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SECURITIES AND EXCHANGE COMMISSION

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

[Release Nos. 33-10763; 34-88321; 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: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing amendments to facilitate capital formation and increase opportunities for investors by expanding access to capital for entrepreneurs across the United States. Specifically, the proposed amendments would simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation while preserving or enhancing important investor protections. Over the years, and particularly since Congress passed the Jumpstart Our Business Startups Act of 2012, the Commission has introduced, expanded, or otherwise revised a number of exemptions from registration. The proposed amendments seek to address gaps and complexities in the exempt offering framework that may impede access to investment opportunities for investors and access to capital for issuers.

DATES: Comments should be received on or before June 1, 2020.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's internet comment form (https://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-05-20 on the subject line.

Paper comments:

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-05-20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's website (http://www.sec.gov/rules/proposed.shtml). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 am and 3 pm. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

We or the staff may add studies, memoranda, or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

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; Lawrence Pace or Benjamin Kalish, Senior Counsel, at (202) 551-6792, Division of Investment Management; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing to amend or add the following rules and forms:

Commission Reference		**CFR Citation (17 CFR)**
Regulation Crowdfunding	Rule 100 through 503	§§ 227.100 through 227.503
	Rule 100	§ 227.100
	Rule 201	§ 227.201
	Rule 204	§ 227.204
	Rule 206	§ 227.206
	Rule 503	§ 227.503
Securities Act of 1933 (Securities Act)[1]	Rule 147	§ 230.147
	Rule 147A	§ 230.147A
	Rule 148	§ 230.148
	Rule 152	§ 230.152
	Rule 155	§ 230.155
	Rule 241	§ 230.241
Regulation A	Rule 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	Rule 501 through 508	§§ 230.501 through 230.508
	Rule 502	§ 230.502
	Rule 504	§ 230.504
	Rule 506	§ 230.506
Regulation S	Rule 901 through 905	§§ 230.901 through 230.905
	Rule 902	§ 230.902
	Rule 906	§ 230.906

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

Regulation S-K	Item 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]	Form 20-F	§ 249.200f
	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

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

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

I. INTRODUCTION

A. Background

The Securities Act requires that every offer[4] and sale of securities be registered with the Securities and Exchange Commission (the "Commission"), unless an exemption from registration is available. In various circumstances, registration is not necessary, nor is it the most effective means, to achieve the objectives of the Securities Act or the Commission's mission more broadly. In recognition of the fact that registration is not always necessary or appropriate, the Securities Act contains a number of exemptions from its registration requirement and the Commission is authorized to adopt additional exemptions. As an example, emerging companies—from early-stage start-ups seeking seed capital to companies that are on a path to become a public reporting company—may use the exempt offering rules to access critical capital needed to grow and scale. Our dynamic markets benefit from a robust pipeline of new companies—supported by the exempt offering framework—that can one day join the public markets. The exempt offering framework also supports the capital needs of many small

[4] *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).

and medium-sized companies that contribute substantially to our economy but that are unlikely to become public companies due to their size, the nature of their capital needs, or other factors.

The scope of exempt offerings has evolved over time through Commission rules and legislative changes. Significantly, the Jumpstart Our Business Startups Act of 2012 ("JOBS Act") greatly expanded the options to raise capital in exempt offerings.[5] Since then, the Fixing America's Surface Transportation Act of 2015 (the "FAST Act")[6] and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (the "Economic Growth Act")[7] resulted in further expansions of, and revisions to, many of our exemptions.[8] The current exempt offering framework is complex and made up of differing requirements and conditions, which may be confusing and difficult for issuers, who bear the burden of demonstrating the availability of any exemption,[9] to navigate. Smaller companies, which may be more likely to rely on these exemptions given the initial and ongoing costs associated with conducting a

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5 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).

6 Pub. L. No. 114-94, 129 Stat. 1312 (2015).

7 Pub. L. No. 115-174, 132 Stat. 1296 (2018).

8 The FAST Act added Section 4(a)(7) to the Securities Act [15 U.S.C. 77d(a)(7)], providing a new exemption for private resales of securities. *See* Section 76001. Among other changes, the Economic Growth Act required the Commission to amend Regulation A to permit entities subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act to use the exemption. *See* Section 508.

9 *See SEC v. Ralston Purina Co.,* 346 U.S. 119, 126 (1953) ("Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable.").

registered offering and becoming a reporting company, may find the framework particularly difficult to navigate given their more limited resources.[10]

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.[11] In the Concept Release, the Commission noted that the regulatory framework for exempt offerings has evolved, and the significance of the exempt securities markets has increased both in terms of the absolute amounts raised and relative to the public registered markets. 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.[12] Of the approximately $2.7 trillion estimated as raised in exempt offerings in 2019, Table 1 shows the amounts that we estimate were raised under each of the identified exemptions.[13]

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[10] *See, e.g.,* comments of Sara Hanks, CEO, CrowdCheck, at the 38th Annual SEC Government-Business Forum on Small Business Capital Formation (Aug. 14, 2019), *available at* https://www.sec.gov/files/2019-sec-government-business-forum-small-business-capital-formation-transcript.pdf, transcript at 132-135.

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

[12] 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 ("DERA") of data collected from SEC filings. *See* Concept Release, at Section II.

[13] "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

Table 1: 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 Commission requested comment on several possible approaches to amend the framework as a whole and to improve specific provisions of the existing exemptions.[14] While commenters voiced many perspectives on what changes would best serve the interests of emerging companies raising capital, as well as small and medium sized companies more generally, and the investors in those companies, a consistent theme in their comments was that many elements of the current structure work effectively and a major restructuring is not needed.[15] Many commenters suggested improvements to the less frequently used capital raising

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.

14 Unless otherwise indicated, comments cited in this release are to comment letters received in response to the Concept Release, which are available at https://www.sec.gov/comments/s7-08-19/s70819.htm.

15 *See, e.g.*, letter from AngelList Advisors, LLC dated September 25, 2019 ("AngelList Letter") (generally supporting the exempt offering framework); letter from CrowdCheck, Inc. dated October 30, 2019 ("CrowdCheck Letter") (generally supporting Regulation A and Regulation Crowdfunding); and letter from Crowdfund Capital Advisors dated September 24, 2019 ("CCA Letter") (generally supporting Regulation Crowdfunding). *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") (stating that "[t]he elements of the current exempt offering framework that are functioning well should be maintained, and therefore, the Commission should 'do no harm' to Rule 506(b) of Regulation D"); 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"), at 4 (noting that panelists discussed the importance of maintaining the elements of the exempt framework that are functioning well for marketplace participants, such as the private placement exemption and Rule 506(b) safe harbor), and at 30 (quoting panelist Bart Dillashaw: "don't mess with 506(b) because there is this venture, angel, private investment role that seems to work pretty well, and certainly a lot of money is raised on it").

pathways to improve their efficacy.[16] Based on the comments received on the Concept Release, as well as other input from market participants,[17] we are proposing a set of amendments that would generally retain the current exempt offering structure and reduce potential friction points identified by commenters, which together are intended to facilitate capital formation while preserving and in some cases enhancing investor protections. We believe that these amendments would address gaps and complexities in the exempt offering framework and help provide viable alternatives to the dominant capital raising tools, such as offerings to accredited investors under Rule 506(b) of Regulation D, benefiting issuers and investors by creating an offering framework that is more consistent, transparent, and manageable, and that reflects the evolving capital needs of our markets.

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed rule amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

B. Overview of Current Exemptions

The Securities Act contains a number of exemptions from its registration requirements and authorizes the Commission to adopt additional exemptions. Most of these exemptions are based on characteristics of the securities themselves, though some exempted securities are identified based on the transaction in which they are offered or sold.[18] Section 4 of the

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16 *See, e.g.*, comment letters discussed in Sections II.B.3, II.D.3.c, II.F and II.G.

17 *See, e.g.*, 2019 Forum Report (recommending that the Commission improve clarity and education through, among other things, the use of "consistent terms in exempt offering rules for ease of understanding" and "bright line rules and examples to provide clarity for investors, small businesses, and lawyers"); and 2019 Small Business Advisory Committee Recommendation on the Exemptive Offering Framework (recommending that the exempt framework should be amended to make it less complex for small businesses to raise capital).

18 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 to the extent that "the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of

Securities Act identifies transactions that are exempt from the registration requirements.[19] In addition, Section 28 of the Securities Act, which was added by the National Securities Markets Improvement Act of 1996 ("NSMIA"),[20] further 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."[21]

Table 2 summarizes some of the characteristics of the most commonly used exemptions[22] from registration.[23]

Table 2: 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
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
Rule 506(b) of Regulation D	None	No	"Bad actor" disqualifications apply	Unlimited accredited investors Up to 35 sophisticated but non-accredited investors	Form D	Yes. Restricted securities	Yes

investors by reason of the small amount involved or the limited character of the public offering." 15 U.S.C. 77c(b)(1).

19 15 U.S.C. 77d.

20 Pub. L. No. 104-290, 110 Stat. 3416 (Oct. 11, 1996).

21 15 U.S.C. 77z-3.

22 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.

23 Generally, Table 2 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 are based on statutory provisions, but provide specific frameworks or safe harbors to comply with the statutory exemptions. For example, Rule 506(b) provides a safe harbor to comply with the exemption under Section 4(a)(2) [15 U.S.C. 77d(a)(2)], and Rule 147 provides a safe harbor under Section 3(a)(11) [15 U.S.C. 77c(a)(11)]. An issuer may choose not to avail itself of one of these specific regulatory exemptions and instead conduct an offering pursuant to the statutory exemption itself, such as Section 4(a)(2), following principles-based requirements that have been developed over time.

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
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, and certain issuers subject to a Section 12(j) order "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	$50 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	$5 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)	$1.07 million	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	Investment limits based on the lesser 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 $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	Yes. Resales must be within state for six months	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
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

* While the exemptions identified here as excluding blank check companies do not use the term "blank check company," they exclude development stage issuers that have no specific business plan or purpose or have indicated that their business plan is to engage in a merger or acquisition with an unidentified company or companies, which is substantially similar to the definition of blank check company in Securities Act Rule 419, used elsewhere in Commission rules. *See* 17 CFR 230.419.

As Table 2 illustrates, the current exemptions impose a variety of conditions designed to protect investors, including both initial investors and those purchasing securities in the secondary market.[24] Exemptions tend to incorporate more investor protection measures where non-accredited or less sophisticated investors are permitted to participate in the offering.

1. Regulation D

Regulation D, adopted in 1982,[25] is a series of rules that sets forth three exemptions from the registration requirements of the Securities Act.[26] One exemption, Rule 506(b) of

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[24] Resales of securities issued in unregistered offerings are required to be registered under the Securities Act when no exemption from registration is available. When resale registration occurs, purchasers in the secondary market receive the disclosure and other benefits that accompany registration. In certain cases, including offers and sales pursuant to the Rule 144 safe harbor under Securities Act Section 4(a)(1), resales do not require registration. A key premise of the Rule 144 safe harbor is that once a restricted security has come to rest for a period of time in the hands of an investor who is at investment risk, that investor is deemed not to have purchased the securities with a view to distribution and would be deemed not to be an underwriter, after meeting Rule 144's holding period and other conditions, absent a scheme to avoid registration. Since adopting Rule 144, the Commission has shortened its holding periods several times. The staff is evaluating whether the current holding periods are sufficient to protect investors in certain circumstances, such as the sale of equity securities acquired on conversion of a debt security held for the applicable holding period where the conversion price has been structured so that the investor may not have meaningful investment risk during the holding period other than issuer bankruptcy.

[25] 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").

[26] Rules 500 through 503 of Regulation D contain the notes, definitions, terms, and conditions that apply generally throughout Regulation D. The exemptions and safe harbor of Regulation D are set forth in Rule 504, Rule 506(b), and Rule 506(c). Rule 507 of Regulation D is a provision that disqualifies issuers under certain

Regulation D, is a non-exclusive safe harbor under Section 4(a)(2) of the Securities Act pursuant to which an issuer may offer and sell an unlimited amount of securities, provided that offers are made without the use of general solicitation or general advertising and sales are made only to accredited investors and up to 35 non-accredited investors who meet an investment sophistication standard.[27] A second exemption, Rule 506(c) of Regulation D, provides an exemption without any limitation on offering amount pursuant to which offers may be made through general solicitation or general advertising, so long as the purchasers in the offering are limited to accredited investors and the issuer takes reasonable steps to verify their accredited investor status.[28]

Offerings under both Rule 506(b) and Rule 506(c) must satisfy the conditions of:

- Rule 501 (definitions for the terms used in Regulation D);
- Rule 502(a) (integration);
- Rule 502(d) (limitations on resale); and
- Rule 506(d) ("bad actor" disqualification).

Offerings under Rule 506(b) must also satisfy the conditions of:

- Rule 502(b) (type of information to be furnished); and

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circumstances from relying on Regulation D for failure to file a notice of sales on Form D. Rule 508 of Regulation D provides that certain insignificant deviations from a term, condition, or requirement of Regulation D will not necessarily result in the loss of a Regulation D exemption.

[27] *See* Rule 506(b)(2)(ii) (stating that each purchaser who is not an accredited investor either alone or with a purchaser representative has such knowledge and experience in financial and business matters that such purchaser is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within that description).

[28] The Commission adopted Rule 506(c) in 2013 to implement Section 201(a) of the JOBS Act. *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-9415 (Jul. 10, 2013) [78 FR 44771 (Jul. 24, 2013)] ("Rule 506(c) Adopting Release").

- Rule 502(c) (limitations on the manner of offering).

A third exemption, Rule 504 of Regulation D, provides an exemption from registration under the Securities Act for the offer and sale of up to $5 million of securities in a 12-month period.[29] Rule 504 was adopted pursuant to the Commission's authority under Section 3(b)(1) of the Securities Act.[30] Prior to rule changes adopted by the Commission in 2016, the aggregate amount of securities that could be offered and sold in a 12-month period under Rule 504 was $1 million.[31] In general, issuers[32] relying on Rule 504 may not use general solicitation or advertising to market the securities, and purchasers in a Rule 504 offering will receive securities subject to the limitations on resale in Rule 502(d). However, Rule 502(c)'s limitation on manner of offering and Rule 502(d)'s resale limitations are inapplicable if the issuer offers and sells the securities in compliance with certain state registration requirements, public filing, and delivery requirements or, if sales are made only to accredited investors, according to state law exemptions from registration that permit general solicitation and general advertising.[33]

In 2019, issuers in the Regulation D market raised approximately $1.56 trillion (average proceeds of $25.4 million). The vast majority of capital raised in this market, approximately $1.5 trillion (average proceeds of $26.5 million), was raised under Rule 506(b). Out of the

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[29] Rule 504.

[30] 15 U.S.C. 77c(b)(1).

[31] *See* 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"). The removal of Rule 505 was effective on May 22, 2017. Rule 505 was an exemption from Securities Act registration that had been available to both non-reporting and reporting companies so long as the aggregate offering amount did not exceed $5 million in a 12-month period and certain other conditions were met.

[32] *See* Rule 504(a) (disqualifying entities that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, investment companies, or blank check companies from issuing securities under Rule 504).

[33] *See* Rule 504(b)(1).

remaining amount, offerings under Rule 506(c) raised approximately $66 billion (average proceeds of $17 million) and offerings under Rule 504 raised approximately $228 million (average proceeds of $0.6 million).

2. Regulation A

Regulation A was originally adopted by the Commission in 1936 as an exemption for small issuances under the authority of Section 3(b) of the Securities Act.[34] Section 401 of the JOBS Act[35] amended Section 3(b) of the Securities Act by designating Section 3(b), the Commission's exemptive authority for offerings of up to $5 million, as Section 3(b)(1), and adding new Sections 3(b)(2) through 3(b)(5) to the Securities Act.[36] Section 3(b)(2) directed the Commission to adopt rules adding a class of securities exempt from the registration requirements of the Securities Act for offerings of up to $50 million of securities within a 12-month period. Sections 3(b)(2) through (5) specify certain terms and conditions for such exempt offerings and authorize the Commission to adopt other terms, conditions, or requirements as necessary in the public interest and for the protection of investors. In 2015, the Commission adopted final rules to implement Section 401 of the JOBS Act by creating two tiers of Regulation A offerings: Tier 1, for offerings of up to $20 million in a 12-month period; and Tier 2, for offerings of up to $50 million in a 12-month period.[37] In 2018, the Commission adopted further amendments to the issuer eligibility and related provisions pursuant to the Economic Growth Act to allow issuers that are subject to the ongoing reporting requirements of

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34 *See* Release No. 33-632 (Jan. 21, 1936).

35 *See* Sec. 401(a), Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012).

36 *See* 15 U.S.C. 77c(b)(2) through (5).

37 *See* Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), Release No. 33-9741 (March 25, 2015) [80 FR 21806 (Apr. 20, 2015)] ("2015 Regulation A Release").

Section 13 or 15(d) of the Exchange Act to use the exemption.[38] Table 3 broadly summarizes the Commission requirements for each tier.

Table 3: Overview of Regulation A Requirements

	Tier 1	Tier 2
Issuer Requirements	U.S. or Canadian issuers; excludes blank check companies, registered investment companies, business development companies, issuers of certain securities, and certain issuers subject to a Section 12(j) order	
Offering Limit within a 12-month Period	$20 million	$50 million
Offering Communications	Testing-the-waters permitted before and after the offering statement is filed	
Investor Limits	No limits	Non-accredited investors are subject to investment limits based on annual income and net worth, unless securities will be listed on a national securities exchange
SEC Filing Requirements	Form 1-A filed with the Commission, including two years of financial statements (which may be unaudited)	Form 1-A filed with the Commission, including two years of audited financial statements
Restrictions on Resale	No	No
Disqualification Provisions	Felons and bad actors disqualified in accordance with Rule 262	
Preemption of State Registration and Qualification	No	Yes
Ongoing Reporting	**Exit report** due within 30 calendar days after termination or completion of an offering	**Annual report** on Form 1-K due within 120 calendar days of issuer's fiscal year end;

[38] *See* Amendments to Regulation A, Release No. 33-10591 (Dec. 19, 2018) [84 FR 520 (Jan. 31, 2019)] ("2018 Regulation A Release").

	Tier 1	Tier 2
		Semi-annual report on Form 1-SA due within 90 calendar days after the end of the first six months of issuer's fiscal year; **Current reports** on Form 1-U due within four business days of occurrence of one of the events specified in that form; and if applicable, an **exit report** on Form 1-Z to terminate an issuer's reporting obligations.

The Commission is required by Section 3(b)(5) of the Securities Act to review the Tier 2 offering limit every two years. In addition to revisiting the Tier 2 offering limit, the Commission stated in the 2015 Regulation A Release that the staff would undertake to review the Tier 1 offering limit at the same time.[39] The Commission also stated that the staff would study and submit a report to the Commission no later than five years following the adoption of the amendments on the impact of both Tier 1 and Tier 2 offerings on capital formation and investor protection.[40] The staff report on Regulation A, which includes additional detail on Regulation A, is discussed in Section II.E.1.

From June 2015 through December 2019, issuers in the Regulation A market reported raising approximately $2.4 billion in 382 qualified offerings. The vast majority of capital raised

39 *See* 2015 Regulation A Release, at Section II.A.

40 *See id.* The 2015 Regulation A Release stated that the report would include, but not be limited to, a review of: (1) the amount of capital raised under the amendments; (2) the number of issuances and amount raised by both Tier 1 and Tier 2 offerings; (3) the number of placement agents and brokers facilitating the Regulation A offerings; (4) 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 (5) whether any additional investor protections are necessary for either Tier 1 or Tier 2.

under Regulation A, approximately $2.2 billion (90.6 percent), was raised under Tier 2, with only $230 million (9.4 percent) raised under Tier 1.

3. Regulation Crowdfunding

Title III of the JOBS Act added Securities Act Section 4(a)(6), which provides an exemption from registration for certain crowdfunding transactions.[41] To qualify for the exemption under Section 4(a)(6), transactions must meet a number of statutory requirements 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." In addition, Title III added Section 4A to the Securities Act, which requires, among other things, that issuers and intermediaries that facilitate transactions under Section 4(a)(6) provide certain specified information to investors and the Commission. Title III also mandated that the Commission establish bad actor provisions disqualifying certain issuers from availing themselves of the Section 4(a)(6) exemption and adopt rules to exempt from the registration requirements of Section 12(g), either conditionally or unconditionally, securities acquired pursuant to an offering under Section 4(a)(6). In 2015, to implement the requirements of Title III, the Commission adopted Regulation Crowdfunding, which became effective on May 16, 2016.[42] On March 31, 2017, the Commission adjusted for inflation certain thresholds in Regulation Crowdfunding, as required by Section 4A(h).[43] From May 2016 through December 2019, issuers in the Regulation

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[41] Crowdfunding generally refers to a method of capital raising in which an entity or individual raises funds via the internet from a large number of people typically making small individual contributions.

[42] *See* Crowdfunding, Release No. 33-9974 (Oct. 30, 2015) [80 FR 71387 (Nov. 16, 2015)] ("Crowdfunding Adopting Release").

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

Crowdfunding market reported raising approximately $170 million in 795 completed offerings (an average of approximately $0.21 million raised in each offering).

4. Rule 147 and Rule 147A

Rule 147 is considered a "safe harbor" under Section 3(a)(11) of the Securities Act and provides objective standards that an issuer can rely on to meet the requirements of that exemption.[44] The Rule 147 safe harbor was intended to provide assurances that the intrastate offering exemption would be used for the purpose Congress intended in enacting Section 3(a)(11), namely the local financing of issuers by investors within the issuer's state or territory.[45] Under Rule 147, states retain the flexibility to adopt requirements that are consistent with their respective interests in facilitating capital formation and protecting their resident investors in intrastate securities offerings, including the authority to impose additional disclosure requirements for offers and sales made to persons within their state or territory, and the authority to limit the ability of certain bad actors to rely on applicable state exemptions.[46]

Rule 147A is an intrastate offering exemption adopted by the Commission in 2016 that seeks to accommodate modern business practices and communications technology and provide an alternative means for smaller issuers to raise capital locally, including through offerings relying on intrastate crowdfunding provisions.[47] Rule 147A was adopted pursuant to the Commission's general exemptive authority under Section 28 of the Securities Act and therefore is not subject to the statutory limitations of Section 3(a)(11). Accordingly, Rule 147A has no

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44 *See* Definitions and Clarification of Certain Conditions Regarding Intrastate Offering Exemption, Release No. 33-5450 (Jan. 7, 1974) [39 FR 2353 (Jan. 21, 1974)] ("Rule 147 Adopting Release"). *See also* "Part of an Issue," "Person Resident," and "Doing Business Within," Release No. 33-5349 (Jan. 8, 1973) [38 FR 2468 (Jan. 26, 1973)].

45 *See* Rule 147 Adopting Release. *See also* Intrastate and Regional Offerings Release.

46 *See* Intrastate and Regional Offerings Release, at Section I.

47 *See* Intrastate and Regional Offerings Release.

restriction on offers, but requires that all sales be made only to residents of the issuer's state or territory to ensure the intrastate nature of the exemption. Rule 147A also does not require issuers to be incorporated or organized in the same state or territory where the offering occurs so long as issuers can demonstrate the in-state nature of their business. Consistent with Rule 147, states retain the flexibility to adopt requirements that are consistent with their respective interests in facilitating capital formation and protecting their resident investors in intrastate securities offerings, including the authority to impose additional disclosure requirements for offers and sales made to persons within their state or territory, or the authority to limit the ability of certain bad actors to rely on applicable state exemptions.

Table 4 broadly summarizes the Commission requirements for each rule. We refer to "in-state" as the state or territory in which the issuer is resident and doing business at the time of the sale of the security.

Table 4: Overview of Rule 147 and Rule 147A requirements

	Requirements of Rule 147 (safe harbor under Section 3(a)(11))	**Requirements of Rule 147A**
The issuer is organized in-state. (Rule 147(c)(1)(i))	✓	
The officers, partners, or managers of the issuer primarily direct, control and coordinate the issuer's activities ("principal place of business") in-state. (Rule 147(c)(1); and Rule 147A(c)(1))	✓	✓
The issuer satisfies at least one of the "doing business" requirements. (Rule 147(c)(2); and Rule 147A(c)(2))	✓	✓

	Requirements of Rule 147 (safe harbor under Section 3(a)(11))	**Requirements of Rule 147A**
Offers are limited to in-state residents or persons whom the issuer reasonably believes are in-state residents. (Rule 147(d))	✓	
Sales are limited to in-state residents or persons whom the issuer reasonably believes are in-state residents. (Rule 147(d); and Rule 147A(d))	✓	✓
The issuer obtains a written representation from each purchaser as to residency. (Rule 147(f)(1)(iii); and Rule 147A(f)(1)(iii))	✓	✓

II. DISCUSSION OF PROPOSED AMENDMENTS

The proposed amendments are intended to address gaps and complexities in the exempt offering framework that may impede access to capital for issuers and thereby limit investment opportunities. More specifically, the amendments would:

- Address, in one broadly applicable rule, the ability of issuers to move from one exemption to another, and ultimately to a registered offering, providing more certainty to issuers raising capital;
- Provide greater certainty to issuers and protect investors by setting clear and consistent rules governing offering communications between investors and issuers;
- Address potential gaps and inconsistencies in our rules by increasing offering and investment limits based on our experience with the rules, marketplace practices, capital raising trends, and comments received; and

- Harmonize certain disclosure requirements and bad actor disqualification provisions to reduce differences between exemptions, while preserving or increasing investor protections.

A. Integration

We are proposing to modernize and simplify the Securities Act integration framework for registered and exempt offerings. This framework currently 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 through Commission rules and legislative changes, the integration framework has grown more complex. This complexity has allowed for regulatory uncertainty to develop, especially as issuers grow, and transition between utilizing types of exempt and registered offerings. The proposed amendments, discussed in Table 5 below, seek to improve the integration framework to allow an efficient path to capital formation, while preserving the investor protections in the exemptions from registration.

The Commission first articulated the integration concept in 1933 and further developed it in two interpretive releases issued in the 1960s.[48] 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 five factors to consider in determining whether the offerings should be integrated. The five factors are whether: (1) the different offerings are part of a single plan of financing, (2)

48 *See* SEC 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) the offerings are made at or about the same time, (4) the same type of consideration is to be received, and (5) the offerings are made for the same general purpose.[49] A common critique of this five factor analysis is that the Commission did not assign any specific weights to any of the five factors, nor indicate how many of the factors need to be present in order for there to be integration.[50]

In 1982, the Commission relied on the five factor test in establishing the framework used to determine whether two offerings that fall outside of the Rule 502(a) safe harbor should be integrated and treated as one offering.[51] Rule 506(b) of Regulation D is by far the most commonly used exemption from registration. As a result, application of the integration framework in Rule 502(a) tends to be the predominant means to analyze whether two offerings should be integrated if the exemption relied upon does not have its own specific integration provision. Notwithstanding the fact that Rule 502(a) only applies to Regulation D offerings, the integration framework in Rule 502(a) is often referred to when considering integration issues arising in other exempt offerings which do not have their own integration guidelines, such as Section 4(a)(2).

In 2007 guidance, the Commission set forth a framework other than the five factor test for analyzing the integration of simultaneous registered and private offerings.[52] The

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49 *See* Rule 502(a); Section 3(a)(11) Release; and Non-Public Offering Exemption Release.

50 *See* Stanley Keller, Integration of Private and Public Offerings 2019 (March 2019) at page 6 ("The five factor test has not brought certainty to the area because its application is subjective and the staff has not provided definitive guidance as to what weight to give to the various factors or indeed how many of them have to be met."). *See also* ABA Task Force Report on "Integration of Securities Offerings," 41 Bus. Law. 595 (1986) (proposing an integration safe harbor rule to provide increased certainty).

51 *See* Regulation D Adopting Release.

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

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 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 solicited by the registration statement or through some other means that would not foreclose the availability of the Section 4(a)(2) exemption.[53] 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.[54]

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. The facts and circumstances integration framework includes situations where one offering permits general solicitation and the other does not, as well as situations where both

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53 *Id*.

54 *Id.* 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.

offerings rely on exemptions permitting general solicitation.[55] 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 that is being relied on for the particular offering.

Commenters on the Concept Release generally supported clarifying and modernizing the existing integration standards.[56] One commenter suggested that the current approach to integration using the five factor test is "unnecessarily complex, and both issuers and investors would benefit from more clarity as to the scope of the integration doctrine, particularly in the context of Regulation D."[57] Some commenters supported using the approach to integration in the Commission's recent rulemakings as the basis for a more comprehensive, general integration rule.[58] One of these commenters explained that the approach to analyzing

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55 *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.

56 *See*, *e.g.*, letter from Davis Polk & Wardwell LLP dated September 24, 2019 ("Davis Polk Letter"); letter from Dechert LLP dated September 24, 2019 ("Dechert Letter");CrowdCheck Letter; letter from Securities Industry and Financial Markets Association dated September 24, 2019 ("SIFMA Letter"); and 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 from Public Investors Advocate Bar Association dated September 24, 2019 ("PIABA Letter") (positing that shortening the six month period in Rule 502(a) would "serve to promote" Ponzi schemes); and letter from North American Securities Administrators Association dated October 11, 2019 ("NASAA Letter") (positing that "loosening" integration safe harbors would "increase the likelihood of regulatory arbitrage or create gaps in the investor protection landscape").

