), and several commenters supported adopting proposed Rule 152(b)(3)(i).[156] In support, one commenter noted that the proposed safe harbor "appears to be generally consistent with existing Rule 152, updated mainly to account for the fact that general solicitation is now permitted for offerings conducted under Rule 506(c)."[157] Another commenter asked the Commission not to include the

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[155] In these circumstances, companies should be careful to avoid any pre-filing communications regarding the contemplated public offering that could render the Section 4(a)(2) exemption unavailable for what would be an otherwise exempt private placement. *See* Regulation D 2007 Proposing Release, at note 124.

[156] *See, e.g.*, Md. St. Bar Assoc. Letter; W. Hubbard Letter; and NASAA Letter (not objecting to the proposed safe harbor).

[157] *See* Md. St. Bar Assoc. Letter.

30-day cooling-off period contemplated as a condition for use of proposed Rule 152(b)(3)(iii), because the commenter believed it undercuts the objective of the rules to "encourage use of registration to the maximum extent possible."[158] Alternatively, the commenter suggested that proposed Rule 152(b)(3)(ii) should be revised to refer to a terminated or completed offering for which general solicitation is permitted *in which sales are made* only to the specified institutional investors.[159]

iii. Final Amendments

After considering these comments, we are adopting new Rule 152(b)(3), as proposed, providing a non-exclusive safe harbor for certain offerings made prior to the commencement of an offering for which a Securities Act registration statement has been filed. New 17 CFR 230.152(b)(3)(i) ("Rule 152(b)(3)(i)") provides that an offering for which a Securities Act registration statement has been filed will not be integrated with terminated or completed offerings for which general solicitation is not permitted.[160] New 17 CFR 230.152(b)(3)(ii) ("Rule 152(b)(3)(ii)") provides that an offering for which a Securities Act registration statement has been filed will not be integrated with a terminated or completed offering for which general solicitation is permitted made only to QIBs and IAIs.[161] Finally, new Rule 152(b)(3)(iii) provides that an offering for which a registration statement under the Securities Act has been

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[158] *See* ABA Letter (stating that the 30-day cooling-off period serves "no real practical purpose," noting that "[i]n these situations, investors in the registered offering will have the benefit of the liability provisions set forth in Section 11 and 12(a)(2) of the Securities Act.").

[159] *See id.*

[160] New Rule 152(b)(3)(i) builds on the Commission's prior integration guidance relating to offerings for which general solicitation is not permitted. Offers and sales preceding registered offerings that do not involve general solicitation are generally not the type of offerings that, when taken together, appear to be susceptible to concerns relating to the prior offers and sales conditioning the market for the registered offering.

[161] New Rule 152(b)(3)(ii) builds on current Rule 255(e) of Regulation A, and current Rules 147(h) and 147A(h), which provide that offerings limited to QIBs and IAIs are not integrated with a subsequently filed registered offering. Similarly, where an issuer has solicited interest in a contemplated, but subsequently abandoned Regulation A offering only to QIBs or IAIs, the abandoned Regulation A offering would not be subject to integration with a subsequently filed registered offering. We do not believe it is appropriate, as suggested by a commenter, that we revise this provision to refer only to offerings in which sales are made to QIBs and IAIs, as to do so would expand the scope of this safe harbor to effectively permit broad use of general solicitation at any time, including immediately prior to commencement of a registered offering, so long as the issuer limits sales in the exempt offerings to the specified institutional investors, thereby raising concerns about the prior offers conditioning the market for the registered offering.

filed will not be integrated with any offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the registered offering.[162]

We continue to believe that capital raising around the time of a public offering, in particular an initial public offering, including immediately before the filing of a registration statement, is often critical if issuers are to have sufficient funds to continue to operate while the public offering process is ongoing.[163] We believe that Rule 152 as currently written is unnecessarily restrictive, given the changing financial requirements and circumstances of issuers, particularly smaller issuers, immediately prior to a registered public offering and may be revised without compromising investor protections. A lengthy waiting period prior to a registered offering combined with a potentially uncertain registration process are particular concerns for smaller issuers contemplating a registered public offering, whose financing needs are often erratic and unpredictable, due in part to limited amounts of working capital, cash reserves, and access to credit.[164] However, we are not persuaded by a commenter's suggestion that we eliminate the 30-day period applicable to an offering for which a registration statement under the Securities Act has been filed subsequent to a terminated or completed offering for which general solicitation is permitted. New Rule 152(b)(3)(iii) does not impose an additional requirement beyond that set forth in the 30-day safe harbor of new Rule 152(b)(1), but rather is meant to clarify the application of that provision to subsequent registered offerings. As discussed above, we believe a 30-day time frame is sufficient to mitigate concerns that an exempt offering may condition the market for a subsequent registered offering. For this reason, we are adopting new Rule 152(b)(3) as proposed to permit issuers to conduct offerings shortly

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[162] New Rule 152(b)(3)(iii) will work in coordination with new Rule 152(b)(1) to clarify the application of the 30-day safe harbor to subsequent registered offerings. As discussed with respect to the non-exclusive safe harbor in new Rule 152(b)(1) in Section II.A.2, if an issuer files a registration statement under the Securities Act less than 30 calendar days after a terminated or completed offering for which general solicitation is permitted, although new Rule 152(b)(3)(iii) would not be available, integration would depend on the availability of the general principle of integration in Rule 152(a).

[163] *See* Regulation D 2007 Proposing Release, at Section II.C.

[164] *See*, *e.g.*, Final Report of the Advisory Committee on Smaller Public Companies to the U.S. Securities and Exchange Commission (Apr. 23, 2006), *available at* https://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf, at 96. *See also* Regulation D 2007 Proposing Release, at note 116 and accompanying text.

before the filing of a Securities Act registration statement without concern that the two offerings would be integrated.[165]

d. Offers or Sales Preceding Exempt Offerings Permitting General Solicitation (Rule 152(b)(4))

Rule 251(c) of Regulation A, and the intrastate offering safe harbor and exemption in Rule 147(g) and Rule 147A(g), respectively, currently provide that offers and sales made pursuant to these exemptive provisions and safe harbors that permit general solicitation will not be integrated with terminated or completed offers and sales made prior to the commencement of these exempt offerings.[166]

i. Proposed Amendments

The Commission proposed Rule 152(b)(4) to provide a safe harbor for all offers and sales made in reliance on an exemption for which general solicitation is permitted that follow any other terminated or completed offering. The proposed safe harbor would expand the current integration safe harbors in Regulation A and Rules 147 and 147A to include offerings relying on: Regulation Crowdfunding; Rules 504(b)(1)(i), (ii), or (iii) that, depending on State registration requirements, permit general solicitation; and Rule 506(c).

ii. Comments

Several commenters supported the safe harbor in proposed Rule 152(b)(4) that would apply to any offering in reliance on an exemption for which general solicitation is permitted

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[165] We note that, as discussed above, the plan or scheme to evade restrictions in the introductory language to Rule 152 apply to all the provisions of new Rule 152, including the safe harbors in Rule 152(b), as well as the general principle of integration in new Rule 152(a) when the safe harbors in new Rule 152(b) are not available. In this regard, none of the provisions of new Rule 152 may be used as a means to circumvent the communication restrictions prior to a registered offering, for example, for communications occurring within 30 days of a registered offering. Section 5(c) of the Securities Act prohibits any written or oral offers prior to the filing of a registration statement. Generally, written and oral offers prior to filing a registration statement are prohibited, absent an exemption. Rule 163B, for example, provides an exemption to issuers, and those authorized to act on their behalf, to gauge market interest in a possible initial public offering or other registered securities offering through discussions with certain institutional investors prior to, or following, the filing of a registration statement.

[166] These integration provisions also provide that offers and sales subsequent to these exempt offerings will not be integrated if they are: (1) registered under the Securities Act; (2) exempt from registration under Rule 701; (3) made pursuant to an employee benefit plan; (4) exempt from registration under Regulation S; (5) exempt from registration under Section 4(a)(6) of the Securities Act; (6) made more than six months after completion of the offering; or (7) limited to QIBS and IAIs. *See* Rule 251(c); Rule 255(e); Rule 147(g) and (h); and Rule 147A(g) and (h).

made subsequent to an offering that has been terminated or completed,[167] while others opposed the proposed safe harbor.[168]

One commenter supporting the proposal recommended that the integration safe harbor should be the same whether the new or terminated offering involves general solicitation or not.[169] Another commenter recommended an additional safe harbor providing that any offering commenced in reliance on an exemption that does not permit general solicitation may be continued in reliance on an exemption that does permit general solicitation.[170] According to this commenter, such a safe harbor would be particularly beneficial to issuers commencing an offering in reliance on Rule 506(b) and desiring to continue it in reliance on Rule 506(c) and would permit the issuer to use the same or substantially identical materials to continue the offering in reliance on Rule 506(c).[171] In contrast, one commenter opposing the safe harbor in proposed Rule 152(b)(4) suggested that permitting a Rule 506(c) offering to commence immediately following the completion of a Rule 506(b) offering for the same securities at the same price is essentially like permitting general solicitation in a Rule 506(b) offering conducted in two phases.[172] One commenter questioned the Commission's basis for claiming that the exemptions allowing general solicitation are sufficiently protective.[173]

iii. Final Amendments

After considering comments, we are adopting new Rule 152(b)(4), as proposed, to provide a non-exclusive safe harbor for all offers and sales made in reliance on an exemption

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[167] *See* W. Hubbard Letter; D. Burton Letter; CrowdCheck Letter (expressing concern about issuer compliance with disclosure requirements of Regulation Crowdfunding); and NASAA Letter (not objecting to the proposed safe harbor).

[168] *See* Md. St. Bar Assoc Letter; and CFA Letter.

[169] *See* D. Burton Letter.

[170] *See* Fried Frank Letter (stating that this additional safe harbor would be consistent with the Commission's guidance in its 2013 release adopting Rule 506(c)) (*citing* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-9415 (July 10, 2013) [78 FR 44771 (July 24, 2013)] ("Rule 506(c) Adopting Release")).

[171] *See id.*

[172] *See* Md. St. Bar Assoc. Letter.

[173] *See* CFA Letter (additionally expressing concern over fraud in the Regulation A market and non-compliance in the Regulation Crowdfunding market). *See also* CrowdCheck Letter.

for which general solicitation is permitted that follow any other terminated or completed offering. This new safe harbor expands on the current integration safe harbors in Regulation A and Rules 147 and 147A to include offerings relying on: Regulation Crowdfunding; Rules 504(b)(1)(i), (ii), or (iii) that, depending on State registration requirements, permit general solicitation; and Rule 506(c). The following table summarizes the types of offerings that will not be integrated under this new safe harbor:

Table 3: Summary of Types of Offerings Not Integrated Under the Safe Harbor

Offering 1	Offering 2
Any offering, which includes: Exempt offering permitting general solicitation, including: • Regulation A • Regulation Crowdfunding • Rule 147 or 147A • Rules 504(b)(1)(i), (ii), or (iii) • Rule 506(c) Exempt offering prohibiting general solicitation, including: • 17 CFR 230.504(b)(1) • Rule 506(b) • Section 4(a)(2) Securities Act registered offering	Exempt offering permitting general solicitation, including: • Regulation A • Regulation Crowdfunding • Rule 147 or 147A • Rules 504(b)(1)(i), (ii), or (iii) • Rule 506(c)

Exempt offerings that permit general solicitation and follow other offers and sales are generally not the type of offerings that appear to be susceptible to concerns about the prior offers and sales conditioning the market for the subsequent exempt offering. We do not believe integrating any type of offers or sales with a subsequent exempt offering permitting general solicitation, such as an offering pursuant to Regulation A, Rule 147, Rule 147A, Rules 504(b)(1)(i), (ii), or (iii), Rule 506(c), or Regulation Crowdfunding, is necessary to further investor protection.

In response to a commenter's request,[174] we are providing guidance with respect to an issuer's ability to rely on Rule 152(b)(4) with respect to an offering that was commenced in

[174] *See* Fried Frank Letter.

reliance on an exemption that does not permit general solicitation, but that the issuer wishes to continue in reliance on an exemption that does permit general solicitation. We are of the view that an issuer may rely on the safe harbor in new Rule 152(b)(4) if, for example, the issuer commences an offering under Rule 506(b) and thereafter engages in general solicitation in reliance on Rule 506(c) so long as once the issuer engages in general solicitation, it relies on Rule 506(c) for all subsequent sales, thereby effectively terminating the Rule 506(b) offering, including by selling exclusively to accredited investors and taking reasonable steps to verify the accredited investor status of each purchaser.[175] The use of general solicitation in reliance on Rule 506(c) will not affect the exempt status of prior offers and sales of securities made in reliance on Rule 506(b).[176] It is also not necessary for an issuer to use different offering materials for offerings that rely on different exemptions, so long as the issuer satisfies the disclosure and other requirements of each applicable exemption.

3. Commencement, Termination, and Completion of Offerings (Rules 152(c) and 152(d))

Existing rules under the Securities Act do not clearly define commencement or completion with respect to exempt and registered offerings, although several rules state when exempt offerings under Regulation A[177] and Regulation Crowdfunding terminate under certain circumstances,[178] as well as when registered offerings terminate.[179]

a. Proposed Amendments

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[175] We do not believe that this approach will permit general solicitation in a Rule 506(b) offering conducted in two phases, in light of the significant investor protections of Rule 506(c) that become applicable as soon as the issuer commences general solicitation activity.

[176] This guidance is consistent with the Commission's 2013 guidance in implementing Rule 506(c). *See* Rule 506(c) Adopting Release, at Section II.A.3.

[177] *See, e.g.*, 17 CFR 230.257(a) ("Rule 257(a)") (requiring filing of "an exit report on [17 CFR 239.94 ("Form 1-Z")] not later than 30 calendar days after the termination or completion of [a Regulation A/Tier I] offering."); 17 CFR 230.259(b) ("Rule 259(b)") (declaration by the Commission that the offering statement has been abandoned); and 17 CFR 230.251(d)(3)(i)(F) ("Rule 251(d)(3)(i)(F)") (required termination of the offering by the third anniversary of the initial qualification date of the offering statement).

[178] *See, e.g.*, 17 CFR 230.201(g) ("Rule 201(g)") (disclosure required of the "target offering amount and the deadline to reach the target offering amount"); and 17 CFR 227.304(b) ("Rule 304(b)") (notice provided by the Regulation Crowdfunding intermediary of the early completion of an offering).

[179] *See, e.g.*, 17 CFR 230.477 ("Rule 477") (withdrawal of the registration statement after application granted by the Commission); 17 CFR 230.479 ("Rule 479") (order by the Commission that the registration statement has been abandoned); and 17 CFR 230.415(a)(5) ("Rule 415(a)(5)") (on the third anniversary of the initial effective date of the registration statement).

To provide greater certainty to issuers as to the availability of the safe harbors under proposed Rule 152(b) that require the prior offering to be "terminated or completed,"[180] the Commission proposed Rule 152(c) to define "terminated or completed" in the context of Rule 152 as follows:

- Offerings of securities made under Section 4(a)(2), Regulation D, Rule 147 or 147A would be considered "terminated or completed," 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.[181]
- Offerings under Regulation A would be considered "terminated or completed": (i) upon the withdrawal of an offering statement under 17 CFR 230.259(a) ("Rule 259(a)" of Regulation A); (ii) upon the filing of 17 CFR 239.94 ("Form 1-Z") with respect to that offering; (iii) upon the declaration by the Commission that the offering statement has been abandoned under Rule 259(b) of Regulation A; or (iv) on the third anniversary of the initial qualification date of the offering statement, in the case of continuous or delayed offerings.
- Offerings under Regulation Crowdfunding would be considered "terminated or completed" on the deadline of the offering identified in the offering materials pursuant to Rule 201(g) of Regulation Crowdfunding, or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under Rule 304(b) of Regulation Crowdfunding.
- Offerings for which a Securities Act registration statement has been filed would be considered, "terminated or completed," for purposes of the proposed safe

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[180] *See* proposed Rules 152(b)(1), (b)(3), and (b)(4).

[181] Efforts to sell securities through the offering include, but are not limited to, the distribution of any offering materials. For purposes of exemptions permitting the use of general solicitation, the cessation of selling efforts would require the removal of any publicly available general solicitation materials, to the extent possible.

harbors: (i) upon the withdrawal of the registration statement after the Commission grants such application under Rule 477; (ii) upon the filing of an amendment or supplement to the registration statement indicating that the registered offering has been terminated or completed and the deregistering of any unsold securities if required by 17 CFR 229.512(a)(3); (iii) the entry of an order by the Commission declaring that the registration statement has been abandoned under Rule 479; or (iv) as set forth in Rule 415(a)(5).

b. Comments

Commenters provided various recommendations on how to provide greater certainty to issuers as to the availability of the proposed safe harbors that require a determination as to when an offering should be considered "terminated or completed."[182] While one commenter supported our proposed definitions of "terminated or completed,"[183] another commenter recommended that the Commission provide guidance for determining when offerings might be considered "terminated or completed" instead of defining the terms, as "the definitions might not catch all possible circumstances."[184] In order to facilitate an issuer terminating an offering of securities in reliance on one exemption, for example, such as Rule 506(b) that prohibits general solicitation, and simultaneously commencing an offering of securities in reliance on another exemption, for example, such as Rule 506(c) that permits general solicitation, one commenter recommended revising the proposed definition of "terminated or completed" in 17 CFR 230.152(c)(1)(ii) to clarify that the requirement to cease selling efforts is limited only to a particular offering, as opposed to the more general language "to make further offers to sell the issuer's securities," as proposed.[185]

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[182] One comment letter supported the definitions as proposed. *See* W. Hubbard Letter. Several other commenters either opposed or suggested alternative definitions or approaches. *See, e.g.*, Shearman & Sterling Letter; CrowdCheck Letter; and J. Clarke Letter.

[183] *See* W. Hubbard Letter (stating that under other alternatives too many "complications otherwise would arise.").

[184] *See* CrowdCheck Letter.

[185] *See* Fried Frank Letter (stating that this may occur because the issuer initially believes that it can raise capital without engaging in general solicitation, but subsequently determines that it is unable to raise the capital without engaging in general solicitation and that the issuer should be able to seamlessly, using the same (or

Several commenters provided further recommendations with regard to specific sections of the definitions on when an offering is considered terminated or completed.[186] In regard to continuous Regulation A Tier 2 offerings that have not been withdrawn or abandoned, one of these commenters noted that under the proposed definition the offering would be deemed completed on the third anniversary of qualification, which would present a problem for purposes of the safe harbors, if the offering by its own terms indicated that it will terminate earlier, for example, one year after qualification.[187]

Some commenters asked the Commission to provide guidance on when an offering is considered to be "commenced,"[188] including one commenter who stated that such guidance would be useful, especially in the context of testing the waters or seeking indications of interest in a contemplated securities offering.[189]

Another commenter raised concerns with respect to termination and commencement in the context of shelf registration statements, and noted that if a registered offering is deemed commenced with the filing of the registration statement, the 30-day safe harbor may be effectively unavailable for shelf registration statements.[190] Accordingly, this commenter suggested that in the case of shelf registration statements on 17 CFR 239.13 ("Form S-3") or 17 CFR 239.33 ("Form F-3"), the relevant commencement date should be the commencement of public efforts to sell the issuer's securities, rather than the filing or existence of a shelf registration statement, and that a particular delayed registered offering, commonly referred to as

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substantially identical) offering materials continue the offering in reliance on an exemption permitting general solicitation, such as Rule 506(c)).

186 *See* Shearman & Sterling Letter; and CrowdCheck Letter (suggesting that the definition with regard to Section 4(a)(2), Regulation D, or Rules 147 and 147A should reference "conditions outside the issuer's control" instead of "outside the investor's control").

187 *See* CrowdCheck Letter.

188 *See* CrowdCheck Letter; Shearman & Sterling Letter; and ABA Letter (expressing concern that it is unclear how the "commencement" of an offering would be applied to continuous offerings).

189 *See* CrowdCheck Letter. *See also* ABA Letter (stating that determining the meaning of "commencement" of an offering can cause uncertainty).

190 *See* Shearman & Sterling Letter (stating that requiring issuers to wait 30 days after the termination of a shelf registration statement before commencing an exempt offering prohibiting general solicitation, or requiring issuers that are engaged in an exempt offering to postpone filing a new shelf registration statement for 30 days after the termination of the exempt offering in order for the safe harbor to be available, would be burdensome for issuers and would not provide incremental protections for investors).

a take-down (or off the shelf) from an effective shelf registration statement, should be deemed terminated or completed when the distribution of the registered securities has been completed or public efforts to sell the issuer's securities in the proposed registered offering have been abandoned.[191] This commenter also suggested that the completion of the distribution in a registered offering could be determined, for example, by reference to the completion of the distribution within the meaning of 17 CFR 242.100 through 105 ("Regulation M") under the Exchange Act.[192]

c. Final Amendments

We agree with many of the commenters' suggestions, and, as adopted, we have modified Rule 152 accordingly. We are adopting the provisions of proposed Rule 152(c) regarding when an offering is terminated or completed as new 17 CFR 230.152(d) ("Rule 152(d)"). We also are adopting provisions for determining when an offering has commenced as new Rule 152(c). In addition, we have structured new Rules 152(c) and 152(d) as factors to consider, rather than definitions. We share the concern expressed by a commenter that definitions might not catch all possible circumstances so, consistent with this commenter's suggestion, the rule includes factors to consider, instead of definitions.[193] We believe that this will provide more flexibility to issuers applying the safe harbors to various offering scenarios and, should make both the rule's general principle of integration and the safe harbors more workable.

New Rule 152(c) provides a non-exclusive list of factors to consider in determining when an offering will be deemed to be commenced for purposes of both the general principle of integration in Rule 152(a) and the safe harbors in Rule 152(b). Specifically, regardless of the type of offering, new Rule 152(c) states that an offering of securities will be deemed to be commenced for purposes of Rule 152 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 be commenced. The list of factors covers registered

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[191] *See id.*

[192] *See id.*

[193] *See* CrowdCheck Letter.

and exempt offerings, noting that 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 Commission, 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 the first filing of a prospectus supplement with the Commission describing the delayed offering, or the issuance of a widely disseminated public disclosure, such as a press release, confirming the commencement of the delayed offering.

Due to their non-public nature, communications between an issuer, or its agents and underwriters, and QIBs and IAIs, including those that would qualify for the safe harbor in 17 CFR 230.163B ("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, such as under Rule 506(b) or Section 4(a)(2), 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.

We believe that the safe harbors in new Rule 152(b)(1) and (3) should accommodate and facilitate seasoned issuers filing shelf registration statements with the Commission. Accordingly, consistent with one commenter's recommendation,[194] for a continuous registered offering that will commence promptly on the date of initial effectiveness,[195] we have included guidance that the commencement of such an offering is likely to occur on the date the issuer first filed its registration statement for the offering with the Commission.[196] However, in the case of a delayed registered offering, we agree that the mere filing or existence of a shelf registration statement, without any actual selling effort or description of the securities to be offered and sold, is unlikely to meaningfully condition the market for a subsequent exempt offering. Therefore, based on the facts and circumstances, the initial public filing of a shelf registration statement with the Commission will not necessarily be deemed to be the commencement of the offering. Rather, commencement of such an offering is likely to occur upon commencement of the public efforts by the issuer, or its agents and underwriters, to offer and sell the securities in the particular delayed registered offering, including the issuance of a widely disseminated public disclosure, such as a press release, or the public filing of a prospectus supplement with the Commission.

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[194] *See* Shearman & Sterling Letter ("In the past three years, 3,697 Form S-3 registration statements were filed by domestic issuers and 405 Form F-3 registration statements by foreign private issuers."). In this regard, we note the critical importance of shelf registration statements to capital formation. Based on staff analysis of EDGAR filings, during calendar year 2019, we estimate that there were 816 filings on Form S-3 and 273 filings on Form F-3. In addition, we estimate that during this period there were 2,126 domestic automated shelf registration filings (S-3ASR) and 61 foreign automated shelf registration filings (F-3ASR).

[195] *See, e.g.*, 17 CFR 230.415(a)(1)(ix).

[196] Confidentially submitted registration statements and related materials would not be considered as filed for purposes of these rules until they are publicly filed on the Commission's EDGAR system.

We are adopting new Rule 152(d) to provide a non-exclusive list of factors to consider in determining when an offering is deemed to be "terminated or completed," substantially as proposed, but with modifications consistent with commenters' recommendations. Instead of definitions, new Rule 152(d) provides a list of factors to consider in determining when an offering will be deemed to be "terminated or completed." Regardless of the type of offering, Rule 152(d) states that termination or completion of an offering is likely to occur when the issuer and its agents cease efforts to make further offers to sell the issuer's securities under such offering. The rule includes a non-exclusive list of factors that should be considered 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 or 147A, on the later of the date:
    - The issuer entered into a binding commitment to sell all securities to be sold under the offering (subject only to conditions outside of the investor's control)[197]; or
    - The issuer and its agents ceased efforts to make further offers to sell the issuer's securities under such offering;
- Regulation A, on:
    - The withdrawal of an offering statement under Rule 259(a);
    - The filing of a Form 1-Z with respect to a Tier I offering under Rule 257(a);
    - The declaration by the Commission that the offering statement has been abandoned under Rule 259(b); or
    - 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

[197] By limiting the conditions to those outside the investor's control, an issuer may take the position that an offering is terminated or completed at a point in time prior to the actual closing of the transaction, so long as the only remaining conditions are solely within the issuer's control.

from continuing to sell securities using the offering statement, or any earlier date on which the offering terminates by its terms;

- Regulation Crowdfunding, on the deadline of the offering identified in the offering materials pursuant to Rule 201(g), or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under Rule 304(b); or
- A registration statement filed under the Securities Act, on:
    - The withdrawal of the registration statement after an application is granted or deemed granted under Rule 477;
    - The filing of a prospectus supplement or amendment to the registration statement indicating that the offering, or particular delayed offering in the case of a shelf registration statement, has been terminated or completed;
    - The entry of an order of the Commission declaring that the registration statement has been abandoned under Rule 479;
    - 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
    - Any other factors that indicate that the issuer has abandoned or ceased its public selling efforts in furtherance of the offering, or particular delayed offering in the case of a shelf registration statement, which could be evidenced by:
        - The filing of a Current Report on Form 8-K; or
        - The issuance of a widely disseminated public disclosure by the issuer, or its agents, informing the market that the offering, or particular delayed offering, in the case of a shelf registration statement, has been terminated or completed.

In response to a commenter's suggestion to facilitate reliance on the proposed rule by issuers wishing to terminate an offering of securities in reliance on one exemption and simultaneously commence an offering of the same securities in reliance on another exemption that may not be able to say that the issuer has "ceased efforts to make further offers to sell" its securities,[198] we are clarifying in new 17 CFR 230.152(d)(1)(ii) that an issuer and its agents must cease efforts to make further offers to sell the issuer's securities under a particular exempt offering.

In new 17 CFR 230.152(d)(2)(iv) ("Rule 152(d)(2)(iv)"), we have also clarified that the date after the third anniversary of the date a Regulation A offering statement was qualified may constitute the termination or completion of an offering for Rule 152 purposes, due to the operation of Rule 251(d)(3)(i)(F). In addition, in response to a commenter's suggestion,[199] we have also further clarified that a Regulation A offering may terminate on any earlier date on which the offering terminates by its terms.

With respect to a registration statement filed under the Securities Act, in accord with suggestions by another commenter to facilitate issuers undertaking shelf offerings, we have provided that the abandonment or cessation of public selling efforts may be evidenced by the filing of a current report on Form 8-K, or the issuance of a widely disseminated public disclosure by the issuer or its agents, informing the market about the termination of a registered offering, or in the case of a shelf registration statement, a particular delayed offering.[200] We note that a particular delayed offering may be deemed terminated or completed, even though the issuer's shelf registration statement may still have unused capacity, or an aggregate amount of securities available to offer and sell in a later delayed registered offering.

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198 *See* Fried Frank Letter.

199 *See* CrowdCheck Letter.

200 *See* Shearman & Sterling Letter. We have not, however, adopted this commenter's suggestion that the completion of distribution in a registered offering could be determined by reference to the completion of the distribution within the meaning of Regulation M under the Exchange Act. We believe including such language in the list of factors to be considered would add an unnecessary layer of complexity to new Rule 152(d), and may also cause unnecessary confusion with respect to the proper scope and application of Regulation M (e.g., market participants may assume incorrectly that Regulation M applies only to registered public offerings, which is not the case).

4. Conforming Amendments to Securities Act Exemptions

a. Proposed Amendments

The Commission proposed to replace the integration provisions of several Securities Act exemptions with references to proposed Rule 152. Specifically, the Commission proposed to amend current Rules 502(a), 251(c), 147(g), and 147A(g) to provide cross-references to the new Rule 152. Although Regulation Crowdfunding has no codified integration provision, in the 2015 adopting release, the Commission provided guidance on integration using the same facts-and-circumstances analysis set forth in the Commission's 2015 amendments to Regulation A and 2016 amendments to Rule 147 and adoption of new Rule 147A.[201] The Commission proposed to amend Rule 100 of Regulation Crowdfunding to cross-reference proposed Rule 152(b), which would codify the Commission's existing guidance on integration.

The Commission additionally proposed to eliminate Rules 255(e), 147(h), and 147A(h) as the relief provided by these rules would be provided by proposed Rule 152(b)(3).

b. Comments

Commenters that addressed the proposal generally preferred our proposed approach to replace the current integration provisions in each Securities Act exemption with a cross-reference to proposed Rule 152, instead of revising each exemption's current integration provisions to reflect the provisions of proposed Rule 152.[202]

Commenters also supported codifying in Rule 100 of Regulation Crowdfunding, as proposed, the Commission's existing integration guidance providing that offers and sales made in reliance on Regulation Crowdfunding will not be integrated with other exempt offerings made by the issuer, provided that each offering complies with the requirements of the applicable

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[201] Securities Act Section 4A(g) states that "[n]othing in the exemption shall be construed as preventing an issuer from raising capital through means other than [S]ection 4(a)(6)." Given this statutory language, the Commission provided guidance in the Crowdfunding Adopting Release that an offering made in reliance on Section 4(a)(6) is not required to be integrated with another exempt offering made by the issuer to the extent that each offering complies with the requirements of the applicable exemption that is being relied on for that particular offering. *See* Crowdfunding Adopting Release, at text accompanying notes 1343–1344.

[202] *See* W. Hubbard Letter; D. Burton Letter; and CrowdCheck Letter.

exemption that is being relied on for the particular offering.[203] One commenter, however, stated that this change was unnecessary if proposed Rule 152 is adopted.[204] Due to the requirements in proposed Rule 152(a)(1) and (b)(1), another commenter stated its belief that applying proposed Rule 152 to Regulation Crowdfunding offerings would be an incomplete solution to Regulation Crowdfunding issuers' concerns.[205] Another commenter asked the Commission to conform existing Rule 500(g) to clarify that the rule applies in addition to, and is not a concept separate from, the general integration rules in Rule 152, such as by cross-referencing Rule 152(b)(2) in Rule 500(g).[206]

c. Final Amendments

We are replacing the integration provisions of several Securities Act exemptions with references to Rule 152, as proposed. Specifically, we are amending Rule 502(a), Rule 251(c), Rule 147(g), and Rule 147A(g) to provide cross-references to the new general principle of integration and safe harbors for integration in Rule 152. We are also similarly amending current Rule 500(g), consistent with a commenter's suggestion. Although we did not propose amending Rule 500(g), we believe a cross-reference to the safe harbor for offers and sales made in compliance with Regulation S in new Rule 152(b)(2) is appropriate to avoid any potential confusion about the intersection between those provisions. This amendment will make it clear that Rule 500(g) provides specific guidance in addition to, and not separate from, the general integration rules in new Rule 152.

We are additionally eliminating Rule 255(e), Rule 147(h), and Rule 147A(h) as the relief provided by these rules is provided by new Rule 152(b)(3). All of these existing integration provisions currently refer to a facts-and-circumstances analysis when their

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[203] *See* J. Clarke Letter; Netcapital Letter; W. Hubbard Letter; R. Campbell Letter; and D. Burton Letter.

[204] *See* CrowdCheck Letter.

[205] *See* R. Campbell Letter (explaining that due to the requirements in proposed Rule 152(a)(1) and (b)(1), "[a]n issuer combining a crowdfunding offering with, for example, an offering under Section 4(a)(2) would not be entitled to the integration protection of proposed Rule 152.").

[206] *See* ABA Letter.

enumerated safe harbors do not apply, and the new Rule 152(b) safe harbors are generally consistent with the current safe harbors in the individual rules.

As proposed, we are also codifying the Commission's guidance on integration of Regulation Crowdfunding offerings by adding a cross-reference to new Rule 152 in a new provision in Rule 100 of Regulation Crowdfunding, which we believe will provide greater certainty to issuers contemplating a Regulation Crowdfunding offering who also may be considering other offerings under the Securities Act. Codification of this guidance should provide issuers that may wish to conduct a Regulation Crowdfunding offering concurrent with a Rule 506(c) offering with certainty and flexibility to help them meet their capital needs.

B. General Solicitation and Offering Communications

The Securities Act defines, and the Commission historically has interpreted, the term "offer" broadly.[207] The Commission has explained that "the publication of information and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer."[208] Although the terms "general solicitation" and "general advertising" are not defined in Regulation D, 17 CFR 230.502(c) ("Rule 502(c)") does provide examples of general solicitation and general advertising, including advertisements published in newspapers and magazines, communications broadcast over television and radio, and seminars where attendees have been invited by general solicitation or general advertising.[209] The Commission has stated that other uses of publicly available media, such as unrestricted websites, also constitute general solicitation and general advertising.[210]

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[207] *See* Securities Offering Reform, Release No. 33-8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)] ("Securities Offering Reform Release"), at note 88 ("The term 'offer' has been interpreted broadly and goes beyond the common law concept of an offer.") (*citing Diskin v. Lomasney & Co*., 452 F.2d 871 (2d. Cir. 1971) and *SEC v. Cavanaugh*, 1 F. Supp. 2d 337 (S.D.N.Y. 1998)). *See also* Section 2(a)(3) of the Securities Act (noting that an offer includes every attempt to dispose of a security or interest in a security, for value; or any solicitation of an offer to buy a security or interest in a security).

[208] *See* Securities Offering Reform Release, at note 88.

[209] *See* Rule 502(c).

[210] *See* Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)], at Section II.A.D; and Use of Electronic Media Release, at Section II.C.2.

Whether a transaction is one not involving any public offering[211] is essentially a question of fact and necessitates a consideration of the surrounding circumstances, including factors such as the relationship between the offerees and the issuer, and the nature, scope, size, type, and manner of the offering. The Commission adopted Rule 506 of Regulation D in 1982 as a non-exclusive safe harbor under Section 4(a)(2), providing objective standards on which an issuer could rely to meet the requirements of the Section 4(a)(2) exemption, including a prohibition on the use of general solicitation to market the securities.[212]

1. Exemption from General Solicitation for "Demo Days" and Similar Events

"Demo days" and similar events are generally organized by a group or entity (such as a university, angel investors, an accelerator, or an incubator) that invites issuers to present their businesses to potential investors, with the aim of securing investment. As the Commission stated in the Proposing Release, if the issuer's presentation at a "demo day" or similar event constitutes an offer of securities, the issuer would not be deemed to have engaged in general solicitation if the organizer of the event has limited participation in the event to individuals or groups of individuals 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, such as angel investors.[213] However, we understand that in many cases it may not be practical for the organizer of the event to limit participation in such a manner.

a. Proposed Amendments

The Commission proposed new Rule 148 to provide that certain "demo day" communications would not be deemed general solicitation or general advertising.[214] Specifically, as proposed, an issuer would not be deemed to have engaged in general solicitation

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[211] Section 4(a)(2) of the Securities Act exempts from the registration requirements "transactions by an issuer not involving any public offering," but does not define the phrase. 15 U.S.C. 77d(a)(2).

[212] *See* Regulation D Adopting Release, at Section III.C.

[213] *See* Proposing Release, at Section II.B.1.

[214] Because communications that comply with proposed Rule 148 would not be deemed a general solicitation or general advertising, the limitations on the manner of offering in Rule 502(c) of Regulation D would not apply.

if the communications are made in connection with a seminar or meeting sponsored by a college, university, or other institution of higher education, a local government, a nonprofit organization, or an angel investor group,[215] incubator, or accelerator.

With respect to the organization and conduct of the event, proposed Rule 148 stated that a sponsor would not be 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 making introductions between attendees and issuers, or for investment negotiations between the parties;
- 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 Advisers Act.

In addition, proposed Rule 148 specified that the advertising for the event may not reference any specific offering of securities by the issuer and that the information conveyed at the event regarding the offering of securities by or on behalf of the issuer would be limited to:

- Notification that the issuer is in the process of offering or planning to offer securities;
- The type and amount of securities being offered; and
- The intended use of the proceeds of the offering.

b. Comments

[215] A proposed instruction to Rule 148 provided that for purposes of the rules the term "angel investor group" means a group: (A) of accredited investors; (B) that holds regular meetings and has written processes and procedures for making investment decisions, either individually or among the membership of the group as a whole; and (C) is neither associated nor affiliated with brokers, dealers, or investment advisers.

The comments we received on the proposed exemption from general solicitation for "demo days" and similar events were mixed. Many commenters expressed support for the proposal.[216] Some of the commenters generally supported an exemption, but recommended fewer limitations on the exemption.[217] Commenters provided various views on the limitations for entities organizing the events, with some supporting the proposed limits[218] and others recommending targeted expansions, such as including State governments, or broad expansions of the entities permitted to rely on the exemption.[219] One commenter also recommended limiting the pool of investors who may attend the events, noting that the sponsors are likely to attract many non-accredited investors who will be ineligible for many of the exempt offerings that may be presented at an event.[220] Some of the commenters supporting the proposal recommended further clarification of the language used in proposed Rule 148.[221]

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[216] *See, e.g.*, ABA Letter; Letter from Brandon Andrews, et al. dated May 1, 2020 ("B. Andrews, et al. Letter"); Letter from Angel Capital Association dated May 26, 2020 ("ACA Letter"); SEC SBCFAC Letter; Geraci Law Letter; Md. St. Bar Assoc. Letter; Letter from NextSeed Securities LLC dated June 1, 2020 ("NextSeed Letter"); Sō.Capital Letter; W. Hubbard Letter; Letter from Shareholder Advocacy Forum dated June 1, 2020 ("SAF Letter"); Letter from Investment Adviser Association dated June 1, 2020 ("IAA Letter"); Letter from SSTI dated June 1, 2020 ("SSTI Letter"); Invesco Letter; D. Burton Letter; Letter from Morningstar, Inc. dated June 1, 2020 ("Morningstar Letter"); Letter from Crowdwise, LLC dated June 8, 2020 ("Crowdwise Letter"); CrowdCheck Letter; Ketsal Letter; and Letter from Pat Toomey, U.S. Senator dated July 1, 2020 ("Sen. Toomey Letter").

[217] *See, e.g.*, CrowdCheck Letter (stating concern that the proposed limits on issuer communications would render issuers unable to answer any of the common questions posed by potential investors and recommending only limitations on types of entities permitted to sponsor events); IAA Letter (recommending permitting disclosure of the unsubscribed amount in the offering); ACA Letter (recommending that the Commission permit organizations other than those listed in the proposal to sponsor events, revise the definition of angel investor group, and permit disclosure of the unsubscribed amount in an offering); and Ketsal Letter (recommending fewer limitations on the scope of information conveyed).

[218] *See, e.g.*, CrowdCheck Letter; and Geraci Law Letter.

[219] *See, e.g.*, IAA Letter (recommending broadening the exemption to permit SEC-registered investment advisers that are sponsors of private funds to be included as an entity that may sponsor an event); SSTI Letter (recommending adding "state governments" and "instrumentalities of state and local governments"); ACA Letter (recommending permitting groups of any type, including those associated or affiliated with investment advisers, venture forums, venture capital associations, trade associations, and professional organizations); and D. Burton Letter (recommending including any business or organization other than a broker-dealer or investment adviser).

[220] *See* Geraci Law Letter. *See also* CFA Letter; and NASAA Letter.

[221] *See* ABA Letter (recommending the rule be expressly framed as a non-exclusive "safe harbor" such that the issuer may rely on other existing Commission guidance, and that the term "information regarding an offering" be clarified to provide that content limitations in the rule do not relate to or prevent communication of factual business information); ACA Letter (recommending use of "defined processes and procedures" instead of "written processes and procedures" in the definition of "angel investor group" to better provide for how angel groups work); Morningstar Letter (recommending that information provided to third parties conducting independent analysis not constitute an offering); Sō.Capital Letter (seeking clarification that traditional events, such as a university-sponsored prominent speaker series, for which a fee is typically charged, which may be supplemented by the sponsor to include a "demo day"-type event at no charge, would not be prohibited); and

In contrast, a number of commenters opposed the proposed exemption, expressing concerns about insufficient investor protections.[222] One of these commenters recommended limiting the exemption by prohibiting any form of control or affiliation with the issuer or group of issuers, prohibiting entities whose sole or primary purpose is to attract investors to private issuers, and limiting an issuer's discussion to factual business information and prohibiting discussion of any potential securities offering.[223]

c. Final Amendments

We are adopting Rule 148 substantially as proposed, with certain modifications in response to commenter feedback. For the reasons discussed in the Proposing Release and below, we believe that exempting certain "demo day" communications from the registration requirements of the Securities Act will further the public interest while being consistent with the protection of investors.

As discussed above, the Commission proposed to include local governments in the list of entities permitted to rely on the exemption. In response to comments, we are expanding the types of entities that may sponsor an event to include State governments and instrumentalities of State and local governments. We are also revising the definition of "angel investor group" to specify that such a group must have "defined" processes and procedures for making investment decisions, but that such processes and procedures do not necessarily need to be written. In addition, to address concerns raised by commenters with respect to the possibility of offering-related communications being made broadly to non-accredited investors, we are adopting certain limitations on the types of investors that may attend virtual events as a condition to the availability of Rule 148. In a change from the proposal, we have also added a requirement that more than one issuer participate in the seminar or meeting in order for new Rule 148 to apply.

SSTI Letter (recommending clarification of the duration of the prohibition on investment negotiations, whether the sponsor may negotiate with issuers or investors separately, and the difference between providing advice and investment negotiations). *See also* IAA Letter (recommending that the Commission provide guidance that communications not intended for public consumption do not constitute general solicitation).

222 *See, e.g.*, NASAA Letter; AFREF Letter; Better Markets Letter; CFA Letter; R. Rutkowski Letter; and CFA Institute Letter.

223 *See* NASAA Letter.

As adopted, an issuer will not be deemed to have engaged in general solicitation if the communications are made in connection with a seminar or meeting sponsored by a college, university, or other institution of higher education, a State or local government or instrumentality of a State or local government, a nonprofit organization, or an angel investor group, incubator, or accelerator. We believe it is appropriate to add State governments and instrumentalities of State or local governments to the list of eligible sponsors, because, as mentioned by commenters, State as well as local governments, and special entities created by such governments, may conduct significant economic development activities. Due to their similarities, we do not believe it is necessary to differentiate between State and local governments for this purpose.

With respect to the definition of angel investor groups, we are persuaded by commenters who recommended that such groups be required to have "defined processes and procedures" for investment decisions rather than requiring written processes and procedures. We understand from such commenters that there are established angel investor groups that have well-settled and defined, but not necessarily written, processes and procedures for investment decisions. Therefore, this change from the proposal will reflect the way that many angel groups are organized and administered, and will not disrupt existing angel investor group practices by requiring them to formally memorialize their established processes and procedures.

We do not believe it is appropriate to further expand the list of eligible sponsors, as suggested by some commenters, to include entities such as sponsors of private funds, venture forums, venture capital associations, trade associations, and professional organizations. In addition, we do not believe it is appropriate to expand the proposed definition of angel investor groups to include groups associated or affiliated with brokers, dealers, or investment advisers, and therefore are adopting the proposed instruction to Rule 148 that excludes such groups from the definition.[224] We note that some of these organizations may be able to qualify as eligible

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[224] We acknowledge that members of angel investor groups may include individuals who are employed as brokers, dealers, or investment advisers. Such an individual's membership in the group 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.

sponsors under the proposed categories, for example, if they are organized as non-profit organizations. We also do not agree with commenters who recommended that we exclude from the scope of the exemption any sponsors that control or are affiliated with the issuer or group of issuers, in light of the limits on the sponsors' activities. We believe the tailored list of organizations eligible to act as event sponsors and the exclusion of brokers, dealers and investment advisers from the scope of the exemption will help to limit the application of Rule 148 to events sponsored by organizations less likely to have a profit motive for their involvement in the event or whose sole or primary purpose is to attract investors to private issuers. In order to address commenters' concerns about the potential misuse of the exemption and clarify the nature of the events covered by new Rule 148, we have also added a requirement that more than one issuer participate in the seminar or meeting. This requirement will help to prevent an organization from attempting to hold an event that is, in essence, a sales pitch for the securities of one issuer, while characterizing the event as a "demo day."

As proposed, under the final rule the sponsor will not be 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 making introductions between event attendees and issuers, or for 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 Advisers Act.

In addition, as proposed, the advertising for the event may not reference any specific offering of securities by the issuer.

We believe that these limitations on the sponsors' activities provide important investor protections by limiting the potential for a sponsor to profit from its involvement or to have a potential conflict of interest due to its relationships with either the issuer or investors attending the event and that it is not necessary to adopt additional restrictions on the relationship between sponsors and the issuers involved in the event. Similarly, although some commenters sought clarification, we are not providing bright-line rules as to whether the administrative fees charged by the sponsor are reasonable, but emphasize that the limitation on fees should be construed consistent with our goal of limiting the potential for a sponsor to profit from its involvement. We note that the limitation on fees charged to attendees of an event is not intended to limit a sponsoring organization's ability to collect membership dues or similar fees from individuals.

As noted above, some commenters raised concerns about these events allowing for broad offering-related communications to non-accredited investors. We share this concern, particularly in light of the increasing prevalence of virtual "demo days" that are more accessible and widely attended by the general public. In light of these concerns, we are persuaded that an incremental approach to relaxing "demo day" communication restrictions is warranted with respect to events that are conducted, in whole or in part, in a virtual format. Accordingly, we are narrowing the scope of the proposed exemption so that online participation in the event is limited to: (a) individuals who are members of, or otherwise associated with the sponsor organization (for example, members of an angel investor group or students, faculty, or alumni of a college or university); (b) individuals that the sponsor reasonably believes are accredited investors; or (c) 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.

In contrast to an online event, the number of potential investors who can attend an in-person "demo day" event is limited by factors such as venue size, administrative capacity, and distance from the event. The limitations we are adopting will help prevent broad offering communications over the internet to unlimited numbers of non-accredited investors by requiring

the sponsor to limit participation to a population of potential investors related to the sponsor or about whose qualifications the sponsor has some knowledge, but at the same time will provide sponsors with ample flexibility to continue to conduct such events.

We are adopting the limitations on the information conveyed at the event regarding the offering of securities by or on behalf of the issuer as proposed, with one expansion in response to comment. As adopted the issuer is allowed to convey only:

- 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 in an offering.

We believe that permitting an issuer to disclose the unsubscribed amount in an offering will provide investors with useful information, but is unlikely to affect investor protection in light of the limits on the overall information about the offering that may be conveyed, and the fact that potential investors will be able to seek additional disclosure about the investment opportunity outside of the event setting. We do not agree with commenters who suggested other expansion of the information that issuers may convey about an offering of securities. The exemption provided by new Rule 148 is not intended to provide for broad communication about a securities offering at a "demo day" event. Rather, the rule is intended to allow issuers, in discussing their business plans with potential investors at these events, the flexibility to note that they are seeking capital without uncertainty as to whether they have jeopardized their ability to rely on a certain exemption from registration.[225]

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[225] We understand that small businesses may face challenges in accessing capital when they are not able to note that they are seeking capital when pitching their business to potential investors. *See, e.g.*, Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at* https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf, at 70 ("Entrepreneurs, when they leave out this vital information, they are pitching with one arm behind their back, and this is a deterrent to accessing the capital from professional sources that help these companies scale, create jobs and grow the U.S. economy.").

Overall, we believe that expanding the information permitted to be conveyed beyond the limits in the final rules may undermine the prohibition on general solicitation that is an important condition of certain exemptions. The limited scope of the offering-related communications permitted under the exemption, along with the limitations on online participation and a sponsor's ability to profit from the event, should help to address commenters' concerns about the potential for increased risk of fraud or misconduct. Moreover, issuers may continue to rely on our previously issued guidance, and not be subject to the conditions of Rule 148, including the limit on communications, if the organizer of the event has limited participation in the event to individuals or groups of individuals 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.[226]

2. Solicitations of Interest

As discussed in the Proposing Release, we believe that it is helpful for issuers to be able to gauge interest in a securities offering prior to incurring the expense of preparing and conducting an offering. Securities Act Rule 163B permits issuers and those authorized to act on their behalf to gauge market interest in a registered securities offering through discussions with QIBs and IAIs prior to, or following, the filing of a registration statement.[227] Regulation A also permits issuers to test the waters with, or solicit interest in a potential offering from, the general public either before or after the filing of the offering statement.[228] These solicitations of interest are deemed to be offers of a security for sale for purposes of the antifraud provisions of the Federal securities laws.[229]

a. Generic Solicitation of Interest Exemption

i. Proposed Amendments

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[226] *See* Proposing Release, at Section II.B.1.

[227] *See* Solicitations of Interest Prior to a Registered Public Offering, Release No. 33-10699 (Sep. 25, 2019) [84 FR 53011 (Oct. 4, 2019)] ("Solicitations of Interest Release"). Securities Act Section 5(d) [15 U.S.C. 77e(d)] statutorily provides these accommodations to emerging growth companies. Securities Act Rule 163B extends these accommodations to all issuers, including fund issuers.

[228] *See* 17 CFR 230.255.

[229] *See* Solicitations of Interest Release; and 17 CFR 230.255(a).

The Commission proposed new Rule 241 to permit an issuer to use generic solicitation of interest materials for an offer of securities prior to a making a determination as to the exemption under which the offering may be conducted.[230] As proposed, Rule 241 would not permit an issuer to identify the specific exemption from registration on which it intends to rely for a subsequent offer and sale of the securities. Proposed Rule 241(b) would require the generic testing-the-waters materials to provide specific disclosures notifying potential investors about the limitations of the generic solicitation of interest.

As proposed, these solicitations would be deemed to be offers of a security for sale for purposes of the antifraud provisions of the Federal securities laws.[231] Furthermore, depending on the method of dissemination of the information, such offers may be considered a general solicitation. Proposed Rule 241 would provide an exemption from registration only with respect to the generic solicitation of interest, not for a subsequent offer or sale. Should the issuer move forward with an exempt offering following the generic solicitation of interest, the issuer would need to comply with an available exemption for the subsequent offering, and investors would have the benefit of the investor protections encompassed in such exemption.

In the event that the issuer commences an offering under Regulation A or Regulation Crowdfunding within 30 days of the generic solicitation, in addition to the information currently required to be disclosed under Regulation A and Regulation Crowdfunding, the Commission proposed to require that the generic solicitation materials be made publicly available as an exhibit to the offering materials filed with the Commission.[232] The Commission also proposed to require an issuer that sells securities under Rule 506(b) to any purchaser that is not an accredited investor within 30 days of the generic solicitation of interest to provide such purchaser with any written communication used under proposed Rule 241.

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[230] Proposed Rule 241 was substantially based on Rule 255 of Regulation A.

[231] Proposed Rule 241(a).

[232] *See* proposed Rule 201(z); and proposed paragraph 13 of Form 1-A, Part III, Item 17. Currently, an issuer that solicits indications of interest in reliance on Rule 255 of Regulation A is required to submit or file solicitation materials to the Commission as an exhibit when the offering statement is either submitted for non-public review or filed (and update for substantive changes in such material after the initial nonpublic submission or filing).

ii. Comments

Commenters' views were mixed. Many commenters expressed support for the proposal.[233] Some commenters that supported the proposal recommended that the Commission permit use of the exemption even if an issuer has identified the exemption on which it intends to rely.[234] One of these commenters stated that determining when an issuer has decided to proceed with a specific exemption is difficult and could work counter to thoughtful exploration of which exemption to use.[235] This commenter recommended permitting issuers to use Rule 241 so long as an offering statement under Regulation A or Regulation C has not been filed. Some commenters that were generally supportive of the proposal recommended that the exemption permit a generic public solicitation followed by a private offering.[236]

A number of commenters opposed the proposal.[237] Some of these expressed concern that expanding the testing-the-waters provisions would weaken investor protection.[238] One of these commenters suggested that a generic testing-the-waters provision that provides information without indicating what kind of offering is to follow blurs the line between what is acceptable for a Rule 506(b) offering and what constitutes general solicitation.[239] One

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[233] *See, e.g.*, ABA Letter; B. Andrews, et al. Letter; Letter from Crowdfunding Professional Association dated May 22, 2020 ("CfPA Letter"); SEC SBCFAC Letter; J. Clarke Letter; Republic Letter; Sō.Capital Letter; Letter from Michael H. Shuman, Esq. dated June 1, 2020 ("M. Shuman Letter"); W. Hubbard Letter; SAF Letter; IAA Letter; Invesco Letter; D. Burton Letter; R. Campbell Letter; and CrowdCheck Letter.

[234] *See, e.g.*, ABA Letter; SIFMA Letter; and Invesco Letter.

[235] *See* ABA Letter.

[236] *See, e.g.*, ABA Letter (recommending permitting an issuer to conduct an offering for which general solicitation is not permitted 20 days following termination of the generic solicitation or, in the alternative, another specific period of time such as 90 days as provided in proposed Rule 506(b)(2)(i)); CfPA Letter (recommending a 90-day safe harbor after which a private offering could be made following a generic public solicitation); SIFMA Letter (recommending permitting a private offering to QIBs and IAIs after a generic public solicitation); R. Campbell Letter (recommending eliminating the requirements in proposed Rule 152(a)(1) and (b)(1), so that issuers may rely on proposed Rule 152 for integration protection, if the offering following the generic solicitation was made pursuant to an exemption provided by Section 4(a)(2), Rule 504 or Rule 506(b)); and M. Shuman Letter (recommending permitting private offerings after the generic solicitation).

[237] *See, e.g.*, NASAA Letter; AFREF Letter; Better Markets Letter (questioning the Commission's authority to adopt the rule); CFA Letter; R. Rutkowski Letter; CFA Institute Letter; and IPA Letter.

[238] *See, e.g.*, NASAA Letter (suggesting the rules would be evaded and exploited); and CFA Letter.

[239] *See* IPA Letter.

commenter expressed concern that the proposed rule would permit an issuer to engage in testing-the-waters communications with all types of investors prior to a registered offering.[240]

Commenters generally supported the proposed requirements to file generic solicitation materials when followed by a Regulation A or Regulation Crowdfunding offering[241] and to provide those materials to non-accredited investors in a Rule 506(b) exempt offering within 30 days of the generic solicitation.[242] However, one commenter expressly opposed requiring the filing of generic solicitation materials.[243] Several commenters also recommended that the Commission preempt State securities law registration and qualification requirements for offers made under proposed Rule 241.[244]

iii. Final Amendments

We are adopting the proposed amendments substantially as proposed, using our exemptive authority under Section 28 of the Securities Act to create a new offering exemption. New Rule 241 exempts the class of persons who are issuers and use generic solicitation of interest materials pursuant to the conditions of the rule from the prohibitions on offers prior to filing a registration statement in Section 5(c) of the Securities Act.[245] As discussed in the Proposing Release and below, we believe that the proposed amendments include appropriate

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[240] *See* Better Markets Letter.

[241] *See, e.g.*, J. Clarke Letter; W. Hubbard Letter; CrowdCheck Letter (recommending not requiring the filing of materials used more than 30 days prior to the offering); and Ketsal Letter.

[242] *See, e.g.*, Geraci Law Letter; J. Clarke Letter (recommending filing all solicitation materials); W. Hubbard Letter; and CrowdCheck Letter (supporting providing the materials to investors, but not filing with the Commission).

[243] *See* NextSeed Letter (acknowledging, however, the potential benefit of requiring the filing of materials that occurred immediately prior to the offering).

[244] *See, e.g.*, D. Burton Letter; W. Hubbard Letter; CrowdCheck Letter (suggesting lack of preemption would affect utility); R. Campbell Letter (suggesting lack of preemption could subject the issuer to civil and criminal liabilities under State securities laws and legal counsel to risks relating to professional ethical rules); and Ketsal Letter (suggesting there is no practical reason to distinguish between communications made pursuant to any of Rule 506, Rule 255, or proposed Rule 206, all of which preempt, or will preempt, State securities law requirements, and proposed Rule 241).

[245] As noted above, one commenter questioned the Commission's authority to adopt Rule 241. *See* Better Markets Letter. Section 28 of the Securities Act gives the Commission broad authority to "conditionally or unconditionally exempt any person … or any class or classes of persons … from any provision or provisions of" the Securities Act and rules or regulations issued thereunder "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." 15 U.S.C. 77z-3. Notwithstanding the commenter's suggestion, nothing in the JOBS Act indicates that Congress sought to limit the Commission's ability to extend the accommodations currently available to emerging growth companies to other issuers, nor does Section 28 include any such limitation. The final rule's use of exemptive authority is thus consistent with the plain language of Section 28.

investor protections and further the public interest by allowing 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.[246]

As noted above, commenters that addressed the proposal were generally supportive of the proposed changes. We are not persuaded by commenters who recommended that we revise the rule to permit an issuer to conduct a general solicitation of interest after the issuer has identified the specific exemption on which it intends to rely. We believe that limiting generic solicitations of interest to solicitations prior to the issuer's determination of which exemption to use appropriately and adequately differentiates these testing-the-waters communications, which are meant to gauge preliminary market interest, from offers that occur closer to the time of sale. Because the determination of which exemption will be used is within the issuer's control, we believe that issuers and their advisers should be able to apply the new rule to their specific circumstances. We disagree with the suggestion from a commenter that an issuer should be permitted to rely on new Rule 241 after determining to conduct a Regulation Crowdfunding or Regulation A offering, so long as the issuer has not filed a Form C for a Regulation Crowdfunding offering or a Form 1-A for a Regulation A offering. To do so would undermine the utility of the existing Regulation A testing-the-waters provision and the new Regulation Crowdfunding testing-the-waters provision we are adopting in this release, and may lead to potential confusion for issuers and investors over which rule applies once an issuer has determined the exemption on which it will rely.

Under new Rule 241, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated offering of securities exempt from registration under the Securities Act.[247] The

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[246] *See, e.g.*, Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at* https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf, at 70 ("Startups and young companies, by their nature, are capital constrained. Expanding that test-the-waters rule provides them flexibility to explore the optimal avenue for raising capital before spending multiple thousands of dollars on legal fees.").

[247] To avoid any confusion with respect to the scope of the exemption, we have revised Rule 241 from the proposal to make it clear that it applies only to solicitations of interest relating to contemplated offerings of securities exempt from registration under the Securities Act.

rule provides an exemption from registration only with respect to the generic solicitation of interest and the solicitation will be deemed to be an offer of a security for sale for purposes of the antifraud provisions of the Federal securities laws. In addition, no solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until the issuer makes a determination as to the exemption on which it will rely and commences the offering in compliance with the exemption.

If the issuer moves forward with an exempt offering following the generic solicitation of interest, it will be required to comply with an applicable exemption for the subsequent offering, and investors will have the benefit of the investor protections included in such exemption. We are not persuaded by commenters that recommended expanding the generic solicitation of interest rules to permit private offerings immediately following public solicitations of interest or to provide a safe harbor that would permit private offerings after a prescribed period of time following a public solicitation of interest. Similarly, we do not believe it is necessary to provide, as suggested by a commenter, that testing-the-waters activity limited to QIBs and IAIs would not result in the Rule 241 offer being integrated with a subsequent private placement that does not permit general solicitation. We believe, as the commenter noted, that an issuer may reasonably conclude on its own that testing-the-waters activity so limited would not constitute general solicitation, depending on the facts and circumstances.

As discussed in the Proposing Release, if the generic solicitation is done in a manner that would constitute 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. Under the new integration rules adopted in this release, an issuer will not be able to follow a generic solicitation of interest that constituted a general solicitation with an offering pursuant to an exemption that does not permit general solicitation, such as Rule 506(b), unless the issuer has a reasonable belief, based on the facts and circumstances, with respect to each purchaser in

the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) either did not solicit such purchaser through the use of general solicitation or established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.[248]

Rule 241 further requires the generic testing-the-waters materials to provide specified disclosures notifying potential investors about the limitations of the generic solicitation. The issuer's communications must state that:

(1) The issuer is considering an offering of securities exempt from registration under the 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;

(2) No money or other consideration is being solicited, and if sent in response, will not be accepted;

(3) 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

(4) A person's indication of interest involves no obligation or commitment of any kind. The rule additionally provides that the 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. We are adopting these provisions as proposed as commenters were generally supportive of this aspect of Rule 241, providing no recommendation to further revise these requirements.

In addition, we are adopting amendments to Regulation A and Regulation Crowdfunding as proposed to require that the Rule 241 generic solicitation materials be made 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

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[248] *See* new Rules 152(a)(1) and 152(b)(1); and *supra* Sections II.A.1 and II.A.2.

solicitation.[249] As discussed above, commenters generally supported this aspect of the proposed rules. Although some commenters expressed the view that such a requirement would be unnecessary, we believe that issuers should be accountable for the content of solicitation materials and that the requirement will help ensure that issuers use solicitation materials with appropriate caution. We are requiring issuers to file these materials only during the 30-day time period because once 30 days elapses following a terminated or completed generic solicitation, that offer would not be subject to integration with a subsequent Regulation Crowdfunding offering in accordance with new Rule 152(b)(1).

We are also adopting, as proposed, the requirement that an issuer provide purchasers with any 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 to any purchaser that is not an accredited investor. This provision, which we believe is appropriate for the same reasons as discussed above with respect to Regulation A and Regulation Crowdfunding, will apply whether or not the issuer engaged in general solicitation through its communications under new Rule 241 and whether or not the generic solicitation would be subject to integration with the Rule 506(b) offering. Consistent with Rule 255 of Regulation A, these amendments to Regulation A, Regulation Crowdfunding, and 17 CFR 230.502(b) ("Rule 502(b)" of Regulation D) require issuers to provide any written communications or broadcast scripts used under new Rule 241.

While some commenters recommended that we preempt State blue sky laws for these offers, we are not doing so at this time. We acknowledge the concerns raised by commenters about the possibility that the lack of preemption will affect the utility of the new rule and potentially subject issuers to civil and criminal liabilities under State blue sky laws. However, in light of the novel nature of this new exemption and the concerns expressed by other commenters about potential misuse of the exemption, we believe a more measured approach is

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[249] *See* new Rule 201(z) and paragraph 13 of Form 1-A, Part III, Item 17. In connection with this amendment to Rule 201, we are also renumbering current paragraph (z), which is a temporary provision, as paragraph (aa).

warranted.[250] We believe that generic solicitation of interest can still be useful to issuers and investors without such preemption and that issuers and their advisers will be able to navigate applicable State law requirements as they have done in connection with other Federal exemptions from registration that do not provide for preemption. Although we are not preempting State securities law registration and qualification requirements at this time, the Commission will have the opportunity to receive feedback on how State regulation may be affecting the use of generic solicitations of interest through its Small Business Capital Formation Advisory Committee and annual Small Business Forum, and that feedback may help inform future determinations about whether State law preemption is warranted.

b. Regulation Crowdfunding

Rule 255 of Regulation A permits an issuer to test the waters prior to filing the offering statement with the Commission. In contrast to Regulation A, an issuer conducting an offer pursuant to Regulation Crowdfunding currently may not solicit interest or make offers or sales under Regulation Crowdfunding prior to filing a Form C with the Commission.[251]

i. Proposed Amendments

The Commission proposed to permit Regulation Crowdfunding issuers to test the waters orally or in writing prior to filing a Form C with the Commission under proposed Rule 206, which is based on existing Rule 255 of Regulation A.[252] As proposed, Rule 206 would permit issuers to test the waters with potential investors, and such testing-the-waters materials would be considered offers subject to the antifraud provisions of the Federal securities laws. Similar to Rule 255, proposed Rule 206 would require issuers to include legends providing that:

- No money or other consideration is being solicited, and if sent, will not be accepted;

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[250] As we noted in the Proposing Release, in connection with the 2015 amendments to Regulation A, the Commission did not provide for preemption of State securities law registration and qualification requirements for Tier 1 offerings in light of concerns raised by State regulators about the testing-the-waters provisions applicable to Regulation A, as well as what the Commission anticipated would be the generally more local nature of Tier 1 offerings.

[251] *See* Section 4A(b) of the Securities Act.

[252] The Commission also proposed an amendment to Rule 204 to permit issuers to engage in communications under proposed Rule 206.

- No sales will be made or commitments to purchase accepted until the Form C offering statement is filed with the Commission and only through an intermediary's platform; and
- Prospective purchaser's indications of interest are non-binding.

In addition, pursuant to proposed Rule 201(z), issuers would be required to include any Rule 206 solicitation materials with the Form C that is filed with the Commission. Unlike Rule 255 of Regulation A, which permits issuers to use testing-the-waters materials both before and after the filing of the offering statement with the Commission, proposed Rule 206 would only permit testing 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 Rule 204 advertising restrictions.

ii. Comments

Commenters addressing the proposal generally supported permitting testing-the-waters communications in Regulation Crowdfunding offerings.[253] Some of these commenters recommended permitting broad testing the waters with few limits,[254] while others recommended only permitting testing the waters through the use of or after engaging an intermediary.[255] Some of these commenters additionally suggested that permitting testing the waters in Regulation Crowdfunding will improve the offering process for issuers[256] and be a benefit to potential

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[253] *See, e.g.*, Letter from Andrew A. Schwartz dated May 21, 2020 ("A. Schwartz Letter"); Letter from Wefunder dated May 28, 2020 ("Wefunder Letter"); SEC SBCFAC Letter; J. Clarke Letter; Silicon Prairie Letter; Republic Letter; NextSeed Letter; Sō.Capital Letter; W. Hubbard Letter; SAF Letter; Letter from Engine Advocacy dated June 1, 2020 ("Engine Letter"); D. Burton Letter; Letter from InnaMed, Inc., et al. dated June 1, 2020 ("InnaMed, et al. Letter"); Letter from SeedInvest dated June 4, 2020 ("SeedInvest Letter"); Crowdwise Letter; CrowdCheck Letter; Letter from Honeycomb Credit Inc. dated June 17, 2020 ("Honeycomb Letter"); R. Campbell Letter; and Ketsal Letter. *See also* Letter from Association of Online Investment Platforms, dated September 1, 2020 ("AOIP Letter") (suggesting the Commission immediately allow Regulation Crowdfunding issuers to test the waters prior to the filing of a Form C in response to the COVID-19 pandemic).

[254] *See, e.g.*, A. Schwartz Letter (recommending permitting advertising and general solicitations); and InnaMed, et al. Letter. *See also* D. Burton Letter; and W. Hubbard Letter (each suggesting that additional restrictions on the manner of communication are unnecessary).

[255] *See, e.g.*, NextSeed Letter; and CrowdCheck Letter. *See also* CFA Letter (expressing opposition to the proposal and supporting restricting crowdfunding communications to communications through intermediary platforms, both before and after a Form C is filed with the Commission).

[256] *See, e.g.*, SeedInvest Letter; and Honeycomb Letter.

investors.[257] In contrast, one commenter expressed concern that relaxing the restrictions on testing-the-waters communications in the crowdfunding market could put investors at risk.[258]

iii. Final Amendments

We are adopting the amendments as proposed to permit Regulation Crowdfunding issuers to test the waters orally or in writing prior to filing a Form C with the Commission under Rule 206, which is based on existing Rule 255 of Regulation A.[259] For the reasons discussed below, we believe that permitting Regulation Crowdfunding issuers to engage in such communications will further the public interest while being consistent with the protection of investors.

As adopted, new Rule 206 permits issuers to test the waters with all potential investors. Like Rule 255, Rule 206 requires issuers to include legends in the testing-the-waters materials. Specifically, Rule 206 requires issuers to state that: (1) no money or other consideration is being solicited, and if sent, will not be accepted; (2) 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;[260] and (3) a prospective purchaser's indication of interest is non-binding. These testing-the-waters materials would be considered offers that are subject to the antifraud provisions of the Federal securities laws. We are additionally amending 17 CFR 227.201(z) ("Rule 201(z)") as proposed to require issuers to include any Rule 206 solicitation materials with the Form C that is filed with the Commission. We believe that making the solicitation materials publicly available will promote accountability for the content of those

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[257] *See, e.g.*, Wefunder Letter (suggesting investors may be able to set more reasonable terms); and Engine Letter (suggesting investors will be able to avoid committing equity to campaigns not likely to be successful).

[258] *See* CFA Letter (expressing concern about the proposal due to the poor record of issuer compliance with Regulation Crowdfunding rules).

[259] We are amending 17 CFR 227.203(a)(1) ("Rule 203(a)(1)") to clarify that a Regulation Crowdfunding issuer may rely on new Rule 206 to offer securities prior to filing a Form C with the Commission. We are also amending Rule 204, as proposed, to permit issuers to engage in communications under new Rule 206.

[260] The Proposing Release discussed, but the proposed text of Rule 206 did not include, the phrase "and only through an intermediary's platform." Rule 206 as adopted includes this language, which is consistent with 17 CFR 227.100(a)(3).

materials and help to ensure that they are consistent with the information contained in the Regulation Crowdfunding offering materials.

Unlike Rule 255 of Regulation A, which permits issuers to use testing-the-waters materials both before and after the filing of the offering statement with the Commission, Rule 206 will only permit issuers to use testing-the-waters materials before the Form C is filed. Once the Form C is filed, any offering communications are required to comply with the terms of Regulation Crowdfunding, including the Rule 204 advertising restrictions. We believe this is appropriate because, while sales under Regulation A may not occur until after the offering statement is qualified, a Regulation Crowdfunding intermediary may accept investment commitments from the time of filing the Form C.

Although some commenters suggested that we require testing the waters to be conducted only through intermediary platforms, we believe that such a requirement would unnecessarily limit the flexibility provided by the new rule by effectively requiring an issuer to enter into a formal relationship with an intermediary prior to determining whether it will proceed with an offering under Regulation Crowdfunding. Nevertheless, we believe issuers may choose to engage an intermediary before testing the waters so that they have a readily available means to receive feedback and questions from prospective investors.

We acknowledge the concern raised by some commenters about the increased communications permitted by new Rule 206—and other proposed changes to the requirements of Regulation Crowdfunding[261]—in light of questions about the extent of issuer compliance with existing Regulation Crowdfunding requirements. We remind issuers of their obligation to comply with the terms, conditions, and requirements of Regulation Crowdfunding and the serious consequences that may result from a failure to do so, such as the potential loss of the exemption and ensuing potential private rights of action for rescission for violations of Section 5 of the Securities Act and loss of preemption for State securities law registration

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[261] *See infra* note 428.

requirements.[262] We also remind intermediaries of their obligation under 17 CFR 227.301(a) ("Rule 301(a)") to have a reasonable basis for believing that an issuer seeking to offer and sell securities in reliance on Section 4(a)(6) through the intermediary's platform complies with the requirements in Securities Act Section 4A(b) and the related requirements in Regulation Crowdfunding.[263] Commission staff will continue to work with FINRA to assess issuer and intermediary compliance with the requirements of Regulation Crowdfunding.

In light of the foregoing, we believe that permitting issuers to test the waters orally or in writing prior to incurring the expense of filing a Form C with the Commission may greatly facilitate the use of the Regulation Crowdfunding exemption, as well as limit the costs incurred by those issuers. We further believe that the flexibility afforded by the amendment will benefit investors, who will be able to have input into the structuring of the offering and convey to the issuer the types of information about which they are most interested.[264]

3. Other Regulation Crowdfunding Offering Communications

An issuer may not advertise the terms of a Regulation Crowdfunding offering[265] outside of the intermediary's platform except in a notice that directs investors to the intermediary's platform and is limited to the information enumerated in Rule 204 of Regulation Crowdfunding.[266] An issuer may communicate with investors and potential investors about the

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[262] While 17 CFR 227.502(a) sets forth a safe harbor for insignificant deviations, 17 CFR 227.502(b) makes it clear that such safe harbor does not preclude the Commission from bringing an enforcement action seeking appropriate relief for an issuer's failure to comply with all applicable terms, conditions, and requirements of Regulation Crowdfunding.

[263] Rule 301(a) also permits intermediaries to reasonably rely on representations of the issuer, unless the intermediary has reason to question the reliability of those representations. As discussed in the Crowdfunding Adopting Release, in satisfying the requirements of Rule 301(a), an intermediary has a responsibility to assess whether it may reasonably rely on an issuer's representation of compliance through the course of its interactions with potential issuers. *See* Crowdfunding Adopting Release, at Section II.C.3.a.(3).

[264] *See, e.g.*, Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at* https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf, at 72-73 (noting that when investors are involved earlier in the process, it allows more time for them to "garner more information to make a well informed decision" when it is time to make an investment).

[265] For purposes of Rule 204, the "terms of [a Regulation Crowdfunding] offering" currently means the amount of securities offered, the nature of the securities, the price of the securities and the closing date of the offering period.

[266] Rule 204 limits the information to: a statement that the issuer is conducting an offering pursuant to Section 4(a)(6) of the Securities Act, the name of the intermediary through which the offering is being conducted, and a link directing the potential investor to the intermediary's platform; the terms of the offering; and specified factual information about the legal identity and business location of the issuer.

terms of the offering through communication channels provided on the intermediary's platform.[267]

a. Proposed Amendments

The Commission proposed to amend Rule 204 to permit oral communications with prospective investors once the Form C is filed, so long as the communications comply with the requirements of Rule 204.[268] The proposed changes would align the Regulation Crowdfunding communication rules more closely with Rule 255 of Regulation A**.**

b. Comments

Most commenters that addressed permitting oral communications about the offering outside of the funding portal's platform channels supported the proposal,[269] while some commenters opposed allowing such communications.[270] Some of the commenters supporting the proposal recommended that the Commission go further and expand the information that issuers are permitted to provide, such as allowing disclosure of the planned use of proceeds and progress towards meeting the issuer's funding goals.[271]

We requested comment in the Proposing Release as to whether we should consider revisions to Regulation Crowdfunding that relate to intermediaries involved in concurrent exempt offerings or provide guidance regarding issues that may arise when an intermediary seeks to host concurrent offerings. A few commenters supported permitting Regulation Crowdfunding portals to be used to sell Rule 506(c) offerings.[272] One of these commenters also

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[267] *See* 17 CFR 227.204(c).

[268] For a discussion of the proposals regarding communications prior to the filing of a Form C, *see supra* Section II.B.2.

[269] *See, e.g.*, CfPA Letter; R. Campbell Letter; J. Clarke Letter (noting the importance of outside oral communications directing investors to the platform for completion of the offering); Netcapital Letter; Republic Letter; NextSeed Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; CrowdCheck Letter; and Honeycomb Letter (recommending eliminating Rule 204). Some of these commenters supported permitting information related to concurrent offerings to be disclosed in those offering materials. *See* J. Clarke Letter; and CrowdCheck Letter.

[270] *See, e.g.*, CFA Institute Letter.

[271] *See, e.g.*, CfPA Letter (recommending permitting both oral and written communications); J. Clarke Letter (recommending permitting disclosure of the use of proceeds as well as how the offering is progressing); Netcapital Letter; Republic Letter (recommending unrestricted communications); and W. Hubbard Letter.

[272] *See* Letter from Fred Pea dated Apr. 25, 2020; J. Clarke Letter; and W. Hubbard Letter.

expressed support for providing Commission guidance.[273] Another commenter questioned the need for guidance and stated its view that it is "standard market practice" for concurrent Rule 506(c) offerings to be offered and sold alongside Regulation Crowdfunding offerings on the same online platform.[274]

c. Final Amendments

We are adopting the amendments substantially as proposed to permit oral communications with prospective investors once the Form C is filed, so long as the communications comply with the requirements of Rule 204. In connection with this amendment to 17 CFR 227.204(a), we have revised 17 CFR 227.204(b)(1) ("Rule 204(b)(1)"), as proposed, to indicate that a link to the intermediary's platform is only required to be provided when the communications are in writing. In response to comment, we are also expanding the information that an issuer may provide in accordance with 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.

We believe that investors will find this information useful in making an investment decision and that the incremental increase in the limited information permitted to be provided under the amendments is unlikely to affect investor protection, particularly because the investors receiving the information will continue to be directed to the intermediary's platform where they can access the disclosures necessary for them to make informed investment decisions. We also believe that these amendments to Rule 204 will improve the information available to investors and provide issuers with certainty as to the acceptable form and content of communications with potential investors.

In a further change from the proposal, in response to comments,[275] we are adding a new 17 CFR 227.204(d) to specify that an issuer may provide information about the terms of an

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[273] *See* W. Hubbard Letter.

[274] *See* CrowdCheck Letter ("Where the platform is not a registered broker-dealer, the Regulation [Crowdfunding] offering is intermediated by a registered funding portal, and the Rule 506(c) offering is not intermediated by the funding portal but hosted by the same technology and no commission is charged.").

[275] *See* CrowdCheck Letter.

offering under Regulation Crowdfunding in the offering materials for a concurrent offering, such as in an offering statement on Form 1-A for a concurrent Regulation A offering or a Securities Act registration statement filed with the Commission, without violating Rule 204. To do so, the information provided about the Regulation Crowdfunding offering must be in compliance with Rule 204, including the requirement to include a link directing the potential investor to the intermediary's platform as required by Rule 204(b)(1). However, in accordance with the Commission's rules with respect to the use of hyperlinks in electronic filings, such link may not be a live hyperlink.[276] We believe the change to Rule 204 will allow issuers to conduct concurrent offerings more easily under different exemptions, without sacrificing investor protection.

Further, in response to commenters who requested clarification on whether funding portals can host concurrent offerings, we note that under 17 CFR 227.401 ("Rule 401" of Regulation Crowdfunding), a funding portal is exempt from the broker registration requirements of Section 15(a) of the Exchange Act only in connection with its activities as an intermediary in a transaction involving the offer or sale of securities for the account of others, pursuant to Section 4(a)(6) of the Securities Act. To the extent a funding portal seeks to host a concurrent offering pursuant to another offering exemption, it would need to consider whether these additional activities could cause it to lose the exemption provided by Rule 401,[277] or otherwise become subject to broker registration requirements.[278]

C. Rule 506(c) Verification Requirements

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[276] *See* 17 CFR 232.105(b). We note that the information contained in the linked material will not be considered part of the document for determining compliance with reporting obligations, but the inclusion of the link will cause the filer to be subject to the civil liability and antifraud provisions of the Federal securities laws with reference to the information contained in the linked material. *See* 17 CFR 232.105(c).

[277] Among other things, the funding portal should consider whether it is clear that the offerings are being conducted under different exemptions from registration, including whether the funding portal has provided appropriate disclosures to avoid investor confusion.

[278] The question of whether a person is a broker within the meaning of Section 3(a)(4) turns on the facts and circumstances of the matter. Because the Exchange Act does not define what it means to be "engaged in the business" or "effecting transactions," the Commission has looked to an array of factors in determining whether a person is a broker within the meaning of the statute. *See*, *e.g.*, *SEC v. Helms*, No. 13-cv-01036, 2015 WL 5010298, at *17 (W.D. Tex. Aug. 21, 2015) ("In determining whether a person 'effected transactions [within the meaning of Section 3(a)(4)],' courts consider several factors, such as whether the person: (1) solicited investors to purchase securities, (2) was involved in negotiations between the issuer and the investor, and (3) received transaction-related compensation.") (citing cases initiated by the Commission).

Rule 506(c) permits issuers to generally solicit and advertise an offering, provided that all purchasers in the offering are accredited investors, the issuer takes reasonable steps to verify that purchasers are accredited investors, and certain other conditions in Regulation D are satisfied.[279] Rule 506(c) provides a principles-based method for verification of accredited investor status as well as a non-exclusive list of verification methods. The principles-based method of verification requires an objective determination by the issuer (or those acting on its behalf) as to whether the steps taken are "reasonable" in the context of the particular facts and circumstances of each purchaser and transaction.[280] Rule 506(c) includes a non-exclusive list of verification methods that issuers may use, but are not required to use, when seeking to satisfy the verification requirement with respect to natural person purchasers.[281]

1. Proposed Amendments

The Commission proposed to add a new item to the non-exclusive list in Rule 506(c) that would allow an issuer to establish that an investor that the issuer previously took reasonable steps to verify as an accredited investor remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation that the investor continues to qualify as an accredited investor and the issuer is not aware of information to the contrary. In the Proposing Release, the Commission expressed the view that this new method would reduce the cost and burden of verification for issuers while alleviating privacy concerns associated with investors having to repeatedly provide financially sensitive information to the issuer and noted that the risk of investor harm would be mitigated by the pre-existing relationship between the issuer and such investor.[282] The Commission additionally reaffirmed its prior guidance that the principles-based method in Rule 506(c) was intended to provide issuers with significant

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[279] *See* 17 CFR 230.501 (Definitions and terms used in Regulation D); Rule 502(a) (Integration); and 17 CFR 230.502(d) (Limitations on Resales).

[280] *See* Rule 506(c) Adopting Release, at Section II.B.1.

[281] The rule does not set forth a non-exclusive list of methods for the verification of investors that are not natural persons. In the adopting release, the Commission expressed the view that the potential for uncertainty and the risk of participation by non-accredited investors is highest in offerings involving natural persons as investors. *See* Rule 506(c) Adopting Release, at Section II.B.3.

[282] *See* Proposing Release, at Section II.C.

flexibility in deciding the steps needed to verify a person's accredited investor status and to avoid requiring them to follow uniform verification methods that may be ill-suited or unnecessary to a particular offering or purchaser in light of the facts and circumstances.[283]

2. Comments

Commenters that addressed verification generally supported the proposal to allow an issuer to establish that an investor that the issuer previously took reasonable steps to verify as an accredited investor remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation that the investor continues to qualify as an accredited investor and the issuer is not aware of information to the contrary.[284] A number of these commenters expressed concern that the requirement to take reasonable steps to verify accredited investor status has generally affected issuers' willingness to use Rule 506(c).[285] One commenter supported eliminating the verification requirement entirely,[286] while another commenter expressed support for the existing standard.[287]

Some commenters, on the other hand, opposed the additional verification method.[288] These commenters expressed concern that permitting reliance on previous verification would not account for changes in investor financial circumstances over time and could therefore result

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[283] *See id*. *See also* Rule 506(c) Adopting Release, at Section II.B.1.

[284] *See, e.g.*, ABA Letter; Geraci Law Letter; Netcapital Letter; Md. St. Bar Assoc. Letter; NextSeed Letter; Letter from Shaver Law Group, LLC dated June 1, 2020; W. Hubbard Letter; Letter from Mark Schonberger dated June 1, 2020 ("M. Schonberger Letter"); IAA Letter; Letter from TIAA dated June 1, 2020 ("TIAA Letter"); Invesco Letter; D. Burton Letter; and IPA Letter.

[285] *See, e.g.*, Geraci Law Letter; J. Clarke Letter; NextSeed Letter; W. Hubbard Letter; TIAA Letter; and D. Burton Letter (suggesting that the income verification requirements are the primary concern); and IPA Letter. In contrast, one commenter suggested that the principal reason more issuers do not use Rule 506(c) is that they do not need it. *See* CrowdCheck Letter.

[286] *See* W. Hubbard Letter.

[287] *See* ABA Letter (supporting the existing principles-based method and clear objective standards in the accredited investor definition).

[288] *See, e.g.*, CFA Letter (noting that an investor's ability to meet the financial thresholds that determine whether they are accredited can and does change over time and suggesting that permitting issuers to rely on previous verification will result in purchasers that are not accredited investors in contravention of the condition in Rule 506(c) that all purchasers must be accredited investors); Better Markets Letter (expressing concern that permitting reliance on the prior verification could lead to issuers, especially issuers of risky investments, to design mechanisms that maximize self-certification); and R. Rutkowski Letter. *See also* CrowdCheck Letter (questioning whether additional verification procedures would be helpful to increase utilization of Rule 506(c)).

in issuers raising money from investors that may have lost their accredited investor status.[289] Some commenters that supported permitting reliance on previous verification also supported imposing time limits on such reliance in order to alleviate this concern.[290]

A number of commenters expressed the need for additional guidance under the principles-based reasonable steps approach.[291] Several commenters also supported additional or alternative verification methods,[292] with some commenters offering specific alternatives, such as minimum investment amounts,[293] self-certification,[294] or reliance on a financial intermediary.[295]

3. Final Amendments

We are adopting the amendments substantially as proposed with some changes in response to comments. In addition, we are re-affirming the guidance in the Proposing Release. As proposed, we are permitting an issuer to establish that an investor that the issuer previously

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[289] *See, e.g.*, CFA Letter; and Better Markets Letter.

[290] *See, e.g.*, Md. St. Bar Assoc. Letter (suggesting that an unlimited time period could call into question the appropriateness of the method and supporting a "reasonable time limit"); NextSeed Letter (acknowledging limits to reliance after an extended period of time has passed, such as five years); W. Hubbard Letter (supporting a three- to five-year time limit); Invesco Letter (supporting a two-year lookback on verification which would tie the standard to the two-year income test in Rule 501(a)(6). In contrast, some commenters specifically opposed any time limit. *See* M. Schonberger Letter; and Netcapital Letter.

[291] *See, e.g.*, ABA Letter (recommending confirmation that the means of verification may be relied on in making determinations under Section 12(g)); IAA Letter (recommending that the Commission provide clear assurances to issuers that they may rely on the principles-based reasonable steps approach, including confirmation that it could be reasonable under the facts and circumstances for issuers to contract with a third party to conduct the required verification); TIAA Letter (recommending clear guidance that the non-exclusive list is not prescriptive); Fried Frank Letter (recommending guidance with respect to verification of the status of a trust); NextSeed Letter (recommending additional guidance with respect to what actions would constitute "reasonable steps" generally and in particular with respect to verification of trusts); and IPA Letter (recommending that the Commission reaffirm and provide clarity on the Commission's prior guidance that the non-exclusive list is not prescriptive, and that a range of verification methods not enumerated in the rule may qualify as "reasonable," and provide guidance with respect to verification by broker-dealers and registered investment advisers). In contrast, one commenter suggested that additional guidance is unnecessary. *See* CrowdCheck Letter.

[292] *See, e.g.*, W. Hubbard Letter; Invesco Letter (recommending verification only apply to natural persons); and IPA Letter (recommending additional means to verify status including an annual net worth certification process). In addition, some commenters generally supported additional verification methods in light of the amendments to the accredited investor definition. *See, e.g.*, Geraci Law Letter; W. Hubbard Letter; IAA Letter; and D. Burton Letter.

[293] *See, e.g.*, CrowdCheck Letter; Invesco Letter; and NextSeed Letter.

[294] *See, e.g.*, Sen. Toomey Letter; IPA Letter; and NextSeed Letter. *See also* D. Burton Letter; and J. Clarke Letter.

[295] *See, e.g.*, Fried Frank Letter (recommending not requiring further verification for investors who have been verified as accredited investors by registered broker-dealers and registered investment advisers and that a representation from an investor to a registered broker-dealer or registered investment adviser with which the investor has a substantive pre-existing relationship is sufficient verification); Letter from Macquarie Investment Management dated June 29, 2020; and TIAA Letter (recommending not requiring verification for offerings involving a registered investment adviser, broker-dealer placement agent or other such intermediary).

took reasonable steps to verify as an accredited investor in accordance with Rule 506(c)(2)(ii) remains an accredited investor as of the time of a subsequent sale if the investor provides a written representation that the investor continues to qualify as an accredited investor and the issuer is not aware of information to the contrary. In a change from the proposal, in response to commenter feedback, we are adding a time limit on the ability of an issuer to rely on the earlier verification.

We believe that permitting an issuer to rely on a prior verification of accredited investor status will reduce the cost and burden of verification for issuers that engage in more than one Rule 506(c) offering over time, and therefore may, to some extent, address commenters' concern that the requirement to take reasonable steps to verify accredited investor status has affected issuers' willingness to use Rule 506(c). We recognize, as some commenters expressed, that over an unlimited time period permitting reliance on a prior verification may not appropriately account for changes in investor financial circumstances and could result in issuers raising money from non-accredited investors. Because such concerns could call into question the appropriateness of the verification method, we are adopting a five-year time limit on the ability of issuers to rely on a prior verification. A five-year period is not so remote that the initial verification is no longer meaningful, but also provides issuers relying on the prior verification substantial cost savings. We believe the inclusion of a five-year time limit, together with the pre-existing relationship between the issuer and such investor, will appropriately balance reducing the cost and burden of verification for issuers with the mitigation of risk of investor harm caused by issuers selling to non-accredited investors.

In addition, as indicated in the Proposing Release, we are reaffirming and updating the Commission's prior guidance with respect to the principles-based method for verification, and in particular what may be considered "reasonable steps" to verify an investor's accredited investor status, in order to reduce concerns that an issuer's method of verification may be second guessed by regulators or other market participants without regard to the analysis performed by the issuer in making the determination and to encourage more issuers to rely on

additional verification methods tailored to their specific facts and circumstances.[296] The principles-based method was intended to provide issuers with significant flexibility in deciding the steps needed to verify a person's accredited investor status and to avoid requiring them to follow uniform verification methods that may be ill-suited or unnecessary to a particular offering or purchaser in light of the facts and circumstances.[297] The Commission has previously indicated, and we continue to believe, that the following factors are among those an issuer should consider when using this principles-based method of verification:

- The nature of the purchaser and the type of accredited investor that the purchaser claims to be;
- The amount and type of information that the issuer has about the purchaser; and
- 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.[298]

We are of the view that, in some circumstances, the reasonable steps determination may not be substantially different from an issuer's development of a "reasonable belief" for Rule 506(b) purposes. For example, an issuer's receipt of a representation from an investor as to his or her accredited status could meet the "reasonable steps" requirement if the issuer reasonably takes into consideration a prior substantive relationship with the investor or other facts that make apparent the accredited status of the investor. That same representation from an investor may not meet the "reasonable steps" requirement if the issuer has no other information about the investor or has information that does not support the view that the investor was an accredited investor.[299]

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[296] Commenters that addressed the issue of Commission guidance generally supported the Commission's updated guidance. *See supra* note 291.

[297] *See* Rule 506(c) Adopting Release, at Section II.B.1.

[298] *See id.* at Section II.B.3.a.

[299] We caution issuers that we continue to believe that an issuer will not be considered to have taken reasonable steps to verify accredited investor status if it, or those acting on its behalf, require only that a person check a box in a questionnaire or sign a form, absent other information about the purchaser indicating accredited investor status.

We are not adopting additional amendments to the definition to expand the list of verification methods, as requested by some commenters. We appreciate that the addition of further verification methods to the non-exclusive list could provide greater certainty to issuers as to satisfaction of the rule's verification requirement, but are mindful that significant expansion of the list could further undermine the use of the principles-based method of verification. We believe that the methods suggested by commenters as possible additions to the list may be considered by an issuer under the principles-based method, depending on the particular facts and circumstances of its offering, and do not wish to limit that flexibility.

We remind issuers that they are not required to use any of the methods set forth in the non-exclusive list and can apply the reasonableness standard directly to the specific facts and circumstances presented by the offering and the investors. We do not believe additional guidance is warranted at this time. We also do not believe it is appropriate to provide guidance, as suggested by a commenter, with respect to reliance on the specified verification methods in making determinations of accredited investor status under Section 12(g). We continue to believe that requiring issuers to consider their particular facts and circumstances in establishing a reasonable basis for their determination of accredited investor status for Section 12(g) purposes provides issuers with appropriate flexibility for making the determination.[300]

D. Harmonization of Disclosure Requirements

Currently, the exempt offerings rules provide different financial statement information requirements for Regulation A and Regulation D. Additionally, in some areas compliance with Regulation A is more complex or difficult than for registered offerings, such as with respect to the rules regarding redaction of confidential information in material contracts and incorporation

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[300] *See* Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, Release No. 33-10075 (May 3, 2016) [81 FR 28689 (May 10, 2016)], at text accompanying note 71. The term "accredited investor" for purposes of Section 12(g)(1) is as defined in 17 CFR 230.501(a), which provides that an accredited investor is any person who comes within one or more of the categories of investors specified therein, or whom the issuer reasonably believes comes within any such category. Whether the issuer has a reasonable belief depends on the particular facts and circumstances surrounding the determination. Under 17 CFR 240.12g-1, an issuer needs to determine, based on the facts and circumstances, whether prior information provides a basis for a reasonable belief that the security holder continues to be an accredited investor as of the last day of the fiscal year. *See id.* at Section II.B.3.

by reference. Finally, the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*[301] led the Commission to review its standard for allowing redaction of information from certain exhibits.

1. Rule 502(b) of Regulation D

When non-accredited investors are participating in an offering under Rule 506(b), the issuer conducting the offering must furnish the information required by Rule 502(b),[302] including specified financial statement and non-financial information, to such non-accredited investors a reasonable time prior to the sale of the securities and must provide these investors with the opportunity to ask questions and receive answers about the offering.[303] This includes, if the issuer is not subject to the reporting requirements of Section 13[304] or 15(d)[305] of the Exchange Act, the following financial statement information:

- *For offerings up to $2 million*: the information required in 17 CFR 210.8-01 through 8-08 ("Article 8 of Regulation S-X"), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited;[306]
- *For offerings up to $7.5 million*: the financial statement information required in 17 CFR 239.11 ("Form S-1") for smaller reporting companies.[307]

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[301] 139 S.Ct. 2356 (2019) ("*Food Marketing Institute*").

[302] *See* 17 CFR 230.502(b)(2)(i) through (vii).

[303] *See* 17 CFR 230.502(b)(2)(v). Although not expressly required by Rule 502(b), issuers and funds conducting Rule 506(b) offerings exclusively to accredited investors often provide those accredited investors with information about the issuer in view of the antifraud provisions of the Federal securities laws. *See* Note to Rule 502(b).

[304] 15 U.S.C. 78m.

[305] 15 U.S.C. 78*o*(d).

[306] *See* 17 CFR 230.502(b)(2)(i)(B)(*1*) ("Rule 502(b)(2)(i)(B)(*1*)").

[307] *See* 17 CFR 230.502(b)(2)(i)(B)(*2*) ("Rule 502(b)(2)(i)(B)(*2*)"). *See also* 17 CFR 240.12b-2 (defining smaller reporting company).

- *For offerings over $7.5 million*: the financial statement information as would be required in a registration statement filed under the Securities Act on the form that the issuer would be entitled to use;[308] and
- *For offerings by foreign private issuers eligible to use 17 CFR 249.220f ("Form 20-F")*: the same kind of information required to be included in a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.[309]

Similarly, issuers conducting offerings pursuant to Regulation A are required to provide certain financial statement and non-financial information to investors. Table 4 summarizes the financial information issuers conducting a Regulation A offering are required to provide under Part F/S of Form 1-A.

Table 4: Current Regulation A Financial Statement Requirements

Offering Size	Financial Statement Information Required	Age of Financial Statements	Audit Required
Up to $20 million (Tier 1):	Consolidated balance sheets of the issuer for the two previous fiscal year ends (or for such shorter time that the issuer has been in existence); Consolidated statements of comprehensive income, cash flows, and stockholders' equity of the issuer; and Financial statements of guarantors and	Not more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months	No, unless issuer has already obtained an audit for another purpose

[308] *See* 17 CFR 230.502(b)(2)(i)(B)(*3*) ("Rule 502(b)(2)(i)(B)(*3*)"). For offerings above $2 million, issuers that cannot obtain audited financial statements without unreasonable effort and expense, that are not limited partnerships, are only required to have the balance sheet, which must be dated within 120 days of the start of the offering, audited. If the issuer is a limited partnership, and it cannot obtain audited financial statements without unreasonable effort and expense it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant. *See* Rules 502(b)(2)(i)(B)(*2*) and (*3*).

[309] *See* 17 CFR 230.502(b)(2)(i)(C). The financial statements provided by foreign private issuers eligible to use Form 20-F need be certified only to the extent required by paragraph Rules 502(b)(2)(i)(B)(*1*), (*2*), or (*3*), as appropriate. *See id.*

Offering Size	Financial Statement Information Required	Age of Financial Statements	Audit Required
	issuers of guaranteed securities, affiliates whose securities collateralize an issuance, significant acquired or to be acquired businesses and real estate operations, and pro forma information relating to significant business combinations		
Up to $50 million (Tier 2):	Financial statements in compliance with Article 8 of Regulation S-X	Not more than nine months before the date of non-public submission, filing or qualification, with the most recent annual or interim balance sheet not older than nine months	Yes (but see paragraph (c) in Part F/S of Form 1-A noting that interim financial statements need not be audited)

a. Proposed Amendments

The Commission proposed to amend 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. Specifically, for Regulation D offerings of $20 million or less, proposed Rule 502(b)(2)(i)(B)(*1*) would refer such issuers to paragraph (b) of part F/S of Form 1-A, which applies to Tier 1 Regulation A offerings. For offerings of greater than $20 million, proposed Rule 502(b)(2)(i)(B)(*2*) would refer issuers to paragraph (c) of part F/S of Form 1-A, which applies to Tier 2 Regulation A offerings.[310] This proposed amendment would eliminate the current Rule 502(b) provisions that permit an issuer, other than a limited

[310] As proposed, issuers need not comply with the other ongoing non-financial statement disclosure requirements in Tier 2 Regulation A offerings. Instead, the proposed requirement would be limited to harmonization of the financial statement disclosure requirements outlined in the offering circular.

partnership, that cannot obtain audited financial statements without unreasonable effort or expense, to provide only the issuer's audited balance sheet.[311]

In addition, under the proposed amendments, a foreign private issuer that is not an Exchange Act reporting company would be required to provide financial statement disclosure consistent with the Regulation A requirements.[312] The foreign private issuer would be permitted to provide financial statements prepared in accordance with either U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board. For business combinations and exchange offers, an issuer that is not an Exchange Act reporting company would provide financial statements consistent with the Regulation A requirements.

b. Comments

Commenters were divided on the proposal. Some commenters supported aligning the financial statement information requirements in Rule 502(b) with the requirements of Regulation A,[313] while others opposed the proposal.[314] One commenter, who opposed the proposal, questioned whether the financial statement information requirements in Rule 502(b) are overly burdensome given the amounts raised under Rule 506(b) and whether the Regulation A disclosure requirements were appropriate for Regulation D, given that the Regulation A

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[311] *See* Rules 502(b)(2)(i)(B)(*2*) and (*3*).

[312] The term "foreign private issuer" means any foreign issuer, other than a foreign government, except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (i) more than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and (ii) any of the following: (a) the majority of the executive officers or directors are United States citizens or residents; (b) more than 50 percent of the assets of the issuer are located in the United States; or (c) the business of the issuer is administered principally in the United States. *See* 17 CFR 230.405.

[313] *See* ABA Letter (suggesting that the disclosure requirements of Regulation A provide adequate information upon which a non-accredited investor can make an informed investment decision); CfPA Letter; SEC SBCFAC Letter; Geraci Law Letter; Letter from Carta, Inc. dated June 1, 2020 ("Carta Letter"); W. Hubbard Letter; CrowdCheck Letter; and IPA Letter.

[314] *See* J. Clarke Letter; NASAA Letter (opposing harmonization of the financial statement requirements with Regulation A because of the difference in the terms of the two exemptions); Better Markets Letter (expressing concern about a loss of investor protection because the proposal would allow companies, including foreign companies, to raise capital without providing audited financial statements); CFA Letter (expressing concern that the proposal would reduce transparency and weaken investor protections); and CFA Institute Letter (stating that harmonization with the Regulation A requirement is not appropriate because Rule 506(b) lacks investor protections that Regulation A Tier 1 (and Regulation Crowdfunding) provide to non-accredited investors).

disclosures are reviewed by the Commission.[315] Another commenter who opposed the proposal expressed concern that removing the audit requirement for financial statements in Rule 506(b) offerings under $20 million would deprive investors of critical information.[316]

Several commenters addressed further aspects of the proposed harmonization of financial disclosure requirements. One commenter recommended harmonizing the Rule 502(b) disclosures with Regulation Crowdfunding.[317] Another commenter expressly opposed requiring issuers conducting Regulation D offerings above the Regulation A Tier 2 offering limit to comply with the financial information requirements applicable to smaller reporting companies under Article 8 of Regulation S-X.[318]

The 2020 Government-Business Forum on Small Business Capital Formation generally recommended that the Commission revise the disclosures required for non-accredited investors in offerings made under Rule 506(b).[319]

c. Final Amendments

We are adopting the amendments as proposed. By aligning the disclosure requirements in Rule 502(b) with those in Regulation A, additional issuers may be willing to include non-accredited investors in their offerings pursuant to Rule 506(b), which would expand investment opportunities for those investors. In addition, we continue to believe, as stated in comments received on the Concept Release, that many issuers view the current financial statement requirements of Rule 502(b) as overly burdensome.[320] We believe revising the disclosure requirements will help address those concerns, while continuing to provide investors with material information about the issuer. We acknowledge that there are differences in the terms

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315 *See* NASAA Letter.

316 *See* CFA Institute Letter.

317 *See* J. Clarke Letter.

318 *See* W. Hubbard Letter (stating that the current Reg A Tier 2 approach to financial statement disclosure requirements is understandable and straightforward and adding financial disclosure requirements for offerings above $50 million will not provide a commensurate benefit or protection to investors however will likely discourage issuers from using the exemption).

319 *See* 2020 Forum Report.

320 *See* Proposing Release, at text accompanying notes 195–198.

and conditions of Regulation A and Rule 506(b) offerings involving non-accredited investors, in particular the fact that the financial statements provided pursuant to Rule 502(b) are not subject to staff review and qualification. We also note that staff review and qualification is not a guarantee that the disclosure is complete and accurate. Nevertheless, we have determined that the financial statement requirements of Regulation A provide adequate information to non-accredited investors in such offerings, and we believe that the same is true for non-accredited investors in the Rule 506(b) context.[321] Further, as noted in the Proposing Release, the information disclosed to investors will continue to be subject to the anti-fraud provisions of the Federal and State securities laws.

We are not persuaded by commenters who suggested that we harmonize the disclosure requirements in Rule 502(b) with those in Regulation Crowdfunding. We also do not believe harmonizing the disclosure requirements in Rule 502(b) with Regulation Crowdfunding for offerings below $5 million and with Regulation A for offerings above $5 million would alleviate any additional burdens on issuers. Instead, such a requirement would create additional complexity for issuers with offerings that could cross from below to above $5 million, by requiring them to simultaneously consider the disclosure requirements of Regulation A and Regulation Crowdfunding.

2. Proposed Amendments to Simplify Compliance with Regulation A

In its review of the exempt offering framework, the Commission identified several areas where compliance with Regulation A is more complex or difficult than for registered offerings, including the rules regarding the redaction of confidential information in material contracts, making draft offering statements public on EDGAR, incorporation by reference, and the abandonment of a post-qualification amendment.

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[321] Regulation A is available only to U.S. or Canadian issuers, and excludes, among others, blank check companies, registered investment companies, business development companies, and issuers of certain securities including asset-backed securities. These limitations do not apply to Regulation D; therefore, such issuers shall apply the Regulation A financial statement requirements as if they were eligible to do so under Regulation A. With respect to foreign private issuers, we are adopting as proposed a provision stating that a foreign private issuer that is not an Exchange Act reporting company would be permitted to provide financial statements prepared in accordance with U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board.

a. Redaction of Confidential Information in Certain Exhibits

In March 2019, the Commission amended several rules to permit registrants to file redacted material contracts and plans of acquisition, reorganization, arrangement, liquidation, or succession without applying for confidential treatment.[322] These rules require registrants to mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted, include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and would be competitively harmful if publicly disclosed, and indicate with brackets where the information has been omitted from the filed version of the exhibit.[323] This process for filing redacted exhibits was not extended to Regulation A offerings at that time. As a result, Regulation A issuers are still compelled to submit an application for confidential treatment in order to redact immaterial confidential information from material contracts and plans of acquisition, reorganization, arrangement, liquidation, or succession.

i. Proposed Amendments

The Commission proposed to amend Item 17 of Form 1-A to provide issuers with the option to file redacted material contracts[324] and plans of acquisition, reorganization, arrangement, liquidation, or succession,[325] consistent with the recent amendments to Regulation S-K). Issuers would still have the option to file such exhibits pursuant to the existing confidential treatment application process, which would remain unchanged.

ii. Comments

Commenters that addressed the proposed amendments supported the proposal to apply the simplified confidential treatment process to Regulation A filers.[326]

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322 *See* FAST Act Modernization and Simplification of Regulation S-K, Release No. 33-10618 (Mar. 20, 2019) [84 FR 12674 (Apr. 2, 2019)] ("FAST Act Modernization Release") at text accompanying notes 45–73 (amending 17 CFR 229.601(b)(2)(ii) and 17 CFR 229.601(b)(10)(iv)).

323 *See* 17 CFR 229.601(b)(2) ("Item 601(b)(2)" of Regulation S-K) and 17 CFR 229.601(b)(10)(iv) ("Item 601(b)(10)(iv)" of Regulation S-K). Redacted exhibits are subject to compliance reviews by the staff.

324 *See* Item 17.6 of Form 1-A.

325 *See* Item 17.7 of Form 1-A.

326 *See* Republic Letter; W. Hubbard Letter; M. Schonberger Letter; and CrowdCheck Letter.

iii. Final Amendments

We are adopting the amendments as proposed to add a new instruction to Item 17 of Form 1-A that applies to paragraphs 6 and 7 of that item and includes procedures similar to Items 601(b)(2) and (b)(10) of Regulation S-K for filing redacted material contracts or plans of acquisition, reorganization, arrangement, liquidation, or succession. We are making one change to the proposed instruction, to further harmonize the procedures for redacting information under Item 17 of Form 1-A with those in 17 CFR 229.601(a)(6) ("Item 601(a)(6)" of Regulation S-K), by allowing issuers to redact information that "would constitute a clearly unwarranted invasion of personal privacy" in any of the exhibits listed in Item 17 of Form 1-A. As a matter of practice, the staff generally does not object where an issuer omits sensitive personally identifiable information, such as bank account numbers, social security numbers, home addresses, and similar information ("PII") from exhibits without also submitting a confidential treatment request. As with the adoption of Item 601(a)(6) of Regulation S-K, codifying this staff practice in Item 17 of Form 1-A will alleviate the burden from issuers of having to provide an analysis in order to redact PII from exhibits, and will also better safeguard PII by limiting its dissemination.[327]

Commission staff will continue to review Forms 1-A filed in connection with Regulation A offerings and selectively assess whether redactions from exhibits appear to be limited to information that meets the appropriate standard.[328] Upon request, issuers will be expected to promptly provide supplemental materials to the staff similar to those currently required, including an unredacted copy of the exhibit and an analysis of why the redacted information is both not material and the type of information that the issuer both customarily and actually treats as private and confidential.[329] If the issuer's supplemental materials do not support its

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[327] *See* FAST Act Modernization Release, at Section II.B.5.b.ii. (adopting Item 601(a)(6) of Regulation S-K).

[328] As discussed below, we are amending the standard for redaction of information under this streamlined process, which currently requires that the redactions from exhibits be limited to information that is not material and that would cause competitive harm if publicly disclosed. The amended standard is patterned on the Supreme Court's language set out in *Food Marketing Institute*. *See supra* note 301.

[329] Pursuant to 17 CFR 200.83, companies are permitted to request confidential treatment of this supplemental information while it is in the staff's possession.

redactions, the staff may request that the issuer file an amendment that includes some, or all, of the previously redacted information, similar to the process the staff currently follows for confidential treatment requests in connection with Regulation A offerings.[330]

b. Amendment to Form 1-A Item 17.16(a) Requirement

Issuers that are conducting Regulation A offerings are permitted to submit non-public draft offering statements and amendments for review by the Commission staff if they have not previously sold securities pursuant to (i) a qualified offering statement under Regulation A or (ii) an effective Securities Act registration statement.[331] Such issuers also may submit related non-public correspondence to the Commission staff for review confidentially. Current rules require that these non-public offering statements, amendments and correspondence be filed as an exhibit to a publicly filed offering statement at least twenty-one calendar days prior to the qualification of the offering statement.[332] Similarly, an emerging growth company may, prior to its initial public offering date, submit a draft registration statement and amendments to the Commission for non-public review by the staff.[333] However, unlike issuers submitting Regulation A offering statements for non-public review, there is no corresponding Securities Act rule or item requiring registration statements and amendments confidentially submitted by emerging growth companies to be filed as an exhibit to a publicly filed registration statement. Instead issuers satisfy their public filing requirement by logging into their EDGAR account, selecting materials previously submitted non-publicly, and releasing them for public dissemination.[334]

i. Proposed Amendments

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330 After completing its review of the supplemental materials, the Commission or its staff will return or destroy them at the request of the company, as applicable.

331 *See* 17 CFR 230.252(d).

332 *See* Item 17, paragraph 16(a) of Form 1-A and 17 CFR 230.252(d).

333 *See* Section 6(e)(1) of the Securities Act.

334 *See* Announcement by the Division of Corporation Finance, Draft Registration Statements to Be Submitted and Filed on EDGAR (Sep. 26, 2012), *available at* https://www.sec.gov/divisions/corpfin/cfannouncements/drsfilingprocedures.htm.

The Commission proposed to amend Item 17.16(a) of Form 1-A to harmonize the procedures for publicly filing draft Regulation A offering statements with those for draft Securities Act registration statements. Instead of requiring documents previously submitted for non-public review by the staff and related, non-public correspondence to be filed as exhibits to a publicly filed offering statement, issuers conducting offerings exempt from registration pursuant to Regulation A would be able to make such documents available to the public via EDGAR to comply with the requirements of 17 CFR 230.252(d).

ii. Comments

Commenters that addressed the proposed amendment supported the proposal to amend Item 17.16(a) of Form 1-A to allow non-public draft offering statements, amendments and related non-public correspondence to be made publicly available through the use of the EDGAR system.[335]

iii. Final Amendments

We are adopting the amendments as proposed, with two changes to renumber the exhibit paragraphs for clarity. As adopted, we are renumbering paragraph 16 of Item 17 of Form 1-A so that it will be referred to as "99. Additional Exhibits," and will be the last paragraph in Item 17, and former paragraph 16 will be designated as "reserved." In addition, as proposed, we are deleting sub-paragraph (a) of that paragraph so that issuers no longer will be required to file the non-public offering statements and related amendments and correspondence as exhibits. Instead, Regulation A issuers will be able to make previously non-public documents available to the public on EDGAR using the same process as issuers conducting a registered offering. We believe that this change simplifies the process of moving from a draft offering statement to a publicly filed document for issuers conducting Regulation A offerings, saving both time and money for such issuers. In addition, because all previously submitted offering statements and related amendments and correspondence will be available to the public on EDGAR, rather than

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[335] *See* J. Clarke Letter; Republic Letter; W. Hubbard Letter; M. Schonberger Letter; CrowdCheck Letter; and IPA Letter.

attached as exhibits to a given offering statement, this change should make it easier for investors to learn about the issuer and the Regulation A offering itself, furthering their ability to make informed investment decisions.

c. Incorporation by Reference of Previously Filed Financial Statements in Form 1-A for Regulation A Offerings

The ability to incorporate financial statements by reference to Exchange Act reports filed before the effective date of a registration statement is permitted on Form S-1, subject to certain conditions.[336] Specifically, General Instruction VII of Form S-1 permits registrants that meet certain eligibility standards[337] to incorporate by reference the information required by Item 11 of Form S-1, which includes information about the registrant, such as, among other things, financial statement information meeting the requirements of 17 CFR 210.1-01 through 12-29.[338] Regulation A issuers, however, are required to include the issuer's financial statements, prepared in accordance with the applicable requirements of Tier 1 or Tier 2 of Regulation A, in their Regulation A offering circular that is distributed to investors.[339]

i. Proposed Amendments

The Commission proposed to permit issuers to incorporate previously filed financial statements by reference into a Regulation A offering circular. The Commission proposed that an issuer must satisfy criteria similar to the requirement in connection with Form S-1. Specifically, issuers that have a reporting obligation under 17 CFR 230.257 ("Rule 257") or the Exchange Act must be current in their reporting obligations. Issuers would be required to make

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336 *See* General Instruction VII to Form S-1.

337 These criteria include, but are not limited to, that the registrant: (i) is subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act, (ii) has filed all reports and other materials required to be filed by Sections 13(a), 14, or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials), (iii) has filed an annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year and (iv) is not, and during the past three years neither it nor any of its predecessors was: (a) a blank check company; (b) a shell company, other than a business combination related shell company; or (c) offering penny stock. The registrant must make its periodic and current reports filed pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference pursuant to Item 11A or Item 12 of Form S-1 readily available and accessible on a website maintained by or for the registrant and containing information about the registrant.

338 *See* Item 12 to Form S-1.

339 *See* General Rule (a) to Part F/S of Form 1-A.

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.[340] Issuers conducting ongoing offerings would 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.[341] These financial statements could be either filed with such post-qualification amendment or incorporated by reference to a previously filed periodic or current report. In addition, issuers would remain liable for such financial statements under Section 12(a)(2) of the Securities Act[342] to the same extent as if they had been filed rather than incorporated by reference.

ii. Comments

Commenters generally supported the proposal to permit incorporation by reference of an issuer's previously filed financial statements.[343] Some commenters additionally supported permitting forward incorporation by reference in Regulation A,[344] with some of these commenters further supporting the elimination of the requirement to file annual post-qualification amendments.[345]

iii. Final Amendments

We are adopting the amendments as proposed. We believe that allowing incorporation by reference of previously filed financial statements should decrease existing filing burdens on Regulation A issuers. We are not expanding Regulation A to allow for forward incorporation by reference as recommended by some commenters, as we believe doing so could increase

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[340] General Instruction III(b) of Form 1-A requires the inclusion of a hyperlink in the offering circular to material incorporated by reference, which would include an issuer's previously filed financial statements on EDGAR.

[341] *See* 17 CFR 230.252(f)(2)(i).

[342] 15 U.S.C. 77*l*(a)(2).

[343] *See* J. Clarke Letter; Republic Letter; W. Hubbard Letter; M. Schonberger Letter; and CrowdCheck Letter.

[344] *See* W. Hubbard Letter; M. Schonberger Letter; and CrowdCheck Letter.

[345] *See* M. Schonberger Letter; and CrowdCheck Letter (supporting elimination of post-qualification amendments where the auditor's consent was included in the 17 CFR 239.91 ("Form 1-K")). In contrast, one commenter supported continuing to require annual post-qualification amendments to ensure that filings remain subject to ongoing staff review. *See* W. Hubbard Letter.

investor search costs and would eliminate the benefit of staff review of post-qualification amendments prior to their qualification.

d. Amendment to Abandonment Provision of Regulation A

Regulation A permits the Commission to declare an offering statement abandoned, but does not provide the same authority for post-qualification amendments.

i. Proposed Amendments

The Commission proposed to amend the abandonment provisions of Rule 259(b) to permit the Commission to declare a post-qualification amendment to an offering statement abandoned, consistent with 17 CFR 230.479, the rule applicable to registered offerings.

ii. Comments

Commenters who addressed the proposed amendment to the abandonment provisions of Rule 259(b) supported the proposal.[346]

iii. Final Amendments

We are adopting the amendments as proposed. We continue believe there are situations where it is appropriate for the Commission to be able to declare a specific post-qualification amendment abandoned, instead of the entire offering statement. For example, Commission staff has observed some issuers attempting to use post-qualification amendments for separate classes of securities that are not otherwise being offered under the offering statement. Under the final rules, if an issuer fails to qualify a post-qualification amendment for such a separate class, but otherwise is in compliance with all of its Regulation A obligations, the Commission will be able to declare that specific post-qualification amendment abandoned so as to avoid potential investor confusion arising from the presence of the unqualified post-qualification amendment on EDGAR.

3. Confidential Information Standard

The current requirements for registrants to file material contracts as exhibits to their disclosure documents permit registrants to redact provisions or terms of exhibits required to be

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[346] *See* Republic Letter; and CrowdCheck Letter.

filed if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed.[347] The "competitive harm" requirement was patterned on the standard then being used by the U.S. Circuit Court of Appeals for the District of Columbia[348] to define what information is confidential under Exemption 4 of the Freedom of Information Act, which protects "trade secrets and commercial or financial information obtained from a person [if they are] privileged or confidential."[349] In June 2019, the Supreme Court rejected the Circuit Court's longstanding test for determining what information was confidential under Exemption 4 and adopted a new definition of "confidential" that does not include a competitive harm requirement.[350] The Supreme Court stated that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."[351]

a. Proposed Amendments

The Commission proposed to adjust the exhibit filing requirements by removing the competitive harm requirement and replacing it with a standard more closely aligned with the Supreme Court's definition of "confidential." Under the proposed amendments, information may be redacted from material contracts if it is the type of information that the issuer both customarily and actually treats as private and confidential and that is also not material.[352]

b. Comments

We received no comments on the proposed amendments to revise the confidential information standard, other than one comment expressing support for the proposed revisions in

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[347] *See, e.g.*, FAST Act Modernization Release, at text accompanying notes 45–73 (amending paragraphs (b)(2)(ii) and (b)(10)(iv) of Item 601 of Reg. S-K).

[348] *See National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); and *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

[349] 5 U.S.C. 552(b)(4).

[350] *See Food Marketing Institute*.

[351] *Id.* at 2366.

[352] The Commission proposed changes to the following rules and forms to update the standard: Item 601(b)(2) and (b)(10) of Regulation S-K; Form S-6; Form N-14; Form 20-F; Form 8-K; Form N-1A; Form N-2; Form N-3; Form N-4; Form N-5; Form N-6; and Form N-8B-2.

the context of variable product registration statement forms.[353] This commenter also suggested that we revise Form N-6 to expand the types of exhibits to which the standard would apply to include participation agreements and administrative contracts.[354] The commenter stated that this would provide greater consistency between Form N-4, which relates to variable annuities, and Form N-6, which relates to variable life insurance contracts.[355]

c. Final Amendments

We are adopting the amendments as proposed to adjust the exhibit filing requirements by removing the competitive harm requirement and replacing it with a standard that permits information to be redacted from material contracts if it is the type of information that the issuer both customarily and actually treats as private and confidential, and which is also not material.[356]

We did not propose to revise Form N-6 to modify the types of exhibits to which the confidential information standard applies and decline to do so here. Information contained in such exhibits is already disclosed to investors in other contexts and, in our staff's experience, these exhibits do not contain confidential or proprietary information. Further, as part of our adoption of updated disclosure requirements for variable annuity and variable life insurance products,[357] among other changes, the instructions to exhibits in Form N-6 and Form N-4 will

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[353] *See* Letter from the Committee of Annuity Insurers dated May 6, 2020 ("Comm. of Annuity Insurers Letter").

[354] *See id.*

[355] *See id.*

[356] We did not propose, and are not adopting, changes to 17 CFR 229.402(b) ("Item 402(b)" of Regulation S-K). Instruction 4 to Item 402(b) and Instruction 2 to 17 CFR 229.402(e) ("Item 402(e)(1)"), which reference a competitive harm standard that is the same as would apply under the current rules when a registrant requests confidential treatment of confidential trade secrets or confidential commercial or financial information pursuant to 17 CFR 230.406 and 17 CFR 240.24b-2. The changes we are adopting to the exhibit requirements do not alter the existing standard applicable to Items 402(b) and 402(e) of Regulation S-K.

[357] *See* Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts, Release No. IC-33814 (May 1, 2020) [FR 24964 (May 1, 2020)] ("VASP Release"). For purposes of this release, we refer to the versions of the relevant forms adopted by the VASP Release as the "VASP amended" versions of Forms N-3, N-4, and N-6 (*e.g.,* "VASP amended Form N-3"). The changes to the exhibit filing requirements that we are adopting in this release, which replace the competitive harm standard, also apply to the parallel instruction in each of Item 32 of VASP amended Form N-3, Item 27 of VASP amended Form N-4, and Item 30 of VASP amended Form N-6.

be revised to eliminate discrepancies related to the categories of exhibits eligible for redaction.[358]

E. Offering and Investment Limits

Regulation A, Regulation Crowdfunding, and Rule 504 of Regulation D contain a variety of requirements and investor protections, including limits on the amount of securities that may be offered and sold under the exemptions. Regulation A and Regulation Crowdfunding also include limits on how much an individual may invest. The Commission has estimated that approximately $2.7 trillion of new capital was raised through exempt offering channels in 2019, of which approximately $1.3 billion (0.05 percent) was raised under Regulation A, Regulation Crowdfunding, and Rule 504 combined.[359]

1. Regulation A

Regulation A establishes two tiers of offerings: Tier 1, for offerings that do not exceed $20 million in a 12-month period; and Tier 2, for offerings that do not exceed $50 million in a 12-month period. The Commission is required by Section 3(b)(5) of the Securities Act to review the $50 million Tier 2 offering limit specified in Section 3(b)(2) of the Securities Act every two years, and the statute authorizes the Commission to increase the annual offering limit if the Commission determines that it would be appropriate to do so.

Earlier this year, the Divisions of Corporation Finance and Economic and Risk Analysis conducted a Regulation A Lookback Study and Offering Limit Review Analysis ("2020 Regulation A Review") as required by the 2015 Regulation A Release.[360] The 2020 Regulation

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[358] *See* Instruction 3 to Item 27 of VASP amended Form N-4 (allowing for the redaction of reinsurance contracts and other material contracts); *see also* Instruction 3 to Item 30 of amended Form N-6 (allowing for the redaction of reinsurance contracts and other material contracts). Registrants must comply with these rule and form amendments by January 1, 2022. *See* VASP Release, at Section II.G.

[359] *See* Concept Release, at Section II. Preliminary estimates from 2019 similarly reflect limited capital raising under the rules, with $1.042 billion raised under Regulation A, $228 million under Rule 504, and $62 million under Regulation Crowdfunding.

[360] *See* Staff of the U.S. Securities and Exchange Commission, Report to the Commission, Regulation A Lookback Study and Offering Limit Review Analysis, 2020 (Mar. 4, 2020), *available at* https://www.sec.gov/smallbusiness/exemptofferings/rega/2020Report. The report includes a review of: the amount of capital raised under the amendments; the number of issuances and amount raised by both Tier 1 and Tier 2 offerings; the number of placement agents and brokers facilitating the Regulation A offerings; the number of Federal, State, or any other actions taken against issuers, placement agents, or brokers with respect to both Tier 1 and Tier 2 offerings; and whether any additional investor protections appear necessary for either Tier 1 or Tier 2.

A Review found that from June 2015 to December 2019, $2.4 billion was reported raised by 183 issuers in ongoing and closed Regulation A offerings, including $230 million in Tier 1 and $2.2 billion in Tier 2 offerings.[361]

a. Proposed Amendments

Since adoption of the 2015 amendments, the Commission has continued to receive feedback on, and has considered further enhancements to, Regulation A.[362] This feedback and consideration informed our proposal to increase the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million. Consistent with the Commission's approach to limitations on secondary sales when adopting the Regulation A amendments, the Commission also proposed to increase the maximum offering amount for secondary sales under Tier 2 of Regulation A from $15 million to $22.5 million.

b. Comments

While most commenters that addressed the proposal supported raising the Tier 2 offering limits,[363] some opposed the increase.[364] Commenters supporting the increase suggested that an increase could encourage development of the smaller initial public offering market, encouraging more issuers to conduct offerings and providing more investment opportunities for

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[361] Over this time period issuers sought $11.2 billion across 487 Regulation A offerings, of which 382 were qualified offering statements seeking up to $9.1 billion. *See* 2020 Regulation A Review.

[362] While the Commission has received feedback from market participants and commenters seeking an increase in the Tier 2 offering limit, these commenters did not seek an increase in the Tier 1 limit. *See* 2017 Forum Report; 2018 Forum Report; and A Financial System That Creates Economic Opportunities - Capital Markets (Oct. 2017), *available at* https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf ("2017 Treasury Report").

[363] *See, e.g.*, ABA Letter; Letter from Bruce D. Wertz, Sr. dated Mar. 10, 2020; B. Andrews, et al. Letter; SEC SBCFAC Letter; Geraci Law Letter (suggesting the increased offering limits will attract a more seasoned pool of investors as well as institutional investors); Carta Letter; SAF Letter; M. Schonberger Letter; D. Burton Letter; InnaMed, et al. Letter; CrowdCheck Letter; IPA Letter; Republic Letter; and Sen. Toomey Letter. Some of these commenters further supported indexing additional increases for inflation. *See, e.g.*, Carta Letter; IPA Letter; and Sen. Toomey Letter. Other commenters offered further suggestions to improve the offering process and raise effective offering limits. *See, e.g.*, M. Schonberger Letter (recommending Regulation A be amended to apply the 180-day selling extension for continuous offerings to certain post-qualification amendment filings). *See also* Annual Report for Fiscal Year 2019: Office of the Advocate for Small Business Capital Formation ("2019 OASB Annual Report"), *available at* https://www.sec.gov/files/2019_OASB_Annual%20Report.pdf, at 41 (recommending that the Commission tie offering limits to expressed marketplace needs for capital and provide flexibility for future review and adjustment).