57 *See* letter from Center for Capital Markets Competitiveness dated September 24, 2019 ("CCMC Letter") (indicating that the uncertainty surrounding the current integration doctrine creates a "barrier to companies seeking to raise capital").

58 *See*, *e.g.*, Davis Polk Letter (generally "welcom[ing] harmonizing exempt offerings with more bright-line rules," while noting that "as long as each Exempt Offering complies with its applicable rules, effective deregulation should result in each offering standing on its own"); Dechert Letter; letter from Committee on Securities Regulation of the Business Law Section of the New York State Bar Association dated October 16, 2019 ("NYSBA Letter"); CrowdCheck Letter; letter from Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association dated October 16, 2019 ("ABA Letter"); and CCMC

integration issues reflected in these recent rulemakings also "preserves the investor protections of each exemption" while providing issuers with more certainty in planning their offerings under "changing circumstances, markets and environments."[59] Other commenters, as well as the 2016, 2017, and 2018 Government-Business Forums on Small Business Capital Formation ("Small Business Forums"), also recommended that the Commission provide additional clarity about the integration of exempt offerings in which general solicitation is permitted—such as Rule 506(c) offerings.[60]

We believe that statutory and regulatory changes to the Securities Act exemptive scheme, including those arising from the JOBS Act, developments in the capital markets, and the evolution of communications technology compel a further examination of the integration framework and its application throughout the Securities Act rules. The proposed rules would build upon the approach to integration in the Commission's recent rulemakings and provide comprehensive rules applicable to all securities offerings under the Securities Act, including registered and exempt offerings.

Letter (supporting one integration doctrine along the lines of the analysis articulated in connection with Regulation A and Rules 147 and 147A.).

59 *See* Dechert Letter.

60 *See*, *e.g.*, Davis Polk Letter (noting that "the current language of Rule 152 does not provide an integration safe harbor for an issuer that conducts a Rule 506(c) offering and then subsequently engages in a registered offering"); Dechert Letter (suggesting that Rule 152 be amended to account for Rule 506(c)); and ABA Letter (supporting broadening Rule 152 so that it applies to offerings under Rule 506(b) and Rule 506(c)). *See also* Final Report of the 2016 SEC Government-Business Forum on Small Business Capital Formation (March 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 (March 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 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).

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, should reduce uncertainty and perceived risk among issuers when considering and planning possible capital raising alternatives, while preserving investor protections built into the respective offering exemptions. We also believe that providing greater certainty to issuers on how securities offerings interrelate and the flexibility to choose between types of offerings may encourage issuers to raise more capital in the securities markets, including in registered offerings.[61]

We are proposing to amend the current integration framework to better facilitate the determination as to whether separate sales of securities are part of the same offering (*i.e.*, are considered integrated).[62] Our proposed integration framework provides a general principle of integration that looks to the particular facts and circumstances of the offering, and focuses the analysis on 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. To assist in the application of the general principle, we are proposing provisions applying this general principle to specific fact patterns. To provide additional clarity, we are proposing four non-exclusive safe harbor integration provisions. The following tables provide an overview of the proposed general integration principle and safe harbors discussed in this section.

Table 5: Overview of the Proposed General Integration Principle and Safe Harbors

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[61] *See*, *e.g.*, CCMC Letter.

[62] The focus of this release is on several exemptions from registration under the Securities Act that facilitate capital raising. We are not proposing to extend these rules to business combination transactions, for which we have already adopted rules or provided guidance that will continue to apply. *See*, *e.g.*, Rule 165 [17 CFR 230.165].

Integration Principle	
General Principle of Integration	For all offerings not covered by a safe harbor, offers and sales would 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 exempt offerings where general solicitation is not permitted	The issuer must have a reasonable belief, based on the facts and circumstances, that: (1) the purchasers in each exempt offering were not solicited through the use of general solicitation; or (2) 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 not permitting general solicitation.
Application of the General Principle to concurrent exempt offerings that each allow general solicitation	If an exempt offering permitting general solicitation includes information about the material terms of a concurrent offering under another exemption also permitting general solicitation, the offering materials must include the necessary legends for, and otherwise comply with, the requirements of each exemption.

Non-Exclusive Integration Safe Harbors	
Safe Harbor 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, would not be integrated; provided that, for an exempt offering for which general solicitation is not permitted, the purchasers either were not solicited through the use of general solicitation, or established a substantive relationship with the issuer prior to the commencement of the offering for which general solicitation is not permitted.
Safe Harbor 2	Offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with Regulation S would not be integrated with other offerings.
Safe Harbor 3	An offering for which a Securities Act registration statement has been filed would not be integrated if 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 and made only to qualified institutional buyers ("QIBs")[63] and institutional accredited investors ("IAIs");[64] 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.
Safe Harbor 4	Offers and sales made in reliance on an exemption for which general solicitation is permitted would not be integrated if made subsequent to any prior terminated or completed offering.

63 *See* 17 CFR 230.144(a)(1) (defining "qualified institutional buyer").

64 *See* Rule 501(a)(1), (2), (3), (7) and (8) (listing entities that are considered "institutional accredited investors").

The proposed integration framework and safe harbor provisions would be set forth in new Rule 152, which would replace current Rules 152 and 155 concerning the integration of non-public and public offerings.[65] Consistent with current Rule 155, proposed Rule 152 would specify that the safe harbors 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. Finally, to ensure consistency in the application of the integration framework across exemptions, we are proposing to replace the integration provisions of Regulation D, Regulation A, Regulation Crowdfunding, and Rules 147 and 147A with references to proposed Rule 152.

1. Integration Principles

We are proposing to establish a general principle of integration 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. We also are proposing two provisions applying this general principle to specific fact patterns.

a. General Principle of Integration

Based on our review of the existing integration framework and after consideration of comments, we are proposing to revise Rule 152 to provide a general principle of integration based upon a facts and circumstances analysis that codifies Commission guidance on integration originally provided in 2007. The general principle of integration, as set forth in proposed paragraph (a) of Rule 152 would apply to all offers and sales of securities not covered by one of the four safe harbors set forth in proposed paragraph (b) of Rule 152, which we describe below.

[65] As a result of the proposed changes, we are proposing to remove and reserve Rule 155.

Specifically, our proposed general principle of integration provides that 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. This proposed facts and circumstances analysis of integration would replace the traditional five factor test first articulated by the Commission in 1962.

b. Application of the General Principle of Integration

We also propose to include two provisions applying the general integration principles that would supplement and provide greater specificity to the facts and circumstances analysis:

- For an exempt offering for which general solicitation is not permitted, offers and sales will not be integrated with other offerings if the issuer has a reasonable belief, based on the facts and circumstances, that (i) the purchasers in each exempt offering were not solicited through the use of general solicitation, or (ii) 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 not permitting general solicitation; and
- For an exempt offering permitting general solicitation that includes information about the material terms of a concurrent offering under another exemption also permitting general solicitation, the offering materials must include the necessary legends for, and otherwise comply with, the requirements of each exemption.

Integration with Exempt Offering for which General Solicitation is not Permitted

Proposed Rule 152(a)(1) would codify Commission guidance first issued in 2007 in the context of setting forth a framework for analyzing how an issuer can conduct simultaneous registered and private offerings.[66] In that guidance, 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 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 solicited by the registration statement or through some other means that would not foreclose the availability of the Section 4(a)(2) exemption.[67] In 2015 and 2016, the Commission provided additional guidance and indicated that, for example, an issuer conducting a concurrent exempt offering for which general solicitation is not permitted will need to be satisfied that purchasers in that offering were not solicited by means of an offering made in reliance on Regulation A, Regulation Crowdfunding, Rule 147, or Rule 147A.[68]

Commenters supported allowing concurrent exempt offerings, where one offering permits general solicitation such as Rule 506(c), and the other prohibits general solicitation, such as Rule 506(b).[69] Proposed Rule 152(a)(1) would codify the position that an issuer may conduct such concurrent offerings without integration concerns, provided that for an offering prohibiting general solicitation 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

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66 *See* Regulation D Proposing Release.

67 *Id*.

68 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 under Regulation A (including any "testing-the-waters" communications), Regulation Crowdfunding, or Rule 147 or 147A. The issuer would need an alternative means of establishing how purchasers in the Rule 506(b) offering were solicited. 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.

69 *See*, *e.g.*, Davis-Polk Letter, and letter from CoinList dated September 26, 2019 ("CoinList Letter"); *see also* the 2016 Forum Report, the 2017 Forum Report, and the 2018 Forum Report.

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 not permitting general solicitation. The most common scenario entails an issuer conducting a registered offering while also soliciting investors for a concurrent Rule 506(b) or Section 4(a)(2) offering. For example, an issuer filing a Securities Act registration statement with the Commission would be able to conduct a concurrent Rule 506(b) offering if it reasonably believes that the investors in the Rule 506(b) offering were not solicited by the registration statement nor became interested in the concurrent offering through the use of general solicitation in connection with the registered offering.

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. For example, proposed Rule 152(a)(1)(ii) would allow a purchaser with whom the issuer has a pre-existing substantive relationship to become aware of the issuer's registered offering due to the marketing of the offering, and still participate in a concurrent or subsequent private offering by the issuer in reliance on an exemption prohibiting general solicitation. However, a pre-existing substantive relationship is not the exclusive means of demonstrating the absence of a general solicitation. For example, the issuer could sell in reliance on Rule 506(b) or Section 4(a)(2) only to investors whom the issuer or its agents contacted outside of its public offering, or general solicitation effort.[70]

Proposed Rule 152(a)(1) would also apply to an offering made under an exemption from

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[70] *See, e.g.*, Regulation D Proposing Release, at text accompanying notes 127–128. Whether there has been a general solicitation is a fact-specific determination. In general, the greater the number of persons without financial experience, sophistication, or any prior personal or business relationship with the issuer that are contacted by an issuer or persons acting on its behalf through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation.

registration for which general solicitation is prohibited that follows a registered offering or an offering that permits general solicitation. For example, an offering conducted in reliance on Rule 506(c) and a subsequent offering conducted in reliance on Rule 506(b) would not be integrated if the investors in the Rule 506(b) offering were not solicited through the use of general solicitation in connection with the Rule 506(c) offering, or if the investors established a substantive relationship with the issuer (or person acting on the issuer's behalf) prior to the commencement of the Rule 506(b) offering.

In general, we view a "pre-existing" relationship as one that the issuer has formed with an offeree prior to the commencement of the securities 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.[71] A "substantive" relationship is one in which the issuer (or a 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.[72]

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71 Certain offerings by private funds that rely on the exclusions from the definition of "investment company" set forth in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act posted on a website 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 Corporation Finance no-action letter to Lamp Technologies, Inc. (May 29, 1997).

72 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

Integration with Exempt Offerings for which General Solicitation is Permitted

Proposed Rule 152(a)(2) builds upon the guidance set forth by the Commission in its 2015 Regulation A and Regulation Crowdfunding rulemakings and in its 2016 Rule 147 and Rule 147A rulemaking. In the context of two concurrent offerings each relying on a Securities Act exemption permitting general solicitation,[73] proposed Rule 152(a)(2) would clarify that if an issuer's general solicitation materials for one offering discuss the material terms[74] of another concurrent offering, the offering materials must include the necessary legends for, and otherwise comply with, the requirements of each exemption.[75] This would provide issuers with greater flexibility and the ability to more effectively use existing Securities Act exemptions without compromising the investor protections included in the requirements of each exemption.

"general solicitation." *See*, *e.g.*, Use of Electronic Media, Release No. 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.

[73] 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 Rule 504(b)(1)(i), (ii) or (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.

[74] Depending on the facts and circumstances, the material terms of the offering could include the amount of the securities offered, the nature of the securities, the price of the securities, and the closing date of the offering period. *See* Rule 204 of Regulation Crowdfunding.

[75] For example, the limitations imposed on advertising the terms of the offering pursuant to Rule 204 of Regulation Crowdfunding would limit the issuer's general solicitation referencing the terms of that offering in a concurrent offering made pursuant to Regulation A, Rule 506(c), or Rule 147A. *See* Concept Release, at text accompanying note 483. In the case of a Regulation A offering, a Form 1-A filed with the Commission that discusses the material terms of a concurrent offering by the same issuer under Regulation Crowdfunding would not comply with the limitations on advertising in Rule 204.

For example, under the proposed rule, an issuer may undertake an offering in reliance on Rule 506(c), so long as the issuer meets all of the conditions to 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 discuss in its Rule 506(c) general solicitation materials the material terms of its concurrent Regulation A offering, proposed Rule 152(a)(2) would require the issuer to include in its Rule 506(c) general solicitation materials all the necessary legends and comply with any restrictions on the use of general solicitation under Regulation A.[76]

2. Integration Safe Harbors

In order to simplify the integration analysis and harmonize our integration framework for both exempt and registered offerings, we are proposing four non-exclusive safe harbors from integration. For offers and sales meeting the conditions of these safe harbors, the issuer need not conduct any further integration analysis.[77] By providing a more simplified and harmonized integration framework, these safe harbors are intended to reduce uncertainty and provide greater confidence to issuers in planning and choosing their capital raising options under the Securities Act, including registered offerings. Proposed Rule 152(b) would provide the following:

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[76] Rule 255 of Regulation A requires certain statements in any communications constituting offers made in reliance on Regulation A. Any such legends or statements would not be required to 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.

[77] As noted above, however, proposed Rule 152 would specify that the safe harbors are not available to any issuer for any transaction or series of transaction that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act.

- 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, provided that:
    - For an exempt offering for which general solicitation is not permitted, the purchasers either: (i) were not solicited through the use of general solicitation, or (ii) established a substantive relationship with the issuer prior to the commencement of the offering for which general solicitation is not permitted;
- Offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or in compliance with Regulation S will not be integrated with other offerings;
- An offering for which a registration statement under the Securities Act 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;
    - A terminated or completed offering for which general solicitation is permitted and made only to QIBs and IAIs; or
    - 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
- 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.

a. 30-Day Integration Safe Harbor

Current Securities Act integration safe harbors generally provide for a six-month safe harbor time period, outside of which other offerings will not be considered as integrated, or part of the same offering.[78] We are proposing a safe harbor in Rule 152(b)(1) that would shorten this time period to 30 days and harmonize current Securities Act exemptions by providing the same 30-day safe harbor time period throughout their integration provisions. This safe harbor would apply to both offerings for which a registration statement has been filed under the Securities Act and exempt offerings.[79] In light of the changes in technology, the markets, and the securities laws since 1982, we preliminarily believe a shortened 30-day safe harbor time period would 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. In considering an appropriate cooling off period between offerings, we considered changes in the informational environment that have occurred since the six-month time period was adopted in Regulation D in 1982.[80] Given the accelerating speed and consumption of electronically disseminated information in

[78] *See* Rule 502(a); Rule 251(c); Rule 147(g); and Rule 147A(g). These rules rely on a six-month time period, but offer exceptions for certain offers and sales under specific exemption or circumstances. For example, Rule 502(a) excludes offers or sales of securities under an employee benefit plan as defined in Rule 405. In addition, Rule 251(c), Rule 147(g), and Rule 147A(g) all exclude offers or sales from integration for all prior offers and sales of securities without regard to a time period so long as the prior offers and sales have terminated. Under Rule 147, Rule 147A, and Rule 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 [17 CFR 230.901 through 230.905] *See* Rule 500(g); and Note to Rule 502(a).

[79] 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.

[80] *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 Rules 146(b)(1) and 242(b)).

today's financial marketplace, 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 or undermine the protections of a subsequent exempt offering. In this regard, we 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.

In order to provide clarity with respect to use of the 30-day safe harbor where an offering under an exemption that does not permit general solicitation, such as Rule 506(b), follows the filing of a registration statement for a registered offering or an exempt offering that permits general solicitation, such as Rule 506(c), proposed Rule 152(b)(1) would provide that the purchasers in the offering for which general solicitation is not permitted (i) must not have been solicited through the use of general solicitation, or (ii) must have established a substantive relationship with the issuer prior to the commencement of the offering for which general solicitation is not permitted. This is consistent with the Commission's current guidance and proposed Rule 152(a)(1), but we believe it is appropriate to address this in proposed Rule 152(b)(1) to avoid any uncertainty as to the application of the 30-day safe harbor in this situation.

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, Rule 155 requires an issuer to wait at least 30 days between an abandoned private offering and a subsequently registered offering,[81] or an

[81] *See* Rule 155(b). Rule 155(b) currently provides a safe harbor that a private offering of securities will not be considered part of an offering for which the issuer later files a registration statement if: (1) no securities were sold in the private offering; (2) the issuer and any person acting on its behalf terminate all offering

abandoned registered offering followed by a subsequent private offering.[82] Similarly, Rule 255(e), Rule 147, and Rule 147A 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 subsequent registered offering.[83]

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activity in the private offering before the issuer files the registration statement; (3) the preliminary and final prospectuses used in the registered offering disclose specified information about the abandoned private offering (including: the size and nature of the private offering; the date on which the issuer abandoned the private offering; that any offers to buy or indications of interest given in the private offering were rejected or otherwise not accepted; and that the prospectus delivered in the registered offering supersedes any offering materials used in the private offering); and (4) 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 satisfy the knowledge and experience standard of Rule 506(b)(2)(ii).

82 *See* Rule 155(c). Rule 155(c) currently provides that an offering for which the issuer filed a registration statement will not be considered part of a later commenced private offering if: (1) no securities were sold in the registered offering; (2) the issuer withdraws the registration statement under 17 CFR 230.477 ("Rule 477"); (3) 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 under Rule 477; (4) the issuer provides specified information about the private offering to each offeree in the private offering; and (5) any disclosure document used in the private offering discloses any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering.

83 Rule 255(e) provides a safe harbor to issuers that file a registered offering after an abandoned Regulation A offering. Specifically, for solicitations of interest made in reliance on Regulation A to persons other than QIBs or IAIs, Rule 255(e) provides that an abandoned Regulation A offering will not be subject to integration with a subsequently filed registered offering, if the issuer waits at least 30 days between the last such solicitation of interest in the Regulation A offering and the filing of the registration statement with the Commission.

Rules 147(h) and 147A(h) provide safe harbors to issuers from integration with any subsequent registered offerings, if issuers make offers pursuant to these rules to persons other than QIBs and IAIs and the issuers or their agents wait at least 30 days between the last such offer made in reliance on these rules and the filing of the registration statement with the Commission.

As discussed below, we are proposing to replace the integration provisions of several Securities Act exemptions with references to proposed Rule 152. Solicitations of interest or offers made to persons other than QIBs or IAIs currently covered by the Rule 255(e), Rule 147(h) and Rule 147A(h) safe harbors would be covered by this proposed 30-day safe harbor, and solicitations of interest or offers limited to QIBs or IAIs currently covered by the Rule 255(e), Rule 147(h), and Rule 147A(h) safe harbors would be covered by proposed Rule 152(b)(3).

Commenters on the Concept Release[84] and others[85] have been generally supportive of shortening the six month time period in Rule 502(a) and expressed concern that the six-month integration safe harbor could inhibit issuers from meeting their capital needs.[86] Several of these commenters explicitly supported a 30-day safe harbor time period, while others supported other shortened time periods.[87] One commenter alternatively suggested that changes to the six-month time period in Rule 502(a) would be unnecessary if the integration analysis universally used the standards in Regulation A and Rules 147 and 147A.[88] In contrast, two commenters were opposed to changing the integration standards,[89] with one of those commenters expressly stating its opposition to shortening the six-month period in Rule 502(a).[90]

Having considered these comments, we believe that the current six-month safe harbor time period in Rules 502(a), 251(c), 147(g), and 147A(g) may be longer than necessary to

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84 *See* CCMC Letter; SIFMA Letter (suggesting that a 30-day period would allow issuers to raise capital as expeditiously as is required in today's market); and Dechert Letter ("Due to the very real and substantial impact of ceasing offering activities for any period of time, we believe that 30 days is sufficient to ensure that issuers do not abuse their ability to conduct separate offerings.").

85 *See* Final Report of the Advisory Committee on Smaller Public Companies to the United States Securities and Exchange Commission (Apr. 23, 2006), *available at* http://www.sec.gov/info/smallbus/acspc/acspcfinalreport.pdf ("Final Report of the Advisory Committee on Smaller Public Companies"), at 94 (recommending that the Commission shorten the integration safe harbor from six months to 30 days). *See also* Regulation D Proposing Release, at Section II.C.

86 *See* CCMC Letter; SIFMA Letter; Dechert Letter; Davis Polk Letter; letter from EquityZen Inc. dated September 30, 2019 ("EquityZen Letter"); and NYSBA Letter.

87 *See* Davis Polk Letter (suggesting 90 days is appropriate, as it would provide additional flexibility, permitting issuers to rely on the safe harbor once every fiscal quarter, while still requiring issuers to wait a sufficient period of time before initiating a substantially similar offering in reliance on the safe harbor); EquityZen Letter (suggesting a 90-day period generally, and a 30-day period for inadvertent general solicitation activity); letter from Silicon Prairie Portal & Exchange, LLC dated September 24, 2019 ("Silicon Prairie Letter") (suggesting a 90-day period); ABA Letter (suggesting a 90-day period); and NYSBA Letter (recommending a shorter period generally, and specifically suggesting a 45-day period in situations of inadvertent general solicitation activity).

88 *See* CrowdCheck Letter.

89 *See* PIABA Letter; and NASAA Letter.

90 *See* PIABA Letter.

protect investors and could inhibit issuers, particularly smaller issuers, from meeting their capital raising needs.[91] In our view, issuers seeking to register offerings under the Securities Act should be encouraged to do so, and we are mindful of the risk that offers made pursuant to an exemption shortly before a registration statement is filed could be viewed as conditioning the market for that registered offering. Accordingly, we are proposing to shorten the current six-month time frame in these rules to 30 days. We are not aware of issuers abusing the similar 30-day waiting periods in the current provisions of Rule 255(e) and Rules 147(h) and 147A(h). As a result, we believe that a 30-day waiting period or separation between offerings would be sufficient to prevent issuers from using a generally solicited exempt offering, such as an offering made in reliance on Rule 506(c), for the purposes of conditioning the market for a later registered offering. We further note that waiting less than 30 days before filing a subsequent registered offering would not necessarily result in integration or be considered as conditioning the market for the subsequent registered offering. Instead, such a determination would depend on the particular facts and circumstances surrounding the offerings.[92]

We are mindful that issuers may seek to undertake serial Rule 506(b) offerings each month, selling to up to 35 unique non-accredited investors in each offering, potentially resulting

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[91] *See* Rule 255(e) of Regulation A; Rule 147(h); Rule 147A(h); Regulation D Proposing Release; and Final Report of the Advisory Committee on Smaller Public Companies. 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), *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).

[92] *See, e.g.*, 2015 Regulation A Release, at text accompanying note 178 (waiting less than the 30 days before a registered offering, as required in Rule 255(e), would not necessarily result in integration with a Regulation A offering, but would instead depend on the particular facts and circumstances, as explained in the Note to Rule 251(c)).

in unregistered sales of securities to hundreds of non-accredited investors in a year.[93] While recent data may suggest that shortening the safe harbor to 30-days is not likely to result in a large increase in the number of non-accredited investors participating in Rule 506(b) offerings,[94] we are proposing to amend Rule 506(b)(2)(i) to address this concern. Under the proposed rule, 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.[95] We preliminarily believe that this would protect against the possibility that an issuer could inappropriately make use of the proposed 30-day safe harbor to effectively conduct a public distribution of securities to non-accredited investors.

In conjunction with our proposal to amend Rule 152 to include a 30-day integration safe harbor and to shorten the integration safe harbor time period throughout Rules 502(a), 251(c), 147(g), and 147A(g) from six months to 30 days, we are also proposing to remove and reserve Rule 155. As proposed Rule 152(b)(1) would supersede the specific requirements in Rule 155 relating to the integration of abandoned offerings with subsequent offerings, other than the 30-day waiting period between the termination of an abandoned offering and the commencement of

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93 In 2007, the Commission expressed this concern that such sales could result in large numbers of non-accredited investors failing to receive the protections of Securities Act registration. *See* Regulation D Proposing Release, at text accompanying note 134.

94 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, approximately 4.45 percent of offerings included non-accredited investors. Among all Rule 506(b) offerings with non-accredited investors by issuers, other than pooled investment funds, the average (median) number of non-accredited investors was reported to be 6.7 (4.0), based on Form D filings in 2019. These estimates of the number of investors may represent a lower bound because they rely on available Form D filings, and because a final Form D upon the conclusion of an offering is not required to be filed.

95 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 Rule 501(e), only non-accredited investors are included in computing the number of "purchasers."

a subsequent offering.[96] 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 a requirement 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).[97] Rule 155(c) provides a similar safe harbor for a registered offering followed by a private offering of securities subject to a similar set of enumerated conditions, including the requirement 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]

We received comments on the Concept Release that were generally supportive of either eliminating or shortening the 30-day time period in Rule 155.[99] One of these commenters suggested that elimination of certain of Rule 155's conditions would increase the likelihood of registration.[100] Other than the required 30-day waiting period between an abandoned and subsequent offering, we believe the list of conditions in Rule 155(b) and (c) is no longer warranted and may be eliminated without compromising investor protections for the same reasons that support our proposal to reduce the integration safe harbors from six months to 30

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96 Rule 155(b) and (c) currently provide safe harbors for integration of abandoned offerings. 17 CFR 230.155(b) and (c).

97 *See supra* note 81.

98 *See supra* note 82.

99 *See* ABA Letter; and NYSBA Letter.

100 *See* ABA Letter.

days. As we believe a 30-day time period between offerings, including if one is abandoned, establishes a more workable standard, without significantly compromising investor protections, we are proposing to remove and reserve Rule 155.

To provide greater certainty to issuers as to the availability of all of our proposed safe harbors that require the prior offering to be "terminated or completed,"[101] we are proposing that:

- Offerings of securities made under Section 4(a)(2), Regulation D, or Rule 147 or 147A would be considered "terminated or completed," on the later of the date: (i) 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 issuer and its agents ceased efforts to make further offers to sell the issuer's securities.[102]
- Offerings under Regulation A would be considered "terminated or completed" upon the: (i) withdrawal of an offering statement under Rule 259(a) of Regulation A; (ii) filing of a Form 1-Z with respect to that offering; (iii) declaration by the Commission that the offering statement has been abandoned under Rule 259(b) of Regulation A; or (iv) 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" upon the deadline of the offering identified in the offering materials pursuant to Rule 201(g) of Regulation Crowdfunding, or indicated by the Regulation

[101] *See* proposed Rule 152(b)(1), (b)(3) and (b)(4).

[102] 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.

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 will be considered, for purposes of the proposed safe harbors, "terminated or completed" upon the: (i) withdrawal of the registration statement after the Commission grants such application under Rule 477; (ii) 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 Item 512(a)(3) of Regulation S-K;[103] (iii) 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).[104]

b. Rule 701, employee benefit plans and Regulation S

We are proposing Rule 152(b)(2), which would provide a safe harbor for all offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or made in compliance with Regulation S, regardless of when these offerings occur, including offers and sales made concurrently with other offerings.[105] Offers and sales pursuant to Rule 701[106] and employee benefit plans are limited to investors, such as employees, consultants and advisors,

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103 17 CFR 229.512(a)(3).

104 17 CFR 230.415(a)(5).

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

106 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 Securities Exchange Act of 1934. *See* Rule 701(b). This 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.

with whom the issuer has written compensation plans or agreements. Given the privity between these investors and the issuer, these offers and sales may not raise the same level of investor protection concerns as offerings to other investors.

We are proposing a similar safe harbor for all offers and sales made in compliance with Regulation S, regardless of when the Regulation S offering occurs in relation to another domestic registered or exempt offering in the United States. In adopting Regulation S, the Commission stated 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.”[107] Proposed Rule 152(b)(2) would codify this position. Specifically, concurrent offshore offerings that are conducted in compliance with Regulation S are not currently, and would not be, integrated with registered domestic offerings or domestic offerings that are conducted in compliance with any exemption. When determining the availability of this safe harbor, it would still be necessary to assess each transaction for compliance with Regulation S and the conditions of the other exemption.

Although, as noted above, the Commission has provided guidance similar to the proposed safe harbor, we have become aware that there may be some uncertainty among market

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

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. Two commenters on the Concept Release suggested that the Commission clarify that general solicitation under Rule 506(c) would not constitute "directed selling efforts" for purposes of Regulation S,[108] which Rule 902(c) defines as 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 securities offered in reliance on Regulation S.[109]

In light of these concerns, we are proposing amendments to Regulation S that would permit an issuer that is conducting an exempt offering that allows general solicitation, such as under Rule 506(c), and uses widely accessible internet or similar communications, to continue to be able to rely on Regulation S for a concurrent offshore offering even though the general solicitation activity would likely be deemed "directed selling efforts" under current Rule 902(c). 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. The definition of "directed selling efforts" currently 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. Due to the nature of a widely accessible general solicitation communication, it is

108 *See* CoinList Letter; and NYSBA Letter.

109 *See* Rule 902(c)(1).

likely that the "reasonably be expected to have the effect of" provision would be implicated by such activity, even though the issuer may not have undertaken the activity "for the purpose of" conditioning the U.S. market. Under the proposal, this definition would be narrowed, only for the purposes of general solicitation activities undertaken in connection with offers and sales under an exemption from registration, such that general solicitation activity that may have the effect of conditioning the U.S. market but is not undertaken for the purpose of doing so would not be covered.