[364] *See, e.g.*, CII Letter; NASAA Letter; Md. St. Bar Assoc. Letter; AFREF Letter; Better Markets Letter; CFA Letter; R. Rutkowski Letter; and CFA Institute Letter.

investors.[365] Some of these commenters additionally suggested that the higher offering limits would improve the economics for issuers and broker dealers to participate in the Regulation A market.[366] A number of commenters supported raising the limit further to $100 million.[367] Several commenters also specifically supported raising the limit for secondary sales.[368] We additionally received many letters urging the Commission to provide Federal preemption for secondary sales of a Tier 2 Regulation A offering.[369]

Commenters opposed to the increase suggested that there is not compelling evidence supporting a need to raise the offering limit[370] and stated that issuers raising such large amounts of capital should be subject to the full disclosure and protections provided in the Securities Act.[371] One commenter expressed concern over the negative effects of increasing the use of Regulation A for unsophisticated non-accredited retail investors due to what it perceived as the lower quality of Regulation A issuers and increased risks of investor losses.[372] Another commenter suggested that the reason Regulation A Tier 2 is underutilized is not that the

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365 *See, e.g.*, Letter from Chamber of Digital Commerce dated June 1, 2020 ("Chamber of Digital Commerce Letter"); J. Clarke Letter; W. Hubbard Letter; CrowdCheck Letter; and Ketsal Letter.

366 *See, e.g.*, Chamber of Digital Commerce Letter, IPA Letter; and Hubbard Letter.

367 *See, e.g.*, J. Clarke Letter; Chamber of Digital Commerce Letter; Ketsal Letter; IPA Letter; Sen. Toomey Letter; Letter from Biotechnology Innovation Organization dated July 21, 2020; M. Schonberger Letter (suggesting higher offering limits reduce the burden on issuers by permitting them to raise more capital before having to file post qualification amendments or new offering statements); and CrowdCheck Letter. *See also* Carta Letter; and Sen. Toomey (additionally recommending indexing the limit for inflation). *But see* ABA Letter (supporting the Commission's proposed incremental approach and suggesting that precedent, prestige of the public offering process and customary use of investment bankers likely will mean that registered offerings will be more frequently used for relatively larger offerings).

368 *See, e.g.*, Carta Letter; and IPA Letter.

369 *See* Form Letter Type A; and Carta Letter.

370 *See, e.g.*, CII Letter; CFA Letter; CFA Institute Letter (noting that issuers that have exhausted the Tier II offering limits have been almost exclusively real estate industry issuers, and that the real estate industry is one marked by significant volatility and risk); and Md. St. Bar Assoc. Letter (noting that the 2020 Regulation A Review found that only approximately 10% of issuers conducting Regulation A Tier 2 offerings have reached the $50 million offering limit).

371 *See, e.g.*, Md. St. Bar Assoc. Letter; CFA Institute Letter (suggesting the expansion of exempt offerings undermines the traditional trade-off between the burdens of public disclosure and the benefits of the right to raise capital from the general public); and NASAA Letter. *See also* R. Rutkowski Letter (suggesting that the proposal would weaken private offering rules in way that would discourage public market offerings and the associated disclosure and governance protections).

372 *See* CFA Letter. *See also* CFA Institute Letter (expressing concerns with compliance by issuers in the exempt markets and its perception of the lower quality of issuers offering in the Regulation A market).

offering limits are too low, but rather that the issuers and investments involve greater risk.[373] Additionally, one commenter opposed to the increase and one commenter supporting the increase expressed concern relating to the Commission's use of its general exemptive authority under Section 28 of the Securities Act to increase the limit.[374]

Although many commenters were supportive of raising the Tier 2 offering limits, only one commenter recommended increasing the Tier 1 offering limit.[375] This commenter also recommended that the Commission reconsider whether "covered securities" status under Section 18 of the Securities Act should be extended to Tier 1 of Regulation A.[376] Other commenters that addressed Tier 1 offering limits, however, were generally opposed to increasing those limits.[377]

c. Final Amendments

In order to facilitate use of Tier 2 Regulation A offerings and having considered the comments on the Proposing Release, the 2020 Regulation A Review, feedback that the Commission received from the Small Business Forums[378] and in response to the Concept Release, we are increasing the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million as proposed. Section 3(b)(5) of the Securities Act expressly authorizes the Commission to review and raise the offering limit as appropriate.[379] Consistent with the Commission's approach to limitations on secondary sales when adopting the

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373 *See, e.g.*, NASAA Letter (recommending strengthening corporate governance and disclosure obligations and rescinding preemption of State securities regulation to increase the regulatory oversight of these companies making them more attractive to and safer for investors).

374 *See* Better Markets Letter (opposing the increase); and CrowdCheck Letter (supporting the increase).

375 *See* Chamber of Digital Commerce Letter.

376 *See id.*

377 *See, e.g.*, CII Letter; NASAA Letter; and CrowdCheck Letter.

378 *See* 2017 Forum Report; and 2018 Forum Report.

379 We also believe that the Commission has general exemptive authority under Securities Act Section 28 to raise the Regulation A offering limit if it finds that raising the limit is necessary or appropriate in the public interest and consistent with the protection of investors.

Regulation A amendments, we are also increasing the maximum offering amount for secondary sales under Tier 2 of Regulation A from $15 million to $22.5 million.[380]

While the 2015 amendments have stimulated the Regulation A offering market, aggregate Regulation A financing levels remain modest relative to traditional IPOs and the Regulation D market.[381] The 2020 Regulation A Review noted that these financing levels are likely related to a combination of factors, including: the pool of issuers and investors drawn to the market under existing conditions; the availability to issuers of attractive private placement alternatives without an offering limit; the availability to investors of attractive investment alternatives outside of Regulation A with a more diversified pool of issuers; limited intermediary participation and a lack of traditional underwriting; and a lack of secondary market liquidity.[382]

We are raising the Tier 2 offering limit in order to enhance the ability of Regulation A issuers that have exhausted existing offering limits to raise additional capital.[383] Further, public commentary since the 2015 amendments indicates that a higher offering limit may help attract a larger and potentially more seasoned pool of issuers and intermediaries or institutional investors to the Regulation A market.[384] In addition, a higher offering limit may make Regulation A offerings more attractive to more established Exchange Act reporting companies.[385] Although

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[380] The Commission observed in connection with the 2014 amendments to Regulation A that selling security holder access to Regulation A has historically been an important part of the exemptive scheme. *See* Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act, Release No. 33-9497 (Dec. 18, 2013) [79 FR 3925 (Jan. 23, 2014)], at Section II.B.3; and 2015 Regulation A Adopting Release, at Section II.B.3.c. Consistent with existing and historical provisions of Regulation A, we are continuing to permit secondary sales under Regulation A up to 30 percent of the maximum offering amount permitted under the applicable tier.

[381] *See* 2020 Regulation A Review.

[382] *See id*.

[383] The 2020 Regulation A Review estimates that approximately 10 percent of issuers in Tier 2 offerings have reached the $50 million offering limit across completed and ongoing offerings. *See id.* at Table 4. As discussed in the 2020 Regulation A Review and noted by one commenter, these issuers have primarily been from the real estate industry. *See* CFA Institute Letter. While raising the offering limit will permit all issuers to raise additional capital, we believe that the disclosure requirements of Regulation A will help investors to evaluate the risk of such investments.

[384] *See, e.g.*, letter in response to the Concept Release from Committee on Securities Regulation of the Business Law Section of the New York State Bar Association dated Oct. 16, 2019.

[385] *See* 2020 Regulation A Review, at Section F.1. However, as noted in the 2020 Regulation A Review, the staff lacks data that would allow it to assess how a specific offering limit increase would affect the size and

some commenters suggested raising the offering limit to $100 million, we believe it is more appropriate to pursue an incremental approach to increasing the threshold,[386] which will provide the Commission with a reasonable opportunity to assess the impact of the increased offering limit on the Regulation A market before considering further changes. In this regard, we note that the Commission is required by Section 3(b)(5) of the Securities Act to review and consider increasing the new $75 million Tier 2 offering limit every two years.[387] In addition, we believe that the issuer eligibility requirements, content, and filing requirements for offering statements and ongoing reporting requirements for issuers in Tier 2 Regulation A offerings continue to provide appropriate protections for investors at this higher offering limit. For these reasons, we believe that it is necessary and appropriate in the public interest and consistent with the protection of investors to raise the Tier 2 offering limit as proposed.[388]

We note that under the final amendments, Tier 2 offerings will continue to be preempted from State law registration and qualification requirements.[389] We believe this is appropriate because we expect that Tier 2 offerings will continue to be more national in nature. While

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composition of the pool of prospective issuers, intermediaries, and investors in the Regulation A market. *See infra* Section IV.C.5.a.i.

[386] We note that adjusting the existing offering limit for inflation from 2015 to present would increase the Tier 2 offering limit by only $5.845 million. *See* 2020 Regulation A Review, at Table 7. Such a change likely would not attract additional institutional investors, intermediaries, or traditional underwriters to the Regulation A market.

[387] As noted above, because of the statutory obligation to review the limit every two years, we do not think it is necessary to index the offering limit for inflation, as some commenters suggested. *See* Carta Letter; and Sen. Toomey Letter.

[388] We did not propose and are not increasing the Tier 1 offering limit. While one commenter recommended an increase, we do not believe it is likely to result in the kinds of benefits discussed above that we expect may result from the increased Tier 2 offering limit, such as attracting a larger and more seasoned pool of issuers and intermediaries or institutional investors to the Regulation A market. As discussed in the 2020 Regulation A Review, while an increase in the Tier 1 offering limit could draw more issuers to Tier 1, Tier 2 may remain more attractive to issuers due to, for example, preemption of state review, an easier path to quotation on the upper tiers of the OTC market in the presence of periodic reports required by Tier 2, and the flexibility to raise more capital without having to undergo a re-qualification. *See* 2020 Regulation A Review at Section F.2. While we do not believe an increase is warranted at this time, we will continue to consider the Tier 1 offering limitation and the appropriate investor protections under Tier 1 when we conduct the Tier 2 offering limit review required by Section 3(b)(5) of the Securities Act.

[389] Many commenters recommended preempting State securities law regulation of secondary trading of Regulation A securities issued in Tier 2 offerings. While such preemption could further advance the development of a national securities market by easing the compliance obligations of investors that trade in the secondary markets, we believe this recommendation merits careful consideration and an opportunity for market participants to receive notice and comment on a specific proposal. Accordingly, we are not adopting any changes to preemption of State securities laws for secondary trading at this time.

issuers in Tier 2 offerings are required to qualify offerings with the Commission before sales can be made pursuant to Regulation A, they are not required to register or qualify their offerings with State securities regulators. Section 18 of the Securities Act generally provides for preemption of State law registration and qualification requirements for "covered securities."[390] Section 18(b)(4)(D) of the Securities Act further provides that securities issued pursuant to Section 3(b)(2) of the Securities Act are covered securities if they are listed, or will be listed, on a national securities exchange or if they are offered or sold to a "qualified purchaser,"[391] which the Commission has defined to include any person to whom securities are offered or sold in a Tier 2 offering.[392] We are not extending "covered securities" status under Section 18 of the Securities Act to Tier 1, as suggested by one commenter. We continue to believe that, in light of concerns raised by state regulators and the generally more local nature of Tier 1 offerings, it is appropriate for the States to retain oversight over Tier 1 offerings.[393]

2. Rule 504

Rule 504 of Regulation D provides an exemption for eligible issuers[394] from registration under the Securities Act for the offer and sale of up to $5 million of securities in a 12-month period. In 2016, the Commission amended Rule 504 to raise the aggregate amount of securities an issuer may offer and sell in any 12-month period from $1 million to $5 million.[395] From 2009 through 2019, for issuers other than pooled investment funds, two percent of the capital raised in Regulation D offerings under $5 million was offered under Rule 504 (and under Rule 505, prior to its repeal), and 98 percent of the capital raised was offered under Rule 506.[396]

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390 *See* 15 U.S.C. 77r(c).

391 *See* 15 U.S.C. 77r(b)(4)(D).

392 *See* 17 CFR 230.256.

393 *See* 2015 Regulation A Release, at Section II.H.3.

394 Issuers that are required to file reports under Exchange Act Section 13(a) or 15(d), investment companies, blank check companies, and issuers that are disqualified under Rule 504's "bad actor" disqualification provisions are not eligible to use Rule 504.

395 Five million dollars is the maximum amount statutorily allowed under Securities Act Section 3(b)(1). *See* Intrastate and Regional Offerings Release. In light of the increased offering threshold under Rule 504, the Commission repealed Rule 505. Most issuers previously using Rule 505 are able to conduct an offering up to $5 million under Rule 504.

396 *See* Proposing Release, at note 263 and accompanying text.

a. Proposed Amendments

The Commission proposed to use its general exemptive authority under Section 28 of the Securities Act to raise the maximum offering amount under Rule 504 from $5 million to $10 million.

b. Comments

We received mixed comments on the proposal to raise the Rule 504 maximum offering amount to $10 million with some commenters supporting[397] and others opposing[398] the proposal. Commenters who supported increasing the maximum offering amount stated that it would allow issuers to more easily raise capital,[399] make offerings more cost effective,[400] and encourage greater use of the exemption.[401] One of these commenters additionally suggested that because Rule 504 offerings will remain subject to applicable federal and state securities law requirements, including antifraud provisions, it is reasonable to expect that the increase "will not meaningfully decrease investor protection or incentivize bad actors to enter the marketplace."[402] Commenters opposed to the increase stated that issuers do not use the full capacity under the existing limit and that an increase may not drive more regional multistate offerings.[403] Commenters also expressed concern that the Commission's analysis of the impact

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397 *See, e.g.*, ABA Letter; B. Andrews, et al. Letter; SEC SBCFAC Letter; Geraci Law Letter (further recommending that securities sold pursuant to Rule 504 be considered "covered securities"); SAF Letter; Carta Letter; and Ketsal Letter. *See also* 2019 OASB Annual Report, at 41 (suggesting that the Commission ensure that dollar amount caps used in exemptions are "tied to expressed marketplace needs for capital and provide flexibility for future review and adjustment").

398 *See, e.g.*, CII Letter; NASAA Letter; AFREF Letter; Better Markets Letter; CFA Letter; R. Rutkowski Letter; and CFA Institute Letter. Some of these commenters suggested that increased offering limits increase investor risk by creating more opportunities for high risk issuers to sell to unsophisticated investors. *See, e.g.*, CFA Letter and CFA Institute Letter.

399 *See* ABA Letter.

400 *See* Carta Letter.

401 *See* Ketsal Letter. *See also* Carta Letter (stating that the increase would make the exemption more attractive to a broader group of issuers).

402 *See* ABA Letter.

403 *See, e.g.*, NASAA Letter (stating its belief that raising the threshold above $5 million would require issuers to comply with Securities Act Section 3(b)(2), which carries with it obligations including mandatory filing of audited financial statements with the Commission.); CFA Letter; and CrowdCheck Letter.

of raising the Rule 504 limit was insufficient,[404] and that increasing the limits may be detrimental to the public markets.[405] Other commenters questioned the Commission's statutory authority to increase the limit.[406]

c. Final Amendments

Based on our consideration of the available data and the feedback that we received on the Concept Release, on the Proposing Release, and from the Small Business Capital Formation Advisory Committee, and in order to facilitate use of Rule 504 for capital raising, we are amending the rules as proposed to raise the offering limit from $5 million to $10 million. We believe that increasing the offering limit in reliance on our general exemptive authority under Securities Act Section 28[407] is appropriate in the public interest because permitting larger offerings under Rule 504 may encourage more issuers to use the exemption, could encourage more issuers to conduct regional multistate offerings and make use of State coordinated review programs, and could make the exemption a more efficient capital raising option for smaller issuers by lowering the offering costs per dollar raised. At the same time, we do not believe that raising the offering limit would expand the private markets at the expense of the public markets.[408] Furthermore, we believe that increasing the offering limit is consistent with the protection of investors because the amendments would not alter the significant protections

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404 *See, e.g.*, CFA Letter (stating that the Commission's analysis lacks data or a methodological approach to determine the impacts of raising the offering limit); CII Letter (stating that the Commission's analysis fails to adequately consider the potential impact on long-term investors and the capital markets from expanding the exempt offering framework); AFREF Letter (stating that the Commission's analysis does not adequately analyze the negative effects of the amendments); and R. Rutkowski Letter.

405 *See, e.g.*, AFREF Letter; CFA Letter; R. Rutkowski Letter; and CFA Institute Letter.

406 *See, e.g.*, Better Markets Letter; CFA Letter; and Public Interest Comment Letter from Andrew N. Vollmer and Brian R. Knight, Mercatus Center at George Mason University dated Oct. 30, 2020 ("Mercatus Center Letter"). *See infra* note 429.

407 Securities Act Section 3(b)(1) currently sets the maximum offering amount for small issues exempted under that section at $5 million. *See* 15 U.S.C. 77c(b)(1). As explained above, we are relying on our general exemptive authority to raise the threshold in Rule 504 to $10 million. We therefore do not agree with the commenter who stated that raising the threshold above $5 million would require compliance with Securities Act Section 3(b)(2).

408 As discussed in Section IV.A below, Rule 504, like Regulation Crowdfunding, currently represents a small segment of the private offering market, and issuers that raise capital pursuant to the exemption tend to be at a much earlier stage of development than those that conduct a traditional initial public offering.

applicable under Rule 504, such as potential State review and prohibitions on "bad actor" participation.

3. Regulation Crowdfunding

Regulation Crowdfunding provides an exemption from registration for certain crowdfunding transactions including limits on the amount an issuer may raise; limits on the amount an individual may invest; and a requirement that the transactions be conducted through an intermediary that is registered as either a broker-dealer or a "funding portal."

The exemption from registration provided by Section 4(a)(6) is available provided that "the aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the exemption provided under [Section 4(a)(6)] during the 12-month period preceding the date of such transaction, is not more than $1,000,000." Under Securities Act Section 4A(h), the Commission is required to adjust the dollar amounts in Section 4(a)(6) "not less frequently than once every five years, by notice published in the *Federal Register*, to reflect any change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics."[409] The Commission adjusted the maximum offering limit to $1.07 million ($1.0 million adjusted to reflect changes in the Consumer Price Index ("CPI")) in 2017.[410]

In addition, Regulation Crowdfunding also limits the amount individual investors are allowed to invest across all Regulation Crowdfunding offerings over the course of a 12-month period. The limitation on how much an individual can invest during that period depends on his or her net worth and annual income and may not exceed $107,000. Individual investors are limited to:

- The greater of $2,200 or five percent of the lesser of the investor's annual income or net worth, if either of an investor's annual income or net worth is less than $107,000; or

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[409] *See* 15 U.S.C. 77d(a)(6) and 15 U.S.C. 77d-1(h). *See also* 17 CFR 227.100(a)(1) ("Rule 100(a)(1)" of Regulation Crowdfunding).

[410] *See* Inflation Adjustments and Other Technical Amendments under Titles I and III of the JOBS Act (Technical Amendments; Interpretation), Rel. No. 33-10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)].

- Ten percent of the lesser of his or her annual income or net worth, if both annual income and net worth are equal to or more than $107,000.[411]

Further, the offering statement for a Regulation Crowdfunding offering must include specified information, including a discussion of the issuer's financial condition and financial statements. Regulation Crowdfunding's financial statement requirements are based on the amount offered and sold in reliance on the exemption within the preceding twelve-month period, with progressively increasing requirements and involvement of outside accountants as offering size increases.[412] On May 4, 2020, the Commission adopted temporary final rules under Regulation Crowdfunding to facilitate capital formation for small businesses impacted by COVID-19, which include, among other things, an exemption from certain financial statement review requirements for issuers offering $250,000 or less of securities in reliance on Regulation Crowdfunding within a 12-month period.[413] These temporary final rules were subsequently extended and apply to offerings initiated under Regulation Crowdfunding between May 4, 2020, and February 28, 2021.[414]

In 2019, the Commission staff undertook a study of the available information on the capital formation and investor protection impacts of Regulation Crowdfunding. The resulting report to the Commission summarized quantitative information, where it was available to the staff, as well as qualitative observations of Commission staff and FINRA staff and input from market participants regarding their experience with Regulation Crowdfunding.[415] The study found that during the considered period, the number of offerings and the total amount of funding were relatively modest, with issuers raising $108 million under Regulation

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[411] *See* 17 CFR 227.100(a)(2) ("Rule 100(a)(2)" of Regulation Crowdfunding). Rule 100(a)(2) is based on the requirement in Section 4(a)(6).

[412] *See* 17 CFR 230.201(t).

[413] *See* Temporary Amendments to Regulation Crowdfunding, Release No. 33-10781 (May 4, 2020) [85 FR 27116 (May 7, 2020)] ("Temporary Amendments Adopting Release"). The amendments adopted in this release do not affect the application of these temporary final rules.

[414] *See* Temporary Amendments to Regulation Crowdfunding; Extension, Release No. 33-10829 (Aug. 28, 2020) [85 FR 54483 (Sept. 2, 2020)] ("Temporary Amendments Extension"). The temporary final rules expire on September 1, 2021.

[415] *See* Report to the Commission: Regulation Crowdfunding (June 18, 2019), *available at* https://www.sec.gov/files/regulation-crowdfunding-2019_0.pdf ("2019 Regulation Crowdfunding Report").

Crowdfunding from May 16, 2016, through December 31, 2018.[416] The study also found that the typical offering during the considered period was small and raised less than the 12-month offering limit.[417]

a. Proposed Amendments

The Commission proposed to use its general exemptive authority under Securities Act Section 28 to raise the offering limit in Regulation Crowdfunding from $1.07 million to $5 million. The Commission also proposed to increase the investment limits for investors in Regulation Crowdfunding offerings. First, the Commission proposed to no longer apply any investment limits to accredited investors. The proposed amendments would treat accredited investors under Regulation Crowdfunding in the same manner as other exempt offerings. Second, the Commission proposed to amend the Regulation Crowdfunding calculation method for the investment limits for non-accredited investors to allow them to rely on the greater of their annual income or net worth. The proposed amendment would conform this aspect of Regulation Crowdfunding with Tier 2 of Regulation A and would apply a consistent approach to limiting the potential losses investors may incur in offerings conducted in reliance on the two exemptions.[418] The Commission did not propose to adjust the financial statement requirements in Regulation Crowdfunding, although the economic analysis in the Proposing Release considered alternatives that would amend these disclosure requirements and solicited comment on them.

b. Comments

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416 *See id.*

417 *See id.*, at Section I.

418 Under Regulation A accredited investors are not limited in the amount of securities they may purchase and other investors are limited to purchasing in a Tier 2 offering no more than: (a) ten percent of the greater of annual income or net worth (for natural persons); or (b) ten percent of the greater of annual revenue or net assets at fiscal year-end (for non-natural persons). *See* 17 CFR 230.251(d)(2)(i)(C). This limit does not, however, apply to purchases of securities that will be listed on a national securities exchange upon qualification.

Commenters were broadly supportive of raising the Regulation Crowdfunding offering limit to $5 million.[419] Many commenters recommended raising the limit in light of economic concerns raised by COVID-19.[420] Some additionally supported raising the limit beyond $5 million.[421] Some commenters supportive of an increased offering limit also supported further action by the Commission to enhance compliance with Regulation Crowdfunding.[422] In particular, some commenters supported relaxing the disclosure and financial statement requirements for smaller Regulation Crowdfunding offerings.[423] Others supported Federal preemption of State securities law registration and qualification requirements for secondary sales.[424]

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419 *See, e.g.*, B. Andrews, et al. Letter; CfPA Letter; SEC SBCFAC Letter; Geraci Law Letter; Letter from Crowdfund Capital Advisors dated May 29, 2020 ("CCA Letter") (suggesting that increasing the offering limit will reduce the cost of capital and permit larger, more stable and lower risk issuers to use the exemption); Silicon Prairie Letter; Letter from Social Enterprise Investments, Inc. dated May 31, 2020 ("SEI Letter"); Netcapital Letter; Carta Letter; Republic Letter; NextSeed Letter; Chamber of Digital Commerce Letter; SAF Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter; InnaMed, et al. Letter; SeedInvest Letter; Crowdwise Letter; Letter from Mark Roderick dated May 31, 2020 ("M. Roderick Letter"); Letter from Representative Patrick McHenry dated June 8, 2020 ("Rep. McHenry Letter"); and Sen. Toomey Letter. *See also* 2019 OASB Annual Report, at 41 (suggesting that the Commission ensure that dollar amount caps used in exemptions are "tied to expressed marketplace needs for capital and provide flexibility for future review and adjustment") and 47 (specifically supporting an increase offering cap for Regulation Crowdfunding offerings, stating an increase "would allow companies to raise meaningful early-stage capital using crowdfunding rather than limiting companies' options to a narrower set of exemptions"); and AOIP Letter (suggesting the Commission immediately increase the Regulation Crowdfunding limit in response to the COVID-19 pandemic).

420 *See, e.g.*, B. Andrews, et al. Letter; Letter from Stuart Halperin dated Mar. 27, 2020; Letter from Kevin Wolf dated Mar. 27, 2020; and AOIP Letter.

421 *See, e.g.*, CCA Letter; J. Clarke Letter; SEI Letter; Netcapital Letter; Republic Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter; InnaMed, et al. Letter; and Sen. Toomey Letter. Some commenters further suggested indexing these new higher amounts for inflation. *See, e.g.*, Carta Letter; and Sen. Toomey Letter.

422 *See, e.g.*, CfPA Letter (recommending funding portals be required to certify that they have reviewed a campaign for compliance prior to posting it on their platform); and M. Roderick Letter (recommending additional disclosure regarding target offering amounts).

423 *See, e.g.*, Silicon Prairie Letter (recommending relaxing the financial information requirements for offerings under $1 million); CrowdCheck Letter (supporting a micro-offering tier below $25,000); Nextseed Letter (recommending a micro-offering tier below $250,000); R. Campbell Letter (recommending eliminating the burden of ongoing reporting requirements for small crowdfunding offerings); Honeycomb Letter; Letter from MainVest, Inc. dated May 7, 2020 (recommending the requirement for reviewed financials not apply for offerings under $500,000); Raise Green & New Haven Comm. Solar Letter; M. Roderick Letter (supporting raising the threshold for reviewed financial statements to at least $350,000); CfPA Letter (recommending financial disclosures are only be required to be provided to the extent that they are "material to an understanding of the issuer, its business and the securities being offered") and Sen. Toomey Letter (supporting tailored auditing requirements). *See also* 2019 OASB Annual Report, at 48 (recommending the Commission reevaluate Regulation Crowdfunding's disclosure obligations, and specifically suggesting that "reporting requirements could be simplified for companies raising under $250,000"). *But see* Better Markets Letter (expressing concern about the temporary Regulation Crowdfunding relief).

424 *See* Form Letter Type A.

Some commenters expressed concern or opposition to increasing the offering limit.[425] A number of these commenters suggested that there is not compelling evidence of the need for an increase or that more information is needed to determine whether such an increase is appropriate.[426] Some of these commenters expressed concern that the proposals would expand the private markets at the expense of the public markets.[427] Other commenters expressed concern with compliance by issuers under Regulation Crowdfunding[428] and the Commission's authority to increase the limit.[429] One commenter recommended that if the Commission raises the threshold above the statutory limit, it should make clear the basis of its authority and the status of securities issued under the increased offering limit under State securities laws, such as whether those securities are "covered securities" under Section 18 of the Securities Act.[430]

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425 *See, e.g.*, Letter from Bridget Richardson dated Mar. 31, 2020 ("B. Richardson Letter"); Letter from Jeffrey Marks, Alliance Legal Partners, Inc. dated Apr. 17, 2020 ("J. Marks Letter"); CII Letter; Md. St. Bar Assoc. Letter; AFREF Letter; Morningstar Letter (noting a lack of investment advice such as from a broker or investment adviser that investors might have access to with regard to an investment in a public company); Better Markets Letter; CFA Letter; R. Rutkowski Letter; CrowdCheck Letter (noting compliance failures and recommending any increase be coupled with a robust enforcement program); and CFA Institute Letter.

426 *See, e.g.*, CII Letter; CFA Letter; CFA Institute Letter; B. Richardson Letter; and Md. St. Bar Assoc. Letter.

427 *See, e.g.*, Better Markets Letter; CFA Letter; CFA Institute Letter; and R. Rutkowski Letter. *See also* J. Marks Letter (suggesting that larger offerings are appropriately subject to additional Commission oversight); CFA Letter; and CFA Institute Letter (suggesting that the amendments will be detrimental to retail investors by providing them greater access to the least attractive private offerings).

428 *See, e.g.*, ABA Letter (suggesting that the Commission should be satisfied that the crowdfunding requirements are being complied with before increasing the limits); CFA Letter (contending that the Commission has a responsibility to examine non-compliance in crowdfunding markets and remedy those deficiencies before expanding the exemption); and CrowdCheck Letter.

429 *See, e.g.*, Better Markets Letter; and CFA Letter. *See also* Mercatus Center Letter. Although the Mercatus Center Letter in particular was received one business day before the publicly-noticed open meeting at which the Commission would consider these amendments [Pub. L. 94-409] and long after the expiration of the comment period, the issues regarding our use of exemptive authority, including the questions raised in that letter, have been carefully considered. As noted above, Section 28 of the Securities Act gives the Commission broad authority to "conditionally or unconditionally exempt any person … or any class or classes of persons … from any provision or provisions of" the Securities Act and rules or regulations issued thereunder "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." 15 U.S.C. 77z-3. We believe that exempting additional classes of transactions above the statutory threshold in Section 4(a)(6) is in the public interest and consistent with the protection of investors for the reasons discussed below, and is thus consistent with the plain language of Section 28. In reaching this determination, we have been informed by the staff's experience administering Regulation Crowdfunding since 2015, the 2019 Regulation Crowdfunding Report, and the feedback of numerous market participants in recent years, including in response to the Concept Release. Section 28 was intended to provide flexibility to the Commission to respond to precisely these sorts of market developments. *See* Rule 701– Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33-7645 (Feb. 25, 1999) (noting that, in enacting the National Securities Markets Improvement Act of 1996, Congress expected the Commission to use its new authority under Section 28, among other things, to raise the offering limit for Rule 701 compensatory offerings beyond the statutorily prescribed limit of $5 million). We thus view these amendments as appropriate and well within our statutory authority.

430 *See* ABA Letter.

Commenters that addressed the issue generally supported amending the rules to remove the investment limits for accredited investors[431] and to use the greater of annual income or net worth in calculating investment limits for non-accredited investors.[432] Some commenters, however, opposed removing the investment limits for accredited investors,[433] or increasing the investment limits for non-accredited investors.[434] Some commenters supporting the amendment suggested requiring verification of accredited investor status,[435] while others were against verification standards.[436] One commenter supporting the amendments to the investment limits also expressly supported not adjusting or increasing Regulation Crowdfunding's financial statement requirements.[437]

c. Final Amendments

Based on our consideration of the available data, the staff's 2019 Regulation Crowdfunding Report, and the feedback that we received on the Concept Release, the Proposing Release and from Small Business Forums[438] and the Small Business Capital Formation

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431 *See, e.g.*, ABA Letter; B. Andrews, et al. Letter; SEC SBCFAC Letter; SEI Letter; Netcapital Letter; Carta Letter; Republic Letter; NextSeed Letter; Chamber of Digital Commerce Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter; Morningstar Letter; InnaMed, et al. Letter; Crowdwise Letter; Rep. McHenry Letter; Honeycomb Letter; M. Roderick Letter; and Ketsal Letter. *See also* CrowdCheck Letter (supporting removing the limits if the investor protections in Regulation A are replicated in Regulation Crowdfunding); and AOIP Letter (suggesting the Commission immediately remove the investment limits for accredited investor in response to the COVID-19 pandemic). *See also* 2019 OASB Annual Report, at 48.

432 *See, e.g.*, ABA Letter; Letter from Regulated Funding Portal Industry Association dated Mar. 6, 2020; B. Andrews, et al. Letter; SEC SBCFAC Letter; CCA Letter; Silicon Prairie Letter (recommending further simplification of the threshold and use of a "certified investor" designation); SEI Letter; Netcapital Letter; Carta Letter; Republic Letter; NextSeed Letter; Chamber of Digital Commerce Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter (recommending increasing the limit); InnaMed, et al. Letter.; Crowdwise Letter; CrowdCheck Letter; CfPA Letter (recommending all investors be permitted to invest $2,200 per transaction); and Ketsal Letter. Some of these commenters recommended applying the limits on a per offering basis. *See, e.g.*, Crowdwise Letter; InnaMed, et al. Letter; Silicon Prairie Letter; and Republic Letter. *See also* AOIP Letter (suggesting the Commission immediately use the greater of annual income or net worth in response to the COVID-19 pandemic, and also suggesting the limits be applicable on a per offering basis).

433 *See, e.g.*, Letter from Jason Pampena dated May 22, 2020 ("J. Pampena Letter") (expressing concern that removing the investment limits for accredited investors will reduce investment opportunities for non-accredited investors).

434 *See, e.g.*, CII Letter; and Morningstar Letter (recommending a cautious approach to changing the investment limit standards and expressing concern that there is limited investment advice for these investors). *See also* NASAA Letter; and CFA Letter (generally opposing the amendments).

435 *See, e.g.*, J. Clarke Letter; and Raise Green & New Haven Comm. Solar Letter.

436 *See, e.g.*, Honeycomb Letter (supporting self-verifications).

437 *See* ABA Letter.

438 *See* 2017 Forum Report; 2018 Forum Report; 2019 Forum Report; and 2020 Forum Report.

Advisory Committee, and in order to facilitate use of Regulation Crowdfunding for capital raising, we are amending the rules as proposed: (1) to raise the issuer offering limits in Regulation Crowdfunding; and (2) to remove or increase the investment limits by no longer applying those limits to accredited investors and allowing investors to rely on the greater of their income or net worth in calculating their investment limit.[439] We are raising the offering limit in Regulation Crowdfunding from $1.07 million to $5 million and are adjusting the investment limits in reliance on the general exemptive authority under Securities Act Section 28.[440] We believe that reliance on Section 28 to raise the offering limit is an appropriate use of our exemptive authority because the amendments will extend the exemption under Section 4(a)(6) of the Securities Act to additional classes of transactions (*i.e.*, those that would cause the aggregate amount sold to all investors by the issuer in the 12 months preceding the transaction to be greater than $1 million,[441] but not more than $5 million, and those involving accredited investors who invest above the statutory investment limits).[442] We are also extending certain temporary rules relating to the financial statement requirements for Regulation Crowdfunding.

Currently, securities issued pursuant to the exemption under Section 4(a)(6) are deemed to be "covered securities" and thus the offer and sale of such securities by an issuer are not subject to State securities law registration and qualification requirements pursuant to Section 18 of the Securities Act. Nevertheless, in light of questions raised by commenters and in order to

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[439] We are not, as some commenters recommended, preempting State securities law regulation of secondary trading of securities issued in Regulation Crowdfunding offerings. We believe this recommendation merits careful consideration and an opportunity for market participants to receive notice and comment on a specific proposal.

[440] Securities Act Section 4(a)(6) currently sets the maximum offering limit at $1.07 million ($1.0 million adjusted to reflect changes in the CPI). *See* 15 U.S.C. 77d(a)(6) and 15 U.S.C. 77d-1(h). *See also* Rule 100(a)(1) of Regulation Crowdfunding.

[441] As adjusted for inflation pursuant to Section 4A(h) of the Securities Act [15 U.S.C. 77d-1(h)].

[442] In contrast, the change to permit non-accredited investors to base their investment limit on the "greater of" rather than the "lesser of" their income or net worth is a discretionary choice that we are making to carry out the statutory exemption. *See* Section 302(c) of the JOBS Act; Section 19(a) of the Securities Act [15 U.S.C. 77s(a)]. In the proposing and adopting releases for Regulation Crowdfunding, the Commission noted the statutory ambiguity in Section 4(a)(6)(B) of the Securities Act as to application of the investment limits. *See* Crowdfunding Adopting Release, at Section II.A.2. After considering the comments received, the Commission adopted a "lesser of" standard in Regulation Crowdfunding. In light of our experience with Regulation Crowdfunding since its adoption in 2015, and concerns raised that the existing limits may be hampering the utility of the exemption, however, the Commission proposed to apply a less restrictive approach by using the "greater of" standard instead of the "lesser of" standard. As discussed below, we are adopting the "greater of" standard.

provide certainty with respect to the status of the exemption and the coverage of Section 18 of the Securities Act, we are adding new 17 CFR 227.504 to Regulation Crowdfunding to provide that for purposes of Section 18(b)(3) of the Securities Act, a "qualified purchaser" means any person to whom securities are offered or sold pursuant to an offering under Regulation Crowdfunding.[443] As securities offered and sold to qualified purchasers also are "covered securities" under Section 18 of the Securities Act, this amendment should remove any doubt that State securities law registration and qualification requirements do not apply to securities offered and sold under Regulation Crowdfunding, as amended.

While approximately 2,000 offerings were initiated pursuant to Regulation Crowdfunding in the approximately three and a half years from the time the exemption first became available through December 31, 2019, market participants have expressed concern that the vitality of the market and the number of offerings is being constrained by the $1.07 million offering limit.[444] As we noted in the Proposing Release, the current offering limits may not reflect current capital raising trends.[445] Commenters further suggested that start-ups and small businesses seeking to raise between $1 million and $5 million need to spend "additional time and expense pursuing other exempt offering types" in addition to Regulation Crowdfunding in order to meet their funding needs, as the existing offering limits in Regulation Crowdfunding are insufficient to meet those needs.[446] We believe that permitting larger offerings under Regulation Crowdfunding may encourage more issuers to use the exemption and could lower

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[443] We believe it is appropriate to define "qualified purchaser" to include any person to whom securities are offered and sold pursuant to an offering under Regulation Crowdfunding. Defining qualified purchaser in this manner is consistent with the public interest because it would provide certainty as to the application of State securities law registration and qualification requirements. We also believe that offerings conducted pursuant to Regulation Crowdfunding, similar to Tier 2 offerings under Regulation A, are likely to be more national in nature. Furthermore, significant and appropriate investor protections would continue to apply, including intermediary requirements and the eligibility, disclosure, and ongoing reporting requirements for issuers, as discussed below. For similar reasons, we are also amending 17 CFR 240.12g-6 ("Rule 12g-6") to provide clarity with respect to the continuing application of that rule's conditional exemption from Section 12(g) for securities issued pursuant to Regulation Crowdfunding.

[444] *See, e.g.*, InnaMed Letter; SeedInvest Letter; and Letter from J. Vinokur, dated May 1, 2020.

[445] *See* Proposing Release, at note 231 (*citing* to 2019 OASB Annual Report, which noted companies are seeking increased capital to fund early-stage operations finding that the average seed funding increased from $1.3 million in 2010 to $5.7 million in 2018).

[446] *See, e.g.*, SeedInvest Letter; and InnaMed Letter.

the offering costs per dollar raised,[447] which would make the exemption a more efficient capital raising option for smaller issuers. At the same time, we do not believe that raising the offering limit would expand the private market at the expense of the public market. As discussed in Section IV.A below, Regulation Crowdfunding represents a relatively small segment of the private offering market, and issuers that raise capital pursuant to the exemption tend to be at a much earlier stage of development than those that conduct a traditional initial public offering. Thus, we anticipate these offerings will have only a marginal impact on the number of registered offerings.

We also believe that existing Regulation Crowdfunding requirements, including the intermediary requirements and the eligibility, disclosure, and ongoing reporting requirements for issuers will continue to provide appropriate investor protections at this higher offering limit. We acknowledge the concerns raised by commenters about the increased offering limit in light of questions regarding issuer compliance with existing Regulation Crowdfunding requirements. As discussed in more detail in Section II.B.2 above, we remind issuers and intermediaries in Regulation Crowdfunding offerings of their obligation to comply with the terms of the exemption and the serious consequences that may result from a failure to do so. At this time, we do not believe additional disclosure or other requirements on issuers or intermediaries is appropriate, or would necessarily be effective in addressing these compliance concerns.[448] Commission staff will continue to work with FINRA to assess issuer and intermediary compliance with the requirements of Regulation Crowdfunding.

For these reasons, we continue to believe that it is necessary and appropriate in the public interest and consistent with the protection of investors to raise the Regulation Crowdfunding offering limit as proposed.

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[447] *See, e.g.*, CCA Letter.

[448] We note, for example, that one commenter recommended we require a certification from an intermediary that it has reviewed a campaign for compliance prior to posting it on their platform. *See* CfPA Letter. However, intermediaries are already required to have a reasonable basis for believing that an issuer seeking to offer and sell securities through the intermediary's platform complies with requirements of Regulation Crowdfunding.

In response to commenters who recommended that we adjust the financial statement requirements or permanently adopt the temporary relief with respect to the financial statement review requirements,[449] we are extending certain provisions of the temporary final rules for an additional 18 months so that they will apply to offerings initiated under Regulation Crowdfunding between May 4, 2020, and August 28, 2022.[450]

Specifically, we are adopting new temporary Rule 201(bb) to extend the relief provided by existing temporary 17 CFR 227.201(z)(3), which applies to an eligible issuer in an offering or offerings that, together with all other amounts sold in Regulation Crowdfunding offerings within the preceding 12-month period, have, in the aggregate, a target offering amount of more than $107,000, but not more than $250,000. Such an issuer may provide financial statements of the issuer and certain information from the issuer's Federal income tax returns, both certified by the principal executive officer, in accordance with 17 CFR 227.201(t)(1) ("Rule 201(t)(1)"), instead of the financial statements reviewed by a public accountant that is independent of the issuer that would otherwise be required by 17 CFR 227.201(t)(2) ("Rule 201(t)(2)"). This temporary relief will apply only if reviewed or audited financial statements of the issuer are not otherwise available. In connection with the extension of this provision, we are also extending the disclosure requirement currently required by existing temporary 17 CFR

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[449] *See, e.g.*, Silicon Prairie Letter (recommending relaxing the financial information requirements for offerings under $1 million); Nextseed Letter (highlighting the ability under the temporary relief to raise up to $250,000 without need for CPA-reviewed financials and recommending the Commission make the temporary relief provisions permanent as a micro-offering tier below $250,000); Honeycomb Letter (noting that the current financial statement thresholds and disclosure requirements impose additional costs on issuers without providing material benefit to investors - particularly for small businesses raising under $250,000.); Letter from MainVest, Inc. dated May 7, 2020 (recommending the requirement for reviewed financials not apply for offerings under $500,000); and Letter from Republic dated Aug. 22, 2020 (recommending that the Commission permanently adopt the temporary relief or extend the relief for at least 12 months). *See also* 2019 OASB Annual Report, at 48 (recommending the Commission reevaluate Regulation Crowdfunding's disclosure obligations, and specifically suggesting that "reporting requirements could be simplified for companies raising under $250,000").

[450] These amendments will be effective upon publication in the Federal Register and will expire on March 1, 2023. We find that there is good cause for the amendments to be effective immediately upon publication because a delay in implementation would substantially undermine the relief provided by the temporary rules and could exacerbate the existing challenges faced by many small businesses in need of capital to continue their operations. We also note that these temporary amendments grant an exemption or relieve a restriction. *See* 5 U.S.C. 553(d)(1) and (3).

227.201(z)(1)(iii),[451] which requires an issuer relying on the temporary rule to provide prominent disclosure that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer.[452] We are also extending the enhanced eligibility requirements of temporary 17 CFR 227.100(b)(7)(i) and 17 CFR 227.100(b)(7)(ii).[453]

We believe that this extension of these portions of the temporary final rules is appropriate, particularly in light of the significant challenges for small businesses that COVID-19 continues to present. We continue to believe that a securities offering under Regulation Crowdfunding may be an attractive fundraising option for some small businesses at this time, particularly as a means of allowing an issuer to make use of the internet to reach out to its customers or members of its local community as potential investors as well as to existing investors. We understand that the temporary final rules have been well received to date and have proven effective for some issuers to raise capital under the current conditions, and we have received positive feedback from market participants with respect to the benefits of current temporary Rule 201(z)(3). The extension of these provisions of the temporary final rules also will provide us with the opportunity to analyze the use of the exemption and gather additional feedback from issuers, investors and other market participants as we consider its benefits and whether to adopt the provision on a permanent basis.

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[451] As part of these amendments, we have added a new provision to Rule 201 to be designated as Rule 201(z), therefore we are renumbering existing Rule 201(z) as Rule 201(aa). *See* Section II.B.2.b.

[452] We are temporarily amending the introductory paragraphs to the section of Form C entitled "Optional Question & Answer Format for an Offering Statement" to include a reminder to issuers relying on these temporary rules to review and tailor their responses to certain questions in the Form C appropriately.

[453] To rely on the temporary rules, issuers must meet the existing eligibility criteria and also cannot have been organized and cannot have been operating for less than six months prior to the commencement of the offering. In addition, an issuer that has sold securities in a Regulation Crowdfunding offering in the past must have complied with the requirements in 15 U.S.C. 77d-1(b) ("Section 4A(b)") of the Securities Act and the related rules. In connection with the amendment to extend the eligibility criteria, we are making a related amendment to Rule 301, consistent with current temporary Rule 301(d), to require that an intermediary involved in an offering by an issuer that is relying on the temporary relief must have a reasonable basis for believing that the issuer has complied with the requirements of Section 4A(b) and the related requirements of Regulation Crowdfunding in prior offerings. For this requirement, the intermediary may reasonably rely on the representations of the issuer concerning compliance with these requirements unless the intermediary has reason to question the reliability of those representations.

We are not adjusting, on either a temporary or permanent basis the financial statement requirements for offerings over $535,000. We have seen no evidence to indicate that investors should receive less information in offerings under Regulation Crowdfunding at this level, and continue to believe that the current requirements provide important information to investors. Offerings of more than $535,000 up to the increased $5 million offering limit will be subject to the financial statement requirements of 17 CFR 230.201(t)(3). We believe that this standard, which (1) requires the provision of audited financial statements similar to the requirements for other exempt offerings with higher offering limits, and (2) currently applies to issuers offering more than $535,000 of their securities, is sufficient for offerings subject to the increased $5 million offering limit.

We are amending the rules as proposed to remove or increase the investment limits for investors in Regulation Crowdfunding offerings.[454] First, we are amending the rules to no longer apply any investment limits to accredited investors. Commenters generally supported increasing the investment limits of accredited investors.[455] In addition, the 2018 Small Business Forum recommended that the Commission increase the investment limits for all investors,[456] and the 2017, 2018, and 2019 Small Business Forums, the SEC Small Business Capital Formation Advisory Committee, and the 2017 Treasury Report all recommended that the investment limits not apply to accredited investors, who face no such limits under other exemptions.[457]

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[454] Consistent with the current approach to investment limits, an issuer may rely on efforts that an intermediary is required to undertake in order to determine that the investor is an accredited investor, or that the aggregate amount of securities purchased by an investor does not cause the investor to exceed the investment limits, provided that the issuer does not have knowledge that the investor has exceeded, or will exceed, the investment limits as a result of purchasing securities in the issuer's offering. *See* Instruction 3 to 17 CFR 270.100(a)(2) of Regulation Crowdfunding.

[455] *See supra* note 431. Only one commenter expressed a specific concern regarding increasing the investment limits of accredited investors. *See* J. Pampena Letter. We believe, however, that rather than decreasing investment opportunities for non-accredited investors, permitting more investment by accredited investors may lead to a more robust market for offerings under Regulation Crowdfunding, which would provide more and better opportunities for non-accredited investors.

[456] *See* 2018 Forum Report.

[457] *See, e.g.*, 2017 Treasury Report, at 41; 2018 Forum Report; 2017 Forum Report, at 17; Recommendation of the SEC Small Business Capital Formation Advisory Committee regarding Regulation Crowdfunding (Dec. 13, 2019), *available at* https://www.sec.gov/spotlight/sbcfac/recommendation-regulation-crowdfunding.pdf. *See also* Final Report of the 2015 SEC Government-Business Forum on Small Business Capital Formation (Nov.

When the Commission considered investment limits for Tier 2 Regulation A offerings, it determined that such limitations were unnecessary for accredited investors because these individuals satisfy certain criteria that suggest they are capable of protecting themselves in transactions that are exempt from registration under the Securities Act.[458] For similar reasons, we believe that investment limits for accredited investors under Regulation Crowdfunding are unnecessary.[459] Accordingly, we believe it is appropriate in the public interest and consistent with the protection of investors to treat accredited investors under Regulation Crowdfunding in the same manner as other exempt offerings.

Second, we are amending the Regulation Crowdfunding calculation method for the investment limits for non-accredited investors to allow them to rely on the greater of their annual income or net worth. Currently, Regulation Crowdfunding imposes a limit that is the lesser of a percentage of the investor's annual income or net worth subject to an absolute maximum of $107,000.[460] Some market participants recommended basing the limits on the greater of the investor's net worth or income, noting that the accredited investor definition only requires the investor to meet *either* the net worth *or* the income standard.[461] Commenters on the proposal also generally supported increasing these investment limits.[462]

2015), *available at* https://www.sec.gov/info/smallbus/gbfor34.pdf (recommending increasing the investment limit for accredited investors). In conjunction with removing the investment limits for individual accredited investors, the 2018 Small Business Forum recommended verification of accredited investor status.

458 *See* 2015 Regulation A Release, at note 145 and accompanying text.

459 While a few commenters suggested that we add an accredited investor verification requirement, we believe that a verification requirement is unnecessary. *See, e.g.*, J. Clarke Letter; and Raise Green & New Haven Comm. Solar Letter. In making this determination, we note that there is no accredited investor verification requirement with respect to investors participating in Regulation A or other exempt offerings outside of offerings seeking to rely on Rule 506(c) and that Regulation Crowdfunding, like Regulation A, layers in additional protections for investors, such as required reporting and the use of intermediaries, that are not provided to investors in offerings relying on Rule 506(c).

460 Rule 100(a)(2) of Regulation Crowdfunding is based on the requirement in Section 4(a)(6) that provides an exemption where the aggregate amount sold to an investor by an issuer does not exceed a given percentage of the annual income or net worth of such investor. The statutory language does not expressly provide that the investor use the lesser of annual income or net worth.

461 *See supra* note 457.

462 *See supra* note 432. While one commenter expressed concern about raising the investment limits for non-accredited investors and recommended that the Commission undertake any such changes cautiously, we believe that making this incremental change appropriately allows investors greater flexibility in making choices relating to their investments and risk tolerance choices, while still retaining substantial loss limitation standards through a consistent approach to investment limits across Regulation A and Regulation Crowdfunding. *See* Morningstar Letter.

When adopting Regulation Crowdfunding, the Commission considered whether to use a "greater of" or "lesser of" standard for the exemption's investment limits and determined to use the "lesser of" standard at that time due to concerns about investors incurring unaffordable losses.[463] By contrast, when the Commission considered investment limits for Tier 2 Regulation A offerings, it determined to permit investors to look to a percentage of the greater of their annual income or net worth.[464] At that time, the Commission indicated that limiting the amount of securities that a non-accredited investor can purchase in a particular Tier 2 offering should help to mitigate concerns that such investors may not be able to absorb the potential loss of the investment and that a limitation based on a percentage of the greater of such investor's net worth/net assets and annual income/revenue is generally consistent with similar maximum investment limitations placed on investors in Title III of the JOBS Act and would help set a loss limitation standard in such offerings.[465] The amendment conforms Regulation Crowdfunding with Tier 2 of Regulation A and applies a consistent approach to limiting potential losses investors may incur in offerings conducted in reliance on the two exemptions. In light of our experience with Regulation Crowdfunding since its adoption and the concerns that the existing investment limits may be hampering the utility of the exemption, we believe it is appropriate to use this less restrictive approach. Additionally, this change provides investors with more flexibility in making their investment decisions. Moreover, we are not aware of evidence since Regulation Crowdfunding's adoption to indicate this market requires a more stringent approach to investment limits than other exemptive regimes.[466]

F. Regulation Crowdfunding and Regulation A Eligibility

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[463] *See* Crowdfunding Adopting Release, at Section II.A.2.c.

[464] *See* 17 CFR 230.251(d)(2)(i)(C)(2); and 2015 Regulation A Release, at Section II.B.4.

[465] *See* Section 301 of the JOBS Act; and 2015 Regulation A Release, at notes 161 and 162 and accompanying text.

[466] *See* 2019 Regulation Crowdfunding Report, at Section III.C.3.

The Commission's exempt offering framework includes specific eligibility restrictions excluding certain types of entities or activities by issuers that apply to both Regulation A[467] and Regulation Crowdfunding.[468] While Regulation Crowdfunding does not restrict the types of securities eligible to be sold under the exemption, the types of securities eligible for sale under Regulation A are limited to equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities.[469] The Commission proposed to amend Regulation Crowdfunding:

- To permit the use of certain special purpose vehicles to facilitate investing in Regulation Crowdfunding issuers; and
- To limit the securities eligible to be sold under Regulation Crowdfunding.

The Commission additionally proposed to amend Regulation A to exclude Exchange Act registrants that are delinquent in their Exchange Act reporting obligations from relying on the exemption.

1. Regulation Crowdfunding Eligible Issuers

Section 4A(f)(3) of the Securities Act prohibits investment companies, as defined in the Investment Company Act (or companies that are excluded from the definition of an investment

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[467] *See* 17 CFR 230.251(b). Regulation A is not available to: issuers that are organized in or have their principal place of business outside of the United States or Canada; investment companies registered or required to be registered under the Investment Company Act or business development companies; blank check companies; issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights; issuers that are required to, but that have not, filed with the Commission the ongoing reports required by the rules under Regulation A during the two years immediately preceding the filing of a new offering statement (or for such shorter period that the issuer was required to file such reports); issuers that are or have been subject to an order by the Commission denying, suspending, or revoking the registration of a class of securities pursuant to Section 12(j) of the Exchange Act that was entered within five years before the filing of the offering statement; or issuers subject to "bad actor" disqualification under 15 CFR 230.262.

[468] Section 4A specifically excludes: non-U.S. issuers; issuers that are required to file reports under Exchange Act Section 13(a) or 15(d); certain investment companies; and other issuers that the Commission, by rule or regulation, determines appropriate. *See* 15 U.S.C. 77d-1. Regulation Crowdfunding further excludes: issuers disqualified under disqualification provisions that are substantially similar to those in 17 CFR 230.506(d) ("Rule 506(d)"); issuers that have failed to comply with the annual reporting requirements under Regulation Crowdfunding during the two years immediately preceding the filing of the offering statement; and blank check companies. *See* 17 CFR 227.100(b).

[469] *See* 17 CFR 230.261 ("Rule 261"). Regulation A also specifically excludes asset-backed securities. *See* Rule 251 (providing that only "eligible securities" can be offered or sold under Regulation A); and Rule 261 (defining "eligible securities"). An asset-backed security generally means a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders. *See* 17 CFR 229.1101(c).

company under section 3(b) or 3(c) of the Investment Company Act), from using the Regulation Crowdfunding exemption. When adopting Regulation Crowdfunding, the Commission did not create, as suggested by some commenters, an exception to this statutory prohibition that would have allowed a single purpose fund organized to invest in, or lend money to, a single company, to use Regulation Crowdfunding.[470] As a result, issuers may not use special purpose vehicles that invest in a single company ("SPVs") that are investment companies (or companies that are excluded from the definition of an investment company under section 3(b) or 3(c) of the Investment Company Act) to conduct Regulation Crowdfunding offerings. Investors purchasing securities in an offering under Regulation Crowdfunding thus must hold the securities in their own name, which can create certain practical impediments to issuers' use of Regulation Crowdfunding. For example, we understand that a large number of investors on an issuer's capitalization table can be unwieldy, creating administrative complexities and potentially impeding future financing.[471]

a. Proposed Amendments

The Commission proposed to add a new exclusion under the Investment Company Act for limited-purpose crowdfunding vehicles ("crowdfunding vehicles"). Proposed Rule 3a-9 under the Investment Company Act would exclude from the definition of "investment company" under that Act a crowdfunding vehicle that meets certain conditions designed to require that it function as a conduit for investors to invest in a business that seeks to raise capital through a crowdfunding vehicle.[472] As a result, Section 4A(f)(3) of the Securities Act would

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[470] *See* Crowdfunding Adopting Release, at 71397. In explaining its decision, the Commission stated that the primary purpose of Section 4(a)(6) is to facilitate capital formation by early stage companies that might not otherwise have access to capital, and expressed its belief that investment companies did not constitute the type of issuer that Section 4(a)(6) and Regulation Crowdfunding were intended to benefit. *Id.*

[471] *See* Concept Release, at Section II.F.1.a. *See also* Proposing Release, at note 323 and accompanying text (noting that commenters on the Concept Release stated that it can be difficult to obtain consent or approval from hundreds of investors as it relates to governance issues, strategic decisions, and later financing rounds).

[472] *See* proposed Rule 3a-9(a). A crowdfunding vehicle complying with the proposed rule would not be an investment company as defined in the Investment Company Act or an entity that is excluded from the definition of investment company by section 3(b) or section 3(c) of that Act, and would therefore not be precluded from relying on Regulation Crowdfunding by Section 4A(f)(3) of the Securities Act. *See* 17 CFR 227.100(b)(3).

not preclude an SPV that meets this definition of a crowdfunding vehicle from relying on Regulation Crowdfunding.

In proposing this exclusion, the Commission expressed its belief that proposed Rule 3a-9 would be consistent with the intent of Section 4(a)(6) because it would not be aimed at allowing investment companies or similar issuers to raise capital, but rather, solely at facilitating crowdfunding offerings by eligible issuers, and under the proposed rule, a crowdfunding vehicle would serve merely as a conduit for investors to invest in a single underlying issuer and would not have a separate business purpose. The proposed crowdfunding vehicle was intended to allow investors in the vehicle to achieve the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the underlying issuer in an offering made under Regulation Crowdfunding. The proposed approach also would allow an eligible issuer ("crowdfunding issuer") to maintain a simplified capitalization table and, by reducing the administrative complexities associated with a large and diffuse shareholder base, may encourage crowdfunding issuers to offer voting rights, or other terms not currently offered as frequently to investors.[473]

Proposed Rule 3a-9 defined a crowdfunding issuer as a company that seeks to raise capital as a co-issuer in an offering with a crowdfunding vehicle that complies with all of the requirements under Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.[474] The Commission also proposed to define a crowdfunding vehicle as an issuer[475] formed by or on behalf of a crowdfunding issuer for the purpose of conducting an offering under Section 4(a)(6) of the Securities Act as a co-issuer with the crowdfunding issuer, which offering would be

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[473] *See* Proposing Release, at note 328.

[474] As co-issuers, the crowdfunding issuer and crowdfunding vehicle would be jointly relying on Regulation Crowdfunding for the combined offering of the crowdfunding issuer's securities and the crowdfunding vehicle's securities to the investors. *See, e.g.*, 17 CFR 230.140. The crowdfunding issuer would also rely on Regulation Crowdfunding, and the Form C filed in connection with the offering of the crowdfunding vehicle's securities, for the offering of its securities to the crowdfunding vehicle.

[475] Under the Investment Company Act, an issuer means every person who issues or proposes to issue any security, or has outstanding any security which it has issued. *See* 15 U.S.C. 80-2(a)(22).

controlled by the crowdfunding issuer. The proposed limitations on the nature and scope of the crowdfunding vehicle's activities were designed to ensure that the crowdfunding vehicle would function as a means for the crowdfunding issuer to raise capital rather than as an independent investment vehicle that would be subject to regulation under the Investment Company Act.

The proposed rule included several conditions for crowdfunding vehicles intended to address specific investor protection concerns raised by a vehicle that acts as a conduit for investments in a crowdfunding issuer.[476] Specifically, under the proposed rule, the crowdfunding vehicle:

- Must be organized and operated for the sole purpose of acquiring, holding, and disposing of securities issued by a single crowdfunding issuer and raising capital in one or more offerings made in compliance with Regulation Crowdfunding;
- Would not be permitted to borrow money and would be required to use the proceeds of the securities it sells solely to purchase a single class of securities of a single crowdfunding issuer;
- Would be permitted to issue only one class of securities in one or more offerings under Regulation Crowdfunding in which the crowdfunding vehicle and the crowdfunding issuer are deemed to be co-issuers under the Securities Act;
- Would be required to obtain a written undertaking from the crowdfunding issuer to fund or reimburse the expenses associated with the crowdfunding vehicle's formation, operation, or winding up, and the crowdfunding vehicle would not be permitted to receive other compensation, and any compensation paid to any person operating the vehicle would be required to be paid solely by the crowdfunding issuer;
- Would be required to maintain the same fiscal year end as the crowdfunding issuer, and maintain 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;

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[476] *See generally* proposed Rule 3a-9(a) for the proposed conditions.

- Would be required to vote the crowdfunding issuer securities, and participate in tender or exchange offers or similar transactions, only in accordance with instructions from the investors in the crowdfunding vehicle;
- Would receive all of the disclosures and other information required under Regulation Crowdfunding from the crowdfunding issuer and would then be required promptly to provide such disclosures and information to the investors and potential investors in the crowdfunding vehicle's securities and to the relevant intermediary; and
- Would be required to provide 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 provide each investor any information that it receives from the crowdfunding issuer as a shareholder of record of the crowdfunding issuer.

Under the proposal, the crowdfunding issuer and the crowdfunding vehicle would be co-issuers under the Securities Act, meaning each would be deemed to be the maker of any statements by the crowdfunding vehicle and any material misstatements or omissions with respect to the offering.[477] As co-issuers, the crowdfunding issuer and the crowdfunding vehicle would be required to jointly file a Form C, providing all of the required Form C disclosure with respect to (i) the offer and sale of the crowdfunding issuer's securities to the crowdfunding vehicle and (ii) the offer and sale of the crowdfunding vehicle's securities to investors.[478]

Finally, the Commission specifically considered, but did not propose, requiring that a registered investment adviser manage the crowdfunding vehicle. The Commission stated that it did not propose this requirement because of concerns that it could make the crowdfunding

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[477] *See, e.g.*, 17 CFR 230.140. The crowdfunding vehicle's business would consist only of the purchase of securities of the crowdfunding issuer, and it would use the sale of its own securities to make such purchases of securities of the crowdfunding issuer.

[478] The Commission proposed to amend Rule 201 of Regulation Crowdfunding and Form C to require disclosure about the co-issuer in the offering statement. Because the crowdfunding vehicle would only be acting as a conduit for the crowdfunding issuer, we did not believe that the individual investment limitations under Regulation Crowdfunding should apply to transfer of the securities from the crowdfunding issuer to the crowdfunding vehicle. In addition, the amount of securities issued by the crowdfunding issuer to the crowdfunding vehicle would not reduce the amount of securities that could be offered and sold to the investors in the crowdfunding vehicle for purposes of the offering limit in Rule 100(a) of Regulation Crowdfunding.

vehicle more than a conduit to hold the securities of the crowdfunding issuer and because of questions regarding economic feasibility.[479]

b. Comments

Commenters generally supported permitting crowdfunding issuers to use crowdfunding vehicles,[480] while a few commenters were opposed.[481] One commenter stated that crowdfunding vehicles would help issuers manage the large number of direct investors that can result from an offering under Regulation Crowdfunding and provide smaller investors with more leverage to negotiate better terms and protections.[482] Another commenter stated that SPVs may make crowdfunding safer and more profitable for investors, which could attract more capital and thereby offer more opportunities for startups.[483]

SPV Structure

Several commenters, while supportive of allowing crowdfunding issuers to use SPVs, questioned whether the proposed crowdfunding vehicle was structured appropriately.[484] Some commenters stated that the proposed structure was too prescriptive and costly, with little benefit to either investors or issuers.[485] For example, one commenter stated that investing through an SPV may have tax implications for certain investments and administrative burdens related to how the SPV is structured.[486]

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479 *See* Proposing Release, at Section II.F.1.