We are mindful that, regardless of the issuer's intent, such activities may increase the risk of flowback of the Regulation S securities to the United States when there is a concurrent exempt offering of the securities in the United States using general solicitation. Therefore, we are proposing new Rule 906 of Regulation S, applicable to securities offered and sold in a transaction subject to the conditions of Rule 901 or Rule 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 to QIBs or IAIs. We preliminarily believe that this restriction on resales would appropriately guard against potential flowback of such securities to the United States. We are proposing to limit resales during the six-month period to QIBs and IAIs, investors that the Commission has long recognized as having the ability to fend for themselves. This approach may help alleviate possible concerns about less-sophisticated investors not fully appreciating the distinctions between the securities sold in each of the offerings, and help guard against flowback to the United States by limiting the potential pool of investors who may purchase in the resale. This six-month limitation on resales would apply regardless of the Regulation S category applicable to the securities, and notwithstanding, and in addition to, any applicable distribution compliance period.[110]

c. Subsequent Registered Offerings

The safe harbor in proposed Rule 152(b)(3) would provide a safe harbor for certain offerings made prior to the commencement of an offering for which a Securities Act registration statement has been filed. 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.[111] 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.[112] Finally, Proposed Rule 152(b)(3)(iii) would make clear that an offering for which a registration statement under the Securities Act 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.[113]

Rule 152 currently 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

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110 *See* Rule 902(f).

111 Proposed Rule 152(b)(3)(i) builds on the Commission's existing 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.

112 Proposed Rule 152(b)(3)(ii) builds on current Rule 255(e) of Regulation A, and current Rules 147(h) and 147A(h), which provides 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.

113 Proposed Rule 152(b)(3)(iii) would work in coordination with proposed Rule 152(b)(1) to clarify the application of the 30-day safe harbor to subsequent registered offerings.

any public offering at the time of the unregistered offering even though 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.[114] 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 general solicitation, those offers and sales would not be integrated with the subsequent registered offering.[115] Once the public offering is commenced or the registration statement is filed, the issuer must satisfy all of the applicable requirements for that subsequent offering.

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, often is critical if companies are to have sufficient funds to continue to operate while the public offering process is ongoing.[116] 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

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

[115] 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 Proposing Release, at note 124.

[116] *Id.* at Section II.C.

are often erratic and unpredictable, due in part to limited amounts of working capital, cash reserves, and access to credit.[117] For this reason, we are proposing Rule 152(b)(3), which would permit companies to conduct offerings shortly before the filing of a Securities Act registration statement without concern that the two offerings would be integrated.

d. Offers or Sales Preceding Exempt Offerings Permitting General Solicitation

Proposed Rule 152(b)(4) would 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. Rule 251(c) of Regulation A, Rule 147(g), and Rule 147A(g) currently provide that offers and sales made in reliance on these exemptions will not be integrated with terminated or completed offers and sales made prior to the commencement of these exempt offerings.[118] We are proposing to establish a new safe harbor that would expand these current integration safe harbors in Regulation A and Rules 147 and 147A to also include offerings relying on: Regulation Crowdfunding; Rule 504(b)(1)(i), (ii) or (iii) that, depending upon state registration requirements, permit general solicitation; and Rule 506(c). The following table summarizes the types of offerings that would not be integrated under this proposed safe harbor:

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[117] *See*, *e.g.*, Final Report of the Advisory Committee on Smaller Public Companies, at page 96. *See also* Regulation D Proposing Release, at note 116 and accompanying text.

[118] 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).

Table 6: Summary of Types of Offerings Not Integrated Under the Safe Harbor

Offering 1	Offering 2
Exempt offering permitting general solicitation, including: • Regulation A • Regulation Crowdfunding • Rule 147 or 147A • Rule 504(b)(1)(i), (ii), or (iii) • Rule 506(c) Exempt offering prohibiting general solicitation, including: • Rule 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 • Rule 504(b)(1)(i), (ii), or (iii) • Rule 506(c)

Offers and sales preceding exempt offerings that permit 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 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, Rule 504(b)(1)(i), (ii) or (iii), Rule 506(c) or Regulation Crowdfunding, is necessary to further investor protection. For example, a subsequent Regulation A or Regulation Crowdfunding offering would provide investors in these offerings with an offering document and ongoing disclosures to provide them with material information about the offering prior to making their investment decision. Similarly, intrastate offerings pursuant to Rule 147 and Rule 147A, as well as regional multi-state offerings under Rule 504(b)(1)(i), (ii) and (iii), are all subject to state registration requirements which generally require the delivery of a disclosure document prior to sale. Finally, Rule 506(c) requires issuers to take reasonable steps to verify that all investors in the offering are accredited investors who are deemed to be sophisticated investors who do not need the protections of Securities Act registration.

3. Conforming Amendments to Securities Act Exemptions

As part of our effort to modernize and harmonize the integration framework for registered and exempt offerings, we are also proposing to replace the integration provisions of several Securities Act exemptions with references to proposed Rule 152. Specifically, we are proposing to amend current Rule 502(a), Rule 251(c), Rule 147(g), and Rule 147A(g) to provide cross-references to the new facts and circumstances analysis and safe harbors for integration in Rule 152. We are additionally proposing to eliminate Rule 255(e), Rule 147(h), and Rule 147A(h) since the relief provided by these rules would be provided by proposed Rule 152(b)(3). All of these existing integration provisions currently refer to a facts and circumstances analysis when their enumerated safe harbors do not apply, and the proposed Rule 152(b) safe harbors are generally consistent with the current safe harbors in the individual rules.

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.[119] Market participants conducting crowdfunding offerings have requested guidance on the integration of crowdfunding offerings with other exempt offerings under the Securities Act.[120] In response, we are

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119 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.

120 *See*, *e.g.*, 2018 Forum Report.

proposing to amend Rule 100 of Regulation Crowdfunding to codify this integration guidance, and further harmonize how offerings under Regulation Crowdfunding interrelate with other offerings under the Securities Act by cross-referencing the proposed Rule 152(b) safe harbors. We believe codifying the Commission's guidance on integration by adding the cross-reference to proposed Rule 152 in a new provision in Rule 100 of Regulation Crowdfunding would provide greater certainty to issuers contemplating a Regulation Crowdfunding offering who may also be considering other offerings under the Securities Act.

Request for Comment

1. Should we adopt a comprehensive integration framework for registered and exempt offerings, as proposed? Is the proposed general principle of integration, which requires an issuer to consider the particular facts and circumstances of each offering, appropriate? Should the framework also include provisions applying this general principle to particular fact patterns? If so, are the proposed provisions appropriate? Are there other provisions applying the general principle to specific fact patterns that we should include? In light of the proposed provisions, should the rules define the terms "pre-existing" and "substantive relationship"? Should we instead eliminate the concept of integration altogether and rely on general anti-evasion principles to prohibit the use of multiple closely-timed offerings to evade the securities laws?
2. Should we replace the five factor test of integration, currently set forth in Rule 502(a), with the more recent approach to integration adopted in rulemakings involving Regulation A, Regulation Crowdfunding, and Rules 147 and 147A, as proposed? Is there another integration principle that should apply in this context? Are there situations in which the five factor test should continue to apply? If so, should the current factors be revised, such as by

adding new factors, or should we provide guidance with respect to the relative importance of the factors to the analysis? Are there uses of the five factor test for purposes other than the integration of offerings?

3. Should we adopt specific safe harbors as part of the proposed integration framework? If so, are the proposed safe harbors appropriate? Are there additional or different safe harbors we should codify? What effect, if any, would the proposed safe harbors have on investor protection or on issuers' ability to raise capital in the exempt offering markets? Should any of the integration provisions in proposed Rule 152(a) be reframed as safe harbors in proposed Rule 152(b)? Similarly, should any of the safe harbors in proposed Rule 152(b) be reframed as principles of integration in proposed Rule 152(a)?
4. Do the proposed rules make clear the interaction between the integration provisions set forth in proposed Rule 152(a) and the non-exclusive safe harbors set forth in proposed Rule 152(b)?
5. Should we include an integration safe harbor that would apply to any offering made more than 30 calendar days prior to, or more than 30 calendar days after, another offering, as proposed? Is this time period too short? Would a longer time period such as 45, 90, or 120 days be more appropriate? Would this proposal raise any investor protection concerns?
6. Should we, as proposed, amend Rule 506(b) to provide that 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? If so, is the proposed timeframe (90 days) and number of purchasers (35) appropriate, or should these be revised? Should we instead, if we consider 35 non-accredited investors over a 90-day period to be an appropriate limitation, set the safe harbor at 90 days to simplify compliance?

Do the risks of sales to large numbers of non-accredited investors in multiple offerings by the same issuer in reliance on Rule 506(b) warrant such limits on the number of non-accredited investors participating in these offerings? Should this limitation apply in all cases in which an issuer conducts more than one offering under Rule 506(b), or should we only require such limit on the number of non-accredited investors if the Rule 506(b) offerings are of the same class of securities, or part of the same plan of financing? Should we only require such limit on the number of non-accredited investors if the Rule 506(b) offerings would be integrated if the five factor test were applied? Alternatively, instead of amending Rule 506(b), should we include this requirement as a condition to reliance on the proposed 30-day safe harbor when an issuer conducts two or more Rule 506(b) offerings?

7. Should we, as proposed, condition the availability of the 30-day safe harbor on the requirement that, for an exempt offering for which general solicitation is not permitted, the purchasers in such offering were not solicited through the use of general solicitation or that the purchasers established a substantive relationship with the issuer prior to commencement of the offering for which general solicitation is not permitted? Alternatively, is a provision similar to that in proposed Rule 152(b)(1) more appropriate in Rule 502(c) of Regulation D concerning purchasers in offerings for which general solicitation is not permitted? Should the provision be included in both proposed Rule 152(b)(1), as well as in Rule 502?
8. Should we adopt an 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?
9. Is it necessary to reference Rule 701 in proposed Rule 152(b)(2), given the integration provision in Rule 701(f)?

10. Should general solicitation in the United States in connection with an exempt, U.S. offering constitute directed selling efforts under Rule 902(c)(1) of Regulation S for purposes of the offshore transaction? Should we, as proposed, amend the definition of "directed selling efforts" to permit issuers to make concurrent offers under Regulation S and an exemption from registration that permits general solicitation? Should we expand the definition of "directed selling efforts" to also exclude activities that would be "reasonably expected to" condition the U.S. market, regardless of the intent of those activities? Would an issuer be able to demonstrate the intent underlying general solicitation activities under the proposed amendment? Would the proposed amendments provide sufficient clarity to issuers using social media to make concurrent U.S. and non-U.S. offerings? In such situations, would an issuer have difficulty separately complying with Regulation S and other exemptions? Do the proposed amendments to Regulation S raise investor protection concerns for offshore investors? Should we expand the proposed exclusion from "directed selling efforts" to apply not only to concurrent exempt offerings that permit general solicitation, but also to domestic registered offerings?

11. Should we require the resale restrictions of proposed Rule 906? Will proposed Rule 906 help prevent flowback of securities to the United States? Is the proposed six-month time period appropriate, or should we consider a longer or shorter time period for the resale restriction to apply? Should the time period during which resales are restricted instead correspond to the distribution compliance period for Category 2 or Category 3 offerings under Regulation S, as applicable? Should we permit resales to QIBs and IAIs during this six-month period, as proposed? We expect that issuers would consider implementing measures similar to the "offering restrictions" defined in Rule 902(g) to comply with the

proposed Rule 906 resale restriction, but should we specify measures an issuer must take to comply with the proposed resale restrictions? If so, what type of measures would be appropriate? Are the proposed definition of "directed selling efforts" and new Rule 906 in keeping with the territorial approach taken in Regulation S?

12. Should we adopt the safe harbor in proposed Rule 152(b)(3) that applies to registered offerings subsequent to a terminated or completed offering for which general solicitation was not permitted, as proposed? Should we also, as proposed, include a safe harbor that applies to registered offerings subsequent to a terminated or completed offering limited to QIBs and IAIs? Should we additionally include a safe harbor that applies to registered offerings subsequent to offerings for which general solicitation is permitted that terminated or completed more than 30 days prior? Do the safe harbors, as proposed, sufficiently cover the relief provided by Rule 255(e) of Regulation A, Rule 147(h), and Rule 147A(h) so as to make them no longer necessary? Alternatively, should we omit the provision in this safe harbor concerning Rules 255(e), 147(h), and 147A(h), and retain these integration provisions as currently provided in Rules 255, 147, and 147A? Would this help simplify the safe harbor in proposed Rule 152(b)(3)? Would this make the integration provisions of Rules 255, 147, and 147A less clear? Does the 30 calendar day provision in proposed Rule 152(b)(3)(iii) for registered offerings appropriately coordinate with the more general provisions of proposed Rule 152(b)(1)? In addition to registered offerings, should we revise this safe harbor provision to cover exempt offerings permitting general solicitation, such as Rule 506(c), as well?

13. Should we adopt 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 made subsequent to an offering that has been terminated or completed?
14. Should we include any other safe harbors from integration in Rule 152? For example:
    a. Should we include a safe harbor for all offers or sales to investors with whom the issuer has a pre-existing substantive relationship? Should this safe harbor be available for all such offers or sales, regardless of when they occur in relation to another offering (*i.e.*, whether prior to, concurrent with, or subsequent to another offering) and regardless of whether the other offering is exempt or registered? If we were to adopt such a safe harbor, would that make any of the proposed safe harbors unnecessary?
    b. Should we include a safe harbor from integration for all offerings limited to QIBs and accredited investors? Should such a safe harbor include offers or sales preceding or concurrent with a registered offering? Alternatively should such a safe harbor apply only to QIBs and IAIs, regardless of whether the offer or sale was prior to, concurrent with, or subsequent to other offerings? Do offers and sales to such investors raise concerns with respect to conditioning the market for a subsequent registered offering of the issuer's securities?
    c. Should we include a safe harbor available for offers or sales made in reliance on Rule 506(c) that are made concurrently with an exempt offering permitting general solicitation, such as in reliance on Regulation A, Regulation Crowdfunding or Rule 147A, provided that, if the general solicitation materials used in connection with the Rule 506(c) offering include the material terms of the other concurrent exempt

offering permitting general solicitation, then the Rule 506(c) materials must conform to the legend and other requirements of the other exempt offering permitting general solicitation? In this regard, is our proposed Rule 152(a)(2) more appropriate as a safe harbor or as an integration principle?

15. Instead of our proposed approach to replace the current integration provisions in Securities Act exemptions with a cross-reference to proposed Rule 152, should we revise the current integration provisions to reflect the provisions of proposed Rule 152? Alternatively, should we revise the current safe harbor provisions in the Securities Act exemptions to reflect the safe harbor provisions of proposed Rule 152(b) and provide cross-references to Rule 152(a) for guidance on integration when these safe harbors are not applicable?
16. Should we codify in Regulation Crowdfunding 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 exemption that is being relied upon for the particular offering in Rule 100 of Regulation Crowdfunding, as proposed?
17. Should we define the terms "terminated or completed," as proposed? Should the analysis of whether an offering is "terminated or completed" be predicated on the issuer's entry into a binding commitment, subject only to conditions outside of the investor's control, to sell securities under the offering, as proposed, or should we consider an alternative such as the closing of the final sale of securities under the offering? Are there any administrative or logistical issues that would be raised if the "termination or completion" of an offering were determined based on the closing of the final sale of securities under the offering? Should

anything else be considered "terminated or completed" with respect to offerings under Regulation A and Regulation Crowdfunding, and registered offerings?

18. Should we consider revisions to Regulation Crowdfunding that relate to intermediaries in light of the proposed integration safe harbors? For example, should we revise the portal requirements under Regulation Crowdfunding to permit concurrent Rule 506(c) offerings to be offered and sold via a portal's internet platform? What other Regulation Crowdfunding rules should be revised to facilitate Rule 506(c) offerings concurrent with Regulation Crowdfunding offerings? Should we provide guidance regarding issues that may arise when an intermediary seeks to host concurrent offerings? Should we expand any of our rules, for example, the rules under Regulation Crowdfunding, to permit certain entities to act as intermediaries for sales of securities to accredited investors in concurrent Rule 506(c) offerings?

B. General Solicitation and Offering Communications

Section 4(a)(2) of the Securities Act exempts from the registration requirements "transactions by an issuer not involving any public offering,"[121] but does not define the phrase. The precise limits of this statutory exemption are also not defined by rule. Whether a transaction is one not involving any public offering is essentially a question of fact and necessitates a consideration of the surrounding circumstances, including such factors as the relationship between the offerees and the issuer, and the nature, scope, size, type, and manner of the offering.[122] An issuer relying on Section 4(a)(2) is restricted in its ability to make public

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[121] 15 U.S.C. 77d(a)(2).

[122] *See* Non-Public Offering Exemption Release. Section 4(a)(2) was traditionally viewed as a way to provide "an exemption from registration for bank loans, private placements of securities with institutions, and the promotion of a business venture by a few closely related persons." *Id.* In 1962, prompted by increased use

communications to attract investors to its offering because public advertising is incompatible with a claim of exemption under Section 4(a)(2).[123]

The Commission adopted Rule 506 of Regulation D 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.[124] This included a prohibition on the use of general solicitation or advertising to market the securities. In 2012, Section 201(a) of the JOBS Act directed the Commission to eliminate the prohibition on using general solicitation in offerings under Rule 506 where all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that the purchasers are accredited investors.[125] To implement Section 201(a), the Commission adopted paragraph (c) of Rule 506, and retained the prior Rule 506 safe harbor as paragraph (b).[126] As a result, general solicitation or advertising continues to be prohibited in an offering under Rule 506(b).

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

The Securities Act defines, and the Commission has historically interpreted, the term "offer" broadly.[127] The Commission has explained that "the publication of information and

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of the exemption for speculative offerings to unrelated and uninformed persons, the Commission clarified limitations on the exemption's availability. *See id.*

123 *See id.*

124 *See* Regulation D Adopting Release, at Section III.C. Attempted compliance with any rule in Regulation D does not preclude an issuer from claiming the availability of another applicable exemption. For example, an issuer's failure to satisfy all the terms and conditions of Rule 506(b) does not raise a presumption that the exemption provided by Section 4(a)(2) is not available. *See* Rule 500(c).

125 Sec. 201(a), Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012).

126 *See* Rule 506(c) Adopting Release.

127 *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

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."[128] Although the terms "general solicitation" and "general advertising" are not defined in Regulation D, 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.[129] The Commission has stated that other uses of publicly available media, such as unrestricted websites, also constitute general solicitation and general advertising.[130] In this release, we refer to both general solicitation and general advertising as they relate to an offer of securities as "general solicitation."

Commenters have raised questions about issuers that present to potential investors at "demo days" and similar events.[131] 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. 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

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(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).

[128] *See* Securities Offering Reform Release.

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

[130] *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.

[131] *See* CCMC Letter (stating that "the SEC should clarify that startups and angel investors are permitted to participate in "demo days" or other publicity events in which companies serially present to audiences that may include potential investors but for which no specific investment solicitation is made"); and letter from Investment Adviser Association dated October 18, 2019 ("IAA Letter") (suggesting that the Commission "should clarify that limited communications designed for consumption by a non-public audience (such as institutional publications or institutionally focused consultant databases), or participation in a 'demo day' or similar event, would not be considered general solicitation or general advertising").

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.

However, we understand that in many cases it may not be practical for the organizer of the event to limit participation in this manner. As a result, we are proposing Rule 148, which would provide that certain "demo day" communications would not be deemed general solicitation or general advertising.[132] Specifically, as proposed, an issuer would not be deemed to have engaged in general solicitation if the communications are made in connection with a seminar or meeting by a college, university, or other institution of higher education, a local government, a nonprofit organization, or an angel investor group, incubator, or accelerator sponsoring the seminar or meeting.[133]

With respect to the organization and conduct of the event, the sponsor would not be permitted to make investment recommendations or provide investment advice to attendees of the event, nor would it be permitted to engage in any investment negotiations between the issuer and investors attending the event. The sponsor would not be permitted to charge attendees of the event any fees, other than reasonable administrative fees, or receive any compensation for making introductions between attendees and issuers, or for investment negotiations between the parties. The sponsor also would not be permitted to receive any compensation with respect to

[132] 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 be inapplicable.

[133] A proposed Instruction to Rule 148 would provide 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 event that would require it to register as broker or dealer under the Exchange Act, or as an investment adviser under the Advisers Act.

In addition, the proposed rule would specify 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 the issuer is 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.

We believe that this tailored approach, which limits the types of organizations that may sponsor events and the scope of the sponsor's activities, coupled with the limitation on the information about a securities offering that an issuer is permitted to provide at the event, appropriately provides for investor protection while permitting issuers, particularly small and emerging issuers, and investors, the opportunity to more efficiently expand and grow their networks. For issuers that have been reported to have historically had less access to capital at start up, this approach may offer an opportunity to help bridge any funding gaps by allowing them to reach broader audiences.[134]

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134 For example, diverse founders, including women-owned and minority-owned businesses may have less access to start-up capital and venture capital ("VC") funding. *See* Office of the Advocate for Small Business Capital Formation Annual Report for Fiscal Year 2019, *available at* https://www.sec.gov/files/2019_OASB_Annual%20Report.pdf, at 26 and 30. *See also* Presentation at Feb. 4, 2020 Small Business Capital Formation Advisory Committee meeting by James Gelfer, Senior Strategist, Lead Venture Analyst, PitchBook, *available at* https://www.sec.gov/spotlight/sbcfac/2020-02-04-presentation-pitchbook-venture-climate.pdf, at 13 ("Female-founded companies as a proportion of total US VC deal activity" (showing the proportion of total U.S. VC deals for companies that had at least one female founder (22.8 percent of VC deals and 14.2 percent of VC dollars) and for companies with all female founders (6.8 percent of VC deals and 2.7 percent of VC dollars)). *See also* Banerji, Devika & Reimer, Torsten, *Startup Founders and Their LinkedIn Connections: Are Well-Connected Entrepreneurs More Successful?* 90 COMPUTERS IN HUM. BEHAVIOR 46 (2019) (finding that social connectedness of founders was the best predictor of funds raised).

In light of recent developments in the capital markets, including the adoption of Rule 506(c), as well as developments in communications and technology, we considered, but are not proposing at this time, adding revised examples of general solicitation to our rules. Furthermore, several commenters on the Concept Release, as well as the SEC Small Business Capital Formation Advisory Committee, have suggested that further guidance and clarification as to the types of communications that classify as "general solicitation" and "general advertising" would be helpful.[135]

As a result, we considered whether to update and expand the current Rule 502(c) examples of general solicitation by adding examples to a new rule outside of Regulation D, deleting the current examples from Rule 502(c) and including a reference in Rule 502(c) to the new rule. For example, we considered stating in the new rule that an issuer would be considered to be engaging in general solicitation if, among other things, the issuer or any person acting on the issuer's behalf uses one or more of the following methods of communication to offer securities:

- Any advertisement, article, notice or other communication published on a publicly available website or mobile application, including social media, published in any newspaper, magazine, or similar media, or broadcast over television, radio or a similar medium;

[135] *See, e.g.*, NYSBA Letter; letter from Institute for Portfolio Alternatives dated September 24, 2019 ("IPA Letter"); CCMC Letter; Dechert Letter; IAA Letter; letter from Association for Corporate Growth dated September 24, 2019; ABA Letter; and Transcript of SEC Small Business Capital Formation Advisory Committee (Feb. 4, 2020), *available at* https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-020420.pdf ("2020 Transcript of Small Business Advisory Committee"), at 172–174 (discussing confusion surrounding general solicitation).

- Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising, other than certain "demo day" activities covered by proposed Rule 148; or
- Any form of direct mail, telephone, e-mail, text messaging, or similar method of communication, if the issuer (or any underwriter, broker, dealer, or agent acting on behalf of the issuer) does not have a pre-existing, substantive relationship with the offerees, or cannot otherwise demonstrate the absence of a general solicitation.

This approach would encompass present day communication methods that did not exist at the time of Rule 502(c)'s adoption, such as websites, social media, texts, and e-mail, and would clarify that cold calling and other similar methods of communication that do not involve the use of mass media may still be considered general solicitation if the issuer or its agent does not have a pre-existing, substantive relationship with the offerees, or cannot otherwise demonstrate the absence of a general solicitation.

We note the existence of a pre-existing, substantive relationship is not the exclusive means of demonstrating the absence of a general solicitation. For example, an issuer may also demonstrate the absence of a general solicitation by limiting its communications to direct contact by the issuer or its agents outside of a public offering effort. In addition, groups of experienced, sophisticated investors, such as "angel investors," may share information about offerings through their network and members who have a relationship with a particular issuer may introduce that issuer to other members. Issuers that contact one or more experienced, sophisticated members of the group through this type of referral may be able to establish a reasonable belief that other offerees in the network have the necessary financial experience and sophistication.

Request for Comment

19. Should we, as proposed, provide a specific exception for communications in connection with a "demo-day" or similar event so that it would not be considered general solicitation if certain conditions are met? Should we permit organizations other than those listed in proposed Rule 148 to act as sponsors of such events? An instruction to the proposed rule provides that the term "angel investor group" means a group that is composed of accredited investors 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 is neither associated nor affiliated with brokers, dealers, or investment advisers. Does this definition appropriately cover the types of groups that sponsor such events, or are there changes that should be made to the definition? Should we include, as proposed, accelerators and incubators as organizations that may act as sponsors of these events? Should we define the terms "accelerator" and "incubator" for this purpose? Alternatively, should we specify only the types of groups that would be prohibited from acting as sponsors of these events, such as broker-dealers, investment advisers, or others? Are the proposed conditions to this exception, such as limitations on the sponsor's fees and the types of information an issuer may provide at the event appropriate? If not, how should those conditions be revised? Are there additional conditions that we should specify with respect to this exception, such as a requirement that certain disclosures be provided to event attendees, or limitations on the characteristics of the entities that may avail themselves of this exception (*i.e.*, entities formed for the purposes of sponsoring events in order to engage in general solicitation)?
20. Should we provide a definition of "general solicitation" and "general advertising"? If so, how should those terms be defined? Should we instead eliminate all prohibitions on

"general solicitation" and "general advertising" and focus investor protections at the time of sale rather than at the time of offer?

21. Should we move the existing list of examples provided in Rule 502(c) to a new rule? Do the current examples in Rule 502(c) pose any particular challenges we should consider in formulating a new rule? Are there different or additional examples that we should provide? For example, should we include any form of direct mail, telephone, e-mail, text messaging, or similar method of communication, if the issuer (or any underwriter, broker, dealer, or agent acting on behalf of the issuer) does not have a pre-existing, substantive relationship with the offerees, or cannot otherwise demonstrate the absence of a general solicitation?
22. Should we define the term "pre-existing substantive relationship" in the rule? If so, should we define the term consistently with the guidance set forth in this release? If not, how should we define this term?
23. Would the proposed changes positively impact access to capital by counterbalancing social network effects for underrepresented founders, such as women, minorities, and entrepreneurs in rural areas?

2. Solicitations of Interest

The JOBS Act added Securities Act Section 5(d), permitting emerging growth companies ("EGCs")[136], and persons authorized to act on their behalf, to engage in oral or written communications with potential investors that are QIBs or IAIs before or after filing a registration statement to gauge such investors' interest in a contemplated securities offering.[137] Securities Act Rule 163B, which the Commission adopted in September 2019, extended to all

[136] *See* 17 CFR 230.405 (defining "emerging growth company").

[137] Sec. 105(c), Pub. L. No. 112-106, 126 Stat. 306 (2012).

issuers the "test-the-waters" accommodation previously available only to EGCs.[138] Under the new rule, all issuers and those authorized to act on their behalf are allowed 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.

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, provided that all solicitation materials include certain required legends and, after publicly filing the offering statement, are preceded or accompanied by a preliminary offering circular or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained.[139]

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.[140] We believe that the existing testing-the-waters provisions allow issuers to consult effectively with investors as they evaluate market interest in a contemplated registered or Regulation A securities offering before incurring the costs associated with such an offering, while preserving investor protections. This consultation allows investors to have input into the structuring of the offering and also allows for investors to convey to the issuer the types of information about which they are most interested, leading ultimately to a lower cost of capital for the issuer and potentially resulting in more investor-friendly deal terms. Because we are of the view that issuers may similarly benefit from an ability to consult with investors as they evaluate market interest in other types of offerings, we

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138 *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").

139 *See* 17 CFR 230.255.

140 *See* Solicitations of Interest Release; and 17 CFR 230.255(a).

are proposing a new exemption that would permit an issuer to solicit indications of interest in an exempt offering orally or in writing prior to determining which exemption it would rely upon to conduct the offering. We are also proposing amendments to Regulation Crowdfunding to permit an issuer to solicit indications of interest under a new Regulation Crowdfunding-specific provision, as well as amendments to Regulation Crowdfunding's and Regulation A's testing-the-waters provisions to reflect the possibility that an issuer may choose to test-the-waters using a generic solicitation of interest prior to determining whether to conduct its offering under Regulation A or Regulation Crowdfunding.

a. Generic Solicitation of Interest Exemption

We are proposing to create a new exemption, using our authority under Section 28 of the Securities Act, that would 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. This new exemption, which is substantially based on existing Rule 255 of Regulation A, would be set forth in proposed Rule 241. We believe that proposed Rule 241 would further the public interest by allowing issuers significant flexibility to gauge market interest in an exempt offering, tailor the size and other terms of the offering, and reduce the costs of conducting an exempt offering. Investors would also benefit from this flexibility, because they would potentially have input into the structuring of the offering and be able to convey to the issuer the types of information about which they are most interested, leading ultimately to a lower cost of capital for the issuer. As discussed below, the proposed rule also includes several conditions intended to ensure appropriate investor protections.

An issuer that chooses to "test-the-waters" under the proposed exemption would not be permitted to identify which specific exemption from registration it may rely upon for a subsequent offer and sale of the securities. We believe that if the issuer has determined the exemption under which the offering will be conducted, the issuer must comply with the specific terms of the exemption being relied upon. For example, an issuer could conduct a generic solicitation of interest under proposed Rule 241 and determine based on feedback from potential investors that it wishes to proceed with an offering under Regulation A. From that point in time, any testing-the-waters materials that the issuer uses would be required to comply with Rule 255 of Regulation A.

As proposed, Rule 241(b) would require the materials used under this exemption to bear a legend or disclaimer notifying potential investors that (1) the issuer is considering an offering of securities exempt from registration under the Securities Act, but has not determined a specific exemption from registration the issuer intends to rely upon for the subsequent offer and sale of the securities; (2) no money or other consideration is being solicited, and if sent, will not be accepted; (3) no sales will be made or commitments to purchase accepted until the issuer determines the exemption under which the offering is intended to be conducted and, where the exemption includes filing, disclosure, or qualification requirements, all such requirements are met; and (4) a prospective purchaser's indication of interest is non-binding. These solicitations would be deemed to be offers of a security for sale for purposes of the antifraud provisions of the federal securities laws.[141]

Depending on the method of dissemination of the information, such offers may be considered a general solicitation.[142] If soliciting generic indications of interest under the

141 Proposed Rule 241(a).

142 Such offers also may be considered "directed selling efforts" as defined in Regulation S. Under the proposed amendment to the definition of directed selling efforts in Rule 902 of Regulation S, a generic solicitation that would be considered general solicitation activity would not be considered "directed selling efforts" in connection with an offering under Regulation S, if the general solicitation activity is not undertaken

proposed rule 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 would need to analyze whether the generally solicited offer and the subsequent private offering could be integrated, thereby making the exemption that does not permit general solicitation unavailable. Such an issuer, however, may be able to rely on the integration safe harbor in proposed Rule 152(b)(1) to conduct an offering that does not permit general solicitation if it waits 30 days following termination of the generic solicitation of interest before commencing the private offering. Note, however, that even if the 30-day safe harbor is available, the issuer would not be able to follow a generic solicitation of interest that used a general solicitation with an offering pursuant to an exemption that does not permit general solicitation, such as Rule 506(b), if the offerees contacted in connection with the Rule 506(b) offering were solicited by means of the general solicitation. Alternatively, an issuer that wanted to have the option to conduct an offering that does not permit general solicitation immediately following a generic solicitation of interest could "test-the-waters" using the proposed legend without using general solicitation, for example, by limiting its communications to potential investors with whom the issuer has a pre-existing substantive relationship or to direct contact by the issuer or its agents outside of a public offering effort.

We believe that the proposed exemption would be consistent with the protection of investors. As with the existing testing-the-waters provisions of Rule 163B and Regulation A, the anti-fraud provisions of the federal securities laws would apply to these generic solicitations

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for the purpose of conditioning the market in the United States for any of the securities being offered in reliance on Regulation S. Such an issuer would be subject to the proposed Rule 906 restrictions on resales. *See supra* Section II.A.2.

of interest.[143] In addition, 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 must comply with the exemption relied upon for the subsequent offering, and investors will have the benefit of the investor protections encompassed in such exemption. For example, if an issuer relies on proposed Rule 241 for a generic solicitation of interest and then opts to rely on Regulation A for the offering, the investors will receive the full disclosures required by Regulation A prior to the time of sale.

In addition to the information currently required to be disclosed under Regulation A and Regulation Crowdfunding, we are proposing to also require that the 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 solicitation.[144] We believe that making the solicitation materials publicly available would help to hold issuers accountable for the content of solicitation materials by making them subject to scrutiny by the potential investors and the public and, in the case of Regulation A, staff review and comment. It also would help to ensure that the solicitation information is consistent with the information contained in the Regulation A or Regulation Crowdfunding offering materials.

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143 *See, e.g.,* Section 17(a) of the Securities Act. *See also* Solicitations of Interest Release; and 2015 Regulation A Release.

144 *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).

We are also proposing an amendment to the information requirements in Rule 502(b) so that if the issuer sells securities under Rule 506(b) within 30 days of the generic solicitation of interest to any purchaser that is not an accredited investor, the issuer would be required to provide such purchaser with any written communication used under proposed Rule 241. Although this information would not be made publicly available, we believe that potential investors may benefit from the ability to compare the solicitation materials with the information being provided in the Rule 506(b) offering, which may help investors hold issuers accountable for any inconsistencies in such materials. We are not proposing that an issuer that subsequently opts to rely on any other exemption, including Rule 506(c), Rule 504, Rule 147, or Rule 147A, for the offering be required to file or provide to investors any materials used under proposed Rule 241, because such rules do not require issuers to file with the Commission any disclosure provided to investors or distinguish between accredited and non-accredited investors for disclosure purposes.

We are not proposing to limit the types of investors that may be solicited under proposed Rule 241. While Securities Act Section 5(d) and Rule 163B only permit the use of testing-the-waters communications with QIBs and IAIs, Regulation A permits such communications with all investor types. We believe that limiting the communications under the proposed exemption to QIBs and IAIs would undermine the intent of the exemption, which is to allow issuers to gauge market interest in a potential exempt offering. Unlike registered offerings, there is likely to be relatively limited institutional investor interest in many types of exempt offerings, particularly those that rely on general solicitation. In addition, small or emerging businesses are likely to face challenges in attracting significant institutional investor interest, either directly or through an underwriter or other intermediary. Thus, limiting this accommodation to institutional investors would significantly undermine its utility.

We are also not proposing to provide for the preemption of state securities law registration and qualification requirements for offers made under proposed Rule 241. Section 18 of the Securities Act generally provides for preemption of state law registration and qualification requirements for "covered securities,"[145] and the Commission has previously used its authority under the Securities Act to define such term. In connection with the 2015 amendments to Regulation A, the Commission determined that preemption of state securities law registration and qualification requirements is appropriate for purchasers in Tier 2 offerings, and defined "qualified purchaser" to include any person to whom securities are offered or sold in a Tier 2 offering.[146] However, in light of concerns raised in connection with the Regulation A amendments 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, the Commission did not include offerees in Tier 1 offerings in the definition of "qualified purchaser."[147] We preliminarily believe that similar concerns would exist with respect to the proposed generic solicitation of interest exemption.

b. Regulation Crowdfunding

An issuer currently may not make offers or sales under Regulation Crowdfunding prior to filing a Form C with the Commission.[148] Commenters on the Concept Release expressed

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145 *See* 15 U.S.C. 77r(c). Section 18(c) of the Securities Act preserves general anti-fraud authority for state securities law regulators.

146 *See* 17 CFR 230.256; and 2015 Regulation A Release, at text accompanying note 799.

147 *See* 2015 Regulation A Release, at text accompanying note 798.

148 *See* Section 4A(b) of the Securities Act.

support for permitting testing-the-waters in advance of an offering under Regulation Crowdfunding.[149] These commenters indicated that prohibiting testing-the-waters under Regulation Crowdfunding restricts issuers' ability to adequately gauge interest in an offering, before incurring the expense of preparing a Form C.[150]

Some commenters supported permitting testing-the-waters under Regulation Crowdfunding, subject to certain restrictions on the means by which such communications were provided to investors, the content of such communications, and the way in which such communications were included in an issuer's public filings.[151] Two of these commenters supported allowing testing-the-waters if such communications were only conducted through an intermediary's platform.[152] Another commenter suggested that testing-the-waters materials should be required to direct investors to the funding portal (or broker-dealer) for more

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149 *See* CrowdCheck Letter; CCA Letter; letter from Wefunder dated September 13, 2019 ("Wefunder Letter"); letter from MainVest, Inc. dated September 24, 2019 ("MainVest Letter"); letter from Republic dated September 24, 2019 ("Republic Letter"); letter from Jade Barker dated September 24, 2019; letter from Association of Online Investment Platforms dated July 5, 2019 ("AOIP Letter"); letter from Indemnis et al. dated September 24, 2019 ("Indemnis et al. Letter"); letter from Andrew A. Schwartz dated September 24, 2019 ("A. Schwartz Letter"); Letter from Christian Bilger dated September 30, 2019 ("C. Bilger Letter"); letter from Patrick McHenry, U.S. Representative, dated October 15, 2019 ("Rep. McHenry Letter"); and Silicon Prairie Letter.

150 *See*, *e.g.*, Wefunder Letter (describing the fact that issuers are currently required to spend "over $10,000" to prepare for a Regulation Crowdfunding offering, without clarity on the investor interest in the offering); MainVest Letter (suggesting that testing-the-waters would allow issuers to more accurately "assess the markets appetite and valuing of their business"); Republic Letter (stating that, under the current rules, "companies cannot assess investor interest in their offering before having to commit the time and expense necessary to conduct a Reg. CF offering"); Indemnis et al. Letter (stating that the current rules prohibit issuers from gaining "any real insight into the likelihood of success"); C. Bilger Letter (arguing that testing-the-waters would allow issuers "to assess the support and project feasibility before [making a] costly Reg CF filing"); and AOIP Letter (suggesting that permitting testing-the-waters would save issuers both time and money).

151 *See*, *e.g.*, CrowdCheck Letter; Wefunder Letter; Republic Letter; and Silicon Prairie Letter.

152 *See* Republic Letter; and Indemnis et al. Letter.

information on the offering.[153] In addition, several commenters suggested that testing-the-waters materials should be filed with the Commission on Form C.[154]

We are proposing 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.[155] Consistent with the views of commenters, we believe that permitting such 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 exemption, as well as limit the costs incurred by issuers. As noted above with respect to the proposed generic testing-the-waters provision, we believe that the flexibility afforded by the amendment would benefit investors, who would potentially have input into the structuring of the offering and be able to convey to the issuer the types of information about which they are most interested, leading ultimately to a lower cost of capital for the issuer.

Under proposed Rule 206, issuers would be permitted to test-the-waters with all potential investors. These testing-the-waters materials would be considered offers that are subject to the antifraud provisions of the federal securities laws. Like Rule 255, proposed Rule 206 would require issuers to include certain legends in the testing-the-waters materials. The legends would provide that: (1) no money or other consideration is being solicited, and if sent, will not be accepted; (2) no sales will be made or commitments to purchase accepted until the

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153 *See* CCA Letter.

154 *See* Wefunder Letter (suggesting that testing-the-waters materials should be filed as a partially complete Form C); CrowdCheck Letter (suggesting that testing-the-waters materials should be included as part of Form C when the final Form C is filed); and Silicon Prairie Letter (suggesting that tombstone advertisements should be separately filed on EDGAR).

155 We are also proposing an amendment to Rule 204 to permit issuers to engage in communications under proposed Rule 206.

Form C is filed with the Commission and only through an intermediary's platform; and (3) a prospective purchaser's indication of interest is non-binding.

Under proposed Rule 201(z), issuers would be required to include any Rule 206 solicitation materials as an exhibit to the Form C that is filed with the Commission.[156] As noted above, we believe that making the solicitation materials publicly available would promote accountability for the content of those 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, issuers under proposed Rule 206 could only use testing-the-waters materials 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. We believe this is appropriate because, while sales under Regulation A may not occur until after the offering statement is qualified, a Regulation Crowdfunding offering commences upon filing of the Form C.

In addition, under the proposed rule, an issuer that makes use of proposed Rule 241's generic testing-the-waters materials and then opts to rely on Regulation Crowdfunding for an offering within 30 days of the most recent generic testing-the-waters materials would be required to file the generic solicitation materials as an exhibit to the Form C. We are proposing to require filing of the 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 any subsequent offer or sale in accordance with the proposed safe harbor of Rule 152(b)(1).

[156] *See* Proposed Rule 201(z).

c. Regulation A

As discussed above, we are proposing to amend Form 1-A's exhibit requirements to require an issuer that uses proposed Rule 241 to conduct a generic solicitation of interest and then opts to rely on Regulation A for its offering within 30 days of the most recent generic solicitation communication to file the generic solicitation materials as an exhibit to the Form 1-A.

d. Regulation D

Similarly, we are proposing to amend Rule 502(b)(2)(viii) to require an issuer that uses proposed Rule 241 to conduct a generic solicitation of interest and then opts to rely on Rule 506(b) within 30 days of the most recent generic solicitation communication and sells securities to any purchaser that is not an accredited investor, to provide the generic solicitation materials to such purchaser a reasonable time prior to sale. As discussed above, we believe potential investors may benefit from the ability to compare the solicitation materials with the information being provided in the Rule 506(b) offering.

Request for Comment

24. Should we, as proposed, permit generic solicitations of interest in advance of an exempt offering of securities under any exemption from registration? Are there any investor protection concerns with doing so? Should we limit the ability to provide testing-the-waters materials to IAIs and QIBs?
25. Should we, as proposed, require filing of the generic solicitation materials as an exhibit to the Form C in a subsequent Regulation Crowdfunding offering, or with the Form 1-A in a subsequent Regulation A offering? Should we instead require the generic solicitation materials to be either filed with Form C or Form 1-A, or filed separately on EDGAR?

Should we, as proposed, limit the filing requirement to offerings that commence within 30 days of the most recent generic test-the-waters communication? Should we instead impose the filing requirement irrespective of the timing of the subsequent offering or for some alternative timeframe?

26. Should we, as proposed, require an issuer to provide the generic solicitation materials to non-accredited investors in a subsequent Rule 506(b) exempt offering if such Rule 506(b) offering is within 30 days of the generic solicitation? Should we require such materials to be provided to the Commission? Should we require such material to be provided to investors or the Commission even outside of the 30-day period proposed?
27. Should we require an issuer that uses generic solicitation materials and subsequently relies on Rule 506(c), Rule 504, Rule 147, Rule 147A, or an exemption other than Regulation A, Regulation Crowdfunding, or Rule 506(b) within 30 days to provide the generic solicitation materials to such investors? Should we require such materials to be provided to the Commission? Should we require such material to be provided to investors or the Commission even outside of the 30-day period proposed?
28. Should we, as proposed, amend Regulation Crowdfunding to permit testing-the-waters for a Regulation Crowdfunding offering, similar to the current testing-the-waters provision of Regulation A? Should we impose additional restrictions on the manner or content of such communications? For example, should we permit testing-the-waters in Regulation Crowdfunding only if any such communications are only conducted through an intermediary's platform, or only if the testing-the-waters materials are required to direct investors to the funding portal (or broker-dealer) for more information on the offering?

29. As proposed, the rules would not preempt state securities law registration and qualification requirements for offers made under the proposed Rule 241 exemption. Should we adopt Rule 241 as proposed? Would the lack of state preemption make it less likely that issuers will use proposed Rule 241? If so, should we preempt state securities law registration and qualification requirements for offers made under the proposed Rule 241 exemption? If not, should we limit preemption to materials provided to accredited investors or QIBs and IAIs?
30. Should we permit testing-the-waters communications to continue following the filing of the Form C with the Commission in a Regulation Crowdfunding offering?

3. Other Regulation Crowdfunding Offering Communications

Under Rule 204 of Regulation Crowdfunding, an issuer may not advertise the terms of a Regulation Crowdfunding offering outside of the intermediary's platform except in a notice that directs investors to the intermediary's platform and includes no more than the following information:

- 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, which means the amount of securities offered, the nature of the securities, the price of the securities, and the closing date of the offering period; and
- Factual information about the legal identity and business location of the issuer, limited to the name of the issuer of the security, the address, phone number, and website of the issuer, the e-mail address of a representative of the issuer, and a brief description of the business of the issuer.[157]

[157] *See* Rule 204.

Although advertising the terms of the offering other than through the intermediary's platform is limited to a brief notice, an issuer may communicate with investors and potential investors about the terms of the offering through communication channels provided on the intermediary's platform. An issuer must identify itself as the issuer, and persons acting on behalf of the issuer must identify their affiliation with the issuer, in all communications on the intermediary's platform.[158]

Commenters have expressed uncertainty as to whether they may orally communicate with potential investors outside of the intermediary's platform once the Form C is filed. According to these commenters, the current requirements of Regulation Crowdfunding make it unclear if an issuer can discuss an ongoing offering at start-up pitch events, in person at the issuer's business, or in the issuer and investor communities, and if so, to what extent.[159]

We are proposing to amend Rule 204 to state that oral communications with prospective investors are permitted once the Form C is filed, so long as the communications comply with the requirements of Rule 204.[160] We believe that this amendment to Rule 204 would be appropriate because it would provide Regulation Crowdfunding issuers with certainty as to the acceptable form and content of communications with potential investors, which may make the exemption more attractive to issuers, while providing potential investors with the protections

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158 *See* Rule 204(c).

159 *See* CrowdCheck Letter (suggesting that issuers should be permitted to discuss directly with prospective investors at start-up pitch events); MainVest Letter (suggesting that the current framework prohibits issuers "with brick and mortar locations" from discussing the offering with customers, and potential investors, who come into the issuer's business with questions about the offering); C. Bilger Letter (indicating that the current restrictions are "unreasonable" and "unrealistic" as "[m]ost investment through Reg CF offerings occurs between issuers and investors that have a pre-existing relationship or are geographically proximate to one another," and further suggesting that "[i]nvestors should be encouraged to pursue multiple channels of investment due diligence (completely separate from a funding portal), including onsite inspection of the issuer's business and personal interview of the issuer's management"); and Wefunder Letter ("Due to legal ambiguity, some lawyers recommend that issuers do not speak with potential investors face-to face.").

160 For our proposals regarding communications prior to the filing of a Form C, *see supra* Section II.B.2.

afforded by Rule 204. These proposed changes would also align the Regulation Crowdfunding communication rules more closely with Rule 255 of Regulation A.

Request for Comment

31. Should we allow for oral communications about the offering outside of the funding portal's platform channels, as proposed? If so, what would be the benefits of allowing more communications? Should we impose any additional requirements to address investor protection concerns?

32. Should we expand the types of information considered to be the terms of the offering for purposes of Rule 204? For example, should we amend the definition of "terms of the offering" to include information about the planned use of proceeds of the offering or about the issuer's progress toward meeting its funding target? Should we amend Rule 204 to allow for oral communications pertaining to any disclosure required by Rule 201 that is included in the filed Form C? Alternatively, should an issuer that uses advertising that includes the terms of the offering be permitted to include additional information, such as information about the planned use of proceeds of the offering or the issuer's progress toward meeting its funding target, even if such information is not included within the definition of the "terms of the offering"? Are there other steps we should take to clarify the advertising restrictions in Rule 204?

33. In light of proposed Rule 152(a)(2), which concerns the integration of concurrent exempt offerings permitting general solicitation, should we amend Rule 204 of Regulation Crowdfunding to permit an issuer to disclose the material terms of a concurrent offering made in reliance on Regulation Crowdfunding in a Regulation A offering statement or a

Securities Act registration statement filed with the Commission? Are any revisions needed to Regulation A to permit such disclosures?

C. Rule 506(c) Verification Requirements

As discussed above, 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.[161]

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.[162] 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.[163]

The Commission included the non-exclusive list of verification methods for natural persons in Rule 506(c) in response to comments requesting more certainty, but expressly stated that issuers are not required to use any of the specified methods and may rely on the principles-

161 *See* Rule 501 (Definitions and terms used in Regulation D); Rule 502(a) (Integration); and Rule 502(d) (Limitations on Resales).

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

163 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.

based approach to comply with the verification requirement.[164] However, the structure of Rule 506(c)'s verification requirement, with its prominent description of several non-exclusive verification methods, may be creating uncertainty for issuers and inadvertently encouraging issuers (or those acting on their behalf) to rely only on the non-exclusive list.

Commenters on the Concept Release expressed concerns regarding the costs and burdens of the "reasonable steps to verify" requirement. For example, one commenter stated that some issuers may be concerned about the added cost of capital represented by the fees charged by third party verification services.[165] Some commenters also expressed concern about the difficulty of determining the appropriate levels of verification of the accredited investor status of purchasers and the impact on investor privacy.[166] Other commenters stated that issuers may be focusing on compliance with the non-exclusive list of methods and that may be driving away potential investors who are wary of turning over financially sensitive information, such as tax returns or brokerage statements, to the issuer for verification.[167] Some commenters further noted that some platforms and intermediaries involved in the verification process do not use all of the methods of verification included in the non-exclusive list of Rule 506(c), and, as a result, some accredited investors have been excluded from offerings.[168]

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[164] *See* Rule 506(c) Adopting Release, at Section II.B.3.

[165] *See* CrowdCheck Letter.

[166] *See* CCMC Letter; and letter from Jor Law dated July 10, 2019. *See also* 2020 Transcript of Small Business Advisory Committee, at 173–174 (discussing verification methods and concerns surrounding investor privacy).

[167] *See* IPA Letter; and letter from Wyrick Robbins Yates & Ponton LLP dated September 17, 2019 ("Wyrick Robbins Letter") ("Our experience tells us that sophisticated funds and/or high net-worth angel investors are very much reluctant to share sensitive financial information, whether about themselves or their limited partners. Issuers are often reluctant to ask for such information as well, particularly where the net worth of the prospective investor is not in material doubt.").

[168] *See* CrowdCheck Letter (noting that "not all platforms and intermediaries are set up to accept all the forms of verification included in the safe harbors for 506(c)"). *See also* AngelList Letter (noting conflicting

Some commenters on the Concept Release suggested eliminating the verification requirement altogether.[169] One commenter suggested eliminating the verification requirement for offerings that involve a placement agent, investment adviser or other regulated institution to act as a gatekeeper.[170] Other commenters recommended self-certification as a reasonable method to establish and verify accredited investor status.[171] Another commenter suggested adding a verification method based on a high minimum investment amount to the non-exclusive list of verification methods.[172]

We are proposing to add a new item to the non-exclusive list in Rule 506(c) that would allow an issuer to establish that an investor for which 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 to that effect and the issuer is not aware of information to the contrary. We believe that this new method would reduce the cost and burden of verification for issuers that may opt to engage in more than one Rule 506(c) offering over time. Investors' privacy concerns may also be alleviated, because they would not be asked to repeatedly provide financially sensitive information to the issuer, while the risk of investor harm would be mitigated by the pre-existing relationship between the issuer and such investor.

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interpretations and uncertainty among issuers' counsel regarding verification of smaller private funds that meet the definition of "accredited investor" under Rule 501(a)(8) because each equity investor is accredited).

169 *See* SIFMA Letter.

170 *See* NYSBA Letter.

171 *See* IPA Letter. *See also* letter from Joseph L. Schocken dated September 24, 2019 ("J. Schocken Letter").

172 *See* Wyrick Robbins Letter.

In addition, in light of the comments received, we believe it would be helpful to reaffirm and update 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. We believe that this additional information may lessen 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 encourage more issuers to rely on additional verification methods tailored to their specific facts and circumstances. This in turn may help reduce the costs and privacy concerns associated with the current non-exclusive list.

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.[173] 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

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

- 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.[174]

We are not proposing to codify the list of factors that the Commission has previously identified as being among those an issuer should consider when using the principles-based method of verification. While we believe that this list of factors remains appropriate, there is no exclusive list of factors to be considered.

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 available

[174] *See id.* at Section II.B.3.a. In that release, the Commission stated that "[a]fter consideration of the facts and circumstances of the purchaser and of the transaction, the more likely it appears that a purchaser qualifies as an accredited investor, the fewer steps the issuer would have to take to verify accredited investor status, and vice versa. For example, if the terms of the offering require a high minimum investment amount and a purchaser is able to meet those terms, then the likelihood of that purchaser satisfying the definition of accredited investor may be sufficiently high such that, absent any facts that indicate that the purchaser is not an accredited investor, it may be reasonable for the issuer to take fewer steps to verify or, in certain cases, no additional steps to verify accredited investor status other than to confirm that the purchaser's cash investment is not being financed by a third party." *Id*. In addition, the Commission stated that the means through which the issuer publicly solicits purchasers may be relevant in determining the reasonableness of the steps taken to verify accredited investor status. For example, "[a]n issuer that solicits new investors through a website accessible to the general public, through a widely disseminated email or social media solicitation, or through print media, such as a newspaper, will likely be obligated to take greater measures to verify accredited investor status than an issuer that solicits new investors from a database of pre-screened accredited investors created and maintained by a reasonably reliable third party." *Id.*

to it about the investor or has information that does not support the view that the investor was an accredited investor.[175]

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34. We note that the vast majority of Regulation D issuers continue to raise capital through Rule 506(b) offerings. Are issuers hesitant to rely on Rule 506(c) (as suggested by the data on amounts raised under that exemption[176]) as compared to other exemptions? If so, why? Is the requirement to take reasonable steps to verify accredited investor status having an impact on the willingness of issuers to use Rule 506(c)?

35. Should we provide an additional method of verification, as proposed, that would allow an issuer to establish that an investor that the issuer has previously verified remains an accredited investor as of the time of sale, so long as the investor provides a written representation to that effect to the issuer and the issuer is not aware of information to the contrary? If so, should we impose a time limit on this method of verification, and if so, how long should that time limit be?

36. Is additional guidance for reasonable steps needed? Would further guidance provide more clarity? Should we eliminate the requirement to take reasonable steps to verify accredited investor status in specified circumstances? If so, which circumstances? Should the verification requirements be eliminated altogether, as suggested by some commenters? Would legislative changes be necessary or helpful?

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175 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.

176 *See supra* Section I.B.1.

37. Should we consider rescinding the non-exclusive list of reasonable verification methods? Should we consider mandating the items on the list as the exclusive methods for verification?
38. Are there additional or alternative verification methods that we should include in the non-exclusive list of reasonable verification methods that would make issuers more willing to use Rule 506(c) or would better address investor protection? For example, should we provide a non-exclusive list of reasonable verification methods that would apply to the verification of an entity's accredited investor status? Should we add as a specific verification method for either natural persons or entities with investments of a large minimum amount, accompanied by written confirmation that investment is not financed by a third party? If so, what minimum investment amount would be appropriate for natural persons or for IAIs?
39. The Commission has proposed to amend the definition of accredited investor to include new categories of natural persons and institutions.[177] Are there additional verification methods that we should include in the non-exclusive list of reasonable verification methods in light of these proposed changes?

D. Harmonization of Disclosure Requirements

We are proposing amendments to the financial statement information requirements in Regulation D to align them with the disclosure requirements in Regulation A. Currently, when non-accredited investors are participating in an offering under Rule 506(b), the issuer conducting the offering must furnish specified financial statement information, along with non-

[177] *See* Amending the "Accredited Investor" Definition. Release No. 33-10734 (Dec. 18, 2019) [85 FR 2574] (Jan. 15, 2020) ("Accredited Investor Definition Proposing Release").

financial information, to 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.[178] Similarly, issuers conducting offerings pursuant to Regulation A are required to provide certain financial statement and non-financial information to investors. The financial statement information requirements in Regulation D, however, differ from those in Regulation A. This difference results in many cases in an issuer being required to provide financial statements in a Rule 506(b) offering that are more burdensome to prepare than the financial statements that would be required in a Regulation A offering of comparable size.

We are also proposing to simplify the requirements for Regulation A and establish greater consistency between Regulation A and registered offerings by permitting Regulation A issuers to: (a) file certain redacted exhibits using the simplified process previously adopted for registered offerings and Exchange Act filings;[179] (b) make draft offering statements and related correspondence available to the public via EDGAR to comply with the requirements of Securities Act Rule 252(d), rather than requiring them to be filed as exhibits to qualified offering statements; (c) incorporate financial statement information by reference to other documents filed on EDGAR; and (d) to have post-qualification amendments declared abandoned. In particular, the exhibit requirements for registered and Regulation A offerings were previously aligned, but have diverged due to subsequent rule changes, while the expansion of the incorporation by reference provision in Form 1-A allows for the further alignment of Form 1-A with the Form S-1 registration statement. Furthermore, in light of the Supreme Court

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[178] *See* Rule 502(b)(2)(v).

[179] *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 Section II.A.2.

decision in *Food Marketing Institute v. Argus Leader Media*,[180] we are also proposing to revise the standard used throughout our rules that allow redaction of information from certain exhibits, as adopted in the FAST Act Modernization Release.

1. Rule 502(b) of Regulation D

We are proposing to amend the financial information requirements in Rule 502(b) for Regulation D offerings by non-reporting companies that include non-accredited investors to align with the disclosure required in offerings pursuant to Regulation A. Specifically, for Regulation D offerings of up to $20 million in securities, issuers would no longer be required to comply with the requirements of paragraph (c) of Part F/S of Form 1-A and provide audited financial statements and would be required to comply with the requirements of paragraph (b) of part F/S of Form 1-A, which applies to Tier 1 Regulation A offerings. For Regulation D offerings of greater than $20 million in securities, issuers would be required to provide audited financial statements and comply with the requirements of Regulation S-X similar to Tier 2 Regulation A offerings.[181] Rule 506(b) limits the number of non-accredited investors that may participate in a Regulation D offering to 35, and we estimate that in 2019 fewer than 5 percent of Rule 506(b) offerings included non-accredited investors.[182] We believe that by aligning the disclosure requirements in Rule 502(b) with those in Regulation A, additional issuers may be

180 *See* 139 S.Ct. 2356 (2019).