480 *See, e.g.,* Wefunder Letter; SEC SBCFAC Letter; CCA Letter; J. Clarke Letter; SEI Letter; NextSeed Letter; W. Hubbard Letter; Engine Letter; Raise Green & New Haven Comm. Solar Letter; D. Burton Letter; Rep. McHenry Letter; CrowdCheck Letter; and ABA Letter. *See also* 2019 OASB Annual Report, at 48.

481 *See* CII Letter; and CFA Letter (stating that allowing the use of SPVs "would further undermine transparency of private offerings and further erode incentives private companies have to become public companies once they have acquired a large and widely dispersed shareholder base.").

482 *See* ABA Letter. *See also* J. Clarke Letter (stating that the proposal would encourage issuers to offer voting rights to investors).

483 *See* Engine Letter.

484 *See e.g.*, Wefunder Letter; CrowdCheck Letter; Crowdwise Letter; and D. Burton Letter.

485 *See* Wefunder Letter; D. Burton Letter; and CrowdCheck Letter.

486 *See* Crowdwise Letter (stating that the proposed approach would create a Schedule K-1 burden for issuers with respect to SPVs organized as limited liability companies, and disadvantage investors by disqualifying them from certain preferential tax treatment).

Several commenters proposed alternative structures. One commenter suggested that an exempt reporting adviser ("ERA") should be able to form SPVs.[487] This commenter also stated that an appropriately structured SPV should include a compensated lead investor associated with the ERA.[488] Other commenters suggested that a crowdfunding vehicle should be managed by a registered investment adviser, ERA, or "compensated administrator" with a fiduciary duty to investors.[489] Some commenters stated that the Commission would need to address certain issues before a registered investment adviser would be interested in participating in this market, such as compliance with the Custody Rule.[490] Other commenters opposed requiring a registered investment adviser to manage the SPV,[491] with one commenter stating that the associated costs might deter small-medium enterprises, community groups, or women- and minority-owned businesses from utilizing an SPV.[492] One commenter suggested that a funding portal would be better situated to manage a crowdfunding vehicle due to the vehicle's small size.[493] Another commenter stated that many small investors do not want to spend time reading legal documents to authorize corporate actions and would rather authorize a lead investor to make such

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487 *See* Wefunder Letter. The commenter also requested guidance from the Commission that, in the absence of an ERA-advised SPV structure, an SPV would be permitted to hire a registered investment adviser that does not custody securities and that is permitted to charge performance fees to Regulation Crowdfunding investors, provided that certain conditions are met.

488 An ERA is an investment adviser that qualifies for the exemption from registration under Section 203(l) of the Advisers Act because it is an adviser solely to one or more venture capital funds, or under 17 CFR 275.203(m)-1 because it is an adviser solely to private funds and has assets under management in the United States of less than $150 million. *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Release No. IA-3222 (June 22, 2011) [76 FR 39646 (July 6, 2011)]. This commenter stated that the Commission should create a "new class" of ERAs that are exempt from registration for an "investment adviser to one or more crowdfunding vehicles" that would be able to receive incentive compensation (and share such compensation with a lead investor), and as such not be subject to the audit requirement under 17 CFR 275.206(4)-2 (the "Custody Rule"), which would otherwise make the arrangement uneconomical. *See* Wefunder Letter.

489 *See* CrowdCheck Letter; NextSeed Letter (stating that a registered investment adviser or ERA could ensure all legal, regulatory and tax requirements of operating the vehicle are fulfilled); and NASAA Letter (stating rule should require the SPV be managed by a registered investment adviser or another fiduciary manager).

490 *See* CrowdCheck Letter; and Wefunder Letter.

491 *See* J. Clarke Letter; W. Hubbard Letter; and Raise Green & New Haven Comm. Solar. Letter.

492 *See* Raise Green & New Haven Comm. Solar Letter.

493 *See id.*

decisions.[494] Finally, one commenter suggested using an "SEC-registered transfer agent" as a custodian, with the "portal entity" paying all associated costs.[495]

SPV Conditions

Most commenters generally supported permitting crowdfunding issuers to use crowdfunding vehicles but suggested certain modifications to the proposed conditions.[496] For example, two commenters stated that they supported the proposed conditions and restrictions designed to require the crowdfunding vehicle act as a conduit for investors to invest in a single crowdfunding issuer.[497] One of these commenters also supported the required redemption of the crowdfunding vehicle's securities upon a liquidity event at the crowdfunding issuer level.[498] However, another commenter stated that the rule should not limit the number of issuers in which a crowdfunding vehicle can invest.[499] Similarly, several commenters stated that the rule should permit investment advisers to form funds for non-accredited investors that invest in multiple crowdfunding issuers.[500] Additionally, commenters suggested allowing crowdfunding vehicles to issue more than one class of securities.[501]

Commenters were generally supportive of the proposed conditions intended to provide investors in the crowdfunding vehicle the same economic exposure, voting power, and Regulation Crowdfunding disclosures as if the investors had invested directly in the

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494 *See* Wefunder Letter.

495 *See id.*

496 *See* J. Clarke Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; CrowdCheck Letter; and SEI Letter.

497 *See* J. Clarke Letter; and W. Hubbard Letter.

498 *See* W. Hubbard Letter.

499 *See* SEI Letter.

500 *See* Hubbard Letter; Raise Green & New Haven Comm. Solar Letter (noting that this approach would decrease investors' risk by spreading their capital over multiple offerings and increase the ease with which an issuer could raise capital, as it would be "directed from one investment adviser and could be done in a recurrent fashion."); and CrowdCheck Letter.

501 *See* Raise Green & New Haven Comm. Solar Letter (also opposing requiring a crowdfunding vehicle to redeem or offer to repurchase its securities if there is a liquidity event at the crowdfunding issuer level and the requirement in the proposal that the crowdfunding issuer pay the costs of the crowdfunding vehicle); and W. Hubbard Letter. *But see* CrowdCheck Letter (stating that crowdfunding vehicles do not need to have multiple classes of securities since they are likely to be formed as series limited liability companies).

crowdfunding issuers, but some suggested certain modifications.[502] Some commenters also supported deeming the crowdfunding vehicle and the crowdfunding issuer to be co-issuers for purposes of the Securities Act.[503] One commenter also suggested that over time the Commission should lessen the rule's restrictions.[504]

One commenter supported requiring crowdfunding vehicles to maintain a one-to-one relationship between the crowdfunding issuer securities it owns and the crowdfunding vehicle securities outstanding to provide investors in the crowdfunding vehicle the same economic exposure as they had invested directly in the crowdfunding issuer.[505] Other commenters opposed this one-to-one requirement.[506]

Commenters generally supported the proposal's requirement that the crowdfunding vehicle be required to seek instructions from its investors to vote the crowdfunding issuer securities it holds, and to participate in tender or exchange offers or similar transactions conducted by the crowdfunding issuer.[507] One commenter opposed this requirement, and asked the Commission to fully articulate what actions the SPV will take on behalf of its investors or, alternatively, to adopt a principles-based rule that would require the SPV to take all actions directed by its investors collectively.[508] One commenter suggested that the crowdfunding vehicle should automatically vote with the majority to simplify the voting process.[509] Other commenters stated that the rule should also address appraisal rights and allow for proxies.[510]

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502 *See* J. Clarke Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

503 *See* Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

504 *See* W. Hubbard Letter.

505 *See* J. Clarke Letter.

506 *See* CrowdCheck letter (stating that exact replication of rights is not possible since a crowdfunding issuer may be a corporation, an LLC or a limited partnership formed under the laws of any State or territory, while the crowdfunding vehicle will have to be a pass-through entity); and Raise Green & New Haven Comm. Solar Letter.

507 *See* J. Clarke Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

508 *See* NASAA Letter.

509 *See* J Clarke Letter.

510 *See* W. Hubbard Letter; and Raise Green & New Haven Comm. Solar Letter.

Commenters generally supported the proposed rule's disclosure requirements.[511] One commenter stated that the disclosures would improve compliance with ongoing reporting requirements under Regulation Crowdfunding by requiring the crowdfunding issuer to provide mandated information.[512] Another commenter stated that the proposed requirements would provide shareholders with the necessary information to determine whether to direct the crowdfunding vehicle to assert Federal and State rights for shareholders and would adequately pass through such rights.[513]

Form C Filings

Commenters supported requiring crowdfunding issuers and crowdfunding vehicles to jointly file a Form C, and several commenters noted its simplicity and efficiency.[514] One commenter also stated that having both parties file the same Form C and the same Form C-AR would reduce market confusion, help investors access information more easily, and assist the administrator of the crowdfunding vehicle in enforcing the crowdfunding issuer's ongoing reporting obligations.[515]

Some commenters supported requiring a crowdfunding issuer to file its own Form C if it is separately offering securities through a crowdfunding vehicle and directly to investors.[516] The commenters were concerned a joint filing in these circumstances could lead to investor confusion. Other commenters opposed this approach, stating that a joint form in these circumstances is necessary to focus the investment on the venture, instead of the crowdfunding vehicle.[517]

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511 *See* J. Clarke Letter; W. Hubbard Letter; and CrowdCheck Letter.

512 *See* CrowdCheck Letter.

513 *See* Hubbard Letter. The commenter also stated that while disclosure in writing of the differences may suffice from a substantive standpoint, "the mechanics and funding for vehicle operations will likely require, from an operational standpoint, a separate vehicle account with funds deemed sufficient for such purposes." *See id.*

514 *See* J. Clarke Letter; SEI Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter (noting that filing obligations of the crowdfunding issuer and the crowdfunding vehicle should be coterminous and coordinated).

515 *See* CrowdCheck letter.

516 *See* W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

517 *See* J. Clarke Letter; and SEI Letter.

Treatment under Other Sections of the Securities Laws

The Commission stated in the Proposing Release that a crowdfunding vehicle may constitute a single record holder for purposes of Section 12(g) of the Exchange Act, rather than treating each of the crowdfunding vehicle's investors as record holders, which would be the case if they had invested in the crowdfunding issuer directly, and solicited comment on the appropriate treatment.[518] Commenters generally supported treating a crowdfunding vehicle as a single record holder for Section 12(g) purposes.[519] Some of these commenters stated that treating crowdfunding vehicles as a single record-holder for Section 12(g) eases record-keeping, capital structures, and entity development[520] and is consistent with what they believed to be the intent of Section 12(g).[521] Commenters opposing this treatment stated that they were concerned that it would allow private companies to avoid going public and therefore reduce market transparency.[522]

The Proposing Release requested comment on whether the Commission should further address the status of a crowdfunding vehicle and persons operating the vehicle for purposes of the definition of broker under Section 3(a)(4) of the Exchange Act or dealer under Section 3(a)(5) of the Exchange Act. Commenters addressing the issue agreed that further clarity would be helpful but suggested differing approaches.[523]

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[518] *See* Proposing Release, at Request for Comment 76 and text accompanying notes 420 and 421.

[519] *See* Wefunder Letter (also requesting clarification that it is permissible for a securities intermediary to hold securities in "street name," and that "that those beneficial owners don't count towards the 12(g) threshold."); J. Clarke Letter; Carta Letter (noting that securities issued pursuant to Regulation Crowdfunding are conditionally exempted from Section 12(g)'s holder of record limit, but commending the Commission for proposing that the SPV be treated as a single holder of record to minimize any concerns around this threshold for those issuers who may have concerns.); W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter. *See also* 2019 OASB Annual Report, at 48 (suggesting that allowing SPVs to be used in Regulation Crowdfunding offerings would mitigate concerns related to Section 12(g)).

[520] *See* W. Hubbard Letter.

[521] *See* Raise Green & New Haven Comm. Solar Letter.

[522] *See* CFA Letter; and AFREF letter.

[523] *See* J. Clarke Letter (requesting the Commission clarify that the portal platform is acting as the broker, since the SPV is not taking dealer inventory risk); W. Hubbard Letter (suggesting "[a] regulatorily conclusive presumption at some point statutorily codified may be helpful."); Raise Green & New Haven Comm. Solar Letter (stating a need for "a safe harbor to assure a crowdfunded issuer and for the intermediary that neither would trigger registration as a broker under Section 15(a) of the Exchange Act."); and CrowdCheck Letter (stating that "a [registered investment adviser] operating a crowdfunding vehicle … would not be a broker-dealer and that it would be appropriate for the Commission to confirm that doing so would not result in the operator being required to register as either a broker or a dealer.").

Finally, with respect to the proposed definition of "crowdfunding issuer," one commenter stated that it was unclear in the proposed rule whether the offering or the crowdfunding vehicle would be required to comply with all of the requirements of Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.[524]

c. Final Amendments

We are adopting Rule 3a-9 under the Investment Company Act, substantially as proposed, to exclude from the definition of "investment company" under that Act a crowdfunding vehicle that meets certain conditions designed to require that it function as a conduit for investors to invest in a business that seeks to raise capital through a crowdfunding vehicle. After considering the comments on the proposed structure and alternative structures commenters suggested, we believe that the "conduit" structure we proposed is consistent with the intent of Section 4(a)(6). We also continue to believe that this conduit structure would address concerns associated with managing the potentially large number of direct investors that could result from a crowdfunding offering.[525]

While some commenters suggested requiring a registered investment adviser or ERA to manage a crowdfunding vehicle, we do not believe this condition is necessary from an investor protection perspective given the conditions set forth in Rule 3a-9. For similar reasons, we do not believe it is necessary to create a new exemption from registration with the Commission for advisers to crowdfunding vehicles.[526] Collectively, the conditions in the rule require the crowdfunding vehicle to act solely as a conduit by limiting the scope of the activities in which the crowdfunding vehicle can engage, and restricting the compensation it can receive. In particular, Rule 3a-9's conditions are designed to limit the crowdfunding vehicle's activities to that of acting solely as a conduit to directly hold the securities of the crowdfunding issuer

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[524] *See* ABA Letter (suggesting that the rule text be revised to state "a company that seeks to raise capital as a co-issuer with a crowdfunding vehicle in an offering that complies with all of the requirements under Section 4(a)(6) of the Securities Act and Regulation Crowdfunding").

[525] In particular, the crowdfunding vehicle may be able to appear as a single entry on the crowdfunding issuer's capitalization table. Several commenters stated that the permitting crowdfunding vehicles would help solve the "messy cap table" issues. *See* CrowdCheck Letter; and W. Hubbard Letter.

[526] *See* Wefunder Letter.

without the ability for independent investment decisions to be made on behalf of the crowdfunding vehicle.

Consistent with the concerns raised by commenters with respect to costs, we also continue to believe that it would not be economically feasible to require a registered investment adviser to manage the vehicle.[527] For example, we believe that compliance with the Custody Rule, coupled with the small size of the typical crowdfunding offering[528] and the fees and other expenses associated with operating a registered investment adviser, would not make it economically feasible for a registered investment adviser to serve as the manager of a crowdfunding vehicle. As some commenters suggested, requiring an adviser to manage the crowdfunding vehicle, along with the associated costs, also could deter small to medium enterprises, or women- or minority-owned businesses, which may not have access to such investment advisory expertise, from using the crowdfunding vehicle.[529] It is also unlikely that a registered investment adviser could receive performance-based compensation for managing a crowdfunding vehicle, since the typical crowdfunding investor may not meet the threshold to qualify as a qualified client.[530] We similarly do not believe that it would be economically feasible to require an ERA to manage the vehicle. Given that one of our objectives is for an investor to achieve the same economic exposure as if he or she had invested directly in the crowdfunding issuer, we continue to believe that it is not appropriate for investors in the crowdfunding vehicle to bear directly the cost of any compensation paid to any person operating

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527 *See* Proposing Release, at text accompanying note 349.

528 Between May 16, 2016, and December 31, 2018, the average Regulation Crowdfunding offering had a maximum offering amount of approximately $577,385 and raised approximately $208,300 (*see* 2019 Regulation Crowdfunding Report, at 4), with a maximum offering size of $1.07 million pursuant to Rule 100(a)(1) of Regulation Crowdfunding.

529 *See* Raise Green & New Haven Comm. Solar Letter.

530 17 CFR 275.205-3 permits registered investment advisers to receive performance-based compensation only when the client is a qualified client. The rule's definition of "qualified client" includes a natural person who, or a company that, immediately after entering into the investment contract has at least $1,000,000 under the management of the investment adviser, and a natural person who, or a company that, the investment adviser entering into the investment contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $2,100,000 (exclude the value of a person's primary residence and certain associated debt).

the vehicle, and we are not convinced that the issuer would be willing to bear the additional cost associated with hiring an investment adviser, whether registered or exempt from registration.

We also do not believe that we should expand the scope of the activities in which the crowdfunding vehicle can engage and allow a compensated lead investor to make decisions on behalf of all investors. We believe this approach would be inconsistent with the "conduit" structure we are using to ensure that there is no material difference between an investment in the crowdfunding issuer and the crowdfunding vehicle. We also are concerned that a compensated lead investor may not serve as an advocate for the interests of other investors in the vehicle, given the potential conflicts of interest that could arise between the lead investor and other investors in the vehicle. For similar reasons, a "SEC-registered transfer agent" structure is inconsistent with the "conduit" structure we are adopting in this release.[531]

We recognize that there are costs associated with organizing and maintaining the crowdfunding vehicle under Rule 3a-9. However, we believe these costs and burdens are necessary to provide investors in the crowdfunding vehicle the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer. As discussed in Section IV.C.6 below, because the use of the crowdfunding vehicle structure will be voluntary, we expect issuers to use a crowdfunding vehicle only when an issuer determines that the benefits justify the costs. The balance of these tradeoffs is likely to vary depending on a number of factors, including the issuer's offering experience, potential for raising follow-on financing from a large investor, costs associated with the creation and administration of the crowdfunding vehicle, and the number of small investors participating in the crowdfunding offering.

Some commenters recommended that we permit advisers to form funds for non-accredited investors to invest in multiple crowdfunding issuers, effectively creating a "private

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[531] The commenter also requested guidance from the Commission on two additional issues that we believe are outside the scope of this rulemaking. *See supra* notes 493 and 517.

fund" like structure for non-accredited investors. This "fund" structure is inconsistent with the "conduit" nature of the crowdfunding vehicle structure in Rule 3a-9, which underlies the limited exemption from Section 3(a) of the Investment Company Act that we are adopting. In addition, this conduit nature also protects investors by simply passing along the same exposures, rights and disclosures as if they had invested directly in the crowdfunding issuer in an offering made under Regulation Crowdfunding.[532]

In response to the commenter who stated that it was unclear whether the offering or the crowdfunding vehicle would be required to comply with applicable requirements, we are slightly modifying the definition of "crowdfunding issuer" from the proposal to clarify that the crowdfunding issuer is acting as a co-issuer with the crowdfunding vehicle and the combined offering of the crowdfunding issuer's securities and the crowdfunding vehicle's securities must comply with of Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.

In order to clarify that we do not intend to permit a crowdfunding vehicle to invest in another crowdfunding vehicle, creating a multi-tier structure to invest in one crowdfunding issuer, we are slightly modifying proposed Rule 3a-9(a)(1) to specify that crowdfunding vehicles must be 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 in compliance with Regulation Crowdfunding. As discussed below, we believe this is appropriate given our treatment of the crowdfunding vehicle under Section 12(g) of the Exchange Act in order to prevent a multi-tier crowdfunding vehicle from further excluding investors from the Section 12(g) calculation.

In response to commenters who requested guidance on this point, we are clarifying that a crowdfunding vehicle and persons operating the vehicle will not implicate the broker-dealer registration requirements of Section 15(a) of the Exchange act so long as the crowdfunding vehicle and persons operating the vehicle limit their activities solely to those permitted by new Rule 3a-9. Under Rule 3a-9, the crowdfunding vehicle would be a co-issuer formed by or on

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[532] *See* Raise Green & New Haven Comm. Solar Letter.

behalf of the underlying crowdfunding issuer to serve merely as a conduit for investors to invest in the crowdfunding issuer and will not have a separate business purpose. Issuers generally are not considered to be "brokers" within the meaning of Section 3(a)(4) of the Exchange Act because they sell securities for their own accounts and not for the accounts of others; nor are issuers generally considered to be "dealers" within the meaning of Section 3(a)(5) of the Exchange Act because they do not buy and sell their securities for their own accounts as part of a regular business. Further, given the limited activities in which a crowdfunding vehicle may engage under Rule 3a-9 and, in particular, the limitations 17 CFR 270.3a-9(a)(4) places on the receipt of compensation by and the payment of compensation to the crowdfunding vehicle, the Commission similarly does not believe that a person operating the crowdfunding vehicle in accordance with Rule 3a-9 would be in the business of effecting securities transactions for the account of others, or in the business of buying and selling securities for the account of the crowdfunding vehicle.

We are adopting the conditions, as proposed, to address specific investor protection concerns raised by a vehicle that acts as a conduit for investments in a crowdfunding issuer.[533] While some commenters suggested modifications to these conditions to expand the crowdfunding vehicle's permissible investments, we believe these capabilities would make the crowdfunding vehicle more like a traditional investment fund, rather than merely a conduit entity for a single issuer consistent with its purpose. For the same reasons, we also do not believe that it is appropriate to permit the crowdfunding vehicle to issue different securities for different rounds of a Regulation Crowdfunding offering or to issue multiple classes of securities. Additionally, consistent with the crowdfunding vehicle's purpose as a conduit, the rule will require the crowdfunding vehicle to redeem or offer to repurchase its securities if there is a liquidity event at the crowdfunding issuer level since its reason for existence will cease on the occurrence of such liquidity event.

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[533] *See* 17 CFR 270.3a-9(a) ("Rule 3a-9(a)").

We disagree with one commenter's suggestion that we eliminate the requirement that the crowdfunding issuer pay the costs of the crowdfunding vehicle.[534] The crowdfunding vehicle provides direct benefits to the crowdfunding issuer, such as reducing capitalization table concerns and providing for greater efficiency for the administration of a large and diffuse investor base, and we believe that it is appropriate for the crowdfunding issuer itself to bear the direct costs of the crowdfunding vehicle. Additionally, requiring investors in the crowdfunding vehicle to bear directly the costs of the crowdfunding vehicle would be inconsistent with our goal of providing those investors with the same economic exposure as if they had invested directly in the crowdfunding issuer given the conduit nature of the SPV structure.

As one commenter pointed out, because investors are investing in the crowdfunding vehicle, and not directly in the crowdfunding issuer, there may be slight differences in the rights in the crowdfunding vehicle that investors receive.[535] However, we do not believe these slight differences in rights should in any way affect the ability of the crowdfunding vehicle to issue securities with rights that are materially indistinguishable from the rights a direct investor in the crowdfunding issuer would have. The rule as adopted will require a one-to-one relationship between the number, denomination, type and rights of crowdfunding issuer securities the crowdfunding vehicle owns and the number, denomination, type, and rights of its securities outstanding to ensure that there is no material difference in rights between investing in the crowdfunding vehicle and investing directly in the crowdfunding issuer. This requirement is designed to ensure that the crowdfunding vehicle maintains its character as a conduit to the crowdfunding issuer.

With respect to a commenter's concerns regarding voting, we do not believe that the rule is too narrow with respect to the specific actions the crowdfunding vehicle is required to take,

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[534] *See* Raise Green & New Haven Comm. Solar Letter. A third-party (*e.g.,* a funding portal) could contribute to the issuer's coverage of these costs, as long as the crowdfunding issuer, and not the crowdfunding vehicle, ultimately bears the costs.

[535] *See* CrowdCheck Letter (stating that the exact replication of the rights attached to the securities of the crowdfunding issuer is impossible because of, for example, possible differences in legal structure and state of incorporation).

nor do we think it is too ambiguous with respect to the assertion of investor rights.[536] The rule's voting conditions were designed to provide flexibility, knowing that it is impossible to anticipate every possible action that a crowdfunding vehicle will need to take in its lifespan. Furthermore, in response to one commenter's suggestion that we address appraisal rights,[537] we believe that the assertion of such rights is captured under the prong of the rule that provides 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.[538]

We recognize that permitting the crowdfunding vehicle to vote automatically with the majority or permitting the crowdfunding investors to otherwise delegate voting authority may simplify the voting process.[539] However, we do not believe the rule should permit either approach to voting because both would be inconsistent with the vehicle's purpose, which is to act merely as a conduit and not an independent investment entity like a fund or other similar investment vehicle. Furthermore, we do not believe that a registered investment adviser is necessary to assert rights attendant to an investment in the issuer as the ability to assert such rights (and the flow through of information related to thereto) will pass directly to investors as if they were direct investors in the crowdfunding issuer.[540]

We are adopting as proposed the requirement that crowdfunding vehicles jointly file a Form C with the crowdfunding issuer,[541] as opposed to requiring that each file a separate Form C or only requiring the crowdfunding vehicle to file a Form C. We continue to believe that by jointly filing a Form C describing both transactions and providing disclosure about both co-issuers, investors will be provided all information necessary to analyze both their direct

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536 *See* NASAA Letter.

537 *See* W. Hubbard Letter.

538 *See* 17 CFR 270.3a-9(a)(9).

539 *See* J. Clarke Letter; W. Hubbard Letter.

540 *See* CrowdCheck Letter (suggesting this is an area where a pro-active registered investment adviser could better provide investor protection).

541 *See* amended Rule 201 of Regulation Crowdfunding and Form C.

investment in the crowdfunding vehicle and the terms of the crowdfunding vehicle's investment in the crowdfunding issuer.[542] This approach also will allow investors to review the entire business of the crowdfunding issuer and crowdfunding vehicle in one location (avoiding any confusion that could arise if the crowdfunding vehicle and crowdfunding issuer provided separate disclosure on the separate transactions, for example, on separate Forms C).

Additionally, we agree with commenters that supported requiring a crowdfunding issuer to file its own Form C if it is separately offering securities both through a crowdfunding vehicle and directly to investors, and are therefore clarifying this in Rule 203(a)(1). We believe that to do otherwise, as noted by commenters, would likely be confusing to investors and overcomplicate and unnecessarily burden the preparation, compliance, and related administrative responsibilities of both the crowdfunding issuer and the crowdfunding vehicle. We do not believe, as one opposing commenter suggested, that having two Form Cs in this context would only promote confusion, as each separate offering would have its own corresponding Form C.

As stated in the Proposing Release, we continue to believe that, because the crowdfunding vehicle is only acting as a conduit for the crowdfunding issuer, the individual investment limitations under Regulation Crowdfunding should not apply to transfer of the securities from the crowdfunding issuer to the crowdfunding vehicle.[543] In addition, we do not believe that the amount of securities issued by the crowdfunding issuer to the crowdfunding vehicle should reduce the amount of securities that could be offered and sold to the investors in the crowdfunding vehicle for purposes of the offering limit in Rule 100(a) of Regulation Crowdfunding. To clarify this treatment of the transfer of securities from the crowdfunding issuer to the crowdfunding vehicle, we are amending 17 CFR 227.100(d) to state that a crowdfunding vehicle is not considered an investor for the purposes of Regulation Crowdfunding.

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[542] *See* 17 CFR 227.201(m). *See also* J. Clarke Letter; SEI Letter; W. Hubbard Letter; Raise Green & New Haven Comm. Solar Letter; and CrowdCheck Letter.

[543] *See* Proposing Release, at note 333.

After considering comments, we have determined that a crowdfunding vehicle should constitute a single record holder in the crowdfunding issuer for purposes of Section 12(g) of the Exchange Act, but only to the extent that all investors in the crowdfunding vehicle are natural persons. As a result, we are adopting amendments to Exchange Act Rule 12g5-1. New Rule 12g5-1(a)(9) will specify that, for purposes of determining whether a crowdfunding issuer is required to register a class of equity securities with the Commission pursuant to Section 12(g)(1) of the Exchange Act, a crowdfunding issuer may exclude securities issued by a crowdfunding vehicle in accordance with Rule 3a-9 that are held by natural persons, but must include securities issued by a crowdfunding vehicle that are held by investors that are not natural persons.[544] The same provision will also apply to a crowdfunding vehicle, which is a separate legal entity from the crowdfunding issuer and itself is subject to Section 12(g). In connection with this new provision, we are also amending Rule 12g5-1(a)(2) to clarify that a crowdfunding issuer that makes use of Rule 3a-9 should look to new Rule 12g5-1(a)(9), even though the crowdfunding vehicle may otherwise have been considered a corporation, partnership, trust or other organization for purposes of Rule 12g5-1(a)(2). Regardless of the crowdfunding vehicle's Section 12(g) treatment, under the final rules, investors in the crowdfunding vehicle will have the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer.

We believe that this treatment of natural person and non-natural person investors is appropriate in light of the novel crowdfunding issuer-crowdfunding vehicle structure we are adopting and the types of offerings the Crowdfunding exemption was intended to facilitate.[545] It recognizes that the crowdfunding vehicle is a separate organization, holding the

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[544] For purposes of the crowdfunding vehicle's calculation of holders of record, such non-natural persons will be treated the same way they would be if they held the crowdfunding issuer's securities directly.

[545] *See* Crowdfunding Adopting Release, at note 2 and text accompanying note 2 (discussing the intent of the crowdfunding provisions of the JOBS Act to help provide startups and small businesses with capital by making relatively low dollar offerings of securities, featuring relatively low dollar investments by the "crowd," less costly).

crowdfunding issuer securities in its own name, but by counting non-natural persons differently reduces the risk that the structure is used by either the crowdfunding issuer or the crowdfunding vehicle to further exclude investors from the Section 12(g) calculation.

Although commenters expressed concern that treating the crowdfunding vehicle as a single entity for Section 12(g) purposes would allow crowdfunding issuers to delay having to register a class of equity securities under Section 12(g) and reduce transparency, we do not believe it is necessary to require a crowdfunding issuer to "look through" the crowdfunding vehicle to count all of the holders in the vehicle. While this may result in some crowdfunding issuers being able to delay Exchange Act registration, we note that, as is the case for any Regulation Crowdfunding issuer, if the crowdfunding issuer and crowdfunding vehicle both meet the terms of Rule 12g-6, they will be able to rely on that conditional exemption. As a result, only the largest issuers that sell securities under Regulation Crowdfunding are likely to trigger a Section 12(g) registration requirement at any time, regardless of the approach we are adopting. Further, we believe that concerns about transparency are mitigated by the existing ongoing reporting requirements of Regulation Crowdfunding, which are tailored to the types of issuers and offerings the exemption is intended to accommodate.[546] Finally, not counting natural persons holding through the crowdfunding vehicle as holders for Section 12(g) purposes also has no impact on the requirement that investors in the crowdfunding vehicle receive the same disclosures as if they had invested directly in the crowdfunding issuer, ensuring that the investors have the full transparency into the crowdfunding issuer required by Regulation Crowdfunding.

We also do not agree with the commenter that suggested that the proposed crowdfunding vehicle is a complex and costly way to have one record holder for the purposes of Section 12(g) without benefits to the issuer that still needs to communicate with possibly

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[546] *See, e.g.*, Crowdfunding Adopting Release, at Section II.B.1.a.(1)(b)(iii) (noting that issuers engaging in crowdfunding transactions may have businesses at various stages of development in different industries, and the need for flexibility for these issuers regarding what information they disclose about their businesses).

thousands of strangers to make corporate decisions. Rule 3a-9 allows issuers to shift the administrative burden to the crowdfunding vehicle, meaning the crowdfunding vehicle could engage a third party (such as a funding portal) to handle the burden of communicating with investors regarding votes and for other administrative matters.

2. Regulation Crowdfunding Eligible Securities

Unlike Regulation A, which limits the types of securities eligible for sale to equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities,[547] Regulation Crowdfunding does not restrict the type of security that may be offered and sold in reliance on the exemption. As a result, issuers using Regulation Crowdfunding have offered and sold a number of non-traditional securities, such as Simple Agreements for Future Equity ("SAFEs"), Simple Agreements for Future Tokens, and certain revenue sharing agreements.

a. Proposed Amendments

The Commission proposed to amend Regulation Crowdfunding to harmonize the rule with Regulation A and limit the types of securities that may be offered under the exemption to correspond with the eligible securities provision of Regulation A. As proposed, the types of securities eligible for sale in an offering under Regulation Crowdfunding would be limited to equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities.

b. Comments

Commenters were divided on whether to revise Regulation Crowdfunding to restrict the securities eligible under the exemption to those included in Regulation A's list of eligible securities. Some commenters generally supported harmonizing the eligible securities under the two exemptions,[548] while other commenters supported harmonizing the exemptions by citing

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[547] *See* 17 CFR 230.261.

[548] *See, e.g.*, ABA Letter; SEI Letter; SEC SBCFAC Letter; Wefunder Letter; and Letter from Y Combinator dated May 29, 2020 ("Y Combinator Letter"). Some of these commenters supported harmonization but indicated that SAFEs should be allowed under Regulation Crowdfunding. *See* Wefunder Letter; and Y Combinator Letter.

concerns regarding the use of SAFEs.[549] One of the commenters who supported harmonizing the eligible securities under the two exemptions specifically stated that "tokenized securities and other forms of digital assets should not be included as eligible securities under Regulation Crowdfunding" as they pose particular risks to investors.[550] A number of commenters specifically opposed revising Regulation Crowdfunding to track the securities eligible under Regulation A.[551] Of these commenters, many recommended there be no restrictions on the types of securities that can be offered under Regulation Crowdfunding.[552]

Commenters were similarly divided on whether to permit SAFEs under Regulation Crowdfunding. A number of commenters generally opposed revising the Regulation Crowdfunding eligible securities to specifically prohibit the offering and selling of SAFEs.[553] These commenters suggested that prohibiting the use of SAFEs under Regulation Crowdfunding would limit the usefulness of the exemption for many issuers[554] and indicated that there was not significant evidence that SAFEs pose undue risks for investors.[555] Another commenter recommended the Commission require issuers and portals to disclose a list of "potentially risky or problematic deal terms" in lieu of prohibiting SAFEs.[556] In contrast, a

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549 *See, e.g.*, CrowdCheck Letter; and CFA Letter.

550 *See* ABA Letter (expressing concern that non-traditional securities can create confusion for retail investors and potentially jeopardize the reputation of the Regulation Crowdfunding market and further recommending that tokenized securities and other forms of digital assets should not be included as eligible securities under Regulation Crowdfunding due to the continued regulatory uncertainty and risks that they pose to investors and issuers).

551 *See, e.g.*, J. Clarke Letter; W. Hubbard Letter; Letter from Shane Hadden dated May 26, 2020 ("S. Hadden Letter"); Silicon Prairie Letter; Chamber of Digital Commerce Letter; Letter from Vezzit, Inc. dated July 13, 2020 ("Vezzit Letter"); Raise Green & New Haven Comm. Solar Letter; and Ketsal Letter.

552 *See, e.g.*, S. Hadden Letter; Silicon Prairie Letter; Chamber of Digital Commerce Letter; Vezzit Letter; Raise Green & New Haven Comm. Solar Letter; and Ketsal Letter.

553 *See, e.g.*, S. Hadden Letter; Wefunder Letter; Y Combinator Letter; Silicon Prairie Letter; Republic Letter; NextSeed Letter; Chamber of Digital Commerce Letter; Vezzit Letter; Raise Green & New Haven Comm. Solar Letter; InnaMed, et al. Letter; Crowdwise Letter; Ketsal Letter; and Letter from Marshall E. Uzzle and Ron Montana dated June 1, 2020. Some of these commenters also contended that harmonizing securities eligible under Regulation Crowdfunding with Regulation A would not prohibit the use of SAFEs, as SAFEs are "securities convertible into equity securities." *See* Letter from Joe Spivak dated Mar. 18, 2020; Y Combinator Letter; and Republic Letter.

554 *See, e.g.*, Wefunder Letter; and Republic Letter.

555 *See* Vezzit Letter.

556 *See* Crowdwise Letter.

number of commenters supported explicitly prohibiting the offering and selling of SAFEs under Regulation Crowdfunding.[557]

c. Final Amendments

We are not adopting the proposed amendments to harmonize the securities eligible under Regulation Crowdfunding with the securities eligible under Regulation A at this time in light of commenters' concerns that doing so would limit the utility of Regulation Crowdfunding. We are also not adopting rule changes that would specifically prohibit SAFEs under Regulation Crowdfunding. We recognize the concern that the offer and sale of non-traditional securities to retail investors in an exempt offering could result in harm to investors who may face challenges in analyzing and valuing such securities or who may be confused by the descriptions of such securities on the funding portals. However, we believe that many of these concerns can be addressed by providing adequate disclosure to investors. To this end, issuers assessing their compliance with Regulation Crowdfunding should carefully consider whether they are clearly describing the terms of the offered securities, especially in the case of non-traditional securities, such as SAFEs. 17 CFR 227.201(m) requires issuers to disclose the terms of the securities being offered whether or not such securities have voting rights, any limitations on such voting rights, how the terms of the securities being offered may be modified and a summary of the differences between such securities and each other class of security of the issuer, and how the rights of the securities being offered may be materially limited, diluted or qualified by the rights of any other class of security of the issuer. We remind issuers of non-traditional securities of the need to carefully consider their obligations under this rule.

3. Regulation A Eligibility Restrictions for Delinquent Exchange Act Filers

Regulation A includes an eligibility requirement that an issuer conducting a Regulation A offering must have filed with the Commission all reports required to be filed, if any, pursuant to Rule 257 during the two years before the filing of the offering statement (or for such shorter

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[557] *See, e.g.*, Letters from Miguel Costa dated Mar. 10, 2020, Mar. 14, 2020, and Mar. 22, 2020; J. Clarke Letter; SEI Letter; NASAA Letter; W. Hubbard Letter; CFA Letter; CrowdCheck Letter; and CFA Institute Letter.

period that the issuer was required to file such reports).[558] However, because Exchange Act registrants are not required to file reports pursuant to Rule 257, the existing eligibility provision does not expressly require those registrants to have filed their Exchange Act reports in order to rely on Regulation A.

a. Proposed Amendments

The Commission proposed to amend Regulation A to require issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act to meet a similar eligibility requirement with respect to Exchange Act reports. As proposed, issuers that do not file all the reports required to have been filed by Sections 13 or 15(d) of the Exchange Act in the two-year period preceding the filing of an offering statement would be ineligible to conduct a Regulation A offering.[559]

b. Comments

Commenters that addressed the issue generally supported requiring Exchange Act reporting Regulation A issuers to be current in their Exchange Act reporting obligations.[560] Only one commenter opposed requiring applicable issuers to be current in their Exchange Act reporting obligations, arguing that because non-reporting companies can rely on Regulation A, there should be no requirement for reporting companies to be current in their reporting obligations.[561] Another commenter recommended that the Commission additionally make Regulation A available to business development companies as defined in Section 2(a)(48) of the Investment Company Act.[562]

c. Final Amendments

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[558] *See* 17 CFR 230.251(b)(7). Rule 257 requires issuers conducting Tier 2 offerings to comply with certain ongoing and periodic reporting requirements.

[559] If an issuer is delayed in filing a report, it would need to become current in its reports over the last two years in order to become eligible again.

[560] *See* CII Letter; NASAA Letter; CrowdCheck Letter; and CFA Institute Letter.

[561] *See* J. Clarke Letter.

[562] *See* ABA Letter.

We are adopting the amendment as proposed. The amendment holds Exchange Act reporting companies to the same standard as repeat Regulation A issuers. This requirement will benefit investors by assuring that they have access to historical financial and non-financial statement disclosure about Exchange Act reporting companies that are conducting Regulation A offerings and may facilitate the development of an efficient secondary market for the securities they purchase in Regulation A offerings. Furthermore, because they are already required to file such reports, the requirement does not increase the burden of making a Regulation A offering for Exchange Act reporting companies or issuers that were Exchange Act reporting companies within the two years prior to making a Regulation A offering. We are not persuaded by the commenter that suggested that because non-reporting companies can use Regulation A, reporting companies should not be required to be current in their reporting obligations. We believe Regulation A investors should be able to look to the Exchange Act filings of reporting company issuers for information supplemental to the issuers' Regulation A disclosures.[563]

We are not amending Regulation A as recommended by a commenter to make the exemption available to business development companies at this time. While we acknowledge that business development companies serve an important function in facilitating capital formation for small, developing and financially troubled companies, there are important considerations with respect to the application of Regulation A's requirements to such entities that we believe we should assess before expanding the eligibility criteria.

G. Bad Actor Disqualification Provisions

The Commission's exempt offering framework includes rules disqualifying certain covered persons, including felons and other "bad actors," from relying on Regulation A, Regulation Crowdfunding, and Regulation D to offer and sell securities. While the

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[563] *See*, *e.g.*, 2020 Regulation A Review (stating that the requirement for Regulation A reporting company issuers to be current in their reporting requirements "would benefit investors by ensuring that they have access to historical financial and non-financial statement disclosure about Exchange Act reporting companies that are conducting Regulation A offerings and may facilitate the development of an efficient secondary market for the securities they purchase in Regulation A offerings"). *See also* NASAA Letter ("By helping to make clear that issuers are expected to behave as public companies once they enter the public markets, even through the means of exempt offerings, the Commission is at least partly addressing the concern that the current proposals will cause even substantial companies to remain in the private markets permanently.")

disqualification provisions are substantially similar,[564] the lookback period for determining whether a covered person is disqualified differs between Regulation D and the other exemptions. For Regulation D, the lookback period is measured from the time of the sale of securities in the relevant offering. For 17 CFR 230.262(a) ("Rule 262(a)" of Regulation A) and 17 CFR 227.503(a) ("Rule 503(a)" of Regulation Crowdfunding), the lookback period is measured from the time the issuer files an offering statement.[565]

Under Regulation A, if a covered person triggers one of the disqualifying events in Rule 262, the Commission may suspend reliance on the Regulation A exemption through 17 CFR 230.258 ("Rule 258"), which requires a notice and hearing opportunity for the issuer prior to the suspension becoming permanent. Furthermore, if a covered person triggers one of the disqualifying events, the issuer may need to consider whether it must suspend the offering until it files a post-qualification amendment to reflect a fundamental change in the information set forth in the most recent offering statement or post-qualification amendment.[566] Regulation Crowdfunding, which similarly measures the lookback from the time of filing of the offering statement, does not have a suspension provision. Similar to Regulation A, it requires an issuer to amend the offering statement to disclose material changes, additions, or updates to information that it provides to investors for offerings that have not been completed or terminated.[567] Nevertheless, in certain circumstances, periods of time may exist during Regulation A and Regulation Crowdfunding offerings between the filing of the offering statement and the next required filing where an offering could continue despite an event that would have constituted a disqualifying event at the time of filing.

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[564] Section 3(b)(2)(G)(ii) of the Securities Act [15 U.S.C. 77c(b)(2)(G)(ii)] provides the Commission with authority to issue bad actor disqualification rules under Regulation A that are "substantially similar" to those adopted for securities offerings under Rule 506 of Regulation D pursuant to Section 926 of the Dodd-Frank Act. *See* 2015 Regulation A Release; Disqualification of Felons, Other "Bad Actors" from Rule 506 Offerings, Release No. 33-9414 (July 10, 2013) [78 FR 44729 (July 24, 2013)] ("Rule 506(d) Final Release"); and Crowdfunding Adopting Release.

[565] Rule 503(a) provides lookback language based on "the filing of the offering statement" or "the filing of the information required by section 4A(b) of the Securities Act" on Form C. *See* 17 CFR 227.503. While the disqualification events in Securities Act Rule 262 and Regulation Crowdfunding Rule 503 are generally tied to the filing of an offering statement, 17 CFR 230.262(a)(6); and 17 CFR 227.503(a)(6) are not.

[566] *See* 17 CFR 230.252(f)(2).

[567] *See* 17 CFR 230.203(a)(2).

1. Proposed Amendments

The Commission proposed to harmonize the bad actor disqualification provisions in Rule 506(d) of Regulation D, Rule 262(a) of Regulation A and Rule 503(a) of Regulation Crowdfunding by adjusting the lookback requirements in Regulation A and Regulation Crowdfunding to include the time of sale in addition to the time of filing. Specifically, the Commission proposed to add "or such sale" to any lookback references that refer to the time of filing, such as the "filing of the offerings statement," "such filing," or "the filing of the information required by Section 4A(b) of the Securities Act" in Rule 262(a) and Rule 503(a).

In order to reflect the offering statement filing requirement before the first Regulation Crowdfunding sale, and more closely track the requirement in Rule 262(a) of Regulation A, the Commission proposed including "any promoter connected with the issuer in any capacity at the time of filing, any offer after filing, or such sale" in Rule 503(a).[568] The proposed amendments would not alter the availability of the existing reasonable care exception, an issuer's ability to seek a waiver from disqualification from the Commission, or the exception applicable when a court or regulatory authority advises in writing that disqualification should not arise.[569] Nonetheless, with respect to the latter provision, the Commission proposed to amend 17 CFR 230.262(b)(3) ("Rule 262(b)(3)") and 17 CFR 227.503(b)(3) ("Rule 503(b)(3)"), which currently provide that a court's or regulatory authority's advice with respect to the disqualifying effect of an order, judgment or decree must occur before: (i) the time of "the filing of the offering statement," in the case of Regulation A, or (ii) "the filing of the information required by section 4A(b) of the Securities Act," in the case of Regulation Crowdfunding. The proposed amendments would conform the existing language in Rules 262(b)(3) and 503(b)(3) with the parallel lookback language in 17 CFR 230.506(d)(2)(iii) by adding the phrase "before . . . [the relevant/such] sale."

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[568] Rule 503(a) currently covers only promoters connected with the issuer in any capacity "at the time of such sale," making it possible that a promoter that previously engaged in fraudulent activities or violated securities or other laws or regulations, could be involved in offering activities under Regulation Crowdfunding so long as such promoter is not connected with the issuer in any capacity at the time of sale.

[569] *See* 17 CFR 230.262(b)(3).

2. Comments

Commenters generally supported revising the bad actor lookback provisions in Regulation A and Regulation Crowdfunding as proposed.[570] One commenter recommended that the Commission provide guidance on how often bad actor checks should be performed, using the same timing for all bad actor lookback periods, and including 20% holders in the revised lookback provisions.[571] Another commenter suggested establishing a consistent standard for bad actor determinations in conjunction with FINRA and providing a centralized bad actor database.[572] Other commenters recommended permitting issuers to continue their offerings and provide investors with disclosure and an option to cancel their investment commitments after a disqualifying event first arises.[573] Commenters also generally supported revising the bad actor language in Rule 503(a) of Regulation D to include "any promoter connected with the issuer in any capacity at the time of filing, any offer after filing, or such sale," to more closely track Rule 262(a) of Regulation A.[574]

One commenter opposed the revisions, suggesting the additional monitoring cost will prevent issuers from relying on Regulation Crowdfunding.[575] Another commenter, who was supportive of the revisions, also acknowledged the potential for significant monitoring costs, especially in Regulation Crowdfunding offerings.[576]

3. Final Amendments

We are adopting the amendments as proposed to further harmonize the disqualification provisions in Regulation A, Regulation Crowdfunding, and Regulation D by using the same

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570 *See, e.g.*, J. Clarke Letter; Netcapital Letter; NASAA Letter; Md. St. Bar Assoc. Letter; W. Hubbard Letter; CrowdCheck Letter; and IPA Letter.

571 *See* CrowdCheck Letter. In contrast, one commenter supported continuing to use the time of filing, rather than time of sale, for covered persons. *See* J. Clarke Letter.

572 *See* IPA Letter.

573 *See* Geraci Law Letter; J. Clarke Letter; NextSeed Letter; and W. Hubbard Letter. *But see* CrowdCheck Letter contending that permitting the offerings to continue would treat more recent disqualifying events as less serious than older ones.

574 *See, e.g.*, Geraci Law Letter; Netcapital Letter; NASAA Letter; Md. St. Bar Assoc. Letter; and CrowdCheck Letter.

575 *See* NextSeed Letter.

576 *See* CrowdCheck Letter.

disqualification lookback period. Although the amendments may, to some extent, increase the compliance costs associated with conducting an offering under Regulation A or Regulation Crowdfunding, for issuers that conduct offerings in reliance on more than one of these exemptions, using the same disqualification lookback period across exemptions may simplify compliance and due diligence for issuers.[577] In addition, the revised lookback period, which looks to both the time of filing of the offering document and the time of sale, will improve investor protections by further limiting the role of "bad actors" in exempt offerings and reducing the chance that investors may unknowingly participate in securities offerings involving offering participants who have engaged in fraudulent activities or violated securities or other laws or regulations.[578]

The disqualification provisions in Regulation A and Regulation Crowdfunding were intended to be "substantially similar" to those in Regulation D.[579] When the Commission adopted disqualification provisions under Regulation D, the Commission also adopted an exception from disqualification for offerings where the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed. At that time, the Commission was cognizant of the monitoring costs associated with Rule 506(d)'s disqualification provisions, particularly the costs of monitoring beneficial owners of 20 percent or more of the issuer's outstanding voting securities.[580]

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[577] *See* 2015 Regulation A Release, at Section II.G. In adopting the 2015 Regulation A amendments, the Commission stated that a uniform set of bad actor triggering events would simplify due diligence, particularly for issuers that may engage in different types of exempt offerings.

[578] This may be particularly true for regulating the conduct of promoters connected with an issuer throughout an ongoing offering.

[579] *See* 2015 Regulation A Release and Crowdfunding Adopting Release. Section 302(d) of the JOBS Act requires the Commission to establish disqualification provisions under which an issuer would not be eligible to offer securities pursuant to Section 4(a)(6) and an intermediary would not be eligible to effect or participate in transactions pursuant to Section 4(a)(6). Section 302(d)(2) specifies that the disqualification provisions must be "substantially similar" to the "bad actor" disqualification provisions contained in Rule 262 of Regulation A. As noted above, the disqualification provisions under Regulation A are required to be "substantially similar" to those adopted for securities offerings under Rule 506. *See supra* note 564.

[580] *See* Rule 506(d) Final Release, at Section II.B. The Commission clarified that, for ongoing offerings, the issuer's reasonable care duty to monitor covered persons generally "includes updating the factual inquiry" on a periodic basis. *Id.* at Section II.D.2.

For Regulation A and Regulation Crowdfunding issuers, monitoring covered beneficial owners may pose different challenges than for issuers in Regulation D offerings because shares sold under Regulation A are potentially freely tradable immediately following an investor's initial purchase, and shares sold under Regulation Crowdfunding are generally freely tradable after a holding period. In recognition of the additional monitoring burdens associated with Regulation A and Regulation Crowdfunding offerings, and the potential for such burdens to discourage reliance on Regulation Crowdfunding, we are, as proposed, retaining the current lookback period applicable to covered beneficial owners in Regulation A and Regulation Crowdfunding rather than amending it to start at the time of sale. We do not believe that permitting issuers to continue their offerings and provide investors with disclosure and an option to cancel their investment commitments after a disqualifying event first arises would provide sufficient investor protections, as it would treat issuers with older disqualifying events differently from issuers with more recent disqualifying events, prohibiting the former from engaging in a Regulation A or Regulation Crowdfunding offering but permitting the latter to engage in the offering with only updated disclosure provided.[581]

III. OTHER MATTERS

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[582] the Office of Information and Regulatory Affairs has designated these rules a "major rule," as defined by 5 U.S.C. 804(2).

IV. ECONOMIC ANALYSIS

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[581] *See* CrowdCheck Letter.

[582] 5 U.S.C. 801 *et seq.*

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 2(b) of the Securities Act,[583] Section 3(f) of the Exchange Act,[584] and Section 2(c) of the Investment Company Act[585] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act requires the Commission to consider the effects on competition of any rules the Commission adopts under the Exchange Act and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[586]

We have considered the economic effects of the final amendments, including their effects on competition, efficiency, and capital formation. Many of the effects discussed below cannot be quantified.[587] Consequently, while we have, wherever possible, attempted to quantify the expected economic effects, much of the discussion remains qualitative in nature.

A. Broad Economic Considerations

The final amendments will simplify, harmonize, and improve certain aspects of the Commission's exempt offering framework, including Regulation D, Regulation A, Regulation Crowdfunding, and other related rules. By providing a more streamlined and consistent exempt offering framework, these amendments are expected to incrementally facilitate capital formation through exempt offerings, expanding issuers' ability to pursue positive net present value

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583 15 U.S.C. 77b(b).

584 15 U.S.C. 78c(f).

585 15 U.S.C. 80a-2(c).

586 15 U.S.C. 78w(a)(2).

587 For example, as discussed in the Proposing Release and noted by commenters (*see, e.g.*, Better Markets Letter; CFA Letter; Letter from Healthy Markets Association dated March 16, 2020 ("HMA Letter"); and NASAA Letter), scaled disclosures and a lack of secondary trading complicate the gathering of performance data on all exempt offerings. Where available, such data is not necessarily directly comparable to public market returns. *See* Proposing Release, at note 372. The analysis of available evidence on the performance of exempt offerings can be found in Report to Congress on Regulation A / Regulation D Performance. *See also* CCA Letter (discussing evidence on the performance of crowdfunding offerings) and Letter on the Concept Release from AngelList Venture dated September 14, 2020 ("AngelList Letter") (discussing evidence on the performance of investments through their platform).

("NPV") investment and growth opportunities. For example, the amendments to Regulation A and Regulation Crowdfunding that raise offering limits and incrementally facilitate compliance are expected to draw a larger and more diversified set of issuers, including issuers with high growth potential and associated high financing needs that might otherwise forgo these exemptions due to the costs of compliance combined with the existing, lower limits.[588] The final amendments may also address current uncertainties in the ability to use exempt offerings prior to, or concurrent with, registered offerings, which could ease the path to a registered offering for some private issuers.

We recognize that many of the issuers that rely on the amended exemptions likely would have relied on an exemption from registration without the final amendments.[589] For example, issuers using amended Regulation A, Regulation Crowdfunding, or Rule 504 might have relied on these exemptions in their current form, or, alternatively, relied on Rule 506 of Regulation D, which does not have an offering limit and does not require the filing of an offering statement or ongoing disclosures. The substitution between different offering methods is likely to limit the economic effects of the amendments. Nevertheless, the increased flexibility afforded by the amendments may enable some issuers to optimize their financing strategy and reduce their financing costs, helping them fund a broader range of investment projects and growth opportunities. Financing cost savings and enhanced ability to fund positive-NPV investment opportunities would in turn benefit shareholders through greater shareholder value.

The amendments may also provide incrementally greater choice of investment opportunities for investors. Importantly, the investor protections applicable to these exemptions will continue to provide significant safeguards against the risk of losses for non-accredited

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[588] The amended offering limits also may attract financial intermediaries that might presently opt out of this market segment because of fixed costs of due diligence and marketing or a small issuer pool.

[589] Aggregate conditions, such as a prolonged period of low interest rates, may also contribute to sustained reliance on exempt offerings. *See, e.g.,* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline in the Public Company*. 68 HASTINGS L. J. 445 (2017), at footnote 7; McKinsey, *Private Markets Come of Age: McKinsey Global Private Markets Review* (2019), https://www.mckinsey.com/~/media/mckinsey/industries/private%20equity%20and%20principal%20investors/our%20insights/private%20markets%20come%20of%20age/private-markets-come-of-age-mckinsey-global-private-markets-review-2019-vf.ashx (noting the role of low interest rates in investor pursuit of high-yield investments, including in private capital markets).

investors. The amendments we are adopting could expand non-accredited investor access to investment opportunities, such as through the following:

- Amendments to Regulation A, Regulation Crowdfunding, and Rule 504, which do not limit the number of non-accredited investors, may attract additional issuers or larger offerings.
- Amendments to Regulation Crowdfunding will increase investment limits for the subset of non-accredited investors whose annual income diverges from net worth, which may allow such investors to participate in more crowdfunding offerings.
- Amendments to Rule 506(b) may on the margin lead to additional offerings that permit non-accredited investors; however, the 35-person cap on the number of non-accredited purchasers in any Rule 506(b) offering in a 90-day period and the historically low proportion of Rule 506(b) offerings with non-accredited investors are expected to significantly limit this effect.

Greater flexibility under the amendments may enable non-accredited investors to optimize their capital allocation through incrementally greater access to exempt offering investment opportunities. The magnitude of the effect would depend on several factors, including:

- Whether issuers switch between offering methods that allow non-accredited investors, in which case the set of investment opportunities for non-accredited investors may change very little.
- Whether issuers prefer accredited investors due to their industry connections and expertise or due to the potential costs of having multiple non-accredited investors (*e.g.,* capitalization table concerns in light of subsequent financing plans[590] or Section 12(g) registration thresholds, costs of investor relations, or risks of proprietary information disclosure).

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[590] *See, e.g.*, *supra* Section II.F.

- Whether non-accredited investors choose not to invest in exempt offerings (*e.g.*, due to illiquidity; transaction, search, due diligence, and agency costs; or investment minimums).
- The efficiency of portfolio allocation of non-accredited investors. Such efficiency would depend on such investors' skill at obtaining and analyzing information about issuers that provide less disclosure compared to registered offerings.[591] Non-accredited investors may in some cases benefit from monitoring and screening by accredited investors, although the effect may be limited if the securities held by accredited investors offer different terms or payoffs.[592]

Today non-accredited investors may invest in a wide range of financial assets with high risk or due diligence costs, both as part of the securities market (*e.g.*, leveraged investments in individual listed securities; short positions; holdings of registered securities of foreign, small-cap, and over-the-counter (OTC) issuers; and holdings of registered nontraded securities, including REITs and structured notes) and outside the securities market (*e.g.*, futures, foreign exchange, real estate, individual small businesses, peer-to-peer lending, and financial transactions that entail high risk or leverage). Thus, the incremental effects on non-accredited investors of potential additional investment in exempt offerings under the amendments should be assessed relative to the existing market conditions.

Some commenters expressed concerns that facilitating capital raising through exempt offerings may incrementally contribute to the ongoing decline in U.S. registered offerings, limiting the overall set of investment opportunities and information available to non-accredited investors.[593] While the aggregate trend of the decline in U.S. registered offerings, which dates back to the aftermath of the 2000 stock market crash, is an important element of the baseline,

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591 *See also* Proposing Release, at note 375.

592 *See also* Proposing Release, at note 376. Differences in payoffs may be compensation for value added by the expertise, advice, governance, and network connections contributed by large investors.

593 *See*, *e.g.*, Better Markets Letter; Letter from Center for American Progress, et al. dated May 26, 2020 ("CAP, et al. Letter"); CFA Letter; and HMA Letter.

we expect the amendments being adopted in this release to have at most a marginal impact on this trend for the following reasons:

- Amendments to individual exemptions that have the greatest potential to result in the growth in capital raising pursuant to those exemptions relative to the baseline affect the market segments that are relatively small in absolute terms today (Regulation A, Regulation Crowdfunding, and Rule 504). While individual issuers may realize significant gains in the form of greater availability or decreased cost of capital, the aggregate effects of the amendments on the market as a whole are likely to be modest in absolute terms. Moreover, issuers that rely on Regulation A, Regulation Crowdfunding, and Rule 504 tend to be at a much earlier stage of development than a traditional IPO issuer.[594] While expanded offering limits may attract some additional issuers that are larger or more mature, the typical issuer relying on these exemptions – especially Regulation Crowdfunding – is unlikely to be able to conduct a traditional IPO at the issuer's present stage of development. This should mitigate concerns about increased substitution of traditional IPOs for Regulation Crowdfunding or Regulation A under the amendments.
- While changes to the disclosure requirements for sales to non-accredited investors under Rule 506(b) will reduce the cost to issuers of sales to such investors and may draw additional issuers to allow non-accredited investors in Rule 506(b) offerings, Rule 506(b) offerings with non-accredited investors currently comprise a relatively small portion of the market. Almost all such offerings report only having accredited investors.[595] Exempt offering integration amendments are most likely to affect issuers that rely on multiple exemptions, particularly ones involving non-accredited investors. We believe that the added flexibility and reduced cost of capital raising may be highly beneficial to the affected issuers – particularly for smaller issuers and issuers that lack an

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[594] *See infra* note 596.

[595] *See supra* note 127.

established network of angel investors or venture backing and thus rely on a combination of capital raising strategies to finance their growth. Nevertheless, for the majority of non-reporting issuers that raise financing from accredited investors without general solicitation (see Table 6 below), the integration amendments will likely have limited effects.

- Further, the integration amendments we are adopting include provisions intended to facilitate exempt and registered offerings occurring close in time and, as such, may make it easier for some issuers to attempt registered offerings. For some issuers looking to do bridge financing right before an IPO, the additional certainty provided by the new integration rule may allow them to accelerate the process of initiating the IPO (or at least provide additional certainty that the prior offering will not be integrated with the IPO).

To the extent that the amendments contribute to some substitution between registered and exempt offerings, it is important to consider any such substitution in the context of other economic channels through which the amendments affect capital allocation and the availability of investable opportunities:

- We do not expect the amendments to deter a significant proportion of the issuers that are large and mature enough to be on the cusp of going public from pursuing a public offering. Such issuers likely already have a developed network of angel investors and/or backing from venture capitalists on which they can rely to raise the necessary amount of financing today. Thus, such issuers' decision to go public is likely driven more by the benefits of being a reporting company (relative to the cost of a registered offering and being a reporting company).[596]

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[596] One commenter stated that "[w]hile we do not disagree with the statement that provisions of the Release would not be expected to 'deter a significant portion' of issuers from pursing a public offering, we believe . . . that the provisions of the Release would be expected to contribute to a lower (rather than higher) number of SEC-registered companies." *See* CII Letter. However, the data on IPO issuer age and size over time appears to support our view. *See, e.g.*, Jay R. Ritter, *Initial Public Offerings: Median Age of IPOs Through 2019*, (Jan. 14, 2020), *available at* https://site.warrington.ufl.edu/ritter/files/2020/02/IPOs2019Age.pdf (citing median IPO issuer age during 2001 through 2019 as ten years) and Jay R. Ritter, *Initial Public Offerings: Sales Statistics Through 2019*, (Mar. 10, 2020), *available at* https://site.warrington.ufl.edu/ritter/files/IPOs2019_Sales.pdf (citing in Table 12 median sales of IPO issuers, expressed in 2005 dollars, as approximately $47 million in 2019). By comparison, the age and size of Regulation A and Regulation Crowdfunding issuers is much

- Additional flexibility in access to capital can help existing issuers meet their financing needs at a lower cost and allocate capital to growth opportunities more efficiently, with the resulting benefits for economic growth, competition, and capital markets as a whole.
- The amendments might have the most significant effects on smaller growth issuers that presently lack sufficient access to financing that they require to develop their business model and gain scale. Such issuers may face significant financing constraints and lack an established network of angel investors or venture capital backing and may be too early in their lifecycle to be a candidate for a public offering. Thus, if the flexibility added by the amendments allows some of these small issuers to raise enough external financing to develop their business model and scale up to a point where they may become viable candidates for a public offering, the amendments might diversify the pool of prospective issuers that are able to conduct a registered offering, which could result in a higher number of IPOs in the future.[597]
- Overall, expanded access to capital may draw new businesses to capital markets, which might have otherwise found a securities offering to be impractical or too costly. Without a securities offering, some of these businesses might not have been able to grow their operations (and in the process create value for their owners).

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smaller. The median Regulation Crowdfunding issuer had no revenues and had an age of approximately two years. *See* Table 9 below. The median Regulation A issuer had no revenues and had an age of approximately three years. *See* 2020 Regulation A Review, at Table 5. In Regulation D offerings, the median issuer age is two years; the median non-fund issuer size (revenues), where reported, is $1 million – $5 million; to the extent that the offering proceeds can serve as a proxy for issuer size and financing needs in offerings without an offering limit, the median Rule 506(b) reported proceeds were $1.5 million. *See* Table 7 below. Thus, we continue to believe that the amendments to offering limits and integration provisions will not result in significant substitution between new IPO activity and additional exempt offerings.

[597] Private capital can provide a critical lifeline to startup and other small private firms to proceed from a development stage to implementing their business model, generating revenue, and growing in size. Larger firms, firms past the development stage, and firms that have venture capital backing (although private capital may also take other, non-venture capital forms) are more likely to achieve a successful IPO exit (as opposed to, for instance, being acquired by a larger competitor). *See, e.g.,* Annette B. Poulsen & Mike Stegemoller, *Moving from Private to Public Ownership: Selling out to Public Firms versus Initial Public Offerings*, 37 FIN. MGMT. 81 (2008), at Table 7; James C. Brau, Bill Francis & Ninon Kohers, *The Choice of IPO versus Takeover: Empirical Evidence*, 76 J. BUS. 583 (2003), at 583; Onur Bayar & Thomas Chemmanur, *What Drives the Valuation Premium in IPOs versus Acquisitions*? *An Empirical Analysis*, 18 J. CORP. FIN. 451 (2012), at Table 3. *See also supra* note 596 (discussing the substantial size of a typical IPO issuer).

Some of the amendments affect the same offerings and issuers or have mutually reinforcing or partly offsetting effects, which makes it more difficult to draw conclusions about the net effects of the final amendments package as a whole. For example, it is difficult to predict how the amendments that expand, simplify, and increase the uniformity of integration safe harbors will affect issuer reliance on individual exemptions. Nevertheless, we expect that these integration amendments will overall facilitate capital formation by harmonizing requirements, reducing legal costs, and providing additional flexibility to issuers seeking an exemption from registration or transitioning to a registered offering. The amendments to offering limits for individual exemptions may lead to increased substitution between exemptions. On the other hand, Regulation Crowdfunding amendments relaxing investment limits and raising offering limits may result in mutually reinforcing benefits for capital formation.

Finally, we recognize that the amendments to exemptions that are relatively infrequently used today compared to Rule 506(b) of Regulation D (such as Regulation Crowdfunding, Regulation A, Rule 504, and Rule 506(c)) are likely to have limited aggregate economic effects on issuers and on investors in absolute terms, even if the percentage changes in the offering activity conducted under those exemptions are significant.

Recently, the Commission amended the accredited investor definition.[598] Those amendments may affect the economic effects of the amendments considered here. In particular, some of the economic effects of the amendments discussed here that facilitate exempt offerings to accredited investors (*e.g.*, expanded integration safe harbors, exemption of accredited investors from Regulation Crowdfunding investment limits) will be amplified to the extent that issuers can offer securities to an expanded pool of accredited investors. In turn, some of the effects of the amendments discussed here that facilitate exempt offerings to non-accredited investors (*e.g.*, expanded offering limits under Regulation A, Regulation Crowdfunding, and

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[598] *See* Amending the "Accredited Investor" Definition, Rel. No. 33-10824 (Aug. 26, 2020) [85 FR 63726 (Oct. 9, 2020)].

Rule 504, testing-the-waters and crowdfunding vehicle provisions of amended Regulation Crowdfunding, and amendments to non-accredited investor disclosure requirements under Rule 506(b)) may be smaller to the extent that issuers able to access an expanded accredited investor pool become less reliant on exempt offerings to non-accredited investors.

B. Baseline

We examine the economic effects of the final amendments relative to the baseline, which comprises the existing regulatory requirements (described in detail in Section I above) and market practices related to exempt offerings (described below).

Generally, the parties affected by the amendments include current and prospective issuers and investors in exempt offerings. To the extent that the amendments affect how issuers choose between registered and exempt offerings, the amendments also might affect issuers and investors in the registered offering market. In cases where intermediaries are involved in exempt offerings and either receive transaction-based compensation or perform some of the offering-related or compliance functions on behalf of issuers, intermediaries will also be affected by the amendments. In particular, Regulation Crowdfunding requires offerings to be conducted through an intermediary's online platform. Thus, to the extent that the amendments affect Regulation Crowdfunding offering activity, they are expected to have direct effects on all crowdfunding intermediaries. In other instances, the effects of the amendments on intermediaries might be more limited (*e.g.*, intermediaries might verify investor status for issuers under Rule 506(c), be authorized by some issuers to test the waters with investors prior to an offering, or be drawn to the Regulation A market if they find that the increase in the offering limit makes underwriting more cost-effective).

Below we present data on the recent state of the market affected by the amendments. In 2019, registered offerings accounted for $1.2 trillion (30.8 percent) of new capital, compared to approximately $2.7 trillion (69.2 percent) that we estimate was raised through exempt

offerings.[599] Of the approximately $2.7 trillion estimated as raised in exempt offerings in 2019, the following table shows the amounts that we estimate were raised under each of the identified exemptions.[600]

Table 5: Overview of amounts raised in the exempt market in 2019

Exemption	Amounts Reported or Estimated as Raised in 2019
Rule 506(b) of Regulation D	$ 1,492 billion
Rule 506(c) of Regulation D	$ 66 billion
Regulation A: Tier 1	$ 0.044 billion
Regulation A: Tier 2	$ 0.998 billion
Rule 504 of Regulation D	$ 0.228 billion
Regulation Crowdfunding	$ 0.062 billion
Other exempt offerings	$ 1,167 billion

The following table[601] summarizes recent data on the Regulation D market.

Table 6: Offerings under Regulation D in 2019

	Rule 504	Rule 506(b)	Rule 506(c)
Number of New Offerings	476	24,636	2,269

[599] Unless otherwise indicated, information in this release on Regulation D, Regulation A, and Regulation Crowdfunding offerings is based on analyses by staff in the Commission's Division of Economic Risk and Analysis of data collected from SEC filings.

[600] "Other exempt offerings" includes Section 4(a)(2), Regulation S, and Rule 144A offerings. The data used to estimate the amounts raised in 2019 for other exempt offerings includes: (1) offerings under Section 4(a)(2) of the Securities Act that were collected from Thomson Financial's SDC Platinum, which uses information from underwriters, issuer websites, and issuer Commission filings to compile its Private Issues database; (2) offerings under Regulation S that were collected from Thomson Financial's SDC Platinum service; and (3) resale offerings under Rule 144A that were collected from Thomson Financial SDC New Issues database, Dealogic, the Mergent database, and the Asset-Backed Alert and Commercial Mortgage Alert publications, to further estimate the exempt offerings under Section 4(a)(2) and Regulation S. We include amounts sold in Rule 144A resale offerings because those securities are typically issued initially in a transaction under Section 4(a)(2) or Regulation S but generally are not included in the Section 4(a)(2) or Regulation S data identified above. These numbers are accurate only to the extent that these databases are able to collect such information and may understate the actual amount of capital raised under these offerings if issuers and underwriters do not make this data available. The data on Rule 144A debt offerings from Mergent is available only through the end of August 2019. We have extrapolated the data to obtain a full calendar year.

[601] This table includes offerings by pooled investment funds. Information on Regulation D offerings, including offerings under Rule 504 and Rule 506, is based on staff analysis of data from Form D filings on EDGAR. The amount raised is based on the amounts reported as "Total amount sold" in all Form D filings (new filings and amendments) on EDGAR. Subsequent amendments to a new filing were treated as incremental fundraising and recorded in the calendar year in which the amendment was filed. It is likely that the reported data on Regulation D offerings underestimates the actual amount raised through these offerings. First, Rule 503 of Regulation D requires issuers to file a Form D no later than 15 days after the first sale of securities, but a failure to file the notice does not invalidate the exemption. Accordingly, it is possible that some issuers do not file Form D for offerings relying on Regulation D. Second, underreporting could also occur because a Form D may be filed prior to completion of the offering, and our rules do not require issuers to amend a Form D to report the total amount sold on completion of the offering or to reflect additional amounts offered if the aggregate offering amount does not exceed the original offering size by more than 10 percent.

Amount Reported Raised	$0.2 billion	$1,491.9 billion	$66.3 billion

As can be seen from Table 6, Rule 506(b) dominates the market for exempt securities offerings. Amounts raised under Rule 506(b) also exceeded the amounts raised in the registered market, estimated to be $1.2 trillion in 2019.[602]

The table below presents summary statistics for Regulation D offering and issuer characteristics over 2009-2019.

Table 7. Summary of Regulation D Issuer and Offering Characteristics, 2009–2019[603]

Number of Issuers	173,697
Number of Offerings	242,070
Amounts Reported Sold	$13,576 billion
Mean Amount Sold (if reported)	$58 million
Median Amount Sold (if reported)	$1.50 million
Mean Offer Size (if reported)	$71 million
Median Offer Size (if reported)	$2.25 million
Median Years Since Incorporation	2
Median Issuer Size (if reported)	
Private Funds (Net Asset Value)	$25 million - $50 million
Non-Fund Issuers (Revenue)	$1 million - $5 million
Used Intermediary	20%
Total Investors	
As reported in initial Form D filings	3.4 million
All filings, including amendments	5.9 million
Average Investors/Offering (if reported)	10

602 *See also* Concept Release; and Scott Bauguess, Rachita Gullapalli, & Vladimir Ivanov, *Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009–2017* (U.S. Sec. and Exch. Comm'n, Division of Economic and Risk Analysis White Paper, Aug. 1, 2018), *available at* https://www.sec.gov/dera/staff-papers/white-papers/dera_white_paper_regulation_d_082018.

603 *See also supra* note 601. The number of issuers is based on a unique Central Index Key (CIK) identifier. Number of offerings represents all new offerings initiated during the period 2009 through 2019, as represented by a Form D filing, and offerings initiated prior to 2009 but continuing into the period 2009 through 2019 (as represented by an amendment filed). Amounts Reported Sold is calculated as described above and includes amounts sold reported in initial Form D filings and incremental amounts sold reported in amendment filings. Total number of investors, as reported in Form D and Form D/A filings, is calculated similarly. Issuers are not required to file a Form D at the close of offering. Not all offerings report amounts raised sold in their initial Form D filing.

The table below[604] summarizes amounts sought and reported raised in offerings under Regulation Crowdfunding since its inception.[605]

Table 8: Regulation Crowdfunding offering amounts and reported proceeds, May 16, 2016 - December 31, 2019

	Number	Average	Median	Aggregate
Target amount sought in initiated offerings	2,003	$63,791	$25,000	$126.9 million
Maximum amount sought in initiated offerings	2,003	$599,835	$535,000	$1,174.2 million
Amounts reported as raised in completed offerings	795	$213,678	$106,900	$169.9 million

Given the offering limits, crowdfunding is used primarily by relatively small issuers. The table below[606] presents data on the characteristics of issuers in crowdfunding offerings.

Table 9: Characteristics of issuers in Regulation Crowdfunding offerings, May 16, 2016 - December 31, 2019

	Average	Median
Age in years	2.9	1.8
Number of employees	5.3	3.0
Total assets	$455,280	$29,982
Total revenues	$325,481	$0

Based on information in new Form C filings, the median crowdfunding offering was by an issuer that was incorporated approximately two years prior to the offering and employed about three people. The median issuer had total assets of approximately $30,000 and no revenues (just over half of the offerings were by issuers with no revenues). Approximately ten percent of offerings were by issuers that had attained profitability in the most recent fiscal year prior to the offering.

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604 *See supra* note 599. Issuers that have not raised the target amount or not filed a report on Form C-U are not included in the estimate of proceeds.

605 For a discussion of the Regulation Crowdfunding market, *see also* 2019 Regulation Crowdfunding Report.

606 *See supra* note 599. The estimates are based on data from Form C or the latest amendment to it, excluding withdrawals. *See also* 2019 Regulation Crowdfunding Report.

The following table[607] summarizes amounts sought and reported raised in offerings under Regulation A since the effective date of the 2015 Regulation A amendments.

Table 10: Regulation A offering amounts and reported proceeds in $ million, June 19, 2015 - December 31, 2019

All Filed Offerings	Tiers 1 & 2	Tier 1	Tier 2
Aggregate dollar amount sought	$11,170.2 million	$1,101.5 million	$10,068.6 million
Number of offerings	487	145	342
Average dollar amount sought	$22.9 million	$7.6 million	$29.4 million
Offerings Qualified by Commission Staff	**Tiers 1 & 2**	**Tier 1**	**Tier 2**
Aggregate dollar amount sought	$9,094.8 million	$759.0 million	$8,335.8 million
Number of offerings	382	105	277
Average dollar amount sought	$23.8 million	$7.2 million	$30.1 million
Capital Reported Raised	**Tiers 1 & 2**	**Tier 1**	**Tier 2**
Aggregate dollar amount reported raised	$2,445.9 million	$230.4 million	$2,215.6 million
Number of issuers reporting proceeds	183	39	144
Average dollar amount reported raised	$13.4 million	$5.9 million	$15.4 million

As can be seen, Tier 2 accounted for the majority of Regulation A offerings (70 percent of filed and 73 percent of qualified offerings), amounts sought (90 percent of amounts sought in filed offerings and 9 percent of amounts sought in qualified offerings), and reported proceeds (91 percent) during this period.

Because reliance on integration safe harbors is not required to be disclosed, we lack a way to reliably quantify the pool of issuers and offerings that would be affected by the amended approach to integration. Nevertheless, some indication of the scope of issuers affected by integration provisions may come from indirect sources: in 2019, based on the analysis of Form

[607] The estimates include post-qualification amendments and exclude abandoned or withdrawn offerings. *See also* 2020 Regulation A Review.

D filings, we estimate that approximately 1,256 issuers other than pooled investment funds filed more than one Form D (excluding amendments) and an additional 258 issuers filed one new Form D and either had a registration statement declared effective, had a Regulation A offering statement qualified, or filed a new or amended Form C. Many private placements, however, rely on Section 4(a)(2) rather than on the Regulation D safe harbor. We lack data on Section 4(a)(2) offerings due to the absence of filing or disclosure requirements associated with this statutory exemption. Also, for issuers filing forms for multiple offerings, in most cases we cannot reliably determine if, and when, proceeds were raised or the offering closed, or whether the specific offerings were eventually subject to integration or not. For instance, a closeout filing on Form D is not required, making it difficult to know when the offering closed or how much was raised. Similarly, proceeds data for Regulation A and Regulation Crowdfunding can be lagged or incomplete.

Except where specified otherwise, the analysis is based on available data through the most recently completed calendar year (2019). Subsequent to the end of the period analyzed here, as of September 2020, the U.S. market has experienced significant macroeconomic and market dislocations related to the global effects of COVID-19 and the related response.[608] These factors are expected to have a negative market-wide impact on the levels of offering activity (including under Regulation A, Regulation D, and Regulation Crowdfunding).[609] Offering activity data through the second quarter of 2020 is likely not reflective of the full-year effects of this shock due to significant lags in the completion of offerings and reporting of proceeds data: For the twelve months ending June 2020, approximately $1.50 trillion in proceeds was reported under Regulation D (including $0.2 billion under Rule 504, $1,430.8 billion under Rule 506(b), and $68.6 billion under Rule 506(c)); $1.3 billion under Regulation

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[608] *See, e.g.*, Scott R. Baker, Nicholas Bloom, Steven J. Davis, Kyle J. Kost, Marco C. Sammon, & Tasaneeya Viratyosin, *The Unprecedented Stock Market Impact of COVID-19*, (NBER Working Paper 26945, 2020). *See also* Maryam Haque, *Startup Ecosystem Faces Capital Crunch over Coming Months – What We Expect & Why It Matters*, (NVCA White Paper, 2020), https://nvca.org/wp-content/uploads/2020/04/Startup-Ecosystem-Faces-Capital-Crunch-over-Coming-Months-5.pdf.

[609] For a discussion of the effects of COVID-19 and temporary relief for Regulation Crowdfunding issuers, *see* Temporary Amendments Adopting Release and Temporary Amendments Extension.

A; and $88 million under Regulation Crowdfunding (compared to approximately $1.56 trillion in proceeds under Regulation D; $1 billion under Regulation A and approximately $62 million under Regulation Crowdfunding during calendar year 2019).[610] Irrespective of these short-term fluctuations, we believe that the economic analysis considerations discussed below generally continue to apply. Inherent cyclicality of offering activity, irrespective of the cause of the macroeconomic shock, is a part of the baseline and prior academic research.[611] While macroeconomic shocks generally reduce capital formation levels (due to both supply and demand factors), which in the short run will negatively affect offering activity incremental to the rule in absolute terms, the effects of the economic considerations we discuss below are likely to remain applicable over the medium- to long-run, which encompasses periods of sustained growth interspersed with market contractions.

Further, on May 4, 2020, the Commission adopted temporary final rules under Regulation Crowdfunding to facilitate capital formation for small businesses impacted by COVID-19, which include, among other things, an exemption from certain financial statement review requirements for issuers offering $250,000 or less of securities in reliance on Regulation Crowdfunding within a 12-month period.[612] These temporary final rules were subsequently extended and apply to offerings initiated under Regulation Crowdfunding between May 4, 2020, and February 28, 2021.[613]

C. Economic Effects of the Final Amendments

1. Integration

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[610] As an important caveat, Regulation A and Regulation Crowdfunding issuers were also provided temporary relief from certain periodic reporting requirements on March 26, 2020. Thus, proceeds information reported as of June 30, 2020, may be incomplete to the extent that issuers had offering proceeds but availed themselves of this relief. *See* SEC Rel. No. 33-10768 (Mar. 26, 2020) Relief for Form ID Filers and Regulation Crowdfunding and Regulation A Issuers Related to Coronavirus Disease 2019 (COVID-19) [85 FR 17747 (Mar. 31, 2020)].

[611] *See, e.g.*, Michelle Lowry, *Why Does IPO Volume Fluctuate So Much*? 67 J. FIN. ECON. 3 (2003); Chris Yung, Gonul Colak, & Wei Wang, *Cycles in the IPO Market*, 89 J. FIN. ECON. 192 (2008); Amy Dittmar & Robert Dittmar, *The Timing of Financing Decisions: An Examination of the Correlation in Financing Waves*, 90 J. FIN. ECON. 59 (2008).

[612] *See* Temporary Amendments Adopting Release.

[613] *See* Temporary Amendments Extension.

The final amendments will revise the framework for integration analysis. As discussed in greater detail in Section II.A, the amendments update and expand existing integration provisions to provide greater uniformity and flexibility to issuers regarding integration of offerings. Considered together, the final amendments are expected to facilitate compliance and reduce issuer costs through greater consistency and uniformity across exemptions, and thus promote the use of exemptions by issuers that undertake multiple offerings.

a. Benefits

The final amendments expand and simplify the integration framework, provide greater uniformity in integration tests applicable across offering types, and in many cases shorten the period of time that issuers must wait between offerings to rely on a safe harbor from integration. The amendments are expected to reduce the cost of compliance with the integration requirements for issuers, which was generally supported by commenters.[614] In particular, the reduction in certain safe harbor periods from six months to 30 days is expected to facilitate compliance for issuers that might need to adjust their financing strategy as a result of evolving business circumstances, growing financing needs, or an inability to attract sufficient capital through a single offering method. A six-month waiting period between consecutive offerings, or the need to assess whether consecutive offerings can be treated as separate offerings or whether they must be integrated, can significantly limit such issuers' ability to raise sufficient capital or react to dynamic business conditions. Similarly, expanding the bright-line safe harbors from integration to a broader set of offering types generally reduces the need for an issuer to conduct an in-depth facts-and-circumstances analysis, as Rule 152(b) states that "[n]o integration analysis under paragraph (a) of this section is required, if any of the following non-exclusive safe harbors apply." This is expected to reduce the costs for issuers seeking to raise capital through multiple offering exemptions. Overall, greater emphasis in the integration analysis on whether a particular offering satisfies the registration requirements or conditions of the specific exemption is expected to reduce integration-specific compliance efforts. The

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[614] *See supra* notes 39–41 and accompanying text.

amendments are expected to reduce the costs of compliance with the provisions of the exemptions for issuers that conducted an offering before, or close in time with, another offering. The resulting decrease in compliance costs may encourage additional issuers to pursue one or more exempt offerings or to pursue a private placement and a registered offering.

The amendments are expected to be particularly beneficial to young, financially constrained, or high-growth issuers whose capital needs, and thus preferred capital raising methods, may change more frequently. The flexibility may be especially valuable in cases where one or more of the exempt offerings conducted by an issuer is subject to offering limits, as well as in cases where an issuer conducts multiple offerings that are subject to different solicitation, disclosure, offering size, or investor requirements. Overall, this flexibility may promote capital formation and enable issuers to optimize their financing strategy so as to attain a lower overall cost of capital while raising the required amount of external financing. The described benefits also are expected to accrue to the shareholders of those issuers through enhanced shareholder value, particularly if the increased flexibility in accessing external financing enables issuers to more efficiently pursue high-growth investment opportunities.

The described benefits may be limited in cases of amendments that codify existing guidance, to the extent that the market has already developed similar practices. Further, if issuers in certain exempt offerings, such as offerings under Rule 506(c), Regulation A, or Regulation Crowdfunding, account for most of the use of the integration safe harbor amendments, the aggregate effects of the integration amendments are expected to be limited, given the relatively small market share of these exemptions, compared to the far more prevalent Rule 506(b) and Section 4(a)(2) offerings.[615] Because Rule 506(b) does not impose an offering limit, and most such offerings do not involve non-accredited investors,[616] many issuers are

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[615] We recognize that other amendments we are adopting in this release, such as increased offering limits under Regulation A and Regulation Crowdfunding, increased investment limits under Regulation Crowdfunding, and additional optional means of verification of accredited investor status under Rule 506(c), might increase the use of Regulation A, Regulation Crowdfunding, and Rule 506(c).

[616] We recognize that the amendments to non-accredited investor disclosure requirements might increase the incidence of non-accredited investors in Rule 506(b) offerings.

likely able to meet their financing needs without having to conduct multiple offerings, which may further limit the effects of the integration amendments.

b. Costs

The amendments could on the margin result in additional financing being raised from non-accredited investors without registration requirements.[617] The disclosure requirements of all of these exemptions are less extensive than the requirements associated with a registered offering, which could result in less public disclosure generally if companies that would have become reporting companies decide to remain non-reporting companies.

Another potential concern is that a decrease in the integration of multiple offerings might result in inadvertent overlaps in solicitation of investors for offerings with different communications provisions. For example, Rule 506(b) and Section 4(a)(2) offerings, which do not allow general solicitation, may be preceded by offerings relying on exemptions that allow general solicitation (such as Regulation Crowdfunding, Regulation A, or Rule 506(c)), which could condition the market for the subsequent private placement offering. This may marginally increase risks to non-accredited investors that may participate in the subsequent private placement offering to the extent such investors rely on the general solicitation, because private placement offerings incorporate fewer investor protections.[618] Several factors are expected to largely alleviate these potential risks to investors. Importantly, the amendments do not alter the

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[617] For example, conducting a Rule 506(b) offering and a Regulation A or Regulation Crowdfunding offering may enable an issuer to reach a broader non-accredited investor base and/or raise a greater amount of non-accredited investor capital. Certain exemptions (Regulation Crowdfunding, Regulation A Tier 2) also conditionally exempt securities offered under the respective exemption from the number of shareholders of record for purposes of Section 12(g). *See supra* note 52 and accompanying text (discussing commenters that opposed the integration amendments because they would allow an issuer to do indirectly what it cannot do directly). For example, one commenter stated that the amendments would allow issuers to "easily avoid registration requirements by dividing large financings into multiple smaller exempt offerings separated by only a brief period of time." *See* R. Rutkowski Letter. Another commenter stated that, under the proposed integration framework, "the original goal of preventing issuers from artificially separating related transactions into multiple offerings to avoid the registration requirement is gone under this approach." *See* CFA Letter. Requiring no integration so long as each individual offering satisfies a particular exemption, according to this commenter, "subverts the purpose of integration, which specifically looks at the totality of a financing scheme rather than different components in isolation." *Id.* This commenter stated that the proposal "would enshrine a framework that effectively allows concurrent and serial offerings that are clearly part of a single plan of financing to avoid integration." *Id.*

[618] For instance, Regulation A and Regulation Crowdfunding offerings are subject to more extensive substantive disclosure requirements. Rule 506(c) offerings do not incorporate disclosure requirements but require verification of accredited investor status, reducing the likelihood of inadvertent non-accredited investor participation, compared to a Rule 506(b) offering.

substantive requirements, including investor protections, associated with individual offering methods. The amendments more closely align issuer efforts to comply with integration provisions and requirements of the respective exemptions, including, importantly, the investor protection provisions of each respective exemption. Moreover, nothing in the amendments eliminates the requirements of the respective exemption or, in the context of registered offerings, the registration and gun jumping provisions of the Securities Act. New Rule 152 specifies that the provisions of the rule will not have the effect of avoiding 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 registration requirements of the Securities Act. Further, issuers remain prohibited from using general solicitation in a Rule 506(b) offering, through any means, irrespective of the integration amendments.

The amendments contain several other specific safeguards that are expected to minimize potential costs and risks to investors. Rule 152(a)(1) requires that for 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 did not solicit such purchaser through the use of general solicitation, or established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation. This provision is expected to minimize the effect on investors of possible solicitation overlaps in cases of multiple offerings. This provision further bolsters existing solicitation restrictions in the individual exemptions and, crucially, focuses the integration analysis on the requirement that the issuer comply with solicitation restrictions intended to protect investors.

Further, Rule 152(a)(2) provides that an issuer conducting two or more concurrent exempt offerings permitting general solicitation, in addition to satisfying the particular requirements of each 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. This requirement will strengthen investor protection by assuring that one exemption is not being improperly used to make offers under the second exemption, without being subject to the same offering restrictions. The legend requirement will provide notice to investors and thereby help minimize potential confusion about the offering methods, reducing the risk of uninformed investor decisions as a result of reliance on preliminary information contained in such solicitations.

The amended non-exclusive safe harbors from integration are designed to minimize potential risks to investors. The 30-day period in the first safe harbor is expected to minimize inadvertent overlaps between offerings and investor solicitation for different offerings while providing issuers greater flexibility to adjust their financing strategy as a result of evolving circumstances. 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,[619] which is expected to further mitigate such concerns. In addition, if an issuer conducts more than one offering under Rule 506(b), the number of non-accredited investors purchasing in all such offerings within 90 calendar days of each other may not exceed 35. This requirement is expected to address concerns that failure to integrate multiple Rule 506(b) offerings could result in sales to a large number of non-accredited investors.

The second safe harbor involves offerings under Rule 701 or Regulation S. As discussed above, offers and sales pursuant to Rule 701 and employee benefit plans are limited to employees, consultants and advisors, with whom the issuer has written compensation plans or

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[619] The provision requires that 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 prior to the commencement of the exempt offering prohibiting general solicitation.

agreements. Given the relationship between these investors and the issuer, excluding such offerings from integration is not likely to raise meaningful investor protection concerns. The amendments also codify a long-standing Commission position with respect to integration of offshore transactions made in compliance with Regulation S with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.[620] When determining the availability of this safe harbor, it will still be necessary to assess each transaction separately for compliance with Regulation S or the other exemption. After considering commenter input, to avoid disruption to the existing Regulation S market practices, we are not adopting the proposed amendment to Regulation S that would have changed the definition of "directed selling efforts" in Rule 902 nor the proposed requirement that a Regulation S issuer that engages in general solicitation activity prohibit resales to U.S. persons of the Regulation S securities for a period of six months from the date of sale except to QIBs or IAIs. We recognize that general solicitation activity undertaken in connection with offers and sales under an exemption from registration concurrent with a Regulation S offering may raise concerns about flowback of the Regulation S securities to the United States. However, the Commission has previously addressed the risks related to abuse of Regulation S by imposing enhanced restrictions applicable to offshore sales of equity securities of domestic issuers[621] and we are of the view that these existing requirements will continue to be effective in addressing such concerns.

The third safe harbor concerns offerings for which a Securities Act registration statement has been filed following a completed or terminated offering. The third safe harbor provides that an offering for which a Securities Act registration statement has been filed will not be integrated if it is made subsequent to a terminated or completed offering for which general solicitation is not permitted. Because private placements would continue to restrict general solicitation, the impact on investors in the private placement, most of which are deemed to have

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[620] *See* Offshore Offers and Sales (Regulation S), Release No. 33-7505 (Feb. 17, 1998) [63 FR 9632 (Feb. 25, 1998)] ("Offshore Offers and Sales Release"), at Section III.C.1.

[621] *See* Offshore Offers and Sales Release.

the financial sophistication and ability to sustain the risk of loss of investment or fend for themselves, is likely to be minimal. In turn, because private placements do not permit general solicitation, and because the extensive registration requirements apply to the registered offering, it is unlikely to have any impact on investors in the registered offering. The third safe harbor also provides that a registered offering will not be integrated if made subsequent to a completed or terminated exempt offering for which general solicitation is permitted but that was either limited to QIBs and IAIs, or was terminated or completed more than 30 calendar days prior to commencement of the registered offering. This is similar to current Rule 147(h), Rule 147A(h), and Rule 255(e) of Regulation A. Because of the extensive protections built into the registration requirements and the 30-day waiting period that would apply if a solicitation involved investors other than QIBs or IAIs, this safe harbor is unlikely to have adverse impacts on investors in the registered offering. In cases where solicitation was limited to QIBs and IAIs, due to the sophistication of those investors, we do not believe that the lack of a 30-day waiting period in the integration safe harbor meaningfully affects investor protection. The amendment is also consistent with Securities Act Section 5(d) and Rule 163B, which allow solicitation of QIBs and IAIs at any time prior to a registered offering.

The fourth safe harbor extends the approach in Regulation A and Rules 147 and 147A and in the guidance regarding Regulation Crowdfunding to provide that offers and sales made in reliance on an exemption for which general solicitation is permitted will not be integrated if made subsequent to any prior terminated or completed offering. The disclosure and substantive requirements of these exemptions should minimize potential costs to investors from not integrating these offerings with prior offers and sales.

We believe these amendments appropriately calibrate the effort required on the part of issuers to address potential overlaps between multiple offerings by the same issuer that may raise investor protection concerns. Overall, because the amendments contain anti-evasion language and issuers must continue to meet the conditions of each exemption they are relying on, and because investor protection provisions of each exemption as well as general antifraud

provisions continue to apply, the amendments are not expected to have significant adverse effects on investor protection.

We recognize that issuers seeking to rely on one or more of the integration provisions will incur costs of analyzing the facts and circumstances of the contemplated offerings and/or the respective integration safe harbors. While we believe that the amendments substantially simplify and streamline the integration safe harbors, we recognize that some issuers might find that navigating the amended integration framework requires additional time and effort. Because use of the integration safe harbors will remain voluntary, we expect that issuers will only rely on the safe harbors if such reliance might reduce their compliance costs.

c. Effects of Efficiency, Competition, and Capital Formation

The amended integration provisions are expected to improve capital formation by enabling issuers to combine financing under different exemptions and registered offerings more optimally as part of their financing strategy. However, the net capital formation benefits may be modest for issuers that do not need multiple offerings (*e.g.*, relying on a single Rule 506(b) offering with no, or few, non-accredited investors but seeking a larger amount of financing).

It is unclear how the integration amendments will affect competition for investor capital. To the extent the amendments reduce issuer compliance costs associated with accessing a broader range of offering exemptions, competition for investor capital in those market segments might increase. However, net effects on overall competition for investor capital may be limited to the extent that issuers reallocate between offering exemptions or additional investor capital is drawn to these markets under the amendments.

As discussed above, the amendments might offer the greatest benefits to smaller issuers that have varying financing needs or to issuers that need to rely on multiple offering exemptions to meet their financing needs (*e.g.*, because they lack an established accredited investor network to support financing exclusively through Rule 506(b) and need to rely on non-accredited investors or general solicitation).

By streamlining and harmonizing integration safe harbors, the amendments are expected to improve the efficiency and reduce the cost of an issuer's compliance efforts, particularly for issuers conducting multiple offerings.

d. Reasonable Alternatives

As an alternative, we could adopt a uniform safe harbor with a time period other than 30 days (*e.g.*, 15, 45, 60, 75, or 90 days). Compared to the final amendments, the alternative of a universal safe harbor with a shorter (longer) time period would reduce (increase) the likelihood that multiple offerings are integrated and, accordingly, reduce (increase) issuer costs of compliance. Compared to the final amendments, the alternative of a safe harbor with a shorter (longer) time period would provide issuers with greater (lower) flexibility in tailoring their capital raising strategy to changing financing needs and market conditions. Compared to the final amendments, such an alternative also might increase (reduce) the number of instances where issuers improperly divide a single plan of financing into multiple offerings.

As another alternative, we could replace the integration doctrine with general anti-evasion principles[622] or a disclosure requirement.[623] Compared to the amendments, this alternative would increase the likelihood that multiple offerings could be conducted consistent with Section 5 or the terms of any applicable exemptions and, accordingly, reduce costs of compliance for some issuers that seek to avoid or postpone registration. However, conducting an anti-evasion analysis or providing disclosures in cases of multiple offerings under this alternative could increase compliance costs for some issuers, compared to the amendments, depending on the nature of the disclosure requirement and issuer circumstances. Compared to the final amendments, this alternative would provide issuers with greater flexibility in tailoring their capital raising strategy to changing financing needs and market conditions. However,

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[622] *See* CrowdCheck Letter. In a comment on the Concept Release, this commenter explained its view that the "integration doctrine should only be retained as an anti-avoidance mechanism where an issuer artificially divides an offering in order to comply with a number-of-investors or dollar offering limit." *See* CrowdCheck Concept Release Letter.

[623] *See* J. Clarke Letter (suggesting to replace the concept of integration with a form required by all issuers to file and keep current describing all historical and current exempt and registered offerings made by the issuer).

compared to the final amendments, such an alternative also would likely increase the number of instances where issuers improperly divide a single plan of financing into multiple offerings, even in the presence of general anti-evasion or disclosure requirements.

The amendments replace the five-factor test. As another alternative, we could codify the use of the five-factor test for all analyses of integration.[624] Compared to the final amendments, such an alternative could be more successful in identifying instances where issuers improperly divide what is economically a single offering into multiple offerings to avoid exemption limitations. However, it also would result in additional costs for issuers and reduced flexibility to combine multiple offering methods.

2. General Solicitation and Offering Communications

a. "Demo Days" and Similar Events

As discussed in greater detail in Section II.B.1 above, we are adding certain "demo day" communications to the list of communications that will not be deemed general solicitation. In a change from the proposal, in response to comments, we are expanding the types of entities that may sponsor an event in reliance on the exemption to include State governments and instrumentalities of State and local governments (in addition to local governments, as proposed). We are also revising the definition of "angel investor group" to specify that, such a group must have "defined" processes and procedures for making investment decisions, but that such processes and procedures do not necessarily need to be written. In response to commenters,[625] we are also revising the information that issuers may convey about an offering of securities during a "demo day" to add the unsubscribed amount in an offering. These changes may incrementally increase the reliance on the exemption, compared to the proposed provision. In addition, as discussed above, to address concerns raised by commenters with respect to the possibility of offering-related communications being made broadly to non-

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[624] *See* CFA Letter; and Md. St. Bar Assoc. Letter (suggesting that the five-factor test be retained).

[625] *See, e.g.,* IAA Letter; ACA Letter; Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at* https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf, at 70. An issuer would also be able to disclose at a "demo day," as proposed, that (i) it is in the process of offering or planning to offer securities; (ii) the type and amount of securities being offered; and (iii) the intended use of the proceeds of the offering.

accredited investors, we are adopting certain limitations on the pool of investors that may virtually attend such events. This change may incrementally reduce reliance on the exemption, compared to the proposed provision.

i. Benefits

The amendments to Rule 148 specify that certain limited "demo day" activities would not be deemed general solicitation. These events are generally organized by a group or entity (such as a university, angel investors, an accelerator, or an incubator) that invites issuers to present their businesses to potential investors, with the aim of securing investment. These amendments are expected to benefit issuers by expanding the range of options for communicating about their business with prospective investors without incurring the cost of restrictions associated with general solicitation and by allowing them to more efficiently access potential investors, as supported by various commenters.[626] These benefits may be relatively more pronounced for small and emerging issuers that may not have a sufficient existing angel investor network to rely on in a Rule 506(b) or Section 4(a)(2) offering. The additional restrictions on the virtual participation of prospective investors in "demo day" events excluded from the definition of general solicitation are expected to reduce the likelihood of non-accredited investor participation, thus decreasing potential risk to investors.

ii. Costs

Several commenters expressed concern about the effect of the amendments on investors,[627] for example, because such expanded use of "demo day" activities could lead to an increase in instances of fraud.[628] Overall, we expect costs to investors from the "demo day" amendments to be modest because the amendments significantly restrict permissible activities of "demo day" sponsors. In particular, the sponsor of the seminar or meeting will not be allowed 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

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[626] *See supra* note 216.

[627] *See supra* note 222.

[628] *See* Better Markets Letter.

event; charge attendees of the event any fees, other than reasonable administrative fees; receive any compensation for making introductions between event attendees and issuers or for investment negotiations between such parties; or receive any compensation with respect to the event that would require registration of the sponsor as a broker-dealer or an investment adviser. These restrictions are expected to mitigate the risk that investors would be improperly induced into an investment as a result of misleading information or sales pressure from financially incentivized "demo day" sponsors.

iii. Effects on Efficiency, Competition, and Capital Formation

The final amendments are expected to make it easier for issuers to participate in "demo days" without incurring the costs of restrictions associated with general solicitation. To the extent that the amendments encourage some additional issuers to participate in "demo days," and such participation facilitates their efforts to raise capital, issuers might realize capital formation benefits. Overall, the effects of the amendments on efficiency, competition, and capital formation are expected to be modest because issuers may offer securities to the same individuals and groups other than through a "demo day".

iv. Reasonable Alternatives

As an alternative, we could limit the "demo day" exception under the amendments by prohibiting any form of control or affiliation with the issuer or group of issuers, prohibiting entities whose sole or primary purpose is to attract investors to private issuers, and limiting issuer's discussion to factual business information and prohibiting discussion of any potential securities offering, as suggested by one commenter.[629] This alternative would potentially reduce the risk of investors receiving biased information about the investment opportunity at the "demo day". However, the restrictions under this alternative could significantly reduce the flexibility for issuers to solicit prospective investors and raise capital.

As another alternative, we could adopt a definition of general solicitation that would either narrow or expand the scope of communications that constitute general solicitation. The

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[629] *See* NASAA Letter.

alternative of narrowing (expanding) the scope of communications that constitute general solicitation, either through changes to the examples of communications that constitute general solicitation or through a definition of general solicitation, would provide greater (lower) flexibility to issuers with regard to the manner of communicating offers of securities and reaching prospective investors, potentially expanding (limiting) the ability of issuers that lack an established network of investors with whom they have a pre-existing relationship to raise capital through an exempt offering. Narrowing (expanding) the scope of communications that constitute general solicitation also could expose investors, including non-accredited investors, to more (fewer) offers of securities from prospective issuers. Additional offers of securities might reduce investor search costs for investors eligible and seeking to invest in the offerings of issuers that engage in solicitation, enabling investors to potentially make more informed decisions and allocate capital more efficiently to a broader range of investment opportunities, and vice versa. The alternative of providing a specific definition of general solicitation might incrementally reduce the compliance costs of issuers to determine whether communications that fall outside the list of provided examples constitute general solicitation. However, this alternative could decrease the flexibility for issuers to consider all relevant facts and circumstances in determining whether a particular communication constitutes general solicitation.

As another alternative, we could simplify the existing framework for all exempt offerings by deregulating offers, thus eliminating general solicitation restrictions and focusing on disclosure requirements for sales.[630] This alternative would significantly expand the options for pre-offering and offering-related communications, giving issuers greater flexibility and reducing costs compared to the final amendments, some of which expand pre-offering communications but impose additional conditions (such as filing and legending). However, by shifting the investor protections to requirements for sales and antifraud provisions, this

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[630] *See* CrowdCheck Letter.

alternative might result in investors that are used to relying on information in offers having to wait for the disclosures required in conjunction with a sale.

b. Solicitations of interest and other offering communications

As discussed in greater detail in Section II.B.2 above, we are adopting a generic test-the-waters exemption that would permit an issuer to use testing-the-waters materials for an offer of securities prior to making a determination as to the exemption under which the offering may be conducted. In connection with this exemption, we are requiring that the generic solicitation materials be made publicly available as an exhibit to, or with, the offering materials filed with the Commission, 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 to non-accredited investors, the issuer would be required to provide such investors with any written communication used under the generic testing-the-waters exemption. We are also expanding permissible offering communications under Regulation Crowdfunding by permitting testing the waters prior to filing a Form C with the Commission. Issuers will be required to use legends and to include any solicitation materials with the Form C that is filed with the Commission. The economic effects of the amendments will be limited if issuers are reluctant to test the waters, for example, as a result of the filing requirements or applicable State restrictions. Finally, as discussed in Section II.B.3 above, we are amending Rule 204 to expand communications permissible under Regulation Crowdfunding after the filing of Form C.

i. Benefits

In general, allowing issuers to gauge interest through expanded testing the waters is expected to reduce uncertainty about whether an offering could be completed successfully.[631] Allowing solicitation prior to conducting an offering will enable issuers to determine market interest in their securities before incurring the costs of preparing and conducting an offering.

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[631] *See supra* notes 233 (discussing commenter support for generic testing the waters) and 253 (discussing commenter support for testing the waters under Regulation Crowdfunding) and accompanying text.

Testing the waters before filing can reduce the risk of a failed offering and the associated reputational costs. If, after testing the waters, the issuer is not confident that it would attract sufficient investor interest, the issuer could consider modifying offering plans or the target amount of the offering, reconsidering the contemplated offering structure and terms, postponing the offering, or exploring alternative methods of raising capital. This option might be useful for smaller issuers, especially early stage issuers, first-time issuers, issuers in lines of business characterized by a considerable degree of uncertainty, and other issuers with a high degree of information asymmetry. The ability to engage in testing-the-waters communications might attract certain issuers—those that may be uncertain about the prospects of raising investor capital—to consider using an exempt offering, thus potentially promoting competition for investor capital as well as capital formation. Importantly, the amendments could benefit issuers that find after testing the waters that their offering is unlikely to be successful and choose not to proceed with an offering, thus saving disclosure preparation and filing costs (including, where applicable, the cost of review or audit of financial statements by an independent accountant), lowering the risk of disclosure of potentially sensitive proprietary information to competitors and mitigating the reputational cost from a failed offering.

Enabling issuers to engage in generic testing-the-waters communications prior to determining the specific exemption type may provide additional flexibility to gauge market interest that is likely to be especially valuable for smaller, less well known issuers that may lack an accurate understanding of prospective investor demand for their securities. Similarly, permitting issuers to solicit investor interest, orally or in writing, in Regulation Crowdfunding offerings is expected to benefit issuers by enabling them to gauge investor interest in a prospective Regulation Crowdfunding offering before incurring the full costs of preparing and filing an offering circular.

The requirement to include legends is expected to provide notice to investors of the preliminary nature of these communications. Issuers that proceed with an offering under Regulation A or Regulation Crowdfunding after testing the waters will be required to include as

exhibits to the offering statement any written materials used in a generic testing-the-waters communication within 30 days prior to the filing of a Regulation A or Regulation Crowdfunding offering statement. Issuers will also be required to include as exhibits any Regulation Crowdfunding testing-the-waters materials. Combined, these requirements are expected to provide informational benefits to investors and allow them to compare the solicitation materials with the offering statement disclosures, leading to potentially more informed investment decisions. The requirement to provide materials used for a generic testing-the-waters solicitation to any non-accredited investors in a Rule 506(b) offering that occurs within 30 days of such solicitation is expected to incrementally enhance the ability of investors in the offering to make informed decisions.

The amendments expanding communications permissible under Regulation Crowdfunding after the filing of Form C are expected to benefit issuers by allowing greater flexibility to communicate with prospective investors about the offering.[632] In addition to permitting oral communications, in response to comments received, we are expanding the information that an issuer may provide in accordance with Rule 204 to include a brief description of the use of proceeds of the offering and information on the progress of the offering toward its funding goals. We are also amending Rule 204 to clarify that an issuer may provide information about the terms of an offering under Regulation Crowdfunding in the offering materials for a concurrent offering (such as a Form 1-A for a concurrent Regulation A offering or a Securities Act registration statement). Being able to communicate with prospective investors outside the communications channels provided by the online crowdfunding platform is expected to facilitate the efforts of issuers to solicit prospective investors and advertise the offering, potentially resulting in a higher rate of offering success and more capital formation, particularly for lesser known, small issuers. Off-portal communications about the terms of the offering are also expected to incrementally improve the information available to investors and

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[632] *See supra* note 269 (discussing commenters that supported expanded oral communications by Regulation Crowdfunding issuers).

reduce costs of searching for information about offering terms for some prospective investors (*e.g.*, investors that may have prior knowledge of, or be customers of, the issuer) that would prefer to find out about offering terms without first reviewing the crowdfunding platform's website and communications channels. Should such prospective investors decide to invest in an offering, they would still have to do so through the portal and would have access therein to the filed offering materials, other offering information, and investor education materials required by Regulation Crowdfunding. Communications intended to drive traffic to the intermediary's website, and therefore to the issuer's offering, would continue to be governed by the Regulation Crowdfunding advertising restrictions.

ii. Costs

We recognize that there might also be potential costs associated with expanding the use of testing-the-waters communications in connection with a contemplated Regulation Crowdfunding offering or another exempt offering. If the contents of the offering circular differ substantively from the material distributed through testing-the-waters communications, and if investors rely on testing-the-waters materials when making investment decisions, this might lead investors to make less informed investment decisions.[633] For example, if the information conveyed through testing-the-waters communications is an incomplete representation of the risk of an offering, and if investors fail to read the subsequent offering circular before making the investment decision, they might make a less informed investment decision. These investor costs might be exacerbated to the extent that, currently, investors in Regulation Crowdfunding offerings are likely to be small and potentially limited in their capacity to process information contained in testing-the-waters communications. The removal of accredited investor investment limits under the Regulation Crowdfunding amendments is expected to increase the participation of accredited investors in such offerings and thus the average Regulation Crowdfunding investor's size and financial sophistication.

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[633] *See supra* notes 237 (discussing commenters that expressed concern about generic testing the waters) and 258 (discussing commenters that opposed testing the waters under Regulation Crowdfunding), and accompanying text.

These potential investor protection concerns are expected to be alleviated by several factors:

- The application of the antifraud provisions of the Federal and State securities laws;[634]
- For issuers that proceed with a Regulation Crowdfunding offering:
  - The availability of an offering circular, allowing investors to review disclosures compliant with Regulation Crowdfunding prior to investing;
  - The requirement that written testing-the-waters materials be included with Form C, allowing the public and Commission staff to review written solicitation materials and compare them to the contents of the offering circular;
  - The availability of investor education materials required to be provided by crowdfunding intermediaries before investing; and
  - The continued application of other provisions of Regulation Crowdfunding, including ones expected to provide additional investor protection, such as investment limits for non-accredited investors, offering limits, crowdfunding intermediary requirements, periodic reporting requirements, and issuer eligibility restrictions; and
- The reputational incentives of issuers and intermediaries, as well as the risk of litigation (particularly for issuers and intermediaries that have assets and that engage in testing-the-waters communications).

Further, concerns about costs of expanding testing-the-waters communications to investors should be considered in the context of the baseline. Investors in Regulation Crowdfunding offerings today might perform an incomplete analysis of the offering risks if they base their investment decision on the promotional video or summary information from the crowdfunding platform's campaign page and fail to review the entire contents of the offering materials. Low investment minimums (many around $100, and some as low as $25) might make it optimal for investors to allocate a limited amount of time to due diligence regarding

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[634] Testing-the-waters communications under Regulation Crowdfunding would be treated as offers of securities, similar to testing-the-waters communications under Regulation A, Section 5(d), and the recently adopted Rule 163B.

prospective crowdfunding investments. While some unscrupulous issuers might seek to disseminate misleading information through testing-the-waters communications, such issuers or intermediaries already could engage in misleading communications today, and such misleading offering communications would remain violations of the antifraud provisions of the Federal securities laws.

The amendments to Rule 204 of Regulation Crowdfunding expanding the ability to advertise the ongoing offering and discuss it in off-portal oral and written communications with prospective investors might similarly result in some investors receiving incomplete information about the offering from the issuer, and, if such investors fail to review the offering circular and other filed offering materials, potentially making less well informed investment decisions.[635]

Several factors are expected to mitigate potential costs to investors due to expanded off-portal communications:

- The availability of the offering circular containing disclosures compliant with Regulation Crowdfunding prior to investing, as well as the continued applicability of Rule 204 requirements, such as the requirement to include a link directing the potential investor to the intermediary's platform where the Form C disclosure document is available;
- The application of antifraud provisions of Federal and State securities laws;
- The availability of investor education materials required to be provided by funding portals;
- The other provisions of Regulation Crowdfunding, including ones expected to provide additional investor protection, such as investment limits, offering limits, crowdfunding intermediary requirements, periodic reporting requirements, and issuer eligibility restrictions, continue to apply; and

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[635] *See supra* note 270 (discussing commenters that opposed expanded oral communications by Regulation Crowdfunding issuers).

- The reputational incentives of issuers, as well as the risk of litigation (for issuers with assets).

The amendments that allow issuers to engage in testing the waters prior to determining the specific exemption type might lead to investor confusion with regard to the regulatory framework applicable to the contemplated offering, particularly for non-accredited investors that may be less sophisticated. However, for issuers that proceed with an exempt offering, the investor protections of the respective exemption would continue to apply. Importantly, because investors would be able to review the offering circular that clearly delineates the exemption relied on for issuers that proceed with a Regulation A or Regulation Crowdfunding offering, investors are expected to receive the disclosure necessary to reach an informed investment decision. Furthermore, should an issuer elect to proceed with a Regulation A or Regulation Crowdfunding offering within 30 days of a generic testing-the-waters communication, the testing-the-waters materials must be filed as an exhibit to, or with, the offering statement, enabling investors and the Commission staff to review testing-the-waters materials and compare them against the disclosures in the offering statement. In cases where an issuer decides to proceed with a Rule 506(c) offering after testing the waters, non-accredited investors that might have received solicitations would remain restricted from participation in a Rule 506(c) offering.

In cases of issuers that choose not to proceed with a Rule 506(c), Regulation A, or Regulation Crowdfunding offering following testing the waters for an exempt offering, but that choose instead to undertake an exempt offering under an exemption that does not permit general solicitation, the amendments are not expected to have significant effects on investors in such a private placement or registered offering. Restrictions specific to private placements, including a restriction on general solicitation for a Rule 506(b) or a Section 4(a)(2) offering would continue to apply in that case. In cases of issuers proceeding with a registered offering, gun jumping provisions of the Securities Act and other investor protections associated with registered offerings (including staff review, Section 11 liability, disclosure requirements in the registration statement, and Exchange Act reporting requirements) would continue to apply.

Because the use of testing-the-waters communications will remain voluntary, we anticipate that issuers will rely on testing-the-waters communications only if the benefits anticipated by issuers justify the expected costs. Issuers that elect to test the waters may incur costs, including direct costs of identifying prospective investors and developing testing-the-waters solicitation materials; indirect costs of potential disclosure of proprietary information to solicited investors; and in some instances, potential legal costs associated with liability arising from testing-the-waters communications with prospective investors. We note that issuers that proceed with an exempt offering without testing the waters similarly might incur costs of searching and soliciting investors, either on their own or through an intermediary.

iii. Effects of Efficiency, Competition, and Capital Formation

The expansion of permissible testing the waters prior to exempt offerings is expected to facilitate capital formation for small issuers by giving prospective issuers that might not otherwise consider an exempt offering a low-cost method of assessing investor interest in a potential offering and efficiently adjusting their financing strategy to reflect information about market demand. These effects are expected to be particularly significant for issuers contemplating Regulation Crowdfunding offerings that presently have to incur the compliance costs of preparing and filing Form C and the risk of disclosure of proprietary information to competitors, as well as the reputational risk of a failed offering, and do not have a cost-effective way of gauging investor demand. Similarly, the amendments to expand permissible issuer communications in Regulation Crowdfunding offerings might promote capital formation in the Regulation Crowdfunding market by allowing issuers to more effectively reach prospective investors as part of marketing the offering and to more efficiently structure the offering based on feedback from prospective investors. Combined, these amendments might make it easier for the smallest issuers with low investor recognition and limited or no securities offering experience to access the Regulation Crowdfunding market or issue securities pursuant to another offering exemption, resulting in potential positive effects on competition. To the extent that these amendments result in issuers switching between offering exemptions, the net effects

on capital allocation might be modest. However, in that scenario some issuers might still benefit from a lower cost of capital if they are able to obtain preliminary information that helps them to identify the most cost-effective offering method and terms that are likely to attract sufficient investor demand.

iv. Reasonable Alternatives

The final amendments permit testing-the-waters communications about a contemplated exempt offering for issuers that have not yet narrowed their offering plans to a specific exemption, so long as the testing-the-waters materials contain required legends and, should an issuer proceed with an exempt offering under Regulation A or Regulation Crowdfunding within 30 days, that written testing-the-waters communications be filed. As an alternative, we could have permitted testing-the-waters communications in conjunction with a contemplated exempt offering that does not currently permit such communications, but required the issuer to have determined and to specify in a legend the offering exemption that would be used. Compared to the proposal, by informing solicited investors about the contours of the exempt offering that is being contemplated, this alternative could potentially increase the utility of the information in the solicitation to prospective investors (*e.g.*, whether the offering would be open to non-accredited investors, and if it is, whether investment limits or other requirements apply). However, because small and early stage issuers might be testing the waters to gauge their optimal offering strategy, including how much capital might in principle be raised (and thus, whether a Regulation A offering, or for instance, a Regulation Crowdfunding offering, is more cost-effective), such an alternative would significantly limit the flexibility of issuers to obtain valuable information from pre-offering communications. It also may not result in meaningful investor protection benefits compared to the final amendments in light of the legend requirements, antifraud provisions, and, for issuers that proceed with an offering, the exhibit filing requirements and other investor protections specific to the respective exemption the issuer uses.

The final amendments permit testing-the-waters communications in connection with Regulation Crowdfunding offerings prior to the filing of Form C. As an alternative, we could permit testing-the-waters communications both before and after the filing of Form C.[636] This alternative would provide greater flexibility to issuers compared to the final amendments, potentially increasing the likelihood that the issuer would raise the desired amount of capital. This option might be most useful for smaller and early stage issuers. This alternative might also require investors to expend additional effort to compare testing-the-waters communications after the filing of an offering statement with the filed offering statement disclosures. However, the incremental economic effects of this alternative on investors and issuers might be limited because of the advertising permitted under Rule 204 and because the incremental costs of filing testing-the-waters materials might discourage the use of testing the waters after the filing of Form C under this alternative.

As an alternative, we could require testing the waters to be conducted through a registered intermediary, as suggested by some commenters.[637] Including the registered intermediary in the testing-the-waters process under the alternative could provide an additional layer of investor protections, compared to the amendments, particularly, for non-accredited investors that could participate in a Regulation Crowdfunding offering if it is launched. However, such benefits may be attenuated by the other investor protections included in the amendments (such as the filing requirement and the availability of the offering circular containing disclosures compliant with Regulation Crowdfunding prior to investing), and in the event the offering is launched, by the general investor protections of Regulation Crowdfunding. Compared to the amendments, this alternative could result in additional costs for issuers that already incur various other costs to launch a small offering. By limiting the options for testing-

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[636] Under Regulation A, testing the waters is permitted before and after the filing of Form 1-A before the qualification of Form 1-A. However, unlike Regulation Crowdfunding, Regulation A issuers are not able to accept investor commitments between the filing and the qualification of Form 1-A. Under Regulation Crowdfunding, issuers may accept investor commitments upon the filing of Form C because Commission qualification is not applicable to Form C. Thus, permitting testing-the-waters communications before the filing of Form C would be more consistent with the testing-the-waters communications permissible under Regulation A, before investor commitments may be accepted.

[637] *See* NextSeed Letter; and CrowdCheck Letter.

the-waters communications to intermediary-facilitated communications, this alternative also could reduce issuer ability and flexibility to reach prospective investors.

Issuers that proceed with a Regulation Crowdfunding offering will be subject to a filing requirement with respect to written testing-the-waters communications, consistent with Rule 255 of Regulation A. As an alternative, we could allow testing-the-waters communications prior to a contemplated Regulation Crowdfunding offering but not impose a filing requirement. As another alternative, we could waive the filing requirement for testing-the-waters communications prior to any exempt offering, including a Regulation A offering. Issuers that have elected to use testing-the-waters communications have already incurred the cost of preparing the materials, so the incremental direct cost of the requirement to file the materials with the Commission would be relatively low. We recognize that this alternative could reduce the indirect costs of some issuers by limiting the ability of the issuer's competitors to discover information about the issuer or the costs associated with requesting confidential treatment for the proprietary portions of the information. However, we note that this information may become available to competitors in any event through the solicitation process or as part of the offering materials (to the extent that the offering materials contain similar information). Furthermore, removing the requirement to publicly file the materials for issuers that proceed with an offering might result in adverse effects on the protection of investors to the extent that it may facilitate fraudulent statements by issuers to all or a selected group of investors that might fail to compare the statements in the solicitation materials against the offering circular. This consideration is especially salient because testing-the-waters communications under Rule 255 and under the amendments could be directed at any investor, including non-accredited investors. On balance, we believe that the requirements governing the use of testing-the-waters communications appropriately balance the goals of providing flexibility to issuers and protection to investors.

Amended Rule 204 allows oral communications with prospective investors once the Form C is filed, so long as the communications comply with the requirements of Rule 204, and

moderately expands the information that an issuer may provide in accordance with that rule. As an alternative, we could expand Rule 204 further, broadening the range of terms an issuer may advertise or not restricting the scope of issues that may be addressed in offering advertisements, as suggested by some commenters.[638] Such an alternative would provide greater flexibility to issuers to advertise the offering to prospective investors, which might increase the likelihood of offering success and yield capital formation benefits. However, such an alternative might increase information processing challenges for investors—particularly less sophisticated investors—that might incur greater effort to compare the more extensive advertising content with the offering statement disclosure, or if they are unable to validate the extended advertising content against the offering statement disclosure, potentially be at risk of less informed investment decisions.

3. Rule 506(c) Verification Requirements

As discussed in Section II.C above, to address some of the concerns about challenges and costs associated with accredited investor status verification in Rule 506(c) offerings, the amendments add a new item to the non-exclusive list in Rule 506(c) that allows an issuer (or those acting on its behalf) to establish that an investor remains an accredited investor as of the time of sale if the issuer (or those acting on its behalf) previously took reasonable steps to verify that investor as an accredited investor, the investor provides a written representation that the investor continues to qualify as an accredited investor to the issuer (or those acting on its behalf), and the issuer (or those acting on its behalf) is not aware of information to the contrary. After considering commenter input, we are adding a five-year limitation on the use of this verification method, after which the issuer must take reasonable steps to verify that the investor is an accredited investor.

a. Benefits

The addition to the non-exclusive list in Rule 506(c) concerning verification of investors for which the issuer previously took reasonable steps to verify accredited investor status is

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[638] *See supra* note 271.

expected to reduce the cost of verification for issuers that may opt to engage in more than one Rule 506(c) offering over time with potential repeat investors.[639] This new method also may help reduce the risk of harm to investors from continually having to provide financially sensitive information to the issuer (or those acting on its behalf) when the additional investor protection benefits of doing so are limited given the pre-existing relationship between the issuer (or those acting on its behalf) and such investors.

b. Costs

Generally, because the amendment represents an incremental revision to the principles-based approach to verification in Rule 506(c), its costs are expected to be modest. However, we recognize that some previously verified investors that experience changes in financial circumstances and lose accredited investor status over time might provide written representations that they are accredited investors,[640] and if issuers are not aware of information to the contrary, such issuers might sell securities to those non-accredited investors under Rule 506(c). As noted above, we expect these risks would be mitigated by the pre-existing relationship between the issuer (or those acting on its behalf) and such investors. Further, consistent with some commenters' suggestions,[641] in a change from the proposal, we are adopting a time limit in conjunction with this additional means of verification of accredited investor status. We expect this time limit will further mitigate the likelihood of the costs to investors described above.

c. Effects on Efficiency, Competition, and Capital Formation

Generally, because the final amendments represent an incremental revision to the principles-based approach to verification in Rule 506(c), we expect modest effects on efficiency, competition, and capital formation.

d. Reasonable Alternatives

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639 *See supra* note 284 and accompanying text.

640 *See supra* note 288.

641 *See supra* note 290.

We are adopting amendments to the existing non-exclusive list of verification methods. As an alternative, we could rescind the non-exclusive list. Compared to the final amendments, this alternative could reduce costs for some issuers that presently feel constrained to use one of the listed verification methods, even though other, less costly methods may be better suited for their particular facts and circumstances. However, the effects of eliminating the non-exclusive list might be limited if issuers that presently rely on the listed verification methods continue to do so under a more principles-based approach.

We are allowing issuers to establish that a previously verified investor remains accredited for up to a five-year period if the investor provides a representation to that effect and the issuer is not aware of information to the contrary. As an alternative, as proposed, we could allow issuers to make such a determination for an unlimited period of time. Compared to the final amendments, this alternative could reduce costs for issuers with repeat investors through less frequent verification of investor status. At the same time, this alternative could increase the likelihood of having investors that previously were accredited but subsequently exited accredited investor status (*e.g.*, due to a change in income or net worth) and thus may have a lower ability to incur the risks of a Rule 506(c) offering becoming purchasers in a Rule 506(c) offering.