181 For the sake of clarity, we are not proposing that issuers must comply with the other ongoing non-financial statement disclosure requirements in Tier 2 Regulation A offerings, and this proposal is limited only to harmonization of the financial statement disclosure requirements outlined in the offering circular itself.

182 *See supra* note 94 (estimating that, in 2019, only 4.45 percent of Rule 506(b) offerings by issuers other than pooled investment funds included non-accredited investors). Based on available data, issuers reported non-accredited investors as participating in only six percent of Rule 506(b) offerings in each of 2015, 2016, 2017, and 2018. *See* Concept Release, at Section II.

willing to include non-accredited investors in their offerings pursuant to Rule 506(b), which would expand investment opportunities for those investors.

Currently, when non-accredited investors are participating in an offering pursuant to Rule 506(b), the issuer conducting the offering must furnish to non-accredited investors the information required by Rule 502(b)[183] a reasonable time prior to the sale of securities and provide those investors with the opportunity to ask questions and receive answers about the offering.[184] The information required to be furnished to non-accredited investors is limited to information that is material to an understanding of the issuer, its business, and the securities being offered, and the examples of information that would satisfy this requirement vary depending on the size of the offering and the nature of the issuer.[185]

If the issuer is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, the issuer must furnish the non-financial statement information required by Part II of Form 1-A[186] (if the issuer is eligible to use Regulation A)[187] or Part I of a Securities Act registration statement on a form that the issuer would be eligible to use.[188]

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183 *See* Rule 502(b)(2)(i) through (vii).

184 *See* Rule 502(b)(2)(v). If an issuer limits participation in its Rule 506(b) offering to accredited investors, Rule 506(b) does not require the issuer to provide substantive disclosure to those accredited investors. However, if the issuer provides any additional information to accredited investors, the issuer shall furnish to any non-accredited purchaser a brief description in writing of any material written information concerning the offering that has been provided by the issuer to any accredited investor but not previously delivered to such non-accredited purchaser. *See* 17 Rule 502(b)(2)(iv). Issuers and funds conducting private accredited investor-only offerings pursuant to Rule 506(b) often provide all purchasers, including accredited investors, with information about the issuer in view of the antifraud provisions of the federal securities laws. *See* Note to Rule 502(b).

185 *See* Rule 502(b)(2)(i) through (vii).

186 17 CFR 239.90.

187 *See infra* Section II.F for a discussion of the Regulation A eligibility requirements.

188 *See* Rule 502(b)(2)(i)(A).

Table 7 summarizes the current financial statement requirements of Rule 502(b) for an issuer not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act.[189]

Table 7: Current Rule 502(b) Financial Statement Requirements (non-reporting issuer)

Offering Size	**Financial Statement Information Required**	**Age of Financial Statements**	**Audit Required**
Up to $2 million:	Information required in Article 8 of Regulation S-X	Balance sheet must be dated within 120 days of the start of the offering	Yes, but only the issuer's balance sheet must be audited
Up to $7.5 million:	Audited financial statement information required in Form S-1 for smaller reporting companies	Balance sheet must be dated within 120 days of the start of the offering	Yes, but if an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet must be audited
Over $7.5 million:	Audited financial statement information that would be required in a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.	Balance sheet must be dated within 120 days of the start of the offering	Yes, but if an issuer other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet must be audited

If the issuer is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, the issuer must furnish to investors either:

189 *See* Rule 502(b)(2)(i)(B). A foreign private issuer, as defined in 17 CFR 230.405 that is eligible to use Form 20-F [17 CFR 249.220f] must disclose the same kind of information required to be included in an Exchange Act registration statement on a form that the issuer would be eligible to use. The financial statements must be audited only to the extent that such information would be required to be audited under Rule 502(b) for issuers not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act. *See* Rule 502(b)(2)(i)(C).

- Its annual report to shareholders for the most recent fiscal year[190] and the definitive proxy statement filed in connection with that annual report;[191] or
- The most recently filed annual report on Form 10-K[192] or registration statement.[193]

The financial statement information that an issuer must provide to non-accredited investors participating in an offering pursuant to Rule 506(b) is broadly similar to the disclosure required under Regulation A.[194] Table 8 summarizes the financial information issuers conducting a Regulation A offering are required to provide under Part F/S of Form 1-A.

Table 8: 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’	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

190 The annual report must meet the requirements of Rules 14a-3 or 14c-3 under the Exchange Act (17 CFR 240.14a-3 or 17 CFR 240.14c-3).

191 *See* Rule 502(b)(2)(ii)(A). If requested by the purchaser in writing, the issuer must also provide a copy of the issuer’s most recent Form 10-K [17 CFR 249.310] under the Exchange Act.

192 17 CFR 249.310.

193 The registration statement may be a registration statement on Form S-1 [17 CFR 239.11], Form S-11 [17 CFR 239.18], or Form 10 [17 CFR 249.10], or for foreign private issuers, Form 20-F [17 CFR 249.220f.] or Form F-1 [17 CFR 239.31]. *See* Rule 502(b)(2)(ii)(B). In addition, the issuer must provide any information required to be filed by the issuer since the distribution or filing of the report or registration statement and a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer’s affairs that are not disclosed in the documents furnished. *See* Rule 502(b)(2)(ii)(C).

194 *See* Rule 251(a)(1).

Offering Size	Financial Statement Information Required	Age of Financial Statements	Audit Required
	equity of the issuer; and Financial statements of guarantors and 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):	Audited 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

* Interim financial statements for a Tier 2 Regulation A offering need not be audited and may comply with the same timing and age requirements as those provided in connection with Tier 1 Regulation A offerings. *See* paragraph (c) in Part F/S of Form 1-A [17 CFR 239.90].

In the Concept Release, the Commission requested comment on both the current information requirements in Rule 506(b) and the financial information requirements in Rule 502(b). Specifically, the Commission asked if it should align the requirements in Rule 502(b) with those of another type of exempt offering, or consider eliminating or scaling the financial information requirements. In response, several commenters stated that the financial statement requirements of Rule 502(b) are generally overly burdensome to issuers and provided a range of suggestions for revising the requirements. Specifically, one commenter stated that the disclosure requirements "result in zero non-Accredited Investors being able to participate" in private offerings and suggested a general "downward adjustment" in such requirements.[195] This sentiment was echoed by several other commenters, one of whom said that the "information requirements for non-accredited investors frequently deter issuers from allowing such investors to participate in exempt offerings," while another highlighted the "risk and uncertainty" of attempting to comply with such disclosure requirements.[196] A few commenters noted that the disclosure requirements in Rule 502(b) are "burdensome."[197]

Some commenters stated that the Commission should consider scaling the disclosure requirements depending on the amount of securities being offered, eliminating or scaling the information requirements to the extent that non-accredited investors are advised by a financial professional affiliated with a registered broker-dealer or employed by a registered investment adviser, and/or modifying the information requirement for early stage issuers, similar to the scaled disclosure requirement available to smaller reporting companies in registered offerings.[198] One commenter stated that overall financial disclosure and reporting requirements

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195 *See* Letter from Island Mountain Development Group dated September 24, 2019.

196 *See* CoinList Letter; and AngelList Letter. *See also* letter from Rosebud Economic Development Corporation dated September 24, 2019; Davis Polk Letter; and letter from Ropes & Gray LLP dated September 24, 2019. Further, another commentator highlighted "issuers' justifiable fear of exposing themselves to the risk of liability if required to provide specific information to purchasers, and . . . the substantial professional service fees related to providing information disclosures," as reasons for the lack of non-accredited investor participation in offerings. *See* letter from Robert Anderson, Samantha Prince, John Neil Conkle, and Sarah Zomaya dated September 24, 2019. Yet another commenter highlighted the substantial cost to issuers of preparing a Rule 506(b) disclosure document for an offering including even a single non-accredited investor. *See* letter from Joe Wallin et al. dated September 23, 2019.

197 *See* Letter from the Committee on Capital Markets Regulation dated September 19, 2019; and letter from Iownit Capital Markets, Inc. dated September 24, 2019 ("Iownit Letter").

198 *See* NYSBA Letter; and ABA Letter.

should reflect the type of company and size and type of offering, such that small issuers conducting smaller offerings would not be held to the same standard as larger companies raising larger amounts of capital.[199] A few commenters suggested harmonizing the Rule 502(b) disclosure requirements for non-accredited investors with those in Form 1-A for offerings exempt from registration pursuant to Regulation A.[200]

Conversely, one commenter supported requiring mandatory disclosures in offerings under Rule 506 to both accredited and non-accredited investors.[201] Another commenter suggested that the information requirements in Rule 506(b) should be privately negotiated and indicated that, with respect to non-accredited investors, the information requirements have not caused "significant problems."[202]

After considering the comments received, we are proposing to amend Rule 502(b)'s requirements governing the financial information that non-reporting companies must provide non-accredited investors participating in Regulation D offerings to align with the financial information that issuers must provide investors in Regulation A offerings.[203] For offerings of $20 million or less, 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, Rule 502(b)(2)(i)(B)(*2*) would refer issuers to paragraph (c) of part F/S of Form 1-A,

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199 *See* AOIP Letter.

200 *See* CrowdCheck Letter; and letter from Bybel Rutledge LLP, dated September 24, 2019.

201 *See* Letter from Xavier Becerra, California Attorney General, et al., dated September 24, 2019 ("State Attorneys General Letter").

202 *See* Letter from The Heritage Foundation, dated September 24, 2019.

203 We are not proposing to amend the current Rule 502(b) disclosure requirements with respect to issuers that are subject to the reporting requirements of the Exchange Act because the required information is generally already prepared by the issuer and available in order to comply with its Exchange Act reporting obligations and the disclosure of such information in connection with a Rule 506(b) offering is a negligible burden.

which applies to Tier 2 Regulation A offerings. This amendment would have the effect of eliminating the current Rule 502(b) provisions that permit an issuer, other than a limited partnership, that cannot obtain audited financial statements without unreasonable effort or expense, to provide only the issuer's audited balance sheet.[204]

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.[205] The foreign private issuer would be permitted to provide financial statements prepared in accordance with either U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). For business combinations and exchange offers, we are proposing that an issuer that is not an Exchange Act reporting company would provide financial statements consistent with the Regulation A requirements.

We believe the proposed information requirements would appropriately provide investors with material financial disclosure about the issuer, enabling informed investment decisions. We acknowledge that Tier 1 of Regulation A limits the sum of all cash and other consideration to be received for the securities being offered plus the gross proceeds for all securities sold pursuant to other offering statements within the 12-month period before the start of and during the current Regulation A offering, which differs from Regulation D because it

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[204] *See* Rule 502(b)(2)(i)(B)(2) and (3).

[205] *See* proposed Rule 502(b)(2)(B). The term "foreign private issuer" means any foreign issuer, other than a foreign government, that does not meet the following criteria 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.

does not include any such lookback period.[206] However, aligning the financial statement information requirements in Rule 502(b) with those in Regulation A would establish greater uniformity in the financial statement information requirements applicable to exempt offerings, permitting issuers to more readily prepare for a variety of types of exempt offerings and therefore avail themselves of the most appropriate exemption from Securities Act registration for their particular facts and circumstances, which may lower their cost of capital. Although the information disclosed pursuant to Rule 502(b) is not filed in a disclosure document with the Commission, the information disclosed is subject to the anti-fraud provisions of the federal securities laws and remains so under this proposal.

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40. Are the current financial statement information requirements in Rule 506(b) appropriate or should they be modified to align the information requirements contained in Rule 502(b) applicable to non-reporting companies with those of Regulation A, as proposed? How would aligning such requirements affect capital raising under Rule 506(b)? Would there be investor protection concerns regarding any reduction in information required to be provided to non-accredited investors? Should we retain the current Rule 502(b) provisions that permit an issuer, other than a limited partnership, that cannot obtain audited financial statements without unreasonable effort or expense, to provide only the issuer's audited balance sheet?
41. Should we allow the use of financial statements consistent with Regulation A in offerings by non-reporting foreign private issuers and in business combinations and exchanges by non-

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206 *See* Rule 251(a)(1).

reporting issuers, as proposed? Are there any unique considerations in these circumstances that would warrant a different approach?

42. Regulation Crowdfunding permits issuers to raise up to a maximum aggregate amount of $1,070,000 through crowdfunding offerings in any 12-month period, with financial statement requirements that vary based on the size of the offering. Should we consider aligning the Rule 502(b) financial information requirements for non-reporting issuers with those of Regulation Crowdfunding, or some combination of the requirements in Regulation A and Regulation Crowdfunding?
43. As proposed, non-reporting issuers conducting an offering of up to $20 million would be subject to the Regulation A Tier 1 financial information requirements, and issuers conducting an offering above that amount would be subject to the Regulation A Tier 2 financial information requirements. As an alternative, should we consider requiring issuers conducting offerings above $50 million or $75 million to comply with the financial information requirements applicable to smaller reporting companies under Article 8 of Regulation S-X?
44. Should we modify the Rule 502(b) financial information requirement in some other way? If so, how should it be amended?
45. Should we also amend the non-financial disclosure requirements in Rule 502(b)?
46. Should we, as proposed, retain the current Rule 502(b) disclosure requirements for Exchange Act reporting companies? If not, what should those requirements be?
47. Should the fact that Regulation A limits the amount of proceeds to be raised in a 12-month period before the start of and during an ongoing offering, while Regulation D does not include any such lookback period, impact the financial information requirements?

2. Confidential Information Standard

In March 2019, the Commission adopted amendments to several rules and forms that require registrants to file material contracts as exhibits to their disclosure documents.[207] The amendments in the FAST Act Modernization Release 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. 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[208] to define what information was confidential under Exemption 4 of the Freedom of Information Act ("FOIA"), which protects "trade secrets and commercial or financial information obtained from a person [if they are] privileged or confidential."[209]

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.[210] 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."[211] We are proposing to adjust our exhibit filing requirements as adopted in the FAST Act Modernization

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[207] *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).

[208] *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).

[209] 5 U.S.C. 552(b)(4).

[210] *Food Marketing Institute v. Argus Leader Media,* 139 S.Ct. 2356 (2019).

[211] *Id.* at 2366.

Release 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 which is also not material.[212] As discussed below, we are also proposing to use this new standard in the proposed exhibit requirements in Item 17 of Part III of Form 1-A.

Request for Comment

48. We are proposing to amend our rules and forms to replace the competitive harm standard with new language based on the Supreme Court's definition of "confidential." Are there other changes we should make to our rules and forms in light of the Supreme Court decision?

3. Proposed Amendments to Simplify Compliance with Regulation A

In our review of the exempt offering framework, we identified several areas where compliance with Regulation A is more complex or difficult than for registered offerings and may not lead to greater investor protection. We are proposing to simplify Regulation A by aligning it with the rules for registered offerings regarding the redaction of confidential information in material contracts, permitting draft offering statements to be made public on EDGAR, permitting incorporation by reference on Form 1-A, and permitting the declaration of a post-qualification amendment as abandoned. Because these changes would not reduce the disclosure available to investors, but would simply harmonize the requirements for Regulation

[212] We are proposing changes to the following rules and forms to update the standard: Item 601(b)(2) and (10) of Regulation S-K [17 CFR 229.601(b)(2) and (10)]; Form S-6 [17 CFR 239.16]; Form N-14 [17 CFR 239.23]; Form 20-F [17 CFR 249.220f]; Form 8-K [17 CFR 249.308]; Form N-1A [17 CFR 239.15A and 17 CFR 274.11A]; Form N-2 [17 CFR 239.14 and 17 CFR 274.11a-1]; Form N-3 [17 CFR 239.17a and 17 CFR 274.11b]; Form N-4 [17 CFR 239.17b and 17 CFR 274.11c]; Form N-5 [17 CFR 239.24 and 17 CFR 274.5]; Form N-6 [17 CFR 239.17c and 17 CFR 274.11d]; and Form N-8B-2 [17 CFR 274.12].

A offering statements with those already in effect for registered offerings, we do not believe there would be any negative implications for investor protection.

a. Redaction of Confidential Information in Certain Exhibits

We propose amending Item 17 of Form 1-A, which requires the filing of certain documents as exhibits to Regulation A disclosure documents,[213] to provide companies with the option to file redacted material contracts[214] and plans of acquisition, reorganization, arrangement, liquidation, or succession,[215] consistent with the recent amendments to Items 601(b)(2) and (10) of Regulation S-K. Companies would still have the option to file such exhibits pursuant to the existing confidential treatment application process, which would remain unchanged.

Currently, if a company wishes to redact immaterial confidential information included in a material contract or plan of acquisition, reorganization, arrangement, liquidation, or succession required to be filed as an exhibit to Regulation A disclosure documents, the company must apply for confidential treatment of that information. More specifically, the company must submit 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 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. Commission staff evaluates and grants or denies the request.

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213 The exhibit requirements in Forms 1-K (Item 8) and 1-SA (Item 4) require companies to file as exhibits to those forms the exhibits required by Form 1-A, except for the exhibits required by paragraphs 1, 12, and 13 of Item 17.

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

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

As described in Section II.D.2 above, in March 2019, the Commission amended several rules and forms to permit registrants to file redacted documents without applying for confidential treatment.[216] The rules currently 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.[217] Redacted exhibits are subject to compliance reviews by the staff. The process for filing redacted exhibits was not extended to Regulation A offerings at that time. As such, 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.

As proposed, a new instruction would be added to Item 17 of Form 1-A that would apply to paragraphs 6 and 7 of that item. This instruction would include similar procedures to the recent amendments to Items 601(b)(2) and (10) of Regulation S-K for filing redacted material contracts or plans of acquisition, reorganization, arrangement, liquidation, or succession. Commission staff would 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.[218] Upon request, companies would

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216 *See* 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).

217 17 CFR 229.601(b)(2) and (b)(10)(iv).

218 As noted in Section II.D.2 above, we are proposing to amend 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. We are proposing that the amended standard be patterned on the Supreme Court's language set out in *Food Marketing Institute*.

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 company both customarily and actually treats as private and confidential. Pursuant to Rule 83, companies would be permitted to request confidential treatment of this supplemental information while it is in the staff's possession. If the company's supplemental materials do not support its redactions, the staff may request that the company 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. After completing its review of the supplemental materials, the Commission or its staff would return or destroy them at the request of the company, as applicable.

Request for Comment

49. Should we amend the Regulation A exhibit filing requirements as proposed? Is there any reason not to extend this simplified confidential treatment application process to Regulation A issuers? Do our proposed amendments raise any investor protection concerns?

b. Amendment to Form 1-A Item 17.17(a) Requirement

We are proposing to amend Item 17.17(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 Securities Act Rule 252(d).

Today, 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.[219] Such issuers are also welcome to 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 publicly filed as an exhibit to a publicly filed offering statement at least twenty-one calendar days prior to the qualification of the offering statement.[220] Similarly, an EGC 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.[221] 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 EGCs 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.[222] We propose deleting paragraph (a) of paragraph 17 so that issuers would no longer be required to file the non-public offering statements and related amendments and correspondence as exhibits. Instead, Regulation A issuers would be permitted to make previously non-public documents available to the public on EDGAR using the same process as issuers conducting a

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[219] 17 CFR 230.252(d).

[220] Item 17, paragraph 17(a) of Form 1-A [17 CFR 239.90] and 17 CFR 230.252(d).

[221] Section 6(e)(1) of the Securities Act.

[222] See related announcement by the Division of Corporation Finance, Draft Registration Statements to be Submitted and Filed on EDGAR, Sept. 26, 2012, *available at* https://www.sec.gov/divisions/corpfin/cfannouncements/drsfilingprocedures.htm.

registered offering. We believe that this change would simplify the process of moving from a draft offering statement to a publicly filed document for issuers conducting Regulation A offerings, and would save both time and money for such issuers. In addition, because all previously submitted offering statements and related amendments and correspondence would be available to the public on EDGAR, rather than attached as exhibits to a given offering statement, this change should make it easier for investors to learn about the company and the Regulation A offering itself, furthering their ability to make informed investment decisions.

Request for Comment

50. Should we, as proposed, amend 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, rather than requiring issuers to file such documents as exhibits to a publicly filed offering statement?

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

We are proposing to permit issuers to incorporate previously filed financial statements by reference into a Regulation A offering circular. 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.[223] Specifically, General Instruction VII of Form S-1 permits registrants that meet certain eligibility standards[224] to

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223 *See* General Instruction VII to Form S-1 [17 CFR 239.11].

224 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)

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 Regulation S-X.[225] 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.[226]

In order to be able to incorporate previously filed financial statements by reference into an offering circular filed pursuant to Regulation A, we propose that, similar to the requirements in connection with Form S-1, issuers must satisfy several criteria. As proposed, issuers that have a reporting obligation under Rule 257 or the Exchange Act must be current in their reporting obligations. In addition, issuers would be required to make incorporated financial statements readily available and accessible on a website maintained by or for the issuer, and disclose in the offering statement that such financial statements will be provided upon request.[227]

Issuers conducting ongoing offerings would need to continue to file post-qualification amendments to Form 1-A annually to include the financial statements, either filed with such post-qualification amendment or incorporated by reference to a previously filed periodic or

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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.

225 *See* Item 12 to Form S-1 [17 CFR 239.11].

226 *See* General Rule (a) to Part F/S of Form 1-A [17 CFR 239.90].

227 General Instruction III(b) of Form 1-A [17 CFR 239.90] 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.

current report, that would be required to be included in a Form 1-A as of such date.[228] In addition, issuers would remain liable for such financial statements under Section 12(a)(2) of the Securities Act to the same extent as if they had been filed rather than incorporated by reference.

Several commenters on the Concept Release supported allowing incorporation by reference of the issuer's previously filed financial statements into the Form 1-A.[229] The ability to incorporate previously filed financial statement information by reference should decrease the existing filing burdens, allowing Regulation A issuers to more easily satisfy their ongoing disclosure requirements. In addition, although allowing incorporation by reference of previously filed financial statements into an offering circular in connection with offerings pursuant to Regulation A could increase the search time for potential investors as those investors would need to separately access the financial statements, we believe the impact of the proposal on investors would be mitigated by the ready availability of the information, particularly through the required hyperlink in the offering statement.

Request for Comment

51. Should we amend Form 1-A to allow incorporation by reference of an issuer's previously filed financial statements, as proposed? How would such an amendment affect investors? Would this cause any increase in costs for issuers, such as in connection with consent fees from auditors?

52. Should the ability to incorporate financial statements into an offering circular by reference to previously filed documents be conditioned on eligibility requirements, similar to those currently applicable to issuers using Form S-1, as proposed? Are there other eligibility

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[228] 17 CFR 230.252(f)(2)(i).

[229] *See* CoinList Letter; CrowdCheck Letter; and letter from Goodwin Procter LLP, dated September 24, 2019 ("Goodwin Letter").

requirements we should consider? Should the ability to incorporate by reference financial statements into an offering circular be limited to previously filed financial statements as proposed or extended to include forward incorporation by reference to future financial statements under Regulation A?

53. Should we allow forward incorporation by reference in Regulation A offerings? In order to forward incorporate Exchange Act reports into a registration statement on Form S-1, a smaller reporting company must be current in its reporting obligations by having filed an annual report for its most recently completed fiscal year and all required Exchange Act reports and materials during the 12 months immediately preceding the Form S-1 filing (or such shorter period that the smaller reporting company was required to file such reports and materials). The smaller reporting company must also make its incorporated Exchange Act reports and other materials readily available and accessible on a website maintained by or for the issuer, and disclose in the prospectus that such materials will be provided upon request. If we were to permit forward incorporation by reference in Regulation A offerings, should issuers be required to meet similar requirements? Should issuers using forward incorporation by reference still be required to file an annual post-qualification amendment to their Form 1-A to include updated financial statements as well as to reflect a fundamental change in the information set forth in the offering statement?

d. Amendment to Abandonment Provision of Regulation A

We are proposing 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 Rule 479,[230] the rule applicable to registered offerings.

[230] 17 CFR 230.479.

The current rule only permits the Commission to declare an offering statement abandoned, and we believe there are situations where it would be appropriate for the Commission to have the ability to declare a specific post-qualification amendment abandoned, instead of the entire offering statement. For example, we have observed some issuers attempting to use post-qualification amendments for separate classes of securities that are not otherwise being offered under the offering statement. If an issuer failed to qualify a post-qualification amendment for such a separate class, but otherwise was in compliance with all of its Regulation A obligations, we believe it would be appropriate for the Commission to have the ability 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.

Request for Comment

54. Should we, as proposed, amend Rule 259(b) to permit the Commission to declare a post-qualification amendment to an offering statement, abandoned, consistent with the rule applicable to registered offerings? Should we also provide notice to the issuer and a waiting period prior to declaring a post-qualification amendment abandoned, as is specified in Rule 479?

E. Offering and Investment Limits

As part of our broad review of the exempt offering framework, we examined the offering and investment limits established under Regulation A, Regulation Crowdfunding, and Rule 504 of Regulation D. These rules were developed with smaller issuers in mind to provide exemptions from Securities Act registration and ongoing Exchange Act reporting for securities offerings that comply with the respective exemptions. The exemptions set forth 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. While these rules were each developed to provide exemptive relief to smaller issuers, the exemptive limits vary considerably among the rules and may not reflect current capital raising trends.[231]

In the Concept Release, the Commission discussed Regulation A, Regulation Crowdfunding, and Rule 504 and requested comment on the rules generally and their respective exemptive limits.[232] In connection with that discussion, the Commission estimated that approximately $2.9 trillion of new capital was raised through exempt offering channels in 2018.[233] However, of this amount, less than $3 billion (0.1 percent) was raised under Regulation A, Regulation Crowdfunding, and Rule 504.[234] After considering the comments received, and based on our review of the current rules, we believe that increasing the offering and investment limits of these rules and better harmonizing the exemptions with each other could improve investor access to these markets and issuers' ability to raise capital. The following table summarizes the proposed changes to the offering and investor limits.

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231 The Commission's Office of the Advocate for Small Business Capital Formation noted in its 2019 Annual Report that companies are seeking increased capital to fund early-stage operations, noting for example that average seed funding increased from $1.3 million in 2010 to $5.7 million in 2018. *See* Annual Report for Fiscal Year 2019: Office of the Advocate for Small Business Capital Formation, *available at* https://www.sec.gov/files/2019_OASB_Annual%20Report.pdf.

232 *See* Concept Release, at Sections II.C, II.D, and II.F.

233 *See* Concept Release, at Section II.

234 *See* Table 2 of the Concept Release estimating the amounts raised under Regulation A ($736 million), Rule 504 ($2 billion), and Regulation Crowdfunding ($55 million). 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.

Table 9: Proposed Changes to Offering and Investment Limits

	Offering Limits		Investment Limits	
	Current Rules	**Proposed Rules**	**Current Rules**	**Proposed Rules**
Regulation A: Tier 1	$20 million	$20 million	None	None
Regulation A: Tier 2	$50 million	$75 million	Accredited investors: no limits Non-Accredited Investors: limits based on the greater of an income or net worth standard	Accredited investors: no limits Non-Accredited Investors: limits based on the greater of an income or net worth standard
Regulation Crowdfunding	$1.07 million	$5 million	All investors: limits based on the lesser of an income or net worth standard	Accredited investors: no limits Non-Accredited Investors: limits based on the greater of an income or net worth standard
Rule 504 of Regulation D	$5 million	$10 million	None	None

1. Regulation A

In 2015, the Commission adopted final rules to implement Section 401 of the JOBS Act by creating two tiers of Regulation A 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.[235] The Commission is required by Section 3(b)(5) of the Securities Act to review the Tier 2 offering limit every two years.

In the 2015 Regulation A Release, the Commission noted that some commenters suggested that the Commission raise the proposed $50 million Tier 2 offering limit to an amount above the statutory limit set forth in Section 3(b)(2); however, the Commission did not believe an increase was warranted at the time.[236] The Commission explained that, while Regulation A had existed as an exemption from registration for some time, the 2015 amendments were significant. Accordingly, the Commission believed that the 2015 amendments would provide for a meaningful addition to the existing capital formation options of smaller issuers while preserving important investor protections. The Commission also expressed concern about expanding the offering limit of the exemption beyond the level directly contemplated in Section 3(b)(2) at the outset of the adoption of the amendments.

Since adoption of the 2015 amendments, the Commission has continued to receive feedback on, and consider further enhancements to, Regulation A. For example, the 2017 and 2018 Small Business Forums recommended that the Commission increase the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million.[237] Similarly, a 2017 report by the Department of the Treasury also recommended that the Tier 2 offering limit be increased to $75 million.[238] In 2018, to implement changes mandated by Congress in the Economic Growth Act, the Commission amended Regulation A to permit Exchange Act

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235 *See* 2015 Regulation A Release. *See also supra* Section I.B.2.

236 *See* 2015 Regulation A Release, at text accompanying note 93.

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

238 *See* A Financial System That Creates Economic Opportunities - Capital Markets (October 2017), *available at* https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf ("2017 Treasury Report").

reporting companies to rely on the exemption.[239] Most recently, in the Concept Release, the Commission requested comment on whether to increase the Regulation A offering limit. Comments were mixed, with some commenters supporting an increase in the offering limit[240] and others opposing an increase.[241]

Our Divisions of Corporation Finance and Economic and Risk Analysis conducted a 2020 Regulation A Lookback Study and Offering Limit Review Analysis ("2020 Regulation A Review") as required by the 2015 Regulation A Release.[242] The 2020 Regulation A Review takes into consideration Regulation A market activity from the 2015 amendments through December 2019; public comment following the 2015 amendments and the Concept Release; and evidence from industry reports, the Small Business Forums, and other public sources. During this period, $2.4 billion was reported raised by 183 issuers in ongoing and closed offerings,

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239 *See* the 2018 Regulation A Release.

240 *See*, *e.g.*, NYSBA Letter (supporting raising the threshold to $75 million); CrowdCheck Letter (supporting raising the threshold to $100 million); Goodwin Letter (supporting raising the threshold to $100 million); letter from OTC Markets dated September 24, 2019 (supporting raising the threshold and noting the 2017 and 2018 Small Business Forum and 2017 Treasury Report recommendations to raise the threshold to $75 million); and IPA Letter (supporting raising the threshold to $100 million).

241 *See*, *e.g.*, State Attorneys General Letter; Davis Polk Letter; letter from the Council of Institutional Investors dated October 3, 2019 (expressing its belief that the Commission should not broaden or expand Regulation A without compelling evidence that the change would benefit long term investors and the capital markets); letter from Consumer Federation of America dated October 1, 2019 ("Consumer Federation Letter") (suggesting that expansion of Regulation A has been bad for investors and markets); letter from Healthy Markets Association dated September 30, 2019 ("Healthy Markets Letter") (suggesting amended Regulation A has been bad for investors and should be curtailed or eliminated); and NASAA Letter (generally rejecting expansion of the availability of private offerings and recommending more oversight by state regulators).

242 *See* https://www.sec.gov/smallbusiness/exemptofferings/rega/2020Report. At the time of adoption of the 2015 amendments, the Commission stated that the staff would study and submit a report to the Commission no later than five years following the adoption of the amendments on the impact of both Tier 1 and Tier 2 offerings on capital formation and investor protection. *See* 2015 Regulation A Release. 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.

including $230 million in Tier 1 and $2.2 billion in Tier 2 offerings.[243] 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.[244] The 2020 Regulation A Review notes 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.[245]

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.[246] Although most issuers have not exhausted the existing Tier 2 offering limit, we believe there are compelling reasons to consider raising that limit. First, a higher offering limit, such as $75 million, may enhance capital formation for those Regulation A issuers that have exhausted existing offering limits.[247] Further, while the offering limit represents one factor in the use of Regulation A, issuers may choose to forgo Regulation A if the offering limit is too low for their financing needs. Evidence from public commentary since the 2015 amendments indicates that a higher offering limit may help attract a larger and potentially more seasoned

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

244 *See* 2020 Regulation A Review.

245 *See id*.

246 *See id.* at Table 4.

247 Based on the available data, such issuers were almost exclusively real estate issuers. *See* 2020 Regulation A Review.

pool of issuers and intermediaries[248] or institutional investors to the Regulation A market.[249] In addition, a higher offering limit may make Regulation A offerings more attractive to Exchange Act reporting companies, which may be more established companies.

Having considered the recent data, the 2020 Regulation A Review, feedback that the Commission received in response to the Concept Release and Small Business Forums, and in order to facilitate use of Tier 2 Regulation A offerings, we are proposing to increase the maximum offering amount under Tier 2 of Regulation A from $50 million to $75 million.[250] Consistent with the Commission's approach to limitations on secondary sales when adopting the Regulation A amendments, we are also proposing to increase the maximum offering amount for secondary sales under Tier 2 of Regulation A from $15 million to $22.5 million.[251] Although some commenters suggested raising the offering limit to $100 million,[252] we believe that raising the maximum offering amount to $75 million would provide an incremental approach to increasing the threshold to a level that would permit issuers that have exhausted existing offering limits to seek more capital under Regulation A and may help attract a larger pool of

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248 *See* 2020 Regulation A Review, at Section F.1. However, as noted in the Regulation A review, the staff lacks data that would allow it to assess how a specific offering limit increase would affect the size and composition of the pool of prospective issuers, intermediaries, and investors in the Regulation A market.

249 *See* NYSBA Letter suggesting that many institutional investors do not want to participate in smaller offerings where their holdings will constitute a disproportionately large percentage of the outstanding securities.

250 We are not proposing to raise the threshold for Tier 1 offerings at this time. 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.

251 The Commission observed in the Regulation A amendments proposing and adopting releases 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 proposing to continue to permit secondary sales under Regulation A up to 30 percent of the maximum offering amount permitted under the applicable tier.

252 *See* IPA Letter; and Goodwin Letter.

issuers and intermediaries to the Regulation A market.[253] 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 would continue to provide appropriate protections for investors at this higher offering limit.

Given the significant additional requirements for Tier 2 offerings, including the requirement to provide audited financial statements, the ongoing reporting requirements, and the investment limits for non-accredited investors, the Commission expected Tier 2 offerings to be national rather than local in nature.[254] While 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."[255] 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,"[256] which the Commission has defined to include any person to whom securities are offered or sold in a Tier 2 offering.[257] We propose to rely on our authority under Section 18 of the Securities Act to continue to preempt Tier 2 offerings

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253 Adjusted for inflation since enactment of the JOBS Act in April 2012, the staff estimates that the Tier 2 offering limit would be $55.845 million as of December 31, 2019. *See infra* note 411. We note that adjusting the existing offering limit for inflation would largely maintain the status quo and likely would not attract additional institutional investors, intermediaries, or traditional underwriters to the Regulation A market.

254 *See* 2015 Regulation A Release, at text accompanying note 830.

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

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

257 *See* 17 CFR 230.256.

from state securities law registration and qualification requirements, as we expect that these offerings would continue to be more national in nature under the proposed amendments.

2. Rule 504

Rule 504 of Regulation D provides an exemption for eligible issuers[258] from registration under the Securities Act for the offer and sale of up to $5 million of securities in a 12-month period.[259] 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, which is the maximum amount statutorily allowed under Securities Act Section 3(b)(1).[260] As discussed in the 2016 adopting release amending Rule 504, while a few commenters[261] and the 2015 Small Business Forum[262] recommended that the Commission increase the Rule 504 offering limit to $10 million, the Commission determined not to use its exemptive authority under Section 28 of the Securities Act to raise the maximum offering amount above $5 million at that time.

From 2009 through 2019, two percent of the capital raised in Regulation D offerings under $5 million by companies other than pooled investment funds was offered under Rule 504 (and under Rule 505, prior to its repeal), and 98 percent of the capital raised was offered under

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258 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.

259 *See* Rule 504.

260 *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.

261 *See id.* at note 272.

262 *See* Final Report of the 2015 SEC Government-Business Forum on Small Business Capital Formation (November 2015), *available at* https://www.sec.gov/info/smallbus/gbfor34.pdf ("2015 Forum Report").

Rule 506.[263] Figure 1 and Figure 2 show the trends in new offerings and capital raised under Rules 504 and 505 (including pooled investment funds) during 2009-2019.[264]

Figure 1: Number of new offerings under Rules 504 and 505

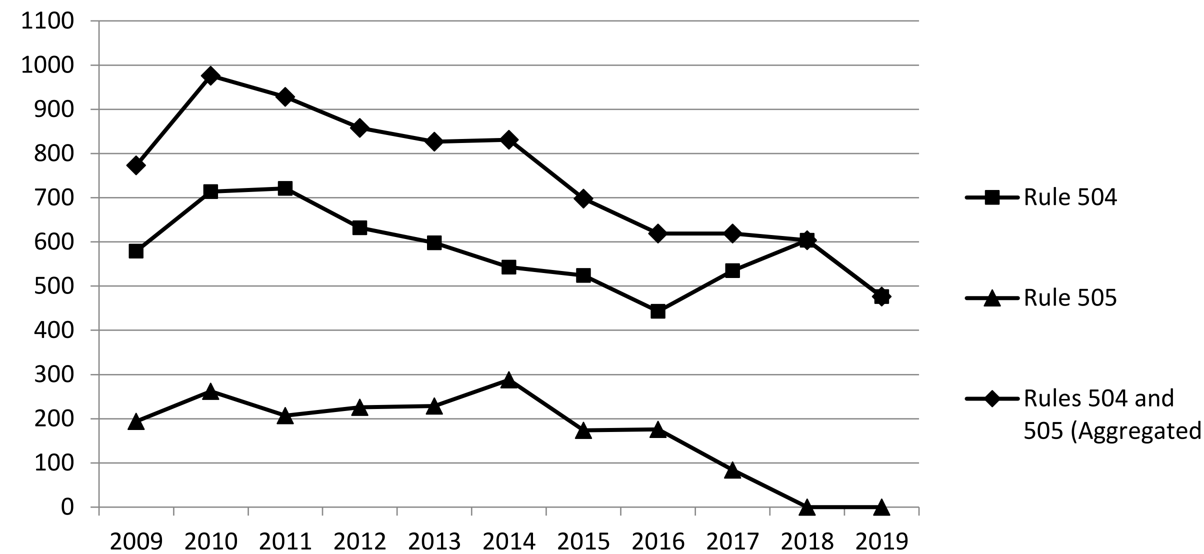
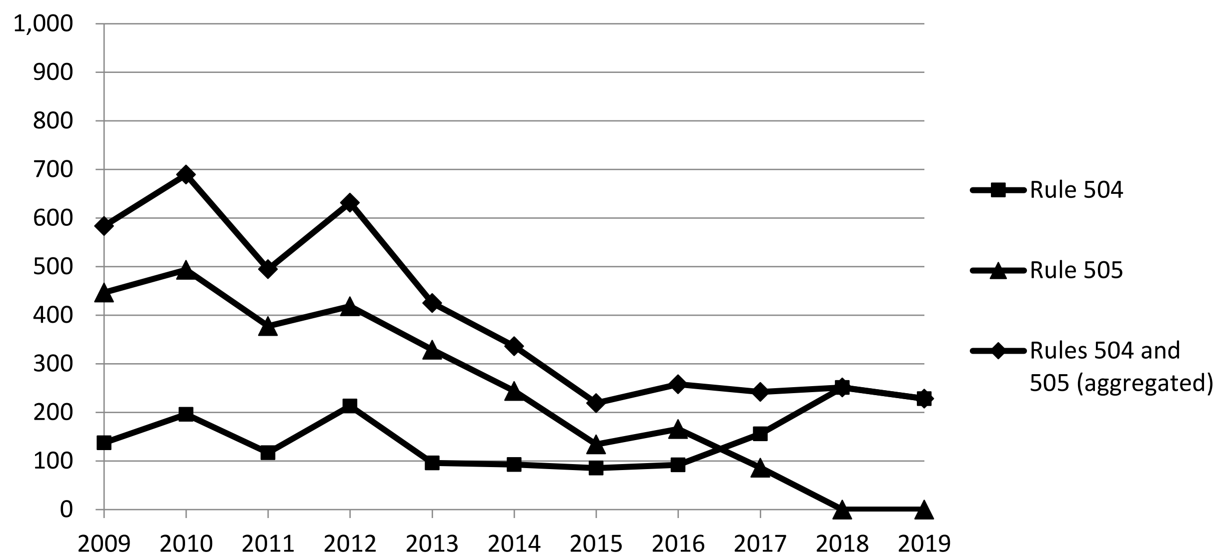


Figure 2: Capital raised under Rules 504 and 505 ($ billion)



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[263] *See* Concept Release, at note 37 and accompanying text.

[264] Aggregate amounts shown here have been revised to cap several outliers identified in the Form D data on Rule 504 reported proceeds at the offer limit to address data noise.

The figures show that the number of new offerings and the capital reported raised has remained flat or declined since the adoption of the changes in 2016. This data suggests that the higher threshold limits have not encouraged more issuers to conduct new offerings under the Rule 504 exemption, although those using the exemption are able to raise more capital in each offering and in the aggregate.

In the Concept Release, the Commission requested comment on whether to increase the Rule 504 offering limit. One commenter supported increasing the limit to the current level,[265] while a few others opposed increasing the limit.[266] In addition, several commenters expressed concern generally with creation and expansion of exemptions and exceptions from the federal securities laws and broadly recommended against such action without further study.[267]

Given the limited number of issuers that have used amended Rule 504 to raise capital, we believe it may be appropriate to revisit the Commission's decision in 2016 not to raise the offering limit to $10 million, as several commenters suggested at that time.[268] In considering the appropriate offering limit, we have been mindful of the significant investor protections that accompany a Rule 504 offering. Specifically, Rule 504 is not available to a development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company.[269] Also, unless

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265 *See* letter from Conserve Financial, Inc., dated September 1, 2019 (supporting increasing the limit, but mistakenly recommending an increase from $1 million to the current $5 million offer limit).

266 *See*, *e.g.*, PIABA Letter; and NASAA Letter (recommending Rule 504 be preserved in its current form).

267 *See* Consumer Federation Letter; Healthy Markets Letter; and State Attorneys General Letter.

268 *See* Exemptions to Facilitate Intrastate and Regional Securities Offerings, Release. No. 33-9973 (Oct. 30, 2015) [80 FR 69786 (Nov. 10, 2015)], at Section III.B.2.

269 *See* Rule 504(a)(3).

certain conditions are met,[270] issuers relying on Rule 504 may not use general solicitation or general advertising to market the securities, and purchasers in a Rule 504 offering will receive securities that are subject to the resale limitations in Rule 502(d).[271] If the conditions in Rule 504(b)(1)(i) through (iii) are met, any non-accredited investors will receive substantive disclosure documents made in accordance with state law. In addition, "bad actor" disqualification and disclosure requirements apply.[272] Finally, Rule 504 offerings, like other exempt offerings, are subject to the federal antifraud provisions.

Based on the recent data, feedback that we received, and in order to facilitate the use of Rule 504, we are proposing to use our general exemptive authority under Securities Act Section 28 to raise the maximum offering amount under Rule 504 from \$5 million to \$10 million. We believe that raising the threshold would permit issuers to seek more capital at a lower marginal cost than under the current rule and may encourage regional multistate offerings and the use of state coordinated review programs, resulting in more issuers conducting offerings under the exemption, which would further increase investment opportunities for investors and the amount of capital raised under Rule 504.

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270 *See* Rule 504(b)(1)(i) through (iii). General solicitation and general advertising are permitted and the resale limitations in Rule 502(d) do not apply if the issuer offers and sells the securities exclusively under state laws that require registration and the public filing and delivery to investors of a substantive disclosure document before sale; or in one or more states that do not have a provision requiring registration or the public filing and delivery of a disclosure document before sale under certain conditions. In states that do not have a provision requiring registration or the public filing and delivery requirements, general solicitation and general advertising are permitted so long as: the securities have been registered in at least one other state that provides for such registration, public filing, and delivery before sale; the issuer offers and sells securities in that other state under those provisions; and the issuer delivers to all purchasers in any state the disclosure documents mandated by the state in which it registered the securities; or exclusively in a state according to an exemption in such state that permits general solicitation and advertising, so long as sales are made only to accredited investors.

271 *See* Rule 502(d).

272 *See* Rule 504(b)(3); *see also* Intrastate and Regional Offerings Release, at Section III.B.3.

3. Regulation Crowdfunding

The Commission adopted Regulation Crowdfunding in 2015.[273] Regulation Crowdfunding provides an exemption from registration for certain crowdfunding transactions that raise up to $1.07 million in a 12-month period. To qualify for the exemption, transactions must meet a number of statutory requirements, 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."

In 2019, the Commission staff undertook a study of the available information on the capital formation and investor protection impacts of Regulation Crowdfunding and 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.[274]

The study found that during the considered period, while the market exhibited growth from 292 offerings initiated in the first year after adoption to over 500 offerings in the second year, the number of offerings and the total amount of funding were relatively modest.[275] From May 16, 2016 through December 31, 2018 approximately 1,351 offerings were initiated under Regulation Crowdfunding and 519 were completed.[276] These offerings raised $108 million for issuers. In contrast, over the same period approximately 12,700 issuers relied on Regulation D

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273 *See* Crowdfunding Adopting Release.

274 *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").

275 *See id.*

276 *See id.* at 15.

to conduct offerings of up to $1.07 million (the 12-month limit under Regulation Crowdfunding), totaling approximately $4.5 billion. [277]

The study also found that the typical offering during the considered period was small and raised less than the 12-month offering limit.[278] Of the offerings that were reported as completed based on a review of progress updates on Form C-U, as of December 2019, Commission staff estimated that the average offering raised approximately $213,678 and that just under 30 issuers reported raising at least $1.07 million over the considered period (aggregating multiple offerings for issuers that conducted more than one offering). Despite few issuers meeting the offering limit, we have received feedback from market participants and observers supporting a higher offering limit and note that the offering limit may not reflect current capital raising trends.[279] In addition, some intermediaries suggested that, while few offerings reach the current limit, many issuers choose not to utilize the crowdfunding exemption because the limit is too low.[280] In contrast, one intermediary stated that the current $1.07 million offering limit is appropriate, noting that most offerings are well below that level, and another intermediary indicated that few potential issuers have expressed interest in raising amounts above the limit.[281]

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277 *See* Concept Release, at Section II.F.4.

278 *See* 2019 Regulation Crowdfunding Report, at Section I.

279 *See, e.g.,* 2017 Treasury Report, at 41 (recommending "increasing the limit on how much can be raised over a 12-month period from $1 million to $5 million, as it will potentially allow companies to lower the offering costs per dollar raised"); 2017 Forum Report, at 18 (recommending a $5 million limit); and 2019 Forum Report (recommending that the Commission "raise the maximum limit on the overall deal."). *See also supra* note 231 citing average seed funding increasing from $1.3 million in 2010 to $5.7 million in 2018.

280 *See* 2019 Regulation Crowdfunding Report, at 37.

281 *Id*.

Regulation Crowdfunding also limits the amount individual investors are allowed to invest to no more than \$107,000 across all Regulation Crowdfunding offerings over the course of a 12-month period. In addition, individual investors are further limited below \$107,000 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
- 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.[282]

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. However, 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.[283] In the sample, accredited investors comprised approximately nine percent of investors and accounted for approximately 40 percent of amounts invested in funded offerings.[284] Information provided by this and other intermediaries indicates that amounts invested did not generally reach investment limits.[285]

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[282] *See* Rule 100(a)(2).

[283] This information is not required to be reported in progress updates, but the intermediary was able to provide information on approximately 31,500 unique crowdfunding investors in this sample that used the platform during the considered period. *See* 2019 Regulation Crowdfunding Report, at III.C.2.b.

[284] *See* 2019 Regulation Crowdfunding Report, at Section III.C.2.b.

[285] *See id*. For investors where data on annual income and net worth was available, the amounts invested over the entire considered period did not reach investments limits. Data from intermediaries reflected that the average investment per issuer was generally less than \$1,000; however, the staff was 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.

A number of market participants and observers have expressed concerns about the investment limits.[286] The 2018 Small Business Forum recommended that the Commission increase the investment limits for all investors,[287] 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.[288] Alternatively, 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.[289] This change would be similar to Regulation A, where 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).[290]

In the Concept Release, the Commission requested comment on whether to increase the Regulation Crowdfunding offering limit and investment limits.[291] Numerous commenters

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286 *See, e.g.,* 2017 Treasury Report; and 2018 Forum Report.

287 *See* 2018 Forum Report.

288 *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 ("2019 Small Business Advisory Committee Recommendation on Crowdfunding"). *See also* 2015 Forum Report (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.

289 *See id*.

290 *See* 17 Rule 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.

291 *See* Concept Release, at Section II.F.

supported raising the offering limit,[292] while some opposed an increase.[293] Several commenters additionally supported eliminating the investment limit for accredited investors,[294] while a few also opposed changing the investment limit.[295] Comments were mixed regarding whether to calculate the investment limit based on *either* income *or* net worth, with some commenters

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[292] *See*, *e.g.*, AOIP Letter (recommending raising the threshold to $10 million and suggesting there is negative selection bias as quality companies seeking larger amounts of capital are discouraged by the lower threshold); letter from Hamilton & Associates Law Group, P.A. dated August 15, 2019; Wefunder Letter (recommending a $5 million offering limit); Republic Letter (recommending raising the limit to $10 or $5 million and suggesting the current limits impair the utility of Regulation Crowdfunding, discourage issuers from using the exemption and negatively impact the ability of portals to sustain their business); Indemnis et. al. Letter; CCMC Letter (suggesting the low upper limit discourages issuers and recommending a $5 million offering limit); A. Schwartz Letter (recommending a $5 million offering limit); letter from Herwig Konings, et. al. dated September 24, 2019 ("H. Konings et al. Letter") (recommending a $5 million offering limit); CCA Letter (recommending a $20 million offering limit in place of Regulation A Tier I offerings); MainVest Letter (recommending a $5 million offering limit and supporting financial review for companies raising over $500,000 and an audit for those that have raised at least $500,000); Silicon Prairie Letter (recommending the offering limit be the maximum of the other exemptions); 2019 Small Business Advisory Committee Recommendation on Crowdfunding; and Rep. McHenry Letter.

[293] *See* Consumer Federation Letter (opposing any expansion prior to the Commission examining non-compliance and remedying deficiencies in the crowdfunding markets); and Healthy Markets Letter (urging the Commission to pause the creation and expansion of exemptions and exceptions to the federal securities laws). *See also* State Attorneys General Letter (recommending that before making any modifications to the current exemptions, the Commission gather data on issuer and investor outcomes as well as retail investor demand for exempt offerings, and analyze how the current framework is impacting each of those categories); NASAA Letter (recommending not expanding the market without corresponding regulations that will increase protections for investors); and CrowdCheck Letter.

[294] *See*, *e.g.*, AOIP Letter; Wefunder Letter; Republic Letter (recommending intermediaries being required to take reasonable steps to verify accredited investor status); Indemnis et al. Letter; A. Schwartz Letter; C. Bilger Letter; Davis Polk Letter; CCA Letter; Rep. McHenry Letter; 2019 Small Business Advisory Committee Recommendation on Crowdfunding; and CrowdCheck Letter. *See also* letter from Startup Practicum at the University of Miami School of Law ("Startup Practicum Letter") (recommending higher limits for accredited investors); and MainVest Letter (recommending a $250,000 investment limit).

[295] *See* Consumer Federation Letter; Healthy Markets Letter; and State Attorneys General Letter.

supporting,[296] and others opposing[297] changes to the investment limit calculations.

Based on our consideration of the available data, our staff's 2019 Regulation Crowdfunding Report, the feedback that we received on the Concept Release and from Small Business Forums and the Small Business Capital Formation Advisory Committee, and in order to facilitate use of Regulation Crowdfunding for capital raising, we are proposing to: (1) raise the issuer offering limits in Regulation Crowdfunding; and (2) 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.

We are proposing to use our general exemptive authority under Securities Act Section 28 to raise the offering limit in Regulation Crowdfunding from $1.07 million to $5 million. 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 Consumer Price Index).[298] While over 500 offerings were completed pursuant to Regulation Crowdfunding in the first year and a half that the exemption was available, market participants have expressed concern that the vitality of the

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[296] *See*, *e.g.*, AOIP Letter (recommending the elimination of cumulative investment limits); Republic Letter (recommending using the greater of two thresholds and applying the limits on a per offering basis); C. Bilger Letter; CCA Letter; MainVest Letter (noting investor confusion regarding the investor limits and supporting mirroring the logic for requirements for investor accreditation and providing more investors access to investment opportunities); and 2019 Small Business Advisory Committee Recommendation on Crowdfunding (recommending investment limits apply on a per investment basis rather than annual limits, and calculating limits based upon the greater of income or net worth). *See also* Indemnis et al. Letter (not specifically addressing this issue, but recommending raising the limits and applying the limits on a per offerings basis); CCMC Letter (not specifically addressing the issue, but supporting raising the current limits); A. Schwartz Letter (recommending an individual investment limit of $5,000 per investment as a simplification of the current rule that does not seek sensitive financial information); Davis Polk Letter (recommending harmonizing limits on investment amounts for non-accredited investors across all exempt offerings); and Silicon Prairie Letter (recommending raising the limits for non-accredited investors to $10,000 or the use of a suitability test).

[297] *See*, *e.g.*, Startup Practicum Letter (supporting the current limits for non-accredited investors); Wefunder Letter (suggesting that the focus should be on issuer quality, not investment limits, but recommending rationalizing the limits with other exemptions, such as using the Regulation A Tier 2 limit for non-accredited investors). *See also* Consumer Federation Letter; Healthy Markets Letter; State Attorneys General Letter; and H. Konings, et. al. Letter (both supporting the current investor limits, and suggesting that they could be simplified to a single $25,000 investor yearly limit or a tiered cap base on income).

[298] *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.

market and the number of offerings is being constrained by the $1.07 million offering limit. We believe that permitting larger offerings under Regulation Crowdfunding may encourage more issuers to use the exemption and additionally would lower the offering costs per dollar raised for issuers. In so doing, these amendments would provide issuers with greater access to investment capital and investors in Regulation Crowdfunding offerings with more investment opportunities. At the same time, we believe raising the offering limit would be consistent with investor protection because existing Regulation Crowdfunding requirements, including the intermediary requirements and the eligibility, disclosure, and ongoing reporting requirements for issuers would continue to provide appropriate investor protections at this higher offering limit.

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.[299] While we are proposing to increase the overall offering limits, we do not believe that it is necessary to adjust or increase the financial statement requirements at this time. Any offerings in excess of the current $1,070,000 offering limit would continue to be subject to the financial statement requirements of Rule 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, would be sufficient for offerings subject to the increased $5 million offering limit.

[299] *See* Rule 201(t) of Regulation Crowdfunding.

We are also proposing to increase the investment limits for investors in Regulation Crowdfunding offerings.[300] First, we are proposing to no longer apply any investment limits to accredited investors. 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.[301] For similar reasons, we believe that investment limits for accredited investors under Regulation Crowdfunding are unnecessary. Accordingly, we believe it would be 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 proposing 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. 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.[302] 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

[300] Consistent with the current approach to investment limits, an issuer would be able to 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 had exceeded, or would exceed, the investment limits as a result of purchasing securities in the issuer's offering. *See* Instruction 3 to Rule 100(a)(2) of Regulation Crowdfunding.

[301] *See* 2015 Regulation A Release, at note 145 and accompanying text.

[302] 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.

incurring unaffordable losses.[303] 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.[304] 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.[305]

The proposed amendment would conform Regulation Crowdfunding with Tier 2 of Regulation A and use a consistent approach to mitigate concerns regarding the ability of investors to absorb losses incurred in offerings conducted in reliance on the two exemptions. While the Commission used a "lesser of" standard when initially implementing the rule, in light of our experience with Regulation Crowdfunding since its adoption and the concerns of commenters that the existing investment limits may be hampering the utility of the exemption,[306] we now believe it is appropriate to consider a less restrictive approach. By permitting investors to use the greater of the income or net worth threshold, investors would have more flexibility in making their investment decisions. Moreover, we are not aware of

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303 *See* Crowdfunding Adopting Release, at Section II.A.2.c.

304 *See* Rule 251(d)(2)(i)(C)(2); and 2015 Regulation A Release, at Section II.B.4.

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

306 *See*, *e.g.*, Republic Letter; CCA Letter; and MainVest Letter.

evidence since Regulation Crowdfunding's adoption to indicate this market requires a more stringent approach to investment limits than other exemptive regimes.[307]

Request for Comment

55. Should we, as proposed, increase the Regulation A Tier 2 offering limit from $50 million to $75 million? Is another limit more appropriate, such as $100 million? What are the appropriate considerations in determining a maximum offering size? In connection with an increase, should we consider additional investor protections, such as aligning standards for when an amendment to an offering statement is required with those in registered offerings? Should we instead simply adjust the offering limit for inflation?
56. Should we increase the Regulation A Tier 1 offering limit? Alternatively, we note that there is significant overlap between Rule 504 and Regulation A Tier 1 offerings. Should the threshold for Rule 504 be raised to $20 million such that Rule 504 might serve as a replacement for Regulation A Tier 1 offerings? If so, should we eliminate Tier 1 of Regulation A?
57. Would increasing the maximum offering size encourage more issuers to undertake Regulation A offerings? Would it attract more institutional investors to the market?
58. Would increasing the maximum offering size increase the risk to investors? Is there any data available that shows an increase or decrease in fraudulent activity in the Regulation A market as a result of the 2015 or 2018 amendments?
59. Should we, as proposed, increase the Rule 504 offering limit from $5 million to $10 million? Is another limit more appropriate? Would the increased offering limit encourage

307 *See* 2019 Regulation Crowdfunding Report, at Section III.C.3.

more regional multistate offerings and state coordinated review programs? Are there additional investor protections we should consider in connection with an increase?

60. Should we, as proposed, increase the Regulation Crowdfunding offering limit from $1.07 million to $5 million? Is another limit more appropriate? Would increasing the limit encourage more issuers to use Regulation Crowdfunding? Are there additional investor protections we should consider in connection with the increase?

61. In conducting our review and analysis of exempt offerings, we and our staff relied on data collected from filings with the Commission and third party data sources.[308] In order to better analyze the exempt offering markets, should we consider ways to enhance compliance with Form D filing requirements?

62. Should we remove investment limits for accredited investors in Regulation Crowdfunding offerings as proposed? If so, should we require verification of accredited investor status, as suggested by several commenters? Should the limits be modified in some other way?