As another alternative, we could adopt additional means of verification of accredited investor status (such as investment amounts[642] or self-certification[643]) as suggested by some commenters.[644] Compared to the final amendments, these alternatives would further reduce the costs of accredited investor status verification for issuers. However, they would result in a significantly higher likelihood of non-accredited investors becoming purchasers in an offering involving general solicitation under Rule 506(c). In particular, self-certification would be a significantly less rigorous means of verification that, in conjunction with general solicitation,

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642 *See, e.g.*, CrowdCheck Letter; Invesco Letter; and NextSeed Letter.

643 *See, e.g.*, Sen. Toomey Letter; IPA Letter; and NextSeed Letter. *See also* D. Burton Letter; and J. Clarke Letter.

644 *See supra* note 290.

could significantly increase risks to non-accredited investors. Relatedly, the alternative of basing verification on the amount invested would increase the likelihood that a non-accredited investor participates in an offering. Moreover, this alternative would increase risks to such non-accredited investors because they would be more likely to have an underdiversified position in the event they allocate a high investment amount to an investment opportunity under Rule 506(c) to meet the verification requirement, resulting in a greater risk of losses to such investors.

As another alternative, we could amend Rule 506(c) to add the fact that an offering is conducted through a registered intermediary to the optional means of accredited investor status verification, building on the suggestion of one commenter.[645] The benefit of this alternative compared to the amendments would be to reduce costs for issuers. As some commenters have stated, the requirement to take reasonable steps to verify accredited investor status has generally impacted issuers' willingness to use Rule 506(c).[646] However, because this alternative would not involve verifying each purchaser's accredited investor status, it could significantly increase the likelihood of non-accredited investors that learned about the offering through general solicitation under Rule 506(c) becoming purchasers in the offering, with the associated increase in risks to such investors.

4. Disclosure Requirements

a. Required Disclosures to Non-Accredited Investors in Rule 506(b) Offerings

The amendments to Rule 502(b) generally align financial disclosure requirements for non-reporting companies that sell to non-accredited investors under Rule 506(b) with the disclosures required for offerings under Tier 1 and Tier 2 of Regulation A, which also allows sales to non-accredited investors.

i. Benefits

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[645] *See, e.g.*, TIAA Letter (recommending not requiring verification for offerings involving a registered investment adviser, broker-dealer placement agent or other such intermediary).

[646] *See supra* note 285.

The amendments to the Rule 502(b) disclosure requirements for sales to non-accredited investors will lower the burden of preparing financial disclosures, particularly the costs of audited financial statements, for issuers in Rule 506(b) offerings up to $20 million that would no longer be subject to those requirements.[647] We do not have information on the costs of an audit in Rule 506(b) offerings involving sales to non-accredited investors. As a proxy, we consider audit costs reported by Regulation A Tier 2 issuers and smaller reporting company issuers. Based on Regulation A Tier 2 offerings qualified from June 2015 through December 2019, the average (median) audit cost, where reported, was $29,015 ($12,319). Based on information from Audit Analytics, the average (median) audit fees, where available, for reporting companies with market capitalization up to $75 million were $386,876 ($95,000) for fiscal years ending in 2018 or 2019.[648] We recognize that these costs may differ from the costs incurred by issuers in Rule 506(b) offerings to non-accredited investors. Overall, relatively few non-accredited investors participated in Rule 506(b) offerings affected by these amendments. We estimate that in 2019 among new Rule 506(b) offerings by non-reporting issuers other than pooled investment funds seeking up to $20 million, between approximately 4.6 percent and 9.5 percent had at least one non-accredited investor.[649]

Lowering costs of sales to non-accredited investors under Rule 506(b) may expand access to capital for some issuers that are not able to obtain sufficient external financing through other methods or through sales of securities to accredited investors only under Rule 506(b). Compliance cost savings in the offering process and expanded access to external financing are expected to enhance shareholder value and thus benefit the issuer's existing shareholders.

As a result of lower disclosure costs, some issuers in Rule 506(b) offerings that presently do not sell securities to non-accredited investors may be more willing to sell securities

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[647] *See supra* note 313.

[648] Estimates reflect data as recorded in Audit Analytics as of August 26, 2020, including the full set of filings due for fiscal year ending in 2019.

[649] *See supra* note 127. This estimate is based on the analysis of data in initial Form D filings with reported offer size, excluding pooled investment fund issuers and reporting issuers. Reporting issuers are identified based on 2019 filings of annual reports or amendments to them.

to non-accredited investors, which could increase the number of issuers subject to the amendments compared to the estimates above. If the amendments result in more issuers selling securities to non-accredited investors under Rule 506(b), those non-accredited investors could benefit from an expanded set of investment opportunities, which might allow them to allocate their capital more efficiently. These benefits might be attenuated if the increase in sales to non-accredited investors under Rule 506(b) is driven by issuers switching from Rule 504, Regulation A, or Regulation Crowdfunding offerings, which also accept non-accredited investors, to Rule 506(b), resulting in little change in the set of investment opportunities available to non-accredited investors. It is difficult to predict whether an increase in sales to non-accredited investors under Rule 506(b), if any, will be due to additional non-accredited investors in Rule 506(b) offerings or greater participation by existing non-accredited investors in other issuers' Rule 506(b) offerings. Due to the limited data disclosed about investors on Form D, we cannot estimate the number of unique non-accredited purchasers in such offerings because a single investor may be a purchaser in multiple Rule 506(b) offerings in a given year.

ii. Costs

Scaling Rule 502(b) disclosure requirements for sales to non-accredited investors—and particularly repealing the requirement to provide audited balance sheets in offerings up to $20 million—can result in less informed investor decisions by some non-accredited investors.[650] For instance, to the extent that audited financial statements are valuable for informed investment decisions,[651] scaled disclosures in offerings of up to $20 million might cause some non-

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[650] *See supra* note 314.

[651] *See, e.g.*, Erik Boyle & Melissa Lewis-Western, *The Value-Add of an Audit in a Post-SOX World* (Working Paper, Apr. 2018) (finding that an audit continues to be associated with reduced financial statement error at public companies post-SOX and that the size of the effect is economically significant); Petro Lisowsky & Michael Minnis, *The Silent Majority: Private U.S. Firms and Financial Reporting Choices* (Univ. of Chi. Booth Sch. of Bus., Research Paper No. 14-01, Apr. 12, 2018) (finding that "[n]early two-thirds [of private firms] do not produce audited GAAP financial statements. Moreover, while firms with external capital are more likely to produce audited GAAP statements, we find that thousands of firms with external debt and dispersed ownership do not. Equity and trade credit are potentially more important factors than debt in affecting private firms' production of audited GAAP reports. Finally, young, high growth firms lacking tangible assets are significantly more likely to produce audited GAAP reports relative to established firms with physical assets, suggesting that audited financial reports play an important information role in capital allocation when business activity is less verifiable."); Michael Minnis, *The Value of Financial Statement Verification in Debt Financing: Evidence from Private U.S. Firms*, 49 J. ACCT. RES. 457 (2011) (showing the

accredited investors to incorrectly value the offered securities and to make less well informed investment decisions. Further, the elimination of audit requirements for disclosures to non-accredited investors in Rule 506(b) offerings of up to $20 million might encourage some issuers with relatively higher information risk to sell securities to non-accredited investors given the absence of investment limits in such offerings. Costs to investor protection from scaling the audit requirement in Rule 506(b) offerings with non-accredited purchasers may be higher than in Regulation A offerings because Rule 506(b) offerings do not undergo Commission review.[652] The requirement that non-accredited investors must satisfy the knowledge and experience standard of 17 CFR 230.506(b)(2)(ii) ("Rule 506(b)(2)(ii)") in order to be eligible to participate in an offering under such rule is expected to mitigate some of these costs. Further, in the aggregate these costs to investors are expected to be limited by the cap on the number of non-accredited investors that can participate in a Rule 506(b) offering.

In evaluating the investor costs of the amendments, we consider the baseline, which includes similarly scaled requirements for financial disclosures required to be made to non-accredited investors in Regulation A Tier 1 and Regulation Crowdfunding offerings of the same size. However, those offering types are associated with certain additional provisions intended to protect non-accredited investors, which are not afforded to non-accredited purchasers in Rule 506(b) offerings (*e.g.*, Commission qualification and State registration of Regulation A Tier 1

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value of audited financial statements for private debt pricing); David W. Blackwell, Thomas R. Noland, & Drew B. Winters, *The Value of Auditor Assurance: Evidence from Loan Pricing*, 36 J. ACCT. RES. 57 (1998) (finding cost of debt reductions in a small sample of small private firms with audited financial statements); and Jeong-Bon Kim et al., *Voluntary Audits and the Cost of Debt Capital for Privately Held Firms: Korean Evidence*, 28 CONTEMP. ACCT. RES. 585 (2011) (confirming the result in a Korean sample). *See also* Ciao-Wei Chen, *The Disciplinary Role of Financial Statements: Evidence from Mergers and Acquisitions of Privately Held Targets*, 57 J. ACCT. RES. 391 (2019) (examining "whether requiring the disclosure of audited financial statements disciplines managers' mergers and acquisitions (M&As) decisions" and finding that "the disclosure of private targets' financial statements is associated with better acquisition decisions. . . [and] that this disciplining effect of disclosure is more pronounced when monitoring by outside capital providers is more difficult and costly").

However, two studies using survey data from the Federal Reserve's Survey of Small Business Finances do not find that an audit is significantly associated with a lower interest rate in small privately held firms. *See* Kristian D. Allee & Teri Lombardi Yohn, *The Demand for Financial Statements in an Unregulated Environment: An Examination of the Production and Use of Financial Statements by Privately-Held Small Businesses*, 84 ACCT. REV. 1 (2009); and Gavin Cassar, Christopher D. Ittner, & Ken S. Cavalluzzo, *Alternative Information Sources and Information Asymmetry Reduction: Evidence from Small Business Debt*, 59 J. ACCT. & ECON. 242 (2015).

652 *See* NASAA Letter.

offerings, offering statement disclosure requirements in Regulation A and Regulation Crowdfunding offerings, as well as investment limit, periodic disclosure, and funding portal requirements in Regulation Crowdfunding offerings). If non-accredited investors remain infrequently represented in Rule 506(b) offerings, the aggregate impacts on costs to investors may be limited. However, the aggregate impacts on investor protection could be amplified if the scaled requirements encourage additional issuers to accept non-accredited investors in Rule 506(b) offerings.

iii. Effects on Efficiency, Competition, and Capital Formation

If scaled financial statement disclosures lead to more non-accredited investor offerings under Rule 506(b), and if such investors contribute additional capital the issuers would not have otherwise raised from accredited investors, the amendments may incrementally promote capital formation through Rule 506(b). If non-accredited investor capital drawn to Rule 506(b) offerings is mostly reallocated from other offerings to non-accredited investors (*e.g.*, registered offerings or offerings under Regulation A, Regulation Crowdfunding, Rule 504, Rule 147/147A, etc.), the net effects on aggregate capital formation will be limited. However, in that instance, issuers may still benefit if they are able to obtain a lower cost of capital under the amendments (*e.g.*, because of lower compliance costs in Rule 506(b) offerings, even after providing disclosures to non-accredited investors, or because non-accredited investors in Rule 506(b) offerings provide better financing terms).

Streamlining disclosure requirements in Rule 506(b) offerings with non-accredited investors to be more aligned with those under Regulation A is expected to make compliance more efficient for those issuers that undertake these types of offerings along with Rule 506(b) offerings to non-accredited investors.

The amendments also may incrementally increase the availability of Rule 506(b) offerings that allow non-accredited investors, potentially enabling more efficient allocation of capital of non-accredited investors among investment alternatives that are otherwise unavailable to them. While non-accredited investors can participate in other exempt offerings, Rule 506(b)

offerings account for the largest share of the exempt offerings market and draw issuers that typically do not participate in Regulation A or Regulation Crowdfunding offerings. The majority of Rule 506(b) offerings are by issuers that are not reporting companies. While non-accredited investors can invest in registered offerings, in most cases issuers in registered offerings have a different profile than issuers in private placements.[653] Expanding opportunities for investment in operating company and exempt investment fund offerings under Rule 506(b) might allow non-accredited investors to construct a more efficient portfolio.[654] However, as

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[653] Investors in public firms can access more extensive disclosures and rely on the protections of the Securities Act registration and Exchange Act reporting regimes. Listed public firms are more likely to have analyst coverage, which may provide additional information to investors.

Past academic studies comparing private and publicly listed firms arrive at somewhat mixed conclusions about investment and innovation behavior of such firms. For example, one study finds that public firms' patents rely more on existing knowledge, are more exploitative, and are less likely in new technology classes, while private firms' patents are broader in scope and more exploratory. *See* Huasheng Gao, Po-Hsuan Hsu, & Kai Li, *Innovation Strategy of Private Firms*, 53 J. FIN. & QUANTITATIVE ANALYSIS 1 (2018). *See also* Daniel Ferreira, Gustavo Manso, & André C. Silva, *Incentives to Innovate and the Decision to Go Public or Private*, 27 REV. FIN. STUD. 256 (2014) (showing, in a theoretical model, that private ownership creates incentives for innovation). Another study shows that public firms in external finance dependent (but not in internal finance dependent) industries spend more on research and development and generate a better patent portfolio than their private counterparts. *See* Viral Acharya & Zhaoxia Xu, *Financial Dependence and Innovation: The Case of Public versus Private Firms*, 124 J. FIN. ECON. 223 (2017). A different U.S. study finds that listed firms invest less and are less responsive to changes in investment opportunities compared to observably similar, matched private firms, especially in industries in which stock prices are particularly sensitive to current earnings. *See* John Asker, Joan Farre-Mensa, & Alexander Ljungqvist, *Corporate Investment and Stock Market Listing: A Puzzle?*, 28 REV. FIN. STUD. 342 (2015). *But see* Naomi E. Feldman et al., *The Long and the Short of It: Do Public and Private Firms Invest Differently?* (Working Paper, 2019) (finding that public firms invest more in long-term assets—particularly innovation—than private firms). *See also* Vojislav Maksimovic, Gordon M. Phillips, & Liu Yang, *Do Public Firms Respond to Investment Opportunities More than Private Firms? The Impact of Initial Firm Quality* (Nat'l Bureau of Econ. Research, Working Paper No. 24104, Dec. 2017) (finding that public firms respond more to demand shocks after their IPO and are more productive than their matched private counterparts, particularly in industries that are capital intensive and dependent on external financing); and Sandra Mortal & Natalia Reisel, *Capital Allocation by Public and Private Firms*, 48 J. FIN. & QUANTITATIVE ANALYSIS 77 (2013) (a cross-country study showing that public listed firms take better advantage of growth opportunities than private firms, although the differential only exists in countries with well-developed stock markets).

Some studies also find that private and public firms differ in their financing, cash, and payout decisions, cost of capital, and other characteristics. *See, e.g.*, Kim P. Huynh, Teodora Paligorova, & Robert Petrunia, *Debt Financing in Private and Public Firms*, 14 ANNALS FIN. 465 (2018); Huasheng Gao, Jarrad Harford, & Kai Li, *Determinants of Corporate Cash Policy: Insights from Private Firms*, 109 J. FIN. ECON. 623 (2013); Sandra Mortal, Vikram Nanda, & Natalia Reisel, *Why Do Private Firms Hold Less Cash than Public Firms? International Evidence on Cash Holdings and Borrowing Costs*, 113 J. BANKING & FIN. 1 (2020); Roni Michaely & Michael R. Roberts, *Corporate Dividend Policies: Lessons from Private Firms*, 25 REV. FIN. STUD. 711 (2012); Menachem Abudy, Simon Benning, & Efrat Shust, *The Cost of Equity for Private Firms*, 37 J. CORP. FIN. 431 (2016); Ilan Cooper & Richard Priestley, *The Expected Returns and Valuations of Private and Public Firms*, 120 J. FIN. ECON. 41 (2016); and Serkan Akguc, Jongmoo Jay Choi, & Suk-Joong Kim, *Do Private Firms Perform Better than Public Firms?* (Working Paper, 2015).

[654] In portfolio theory, constraining the set of investment opportunities yields a potentially inferior optimal portfolio. However, the presence of information frictions due to a lack of investor sophistication might reverse this general prediction and result in lower portfolio risk-adjusted returns. *See supra* note 591.

discussed above, the amendments also may in some cases result in less informed investment decisions, lowering the efficiency of capital allocation.

The incremental economic effects of the amendments to non-accredited investor disclosures in Rule 506(b) offerings discussed above might be modest, relative to the baseline, for several reasons: (i) while non-accredited investors are not subject to investment limits in Rule 506(b) offerings, their participation in Rule 506(b) offerings remains highly limited by the restriction that no more than 35 investors participate and that such investors must meet the knowledge and experience standard of the rule; (ii) non-accredited investors may be unwilling to participate in the majority of Rule 506(b) offerings because of the higher due diligence and transaction costs, potentially higher investment minimums that may be inconsistent with optimal diversification in their portfolio, and significantly lower liquidity involved in private placements due to transferability restrictions and a highly limited secondary market; (iii) issuers may be unwilling to accept non-accredited investors in Rule 506(b) offerings for reasons other than the cost of disclosures (*e.g.*, a preference to attract accredited investors that may be able to bring a larger amount of capital and business expertise, an unwillingness to expand the capitalization table that may make future angel investors or venture capital ("VC") funding less interested in providing funding to the issuer, an unwillingness to increase the number of non-accredited investors that may draw the issuer incrementally closer to the Section 12(g) registration threshold, or concerns about investor relations and risk of litigation involving less informed investors); and (iv) even though required disclosures to non-accredited investors would be scaled under the amendments, the direct and indirect costs of such disclosures (such as risks of disclosure of proprietary information to a broader range of investors) may discourage issuers from selling to non-accredited investors in Rule 506(b) offerings.

iv. Reasonable Alternatives

We are repealing audit requirements for Rule 506(b) offerings of up to $20 million involving non-accredited investors. As an alternative, we could repeal audit requirements for all Rule 506(b) offerings, irrespective of offer size. As compared to the proposal, this

alternative would result in additional compliance cost savings for issuers in Rule 506(b) offerings with sales to non-accredited investors and might induce additional Rule 506(b) issuers to accept non-accredited investors. However, the relative benefits of compliance cost savings under this alternative might have a more limited impact in larger offerings. Further, such an alternative could increase costs to non-accredited investors as a result of less well informed investment decisions, particularly if non-accredited investors, which are not subject to investment limits in Rule 506(b), invest significant amounts in large Rule 506(b) offerings without the benefit of audited financial statements. Limitations on the number and types of non-accredited investors that are eligible to participate in Rule 506(b) offerings (no more than 35 non-accredited investors are allowed to participate and such investors must possess sophistication) would limit the aggregate costs to non-accredited investors under this alternative. Such an alternative would also be inconsistent with the requirements applicable to other larger offerings available to non-accredited investors, including larger offerings under Regulation A Tier 2 and registered offerings, both of which require audited financial statements.

Under the final amendments, audited financial statement disclosures will not be required for sales to non-accredited investors in Rule 506(b) offerings of up to $20 million by non-reporting issuers, irrespective of how much capital is invested by non-accredited purchasers. As another alternative, we could require audited financial statement disclosures in Rule 506(b) offerings by non-reporting issuers that have up to $20 million in sales to non-accredited investors. On the one hand, this alternative would reduce costs for non-reporting issuers with limited sales to non-accredited investors under Rule 506(b). On the other hand, each non-accredited investor that is a purchaser in such an offering may incur a potentially significant loss of information and increase in due diligence costs, which do not depend on the amount of capital committed by other non-accredited investors to this offering.

As another alternative, rather than scale disclosure requirements in Rule 506(b) offerings by non-reporting issuers of up to $20 million with sales to non-accredited investors, we could waive the requirements for disclosures to non-accredited investors altogether. This alternative

would result in significantly lower compliance costs for issuers and could encourage more issuers to sell securities to non-accredited investors under Rule 506(b). However, the loss of information to non-accredited investors could significantly reduce their ability to allocate capital in an informed manner, particularly because a lack of a secondary trading market in many cases precludes effective price discovery through other sources. Alternatively, we could require issuers to provide the same disclosures to non-accredited investors if they provide any disclosures, such as a private placement memorandum, to accredited investors. While such a provision could significantly lower non-accredited investor information risk and due diligence costs in some cases, without dramatically increasing issuer costs (because they already would have to incur many of the direct costs to provide the disclosure to accredited investors), non-accredited investors might suffer a significant loss of information in cases where the issuer's disclosures to accredited investors are limited. The existing requirement that the non-accredited investor satisfy the knowledge and experience standard of Rule 506(b)(2)(ii), as well as the continued application of the antifraud provisions of the Federal securities laws, might mitigate some of the investor protection risks under this alternative.

We are extending the disclosure requirements of Regulation A Tier 2 for sales to non-accredited investors by non-reporting issuers under Rule 506(b), irrespective of the size of the Rule 506(b) offering above $20 million. As an alternative, we could extend the financial statement requirements of Regulation A Tier 2 to sales to non-accredited investors in offerings under Rule 506(b) up to $75 million (the amended Regulation A Tier 2 offer limit), and continue to apply the existing financial statement disclosure requirements (that are aligned with the financial statement disclosure requirements applicable to registration statements) to Rule 506(b) offerings exceeding $75 million that include sales to non-accredited investors. Compared to the final amendments, this alternative might increase compliance costs for non-reporting issuers seeking to raise over $75 million under Rule 506(b) and sell securities to non-accredited investors. At the same time, these financial statement disclosures may lower the risk of less informed investment decisions by non-accredited investors in such offerings compared to

the proposal, particularly for small and pre-revenue issuers with large financing needs. However, the impact of this alternative may be modest because relatively few offerings would be affected by this alternative compared to the final amendments. We estimate that in 2019 there were approximately 383 offerings under Rule 506(b) by non-reporting issuers other than pooled investment funds with offer sizes in excess of $75 million (excluding undefined offer sizes), of which between 3.1 percent and 4.4 percent of offerings involved non-accredited investors.[655] This alternative might also decrease the willingness of non-reporting issuers to accept non-accredited investors in Rule 506(b) offerings exceeding $75 million, resulting in potentially fewer investment opportunities for non-accredited investors compared to the proposal.

As another alternative, we could extend Regulation Crowdfunding financial statement disclosure requirements to Rule 506(b) offerings with non-accredited purchasers, as suggested by one commenter.[656] Under such an alternative, issuers in offerings above $107,000 and up to $5 million (the amended Regulation Crowdfunding limit) would have to provide non-accredited purchasers with financial statements that have been either reviewed or audited by an independent accountant (depending on offering size). Compared to the amendments, which only require audited financial statements in offerings with non-accredited purchasers of above $20 million, this alternative could provide non-accredited purchasers in such offerings with additional certainty about financial statement disclosures. However, it also would introduce additional costs for such issuers to obtain an independent accountant review[657] or audit of its financial statements.

b. Simplification of Disclosure Requirements in Regulation A Offerings

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[655] *See supra* note 127. This estimate is based on the analysis of Form D data in initial Form D filings with reported offer size, excluding pooled investment fund issuers and reporting issuers. Reporting issuers are identified based on 2019 filings of annual reports or amendments to them.

[656] *See, e.g.*, J. Clarke Letter.

[657] In the Regulation Crowdfunding Adopting Release, the Commission estimated review costs to be approximately $1,500 to $18,000. *See* Regulation Crowdfunding Adopting Release, at 71499. Recent reports and commenters estimate such costs at between $1,500 and $6,000. *See* Temporary Amendments Adopting Release, at 27127.

The final amendments extend to Regulation A issuers certain accommodations presently available to reporting companies, namely: (1) the option to redact confidential information from material contracts and certain other agreements filed as exhibits without a need to submit a confidential treatment request; (2) the option to redact information that would constitute a clearly unwarranted invasion of personal privacy in any exhibit; and (3) the option of incorporating by reference financial statement information into Regulation A offering statements. The amendments also eliminate the requirement to file a draft offering statement as a separate exhibit with Form 1-A and instead enable automated public dissemination of the draft offering statement through EDGAR, similar to the framework in place for registered offerings. In addition, the amendments permit the Commission to declare an offering statement, or a post-qualification amendment to such offering statement, abandoned, consistent with the rule applicable to registered offerings.

i. Benefits

Extending to Regulation A issuers the option to redact confidential information from material contracts and certain other agreements filed as exhibits without a need to submit a confidential treatment request—provided that information is not material and is the type of information that the issuer both customarily and actually treats as private and confidential—is expected to reduce disclosure costs for Regulation A issuers and expedite the filing process by eliminating the need to file a confidential treatment application and the associated cost, which was supported by the commenters that addressed these amendments.[658] Similarly, extending to Regulation A issuers the option to redact information that would constitute a clearly unwarranted invasion of personal privacy in any exhibit is expected to reduce disclosure costs and expedite the filing process for affected Regulation A issuers. These accommodations are currently available to reporting companies. Submitting a confidential treatment request requires a filer to prepare a detailed application to the Commission that identifies the particular text for which confidential treatment is sought, a statement of the legal grounds for the exemption, and

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[658] *See supra* note 326.

an explanation of why, based on the facts and circumstances of the particular case, disclosure of the information is unnecessary for the protection of investors. If the Commission staff issues comments on the application, the filer might need to revise and resubmit the application. These requirements impose direct compliance costs on filers, for instance, in the form of legal counsel costs. For filers not willing or not able to incur such costs, inclusion of confidential information of proprietary value in a material contract or similar exhibit that is filed publicly can result in significant indirect costs due to the disclosure of sensitive information to potential competitors. While under the amendments, filers would still need to determine whether information they are redacting is material, they will not need to follow the confidential treatment application process.

Based on EDGAR filings analysis, we have identified 11 issuers in qualified Regulation A offerings that have also filed confidential treatment applications as of December 2019. We lack data to determine how many of those filers had filed confidential treatment applications with regard to information that could be redacted under the amendments. In general, more than 90 percent of the confidential treatment requests granted by the Commission in fiscal year 2018 were made in reliance on the exemption concerning competitive harm. It is also difficult to gauge how many filers had proprietary information in material contracts or similar exhibits but opted not to file a confidential treatment request due to legal and other costs of preparing such a request. One commenter on the FAST Act Modernization Release estimated that legal fees for confidential treatment requests ranged from $35,000 to over $200,000,[659] while another commenter estimated that attorneys and paralegals at the company spend an average of 80 hours each quarter preparing redacted exhibits and related confidential treatment requests.[660] According to another commenter, the cost savings of streamlining the confidential treatment process are expected to be relatively more impactful for smaller filers because such issuers have a lower threshold for determining whether a contract is material and therefore required to be

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[659] *See* FAST Act Modernization Release, at note 341.

[660] *See* FAST Act Modernization Release, at note 342. Under the amendments, filers will still need to prepare redacted exhibits and in some cases filers will incur costs to respond to a staff request to demonstrate that redacted information was not material.

filed publicly, as well as for issuers in industries that are associated with more confidential treatment requests, such as biotechnology.[661] We generally expect similar cost savings from extending this accommodation to Regulation A issuers.

Similarly, extending to Regulation A issuers the option of incorporation by reference of previously filed financial statement information into the offering statement, consistent with the current rules applicable to registered securities offerings filed on Form S-1, is expected to incrementally reduce Form 1-A preparation costs.

Enabling automated dissemination of draft offering statements in lieu of the existing exhibit filing requirement, consistent with the process of dissemination of draft registration statements, is expected to incrementally reduce filer effort to prepare the offering statement and promote greater efficiency of the filing process and regulatory harmonization.

Similarly, permitting the Commission to declare an offering statement, or a post-qualification amendment to such offering statement, abandoned, consistent with the rule applicable to registered offerings, is expected to promote greater regulatory harmonization and to incrementally promote efficiency of the filing process in cases where only a post-qualification amendment, rather than the entire offering, is abandoned. The amendments are expected to benefit investors by reducing potential investor confusion arising from the presence of the unqualified post-qualification amendment on EDGAR.

ii. Costs

The extension of the option to redact confidential information from material contracts filed as exhibits to Regulation A filings is not expected to result in a significant loss of information to investors because of the condition that any information being omitted not be material. Filers electing to rely on this accommodation would still need to incur costs to determine that information meets the standard for redaction, as they do today when they file a confidential treatment request, but they would not incur the cost of preparing a confidential

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[661] *See* FAST Act Modernization Release, at note 343 and accompanying text.

treatment application.[662] One potential cost of the final amendments to Regulation A investors is that information might be redacted by filers that would not otherwise be afforded confidential treatment by the staff. However, based on previous experience and a review of confidential treatment applications by reporting companies, we believe that such instances would be rare.[663]

Allowing Regulation A issuers to rely on incorporation by reference of financial statement information from previously filed periodic reports may marginally increase search time for potential investors. Instead of having all the information available in one location, investors may need to separately access the incorporated reports in order to price the offered security. However, the inclusion of hyperlinks should facilitate the retrieval of such information by investors. As a result, any increase in the costs to investors of assembling and assimilating necessary information is expected to be minimal. We do not have data to assess if, and to what extent, the Form 1-A revision would be burdensome to investors.

iii. Effects on Efficiency, Competition, and Capital Formation

Extending certain disclosure accommodations presently available to reporting companies to Regulation A issuers is expected to have an incremental beneficial effect on capital formation under Regulation A by reducing disclosure and compliance costs required to undertake a Regulation A offering. If lower compliance costs encourage new issuers, particularly smaller issuers with less compliance experience that might not have otherwise been able to access external financing, to raise capital under Regulation A, the amendments may, on the margin, promote competition. Compliance cost savings may have relatively greater benefits for smaller issuers to the extent that such costs have a fixed component.

If the amendments marginally reduce the amount of information available to investors such that the ability to make informed investment decisions is affected, they may result in less

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[662] Filers may be asked by the Commission staff to provide on a supplemental basis an unredacted copy of the exhibit and provide an analysis of why the redactions are consistent with the redacted exhibit rules, which might result in incremental additional costs.

[663] *See* FAST Act Modernization Release, at Section VI.D.2.

efficient capital allocation and, for Regulation A securities with a secondary market (*e.g.*, OTC-quoted Regulation A securities), less informationally efficient secondary market prices.

iv. Reasonable Alternatives

The amendments will permit Regulation A issuers to incorporate previously filed financial statements by reference. As an alternative, we could also permit forward incorporation by reference on Form 1-A with the same conditions as the ones for forward incorporation by reference available to smaller reporting companies on Form S-1. Forward incorporation by reference allows an issuer to automatically incorporate by reference periodic and current reports filed subsequent to the qualification of the registration statement. This would result in compliance cost savings for Regulation A issuers and allow for greater regulatory harmonization and more uniformity in disclosure requirements applicable to different categories of offerings by small issuers. Forward incorporation by reference would eliminate the need for Regulation A issuers to update information in a qualified Form 1-A filing that has become stale or is incomplete and file post-qualification amendments solely related to updating information from periodic reports, thereby reducing compliance costs.[664] By avoiding the need to file certain post-qualification amendments, under this alternative Regulation A issuers might be able to move more quickly and at a lower cost to raise capital when favorable market conditions occur. Forward incorporation by reference, however, could increase investor search costs and eliminate the benefit of staff review of post-qualification amendments. Because issuers with a relatively higher level of information risk—for instance, issuers not current in their reports, blank check companies, shell companies (other than business combination related shell companies), and penny stock issuers, as well as issuers whose reports are not available on a website maintained by or for the issuer—would be ineligible for forward incorporation under

[664] We lack data for a reliable estimate of the number of affected issuers because it is difficult to determine which of the post-qualification filings solely update information from periodic reports versus other information, such as offering price, amount sought, offering deadline, as well as financial information. Based on the analysis of EDGAR filings from June 2015 through December 2019, we estimate that the average (median) issuer in a qualified Regulation A offering has filed 1.7 (0) post-qualification amendments.

this alternative, the increase in investor information gathering costs under this alternative might be small.

The disclosure simplification amendments will apply to all Regulation A issuers. As an alternative, we could extend the provisions only to Regulation A issuers that are reporting companies. This alternative would be generally consistent with the treatment of reporting companies in registered offerings. It would decrease the potential for loss of information available to Regulation A investors about material contracts and similar agreements and marginally reduce their costs of retrieving financial statement information from previously filed periodic reports that are incorporated by reference for issuers other than reporting companies. However, this alternative also would decrease the benefits of the rule, compared to the proposal.[665]

c. Confidential Information Standard

As discussed in Section II.D.3 above, the current requirements for registrants to file material contracts as exhibits to their disclosure documents permit registrants to redact provisions or terms of exhibits required to be filed if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed. We are adopting as proposed the amendments to the exhibit filing requirements by removing the competitive harm requirement and replacing it with a standard more closely aligned with the Supreme Court's definition of "confidential" that permits information to be redacted from material contracts if it is the type of information that the issuer both customarily and actually treats as private and confidential and that is also not material. These amendments are expected to benefit issuers through greater regulatory simplification and harmonization of the requirements governing confidential information in exhibits with the Supreme Court's definition, enabling more efficient compliance and greater flexibility to redact confidential information from exhibits. To the extent that the amendments makes the option to redact

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[665] The change to permit Exchange Act registrants to use Regulation A was adopted in December 2018 and approximately 17 Exchange Act registrants sought to use Regulation A to conduct an offering in 2019, of which 11 of those offerings were qualified.

certain information from exhibits more attractive to issuers, it may result in a marginally decreased availability of information to investors.

As an alternative, as suggested by one commenter, we could have extended the amendments to include participation agreement and administrative contract exhibits to Form N-6.[666] This alternative would be unlikely to result in significant benefits to issuers because information contained in such exhibits is already disclosed to investors in other contexts and, in our staff's experience, these exhibits do not contain confidential or proprietary information.

5. Offering and Investment Limits

a. Offering and Investment Limits under Regulation A, Regulation Crowdfunding, and Rule 504

As proposed, the final amendments increase the 12-month offering limit for Regulation Crowdfunding, presently set at $1.07 million, to $5 million; the 12-month offering limit for Regulation A Tier 2, presently set at $50 million, to $75 million with the associated revision of the 12-month offering limit for sales by existing affiliate security holders from $15 million to $22.5 million; and the 12-month offering limit for Rule 504, presently set at $5 million, to $10 million.

We can gain some insight into the likely capital formation benefits of a higher offering limit from repeat issuers that have raised multiple rounds of financing under the capped offering exemptions. Some of those issuers might have had to raise financing over multiple years because of the existing offering limits. The following table examines total proceeds per issuer reported raised during 2016 through 2019.

Table 11: Capital Raising during 2016-2019 by Repeat Issuers Using Affected Exemptions

Number of Regulation A issuers that raised at least $50 million	14
Average (median) amount reported raised	$13.4 million ($5.0 million)
Number of Regulation Crowdfunding issuers that raised at least $1.0 million ($1.07 million)	51 (27)
Average (median) amount reported raised	$213,678 ($106,900)

[666] *See* Comm. of Annuity Insurers Letter.

Number of Rule 504 issuers other than pooled investment funds that raised at least $5 million	7
Average (median) amount reported raised	$384,200 ($100,000)

Some of the existing issuers under the exemptions being amended have conducted other types of offerings that are not subject to offering limits. Information about offering sizes in Rule 506 can provide additional insights for the review of the offering limits for Regulation A, Regulation Crowdfunding, and Rule 504.[667] Generally, however, we do not know whether those issuers used Rule 506 because the offering limits of the exemptions being amended were too low for their needs or for other reasons. The table below shows the capital raising under Rule 506 in 2019 by issuers using offering exemptions being amended.[668]

Table 12: Capital Raising under Rule 506 in 2019 by Issuers Using Affected Exemptions

Number of Regulation A issuers raising financing under Rule 506	34
Average (median) amount reported raised under Rule 506 per Regulation A issuer	$5.8 million ($0.2 million)
Number of Regulation Crowdfunding issuers raising financing under Rule 506	139
Average (median) amount reported raised under Rule 506 per Regulation Crowdfunding issuer	$2.4 million ($0.2 million)
Number of Rule 504 issuers raising financing under Rule 506	110
Average (median) amount reported raised under Rule 506 per Rule 504 issuer	$1.4 million ($0.3 million)

[667] We focus on Rule 506 offerings due to data limitations. First, reporting companies are ineligible under Rule 504. Additionally, we have identified only one Regulation Crowdfunding issuer that has undertaken a registered offering as of December 31, 2019. Further, very few Regulation A issuers have undertaken a registered offering during this period, resulting in a lack of reliable data on such issuers' registered offering proceeds. From June 19, 2015, through December 31, 2019, we identified 14 issuers in qualified Regulation A offerings that had a registration statement declared effective, based on the analysis of EDGAR filings. These were issuers that proceeded to list on an exchange after their Regulation A offering and then sought follow-on financing through a registered offering.

[668] For purposes of this table, Regulation A issuers are defined as issuers in qualified Regulation A offerings from June 2015 through December 2019; Rule 504 issuers are defined as issuers in new and amended Rule 504 offerings from 2016 through 2019; Regulation Crowdfunding issuers are issuers in Regulation Crowdfunding offerings from May 2016 through December 2019. Data on Rule 506 financing is based on total proceeds reported raised per issuer in new and amended Form D filings from 2019. Pooled investment funds are excluded.

Evidence in Tables 11 and 12 suggests that most issuers that rely on Regulation A, Regulation Crowdfunding, and Rule 504 tend to raise amounts of financing, both under these exemptions and when they raise financing under Rule 506, which has no offering limit, that are below the existing offering limits. This observation is based on the pool of issuers attracted to these offering exemptions with the provisions that are in place today. It is likely that issuers with larger financing needs forgo the exemptions with offering limits that are too low for their financing needs. Expanding the offering limits is therefore expected to attract additional issuers to these exemptions.

It is difficult to predict how many new issuers will be drawn to Regulation Crowdfunding, Regulation A, and Rule 504 under the amended offering limits. Because of potential unobservable differences in issuer characteristics, comparisons presented below are intended as illustrative examples. The table below[669] examines the use of other securities offering methods by issuers that raised amounts above the existing limits but below the amended offering limit thresholds, some of which may consider using the amended exemptions. We consider (1) Rule 506 and registered offerings for purposes of analyzing the amended offering limit threshold under Regulation A; (2) Regulation A, Rule 504, and Rule 506 offerings for purposes of analyzing the amended offering limit threshold under Regulation Crowdfunding; and (3) Regulation A and Rule 506 offerings for purposes of analyzing the amended offering limit threshold under Rule 504.[670] Information on amounts raised under Section 4(a)(2), Section 3(a)(11), and Rules 147/147A is not available to us.

Table 13: Evaluation of Offering Limit Amendments Based on Evidence from Select Other Securities Offering Methods in 2019

Regulation A: offering limit increase from $50 million to $75 million

[669] For purposes of this table, Regulation A issuers are defined as issuers in qualified Regulation A offerings from June 2015 through December 2019; Rule 504 issuers are defined as issuers in new and amended Rule 504 offerings from 2016 through 2019; Regulation Crowdfunding issuers are issuers in Regulation Crowdfunding offerings from May 2016 through December 2019. Data on Rule 506 financing is based on total proceeds reported raised per issuer in new and amended Form D filings from 2019. Pooled investment funds are excluded.

[670] For purposes of analyzing the amended offering limit thresholds under Regulation Crowdfunding and Rule 504, we do not consider registered offering activity, as registered offerings are not likely to be a cost-effective alternative at those offer sizes.

Number of issuers in offerings that raised above $50 million and up to $75 million:	
Rule 506 [a]	171
Registered offerings [b]	57
Regulation Crowdfunding: offering limit increase from $1.07 million to $5 million	
Number of issuers in offerings that raised above $1.07 million and up to $5 million:	
Regulation A [c]	13
Rule 504 [d]	55
Rule 506 [e]	4,004
Rule 504: offering limit increase from $5 million to $10 million	
Number of issuers in offerings that raised above $5 million and up to $10 million:	
Regulation A [f]	10
Rule 506 [g]	1,618

[a] Regulation A eligibility criteria exclude investment companies and blank check companies and limit the exemption to U.S. and Canadian issuers, so for comparability pooled investment funds and issuers outside the U.S. and Canada are excluded from the Rule 506 proceeds used in this estimate. Reporting companies are eligible to rely on Regulation A under the 2018 amendments.

[b] Registered offering proceeds are based on gross proceeds reported in SDC Platinum for U.S. public offerings of equity, debt, and convertible securities with issue dates in 2019, excluding withdrawn, postponed, and rumored offerings, asset-backed securities offerings, blank check issuers, investment fund issuers, and issuers outside the U.S. and Canada.

[c] For purposes of this table, only incremental Regulation A proceeds reported in 2019 are considered, as opposed to cumulative proceeds reported from June 2015 through December 2019. Regulation Crowdfunding eligibility criteria limit the exemption to U.S. issuers and exclude Exchange Act reporting companies, so for comparability non-U.S. issuers and reporting companies are excluded from the Regulation A proceeds used in this estimate.

[d] Regulation Crowdfunding eligibility criteria exclude investment companies and Exchange Act reporting companies and limit the exemption to U.S. issuers, so for comparability pooled investment funds and non-U.S. issuers are excluded from Rule 504 proceeds used in this estimate. Reporting companies are ineligible under Rule 504.

[e] Regulation Crowdfunding eligibility criteria exclude investment companies and Exchange Act reporting companies and limit the exemption to U.S. issuers, so for comparability pooled investment funds, reporting companies, and non-U.S. issuers are excluded from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019.

[f] For purposes of this table, only incremental Regulation A proceeds reported in 2019 are considered, as opposed to cumulative proceeds reported from June 2015 through the end of the period. Rule 504 eligibility criteria exclude Exchange Act reporting companies, so for comparability reporting companies are excluded from the Regulation A proceeds used in this estimate.

[g] For comparability with other estimates in this table, we exclude reporting companies and pooled investment funds from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019.

Given the scale of Regulation A offering activity today, the number of Rule 506 and registered offerings in the $50 million to $75 million range suggests potential for a significant relative increase in Regulation A activity under the amended offering limit. As a crucial caveat,

issuers choosing to rely on Rule 506 or registered offerings today may be inherently different from the types of issuers that might find Regulation A attractive under the amended limit. Further, the number of Rule 506 offerings in the $1.07 million to $5 million range significantly exceeds the absolute number of Regulation Crowdfunding offerings today, which thus may suggest potential for a significant relative increase in Regulation Crowdfunding activity under the amended offering limit. Similarly, the number of Rule 506 offerings in the $5 million to $10 million range significantly exceeds the absolute number of Rule 504 offerings today, which thus may suggest potential for a significant relative increase in Rule 504 activity under the amended offering limit. As a caveat, issuers choosing to rely on Rule 506 today may be inherently different from the types of issuers that might find Regulation Crowdfunding or Rule 504 attractive under the amended limits. Importantly, historical use of other offering methods may not fully represent potential future use of the exemptions being amended, particularly if the amendments facilitate offerings by issuers that may not currently rely on securities offerings. We lack data or a methodology to predict how many new issuers that would not have otherwise undertaken any securities offering will be drawn to Regulation Crowdfunding, Regulation A, and Rule 504 under the amendments.

As discussed above, in response to commenters, we also are extending for an additional 18 months the temporary relief from certain financial statement review requirements for eligible issuers offering up to $250,000 of securities in reliance on Regulation Crowdfunding in a 12-month period. The temporary final rules adopted on May 4, 2020, and subsequently extended on August 28, 2020, serve as the economic baseline against which the costs and benefits, as well as the impact on efficiency, competition, and capital formation, of these amendments are measured. Consistent with the existing temporary relief, the eligibility criteria exclude (1) issuers that were organized or had operations for less than six months prior to the commencement of the offering and (2) issuers that were not compliant with Regulation Crowdfunding requirements with regard to any prior offerings in which they sold securities. Historical data provides an indication of the potential share of offerings eligible for the extended

relief among all offerings. From the inception of Regulation Crowdfunding through December 31, 2019, we estimate that 1,537 (approximately 77 percent of the total number of crowdfunding offerings during this period) were initiated by 1,407 issuers that were eligible or would have been eligible for the relief under the six-month eligibility criteria.[671] It is more difficult to estimate the percentage of prior Regulation Crowdfunding issuers that would not be eligible because they were not compliant with one or more of the requirements of Regulation Crowdfunding in a prior offering. From inception through December 31, 2019, we estimate that there were 149 repeat Regulation Crowdfunding issuers, including 116 such issuers that had reported successful completion of at least one Regulation Crowdfunding offering on Form C-U.[672] We are unable to predict precisely the number of issuers likely to rely on this provision among eligible issuers.[673] A review of new filings made on Form C on or after May 4, 2020, provides some information about issuer reliance on this provision under the existing temporary relief. As of September 30, 2020, we find that, of the 400 new offerings on Form C by eligible issuers (excluding filings withdrawn as of September 30, 2020, and duplicate filings, across offerings of all sizes), 53 offerings, or 13% provided certified rather than reviewed financial statements.[674]

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671 For this estimate, eligibility was estimated approximately based on the issuer having been formed at least six months prior to the filing date of the offering as reported in the XML portion of Form C and having had (1) either positive assets, revenues, net income, debt, accounts receivable, cost of goods sold, taxes paid, or employees in the most recent fiscal year reported in the XML portion of Form C, or (2) a prior Regulation Crowdfunding offering. In addition, we recognize that many of the past Regulation Crowdfunding issuers may meet the six-month eligibility criterion as of the effective date of these amendments, should they wish to avail themselves of the relief for a follow-on offering under Regulation Crowdfunding.

672 This figure likely provides a lower bound on the number of issuers that have initiated a follow-on offering after successfully completing a prior offering due to incomplete reporting of offering proceeds on Form C-U. Follow-on issuance activity may differ from historical data due to changes in the crowdfunding market as a result of confounding market factors and continued uptake of the relief under the temporary rules by past issuers. *See also* Temporary Amendments Adopting Release, at 27124.

673 For a more detailed discussion, s*ee* Temporary Amendments Adopting Release, at 27124-5.

674 *See supra* note 671 for the definition of eligible issuer used in this estimate. This estimate may represent a lower bound because reliance on the provisions is not disclosed in a structured data or in a standardized format and was evaluated based on manual review of filings for mention of the temporary rules. Of the issuers in the 53 offerings, we identified 48 as first-time issuers and five as repeat Regulation Crowdfunding issuers based on having made a prior filing on Form C. Each of the five repeat Regulation Crowdfunding issuers had made a filing on Form C-U and a filing on Form C-AR (annual report), however, our review did not examine the details of these filings for specific content. In addition to the issuers in the 53 offerings discussed above (which listed dates of organization that were six months or more prior to filing), we examined all issuers using reviewed financial statement relief between May 4, 2020, and September 30, 2020, and we identified four

i. Benefits

The amended Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 offering limits are expected to increase capital formation in those markets by enabling existing issuers that are approaching offering limits to raise larger amounts of financing, as well as by drawing new issuers that are deterred by relatively low offering limits today.[675]

We recognize that these benefits will be limited if issuers raise amounts below the limit. We note that some commenters suggested that there is not compelling evidence of the need for increased offering limits in Regulation A, Regulation Crowdfunding, or Rule 504 or that more information is needed to determine whether such an increase is appropriate.[676] While historical utilization rates for these exemptions have not reached offering limits for the average issuer, it is important to note that estimates from past data obtained under the existing limits are inevitably subject to selection bias—high-growth issuers or larger issuers with considerable financing needs may forgo these offering methods because it may not make sense for such issuers to incur the cost of an offering with a lower offering limit in addition to pursuing other financing options. Similarly, the high fixed cost of due diligence and marketing related to the kinds of small issuers and offerings represented in the market today may cause intermediaries to be unwilling to participate in the Regulation A market under the existing offering limits. As a result, if smaller issuers, issuers with a lower growth rate, or issuers without intermediaries are overrepresented in the Regulation A market today, they may account for relatively low average proceeds raised. Thus, historical utilization rates could fail to capture the potentially expanded

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issuers (all of which were first-time issuers) in offerings seeking above $107,000 and up to $250,000 that listed a date of organization that was less than six months prior to filing. We could not confirm, based on the filings, whether the issuers may have been organized prior to the date listed, such as in a different corporate form (e.g., a limited liability company instead of a corporation). Our review of the recent Regulation Crowdfunding filings focused on the use of the relief and the small sample size on which these estimates are based limits our ability to draw systematic inference about issuers relying on the relief.

675 *See supra* notes 363 and 365 (noting commenters supporting the benefits of an increased Regulation A limit); *supra* note 419 (noting commenters supporting the benefits of an increased Regulation Crowdfunding limit); and *supra* note 397 (noting commenters supporting the benefits of an increased Rule 504 limit). Many individual commenters recommended raising the Regulation Crowdfunding limit in light of economic concerns raised by COVID-19.

676 *See supra* notes 370, 425, and 398.

pool of prospective issuers with larger financing needs that may consider these exemptions, and pursue larger offerings, under the amendments, as well as the potentially expanded pool of intermediaries and investors that are expected to be drawn to the Regulation A market under the amended offering limit. Similarly, startups whose financing needs may exceed the existing $1.07 million annual Regulation Crowdfunding limit or the existing $5 million Rule 504 limit—such as startups with a significant growth potential—may be reluctant to consider Regulation Crowdfunding or Rule 504 because even after they incur the cost of compliance and other offering costs, they would still have to resort to other financing to meet their remaining financing needs. Thus, the existing offering limits likely shape the composition of issuers, intermediaries, and investors attracted to these exemptions. While it is possible that low utilization will continue to be driven by factors other than the offering limit, significant caution is warranted with respect to any prediction of future utilization under an expanded offering limit extrapolated from historical data.

The effects on aggregate capital formation will also be limited if the issuers drawn to the amended exemptions are switching from other securities offering methods;[677] however, such issuers may still benefit from optimizing their financing strategy and lowering their cost of capital.

The amendments also may lead to changes in the composition of the pool of issuers relying on these exemptions by drawing a larger and more diversified set of issuers with high growth potential and financing needs in excess of the existing limits.[678] Today such startups may forgo an exemption with an offering limit in favor of a Rule 506 offering. A broader and more diversified range of investment opportunities may benefit investors in these market segments, particularly non-accredited investors that seek exposure to private companies but are constrained from participation in private placements. The amended offering limits also may

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677 *See supra* note 427 (discussing concerns of commenters about substitution between registered offering and exempt offering markets).

678 *See, e.g.*, *supra* note 365 (discussing comment letters that suggested that an increase in the Regulation A offering limit could encourage development of the smaller initial public offering market, encouraging more issuers to conduct offerings and providing more investment opportunities for investors).

make the exemptions more attractive to a broader range of intermediaries, some of which may be deterred from participating in these markets today by fixed costs (*e.g.*, due diligence, compliance, crowdfunding platform operation, etc.) in proportion to potential compensation.[679]

Under the existing rules, Regulation A Tier 2 offerings are not subject to State registration and qualification requirements. We are not making changes to this provision, which will continue to apply to Tier 2 offerings up to the amended offering limit. Under the existing rules, Regulation Crowdfunding offerings up to $1.07 million similarly are preempted from State registration and qualification requirements under Section 4(a)(6). The amendments we are adopting in this release extend the preemption of State registration and qualification requirements to Regulation Crowdfunding offerings in excess of $1.07 million and not exceeding the amended offering limit ($5 million). This provision will benefit prospective issuers seeking above $1.07 million in a 12-month period under Regulation Crowdfunding through lower costs of compliance and a more streamlined offering process than if the offering had been subject to State review. An additional benefit to our approach is that issuers and intermediaries will potentially incur lower legal costs due to greater certainty as to the application of preemption to Regulation Crowdfunding offerings above $1.07 million.[680] Rule 504 offerings will remain subject to State registration and qualification requirements. Because issuers in small offerings continue to have a choice of securities offering exemptions, issuers that seek to avail themselves of the State review regime may continue to do so through a Regulation A Tier 1 or a Rule 504 offering.

The temporary final rules currently in effect serve as the economic baseline against which the benefits of the amendments extending the relief from certain Regulation Crowdfunding financial statement review requirements are measured. Thus, we do not expect additional significant benefits to result from the extension. Extension of the temporary relief will allow small businesses to continue to avail themselves of the benefits of the relief as they

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679 *See, e.g.*, *supra* note 366 (discussing commenters that suggested that the higher offering limits would improve the economics for issuers and broker dealers to participate in the Regulation A market).

680 *See supra* Section II.E.3.c.

do today under the baseline,[681] particularly in the face of significant challenges facing small businesses as a result of the COVID-19 crisis.[682] While the existing temporary rule specifies that it applies to issuers affected by COVID-19, the extension of this relief under the final rules does not include this condition. Given the broad scope of the direct and indirect impact that COVID-19 has had on small business issuers and the continuing challenges they face, we do not expect this change in conjunction with the 18-month extension to have a substantial economic impact.[683] We note that several commenters supported extending the temporary relief.[684]

ii. Costs

The amendments may increase aggregate potential investor losses.[685] Increased offering limits under Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 may make it easier for smaller, higher-risk issuers to access capital through these exemptions.[686] The increased

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[681] The relief allows issuers to raise capital without incurring costs and delays involved in an independent accountant's review of their financial statements. This incrementally enhances the efficiency of conducting the offering and yields capital formation benefits for eligible issuers. *See also* Temporary Amendments Adopting Release, at 27127. The upfront costs of obtaining a review report may be nontrivial for small issuers, particularly issuers experiencing declines in internal cash flows as a result of the COVID-19 crisis. In the Crowdfunding Adopting Release, the Commission estimated review costs to be approximately $1,500–$18,000. *See* Crowdfunding Adopting Release, at 71499. More recent information about the costs of a review report is available from commenters and industry sources. For example, one industry source estimates the cost of a review as $2,000 – $2,450 for a single-owner LLC/S-Corp/Sole Proprietor issuer that has not previously had a review or audit but is in possession of full financial records and $2,400 – $2,950 for a single-owner issuer that has not previously had a review or audit and instead tracks financials in a spreadsheet format. These are estimates based on a hypothetical issuer. Costs may vary depending on the accountant and the issuer's circumstances. *See* CrowdfundCPA Crowdfunding Audit/Review Cost Calculator, available at: http://crowdfundcpa.com/cost-estimate--calculator.html (retrieved April 22, 2020). A commenter on the Concept Release stated that it has "interviewed dozens of CPA firms and found that the average cost of reviewing a company that has two years of financial history is at least $6,000" and that "[f]or a company with no history, this quote (from many CPA firms) has been in the $1,500 to $2,500 range." *See* Letter from Mainvest (Sep. 24, 2019), *available at*: https://www.sec.gov/comments/s7-08-19/s70819-6193357-192513.pdf.

[682] *See infra* note 695.

[683] *See id.*.

[684] *See supra* note 449.

[685] *See, e.g.,* CFA Letter (expressing concern about the negative effects of increasing the use of Regulation A for non-accredited investors and increased risks of investor losses); R. Rutkowski Letter (expressing concern about risk to non-accredited investors in Regulation A and Regulation Crowdfunding offerings); and Morningstar Letter (noting a lack of investment advice such as from a broker or investment adviser that investors might have access to with regard to an investment in a public company).

[686] *See, e.g.,* Md. St. Bar Assoc. Letter (expressing concern that Regulation Crowdfunding will draw non-accredited investors to issuers that accredited investors refused to fund and further stating that companies that require more than $50 million every 12 months should be raising capital through registered offerings rather than Regulation A); B. Richardson Letter (discussing uncertainty about Regulation Crowdfunding issuer outcomes); Better Markets Letter (stating that early-stage companies have a high risk of failure and that retail investors cannot adequately diversify among such firms due to the "dearth of investable funds"); CFA Letter (stating that "worse deals are sold to members of the general public subject to Reg. A, Reg. CF, and Rule 504"); CFA Institute Letter (stating that increased offering limits "may attract other high-risk issuers");

offering limits could also make the exemptions more attractive to issuers that cannot meet more restrictive requirements applicable to larger offerings today, resulting in potentially greater representation of such issuers among the issuers relying on the amended exemptions.[687] For example, some issuers seeking up to $5 million that are unable to meet State or Commission qualification requirements under Regulation A would instead be able to offer $5 million, rather than only $1.07 million, under Regulation Crowdfunding, which does not require State or Commission review prior to sales. As another example, some issuers seeking up to $75 million in an offering and also seeking to avoid the more extensive periodic reporting, beneficial ownership reporting, proxy disclosure, and 17 CFR 243.100 through 243.103 requirements associated with being a public reporting company would be able to forgo registration and offer up to $75 million, rather than $50 million, under Regulation A. Issuers seeking up to $75 million and seeking to avoid restrictions on testing the waters with individual investors, as well as unlisted issuers seeking to avoid State law restrictions on primary offers and sales, may find amended Regulation A Tier 2 to be increasingly attractive compared to a registered offering. To the extent that issuers under Regulation A Tier 2, Regulation Crowdfunding, and Rule 504

AFREF Letter and R. Rutkowski Letter (expressing concern about risk to retail investors from the expansion of offering limits under Regulation A, Regulation Crowdfunding, and Rule 504). *See also* CFA Institute Letter (noting "the outsized role played by a single industry – real estate – in Regulation A markets"). Real estate issuers have accounted for the majority of financing under Regulation A to date. *See* Report to Congress on Regulation A / Regulation D Performance, at p. 32. We recognize that unlisted REITs, including Regulation A REITs, may pose risks to some non-accredited investors. We note that such investors already may invest in unlisted REITs that are registered under Section 12(g). *See* Investor Bulletin: Non-traded REITs, *available at* https://www.sec.gov/oiea/investor-alerts-bulletins/ib_nontradedreits.html. Although Regulation A Tier 2 REIT offerings are eligible for certain additional relief relative to unlisted REITs registered under Section 12(g) (including testing the waters and semi-annual rather than quarterly reporting), Regulation A Tier 2 offerings are subject to non-accredited investor investment limits. The ability to access unlisted real estate offerings may offer benefits – as well as risks – to investors. Real estate is associated with considerable returns among private funds (to which non-accredited investors generally lack access). *See* Report to Congress on Regulation A / Regulation D Performance, at Table 14. Real estate also accounts for the largest share of non-fund Regulation D offerings (to which non-accredited investors also rarely have access today). *See id*, at Figure 9. Non-accredited investor access to real estate private equity through Regulation A could expand their investable opportunity set and potential for diversification, allowing them to potentially construct more efficient portfolios. *See, e.g.,* IPA Letter (supporting "increased access to investment strategies with low correlation to the equity markets, including net asset value real estate investment trusts ("REITs"), lifecycle REITs, business development companies, interval funds and direct participation programs. . . individual investor access to a wide variety of asset classes that have historically been available only to institutional investors"). *See also supra* note 654.

[687] *See, e.g.,* CFA Institute Letter (expressing concern about risks to non-accredited investors from adverse selection in Regulation A and Regulation Crowdfunding offerings); and Md. St. Bar Assoc. Letter.

are subject to fewer rules and requirements or fail to comply with those rules and requirements, investors may be at an increased risk of loss.[688]

The increased offering limits for Regulation A Tier 2, as well as the increased offering limit for Regulation Crowdfunding (combined with the Regulation Crowdfunding qualified purchaser amendments) also will expand the scope of offerings that are not subject to State registration and qualification requirements, potentially increasing risk of investor losses to the extent not mitigated by other investor protection provisions. Rule 504 offerings will remain subject to State registration and qualification requirements.

The investor costs described above are expected to be mitigated by the investor protection provisions of each exemption. In particular, Regulation A Tier 2 offerings will remain subject to offering statement and ongoing disclosure requirements, non-accredited investor investment limits, bad actor disqualification provisions, and issuer eligibility requirements, and will continue to be required to undergo Commission qualification before sales can be made. Regulation Crowdfunding offerings will remain subject to offering statement and periodic disclosure requirements, intermediary requirements, including investor education and measures to reduce the risk of fraud, as well as non-accredited investor investment limits, bad actor disqualification provisions, and issuer eligibility requirements. Moreover, costs to investors are expected to be further mitigated by the continued application of the antifraud provisions of Federal and State securities laws and the role of reputational incentives of issuers and, if applicable, intermediaries, in these offerings. Rule 504 offerings will remain subject to issuer eligibility requirements, bad actor disqualification provisions, and State registration and qualification requirements.

As discussed above, the temporary final rules currently in effect serve as the economic baseline against which the costs of the amendments extending the relief from certain Regulation

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[688] *See, e.g.,* CII Letter (discussing concerns about Regulation A issuer compliance); NASAA Letter (recommending strengthening corporate governance and disclosure obligations and rescinding preemption of State securities regulation to increase the regulatory oversight of these companies making them more attractive to and safer for investors); and J. Marks Letter (expressing concern about Regulation Crowdfunding issuer compliance). *See also, e.g.*, Mercer Bullard, *Crowdfunding's Culture of Noncompliance: An Empirical Analysis*, 24 LEWIS & CLARK L. REV. 899 (2020).

Crowdfunding review requirements are measured. Thus, we do not expect additional significant costs to result from the extension. We recognize that costs to investors associated with the temporary final rules will continue to be incurred under the amendments extending the rules, similar to the baseline.[689] Importantly, several provisions of the temporary rules are expected to continue to mitigate potential risks to investors. Issuers relying on the temporary rules must still provide prominent disclosure that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer. Moreover, temporary relief from the review report requirement does not preclude liability in instances of materially misleading financial disclosures provided at the time of the offering, and general anti-fraud provisions and liability for offers under Regulation Crowdfunding will continue to apply. Finally, the remaining investor protections of Regulation Crowdfunding continue to provide significant safeguards for investors in offerings reliant on the temporary relief from the review report requirement.