63. Should we amend the method for calculating the investment limits for non-accredited investors in Regulation Crowdfunding to allow those investors to rely on the greater of their annual income or net worth as proposed? Is there any evidence to suggest that a more restrictive approach to investment limits is warranted for Regulation Crowdfunding offerings? Should we align the non-accredited investor limits in Regulation Crowdfunding with those in Regulation A Tier 2?

64. The 2017 and 2018 Small Business Forums recommended that the Commission amend Regulation Crowdfunding requirements for debt offerings and small offerings under $250,000, such as by limiting the ongoing reporting obligations to actual investors instead

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308 *See supra* notes 12 and 13.

of the general public, and scaling the requirements to reduce accounting, legal and other costs of the offering. Further, the 2019 Small Business Forum recommended that the Commission should provide an exemption for investments of less than $25,000 for up to 35 non-accredited investors, where all investors have access to the same disclosures about the issuer. Should we consider creating a "micro-offering" tier of Regulation Crowdfunding consistent with these recommendations? If so, should that micro-offering exemption be limited to offerings of debt securities conducted through an intermediary, but with no specific disclosure requirements? Would an aggregate offering limit be appropriate, such as $250,000, as recommended by the 2017 and 2018 Small Business Forums? Should such a micro-offering be available to non-accredited investors? If so, should there be a limit on the number of non-accredited investors that may participate? Should there be any limit on how much a person can invest in any one offering or in all such offerings during a specified time period?

65. Should we extend federal preemption to secondary sales of Regulation A or Regulation Crowdfunding securities, for example, by expanding the definition of "qualified purchaser"? Several Small Business Forums, as well as the Commission's Advisory Committee on Small and Emerging Companies, have recommended that the Commission provide blue sky preemption for secondary trading of securities issued under Tier 2 of Regulation A.[309]

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[309] *See* 2019 Forum Report (recommending federal preemption for all resales of securities sold in a Regulation A Tier 2 offering, provided that the issuer is current in its Tier 2 reporting); 2018 Forum Report; 2017 Forum Report; 2016 Forum Report; 2015 Forum Report; Final Report of the 2014 SEC Government-Business Forum on Small Business Capital Formation (May 2015), *available at* http://www.sec.gov/info/smallbus/gbfor33.pdf ("2014 Forum Report"); Advisory Committee on Small and Emerging Companies: Recommendations Regarding Secondary Market Liquidity for Regulation A, Tier 2 Securities (May 15, 2017) available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-secondary-liquidityrecommendation.pdf. The 2017 Treasury Report also recommended that state securities regulators update their regulations to exempt from state registration and qualification requirements secondary trading of securities issued under Tier 2 of Regulation A or, alternatively, that the Commission use its authority to preempt state registration requirements for such transactions.

Should we preempt state securities registration or other requirements applicable to secondary sales of all securities initially issued in a Tier 2 Regulation A offering? Should we preempt state securities registration or other requirements applicable to secondary trading of securities only of Regulation A Tier 2 issuers that are current in their ongoing reports? Should we similarly preempt state securities registration or other requirements applicable to secondary trading of securities of initially issued in a Regulation Crowdfunding offering? Should such preemption only apply if the Regulation Crowdfunding issuer is current in its ongoing reports? What other steps should we consider to improve secondary trading liquidity of securities exempt from registration under Regulation A or Regulation Crowdfunding?

F. Regulation Crowdfunding and Regulation A Eligibility

The Commission's exempt offering framework includes eligibility restrictions. Specific eligibility restrictions excluding certain types of entities or activities by issuers apply to both Regulation A[310] and Regulation Crowdfunding,[311] respectively. While Regulation

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310 *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 BDCs; 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.

311 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 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).

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.[312] Regulation A also specifically excludes asset-backed securities.[313]

We are proposing amendments to the eligibility restrictions in Regulation Crowdfunding and Regulation A. We are proposing 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. We are additionally proposing to amend Regulation A to harmonize its eligibility restrictions by excluding Exchange Act registrants that are delinquent in their Exchange Act reporting obligations from relying on the exemption.

Table 10 below summarizes the proposed changes to the eligible issuers and securities under Regulation Crowdfunding and Regulation A:

Table 10: Summary of Proposed Changes to Eligibility Under Regulation Crowdfunding and Regulation A

	Eligible Issuers		Eligible Securities	
	Current Rules	**Proposed Rules**	**Current Rules**	**Proposed Rules**
Regulation Crowdfunding	Excludes special purpose vehicles	Permits crowdfunding vehicles	No limits on types of securities	Securities limited to: • Equity securities • Debt securities • Securities convertible or exchangeable for equity interests

[312] *See* 17 CFR 230.261.

[313] *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).

				• Guarantees of any of the above-listed securities
Regulation A	Excludes issuers that have not filed required reports in the two prior years under Regulation A	Excludes issuers that have not filed required reports in the two prior years under Regulation A or Section 13 or 15(d) of the Exchange Act	Securities limited to: • Equity securities • Debt securities • Securities convertible or exchangeable for equity interests • Guarantees of any of the above-listed securities	No change

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 company under section 3(b) or 3(c) of the Investment Company Act), from using the Regulation Crowdfunding exemption.[314] 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. Thus, an investor purchasing securities in an offering under Regulation Crowdfunding must hold the securities in his or her own name, which, as discussed below, can create certain practical impediments to issuers' use of the 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.[315] In explaining its decision, the Commission

[314] *See* Section 4A(f)(3) of the Securities Act [17 CFR 227.100(b)(3)].

[315] *See* Crowdfunding Adopting Release, at 71397.

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.[316]

Since the adoption of Regulation Crowdfunding, the Commission has received comments and recommendations from a variety of sources, including certain of the annual Small Business Forums,[317] the 2017 Treasury Report,[318] and the Small Business Capital Formation Advisory Committee[319] on the potential benefits of allowing an SPV to conduct a crowdfunding offering. In particular, public feedback has indicated that allowing the use of such vehicles could address concerns associated with managing the potentially large number of direct investors that could result from a crowdfunding offering, as those investments would be held through a single purpose entity.

The 2017 Small Business Forum recommended that the Commission consider promoting simplification of the capitalization table of Regulation Crowdfunding issuers by allowing the use of SPVs to aggregate investors with appropriate conditions.[320] Similarly, the 2017 Treasury Report recommended allowing the use of SPVs advised by a registered investment adviser, which may mitigate crowdfunding issuers' concerns about vehicles having an unwieldy number of shareholders and surpassing the registration thresholds of Section 12(g).[321] However, the

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316 *Id.*

317 *See* 2017 Forum Report. *See also* 2014 Forum Report (commenting on the proposing release for Regulation Crowdfunding).

318 *See* 2017 Treasury Report.

319 *See* 2019 Small Business Capital Formation Advisory Committee Recommendation on Crowdfunding (recommending eligible investors be allowed to invest through special purpose vehicles).

320 *See* 2017 Forum Report.

321 *See* 2017 Treasury Report.

2017 Treasury Report also recognized that it is critical to ensure appropriate investor protections if any changes are made to Regulation Crowdfunding, given the participation of non-accredited investors. In light of risks that SPVs may weaken investors' ability to avail themselves of protections available to direct investors, as well as potential conflicts of interest between the issuer, lead investors, and other investors, the 2017 Treasury Report recommended that any rulemaking in this area prioritize: (1) alignment of interests between a lead investor and the other investors participating in the SPV; (2) regular dissemination of information from the issuer; and (3) minority voting protections with respect to significant corporate actions.[322]

In connection with the 2019 Regulation Crowdfunding Report, the staff received similar feedback from market participants regarding certain issues that may be discouraging companies from raising capital through the exemption. As discussed in the 2019 Regulation Crowdfunding Report, some intermediaries have told the staff that many issuers have elected not to pursue an offering under Regulation Crowdfunding because, without an SPV, a large number of investors on an issuer's capitalization table can be unwieldy and potentially impede future financing. These intermediaries frequently noted that allowing SPVs to participate in Regulation Crowdfunding offerings may encourage use of the exemption because it would help the issuer manage the size of its capitalization table. Similarly, some intermediaries have reported that issuers may be hesitant to offer voting rights to investors in offerings under this exemption because of the logistical challenges of seeking any required shareholder vote. In addition, several market participants pointed to the other potential investor protections that an SPV structure could provide. For example, some commenters noted that an SPV could allow small

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322 *See id.* (noting that SPVs could potentially facilitate the type of syndicate investing model that has developed in accredited investor platforms, whereby a lead investor conducts due diligence, pools the capital of other investors, and receives carried interest compensation).

investors to invest alongside a sophisticated lead investor who may negotiate better terms, protect against dilution by negotiating during subsequent financings, mentor the issuer, and represent smaller investors on the board.

Many of these views were echoed by commenters on the Concept Release. For example, several commenters stated that private companies do not use Regulation Crowdfunding to raise capital because the capitalization table becomes unwieldy with several hundred investors, and it is difficult to obtain consent or approval from hundreds of investors as it relates to governance issues, strategic decisions, and later financing rounds.[323] These commenters urged the Commission to permit issuers to raise capital under Regulation Crowdfunding through an SPV to address these concerns.[324] Some commenters suggested that the Commission require a registered investment adviser to manage the SPV to provide protection for the SPV's investors.[325] In contrast, one commenter opposed allowing crowdfunding issuers to use SPVs, stating that because the dollar value of typical crowdfunding transactions is small, there would not be enough money available to pay an SPV manager, or the fees paid would need to come immediately from the principal investment.[326] This commenter

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323 *See* Iownit Letter; Rep. McHenry Letter; Wefunder Letter; AOIP Letter; MainVest Letter; and J. Schocken Letter.

324 *See* AOIP Letter (noting that the use of an SPV can streamline communications with investors, allow for a single entry on the issuer's capitalization table, and allow for better management of investor rights to assure no excessive dilution takes place); Wefunder Letter; CCA Letter ("If the goal of some of these issuers is to be acquired, then having a shareholder table that is easy to manage would facilitate some of these acquisitions. An SPV would be beneficial and have no downside since investors still retain their voting rights."); Rep. McHenry Letter; NYSBA Letter; and CrowdCheck Letter. *See also* supplemental letter from Wefunder, dated January 15, 2020 (suggesting the use of voting trusts as a type of SPV solution for Regulation Crowdfunding offerings).

325 *See* CrowdCheck Letter. *See also* NASAA Letter ("crowdfunding funds could open the door to greater use of crowdfunding by issuers and investors. Those corresponding investor protections should require that any such funds be managed by a registered investment adviser, issue a single class of securities, be limited to investing in only a single crowdfunding offering, and maintain certain mandatory disclosure obligations.").

326 *See* letter from William F. Galvin, Secretary of the Commonwealth of Massachusetts, dated September 24, 2019 ("MA Secretary Letter").

also stated that the SPV approach would make it difficult or impossible for crowdfunding investors to exercise their basic rights under state corporation laws, including voting for company directors, voting on material transactions, rights of access to corporate records, and appraisal rights.

After considering this feedback, we are proposing a new exclusion under the Investment Company Act for limited-purpose vehicles ("crowdfunding vehicles") that function solely as conduits to invest in businesses raising capital through the vehicle under Regulation Crowdfunding. 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 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.[327] As a result, SPVs meeting the definition of a crowdfunding vehicle would be able to utilize Regulation Crowdfunding.

Because the rule we are proposing would not be aimed at allowing investment companies or similar issuers to raise capital, but rather, solely at facilitating crowdfunding offerings by eligible issuers, we believe this approach would be consistent with the intent of Section 4(a)(6). Specifically, 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. As discussed below, our proposed approach would allow investors in a 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

[327] *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* Rule 100(b)(3) of Regulation Crowdfunding [17 CFR 227.100(b)(3)].

Crowdfunding, as if they had invested directly in the underlying issuer ("crowdfunding issuer") in an offering made under Regulation Crowdfunding. This approach also would allow the crowdfunding issuer to maintain a simplified capitalization table and, by reducing the administrative complexities associated with a large and diffuse shareholder base,[328] may encourage crowdfunding issuers to offer voting rights, or other terms not currently offered as frequently to investors.

A crowdfunding issuer would be defined as a company[329] 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.[330] We propose to define a crowdfunding vehicle as an issuer[331] 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 is controlled by the crowdfunding issuer. Because the crowdfunding vehicle would only be a conduit for the crowdfunding issuer—and taking into account the significant limitations on the nature and scope of the crowdfunding vehicle's activities under the proposed rule—we believe that the crowdfunding vehicle would function as a means for the crowdfunding issuer to raise capital rather than an independent investment vehicle that would need to be subject to regulation under the Investment Company

328 Shifting the administrative burden from the crowdfunding issuer to the crowdfunding vehicle would, for example, allow a third party (such as a funding portal) to more easily be engaged to handle the burden.

329 Under the Investment Company Act, a company means a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such. 15 U.S.C. 80-2(a)(8).

330 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.

331 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. 15 U.S.C. 80-2(a)(22).

Act to protect its investors. Moreover, because the crowdfunding vehicle's business would consist only of the purchase of securities of the crowdfunding issuer, and would use the sale of its own securities to make such purchases, 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.[332]

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.[333] For example, the Form C would be required to include the crowdfunding issuer's financial statements. By jointly filing a Form C describing both transactions and providing disclosure about both co-issuers, investors would be provided all information necessary to analyze both their direct investment in the crowdfunding vehicle and the terms of the crowdfunding vehicle's investment in the crowdfunding issuer.[334] This approach also would 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).

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332 *See, e.g.,* 17 CFR 230.140.

333 We are proposing 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 is only acting as a conduit for the crowdfunding issuer, we do 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.

334 *See* 17 CFR 227.201(m) (requiring a description of the ownership and capital structure of the issuer, including "a summary of the differences between [the offered] securities and each other class of security of the issuer"). If a crowdfunding issuer also wanted to offer its own securities directly to investors pursuant to Regulation Crowdfunding, it would have to file a separate Form C with respect to that offering.

The conditions we are proposing for crowdfunding vehicles are intended to address any specific investor protection concerns raised by a vehicle that acts as a conduit for investments in a crowdfunding issuer. First, the proposed rule includes several conditions designed to require that the crowdfunding vehicle serve only as a conduit for investors to invest in the crowdfunding issuer. Specifically, 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;[335]
- 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;[336]
- 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;[337]
- 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.[338]

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335 *See* proposed Rule 3a-9(a)(1).

336 *See* proposed Rule 3a-9(a)(2).

337 *See* proposed Rule 3a-9(a)(3).

338 *See* proposed Rule 3a-9(a)(4).

In addition, any compensation paid to any person operating the crowdfunding vehicle must be paid solely by the crowdfunding issuer.[339] These conditions collectively would require the crowdfunding vehicle to act as a conduit by limiting the scope of the activities in which the crowdfunding vehicle could engage and limiting the compensation it could receive.

These conditions also would prevent a crowdfunding vehicle from bearing any of the costs associated with its formation, operation, or winding up. We believe it is appropriate for the crowdfunding issuer to bear these costs because the crowdfunding issuer and all of its investors would benefit from the ability to maintain a simplified capitalization table. In addition, if a crowdfunding vehicle could use offering proceeds or the assets held by the vehicle to cover its own expenses or the costs of any person operating the crowdfunding vehicle, this could result in investors obtaining different economic exposure if they were to invest through a crowdfunding vehicle rather than investing in the crowdfunding issuer directly.

Second, the proposed rule includes several conditions designed to provide investors in the crowdfunding vehicle with the same economic exposure, voting power, and Regulation Crowdfunding disclosures as if the investors had invested directly in the crowdfunding issuer.

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339 *Id*. We preliminarily believe that a crowdfunding vehicle complying with the proposed rule would not be a broker as defined in Section 3(a)(4) of the Exchange Act or a dealer as defined in Section 3(a)(5) of the Exchange Act. If, however, a crowdfunding vehicle or a person operating the crowdfunding vehicle engages in activities beyond the limited scope described above, they may need to consider whether they would be required to register under Section 15(a) of the Exchange Act. *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). In the context of a dealer, a key consideration in determining whether a person qualifies as a dealer has been the regularity with which it engages in securities transactions. *See, e.g.*, *Eastside Church of Christ v. Nat'l Plan, Inc.*, 391 F.2d 357, 361-62 (5th Cir. 1968) (an entity that purchased many securities for its own account as part of its regular business and sold some of them was deemed a dealer).

The crowdfunding vehicle would be required to maintain the same fiscal year end as the crowdfunding issuer.[340] This condition is designed to align the Regulation Crowdfunding reporting requirements of the crowdfunding issuer and crowdfunding vehicle, and avoid any confusion that might arise if the two entities provided investors with disclosure covering different fiscal periods. The crowdfunding vehicle also would be required to 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.[341] This condition is designed to provide an investor in the crowdfunding vehicle the same economic exposure as if he or she had invested directly in the crowdfunding issuer.

The crowdfunding vehicle similarly would be required to seek instructions from its investors with regard to two matters: (i) the voting of the crowdfunding issuer securities it holds; and (ii) participating in tender or exchange offers or similar transactions[342] conducted by the crowdfunding issuer.[343] The crowdfunding vehicle 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.[344] This condition is designed to provide each investor in the crowdfunding vehicle the same voting power as if the investor had invested in the crowdfunding issuer directly. It also

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340 *See* proposed Rule 3a-9(a)(5).

341 *See* proposed Rule 3a-9(a)(6).

342 An example of a similar transaction would be the opportunity to sell alongside the crowdfunding issuer in an offer of the crowdfunding issuer securities.

343 *See* proposed Rule 3a-9(a)(7).

344 *See id.*

would allow investors to participate in certain important transactions related to the crowdfunding issuer securities should they arise.

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.[345] Investors would therefore receive the same disclosures required under Regulation Crowdfunding about a crowdfunding issuer whether they invested in the issuer directly or through a crowdfunding vehicle.

Finally, we recognize that, absent a contrary condition in the proposed rule, there could be certain differences in an investor's rights under state and federal law when an investor invests in a crowdfunding vehicle as opposed to directly in a crowdfunding issuer. A direct investor as a shareholder of record, for example, could have rights of access to corporate records or appraisal rights under state law that might not be available to an investor that holds his or her investment indirectly through another entity.[346] We are therefore proposing to require a crowdfunding vehicle 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.[347] We are also requiring that the crowdfunding vehicle provide to each investor any information that it receives from the crowdfunding issuer as a shareholder of record of the crowdfunding issuer.[348] These conditions are designed to

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[345] *See* proposed Rule 3a-9(a)(8). *See, e.g.*, Rule 201 of Regulation Crowdfunding [17 CFR 227.201].

[346] *See, e.g.*, MA Secretary Letter.

[347] *See* proposed Rule 3a-9(a)(9).

[348] *Id.*

provide shareholders the ability to assert the same rights under state and federal law regardless of whether they invest directly in a crowdfunding issuer or through a crowdfunding vehicle. These conditions would also require the crowdfunding vehicle to provide its investors with any information they would have received if they had invested directly in a crowdfunding issuer so that the investors would have the information that may be necessary to determine whether to direct the crowdfunding vehicle to assert any rights under state or federal law.

In addition to these conditions, we also considered proposing to require that a registered investment adviser manage the crowdfunding vehicle, as suggested by some commenters and the 2017 Treasury Report.[349] We are not proposing this requirement, however, because the proposed rule's conditions are designed to limit the crowdfunding vehicle's activities to that of acting solely as a conduit to hold the securities of the crowdfunding issuer without the ability for independent investment decisions to be made on behalf of the crowdfunding vehicle. We are also concerned that, given the relatively small amount of capital that can be raised through Regulation Crowdfunding, it would not be economically feasible to require a registered investment adviser in light of the fees and other expenses associated with such a requirement.

Request for Comment

66. Should we permit crowdfunding issuers to use crowdfunding vehicles as proposed? Would this approach encourage crowdfunding issuers to offer voting rights or other advantageous terms to investors?
67. Should we require registered investment advisers to manage crowdfunding vehicles? Would there be a role for a registered investment adviser in light of the limited activities in which a crowdfunding vehicle could engage? Would registered investment advisers find it

[349] *See* Iownit Letter; NASAA Letter; CrowdCheck Letter; and 2017 Treasury Report.

practical to serve a role with respect to a crowdfunding vehicle? Should we require an exempt reporting adviser to manage crowdfunding vehicles? Should we allow investment advisers to form funds for non-accredited investors that invest in multiple crowdfunding issuers?

68. The proposed rule includes several conditions designed to require that the crowdfunding vehicle serve the sole purpose of acting as a conduit for investors to invest in the crowdfunding issuer. Are these conditions appropriate? Should a crowdfunding vehicle be permitted to engage in a broader range of activities? For example, should the rule provide that a crowdfunding vehicle must redeem or offer to repurchase its securities if there is a liquidity event at the crowdfunding issuer? If so, how should the rule accommodate these activities? Are there other purposes for which the crowdfunding vehicle should be permitted to receive compensation or use offering proceeds? Should a crowdfunding issuer be required to pay the expenses associated with the formation, operation, or winding up of the crowdfunding vehicle? Should anyone else bear these costs? Should any compensation paid to any person operating the crowdfunding vehicle be paid solely by the crowdfunding issuer? Should we include any additional restrictions? Are there any other issues that could arise if we allow the use of crowdfunding vehicles in Regulation Crowdfunding offerings, as proposed? Would legislative changes be necessary or beneficial to permit crowdfunding vehicles to engage in a broader range of activities, pay compensation to any person operating the crowdfunding vehicle, or include any additional restrictions on the operations of the crowdfunding vehicle?

69. The proposed rule includes several conditions designed 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 crowdfunding issuers. Are these conditions appropriate? Should a crowdfunding vehicle be allowed to issue multiple classes of securities in the event that the crowdfunding issuer has multiple classes of securities? Would legislative changes be necessary or beneficial to permit a crowdfunding vehicle to issue multiple classes of securities? Should the crowdfunding vehicle and the crowdfunding issuer be deemed co-issuers for purposes of the Securities Act, including that Act's antifraud and liability provisions?

70. Would the proposed requirement that the crowdfunding vehicle 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 crowdfunding vehicle securities outstanding provide an investor in the crowdfunding vehicle the same economic exposure as if he or she had invested directly in the crowdfunding issuer? Are there any changes we should make to achieve this objective more effectively or to address the manner in which a crowdfunding vehicle may hold crowdfunding issuer securities? For example, in the case of a stock-split by a crowdfunding issuer, should we permit a crowdfunding vehicle to maintain its current capitalization structure on the condition that it otherwise maintain the same economic exposure for its beneficial owners to the stock-split securities of the crowdfunding issuer?

71. The crowdfunding vehicle would be required to seek instructions from its investors with regard to two matters: (i) the voting of the crowdfunding issuer securities it holds; and (ii) participating in tender or exchange offers or similar transactions conducted by the crowdfunding issuer. The crowdfunding vehicle 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 these requirements effectively pass-through any voting rights associated with securities issued by crowdfunding issuers and the ability to participate in tender or exchange offers or similar transactions? Should the rule refer to additional types of transactions? Would these requirements impact an issuer's willingness to use a crowdfunding vehicle, as the issuer would still indirectly be required to obtain consent or approval from numerous investors? Operationally, how would crowdfunding vehicles comply with this condition? Should the rule provide that a crowdfunding issuer may obtain proxies or investors' pre-approval with respect to certain (or all) matters? Should the rule provide more flexibility? For example, should the rule permit a crowdfunding vehicle to disclose to its investor at the time of its initial offering that the vehicle will cast all of its votes in accordance with the instructions of a majority of its security holders, rather than using pass-through voting as proposed? Would legislative changes be necessary or beneficial to provide the crowdfunding vehicles additional flexibility with respect to voting rights and the distribution of information?

72. Upon receiving all of the disclosures and other information required under Regulation Crowdfunding from the crowdfunding issuer, the crowdfunding vehicle 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. Would these requirements address any concerns about investors and potential investors in a crowdfunding vehicle receiving regular information from the crowdfunding issuers?

73. The crowdfunding vehicle would be required to provide to each investor (i) 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 (ii) any information that it receives from the crowdfunding issuer as a shareholder of record of the crowdfunding issuer. Would this effectively preserve state and federal law rights for shareholders and provide shareholders with the necessary information to determine whether to direct the crowdfunding vehicle to assert such rights? Is this condition appropriate for crowdfunding vehicles which, unlike collective investment vehicles generally, would serve the specific and limited purpose of functioning solely as conduits to invest in businesses raising capital through the vehicle under Regulation Crowdfunding? Operationally, how would crowdfunding vehicles comply with this condition in practice? In lieu of this condition, would a crowdfunding vehicle's disclosure to investors in writing of any differences that its investors would experience by investing indirectly in the crowdfunding issuer through the crowdfunding vehicle sufficiently address any concerns about a crowdfunding vehicle affecting an investor's rights under state or federal law?

74. Should we, as proposed, require crowdfunding issuers and crowdfunding vehicles to jointly file a Form C? Alternatively, should we require that each file a separate Form C or only require the crowdfunding vehicle to file a Form C? What would be the advantages and disadvantages of requiring separate Forms C to be filed? Should the application of the Regulation Crowdfunding offering limit be revised in light of the requirement to jointly file a Form C?

75. The proposed rule would require a crowdfunding issuer that is offering securities through a crowdfunding vehicle to file a separate Form C if it wanted to also directly offer its securities to investors. Should we instead permit such a crowdfunding issuer to offer its securities directly to investors on the same Form C the crowdfunding vehicle uses to offer

its securities? If so, are there any restrictions or disclosure obligations we should implement to avoid investor confusion? What issues could arise if crowdfunding issuers were allowed to simultaneously offer on Form C in this way?

76. A crowdfunding vehicle may constitute a single record holder for purposes of Section 12(g), rather than treating each of the crowdfunding vehicle's investors as record holders as would be the case if they had invested in the crowdfunding issuer directly. Is this treatment appropriate? Should each investor in the crowdfunding vehicle be treated as a separate record holder for purposes of Section 12(g)? Would legislative changes be necessary or beneficial to address the treatment of the crowdfunding vehicle under Section 12(g)?
77. Should the Commission further address the status of a crowdfunding vehicle complying with the proposed rule 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, and persons operating such crowdfunding vehicle?

2. Regulation Crowdfunding Eligible Securities

We are proposing to limit the types of securities that may be offered and sold in reliance on Regulation Crowdfunding. 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,[350] 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-

[350] *See* 17 CFR 230.261.

traditional securities.[351] One type of non-traditional security that has caused concern is the "Simple Agreement for Future Equity," or SAFE.[352] The offer and sale of these kinds of 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. These kinds of securities may also create confusion for retail investors who may not understand the differences between these securities and traditional common stock. Such confusion could lead to investor dissatisfaction, which in turn may jeopardize the reputation of the Regulation Crowdfunding market.

As a result, we are proposing 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. Thus, 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.[353] We preliminarily believe that such a limitation is consistent with the nature of the crowdfunding exemption. We understand that the popularity of

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[351] Other types of non-traditional securities that have been offered and sold under Regulation Crowdfunding include Simple Agreements for Future Tokens and certain revenue sharing agreements. *See infra* Section IV.C.6.b for further information about security types in Regulation Crowdfunding.

[352] *See* SEC Office of Investor Education and Advocacy, Investor Bulletin: Be Cautious of SAFEs in Crowdfunding (May 9, 2017), *available at* https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_safes. A SAFE is an agreement to provide investors with a future equity stake in the issuer if certain triggering events occur. SAFEs are not an equity interest or common stock of an issuer. Rather, they are convertible into such equity only upon the occurrence of a triggering event specifically enumerated in the agreement, such as when the issuer is acquired, merges with another company, or conducts an initial public offering. As such, SAFEs are specifically controlled by the terms of the agreement between the issuer and the investors and unlike common stock do not confer all of the rights and entitlements provided under state corporation law, such as voting rights or appraisal rights. *See also* FINRA, "Be Safe—5 Things You Need to Know About SAFE Securities and Crowdfunding," *available at* https://www.finra.org/investors/insights/safe-securities.

[353] Certain securities that may not have all of the characteristics traditionally associated with equity or debt securities, such as tokens, may qualify as Regulation A eligible securities, depending on the particular facts and circumstances. If adopted, we believe the proposed amendment to eligible securities under Regulation Crowdfunding would be applied in the same manner.

SAFEs and similar security types in Regulation Crowdfunding offerings may be in part due to a desire by issuers to avoid a complicated capitalization table. However, we believe that the proposed amendment permitting crowdfunding vehicles to use Regulation Crowdfunding discussed above may more appropriately alleviate that concern.

Request for Comment

78. Should we harmonize the limitations on the types of eligible securities issuable under Regulation Crowdfunding with Regulation A as proposed? If so, what would be the effect on issuers, investors, and the market of limiting these categories of securities? In the alternative, should we modify Regulation Crowdfunding only to exclude particular security types, such as SAFEs?
79. If the popularity of SAFEs is in part due to a desire by issuers to avoid a complicated capitalization table, would our proposed amendments permitting crowdfunding vehicles to use Regulation Crowdfunding appropriately alleviate that concern? Are there other reasons why issuers issue SAFEs or other security types in Regulation Crowdfunding offerings that we should be aware of when considering whether to exclude particular security types?

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 period that the issuer was required to file such reports).[354] Now that issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act are permitted to conduct

[354] 17 CFR 230.251(b)(7). Rule 257 requires issuers conducting Tier 2 offerings to comply with certain ongoing and periodic reporting requirements.