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[689] Although a review report provides a more limited level of assurance compared to an audit report, reviewed financial statements confer valuable informational benefits to investors. *See, e.g.,* Brad A. Badertscher et al., *Verification Services and Financial Reporting Quality: Assessing the Potential of Review Procedures* (Simon Bus. Sch., Working Paper No. FR 17-17, July 2018) ("[B]oth reviews and audits yield significantly better reporting quality scores and lower cost of debt than zero-verification compilations. However, model-based reporting quality scores of reviews and audits are indistinguishable statistically, on average. Regarding broader economics, we find that relative to compilations, reviews yield more than half the added interest rate benefit associated with an audit, at considerably less than half the added cost. Overall, our results suggest reviews may provide a cost-effective verification alternative to audits, and the potential of analytical procedures warrants more attention by audit researchers and regulators."); Evisa Bogdani, Monika Causholli & W. Robert Knechel, *The Role of Assurance in Equity Crowdfunding* (Working Paper, 2019) (finding that "firms that provide either reviewed or audited financial statements are more likely to reach their target capital, attract a greater number of investors, and raise more capital relative to firms that only provide management-certified financial statements" in equity crowdfunding). Thus, in cases of issuers temporarily exempted from the review report requirement, particularly in an environment of heightened market uncertainty, investors may have less information in making their investor decisions and may incur additional risks. Exemptive relief from the review report requirement also may continue to weaken the incentives of some issuers to provide compliant financial statement disclosures since they no longer would be required to undergo a review by an independent accountant and to provide such a report to investors, resulting in potentially less informative financial disclosures provided to investors in affected offerings. For example, some financial statement disclosures provided by issuers below the existing review report threshold are not prepared in a U.S. GAAP-compliant manner. *See, e.g.,* Letter from CrowdCheck (Oct. 30, 2019) commenting on the Concept Release, available at: https://www.sec.gov/comments/s7-08-19/s70819-6368811-196431.pdf. However, to the extent that issuer financial disclosures are historical in nature, such disclosures might be relatively less meaningful for purposes of assessing the current financial condition and growth prospects of an issuer that was financially sound but has experienced significant adverse effects as a result of the COVID-19 crisis. Further, historical financial disclosures may be incrementally less meaningful for evaluating the business of a recently formed or development-stage issuer. *See, e.g.*, Letter from Mainvest (stating that "a company with no operating history simply does not have historical financial information that can be reviewed. Issuers on our platform unfortunately are required to get CPA reviews of a balance sheet with almost no zeros [*sic*]. This adds practically no value to investor protections and significantly increases up-front costs to companies.").

iii. Effects on Efficiency, Competition, and Capital Formation

The amendments to the Regulation A, Regulation Crowdfunding, and Rule 504 offering limits are expected to increase capital formation in those markets and to provide issuers that cannot meet their financing needs under existing exemptions with a means of raising external financing and potentially lowering their cost of capital (*e.g.*, as a result of economies of scale and fixed cost of initiating an offering), resulting in more efficient allocation of capital to growth opportunities. The capital formation effects of the amendments are expected to be more limited if issuers raise amounts of financing below the amended offering limits or if some of the capital raised under the amended exemptions would have been otherwise raised through other securities offering methods. For example, raising the Regulation Crowdfunding offering limit may draw some of the issuers that would have otherwise sought between $1.07 and $5 million under Rule 504, Rule 506, or Regulation A. Similarly, raising the Rule 504 offering limit may draw some of the issuers that would have otherwise sought between $5 and $10 million under Rule 506 or Regulation A. Those scenarios entail the switching of issuers between offering methods rather than new capital formation.

As discussed above, these amendments may enable some issuers to delay or forgo a registered offering, thereby avoiding the associated costs of Exchange Act registration and being a public reporting company. For example, the higher offering limits for the discussed exemptions may allow more issuers to raise capital from non-accredited investors without registration. This could result in less disclosure and lower liquidity for some of these investors. However, this possibility must be considered in the context of the baseline, under which those issuers otherwise might have relied on Rule 506, which significantly limits non-accredited investor access and, for non-accredited investors that do invest, restricts resales as well as limits the ability to obtain current information about the issuer. Alternatively, issuers on the margin between a Regulation A Tier 2 offering and a registered offering might have registered their securities but not listed on an exchange in a traditional public offering (due to cost, small size, lack of underwriter or institutional investor interest, etc.). As a result, their securities would

have no secondary market or be quoted over-the-counter, which affords only marginal benefits, if any, of liquidity and information availability compared to a Regulation A Tier 2 offering.

If the amended offering limits draw additional issuers to these exemptions, which accept an unlimited number of non-accredited investors, the amendments could expand the set and nature of investable opportunities for non-accredited investors seeking exposure to issuers that have not yet registered an offering. The effects on competition for investor capital will depend on how the additional investor capital drawn to the affected markets compares to the amount of additional financing sought by issuers in these markets. By promoting access to external financing for smaller issuers, the amendments may increase product market competition among small issuers and between small issuers and more established issuers.

As discussed above, the temporary final rules currently in effect serve as the economic baseline against which the economic effects of the amendments extending the relief from the review report requirements are measured. Thus, we do not expect additional significant effects on efficiency, competition, or capital formation to result from the extension.

iv. Reasonable Alternatives

As an alternative, we could have adopted different offering limits. For example, we could have adopted smaller increases to the offering limits, such as an adjustment to the existing offering limits to reflect the rate of inflation since the enactment of the JOBS Act in April 2012.[690] As another alternative, we could have adopted larger increases in the offering limits, as suggested by some commenters.[691] Compared to the final amendments, a higher (lower) offering limit could make an offering under the exemption more (less) cost-effective for issuers

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[690] The Regulation A offering limit has not been adjusted for inflation since the enactment of the JOBS Act. Between April 2012, when the JOBS Act was enacted, and December 2019, the rate of CPI inflation was 11.7 percent according to Bureau of Labor Statistics ("BLS") data. Adjusting for inflation would yield a Regulation A limit of $55.845 million ($50 million x 1.1169). The Regulation Crowdfunding offering limit was last adjusted for inflation in April 2017. Between April 2017 and December 2019, the rate of CPI inflation was 5.09 percent, according to BLS data. Adjusting for inflation would yield a Regulation Crowdfunding offering limit of $1.124 million ($1.07 million x 1.0509). The Rule 504 offering limit was raised to $5 million in October 2016. Between October 2016 and December 2019, the rate of CPI inflation was 6.31 percent. Adjusting for inflation would yield a Rule 504 offering limit of $5.316 million ($5 million x 1.0631).

[691] For instance, some commenters have suggested raising the Regulation A offering limit to $100 million. *See supra* note 367. Some commenters have suggested raising the Regulation Crowdfunding offering limit above $5 million. *See supra* note 421.

(and if applicable, intermediaries) facing fixed offering and due diligence costs, resulting in larger (smaller) capital formation benefits. Compared to the final amendments, a higher (lower) offering limit could draw a larger (smaller) pool of additional issuers to the respective segment of the exempt market and potentially expand investment opportunities for non-accredited investors seeking exposure to issuers that have not yet registered their securities. The net impacts of these alternatives on capital formation, investor protection, and competition could be limited if most of the incremental offering activity under these alternatives is due to issuers switching between various offering methods. Even if most of the additional issuers under these alternatives would have otherwise raised financing through another offering method, such issuers might still be able to benefit from a lower cost of capital under the alternative of increased offering limits. The net impacts of the alternative would be further attenuated to the extent that the majority of issuers continue to raise amounts below the offering limits.[692] As a caveat, similar to the discussion above, existing data on issuers approaching the offering limits may not be representative of the amounts that would be raised if a different pool of issuers or investors is drawn to the respective market segment under alternative offering limits.

It is difficult to predict how many new issuers that would not have otherwise engaged in a securities offering would be drawn to the respective exempt market segment under these alternatives, compared to the amended offering limits. The table below examines the use of alternative securities offering methods that are most likely to be relied on by issuers that raise amounts above existing offering limits but below several alternative offering limit thresholds to illustrate the potential number of additional issuers that presently utilize other offering methods that do not have a cap but that might see the amended exemption as an option under these alternatives. The caveats that accompany Table 12 continue to apply.

Table 14: Evaluation of Alternatives to the Amended Offering Limits Using Evidence from Capital Raising in 2019 through Select Other Securities Offering Methods

Evaluation of Alternative Regulation A Offering Limits

[692] For example, the average (median) Regulation Crowdfunding offering reported proceeds of $213,678 ($106,900) between the inception of Regulation Crowdfunding (May 16, 2016) through December 31, 2019; the average (median) Regulation A issuer reported raising $13.4 million ($5.0 million) between the effective date of 2015 Regulation A amendments (June 19, 2015) and December 31, 2019.

Number of issuers that raised above $50 million and up to:	Number of issuers in offerings under Rule 506 [a]	Number of issuers in registered offerings [b]
$55.845 million (inflation adjustment)	51	17
$60 million	85	29
$70 million	144	46
$75 million (amended offering limit)	171	57
$80 million	198	72
$90 million	231	90
$100 million	270	122
$110 million	298	143
$120 million	315	151
$125 million	325	162

Evaluation of Alternative Regulation Crowdfunding Offering Limits			
Number of issuers that raised above $1.07 million and up to:	Number of issuers in offerings under Rule 504 [c]	Number of issuers in offerings under Rule 506 [d]	Number of issuers in offerings under Regulation A [e]
$1.124 million (inflation adjustment)	2	104	0
$2 million	31	1,542	2
$3 million	44	2,662	7
$4 million	51	3,388	10
$5 million (amended offering limit)	55	4,004	13
$6 million	-	4,454	15
$7 million	-	4,813	17
$8 million	-	5,127	20
$9 million	-	5,333	21
$10 million	-	5,567	23
$15 million	-	6,233	29
$20 million	-	6,604	31

Evaluation of Alternative Rule 504 Offering Limits			
Number of issuers that raised above $5 million and up to:		Number of issuers in offerings under Rule 506 [f]	Number of issuers in offerings under Regulation A [g]
$5.316 million (inflation adjustment)		152	0
$6 million		464	2
$7 million		834	4
$8 million		1,166	7
$9 million		1,377	8
$10 million (amended offering limit)		1,618	10
$15 million		2,315	16
$20 million		2,695	18
$25 million		2,974	19

[a] Regulation A eligibility criteria exclude investment companies and blank check companies and limit the exemption to U.S. and Canadian issuers, so for comparability pooled investment funds and issuers outside the U.S. and Canada are excluded from the Rule 506 proceeds used in this estimate. Reporting companies are eligible to rely on Regulation A under the 2018 amendments.

[b] Registered offering proceeds are based on gross proceeds reported in SDC Platinum for U.S. public offerings of equity, debt, and convertible securities with issue dates in 2019, excluding withdrawn, postponed, and rumored offerings, asset-backed securities offerings, blank check issuers, investment fund issuers, and issuers outside the U.S. and Canada.

[c] For purposes of this table, only incremental Regulation A proceeds reported in 2019 are considered, as opposed to cumulative proceeds reported from June 2015 through December 2019. Regulation Crowdfunding eligibility criteria limit the exemption to U.S. issuers and exclude Exchange Act reporting companies, so for comparability non-U.S. issuers and reporting companies are excluded from the Regulation A proceeds used in this estimate.

[d] Regulation Crowdfunding eligibility criteria exclude investment companies and Exchange Act reporting companies and limit the exemption to U.S. issuers, so for comparability pooled investment funds and non-U.S. issuers are excluded from Rule 504 proceeds used in this estimate. Reporting companies are ineligible under Rule 504.

[e] Regulation Crowdfunding eligibility criteria exclude investment companies and Exchange Act reporting companies and limit the exemption to U.S. issuers, so for comparability pooled investment funds, reporting companies, and non-U.S. issuers are excluded from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019.

[f] For purposes of this table, only incremental Regulation A proceeds reported in 2019 are considered, as opposed to cumulative proceeds reported from June 2015 through the end of the period. Rule 504 eligibility criteria exclude Exchange Act reporting companies, so for comparability reporting companies are excluded from the Regulation A proceeds used in this estimate.

[g] For comparability with other estimates in this table, we exclude Exchange Act reporting companies and pooled investment funds from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019.

After considering these alternatives and public comment, we continue to believe that the amended offering limits are most likely to provide meaningful capital formation benefits and increased access to investment opportunities to investors while representing a balanced approach to expansion of the respective offering exemptions.

We are amending the Regulation A Tier 2 offering limit but not the Tier 1 offering limit. As an alternative, we could amend the Tier 1 offering limit, as suggested by one commenter.[693] For example, we could raise the Tier 1 offering limit proportionately to the increase in the Tier 2 offering limit, by 50 percent, from $20 million to $30 million. The economic effects of this alternative are similar to the ones considered above. A higher (lower) Tier 1 offering limit could draw more (fewer) issuers to Tier 1 of Regulation A. Some of the additional issuers drawn to Tier 1 under this alternative might be switching from Tier 2 or other exempt offering methods, which might limit the net impact on capital formation.[694] Even in that case, some

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[693] *See* Chamber of Digital Commerce Letter. *But see* CII Letter; NASAA Letter; and CrowdCheck Letter (opposing an increase in the Tier 1 offering limit).

[694] For example, from June 2015 through December 2019, we have identified seven Tier 2 issuers that reported raising between $20 million and $30 million in financing under Regulation A and that could become newly eligible to raise the same amount of financing under Tier 1, if it were amended under this alternative. However, they also might not choose to switch to Tier 1 if they find Tier 2 to be more attractive (*e.g.*, due to preemption of State review or an easier path to quotation on the upper tiers of the OTC market in the presence of periodic reports required by Tier 2). For example, from June 2015 through December 2019, we estimate that 112 Tier 2 issuers reported raising up to $20 million in financing under Regulation A even though that amount would have made them eligible to use Tier 1 as well. Further, some issuers might still prefer Tier 2

issuers switching from Tier 2 or other offering methods might be able to decrease their cost of capital.

We are raising the Regulation Crowdfunding offering limit to $5 million, which may create redundancies between Regulation Crowdfunding and Rule 504. The amended Rule 504 offering limit also may create redundancies between Rule 504 and Regulation A. As an alternative, we could eliminate Rule 504. Such an alternative might contribute to regulatory simplification. However, it also might be disruptive for those issuers that rely on Rule 504 and find it to be cost-effective for their financing strategy (*e.g.*, due to a lack of the intermediary and periodic reporting requirements).

We are extending temporary relief from the review report requirement for eligible issuers in Regulation Crowdfunding offerings of up to $250,000 for an additional 18 months. As an alternative, we could have amended the Regulation Crowdfunding offering limit but not extended the temporary relief from certain review requirements for eligible issuers in offerings of up to $250,000. As a general matter, the flexibility to access limited amounts of capital under Regulation Crowdfunding on an expedited basis, without incurring the cost of an independent accountant's review report, facilitates capital formation and reduces some of the barriers to accessing capital markets for the smallest issuers, allowing some issuers to raise additional capital or to optimize their financing cost through a more efficient and streamlined offering process. By providing targeted relief in a market segment that primarily attracts small businesses, which are disproportionately affected by downturns, the amendments extending the temporary relief also serve to incrementally enhance competition between small businesses and larger businesses (which tend to be less financially constrained).[695] The alternative of not

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because it allows issuers to undertake an offering with a higher maximum offering amount, which provides issuers with flexibility to raise more capital without having to undergo a re-qualification (*e.g.*, if market conditions improve) even if the average issuer's proceeds do not reach the amount sought.

[695] Research has related small size to financing constraints, and conversely, larger size to being less financially constrained. *See, e.g.*, Nathalie Moyen, *Investment–Cash Flow Sensitivities: Constrained versus Unconstrained Firms*, 59 J. FIN. 2061 (2004); Christopher Hennessy, Amnon Levy, & Toni Whited, *Testing Q Theory with Financing Frictions*, 83 J. FIN 691 (2007). Other studies also show that diversified firms can rely on internal capital markets to mitigate financing constraints. *See, e.g.,* Venkat Kuppuswamy & Belén Villalonga, *Does Diversification Create Value in the Presence of External Financing Constraints? Evidence from the 2007–2009 Financial Crisis*, 62 MGMT. SCI. 905 (2016) (showing that "the value of corporate

extending the relief would impose costs and reduce the flexibility for small issuers adversely affected by COVID-19 seeking to meet their financing needs through Regulation Crowdfunding. It also would create competitive disparities for otherwise similar issuers that initiate offerings of this size before and after the expiration of the existing relief (February 28, 2021).

We recognize that the alternative of allowing the temporary relief to expire could incrementally decrease concerns about investor protection compared to extending the relief.[696] Generally, however, the aggregate incremental effect of the temporary rules on retail investor protection is likely limited by various factors, including the tailoring of the relief (through the eligibility requirements and the narrow scope and time-limited nature of the relief) and the modest size of the Regulation Crowdfunding market compared to other market segments that draw retail investors.[697] Further, issuers are required to disclose reliance on the temporary relief to investors, enabling more informed decisions. In addition, several essential safeguards contained in the 2015 Regulation Crowdfunding rules continue to apply, such as offering and investment limits, the use of registered crowdfunding intermediaries to conduct Regulation Crowdfunding offerings, other disclosure requirements of Form C, and annual report obligations. While we recognize that there may be somewhat greater investor protection concerns with an extension of the temporary final rules compared to an alternative of allowing the temporary relief to expire, overall we do not believe the difference to be significant in light of the other features of these offerings.

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diversification increased during the 2007–2009 financial crisis" and that "conglomerates' access to internal capital markets became more valuable"). *See also, e.g.,* several recent working papers examining impacts of the COVID-19 crisis on small businesses: Alexander W. Bartik et al., *How Are Small Businesses Adjusting to COVID-19? Early Evidence from a Survey*, (Nat'l Bureau of Econ. Research, *Working Paper* No. 26989, 2020); Jose Maria Barrero, Nicholas Bloom, & Steven J. Davis, *COVID-19 Is Also a Reallocation Shock*, (Nat'l Bureau of Econ. Research, Working Paper No. 27137, 2020); John Eric Humphries, Christopher Neilson, & Gabriel Ulyssea, *The Evolving Impacts of COVID-19 on Small Businesses Since the CARES Act*, (Cowles Foundation, Discussion Paper No. 2230, 2020); Robert W. Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence from the First Three Months after Widespread Social-Distancing Restrictions*, 29 J. ECON. MGMT. STRATEGY 727 (2020).

[696] *See also* Temporary Amendments Adopting Release, at 27122; Better Markets Letter.

[697] *See also* Temporary Amendments Extension, at 54489.

We could also extend the relief from review report requirements for eligible issuers in offerings of up to $250,000 for a shorter or longer time period than specified in these amendments. The alternative of extending the relief for a shorter (longer) time period would lead to fewer (more) potential issuers being afforded the flexibility in capital raising under the temporary rules, compared to the amendments. Because of the severe and continuing economic impact of the COVID-19 crisis, we believe that the extension of the temporary rules is appropriate.

As another alternative, we could permanently raise the financial statement requirement thresholds, for instance, in proportion to the increase in the offering limit: $500,000 for reviewed financial statements (in lieu of $107,000); $2.5 million for audited financial statements for follow-on offerings (in lieu of $535,000); and $5 million for audited financial statements for initial offerings (in lieu of $1.07 million).[698] As another alternative, we could waive certain other disclosure requirements (*e.g.*, progress updates and/or annual reports) for the lower tier of crowdfunding offerings (*e.g.*, offerings up to $250,000 or $1 million) to make crowdfunding offerings more cost-effective for the smallest issuers, many of which have not yet begun generating revenue and might not have enough liquid assets or access to loans to cover the compliance costs of a Regulation Crowdfunding offering. Scaling disclosure requirements for Regulation Crowdfunding offerings under these alternatives could attract a larger set of early stage issuers that seek to raise small amounts of capital to Regulation Crowdfunding while providing a degree of independent verification of accounting quality for larger crowdfunding offerings in a more cost-effective manner than with an audit.[699] Scaling disclosure requirements under this alternative, however, would result in information loss to investors, potentially contributing to less well informed investment decisions, greater risk of investment losses, and

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[698] *See, e.g.*, Wefunder Letter (recommending a $1 million threshold for reviewed financial statements and a $5 million threshold for audited financial statements); CCA Letter (recommending increasing the reviewed financial statements threshold to $500,000 and the audited financial statements threshold to $5 million for initial offerings).

[699] *See supra* note 689.

less efficient allocation of capital. Moreover, this alternative could attract high-risk issuers to the lower crowdfunding tier, which could undermine future capital raising in that market tier.

b. Investment Limits under Regulation Crowdfunding

The final amendments revise Regulation Crowdfunding investment limits.[700] As proposed, the amended limits will be based on the greater of, rather than the lower of, an investor's annual income or net worth. Further, as proposed, the amended limits will only apply to non-accredited investors.

i. Benefits

The amendments will increase the maximum amount that can be invested across all Regulation Crowdfunding offerings by the subset of non-accredited investors whose net worth and annual income diverge. This may benefit issuers by increasing the amount of capital formation and/or by lowering the overall costs of soliciting non-accredited investors. Relaxing the investment limitation may also benefit the affected subset of non-accredited investors by enabling them to achieve more efficient portfolio allocations and enhanced upside from investing in early-stage companies. Because crowdfunding issuers commonly set investment minimums, relaxing the investment limitation may allow the affected investors to invest in a larger number of crowdfunding issuers, holding invested amounts constant, which may result in greater diversification within the crowdfunding category of the investor's portfolio. However, a larger aggregate investment in the crowdfunding category may reduce the diversification of the investor's overall portfolio, holding portfolio size constant. The effect of the amendments on portfolio diversification will also depend on how much investors allocate to different crowdfunding securities, out of the allowable limit, relative to non-crowdfunding securities, and on the correlations between crowdfunding and non-crowdfunding securities chosen by investors for their portfolios.

The amendments will also remove the investment limitation for accredited investors in Regulation Crowdfunding, harmonizing the treatment of accredited investors across Regulation

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[700] *See supra* Section II.E.3.

Crowdfunding, Regulation A, Regulation D, and private placements not reliant on Regulation D.[701] Accredited investors are expected to possess the capability to evaluate larger crowdfunding investments and the resulting financial risk. Removing the investment constraint may benefit such investors by allowing them to allocate their capital more efficiently within their overall investment portfolio. It may also create stronger incentives to perform due diligence, screen, and monitor crowdfunding issuers, which may have positive spillovers for non-accredited investors in Regulation Crowdfunding. It is possible that accredited investors will simply reallocate capital between exemptions (*e.g.*, in cases of side-by-side Regulation Crowdfunding/Rule 506(c) offerings). Accredited investors may also continue to favor private placements, which do not cap offering size and allow them to capitalize more fully on their due diligence, with fewer spillovers to the rest of the market (because information about investments is private, there is less free riding on large investors' due diligence) and more bargaining power to negotiate offering terms.

We lack the data to assess how many investors may be affected by the described amendments to investment limits because investor information generally is not available and is not required to be disclosed. Based on a subset of data made available by one crowdfunding intermediary,[702] among non-accredited investors with available information on annual income and net worth, revising the investment limits as described can increase the investment limit by 98 percent for the median non-accredited investor in that subset. In addition, approximately nine percent of investors in the examined subset of data were accredited and thus will no longer be subject to investment limits under the amendments. The economic effects of the amendments will be mitigated to the extent that investors may invest amounts below the

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[701] *See also supra* note 431 (discussing commenters that supported the amendments).

[702] *See* 2019 Regulation Crowdfunding Report, at notes 91–93 and accompanying text. Information on amounts invested by an average investor or the number of investors per offering is not available for the full sample of Regulation Crowdfunding offerings. Information on offerings from one intermediary from May 2016 through September 2018 provides some insight into the typical investment size, investor composition, and number of investors in crowdfunding offerings. For purposes of these estimates, we exclude investments redirected to a Rule 506(c) offering; offerings that were not funded (*i.e.*, were either canceled or ongoing) or had missing data; observations where an investor made but subsequently withdrew the commitments, yielding a cumulative investment of zero; and investor observations with missing accredited investor status.

investment limits.[703] We cannot determine whether these results are representative of the distribution of investors on other funding portals or during other time periods, or how that distribution may change under the amendments if new investors and issuers are drawn to Regulation Crowdfunding.

ii. Costs

The final amendments to Regulation Crowdfunding investment limits may increase the magnitude of investor losses, particularly if some investors inefficiently under-diversify their portfolios and take on too much risk from crowdfunding investments.[704] For example, relaxing investment limits may enable some non-accredited investors to make larger investments in crowdfunding offerings based on an incomplete assessment of information about the securities offered, with the resulting potential for increased investor losses that they may be less able to bear. However, other investor protection provisions of Regulation Crowdfunding, such as issuer disclosure requirements and investor education and other intermediary requirements, may partly mitigate these risks. The potential costs of the amendments should be considered in the context of the baseline, under which non-accredited investors are permitted to invest unlimited amounts in both listed and unlisted registered securities and in Regulation A Tier 1 securities,[705] as well as up to ten percent of the higher of income or net worth in each offering of Regulation

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[703] *See* 2019 Regulation Crowdfunding Report, at 40 ("For most investors with available data on annual income and net worth (approximately 30% of investors in offerings funded on the platform), cumulative amounts invested during the entire considered period (almost 2.5 years) through this intermediary's platform did not reach the investment limit, with fewer than 10% of investors on the platform investing amounts exceeding their 12-month investment limit over the entire 2.5-year period. According to information provided by another intermediary respondent to the lookback survey, the median (average) crowdfunding investment through its platform was $1,335 ($500), with investors making an average of 2.7 investments and approximately 40% of investors making two or more investments. According to information provided by a different intermediary respondent, the average investment was approximately $992, and investors made an average of 1.5 investments. Based on available data, we are unable to determine whether these investors also invested in crowdfunding offerings through other crowdfunding platforms; thus, these estimates are likely to represent a lower bound on average investment amounts.").

[704] *See, e.g.*, CII Letter (opposing increasing investment limits for non-accredited investors); Morningstar Letter (opposing increasing investment limits for non-accredited investors due to a lack of investment advice and the difficulty of detected scams); NASAA Letter; and CFA Letter.

[705] In contrast to Regulation Crowdfunding securities, sales and offers of unlisted registered securities and Regulation A Tier 1 securities are subject to State registration requirements, including, in some states, merit review.

A Tier 2 securities, and thus they already may be in a position of making investments which also may result in considerable risk to investor portfolios.

The final amendments removing investment limits for accredited investors in Regulation Crowdfunding offerings are not expected to result in a negative effect on investor protection given that accredited investors generally have the capacity to fend for themselves and greater ability to withstand financial losses. Because accredited investors are not subject to investment limitations in offerings under Regulation A, in offerings under Regulation D, in other private placements, or in registered offerings, they may simply reallocate capital between holdings of securities issued under other exemptions. It is also possible that accredited investors investing large amounts may continue to prefer private placements, as discussed above.

iii. Effects on Efficiency, Competition, and Capital Formation

The described amendments to Regulation Crowdfunding investment limits may incrementally promote capital formation through Regulation Crowdfunding, particularly for issuers that may attract accredited investors or non-accredited investors who have a greater disparity between income and net worth. The revised investment limits may allow some investors that were constrained by existing investment limits to attain a more efficient portfolio allocation. For other investors, relaxing investment limits may enable an inefficiently high exposure to crowdfunding investments, resulting in under-diversification. If the amendments increase accredited investor participation in Regulation Crowdfunding offerings, the average intensity of monitoring and screening of issuers by investors may increase, with potential positive spillovers for small investors that lack the expertise and incentives to engage in comparable monitoring and screening. This may lead to greater efficiency of capital allocation in the Regulation Crowdfunding market. Removing accredited investor investment limits may lead to a reallocation of investment opportunities in that market segment from non-accredited investors to accredited investors, as indicated by one commenter.[706]

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[706] *See* J. Pampena Letter (suggesting the change may eliminate investment opportunities for non-accredited investors). According to the commenter, if accredited investors are permitted to invest under Regulation Crowdfunding without an investment limit, investment from accredited investors will rapidly satisfy the offering limits of these mostly small offerings.

Depending on how the additional investor capital drawn to Regulation Crowdfunding compares to the amount of additional financing sought by issuers in these markets after the amendments, the amendments may affect competition among issuers for investor capital.

The net impacts of the amendments may be attenuated if the additional capital is reallocated from other offerings that either do not have investment limits or that have less stringent investment limits (*e.g.*, Rule 506, other private placements, or Regulation A).

iv. Reasonable Alternatives

As an alternative, we could align Regulation Crowdfunding investment limits with those of Regulation A Tier 2—apply the ten-percent limit on a per-offering basis to all non-accredited investors—rather than apply a two-tier limit (five percent for non-accredited investors with a lower income and net worth and ten percent for other non-accredited investors) across all Regulation Crowdfunding offerings in a twelve-month period. Compared to the final amendments, this alternative would have expanded investment limits, particularly for non-accredited investors with lower income and net worth and for investors that participate in multiple Regulation Crowdfunding offerings, yielding potential increases in capital formation benefits and non-accredited investor access to startup investment opportunities. However, this alternative also might have increased investor losses per investor and decreased diversification for some non-accredited investors, compared to the final amendments.

As another alternative, we could have increased or lowered the numerical thresholds in investment limits under Regulation Crowdfunding. For example, we could scale up the $2,200 numerical threshold in the investment limit in proportion to the increase in the offering limit (from $2,200 to $11,000). This alternative would increase (decrease) capital formation benefits while increasing (decreasing) the magnitude of potential investor losses per non-accredited investor, particularly for non-accredited investors with lower income and net worth, compared to the final amendments.

As another alternative, we could require verification of accredited investor status under Regulation Crowdfunding, similar to Rule 506(c).[707] Under this alternative, the likelihood of non-accredited investors that could have been mistakenly identified as accredited investors without verification incurring losses from a large investment under Regulation Crowdfunding would be decreased compared to the amendments. However, issuers would incur additional costs of verification of investor status under this alternative (whether in the form of the cost passed along to the issuer by an intermediary, or the cost incurred by the issuer directly). While such additional costs would be smaller for issuers with a prior or concurrent Rule 506(c) offering, for the typical Regulation Crowdfunding issuer that is small, with limited internal cash flows and no prior offering experience, such costs may serve as a significant barrier to accepting accredited investors in a Regulation Crowdfunding offering.

6. Eligibility Requirements in Regulation Crowdfunding and Regulation A

a. Eligibility Requirements under Regulation Crowdfunding

The final rules will allow crowdfunding issuers to raise capital through a crowdfunding vehicle, substantially as proposed. Such crowdfunding vehicles will be formed by or on behalf of the underlying crowdfunding issuer to serve merely as a conduit for investors to invest in the crowdfunding issuer and will not have a separate business purpose. This approach is designed to allow investors in the crowdfunding vehicle to achieve the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the underlying crowdfunding issuer in an offering made under Regulation Crowdfunding. As discussed in Section II.F.2 above, after considering public comment, we are not adopting the proposal to limit the types of securities that may be offered and sold in reliance on Regulation Crowdfunding.

i. Benefits

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[707] *See, e.g.*, J. Clarke Letter; Raise Green & New Haven Comm. Solar Letter; and Honeycomb Letter (supporting self-verifications).

The final rules will benefit issuers by allowing them to reduce the administrative complexities associated with a large and diffuse shareholder base.[708] Commenters generally supported permitting crowdfunding issuers to use crowdfunding vehicles.[709] As discussed in Section II.F.1.c above, under the final rules, natural person investors in the crowdfunding vehicle will be excluded from the number of holders of record for purposes of Section 12(g). We expect this provision to significantly increase the utility of the crowdfunding vehicle structure to issuers, especially in offerings that attract small investors, and potentially make it easier for Regulation Crowdfunding issuers to raise capital from venture capitalists and other large investors in the future. However, the effect on all except the largest crowdfunding issuers may be limited due to the availability of the conditional exemption in Exchange Act Rule 12g-6.

Currently, some early-stage issuers with high growth potential that have a chance of attracting VC funding in the future may avoid conducting an offering under Regulation Crowdfunding due to concerns about a large and unwieldy capitalization table. By potentially alleviating some of these concerns, the final rule may encourage additional issuers with high growth potential to consider pursuing an offering under Regulation Crowdfunding. Because these issuers might presently offer securities only to accredited investors or a few non-accredited investors through offerings under Rule 506 or through other private placement offerings, the final rule may benefit non-accredited investors by expanding their access to investment opportunities in startups with high growth potential that are early in their lifecycle.

As discussed in Section II.F.1 above, the use of a crowdfunding vehicle will be subject to certain conditions designed to ensure that investors achieve the same economic exposure, voting power, and ability to assert State and Federal law rights, and receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer in an offering made under Regulation Crowdfunding, thereby minimizing any potential adverse effects for investors of investing in a crowdfunding issuer through such an offering structure.

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[708] *See also* Proposing Release, at note 420.

[709] *See supra* note 480. *But see* CFA Letter and CII Letter.

The crowdfunding vehicle and the crowdfunding issuer also will be co-issuers in the offering, with the resulting joint liability for offers and sales, and the offering must comply with Section 4(a)(6) of the Securities Act and Regulation Crowdfunding.

The required transparency and single-purpose nature of the crowdfunding vehicle, combined with the continued application of the substantive and disclosure requirements of Regulation Crowdfunding and the antifraud provisions of the Federal and State securities laws, are expected to provide significant investor protections for crowdfunding vehicle investors under the final rules.

ii. Costs

The use of crowdfunding vehicles may result in additional offering costs. The costs of forming and operating the crowdfunding vehicle will be incurred by the crowdfunding issuer, which may decrease the overall economic benefits of the offering for all investors in the crowdfunding issuer, including investors in the crowdfunding vehicle. However, to the extent that the crowdfunding vehicle yields benefits for the crowdfunding issuer, including expanded potential for future funding rounds due to the treatment of the crowdfunding vehicle under Section 12(g), reduced capitalization table concerns and greater efficiency of administration of a large and diffuse investor base, these economic benefits of a crowdfunding vehicle may offset the additional costs. The balance of these tradeoffs is likely to vary depending on the issuer's offering experience, potential for raising follow-on financing from a large investor, costs associated with the formation and operation of the crowdfunding vehicle, and the number of investors participating in the crowdfunding offering. Because the use of the crowdfunding vehicle structure will be voluntary, we expect issuers to use a crowdfunding vehicle only when the issuers determine that the benefits justify the costs.

If the crowdfunding vehicle is administered by an external entity on behalf of the issuer, the associated fees may depend on other business between the external administrator and the issuer. On the one hand, administration fees may be reduced in instances where an issuer obtains a bundle of other services related to the offering from the external administrator or

where an administrator seeks future business of the issuer related to other offerings. On the other hand, administration fees may be increased to compensate for discounted fees for other services related to this or other offerings. Several factors are expected to mitigate concerns about administration fees. Competition among external service providers is expected to put downward pressure on such fees. The requirement that crowdfunding vehicle costs be incurred by the crowdfunding issuer rather than the crowdfunding vehicle will ensure a degree of alignment of interests of crowdfunding vehicle investors and the crowdfunding issuer with respect to crowdfunding vehicle costs. The highly limited scope of permissible activities of the crowdfunding vehicle will further limit potential discretion related to fees.

As discussed above, the conditions for the use of crowdfunding vehicles are expected to minimize any potential conflicts of interest incremental to a crowdfunding vehicle.[710] The crowdfunding vehicle structure is not expected to significantly affect information processing costs for investors, compared to a direct crowdfunding offering, because of the transparency and single-purpose nature of the crowdfunding vehicle, as well as the provisions designed to ensure that crowdfunding vehicle investors receive the same disclosures under Regulation Crowdfunding, as if they had invested directly in the crowdfunding issuer.

iii. Effects on Efficiency, Competition, and Capital Formation

The final rules are expected to enhance capital formation by making Regulation Crowdfunding more attractive to issuers. If the incremental financing is largely due to issuers switching from other offering methods to Regulation Crowdfunding, the net impact on capital formation may be minimal. However, if that is the case, the final rules may reduce the cost of capital. By giving crowdfunding issuers the flexibility to conduct a crowdfunding offering via a crowdfunding vehicle, the final rules may make crowdfunding offerings more attractive to a broader range of issuers, enabling such issuers to diversify their financing strategy at an early stage of their operation and in some cases potentially obtain a lower cost of capital or greater

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[710] Small investors in a direct crowdfunding offering might face agency conflicts today. However, we do not expect the amendments to result in significant additional agency conflicts for investors in direct crowdfunding vehicle offerings.

amounts of capital than they would otherwise. The final rules may be especially beneficial for crowdfunding issuers with high growth potential by helping them attract institutional investors or other large investors in the future, thus enabling a potentially more efficient financing and growth strategy.

Further, the ability to use a crowdfunding vehicle may expand investment opportunities available to non-accredited investors and, as a result, potentially affect the efficiency of their capital allocation. If the final rules draw additional issuers to Regulation Crowdfunding, broader access to those investment opportunities may enable non-accredited investors to allocate their capital more efficiently.

The final rules may promote competition. By making Regulation Crowdfunding attractive to a broader subset of small issuers, they may incrementally broaden access to funding for small and early stage issuers, many of which have not participated in other securities offerings and are otherwise highly financially constrained. Expanding access to capital for small and early stage issuers may, on the margin, encourage new entry and promote competition between small issuers and more established competitors. The aggregate effects on competition for investor capital are difficult to predict and will depend on the relative effects of the final rules on issuer and investor willingness to participate in Regulation Crowdfunding.

iv. Reasonable Alternatives

As an alternative, we could require that a registered investment adviser or ERA manage the crowdfunding vehicle, as suggested by some commenters and the 2017 Treasury Report.[711] Under this alternative, investors in crowdfunding vehicles could benefit because an investment adviser is a fiduciary subject to the requirements of the Advisers Act and regulations thereunder. The final rule's conditions, however, are designed to limit the crowdfunding vehicle's activities to that of acting as a conduit to directly hold the securities of the crowdfunding issuer without the ability for independent investment decisions to be made on behalf of the crowdfunding vehicle. Moreover, investors in the crowdfunding vehicles remain

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[711] *See supra* note 489. *See also* 2017 Treasury Report.

protected by the provisions of Regulation Crowdfunding as well as the antifraud protections of the Federal securities laws more broadly. Any incremental benefits of this alternative to investors therefore could be limited. In addition, such a requirement would likely deter issuers, particularly small issuers, from using the crowdfunding vehicle structure. Given the relatively small amount of capital that can be raised through Regulation Crowdfunding, particularly in offerings by smaller issuers, it may not be economically feasible to require a registered investment adviser or an ERA to manage the crowdfunding vehicle.[712] Further, small issuers may lack access to investment advisory expertise.

As another alternative, we could remove some of the requirements in the final rule,[713] such as the restrictions on the permissible activities and other provisions intended to provide the investor with the same economic exposure, rights, and disclosures as they would have if they invested in a direct Regulation Crowdfunding offering or the requirement that crowdfunding vehicle costs be borne by the crowdfunding issuer. Removing these restrictions would increase the flexibility for issuers in structuring their crowdfunding offering and potentially make Regulation Crowdfunding more attractive as a capital raising option. However, it also could lead to agency conflicts and weaken investor protections for crowdfunding vehicle investors, compared to the final rule's conditions. Some of these additional costs to investors might be partly mitigated by the substantive and disclosure requirements of Regulation Crowdfunding.

Similarly, we could modify some of the conditions in the final rule so that an investor in a crowdfunding vehicle would still achieve the same economic exposure, and receive the same disclosures, as if he or she had invested in the crowdfunding issuer directly, while providing greater flexibility for crowdfunding vehicles and their investors to determine other aspects of the crowdfunding vehicle's operations. For example, rather than requiring a crowdfunding vehicle to vote and participate in tender or exchange offers or similar transactions only in accordance with the instructions it receives from its investors, we could allow a crowdfunding

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[712] *See also supra* notes 528, 530 and accompanying text.

[713] *See supra* note 484 and accompanying text (discussing commenters in favor of a less restrictive crowdfunding vehicle structure).

vehicle and its investors to determine these matters. A crowdfunding vehicle, for example, could disclose to its investors at the time of its initial offering that the vehicle will vote automatically with the majority of its security holders. Another example would be to permit a crowdfunding vehicle and its investors to determine how the crowdfunding vehicle will exercise any rights under State or Federal law, rather than providing each investor the ability to assert those rights.

These and similar modifications would provide additional flexibility for crowdfunding vehicles and the crowdfunding issuers using the vehicles to raise capital. If this greater flexibility would result in additional offerings under Regulation Crowdfunding, this could provide capital formation benefits to issuers and benefit investors by providing additional investment options. These and similar modifications could, however, result in offering terms that may be less advantageous for investors. The net benefits and costs to investors would therefore depend on the extent to which a more flexible approach would result in additional Regulation Crowdfunding offerings relative to the final rule and the terms of those offerings. However, these alternatives would go against the purpose of the crowdfunding vehicle, which is to act solely as a conduit.

As discussed above, under the final rules, natural persons investing in the crowdfunding vehicle will be excluded from the number of holders of record for purposes of Section 12(g). As an alternative, the final rules could treat all investors in the crowdfunding vehicle and investors in the crowdfunding issuer similarly for purposes of Section 12(g) by requiring all investors to be included in the number of holders of record. This alternative would increase the risk to Regulation Crowdfunding issuers of having to incur registration and Exchange Act reporting costs before they are ready to enter public markets. This alternative could make it harder for Regulation Crowdfunding issuers to raise capital from venture capitalists and other large investors in the future, compared to the final rules. This alternative would significantly decrease the utility of the crowdfunding vehicle structure to issuers, especially in offerings that attract small individual investors, compared to the final rules. However, this alternative could

decrease the risk that crowdfunding issuers with a substantial number of individual investors through the crowdfunding vehicle structure would not exceed the thresholds in Section 12(g)(1) of the Exchange Act and become subject to the more extensive periodic reporting requirements under the Exchange Act, compared to the final rules. Nevertheless, the discussed effects could be mitigated for all except the largest Regulation Crowdfunding issuers, to the extent that such issuers may already avail themselves of the existing conditional exemption under Exchange Act Rule 12g-6.

We are not adopting the proposed changes to the types of securities eligible under Regulation Crowdfunding. As an alternative, we could narrow the eligible security types to those eligible under Regulation A (debt, equity, and debt convertible or exchangeable into equity, including guarantees of such securities), as proposed,[714] which was supported by several commenters.[715] This alternative could strengthen investor protection in some instances, to the extent that Regulation Crowdfunding investors may lack resources to analyze novel security types with complex payoff structures.[716] This alternative could also make it easier for investors to compare different offerings under Regulation Crowdfunding and Regulation A, potentially facilitating better informed investment decisions. Such benefits would be limited to the extent that Regulation Crowdfunding disclosures already require a description of the terms of securities and the valuation method used, along with the continued application of other Regulation Crowdfunding investor protections (including other offering circular and periodic

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[714] For a discussion of the costs and benefits of other alternative security type eligibility criteria, *see* Proposing Release, at 18032.

[715] *See supra* notes 548 and 549.

[716] *See supra* note 549; U.S. Securities and Exchange Commission Office of the Investor Advocate, *Report on Activities for Fiscal Year 2016*, *available at* https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2016.pdf; Jamie Ostrow, *Buyer Beware: Securities Are Not Always What They Seem…*, CROWDCHECK BLOG (Aug. 27, 2018), *available at* https://www.crowdcheck.com/blog/buyer-beware-securities-are-not-always-what-they-seem; and Joseph M. Green & John F. Coyle, *Crowdfunding and the Not-So-Safe SAFE*, 102 VA. L. REV. 168 (2016). *See also* U.S Securities and Exchange Commission, *Investor Bulletin: Be Cautious of SAFEs in Crowdfunding*, *available at* https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_safes; Andrew Stephenson, *Compliance with Reg CF: When Failure Becomes Fraud*, CROWDCHECK BLOG (Apr. 23, 2018), *available at* https://www.crowdcheck.com/blog/compliance-reg-cf-when-failure-becomes-fraud; and FINRA, *Be Safe—5 Things You Need to Know About SAFE Securities and Crowdfunding*, *available at* http://www.finra.org/investors/highlights/5-things-you-need-know-about-safe-securities-and-crowdfunding. *But see* Jack Wroldsen, *Crowdfunding Investment Contracts*, 11 VA. L. & BUS. REV. 543 (2017).

disclosure requirements, investment limits, investor education, and other crowdfunding intermediary requirements). At the same time, the alternative could impose costs on issuers by limiting the flexibility to offer the types of securities that are most compatible with their desired capital structure, financing needs, and assessment of market conditions.[717] A significant share of Regulation Crowdfunding issuers rely on security types other than debt and equity. From inception of Regulation Crowdfunding in May 2016 through December 2019,[718] we estimate that equity and debt accounted for 77 percent of the number of offerings and 74 percent of the aggregate target amount sought. The alternative could also impose costs on some investors that found securities with payoff structures other than equity or debt optimal for their investment strategy and relied on existing disclosures to accurately value such securities.

b. Excluding Delinquent Reporting Companies from Eligibility under Regulation A

The final amendments exclude reporting companies that are not current in periodic reports required under Section 13 or 15(d) of the Exchange Act from using Regulation A, consistent with the existing exclusion of issuers that are not subject to Exchange Act reporting and that have not filed required Regulation A periodic reports for the last two years.

i. Benefits

The amendments are expected to promote investor protection and benefit investors by ensuring the availability of information about issuers required in periodic Exchange Act reports to Regulation A investors and thus enabling better informed investment decisions, which was

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[717] *See supra* notes 551 and 553 (opposing the restriction on security types eligible under Regulation Crowdfunding).

[718] These estimates are based on data from Form C or the latest amendment to it, excluding withdrawn offerings. Equity is comprised of common and preferred equity (including partnership/membership units and interests). Approximately a third of Regulation Crowdfunding offerings were by issuers organized as limited liability companies or as partnerships. Debt is comprised of straight and convertible debt. Analysis of XML data from Form C does not allow a granular breakdown of debt security types. Other security types include SAFEs and securities not elsewhere classified (*e.g.*, revenue participation agreements and miscellaneous tokens. Some of the revenue share agreements remaining in the "other security type" category may have quasi-debt features. SAFEs are identified by keyword from "other security type description." Anecdotal review suggests that some equity and debt offerings were denoted as "other" in the form. Where detected, such instances were re-classified manually based on the "other security type description" field. Examples of "other" are, for instance, tokens, simple agreement for future tokens ("SAFTs"), and revenue participation agreements.

supported by several commenters.[719] Excluding issuers that are subject to, but not current in, Exchange Act reporting obligations from eligibility under Regulation A may reduce the average level of information asymmetry about Regulation A issuers and to the extent investors did not already consider a reporting company's failure to remain current in its reporting obligations in assessing a Regulation A offering may incrementally increase investor confidence and interest in securities offered in this market.

As a caveat, the use of Regulation A by reporting companies has been modest to date,[720] which may attenuate the effects of changes to reporting company eligibility under Regulation A. By extending similar requirements regarding being current in periodic reports that presently apply in follow-on Regulation A offerings to reporting companies in initial Regulation A offerings, the amendments will increase uniformity in eligibility requirements across different categories of Regulation A issuers and may reduce potential for investor confusion.

ii. Costs

The amendments may lead to higher financing costs or reduced ability to raise the required financing under Regulation A for issuers that are not current in periodic reports required under Section 13 or 15(d) of the Exchange Act.

iii. Effects on Efficiency, Competition, and Capital Formation

The amendments may, on the margin, limit capital formation by affected issuers. At the same time, by ensuring more timely availability of information in periodic reports to prospective Regulation A investors, the amendments are expected to facilitate better informed decisions and more efficient allocation of investor capital in Regulation A offerings, and, for Regulation A securities with a secondary market, more informationally efficient security prices. In turn, if the amendments help alleviate investor concerns about adverse selection in the Regulation A market, they may promote greater investor interest in Regulation A securities, increasing aggregate capital formation in the Regulation A market. These effects on capital

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[719] *See supra* note 560. *But see* J. Clarke Letter.

[720] *See supra* note 667.

formation and efficiency of capital allocation may be modest if the amendments mainly result in a reallocation of delinquent reporting company issuers between Regulation A and other offering methods. We lack the ability to quantify the extent of such potential switching between offering methods as a result of the amendments.

iv. Reasonable Alternatives

As an alternative, we could have required filers to have filed in a timely manner all reports required to be filed during the prior 12 months, consistent with Form S-3 and F-3 requirements.[721] This alternative may benefit investors by incentivizing reporting companies that use Regulation A to provide timely periodic disclosures. However, we continue to believe that this alternative might increase costs and decrease the ability of reporting companies that have failed to timely file Exchange Act reports during the lookback period to raise follow-on Regulation A Tier 2 financing.[722] Further, such conditions are not imposed on issuers that are not subject to Exchange Act reporting obligations and that seek to offer Regulation A securities. Overall, relative to the final amendments, we do not expect the effects of this alternative to be significant given the other incentives that reporting companies have to remain current in their Exchange Act reports (*e.g.*, greater secondary market liquidity, not being delisted from an exchange or losing quote eligibility in the OTC market, future eligibility for a streamlined registration process, reduced legal liability, and a reputation for transparency).

7. Bad Actor Disqualification Provisions

The disqualification provisions of Regulation A and Regulation Crowdfunding currently differ from the disqualification provisions in Rule 506(d) in defining the lookback period for the disqualification event through the time of the filing, rather than through the time of sale. As a result, in certain circumstances, periods of time may exist during Regulation A and Regulation Crowdfunding offerings where an offering continues despite an event that would have

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[721] *See* General Instruction I.A.3 to Form S-3; and General Instruction I.A.2 to Form F-3.

[722] *See* 2018 Regulation A Release, at Section IV.B.c.2.

constituted a disqualifying event at the time of filing.[723] In order to harmonize the disqualification provisions of Regulation A and Regulation Crowdfunding with those of Rule 506(d) of Regulation D, the amendments specify that a disqualifying event that occurs at any time during an offering, not only prior to the filing, would disqualify the bad actor from further involvement in the offering. However, to reduce the cost for issuers of monitoring disqualification events that may affect beneficial owners during an ongoing offering, differently from the disqualification provision of Rule 506(d), we are retaining the disqualification lookback period through the time of filing, rather than through the time of sale, for disqualification events affecting beneficial owners.

a. Benefits

By providing greater uniformity in the bad actor disqualification provisions across Rule 506(d), Rule 262(a), and Rule 503(a), the amendments may facilitate compliance for issuers, particularly issuers that undertake different types of exempt offerings over time. The amendments may further benefit issuers by reducing or even eliminating the need to undergo a potentially lengthy and costly Rule 258 suspension process in the event of a disqualifying event occurring after the filing. By preserving the existing "through date of filing" lookback period provision with respect to disqualifying events involving beneficial owners, the amendments are expected to give issuers leeway to raise capital while managing disqualification monitoring costs.

The amendments are expected to strengthen investor protection in cases of disqualifying events occurring after the initiation of an offering.[724] This benefit is expected to be most salient

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[723] As discussed in Section II.G above, under Regulation A, if a covered person triggers one of the disqualifying events in Rule 262, the Commission is able to suspend reliance on the Regulation A exemption through Rule 258, which requires a notice and hearing opportunity for the covered person. Furthermore, if a covered person triggers one of the disqualifying events, the issuer may need to consider whether it must suspend the offering until it files a post-qualification amendment to reflect a fundamental change in the information set forth in the most recent offering statement or post-qualification amendment. Regulation Crowdfunding, which similarly measures the lookback from the time of filing of the offering statement, does not have a suspension provision, similar to Regulation A, but similarly requires an issuer to amend the offering statement to disclose material changes, additions, or updates to information that it provides to investors for offerings that have not been completed or terminated.

[724] *See supra* note 570.

for issuers in continuous offerings, which may span multiple months and years. For example, from June 2015 (when the 2015 Regulation A amendments raising the offering limit to $50 million took effect) through December 2019, based on the analysis of Form 1-A data, we estimate that approximately 80 percent of qualified Regulation A offerings were conducted on a continuous basis. Based on the analysis of Form C data from inception of Regulation Crowdfunding through December 2019, we estimate that the average (median) duration of a Regulation Crowdfunding offering was approximately four months (three months).

b. Costs

The amended disqualification provisions may impose costs on issuers and covered persons. The amendments may lead issuers to incur additional due diligence and monitoring costs and potentially modify their policies and procedures to reduce the odds of a disqualifying event during an ongoing offering (*e.g.*, replacing personnel or avoiding the participation of covered persons, other than beneficial owners, who are subject, or might become subject, to disqualifying events after filing).[725] These additional costs of monitoring disqualification events in ongoing offerings are expected to be somewhat mitigated by the carve-out for events affecting the beneficial owner category of covered persons, which will remain subject to the existing lookback period (defined based on the date of filing). In addition, issuers might incur costs related to seeking disqualification waivers from the Commission. Alternatively, issuers that are disqualified from an ongoing Regulation A or Regulation Crowdfunding offering as a result of a disqualification event occurring after filing might experience an increased cost of capital or a reduced availability of capital. By subjecting additional issuers to the potential for disqualification in the event of a disqualification event affecting a covered person (other than a beneficial owner) after the offering has commenced, the amendments may cause some issuers to discontinue an offering, resulting in a failure to raise the required capital after some costs of preparing an offering statement or marketing an offering have already been incurred.

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[725] *See* NextSeed Letter (stating that the additional monitoring cost will prevent issuers from relying on Regulation Crowdfunding) and CrowdCheck Letter (acknowledging the potential for significant monitoring costs, especially in Regulation Crowdfunding offerings).

c. Effects on Efficiency, Competition, and Capital Formation

As discussed above, the amendments may cause some issuers whose covered persons (other than beneficial owners) become subject to a disqualification event after filing to discontinue an offering, resulting in decreased capital formation for such issuers. Additional costs of monitoring disqualification events might incrementally increase the compliance costs associated with conducting an offering under Regulation A or Regulation Crowdfunding. For Regulation Crowdfunding issuers, intermediaries might incur incrementally higher due diligence costs as well, insofar as the monitoring of disqualification triggers is not already a part of the intermediary's measures to reduce the risk of fraud.

We expect the incrementally more stringent bad actor disqualification provisions to lead most issuers to take additional steps to monitor disqualification events after filing and restrict the participation of covered persons (other than beneficial owners) in ongoing Regulation A and Regulation Crowdfunding offerings, which could incrementally help reduce the potential for fraud in these types of offerings and thus strengthen investor protection. To the extent that more stringent bad actor disqualification requirements increase investor interest in these offerings, on the margin, overall capital formation in the Regulation A and Regulation Crowdfunding markets may increase. If the amendments to the disqualification lookback period alleviate some of the concerns about adverse selection in the Regulation A and Regulation Crowdfunding markets and thus lower the risk premium associated with the risk of fraud due to the presence of bad actors in these markets, they may also reduce the cost of capital for issuers that rely on these offering exemptions.

d. Reasonable Alternatives

As an alternative, instead of disqualifying Regulation A or Regulation Crowdfunding issuers affected by disqualifying events during an ongoing offering, we could allow such issuers to continue the offering but require the disclosure of a disqualifying event and the option for investors to cancel their investment commitments and obtain a refund of invested funds.[726] This

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[726] *See supra* note 573.

alternative might reduce costs for some issuers affected by a disqualification trigger in the course of an ongoing offering. However, it also might result in costs to investors if investors fail to review the disclosure of a disqualifying event occurring after commencement of an offering. This alternative also would not be consistent with the disqualification provisions in Rule 506(d), which might introduce confusion for issuers and investors that participate in multiple offerings conducted pursuant to different securities exemptions.

The amendments preserve the definition of the lookback period (using the time of filing as a basis) with respect to disqualification events affecting covered persons that are beneficial owners. As an alternative, we could extend the amended lookback period definition (continuing through the time of sale) with respect to disqualification events affecting all covered persons, including beneficial owners. Compared to the final amendments, this alternative might incrementally strengthen investor protection to the extent that the types of disqualification events that affect beneficial owners after filing in continuous Regulation A or Regulation Crowdfunding offerings pose conflicts of interest or other significant risks to investors. However, compared to the proposal, this alternative might result in the exclusion of some issuers whose beneficial owners become subject to a disqualification trigger after filing from eligibility to conduct an offering. To minimize this risk, issuers might incur increased costs of monitoring potential disqualification events affecting beneficial owners under this alternative. Issuers also might incur costs to restructure their share ownership to avoid beneficial ownership of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, by individuals that may become subject to disqualifying events after filing.

V. PAPERWORK REDUCTION ACT

A. Summary of the Collection of Information

Certain provisions of our rules and forms affected by the amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[727] The Commission is submitting the amendments to the Office of Management

[727] *See* 44 U.S.C. 3501 *et seq.*

and Budget ("OMB") for review in accordance with the PRA.[728] The hours and costs associated with preparing and filing the forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are:[729]

- "Regulation A (Form 1-A)" (OMB Control No. 3235-0286);
- "Regulation D" (a new collection of information);
- "Regulation D Rule 504(b)(3) – Felons and Other Bad Actors Disclosure Statement" (OMB Control No. 3235-0746);
- "Regulation D Rule 506(e) Felons and Other Bad Actors Disclosure Statement" (OMB Control No. 3235-0704);
- "Form D" (OMB Control No. 3235-0076); and
- "Form C" (OMB Control No. 3235-0716).

We are combining the existing collections of information for 17 CFR 230.504(b)(3) ("Rule 504(b)(3)"), 17 CFR 230.506(e) ("Rule 506(e)"), and Form D in a new collection of information that covers all of the PRA compliance burdens for Regulation D.[730] The regulations and forms listed above were adopted under the Securities Act and set forth filing

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[728] 44 U.S.C. 3507(d); and 5 CFR 1320.11.

[729] As discussed in Section II.D.3 above, we are revising the confidential information standard used in our exhibit filing requirements to provide that information may be redacted if it is both not material and the type that the registrant treats as private or confidential. A number of collections of information could be affected by this amendment, including 17 CFR 249.310 (OMB Control No. 3235-0063), 17 CFR 249.308a (OMB Control No. 3235-0070), Form 8-K (OMB Control No. 3235-0060), Form S-1 (OMB Control No. 3235-0065), and 17 CFR 249.210 (OMB Control No. 3235-0064); as well as Form S-6 (OMB Control No. 3235-0184); Form N-14 (OMB Control No. 3235-0336); Form 20-F (OMB Control No. 3235-0288); 17 CFR 239.31 (OMB Control No. 3235-0258); Form N-1A (OMB Control No. 3235-0307); Form N-2 (OMB Control No. 3235-0026); Form N-3 (OMB Control No. 3235-0316); Form N-4 (OMB Control No. 3235-0318); Form N-5 (OMB Control. No. 3235-0169); Form N-6 (OMB Control No. 3235-0503); and Form N-8B-2 (OMB Control No. 3235-0186). We believe that the standard will not change the paperwork burden associated with these collections of information because the revised standard will be applied in similar circumstances and in a similar way as the current standard.

[730] Since the new collection of information for Regulation D will cover the existing compliance burdens, we are eliminating the separate collections of information for Rule 504(b)(3), Rule 506(e), and Form D.

and disclosure requirements associated with exempt offerings. A description of the amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the amendments can be found in Section IV above.

B. Summary of the Effects on the Collections of Information

PRA Table 1[731] summarizes the estimated effects of the amendments on the paperwork burdens associated with the affected collections of information listed in Section V.A.

PRA Table 1. Estimated Paperwork Burden Effects of the Amendments

Final Amendments and Effects	Affected Collections of Information	Estimated Net Effect
Regulation D: • Provide a new collection of information to encompass disclosure required by Regulation D, including the following: ○ Financial statement and non-financial statement information and delivery requirements, including the proposed requirement to provide the purchaser with generic solicitation of interest materials (Rule 502(b)); and ○ Felon and bad actor disclosure requirements (Rules 504(b)(3)) and 506(e).	• Regulation D (including Form D, Rule 502(b), Rule 504(b)(3), and Rule 506(e))	• 5 hour compliance burden per response to the new collection of information
Regulation A: • Requiring the filing of generic solicitation of interest materials. Estimated burden increase: 0.5 hours per form. • Simplifying compliance with Regulation A by conforming certain requirements with similar requirements for registered offerings (including permitting the redaction of confidential information in certain exhibits; permitting incorporation by reference of financial statements in the offering circular; and simplifying the requirements for making non-public documents available to the public on EDGAR). Estimated burden decrease: 2.5 hours per form. • We estimate that the increase in offering limit would increase the number of filings on Form 1-A by 25.	• Form 1-A	• 2 hour net decrease in compliance burden per form • 25 additional responses

[731] We do not believe that the amendments with respect to the use of general solicitation in exempt offerings, the integration framework, harmonization of bad actor disqualification provisions in Regulation A and Regulation Crowdfunding with those in Regulation D, excluding Exchange Act registrants that are delinquent filers from relying on Regulation A, revising the non-exclusive list of methods for verifying accredited investor status, permitting the use of crowdfunding vehicles (other than Form C disclosure when a crowdfunding vehicle is used), increasing the Rule 504 offering limit, or increasing the investment limits under Regulation Crowdfunding will substantially or materially modify the number of new filings or the burdens for those filings. In addition, as discussed in Section II.E.3 above, we are extending certain provisions of the Commission's temporary relief from certain financial information requirements of Regulation Crowdfunding. The temporary relief also requires issuers relying on the temporary relief to provide certain additional disclosures, the burden of which is expected to be minimal. As discussed in the Temporary Amendments Adopting Release, we believe that the net change in paperwork burden as a result of the temporary relief will be minimal and are not adjusting the burden or cost estimates for Form C.

Regulation Crowdfunding: • Requiring the filing of generic solicitation of interest materials and solicitations of interest under Rule 206; and requiring disclosure about a co-issuer on Form C when an SPV is used. Estimated burden increase: 1 hour per form. • We believe that increasing the offering limits under Regulation Crowdfunding would not affect the burden estimate per form, but we estimate that the increase in the offering limit would increase the number of filings on Form C by 55.	• Form C	• 1 hour net increase in compliance burden per form • 55 additional responses

Although we estimate that the amendments to Regulation D that we are adopting will not have a net effect on the current burdens relating to Regulation D, we are changing how we allocate those burdens to an information collection for PRA purposes. In particular, as discussed above, we are establishing a new, single collection of information for Regulation D to encompass all of the associated paperwork burdens. The estimates for this new collection of information include the existing burdens associated with Form D, Rule 504(b)(3), and Rule 506(e) , as well as other burdens resulting from the implementation of Regulation D. As a result, the new collection of information for Regulation D reflects an increase from the aggregated burdens for the existing Form D, Rule 504(b)(3) and Rule 506(e) collections of information. See PRA Table 6 below.

Although it is not possible to predict with certainty the increase in the number of Regulation A and Regulation Crowdfunding offerings following the amendments, we estimate for purposes of the PRA an approximate 20 percent increase in the number of new Regulation A offerings resulting in 25 additional respondents, and an approximate 10 percent increase in the number of new Regulation Crowdfunding offerings resulting in 55 additional respondents.[732] It is possible that the increase in the offering limit may also increase the number of Form 1-K, 17 CFR 239.92 (Form 1-SA), 17 CFR 239.93 (Form 1-U), and Form 1-Z filings. However, due to uncertainties regarding whether any increase in Tier 2 offerings would be conducted by

[732] We derived these estimates based on 125 Regulation A offerings filed in 2019 and 552 Regulation Crowdfunding offerings conducted in the second full year since effectiveness of those rules.

Exchange Act reporting companies, we are not increasing in the number of responses for the associated collections of information at this time.

C. Incremental and Aggregate Burden and Cost Estimates

Below we estimate the incremental and aggregate changes in paperwork burden as a result of the amendments. These estimates represent the average burden for all issuers, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the nature of their business. We believe that the amendments will change the frequency of responses to the existing collections of information and the burden per response.

The burden estimates were calculated by adding the estimated additional responses to the existing estimated responses and multiplying the estimated number of responses by the estimated average amount of time it takes an issuer to prepare and review disclosure required under the amendments. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. PRA Table 2[733] sets forth the percentage estimates we typically use for the burden allocation for each collection of information and the estimated burden allocation for the new collection of information for Regulation D. We also estimate that the average cost of retaining outside professionals is $400 per hour.[734]

PRA Table 2. Estimated Burden Allocation for Specified Collections of Information

Collection of Information	Internal	Outside Professionals
Forms 1-A, C	75%	25%
Regulation D	25%	75%

PRA Table 3[735] below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the amendments' estimated effect

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[733] Here and in the tables below, we derived current estimated burdens and burden allocations for Regulation D using the estimates for Form D, Rule 504(b)(3), and Rule 506(e).

[734] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

[735] The estimated reductions in Columns (C), (D), and (E) are rounded to the nearest whole number.

on the paperwork burden per response. The number of estimated affected responses shown in PRA Table 3 is based on the number of responses in the Commission's current OMB PRA filing inventory plus the number of additional responses we estimate as a result of the amendments (25 responses for Form 1-A, and 55 responses for Form C).[736]

PRA Table 3. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Amendments

Collection of Information	Number of Estimated Affected Responses (A)	Burden Hour Affect per Current Affected Response (B)	Change in Burden Hours for Current Affected Responses (C) = (A) x (B)	Change in Company Hours for Current Affected Responses (D) = (C) x 0.75	Change in Professional Hours for Current Affected Responses (E) = (C) x 0.25	Change in Professional Costs for Current Affected Responses (F) = (E) x $400
Form 1-A	204	(2)	(408)	(306)	(102)	($40,800)
Form C	5,907	1	5907	4,430	1,477	$590,800

The table below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the amendments' estimated effect on the number of responses.

PRA Table 4. Calculation of the Change in Burden Estimates as a Result of Change in Number of Responses Resulting from the Amendments

	Current Burden			Program Change		
Collection of Information	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Estimated Additional Responses (D)	Change in Company Hours (E) = ((B)/(A)) x (D)	Change in Professional Costs (F) = ((C)/(A)) x (D)
Form 1-A	179	98,396	$13,111,912	25	13,742	$1,932,390
Form C	5,852	214,928	$28,500,000	55	2,020	$267,857

The following tables summarize the requested paperwork burden, including the estimated total reporting burdens and costs, under the amendments. To estimate the new burdens for Form 1-A and Form C resulting from the amendments, we add the estimated burden and cost changes in PRA Table 3 and PRA Table 4 and have incorporated them into PRA Table 5. For example, Column (E) of PRA Table 5 represents the sum of column (D) in PRA Table 3

[736] The OMB PRA filing inventory represents a three-year average.

and column (E) in PRA Table 4.

PRA Table 5. Requested Paperwork Burden under the Amendments

	Current Burden			Program Change			Revised Burden		
Collection of Information	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Number of Affected Responses (D)	Change in Company Hours (E)	Change in Professional Costs (F)	Annual Responses (G)	Burden Hours (H) = (B) + (E)	Cost Burden (I) = (C) + (F)
Form 1-A	179	98,396	$13,111,912	204	13,436	$1,891,590	204	111,832	$15,003,502
Form C	5,852	214,928	$28,500,000	5,907	6,450	$858,657	5,907	221,378	$29,358,657

PRA Table 6 summarizes the requested paperwork burden for the new Regulation D collection of information, including the estimated total reporting burdens and costs, under the amendments. The estimates for this new collection of information include the existing burden estimated for Form D, Rule 504(b)(3), and Rule 506(e), as well as other burdens resulting from the implementation of Regulation D. For purposes of the PRA, we estimate that the new Regulation D collection of information will entail a 5 hour compliance burden per response with 26,000 annual responses (derived from the current 26,000 annual responses for Form D).[737]

PRA Table 6. Requested Paperwork Burden for the new Collection of Information

	Requested Paperwork Burden		
Collection of Information	Annual Responses (A)	Burden Hours (A) x 5 x (0.25)	Cost Burden (A) x 5 x (0.75) x $400
Regulation D	26,000	32,500	$39,000,000

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

[737] We expect the amendments providing an additional method to verify an investor's accredited investor status and increasing the offering limit under Rule 504 could lead to additional Rule 506(c) or Rule 504 offerings. However, as discussed in Section IV above, some of these offerings may be conducted by issuers switching from other Regulation D exemptions. Additionally, some of the issuers conducting the additional Regulation A or Regulation Crowdfunding offerings may be switching from Regulation D offerings. Because it is difficult to predict the net impact of the proposed amendments on the overall number of Regulation D responses, we are not adjusting the current estimate of 26,000 responses at this time.

The Regulatory Flexibility Act ("RFA")[738] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act,[739] to consider the impact of those rules on small entities. We have prepared this Final Regulatory Flexibility Act Analysis ("FRFA") in accordance with Section 604 of the RFA.[740] An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with the RFA and was included in the Proposing Release. This FRFA relates to the amendments or additions to the rules and forms described in Section II above.

A. Need for, and Objectives of, the Final Amendments

The amendments to the exempt offering framework are intended to close gaps and reduce complexities that may impede access to capital for issuers and thereby limit investment opportunities, while preserving or enhancing important investor protections. The need for, and objectives of, the amendments are discussed in more detail in Sections II and IV above.

B. Significant Issues Raised by Public Comment

In the Proposing Release, we requested comment on all aspects of the IRFA, including how the proposed amendments could further lower the burden on small entities, the number of small entities that would be affected by the proposed amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We did not receive any comments specifically addressing the IRFA. However, we received a number of comments on the proposed amendments generally,[741] and have considered these comments in developing the FRFA.

C. Small Entities Subject to the Final Amendments

The final amendments will affect issuers that are small entities. The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[742]

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[738] 5 U.S.C. 601 *et seq.*

[739] 5 U.S.C. 553.

[740] 5 U.S.C. 604.

[741] *See* Section II above.

[742] 5 U.S.C. 601(6).

For purposes of the RFA, under 17 CFR 230.157, an issuer, other than an investment company, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities not exceeding $5 million. Under 17 CFR 270.0-10, an investment company, including a business development company, is considered to be a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.

The amendments are expected to promote capital formation through exempt offerings and create additional flexibility for issuers. Because the amendments will affect all issuers conducting offerings exempt from registration under the Securities Act, which includes companies not subject to ongoing reporting obligations under the Exchange Act, Regulation A, or Regulation Crowdfunding, it is difficult to estimate the number of issuers that qualify as small entities that would be eligible to rely on the amendments.[743]

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

As noted above, the amendments to the exempt offering framework are intended to close gaps and reduce complexities that may impede access to capital for issuers. The final amendments apply to small entities to the same extent as other entities, irrespective of size, and we expect that the nature of any associated benefits and costs to be similar. Accordingly, we refer to the discussion of the economic effects on all affected parties, including small entities, in Section IV above.[744] Consistent with that discussion, we anticipate that the economic benefits and costs likely could vary widely among small entities based on a number of factors, such as the nature and conduct of their businesses, including their capital raising decisions, which

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[743] In particular, as discussed in Section IV above, due to the large number of offerings in reliance on the offering exemptions in Regulation D relative to other offering exemptions affected by the amendments, most of which are conducted by issuers that are not subject to Exchange Act, Regulation A, or Regulation Crowdfunding reporting requirements, Regulation D issuers are likely to continue to comprise a significant share of the small entities affected by the amendments. However, we do not have information on the assets of such issuers, which is required for an estimate of small entities for purposes of the RFA definition, because this information is not required by Form D and because such issuers may not be subject to ongoing reporting requirements.

[744] We also discuss the estimated compliance burden associated with the proposed amendments for purposes of the PRA in Section V above.

makes it difficult to project the economic impact on small entities with precision. Compliance with the final amendments may require the use of professional skills, including accounting and legal skills.

Many of the final amendments are expected to be of greatest benefit to the capital raising efforts of small entities that may lack an existing network of angel and VC funders and appear to face the greatest constraints in obtaining external financing. Examples of this include: amendments to integration principles that are intended to facilitate multiple offerings, including offerings with general solicitation; amendments expanding investment limits and issuer eligibility under Regulation Crowdfunding; amendments tailoring the requirements for non-accredited investor sales under Rule 506(b); and amendments expanding the offering limits for Regulation Crowdfunding, Rule 504, and Regulation A. In addition, certain of the rules that we are amending, such as Regulation Crowdfunding and Rule 504, have eligibility requirements and other restrictions that increase the likelihood that such rules will be relied on by small businesses that are seeking to raise relatively small amounts of capital without incurring the costs of conducting a registered offering.

Although many of the final amendments are expected to be of greatest benefit to the capital raising efforts of small entities, we acknowledge that any costs of the amendments borne by the affected entities, such as those related to compliance with the amendments, or the implementation or restructuring of internal systems needed to adjust to the amendments, could have a proportionally greater effect on small entities, as they may be less able to bear such costs relative to larger entities. For example, the final amendments to the bad actor disqualification provisions[745] could cause some small entities to incur additional due diligence costs or modify their offerings to reduce the possibility of a disqualifying event (e.g., replacing personnel or avoiding the participation of covered persons, other than beneficial owners, who are subject, or might become subject, to disqualifying events after filing). Similarly, small entities electing to

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[745] *See supra* Section II.G.

use the generic or Regulation Crowdfunding testing-the-waters provisions[746] might incur costs, such as those related to preparing the testing-the-waters materials. These potential costs would be borne equally by all issuers, regardless of size.

F. Agency Action to Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Accordingly, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The final amendments generally simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation, including for offering exemptions used by and designed primarily for small entities. Thus, we do not think it is necessary to exempt small entities from all or part of these requirements. As discussed in more detail in Sections II and IV above, commenters offered, and we considered, various alternatives to the final amendments.

Several of the offering exemptions that we are amending (*e.g.*, Regulation A and Regulation Crowdfunding) already contain different compliance or reporting requirements that take into account the resources of the smaller entities that are likely to use these exemptions. In addition, certain amendments clarify, consolidate, or simplify compliance and reporting requirements under our rules, which should benefit small entities in particular. For example, we are amending the financial statement information requirements in Regulation D to align them with the disclosure requirements in Regulation A. We are also amending Regulation A to

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[746] *See supra* Section II.B.

simplify compliance, such as by providing for the redaction of confidential information in certain exhibits, harmonizing the procedures for publicly filing draft Regulation A offering statements with those for draft Securities Act registration statements, and permitting issuers to incorporate previously-filed financial statements by reference into a Regulation A offering statement. Finally, we are amending Regulation Crowdfunding and rules under the Investment Company Act to help reduce administrative complexities that some issuers may encounter under Regulation Crowdfunding.

With respect to using performance rather than design standards, we note that several of the amendments concern rules that use principles-based approaches that are more akin to performance standards. For example, we are adopting a general principle of integration that requires an issuer to consider the particular facts and circumstances of each offering, including whether 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.

VII. STATUTORY AUTHORITY

The final amendments contained in this release are being adopted under the authority set forth in the Securities Act (15 U.S.C. 77a *et seq.*), particularly, Sections 3, 4, 4A, 19, and 28 thereof; the Exchange Act (15 U.S.C. 78a *et seq.*), particularly, Sections 3, 10(b), 12, 15, 17, 23(a), and 36 thereof; the Investment Company Act (15 U.S.C. 80a-1 *et seq.*), particularly Sections 6(c), 8, 24, 30, 38, and 45; and Pub. L. No. 112-106, secs. 301-305, 126 Stat. 306 (2012).

List of Subjects

17 CFR Part 227

Crowdfunding, Reporting and recordkeeping requirements, Securities.

17 CFR Part 229

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 230

Advertising, Administrative practice and procedure, Confidential business information, Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Part 239

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Administrative practice and procedure, Brokers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 270

Administrative practice and procedure, Confidential business information, Fraud, Investment companies, Life insurance, Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Administrative practice and procedure, Electronic funds transfer, Investment companies, Reporting and recordkeeping requirements, Securities.

TEXT OF RULE AMENDMENTS

In accordance with the foregoing, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

PART 227—REGULATION CROWDFUNDING, GENERAL RULES AND REGULATIONS

1. The authority citation for part 227 continues to read as follows:

Authority: 15 U.S.C. 77d, 77d-1, 77s, 77z-3, 78c, 78*o*, 78q, 78w, 78mm, and Pub. L. No. 112-106, secs. 301-305, 126 Stat. 306 (2012).

2. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], to March 1, 2023, amend § 227.201 by revising paragraph (b)(7) to read as follows:

§ 227.100 Crowdfunding exemption and requirements.

* * * * *

(b) * * *

(7) Seeks to rely on § 227.201(aa) to conduct an offering on an expedited basis due to circumstances relating to coronavirus disease 2019 (COVID-19), where such offering is initiated between May 4, 2020, and February 28, 2021, or seeks to rely on § 227.201(bb), where such offering is initiated between March 1, 2021, and August 28, 2022, and:

(i) Was organized and had operations less than six months prior to the commencement of the offering; or

(ii) Sold securities in reliance on section 4(a)(6) of the Securities Act and has not complied with the requirements in section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) and the related requirements in this part.

* * * * *

3. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], further amend § 227.100 by:

a. Revising paragraphs (a)(1), (a)(2) introductory text, and paragraphs (a)(2)(i) and (ii);

b. Revising paragraph (d); and

c. Adding paragraph (e).

The revisions and additions read as follows:

§ 227.100 Crowdfunding exemption and requirements.

(a) * * *

(1) The aggregate amount of securities sold to all investors by the issuer in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) during the 12-month period preceding the date of such offer or sale, including the securities offered in such transaction, shall not exceed $5,000,000;

(2) Where the purchaser is not an accredited investor (as defined in Rule 501 (§ 230.501 of this chapter)), the aggregate amount of securities sold to such an investor across all issuers in

reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) during the 12-month period preceding the date of such transaction, including the securities sold to such investor in such transaction, 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;

* * * * *

(d) *Investor*. For purposes of this part, investor means any investor or any potential investor, as the context requires. A crowdfunding vehicle (as defined in § 270.3a-9 of this chapter) is not considered an investor for the purposes of this part.

(e) *Integration with other offerings.* To determine whether offers and sales should be integrated, see § 230.152 of this chapter.

4. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], to September 1, 2021, amend § 227.201 by:

a. Redesignating paragraph (z) as paragraph (aa) and revising it; and

b. Adding new reserved paragraph (z).

The revision reads as follows:

§ 227.201 Disclosure requirements.

* * * * *

(aa) Between May 4, 2020, and February 28, 2021, an issuer may initiate an offering intended to be conducted on an expedited basis due to circumstances relating to COVID-19. Such issuer:

(1) Must prominently provide the following information:

(i) A statement that the offering is being conducted on an expedited basis due to circumstances relating to COVID-19 and pursuant to the Commission's temporary regulatory COVID-19 relief set out in this part;

(ii) If the issuer is relying on paragraph (aa)(2) of this section to omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§ 239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with § 227.203(a)(1), a statement that:

(A) The financial information that has been omitted is not currently available and will be provided by an amendment to the offering materials;

(B) The investor should review the complete set of offering materials, including previously omitted financial information, prior to making an investment decision; and

(C) No investment commitments will be accepted until after such financial information has been provided; and

(iii) If the issuer is relying on paragraph (aa)(3) of this section to provide financial statement information required by paragraph (t)(1) of this section, a statement that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer; and

(iv) In lieu of the information required by paragraph (j) of this section, a description of the process to complete the transaction or cancel an investment commitment, including a statement that:

(A) Investors may cancel an investment commitment for any reason within 48 hours from the time of his or her investment commitment (or such later period as the issuer may designate);

(B) The intermediary will notify investors when the target offering amount has been met;

(C) The issuer may close the offering at any time after it has aggregate investment commitments for which the right to cancel pursuant to paragraph (aa)(1)(iv)(A) of this section

has lapsed that equal or exceed the target offering amount (absent a material change that would require an extension of the offering and reconfirmation of the investment commitment); and

(D) If an investor does not cancel an investment commitment within 48 hours from the time of the initial investment commitment, the funds will be released to the issuer upon closing of the offering and the investor will receive securities in exchange for his or her investment;

(2) May omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§ 239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with § 227.203(a)(1) if such information is unavailable at the time of filing, but the intermediary may not accept any investment commitments until complete information required under paragraph (t) of this section is provided through an amendment to the Form C in accordance with § 227.203(a)(2); and

(3) May comply with the requirements of paragraph (t)(1) of this section instead of paragraph (t)(2) of this section for an offering or offerings that, together with all other amounts sold under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) within the preceding 12-month period, have, in the aggregate, a target offering amount of more than $107,000, but not more than $250,000, and financial statements of the issuer that have either been reviewed or audited by a public accountant that is independent of the issuer are unavailable at the time of filing.

* * * * *

5. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], to March 1, 2023, further amend § 227.201 by adding paragraph (bb) to read as follows:

§ 227.201 Disclosure requirements.

* * * * *

(bb) Between March 1, 2021, and August 28, 2022, an issuer may comply with the requirements of paragraph (t)(1) of this section instead of paragraph (t)(2) of this section for an offering or offerings that, together with all other amounts sold under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) within the preceding 12-month period, have, in the

aggregate, a target offering amount of more than $107,000, but not more than $250,000, and financial statements of the issuer that have either been reviewed or audited by a public accountant that is independent of the issuer are unavailable at the time of filing. Such issuer must prominently provide a statement that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer.

* * * * *

6. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], further amend § 227.201 by:

a. Revising the introductory text;

b. Removing the word "and" from the end of paragraph (x);

c. Removing the period from the end of paragraph (y) and adding in its place "; and";

d. Removing the "*Instruction to § 227.201*" from where it appears after paragraph (y) and adding it to the end of the section; and

e. Adding paragraph (z).

The revisions and addition read as follows:

§ 227.201 Disclosure requirements.

An issuer offering or selling securities in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and in accordance with section 4A of the Securities Act (15 U.S.C. 77d-1) and this part, and any co-issuer jointly offering or selling securities with such an issuer in reliance on the same, must file with the Commission and provide to investors and the relevant intermediary the following information:

* * * * *

(z) Any written communication or broadcast script provided in accordance with § 227.206 or, if within 30 days of the initial filing of the offering statement, § 230.241 of this chapter.

(aa) Between May 4, 2020, and February 28, 2021, an issuer may initiate an offering intended to be conducted on an expedited basis due to circumstances relating to COVID-19. Such issuer:

(1) Must prominently provide the following information:

(i) A statement that the offering is being conducted on an expedited basis due to circumstances relating to COVID-19 and pursuant to the Commission's temporary regulatory COVID-19 relief set out in this part;

(ii) If the issuer is relying on paragraph (aa)(2) of this section to omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§ 239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with § 227.203(a)(1), a statement that:

(A) The financial information that has been omitted is not currently available and will be provided by an amendment to the offering materials;

(B) The investor should review the complete set of offering materials, including previously omitted financial information, prior to making an investment decision; and

(C) No investment commitments will be accepted until after such financial information has been provided; and

(iii) If the issuer is relying on paragraph (aa)(3) of this section to provide financial statement information required by paragraph (t)(1) of this section, a statement that financial information certified by the principal executive officer of the issuer has been provided instead of financial statements reviewed by a public accountant that is independent of the issuer; and

(iv) In lieu of the information required by paragraph (j) of this section, a description of the process to complete the transaction or cancel an investment commitment, including a statement that:

(A) Investors may cancel an investment commitment for any reason within 48 hours from the time of his or her investment commitment (or such later period as the issuer may designate);

(B) The intermediary will notify investors when the target offering amount has been met;

(C) The issuer may close the offering at any time after it has aggregate investment commitments for which the right to cancel pursuant to paragraph (aa)(1)(iv)(A) of this section has lapsed that equal or exceed the target offering amount (absent a material change that would require an extension of the offering and reconfirmation of the investment commitment); and

(D) If an investor does not cancel an investment commitment within 48 hours from the time of the initial investment commitment, the funds will be released to the issuer upon closing of the offering and the investor will receive securities in exchange for his or her investment;

(2) May omit the information required by paragraph (t) of this section in the initial Form C: Offering Statement (Form C) (§ 239.900 of this chapter) filed with the Commission and provided to investors and the relevant intermediary in accordance with § 227.203(a)(1) if such information is unavailable at the time of filing, but the intermediary may not accept any investment commitments until complete information required under paragraph (t) of this section is provided through an amendment to the Form C in accordance with § 227.203(a)(2); and

(3) May comply with the requirements of paragraph (t)(1) of this section instead of paragraph (t)(2) of this section for an offering or offerings that, together with all other amounts sold under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) within the preceding 12-month period, have, in the aggregate, a target offering amount of more than $107,000, but not more than $250,000, and financial statements of the issuer that have either been reviewed or audited by a public accountant that is independent of the issuer are unavailable at the time of filing.

* * * * *

7. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 227.203 by revising paragraph (a)(1) to read as follows:

§ 227.203 Filing requirements and form.

(a) * * *

(1) *Offering statement.* Except as allowed by § 227.206, an issuer offering or selling securities in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and in accordance with section 4A of the Securities Act (15 U.S.C. 77d-1) and this part, and any co-issuer jointly offering or selling securities with such an issuer in reliance on the same, must file with the Commission and provide to investors and the relevant intermediary a Form C: Offering Statement (Form C) (§ 239.900 of this chapter) prior to the commencement of the offering of securities. An issuer that is both offering or selling securities with a co-issuer and separately offering or selling securities on its own must file with the Commission and provide to investors and the relevant intermediary a separate Form C for such offering. Every Form C must include the information required by § 227.201.

* * * * *

8. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 227.204 by:

a. Revising paragraphs (a) and (b)(1);

b. Adding paragraph (d); and

c. Redesignating the Instruction to § 227.204 as paragraph (e) and revising it.

The revisions and addition read as follows:

§ 227.204 Advertising.

(a) (1) An issuer may not, directly or indirectly, advertise the terms of an offering made in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)), except for oral or written communications that meet the requirements of paragraph (b) of this section or of § 227.206.

(2) *Instruction to paragraph (a).* For purposes of this paragraph (a), issuer includes persons acting on behalf of the issuer.

(b) * * *

(1) A statement that the issuer is conducting an offering pursuant to section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)), the name of the intermediary through which the offering is being conducted, and information (including a link in any written communications) directing the potential investor to the intermediary's platform;

* * * * *

(d) Notwithstanding the requirement that a notice advertising any of the terms of an issuer's offering made in reliance on section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) include no more than the information specified in paragraph (b) of this section, an issuer conducting an offering in reliance on Regulation Crowdfunding concurrently with another offering that discloses the terms of the Regulation Crowdfunding offering in the disclosure document for the other offering will not be deemed to have exceeded these disclosure limitations if the disclosure document for the other offering satisfies all the other requirements of this section. If the disclosure document for the other offering is filed on the Commission's Electronic Data Gathering and Retrieval System (EDGAR), the link required by paragraph (b)(1) may not be a live hyperlink.

(e) *Instruction to § 227.204.* For purposes of this section, terms of the offering means the amount of securities offered, the nature of the securities, the price of the securities, the closing date of the offering period, the planned use of proceeds and the issuer's progress toward meeting its funding target.

9. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], add § 227.206 to subpart B to read as follows:

§ 227.206 Solicitations of interest and other communications.

(a) *Solicitation of interest*. At any time before the filing of an offering statement, an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated securities offering. Such communications are deemed to be an offer of a security for sale for purposes of the antifraud provisions of the Federal securities laws. No solicitation

or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until the offering statement is filed.

(b) *Conditions*. The communications must:

(1) State that no money or other consideration is being solicited, and if sent in response, will not be accepted;

(2) State that 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

(3) State that a person's indication of interest involves no obligation or commitment of any kind.

(c) *Indications of interest*. Any written communication under this section may include a means by which a person may indicate to the issuer that such person is interested in a potential offering. This issuer may require the name, address, telephone number, and/or email address in any response form included pursuant to this paragraph (c).

10. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], to March 1, 2023, add paragraph (e) to § 227.301 to read as follows:

§ 227.301 Measures to reduce risk of fraud.

* * * * *

(e) Have a reasonable basis for believing that an issuer seeking to initiate an offering of securities between March 1, 2021, and August 28, 2022, in reliance on section 4(a)(6) of the Securities Act through the intermediary's platform that is relying on § 227.201(bb) and that has previously sold securities in reliance on section 4(a)(6) of the Securities Act has complied with the requirements in section 4A(b) of the Act (15 U.S.C. 77d1(b)) and the related requirements in this part. In satisfying the requirement in this paragraph (e), an intermediary may rely on the representations of the issuer concerning compliance with the requirements in this paragraph (e) unless the intermediary has reason to question the reliability of those representations.

§ 227.303 [Amended]

11. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], until September 1, 2021, amend § 227.303 by:

a. Removing "§ 227.201(z)(1)" from paragraph (g)(1)(i) and adding in its place "§ 227.201(aa)(1)"; and

b. Removing "§ 227.201(z)(3)" from paragraph (g)(1)(iii) and adding in its place "§ 227.201(aa)(3)".

§ 227.304 [Amended]

12. Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], until September 1, 2021, amend § 227.304 by removing "§ 227.201(z)" from paragraph (e)(2)(i) and adding in its place "§ 227.201(aa)".

13. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 227.503 by revising paragraphs (a), adding an Instruction to paragraph (a), and revising paragraph (b)(3) to read as follows:

§ 227.503 Disqualification provisions.

(a) *Disqualification events*. No exemption under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, officer, general partner or managing member of the issuer; any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of filing, any offer after filing, or such sale; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; or any general partner, director, officer or managing member of any such solicitor:

(1) Has been convicted, within 10 years before the filing of the offering statement or such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser, funding portal or paid solicitor of purchasers of securities;

(2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) or such sale that, at the time of such filing or sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser, funding portal or paid solicitor of purchasers of securities;

(3) Is subject to a final order of a State securities commission (or an agency or officer of a State performing like functions); a State authority that supervises or examines banks, savings associations or credit unions; a State insurance commission (or an agency or officer of a state performing like functions); an appropriate Federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(i) At the time of the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) or such sale, bars the person from:

(A) Association with an entity regulated by such commission, authority, agency or officer;

(B) Engaging in the business of securities, insurance or banking; or

(C) Engaging in savings association or credit union activities; or

(ii) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative or deceptive conduct entered within ten years before such filing of the offering statement or such sale;

(iii) *Instruction to paragraph (a)(3). Final order* shall mean a written directive or declaratory statement issued by a Federal or State agency, described in this paragraph (a)(3), under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that Federal or State agency.

(4) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Exchange Act (15 U.S.C. 78*o*(b) or 78*o*-4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f)) that, at the time of the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) or such sale:

(i) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer, investment adviser or funding portal;

(ii) Places limitations on the activities, functions or operations of such person; or

(iii) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(5) Is subject to any order of the Commission entered within five years before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) or such sale that, at the time of such filing or sale, orders the person to cease and desist from committing or causing a violation or future violation of:

(i) Any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act (15 U.S.C. 77q(a)(1)), section 10(b) of the Exchange Act (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Exchange Act (15 U.S.C. 78*o*(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)) or any other rule or regulation thereunder; or

(ii) Section 5 of the Securities Act (15 U.S.C. 77e);

(6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A (17 CFR 230.251 through 230.263) offering statement filed with the Commission that, within five years before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) or such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such filing or sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(8) Is subject to a United States Postal Service false representation order entered within five years before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) or such sale, or is, at the time of such filing or sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

Instruction to paragraph (a): With respect to any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, the issuer is required to determine whether a disqualifying event has occurred only as of the time of filing of the offering statement and not from the time of such sale.

(b) * * *

(3) If, before the filing of the information required by section 4A(b) of the Securities Act (15 U.S.C. 77d-1(b)) or such sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (a) of this section should not arise as a consequence of such order, judgment or decree; or

* * * * *

14. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], add § 227.504 to read as follows:

§ 227.504 Definition of "qualified purchaser".

For purposes of section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a "qualified purchaser" means any person to whom securities are offered or sold pursuant to an offering under §§ 227.100 through 227.504 (Regulation Crowdfunding).

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

15. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78*l*, 78m, 78n, 78n-1, 78*o*, 78u-5, 78w, 78*ll*, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 *et seq.*; 18 U.S.C. 1350; sec. 953(b), Pub. L. 111-203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012).

* * * * *

16. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 229.601 by revising paragraph (b)(2)(ii) and paragraph (b)(10)(iv), to read as follows:

§ 229.601 (Item 601) Exhibits.

* * * * *

(b) * * *

(2) * * *

(ii) The registrant may redact specific provisions or terms of exhibits required to be filed by paragraph (b)(2) of this section if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The registrant

also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this paragraph (b)(2)(ii) pursuant to § 200.83 of this chapter while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in § 230.418 or 240.12b-4 of this chapter.

* * * * *

(10) * * *

(iv) The registrant may redact specific provisions or terms of exhibits required to be filed by this paragraph (b)(10) if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material

submitted under this paragraph (b)(10)(iv) pursuant to § 200.83 of this chapter while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in § 230.418 or 240.12b-4 of this chapter.

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

17. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78*o*, 78*o*-7 note, 78t, 78w, 78*ll*(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

Section 230.502 is also issued under 15 U.S.C. 80a-8, 80a-29, 80a-30.

* * * * *

18. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.147 by revising paragraph (g), removing the Instruction to paragraph (g), and removing paragraph (h).

The revisions read as follows:

§ 230.147 Intrastate offers and sales.

* * * * *

(g) *Integration with other offerings.* To determine whether offers and sales should be integrated, refer to § 230.152.

19. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.147A by revising paragraph (g), removing the Instruction to paragraph (g), and removing paragraph (h).

The revisions read as follows:

§ 230.147A Intrastate sale exemption.

* * * * *

(g) *Integration with other offerings.* To determine whether offers and sales should be integrated, refer to § 230.152.

20. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], add § 230.148 to read as follows:

§ 230.148 Exemption from general solicitation or general advertising.

(a) 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, State or local government or instrumentality thereof, nonprofit organization, or angel investor group, incubator, or accelerator, provided that:

(1) No advertising for the seminar or meeting references a specific offering of securities by the issuer;

(2) The sponsor of the seminar or meeting does 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 (15 U.S.C. 78a *et seq.*) or an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*);

(3) The 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; and

(4) If the event allows attendees to participate virtually, rather than in person, online participation in the event is 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; or

(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.

(5) For purposes of this paragraph, 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.

(b) [Reserved]

21. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], revise § 230.152 to read as follows:

§ 230.152 Integration.

This section provides a general principle of integration and non-exclusive safe harbors from integration of registered and exempt offerings. Because of the objectives of this section and the policies underlying the Act, the provisions of this section will not have the effect of avoiding integration for any transaction or series of transactions that, although in technical compliance with the section, is part of a plan or scheme to evade the registration requirements of the Act.

(a) *General principle of integration.* If the safe harbors in paragraph (b) of this section 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 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 Act, or that an exemption from registration is available for the particular offering. In making this determination:

(1) For 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 prior to the commencement of the exempt offering prohibiting general solicitation; and

(2) For 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.

(b) *Safe harbors.* No integration analysis under paragraph (a) of this section is required, if any of the following non-exclusive safe harbors apply:

(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 § 230.152(a)(1) shall apply.

(2) Offers and sales made in compliance with § 230.701, pursuant to an employee benefit plan, or in compliance with §§ 230.901 through 230.905 (Regulation S) will not be integrated with other offerings;

(3) An offering for which a registration statement under the 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 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; or

(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.

(c) *Commencement of an offering*. For purposes of this section, an offering of securities will be deemed to be commenced at the time of the first offer of securities in the offering by the issuer or its agents. The following non-exclusive list of factors should be considered in determining when an offering is deemed to be commenced. Pursuant to the requirements for registered and exempt offerings, an issuer or its agents may commence an offering in reliance on:

(1) Section 230.241, on the date the issuer first made a generic offer soliciting interest in a contemplated securities offering for which the issuer had not yet determined the exemption under the Act under which the offering of securities would be conducted;

(2) Section 15 U.S.C. 77d(a)(2) (Section 4(a)(2)), §§ 230.501 through 230.508 (Regulation D), or § 230.147, or § 230.147A (Rules 147 or 147A), on the date the issuer first made an offer of its securities in reliance on these exemptions;

(3) Sections 230.251 through 230.263 (Regulation A), on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on § 230.255, or the public filing of a Form 1-A offering statement;

(4) Sections 227.100 through 227.503 of this chapter (Regulation Crowdfunding), on the earlier of the date the issuer first made an offer soliciting interest in a contemplated securities offering in reliance on § 227.206 of this chapter, or the public filing of a Form C offering statement; and

(5) A registration statement filed under the Act, in the case of:

(i) 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 Commission; or

(ii) 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:

(A) The first filing of a prospectus supplement with the Commission describing the delayed offering; or

(B) The issuance of a widely disseminated public disclosure, such as a press release, confirming the commencement of the delayed offering.

NOTE 1 TO PARAGRAPH (c)(5): Offers by the issuer, or persons acting on behalf of the issuer, limited exclusively to qualified institutional buyers and institutional accredited investors, including those that would qualify for the safe harbor in § 230.163B, will not be considered the commencement of a registered offering for purposes of this section.

(d) *Termination or completion of an offering.* For purposes of this section, the 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. The following non-exclusive list of factors should be considered in determining when an offering is deemed to be terminated or completed including for offerings made in reliance on:

(1) Section 4(a)(2), Regulation D, or Rules 147 or 147A, on the later of the date:

(i) The issuer entered into a binding commitment to sell all securities to be sold under the offering (subject only to conditions outside of the investor's control); or

(ii) The issuer and its agents ceased efforts to make further offers to sell the issuer's securities under such offering;

(2) Regulation A, on:

(i) The withdrawal of an offering statement under § 230.259(a);

(ii) The filing of a § 239.94 of this chapter (Form 1-Z) with respect to a Tier I offering under § 230.257(a);

(iii) The declaration by the Commission that the offering statement has been abandoned under § 230.259(b); or

(iv) The date, after the third anniversary of the date the offering statement was initially qualified, on which § 230.251(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 terms;

(3) Regulation Crowdfunding, on the deadline of the offering identified in the offering materials pursuant to § 227.201(g) of this chapter, or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under § 227.304(b) of this chapter; and

(4) A registration statement filed under the Act:

(i) On the withdrawal of the registration statement after an application is granted or deemed granted under § 230.477;

(ii) On the filing of a prospectus supplement or amendment to the registration statement indicating that the offering, or particular delayed offering in the case of a shelf registration statement, has been terminated or completed;

(iii) On the entry of an order of the Commission declaring that the registration statement has been abandoned under § 230.479;

(iv) On the date, after the third anniversary of the initial effective date of the registration statement, on which § 230.415(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, or particular delayed offering in the case of a shelf registration statement, which could be evidenced by:

(A) The filing of a Current Report on Form 8-K; or

(B) The issuance of a widely disseminated public disclosure by the issuer, or its agents, informing the market that the offering, or particular delayed offering, in the case of a shelf registration statement, has been terminated or completed.

NOTE 2 TO PARAGRAPH (d)(4): A particular delayed offering may be deemed terminated or completed, even though the issuer's shelf registration statement may still have an aggregate amount of securities available to offer and sell in a later delayed offering.

§ 230.155 [Removed and reserved]

22. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], remove and reserve § 230.155.

23. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], add § 230.241 before the undesignated center heading "Regulation A—Conditional Small Issues Exemption" to read as follows:

§ 230.241 Solicitations of interest.

(a) *Solicitation of interest*. At any time before making a determination as to the exemption from registration under the Act under which an offering of securities will be conducted, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated offering of securities exempt from registration under the Act. Such communications are deemed to be an offer of a security for sale for purposes of the antifraud provisions of the Federal securities laws. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until the issuer makes a determination as to the exemption to be relied on and the offering, meeting the requirements of the exemption, is commenced.

(b) *Conditions*. The communications must state that:

(1) The issuer is considering an offering of securities exempt from registration under the 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;

(2) No money or other consideration is being solicited, and if sent in response, will not be accepted;

(3) 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

(4) A person's indication of interest involves no obligation or commitment of any kind.

(c) *Indications of interest*. Any written communication under this section may include a means by which a person may indicate to the issuer that such person is interested in a potential offering. The issuer may require the name, address, telephone number, and/or email address in any response form included pursuant to this paragraph (c).

24. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.251 by revising paragraphs (a)(2), (b)(7), and (c), and removing the Instruction to paragraph (c) to read as follows:

§ 230.251 Scope of exemption.

* * * * *

(a) * * *

(2) *Tier 2*. Offerings pursuant to §§ 230.251 through 230.263 (Regulation A) in which the sum of the aggregate offering price and aggregate sales does not exceed $75,000,000, including not more than $22,500,000 offered by all selling securityholders that are affiliates of the issuer ("Tier 2 offerings").

* * * * *

(b) * * *

(7) Has filed with the Commission all reports required to be filed, if any, pursuant to § 230.257 or pursuant to section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78*o*) during the two years before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports); and

* * * * *

(c) *Integration with other offerings.* To determine whether offers and sales should be integrated, see § 230.152.

* * * * *

§ 230.255 [Amended]

25. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.255 by removing paragraph (e).

26. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.259 by revising paragraph (b) to read as follows:

§ 230.259 Withdrawal or abandonment of offering statements.

* * * * *

(b) *Abandonment*. When an offering statement, or a post-qualification amendment to such statement, has been on file with the Commission for nine months without amendment and has not become qualified, the Commission may, in its discretion, declare the offering statement or post-qualification amendment abandoned. If the offering statement has been amended, or if the post-qualification amendment has been amended, the nine-month period shall be computed from the date of the latest amendment.

27. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.262 by revising paragraph (a), adding an Instruction to paragraph (a), and revising paragraph (b)(3) to read as follows:

§ 230.262 Disqualification provisions.

(a) *Disqualification events*. No exemption under §§ 230.251 through 230.263 (Regulation A) shall be available for a sale of securities if the issuer; any predecessor of

the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of filing, any offer after qualification, or such sale; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such solicitor; or any director, executive officer or other officer participating in the offering of any such solicitor or general partner or managing member of such solicitor:

(1) Has been convicted, within 10 years before the filing of the offering statement or such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the filing of the offering statement or such sale that, at the time of such filing or such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(3) Is subject to a final order (as defined in § 230.261) of
a State securities commission (or an agency or officer of a State performing like functions); a State authority that supervises or examines banks, savings associations, or credit unions;

a State insurance commission (or an agency or officer of a State performing like functions); an appropriate Federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(i) At the time of the filing of the offering statement or such sale, bars the person from:

(A) Association with an entity regulated by such commission, authority, agency, or officer;

(B) Engaging in the business of securities, insurance or banking; or

(C) Engaging in savings association or credit union activities; or

(ii) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such filing of the offering statement or such sale;

(4) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(b) or 78*o*-4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f)) that, at the time of the filing of the offering statement or such sale:

(i) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(ii) Places limitations on the activities, functions or operations of such person; or

(iii) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(5) Is subject to any order of the Commission entered within five years before the filing of the offering statement or such sale that, at the time of such filing or sale, orders the person to cease and desist from committing or causing a violation or future violation of:

(i) Any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(c)(1)) and section 206(1) of

the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or

(ii) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or offering statement filed with the Commission that, within five years before the filing of the offering statement or such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such filing or such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(8) Is subject to a United States Postal Service false representation order entered within five years before the filing of the offering statement or such sale, or is, at the time of such filing or such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

Instruction to paragraph (a): With respect to any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, the issuer is required to determine whether a disqualifying event has occurred only as of the time of filing of the offering statement and not from the time of such sale.

(b) * * *

(3) If, before the filing of the offering statement or the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or

its staff) that disqualification under paragraph (a) of this section should not arise as a consequence of such order, judgment or decree; or

* * * * *

28. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.500 by revising paragraph (g) to read as follows:

§ 230.500 Use of Regulation D.

* * * * *

(g) Securities offered and sold outside the United States in accordance with §§ 230.901 through 230.905 (Regulation S) need not be registered under the Act. See Release No. 33-6863. Regulation S may be relied on for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. See § 230.152(b)(2). Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this paragraph (g), however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States. See §§ 230.502(a) and 230.152.

29. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.502 by:

a. Revising paragraph (a);

b. Removing the Note following paragraph (a);

c. Revising paragraph (b)(2)(i)(B); and

d. Adding paragraph (b)(2)(viii).

The revisions and addition read as follows:

§ 230.502 General conditions to be met.

* * * * *

(a) *Integration.* To determine whether offers and sales should be integrated, see § 230.152.

(b) * * *

(2) * * *

(i) * * *

(B) *Financial statement information*—(*1*) *Offerings up to $20,000,000.* The financial statement information required by paragraph (b) of Part F/S of Form 1-A. Such financial statement information must be prepared in accordance with generally accepted accounting principles in the United States (US GAAP). If the issuer is a foreign private issuer, such financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). If the financial statements comply with IFRS, such compliance must be explicitly and unreservedly stated in the notes to the financial statements and if the financial statements are audited, the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.

(*2*) *Offerings over $20,000,000.* The financial statement information required by paragraph (c) of Part F/S of Form 1-A (referenced in § 239.90 of this chapter). If the issuer is a foreign private issuer, such financial statements must be prepared in accordance with either US GAAP or IFRS as issued by the IASB. If the financial statements comply with IFRS, such compliance must be explicitly and unreservedly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB.

* * * * *

(viii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.506(b), the issuer shall provide the purchaser with any written communication or broadcast script used under the authorization of § 230.241 within 30 days prior to such sale.

* * * * *

30. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.504 by:

a. Revising the section heading;

b. Revising paragraph (b)(2); and

c. Revising Instruction to paragraph (b)(2).

The revisions read as follows:

§ 230.504 Exemption for limited offerings and sales of securities not exceeding $10,000,000.

* * * * *

(b) * * *

(2) *Offering limit.* The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $10,000,000, less the aggregate offering price for all securities sold within the 12 months before the start of and during the offering of securities under this § 230.504 or in violation of section 5(a) of the Securities Act.

Instruction to paragraph (b)(2): If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $10,000,000 of its securities on June 1, 2021, under this § 230.504 and an additional $500,000 of its securities on December 1, 2021, this § 230.504 would not be available for the later sale, but would still be applicable to the June 1, 2021, sale.

* * * * *

31. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 230.506 by:

a. Revising paragraph (b)(2)(i) and republishing the note to paragraph (b)(2)(i);

b. Amending paragraph (c)(2)(ii)(B)(*2*) by removing the word "or" from the end of the paragraph;

c. Revising paragraph (c)(2)(ii)(C)(*4*) by removing the period from the end of paragraph and adding in its place a semicolon;

d. Revising paragraph (c)(2)(ii)(D) by removing the period from the end of the paragraph and adding "; or" in its place;

e. Adding paragraph (c)(2)(ii)(E) before the *Instructions to paragraph (c)(2)(ii)(A) through (D) of this section*; and

f. Removing the text "(A) through (D) of this section" from the heading to *Instructions to paragraph (c)(2)(ii)(A) through (D) of this section*, and republishing it.

The revisions and addition read as follows:

§ 230.506 Exemption for limited offers and sales without regard to dollar amount of offering.

* * * * *

(b) * * *

(2) * * *

(i) *Limitation on number of purchasers*. There are no more than, or the issuer reasonably believes that there are no more than, 35 purchasers of securities from the issuer in offerings under this section in any 90-calendar-day period.

NOTE 1 TO PARAGRAPH (b)(2)(i): See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under paragraph (b) of this section.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(E) In regard to any person that the issuer previously took reasonable steps to verify as an accredited investor in accordance with this paragraph (c)(2)(ii), so long as the issuer is not aware of information to the contrary, obtaining a written representation from such person at the

time of sale that he or she qualifies as an accredited investor. A written representation under this method of verification will satisfy the issuer's obligation to verify the person's accredited investor status for a period of five years from the date the person was previously verified as an accredited investor.

Instructions to paragraph (c)(2)(ii): * * *

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

32. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78*l*, 78m,78n, 78*o*(d), 78*o*-7 note, 78u-5, 78w(a), 78*ll*, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37; and sec. 107, Pub. L. 112-106, 126 Stat. 312, unless otherwise noted.

* * * * *

33. Amend Form S-6 (referenced in § 239.16) by revising Additional Instruction 3 of "Instructions as to Exhibits" to read as follows:

Note: The text of Form S-6 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S-6

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

Additional Instructions:

* * * * *

3. The registrant may redact specific provisions or terms of exhibits required to be filed by paragraph (9) of section IX of Form N-8B-2 (Exhibits) if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit

have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

34. Amend Form N-14 (referenced in § 239.23) by revising Instruction 3 to Item 16 to read as follows:

Note: The text of Form N-14 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N-14

* * * * *

Item 16. Exhibits

* * * * *

Instructions:

* * * * *

3. The registrant may redact specific provisions or terms of exhibits required to be filed by paragraph (13) of this Item if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

35. Amend Form 1-A (referenced in § 239.90) by:

a. Revising General Instruction I;

b. Revising General Instruction III(a);

c. Revising paragraph 13 of Part III, Item 17;

d. Removing and reserving paragraph 16 of Part III, Item 17;

e. Adding paragraph 99 of Part III, Item 17; and

f. Adding an instruction at the end of Part III, Item 17.

The revisions and additions read as follows:

Note: The text of Form 1-A does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 1-A

REGULATION A OFFERING STATEMENT

UNDER THE SECURITIES ACT OF 1933

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form 1-A.

This Form is to be used for securities offerings made pursuant to Regulation A (17 CFR 230.251 *et seq.*). Careful attention should be directed to the terms, conditions and requirements of Regulation A, especially Rule 251, because the exemption is not available to all issuers or for every type of securities transaction. Further, the aggregate offering price and aggregate sales of securities in any 12-month period is strictly limited to $20 million for Tier 1 offerings and $75 million for Tier 2 offerings, including no more than $6 million offered by all selling securityholders that are affiliates of the issuer for Tier 1 offerings and $22.5 million by all selling securityholders that are affiliates of the issuer for Tier 2 offerings. Please refer to Rule 251 of Regulation A for more details.

* * * * *

III. Incorporation by Reference and Cross-Referencing.

* * * * *

(a) The use of incorporation by reference and cross-referencing in Part II of this Form:

(1) Is limited to the following items:

(A) Items 2-14 of Part II and Part F/S if following the Offering Circular format;

(B) Items 3-11 of Form S-1 if following the Part I of Form S-1 format; or

(C) Items 3-28, and 30 of Form S-11 if following the Part I of Form S-11 format;

(2) May only incorporate by reference previously submitted or filed financial statements if the issuer meets the following requirements:

(A) the issuer has filed with the Commission all reports and other materials required to be filed, if any, pursuant to Rule 257 (§ 230.257) or by Sections 13(a), 14 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and other materials);

(B) the issuer makes the financial statement information that is incorporated by reference pursuant to this item readily available and accessible on a website maintained by or for the issuer; and

(C) the issuer must state that it will provide to each holder of securities, including any beneficial owner, a copy of the financial statement information that have been incorporated by reference in the offering statement upon written or oral request, at no cost to the requester, and provide the issuer's website address, including the uniform resource locator (URL) where the incorporated financial statements may be accessed.

* * * * *

Part III – Exhibits

* * * * *

Item 17. Description of Exhibits

* * * * *

13. *"Testing-the-waters" materials*—Any written communication or broadcast script used under the authorization of Rule 241 within 30 days of the initial filing of the offering statement, and any written communication or broadcast script used under the authorization of Rule 255. Materials used under the authorization of Rule 255 need not be filed if they are substantively the same as materials previously filed with the offering statement.

* * * * *

16. RESERVED

* * * * *

99. *Additional exhibits*—Any additional exhibits which the issuer may wish to file, which must be so marked as to indicate clearly the subject matters to which they refer.

* * * * *

Instruction to Item 17:

The issuer may redact information from exhibits required to be filed by this Item if disclosure of such information would constitute a clearly unwarranted invasion of personal privacy (e.g., disclosure of bank account numbers, social security numbers, home addresses, and similar information). In addition, the issuer may redact specific provisions or terms of exhibits required to be filed by paragraph 6 or 7 of this Item, if the issuer customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the issuer should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The issuer also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the issuer must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the issuer's supplemental materials, the Commission or its staff may require the issuer to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the issuer's analyses. The issuer may request confidential treatment of the supplemental material submitted under paragraphs 6 or 7 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in Rule 418 (§ 230.418 of this chapter).

* * * * *

36. Amend Form C (referenced in § 239.900) by:

a. Adding items to the Cover Page after "Website of the Issuer,"

b. Revising General Instruction I;

c. Revising Instruction 1 to the Signature;

d. Revising the introductory paragraphs in the Optional Question and Answer Format for an Offering Statement; and

e. Revising Question 11 in the Optional Question and Answer Format for an Offering Statement.

The addition and revisions read as follows:

Note: The text of Form C does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM C

UNDER THE SECURITIES ACT OF 1933

* * * * *

Is there a co-issuer? ___ yes ___ no. If yes,

Name of co-issuer: _____

Legal status of co-issuer:

Form: _____

Jurisdiction of Incorporation/Organization: _____

Date of organization: _____

Physical address of co-issuer: _____

Website of co-issuer: _____

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form C

This Form shall be used for the offering statement, and any related amendments and progress reports, required to be filed by any issuer offering or selling securities in reliance on the exemption in Securities Act Section 4(a)(6) and in accordance with Section 4A and

Regulation Crowdfunding (§ 227.100 *et seq*.). The term "issuer" includes any co-issuer jointly offering or selling securities with an issuer in reliance on the exemption in Securities Act Section 4(a)(6) and in accordance with Securities Act Section 4A and Regulation Crowdfunding (§ 227.100 *et seq*.) This Form also shall be used for an annual report required pursuant to Rule 202 of Regulation Crowdfunding (§ 227.202) and for the termination of reporting required pursuant to Rule 203(b)(2) of Regulation Crowdfunding (§ 227.203(b)(2)). Careful attention should be directed to the terms, conditions and requirements of the exemption.

* * * * *

SIGNATURES

* * * * *

Instructions.

1. The form shall be signed by the issuer, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer and at least a majority of the board of directors or persons performing similar functions. If there is a co-issuer, the form shall also be signed by the co-issuer, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer and at least a majority of the board of directors or persons performing similar functions.

* * * * *

OPTIONAL QUESTION AND ANSWER FORMAT

FOR AN OFFERING STATEMENT

Respond to each question in each paragraph of this part. Set forth each question and any notes, but not any instructions thereto, in their entirety. If disclosure in response to any question is responsive to one or more other questions, it is not necessary to repeat the disclosure. If a question or series of questions is inapplicable or the response is available elsewhere in the Form, either State that it is inapplicable, include a cross-reference to the responsive disclosure, or omit the question or series of questions. The term "issuer" in these questions and answers includes any "co-issuer" jointly offering or selling securities with the issuer in reliance on the

exemption in Securities Act Section 4(a)(6) and in accordance with Securities Act Section 4A and Regulation Crowdfunding (§ 227.100 *et seq.*). Any information provided with respect to the issuer should also be separately provided with respect to any co-issuer.

If you are seeking to rely on the Commission's temporary rules to initiate an offering between May 4, 2020, and February 28, 2021, intended to be conducted on an expedited basis due to circumstances relating to coronavirus disease 2019 (COVID-19), you will likely need to provide additional or different information than described in questions 2, 12, and 29. If you are seeking to rely on the Commission's temporary Rule 201(bb) for an offering initiated between March 1, 2021, and August 28, 2022, you will likely need to provide additional or different information than described in questions 2 and 29. When preparing responses to such questions, please carefully review temporary Rules 100(b)(7), 201(aa), 201(bb), and 304(e) and tailor your responses to those requirements as applicable.

Be very careful and precise in answering all questions. Give full and complete answers so that they are not misleading under the circumstances involved. Do not discuss any future performance or other anticipated event unless you have a reasonable basis to believe that it will actually occur within the foreseeable future. If any answer requiring significant information is materially inaccurate, incomplete or misleading, the Company, its management and principal shareholders may be liable to investors based on that information.

* * * * *

11. (a) Did the issuer make use of any written communication or broadcast script for testing the waters either (i) under the authorization of Rule 241 within 30 days of the initial filing of the offering statement, or (ii) under the authorization of Rule 206? If so, provide copies of the materials used.

(b) How will the issuer complete the transaction and deliver securities to the investors?

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

37. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, secs. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

38. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 240.12g-6 by

a. Revising the section heading; and

b. Revising paragraph (a) introductory text.

The revisions read as follows:

§ 240.12g-6 Exemption for securities issued pursuant to section 4(a)(6) of the Securities Act of 1933 or Regulation Crowdfunding.

(a) For purposes of determining whether an issuer is required to register a security with the Commission pursuant to section 12(g)(1) of the Act (15 U.S.C. 78l(g)(1)), the definition of held of record shall not include securities issued pursuant to the offering exemption under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) or §§ 227.100 through 227.504 (Regulation Crowdfunding) by an issuer that:

* * * * *

39. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], amend § 240.12g5-1 by

a. Revising paragraph (a)(2); and

b. Adding paragraph (a)(9).

The revision and addition read as follows:

§ 240.12g5-1 Definition of securities "held of record".

(a) * * *

(2) Except as specified in paragraph (a)(9) of this section, securities identified as held of record by a corporation, a partnership, a trust whether or not the trustees are named, or other organization shall be included as so held by one person.

* * * * *

(9) For purposes of determining whether a crowdfunding issuer, as defined in § 270.3a-9(b)(1) of this chapter, or a crowdfunding vehicle, as defined in § 270.3a-9(b)(2) of this chapter, is required to register a class of equity securities with the Commission pursuant to section 12(g)(1) of the Act, both the crowdfunding issuer and the crowdfunding vehicle:

(i) May exclude securities issued by a crowdfunding vehicle, as defined in § 270.3a-9(b)(2) of this chapter, in an offering under §§ 227.100 through 227.504 (Regulation Crowdfunding) in which the crowdfunding vehicle and the crowdfunding issuer are deemed to be co-issuers under the Securities Act (15 U.S.C. 77a *et seq.*) and that are held by natural persons; and

(ii) Shall include securities issued by a crowdfunding vehicle, as defined in § 270.3a-9(b)(2) of this chapter, in an offering under Regulation Crowdfunding in which the crowdfunding vehicle and the crowdfunding issuer are deemed to be co-issuers under the Securities Act and that are held by investors that are not natural persons.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

40. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq*. and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112-106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112-106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114-94, 129 Stat. 1312 (2015), unless otherwise noted.

Section 240.220f is also issued under secs. 3(a), 202, 208, 302, 306(a), 401(a), 401(b), 406 and 407, Pub. L. 107-204, 116 Stat. 745.

* * * * *

Section 249.308 is also issued under 15 U.S.C. 80a-29 and 80a-37.

* * * * *

41. Amend Form 20-F (referenced in § 249.220f) by revising the second, third, and fourth paragraphs following instruction 4.(a)(ii) under "Instructions as to Exhibits," and prior to the note, to read as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20-F

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

4. (a) * * *

(ii) completes a transaction that had the effect of causing it to cease being a public shell company.

The only contracts that must be filed are those to which the registrant or a subsidiary of the registrant is a party or has succeeded to a party by assumption or assignment or in which the registrant or such subsidiary has a beneficial interest.

The registrant may redact specific provisions or terms of exhibits required to be filed by this Form 20-F if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon

evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this instruction pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in Rules 418 or 12b-4 (§ 230.418 or § 240.12b-4).

* * * * *

42. Amend Form 8-K (referenced in § 249.308) by revising Instruction 6 under Item 1.01 to read as follows:

Note: The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 8-K

* * * * *

INFORMATION TO BE INCLUDED IN THE REPORT

Section 1 – Registrant's Business and Operations

Item 1.01 Entry into a Material Definitive Agreement

* * * * *

Instructions.

* * * * *

6. To the extent a material definitive agreement is filed as an exhibit under this Item 1.01, the registrant may redact specific provisions or terms of the exhibit if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material, provided that the registrant intends to incorporate by reference this filing into its future periodic reports or registration statements, as applicable, in satisfaction of Item 601(b)(10) of Regulation S-K. If it does so, the registrant should mark the exhibit index to

indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and is the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this instruction pursuant to Rule 83 (§ 200.83) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it if the registrant complies with the procedures outlined in Rules 418 or 12b-4 (§ 230.418 or § 240.12b-4).

* * * * *

Part 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

43. The authority citation for part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-34(d), 80a-37, 80a-39, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2020), unless otherwise noted.

* * * * *

44. Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], add § 270.3a-9 to read as follows:

§ 270.3a-9 Crowdfunding vehicle.

(a) Notwithstanding section 3(a) of the Act, a crowdfunding vehicle will be deemed not to be an investment company if the vehicle:

(1) 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 in compliance with §§ 227.100 through 227.504 (Regulation Crowdfunding);

(2) 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;

(3) Issues only one class of securities in one or more offerings under Regulation Crowdfunding in which the crowdfunding vehicle and the crowdfunding issuer are deemed to be co-issuers under the Securities Act (15 U.S.C. 77a *et seq*.);

(4) 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 vehicle is paid solely by the crowdfunding issuer;

(5) Maintains the same fiscal year-end as the crowdfunding issuer;

(6) 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;

(7) Seeks instructions from the holders of its securities with regard to:

(i) The voting of the crowdfunding issuer securities it holds and votes the crowdfunding issuer securities only in accordance with such instructions; and

(ii) Participating in tender or exchange offers or similar transactions conducted by the crowdfunding issuer and participates in such transactions only in accordance with such instructions;

(8) Receives, from the crowdfunding issuer, all disclosures and other information required under Regulation Crowdfunding and the crowdfunding vehicle promptly provides such disclosures and other information to the investors and potential investors in the crowdfunding vehicle's securities and to the relevant intermediary; and

(9) 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.

(b) For purposes of this section:

(1) *Crowdfunding issuer* means a company that seeks to raise capital as a co-issuer with a crowdfunding vehicle in an offering that complies with all of the requirements under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) and Regulation Crowdfunding.

(2) *Crowdfunding vehicle* means an issuer formed by or on behalf of a crowdfunding issuer for the purpose of conducting an offering under section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)) as a co-issuer with the crowdfunding issuer, which offering is controlled by the crowdfunding issuer.

(3) *Regulation Crowdfunding* means the regulations set forth in §§ 227.100 through 227.504 of this chapter.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1934

45. The authority citation for part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78*o*(d), 80a-8, 80a-24, 80a-26, 80a-29, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

46. Amend Form N-5 (referenced in §§ 239.24 and 274.5) by revising Instruction 3 in "Instructions as to Exhibits" to read as follows:

Note: The text of Form N-5 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N-5

REGISTRATION STATEMENT OF SMALL BUSINESS INVESTMENT COMPANY UNDER THE SECURITIES ACT OF 1933 AND THE INVESTMENT COMPANY ACT OF 1940*

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

Instructions:

* * * * *

3. The registrant may redact specific provisions or terms of exhibits required to be filed by paragraph 9 of this Item if the registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the registrant complies with the procedures outlined in Rule 418 under the Securities Act of 1933 [17 CFR 230.418].

* * * * *

47. Amend Form N-1A (referenced in §§ 239.15A and 274.11A) by:

a. Amending the last sentence of Instruction 2 to Item 28 by removing "registrant" and adding in its place "Registrant";

b. Amending Instruction 3 to Item 28 by removing "registrant" and adding in its place "Registrant"; and

c. Revising Instruction 4 to Item 28.

The revision reads as follows:

Note: The text of Form N-1A does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N-1A

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Item 28. Exhibits

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Instructions

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4. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraph (h) of this Item if the Registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit

any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 4 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

48. Amend Form N-2 (referenced in §§ 239.14 and 274.11a-1) by:

a. Amending the last sentence of Instruction 4 to Item 25.2 by removing "registrant" and adding in its place "Registrant";

b. Amending Instruction 5 to Item 25.2 by removing "registrant" and adding in its place "Registrant"; and

c. Revising Instruction 6 to Item 25.2.

The revision reads as follows:

Note: The text of Form N-2 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N-2

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Item 25. Financial Statements and Exhibits

* * * * *

2. Exhibits:

* * * * *

Instructions

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6. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraph k. of this Item if the Registrant customarily and actually treats that information as

private or confidential and if the omitted information is not material. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the Registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 6 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

49. Amend Form N-3 (referenced in §§ 239.17a and 274.11b) by revising Instruction 5 to Item 29(b) to read as follows:

Note: The text of Form N-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N-3

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Item 29. Financial Statements and Exhibits

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(b) Exhibits:

* * * * *

Instructions

* * * * *

5. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraphs (9) and (11) of this Item if the Registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the Registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 5 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

50. Amend Form N-4 (referenced in §§ 239.17b and 274.11c) by revising Instruction 5 to Item 24(b) to read as follows:

Note: The text of Form N-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N-4

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Item 24. Financial Statements and Exhibits

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(b) Exhibits:

* * * * *

Instructions

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5. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraphs (7) and (8) of this Item if the Registrant customarily and actually treats that information as private or confidential and if the omitted information is not material. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the Registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 5 pursuant to Rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

51. Amend Form N-6 (referenced in §§ 239.17c and 274.11d) by revising Instruction 3 to Item 26 to read as follows:

Note: The text of Form N-6 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N-6

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Item 26. Exhibits

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Instructions:

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3. The Registrant may redact specific provisions or terms of exhibits required to be filed by paragraphs (g) and (j) of this Item if the Registrant customarily and actually treats that information as private. If it does so, the Registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the Registrant treats as private or confidential. The Registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the Registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the Registrant's supplemental materials, the Commission or its staff may require the Registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the Registrant's analyses. The Registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to rule 83 of the Commission's Organizational Rules [17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the

Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

52. Amend Form N-8B-2 (referenced in § 274.12) by revising Instruction 3 to "IX Exhibits" to read as follows:

Note: The text of Form N-8B-2 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N-8B-2

REGISTRATION STATEMENT OF UNIT INVESTMENT TRUSTS

WHICH ARE CURRENTLY ISSUING SECURITIES

* * * * *

IX

EXHIBITS

* * * * *

Instructions:

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3. The registrant may redact specific provisions or terms of exhibits required to be filed by A(9) if the registrant customarily and actually treats that information as private. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both not material and the type that the registrant treats as private or confidential. The registrant also must include brackets indicating where the information is omitted from the filed version of the exhibit. If requested by the Commission or its staff, the registrant must promptly provide on a supplemental basis an unredacted copy of the exhibit and its materiality and privacy or confidentiality analyses. Upon evaluation of the registrant's supplemental materials, the Commission or its staff may require the registrant to amend its filing to include in the exhibit

any previously redacted information that is not adequately supported by the registrant's analyses. The registrant may request confidential treatment of the supplemental material submitted under this Instruction 3 pursuant to rule 83 of the Commission's Organizational Rules

[17 CFR 200.83] while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the registrant complies with the procedures outlined in rule 418 under the Securities Act [17 CFR 230.418].

* * * * *

By the Commission.

Dated: November 2, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020-24749 Filed: 1/13/2021 8:45 am; Publication Date: 1/14/2021]