Regulation A offerings, we are proposing to amend Regulation A to include a similar eligibility requirement covering Exchange Act reports. As proposed, companies 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.[355]

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. The proposed change would hold Exchange Act reporting companies to the same standard as repeat Regulation A issuers. This requirement 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. Furthermore, because they are already required to file such reports, the proposed requirement would not increase the burden of making a Regulation A offering for Exchange Act reporting companies or companies that were Exchange Act reporting companies within the two years prior to making a Regulation A offering.

Request for Comment

80. Should we amend Regulation A as proposed to include an eligibility requirement that requires Exchange Act reporting companies to be current in their Exchange Act reporting for the two years before filing an offering statement?

G. Bad Actor Disqualification Provisions

[355] 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.

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 disqualification provisions are substantially similar,[356] the look-back period for determining whether a covered person is disqualified differs between Regulation D and the other exemptions. We are proposing 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 look-back requirements in Regulation A and Regulation Crowdfunding to include the time of sale in addition to the time of filing.

Under Regulation D[357] a disqualification occurs if: (1) a covered person is involved in the offering; (2) that covered person is subject to one or more of the disqualifying events in Rule 506(d); and (3) the disqualifying event occurs within the look-back period provided by the regulation.[358] For Regulation D, the look-back period is measured from the time of the sale of securities in the relevant offering. For Rule 262(a) of Regulation A and Rule 503(a) of Regulation Crowdfunding, the look-back period is measured from the time the issuer files an offering statement.[359]

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[356] 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.

[357] The disqualification provisions in Rule 506(d) also apply to Rule 504. *See* 17 CFR 230.504(b)(3).

[358] *See* 17 CFR 230.506(d)(1)(i) through (viii).

[359] Rule 503(a) provides look-back 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, Rule 262(a)(6) and Rule 503(a)(6) are not. *See* 17 CFR 230.262(a)(6); and 17 CFR 227.503(a)(6).

We believe that it is important to look to both the time of filing of the offering document and the time of the sale with respect to disqualifying bad actors from participating in an offering.[360] Otherwise, there is an increased likelihood 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. We note, for example, that in the context of a continuous or delayed offering under Regulation A where the look-back is generally measured from the time of filing of the offering statement, a covered person under Rule 262 could potentially offer and sell securities under Regulation A after the filing of the offering statement and until the issuer is required to file a post-qualification amendment to the offering statement, despite the occurrence of an event during that time frame that otherwise would constitute a disqualifying event if it occurred prior to the filing of the offering statement.

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 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.[361] Regulation Crowdfunding, which similarly measures the look-back 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

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[360] This may be particularly true for regulating the conduct of promoters connected with an issuer throughout an ongoing offering.

[361] *See* Rule 252(f)(2).

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.[362] 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.

The disqualification provisions in Regulation A and Regulation Crowdfunding were intended to be "substantially similar" to those in Regulation D.[363] We believe that further harmonizing these provisions by using the same disqualification look-back period would simplify compliance and due diligence for issuers and would improve investor protections by further limiting the role of "bad actors" in exempt offerings.[364] Specifically, we propose to add "or such sale" to any look-back 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).

Additionally, 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, we propose including "any promoter connected with the issuer in any capacity at

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362 *See* Rule 203(a)(2).

363 *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 356.

364 *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.

the time *of filing, any offer after filing, or such sale*" in Rule 503(a). Rule 503(a) currently only covers 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.

In adopting the disqualification provisions under Regulation D, the Commission was cognizant of the monitoring costs associated with Rule 506(d)'s disqualification provisions in an ongoing offering. The Commission therefore 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. The Commission was particularly aware of the costs of monitoring beneficial owners of 20 percent or more of the issuer's outstanding voting securities.[365] At the time, 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.[366] For Regulation A and Regulation Crowdfunding, however, monitoring covered beneficial owners may pose different challenges than for 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, we are proposing to retain the current look-back period applicable to covered

[365] Rule 506(d) Final Release, at Section II.B.

[366] *Id.* at Section II.D.2.

beneficial owners in Regulation A and Regulation Crowdfunding rather than amending it to start at the time of sale. We are not aware of any investor protection concerns that have arisen with respect to the current look-back period for beneficial owners.

These 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.[367] Nonetheless, with respect to the latter provision, we propose to amend Rule 262(b)(3) and 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 may occur after the time of "the filing of the offering statement," in the case of Regulation A, or "the filing of the information required by section 4A(b) of the Securities Act," in the case of Regulation Crowdfunding. The proposed added language would accord with the parallel look-back language in Rule 506(d)(2)(iii) of Regulation D by replacing the references in Rules 262(b)(3) and 503(b)(3) with "before the relevant sale."

Request for Comment

81. Should we revise the bad actor look-back provisions in Rule 262(a) of Regulation A and Rule 503(a) of Regulation Crowdfunding as proposed?
82. Should we keep any of the current bad actor look-back provisions centered on the time of filing rather than the time of sale as we are proposing to do for 20 percent beneficial owners? Should we do the same for any covered persons other than 20 percent beneficial owners?

[367] 17 CFR 230.262(b)(3).

83. Instead of disqualifying Regulation A or Regulation Crowdfunding issuers affected by disqualifying events that first arise or occur during an ongoing offering, should we allow such issuers to continue the offering but require them to disclose the disqualifying event, and provide investors with the option to cancel their investment commitments and obtain a refund of invested funds? Would such an option be difficult for issuers to administer?
84. Should we, as proposed, revise the language in Rule 503(a) to more closely track the requirement in Rule 262(a) of Regulation A by including "any promoter connected with the issuer in any capacity at the time of filing, any offer after filing, or such sale"?
85. Are there any anticipated additional costs of verifying the bad actor status of covered persons under Rule 262(a) and Rule 503(a) with a look-back period based on the time of sale instead of the time of filing? If so, would those costs be significant to the average issuer in Regulation A and Regulation Crowdfunding offerings?

III. GENERAL REQUEST FOR COMMENT

We request and encourage any interested person to submit comments regarding the proposed rules and amendments that are the subject of this release, potential additions or changes to these proposals, and other matters that may have an effect on the proposals. With regard to any comments, we note that such comments are of particular assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. ECONOMIC ANALYSIS

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 2(b) of the Securities Act,[368] Section 3(f) of the Exchange Act,[369] and Section 2(c) of the Investment Company Act[370] 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.[371]

We have considered the economic effects of the proposed amendments, including their effects on competition, efficiency, and capital formation. Many of the effects discussed below cannot be quantified. Consequently, while we have, wherever possible, attempted to quantify the economic effects expected from this proposal, much of the discussion remains qualitative in nature. Where we are unable to quantify the economic effects of the proposed amendments, we provide a qualitative assessment of the potential effects and encourage commenters to provide data and information that would help quantify the benefits, costs, and the potential impacts of the proposed amendments on efficiency, competition, and capital formation.

We request comment from the points of view of all interested parties. With regard to any comments, we note that such comments are of greatest assistance to our rulemaking

368 15 U.S.C. 77b(b).

369 15 U.S.C. 78c(f).

370 15 U.S.C. 80a-2(c).

371 15 U.S.C. 78w(a)(2).

initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

A. Broad Economic Considerations

The proposed amendments would simplify, harmonize, and improve certain aspects of the Commission's exempt offering framework, including Regulation D, Regulation A, Regulation Crowdfunding, and other related rules. The proposed amendments build on changes to the federal securities laws brought about by the JOBS Act, as well as many other developments in the securities laws, capital markets, and communication technologies since the adoption of Regulation D in 1982. By providing a more streamlined and consistent exempt offering framework, the proposed amendments are expected to promote capital formation through exempt offerings (either by existing issuers or by issuers that would not have otherwise pursued a securities offering), expanding such issuers' ability to pursue positive net present value investment and growth opportunities. The proposed 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 for some issuers to a registered offering. In addition, the increased flexibility afforded by the proposed amendments could enable issuers to optimize their offering strategy and reduce their external financing costs, enabling such issuers to fund a broader range of investment projects. We recognize, however, that the proposed amendments might lead to some substitution between different exempt offering methods or between registered offerings and exempt offerings, which would moderate the aggregate effects of the amendments on new capital formation.

Amendments to certain provisions of Regulation A, Regulation Crowdfunding, and Rule 504 intended to facilitate compliance and raise offering limits are expected to make these exemptions more cost-effective and attractive to a broader range of issuers than they are today. The resulting composition of the issuers that would rely on these exemptions remains unclear. One possibility is that the amended exemptions would 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 in light of the existing, lower limits. The higher offering limits also might make the amended exemptions more attractive to financial intermediaries that presently might be unwilling to partake in such offerings because fixed costs of participating in such a fund raising, such as the costs of due diligence, might be too high in proportion to the potential compensation, and because the pool of issuers seeking financing in these market segments today might not be sufficiently large or diversified to attract intermediaries. Another possibility is that the proposed amendments could make these exemptions more attractive to issuers seeking to avoid more stringent requirements that would apply to other offering structures. We lack the data, or a methodological approach, to disentangle these competing effects. Importantly, even if adverse selection increased somewhat in some segments of the exempt market under the proposed amendments, the investor protections applicable to each exemption would remain as significant safeguards against the risk of losses for less sophisticated investors.

Some of the proposed amendments could expand non-accredited investor access to investment opportunities, including:

- Proposed changes to increase investment limits for non-accredited investors in Regulation Crowdfunding offerings;
- Provisions expanding integration safe harbors for Rule 506 offerings, potentially enabling more frequent offerings involving non-accredited investors; and

- Provisions that potentially make Rule 504, Regulation A, and Regulation Crowdfunding, which do not limit the number of non-accredited investors, more attractive to prospective issuers through increased offering limits, the eligibility of crowdfunding vehicles under Regulation Crowdfunding, and modifications to certain Regulation A disclosure requirements.

Expanded access to exempt securities could enable non-accredited investors to allocate capital across a broader range of opportunities.[372] Several factors make it difficult to assess the

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[372] As noted by several commenters, comprehensive data on the investment returns resulting from investments in exempt offerings is scarce due to the scaled disclosure requirements and a lack of a secondary trading market. *See* State Attorneys General Letter; letter from Philip A. Feigin dated August 21, 2019; letter from Elizabeth D. de Fontenay et al. dated September 24, 2019; letter from Rick A. Fleming, Investor Advocate of the Commission, dated July 11, 2019; and letter from Better Markets, Inc. dated September 24, 2019 ("Better Markets Letter"). Available evidence focuses on returns of hedge funds and private equity funds. Comprehensive, market-wide data on the returns of private investments is not available due to a lack of required disclosure, the voluntary nature of disclosure of performance information by private funds, and the very limited nature of secondary trading in these securities. Academic studies have focused on private fund returns, acknowledging limitations and biases in the available data. As an important caveat, risk-adjusted returns obtained by large institutional investors in private placements may not be an accurate representation of the returns that would be obtained by non-accredited investors. Research has examined (i) private equity returns (*see*, *e.g.*, Steven N. Kaplan & Antoinette Schoar, *Private Equity Performance: Returns, Persistence, and Capital Flows*, 60 J. FIN. 1791 (2005); Andrew Metrick & Ayako Yasuda, *Venture Capital and Other Private Equity: A Survey*, 17 EUR. FIN. MGMT. 619 (2011); Christian Diller & Christoph Kaserer, *What Drives Private Equity Returns? Fund Inflows, Skilled GPs, and/or Risk?*, 15 EUR. FIN. MGMT. 643 (2009); Robert S. Harris et al., *Financial Intermediation in Private Equity: How Well Do Funds of Funds Perform?*, 129 J. FIN. ECON. 287 (2018); Robert S. Harris, Tim Jenkinson, & Steven N. Kaplan, *Private Equity Performance: What Do We Know?*, 69 J. FIN. 1851 (2014); and Kasper Nielsen, *The Return to Direct Investment in Private Firms: New Evidence on the Private Equity Premium Puzzle*, 17 EUR. FIN. MGMT. 436 (2011)); (ii) VC performance (*see*, *e.g.*, John H. Cochrane, *The Risk and Return of Venture Capital*, 75 J. FIN. ECON. 3 (2005); Arthur Korteweg & Stefan Nagel, *Risk-Adjusting the Returns to Venture Capital*, 71 J. FIN. 1437 (2016); and Axel Buchner, Abdulkadir Mohamed, & Armin Schwienbacher, *Does Risk Explain Persistence in Private Equity Performance?*, 39 J. CORP. FIN. 18 (2016)); and (iii) hedge fund returns (*see*, *e.g.*, William Fung & David A. Hsieh, *Hedge Fund Benchmarks: A Risk-Based Approach*, FIN. ANALYSTS J., Sept./Oct. 2004, at 65; William Fung & David A. Hsieh, *Measurement Biases in Hedge Fund Performance Data: An Update*, FIN. ANALYSTS J., May/June 2009, at 36; Manuel Ammann, Otto R. Huber, & Markus Schmid, *Benchmarking Hedge Funds: The Choice of the Factor Model* (Working Paper, 2011); Zheng Sun, Ashley W. Wang, & Lu Zheng, *Only Winners in Tough Times Repeat: Hedge Fund Performance Persistence over Different Market Conditions*, 53 J. FIN. & QUANTITATIVE ANALYSIS 2199 (2018); Charles Cao et al., *What Is the Nature of Hedge Fund Manager Skills? Evidence from the Risk-Arbitrage Strategy*, 51 J. FIN. & QUANTITATIVE ANALYSIS 929 (2016); Vikas Agarwal, T. Clifton Green, & Honglin Ren, *Alpha or Beta in the Eye of the Beholder: What Drives Hedge Fund Flows?*, 127 J. FIN. ECON. 417 (2018); Jakub Jurek and Erik Stafford, *The Cost of Capital for Alternative Investments*, 70 J. FIN. 2185 (2015); Turan G. Bali, Stephen J. Brown, & Mustafa O. Caglayan, *Systematic Risk and the Cross Section of Hedge Fund Returns*, 106 J. FIN. ECON. 114 (2012); Turan G. Bali, Stephen J. Brown, & Mustafa O. Caglayan, *Macroeconomic Risk and Hedge Fund Returns*, 114 J. FIN. ECON. 1 (2014); Andrea Buraschi, Robert Kosowski, & Fabio Trojani, *When There Is No Place to Hide: Correlation*

net effects of the proposed amendments would have on the participation in exempt offerings and efficiency of capital allocation by non-accredited investors:

- The amendments might lead to substitution between exempt offering methods that allow non-accredited investors or between registered offerings and exempt offerings, leaving the aggregate set of investment opportunities for non-accredited investors little changed. For instance, some commenters expressed concern that facilitating capital raising through exempt offerings might incrementally contribute to the ongoing decline in U.S. registered offerings, which might limit the overall set of investment opportunities available to non-accredited investors and decrease the aggregate amount of information available to investors.[373] Even if that were the case, expanded access to capital allowing

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Risk and the Cross-Section of Hedge Fund Returns, 27 REV. FIN. STUD. 581 (2014); Ravi Jagannathan, Alexey Malakhov, & Dmitry Novikov, *Do Hot Hands Exist Among Hedge Fund Managers? An Empirical Evaluation*, 65 J. FIN. 217 (2010); Andrea Buraschi, Robert Kosowski, & Worrawat Sritrakul, *Incentives and Endogenous Risk Taking: A Structural View on Hedge Fund Alphas*, 69 J. FIN. 2819 (2014); Ronnie Sadka, *Liquidity Risk and the Cross-Section of Hedge-Fund Returns*, 98 J. FIN. ECON. 54 (2010); and Ilia D. Dichev & Gwen Yu, *Higher Risk, Lower Returns: What Hedge Fund Investors Really Earn*, 100 J. FIN. ECON. 248 (2011)).

Comprehensive data on angel investment returns, entrepreneur returns on investment of their own funds and savings in starting a private business, and returns of investors in the crowdfunding market is lacking. A few studies we have identified have used small, selected samples, sometimes from foreign markets, which do not generalize to the entire U.S. market. *See*, *e.g.*, Vincenzo Capizzi, *The Returns of Business Angel Investments and Their Major Determinants*, 17 VENTURE CAP. 271 (2015) (using a small sample of Italian data); and Colin M. Mason & Richard T. Harrison, *Is It Worth It? The Rates of Return from Informal Venture Capital Investments*, 17 J. BUS. VENTURING 211 (2002) (using a small UK sample). Investments through AngelList and similar platforms allow accredited investors to make VC-like investments in startups. The returns generated by such investments have been a topic of debate in the literature. *See*, *e.g.*, Olga Itenberg & Erin E. Smith, *Syndicated Equity Crowdfunding: The Trade-Off Between Deal Access and Conflicts of Interest* (Simon Bus. Sch., Working Paper No. FR 17-06, Mar. 2017). *See also*, *e.g.*, Elisabeth Mueller, *Returns to Private Equity – Idiosyncratic Risk Does Matter!*, 15 REV. FIN. 545 (2011); Thomas Astebro, *The Returns to Entrepreneurship*, in OXFORD HANDBOOK OF ENTREPRENEURIAL FINANCE (Douglas Cumming ed. 2012); and Thomas J. Moskowitz & Annette Vissing-Jørgensen, *The Returns to Entrepreneurial Investment: A Private Equity Premium Puzzle?*, 92 AM. ECON. REV. 745 (2002) ("Moskowitz and Vissing-Jørgensen"). For instance, Moskowitz and Vissing-Jørgensen examine the returns to investing in U.S. nonpublicly traded equity and find that, although entrepreneurial investment is extremely concentrated, the returns to private equity are no higher than the returns to public equity. They attribute the willingness of households to invest substantial amounts in a single privately held firm with a seemingly far worse risk-return trade-off to large nonpecuniary benefits, a preference for skewness, or overestimated probability of survival.

373 *See*, *e.g.*, Better Markets Letter (opining that "if the Commission enacts some of the ideas it is contemplating in this Concept Release, the US investors will have fewer public companies to invest in, the

issuers to meet their financing needs at a lower cost would enhance the efficiency of capital allocation to growth opportunities, with the resulting benefits for economic growth, competition, and capital markets as a whole. Importantly, we do not expect the proposed 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 public reporting company (relative to the cost of being public). Rather, we believe that 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 added flexibility contained in 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.

securities markets will have more companies with illiquid securities, and price discovery will suffer.") and Healthy Markets Letter (opining that "the available evidence suggests that instead of promoting efficient allocations of capital and protecting investors, the proposals outlined by the Concept Release will increase the number of companies and amount of capital in the private markets on one hand, while further eroding the number and quality of public companies on the other.").

- Issuers might remain unwilling to undertake exempt offerings with non-accredited investors (*e.g.*, due to a preference for institutional and angel investors that bring connections and expertise in addition to capital; capitalization table concerns in light of subsequent financing plans[374] or Section 12(g) registration thresholds; costs of investor relations with small investors; or risks of proprietary information disclosure due to the presence of multiple small investors; or general solicitation). Issuers with worse prospects that are unable to attract capital from large investors, which undertake more monitoring and screening, might be overrepresented among exempt offerings focused on non-accredited investors. This mechanism might contribute to quality sorting in an expanded set of investment opportunities in exempt offerings to non-accredited investors.
- Non-accredited investors might choose not to participate in exempt offerings (*e.g.*, due to illiquidity, high transaction costs, search costs, high information asymmetries and due diligence costs, high investment minimums that preclude the desired level of diversification for small investors, agency problems due to minority stakes, etc.).
- The resulting efficiency of portfolio allocations of non-accredited investors also would depend on the level of investor sophistication in obtaining and analyzing information in a setting where issuers provide less disclosure compared to registered offerings.[375]

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374 *See, e.g.*, *supra* Section II.F.

375 In Modern Portfolio Theory, constraining the set of investment opportunities yields a potentially inferior optimal portfolio. *See, e.g.*, Zvi Bodie, Alex Kane, & Alan J. Marcus, INVESTMENTS (10th ed. 2013) ("Bodie et al. 2013"). 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, generally*, surveys in Nicholas Barberis & Richard Thaler, *A Survey of Behavioral Finance*, in HANDBOOK OF THE ECONOMICS OF FINANCE (Vol. 1B) (George M. Constantinides, Milton Harris, & Rene M. Stulz eds., 1st ed. 2003), at 1053; and Brad Barber & Terrance Odean, *The Behavior of Individual Investors*, in HANDBOOK OF THE ECONOMICS OF FINANCE (Vol. 2B) (George M. Constantinides, Milton Harris, & Rene M. Stulz eds., 1st ed. 2013), at 1533.

- Irrespective of their individual level of sophistication, non-accredited investors might potentially benefit from the positive spillovers of the monitoring and screening efforts of

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See also, e.g., William N. Goetzmann & Alok Kumar, *Equity Portfolio Diversification*, 12 REV. FIN. 433 (2008) (finding that "U.S. individual investors hold under-diversified portfolios, where the level of under-diversification is greater among younger, low-income, less-educated, and less-sophisticated investors. The level of under-diversification is also correlated with investment choices that are consistent with over-confidence, trend-following behavior, and local bias. . .Under-diversification is costly to most investors, but a small subset of investors under-diversify because of superior information."); Shlomo Benartzi & Richard H. Thaler, *Heuristics and Biases in Retirement Savings Behavior*, J. ECON. PERSP., Summer 2007, at 81; Warren Bailey, Alok Kumar, & David Ng, *Behavioral Biases of Mutual Fund Investors*, 102 J. FIN. ECON. 1 (2011) (examining "the effect of behavioral biases on the mutual fund choices of a large sample of US discount brokerage investors using new measures of attention to news, tax awareness, and fund-level familiarity bias, in addition to behavioral and demographic characteristics of earlier studies. Behaviorally biased investors typically make poor decisions about fund style and expenses, trading frequency, and timing, resulting in poor performance. Furthermore, trend chasing appears related to behavioral biases, rather than to rationally inferring managerial skill from past performance. Factor analysis suggests that biased investors often conform to stereotypes that can be characterized as Gambler, Smart, Overconfident, Narrow Framer, and Mature."); Anders Anderson, *Trading and Under-Diversification*, 17 REV. FIN. 1699 (2013) (documenting "a link between trading and diversification by using detailed trading records from a Swedish discount broker matched with individual tax records. Diversification is measured by the investors' stake size, defined as the fraction of their risky financial wealth invested in individual stocks through the broker under study. High-stake investors have concentrated portfolios, trade more, and achieve lower trading performance. They share several features with those who trade excessively, namely lower income, wealth, age, and education, suggesting that they lack investment expertise. The results directly imply that trading losses in the cross-section are mainly borne by those who can least afford them."); and Hans-Martin von Gaudecker, *How Does Household Portfolio Diversification Vary with Financial Literacy and Financial Advice?*, 70 J. FIN. 489 (2015) (finding that "[n]early all households that score high on financial literacy or rely on professionals or private contacts for advice achieve reasonable investment outcomes. Compared to these groups, households with below-median financial literacy that trust their own decision-making capabilities lose an expected 50 bps on average. All group differences stem from the top of the loss distribution.").

We note that the level of investor sophistication and due diligence capabilities might improve with investing experience, which investors might not have been able to develop under the baseline, although evidence is mixed on the effectiveness of learning among individual investors. *See, e.g.*, Lubos Pastor & Pietro Veronesi, *Learning in Financial Markets*, 1 ANN. REV. FIN. ECON. 361 (2009) (surveying literature on learning); Maximilian Koestner et al., *Do Individual Investors Learn from Their Mistakes?*, 87 J. BUS. ECON. 669 (2017); Amit Seru, Tyler Shumway, & Noah Stoffman, *Learning by Trading*, 23 REV. FIN. STUD. 705 (2010) (finding "evidence of two types of learning: some investors become better at trading with experience, while others stop trading after realizing that their ability is poor. A substantial part of overall learning by trading is explained by the second type" and noting that "ignoring investor attrition, the existing literature significantly overestimates how quickly investors become better at trading."); Stefan Muhl & Tõnn Talpsepp, *Faster Learning in Troubled Times: How Market Conditions Affect the Disposition Effect*, 68 Q. REV. ECON. & FIN. 226 (2018) (using Estonian data and finding that learning, particularly learning by doing, is enhanced during bad times); and Tarvo Vaarmets, Kristjan Liivamägi, & Tõnn Talpsepp, *How Does Learning and Education Help to Overcome the Disposition Effect?*, 23 REV. FIN. 801 (2019) (evaluating how investor learning reduces disposition effect using Estonian data and finding heterogeneity in learning ability). *But see, e.g.*, Yao-Min Chiang et al., *Do Investors Learn from Experience? Evidence from Frequent IPO Investors*, 24 REV. FIN. STUD. 1560 (2011) (presenting evidence of IPO investors in Taiwan that "individuals become unduly optimistic after receiving good returns.").

any participating accredited investors that have more extensive due diligence expertise. However, non-accredited investors that tend to hold minority stakes might need to perform additional due diligence, given potential differences in the payoffs obtained by accredited versus non-accredited investors.[376]

- Finally, any potential effects of the proposed amendments on the risks to non-accredited investors should be assessed in the context of the existing economic and market

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[376] Such differences might be due to differences in terms of securities. For instance, downside protection and anti-dilution options may be negotiated by large investors with greater bargaining power. *See* Healthy Markets Letter (commenting that investors' rights in private placements are "left to the bargaining power of the parties" which limits the rights of smaller investors); and NASAA Letter (commenting that "investors are not treated equally" in private markets). For example, one study has analyzed data on contractual provisions in PIPEs and documented significant variation in the use of downside protection terms. *See* Matthew T. Billett, Redouane Elkamhi, & Ioannis V. Floros, *The Influence of Investor Identity and Contract Terms on Firm Value: Evidence from PIPEs*, 24 J. FIN. INTERMEDIATION 564 (2015). *See also* David J. Brophy, Paige P. Ouimet, & Clemens Sialm, *Hedge Funds as Investors of Last Resort?*, 22 REV. FIN. STUD. 541 (2009) (showing that hedge funds investing in PIPEs as "investors of last resort" protect themselves by requiring substantial discounts, negotiating repricing rights, and entering into short positions of the underlying stocks); and Susan Chaplinsky & David Haushalter, *Financing Under Extreme Risk: Contract Terms and Returns to Private Investments in Public Equity*, 23 REV. FIN. STUD. 2789 (2010) (examining control rights and other contractual terms in PIPE transactions with financially constrained issuers). We recognize that evidence from PIPEs need not generalize to non-reporting companies that account for the majority of private placement issuers. However, because Form D does not provide disclosure of contractual terms and private placement memoranda from Regulation D or Section 4(a)(2) offerings are not required to be filed, data on the terms obtained by various investors in private placements is generally not available.

Studies have also documented terms negotiated in VC contracts. *See, e.g.*, Steven N. Kaplan & Per Stromberg, *Characteristics, Contracts, and Actions: Evidence from Venture Capitalist Analyses*, 59 J. FIN. 2177 (2004) (documenting the use of redemption rights, liquidation rights, and antidilution provisions in VC contracts); and Paul A. Gompers et al., *How do Venture Capitalists Make Decisions?*, 135 J. FIN. ECON. 169 (2020) (surveying 885 institutional VCs at 681 firms and documenting various VC practices, including the use of various deal terms, such as anti-dilution protection (which gives the VC more shares if the company raises a future round at a lower price), pro rata rights (which give investors the right to participate in the next round of funding), liquidation preferences (which give investors a seniority position in liquidation), participation rights (which allow VC investors to combine upside and downside protection so that VC investors first receive their downside protection and then share in the upside), and redemption rights (which give investors the right to redeem their securities, or demand from the company the repayment of the original amount)).

We further recognize that differences in payoffs of different investor types can be fair compensation for value added by the expertise, advice, governance, and network connections contributed by large investors. *See also* Karen H. Wruck & YiLin Wu, *Relationships, Corporate Governance, and Performance: Evidence from Private Placements of Common Stock*, 15 J. CORP. FIN. 30 (2009) (concluding that PIPEs are more likely to create value when they are associated with increased monitoring and strong governance by PIPE investors).

Other potential benefits resulting from a large investor's control of an issuer include the investor's ability to enter a governance relationship with the issuer or otherwise have input into corporate decisions that reduce the value of such issuer but increase the value of other issuers in which a large investor also has a stake.

conditions, which allow such investors to establish other financial exposures that might involve a high level of risk or require extensive due diligence, 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 of the securities market (*e.g.*, holdings of futures, foreign exchange, real estate, individual small businesses, peer-to-peer lending, and other personal financial transactions that may entail high risk or leverage). Thus, some of the new capital invested in exempt offerings by non-accredited investors under the proposed amendments might have otherwise been allocated to other assets with high risk or extensive due diligence requirements.

Some of the proposed 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 proposed 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 proposed integration amendments would overall facilitate capital formation by harmonizing requirements and providing additional flexibility to issuers seeking an exemption from registration or transitioning to a registered offering. As another example, the effects of the amendments to provisions regarding eligible security types and eligible categories of issuers in Regulation Crowdfunding might interact. To the extent that reliance on SAFEs is driven by capitalization table concerns, the proposed narrowing of the eligible security types, which would exclude SAFEs from Regulation Crowdfunding, might have minimal effects on issuers if crowdfunding vehicles become eligible under Regulation Crowdfunding as proposed. Furthermore, the proposed amendments relaxing investment limits and raising offering limits in Regulation Crowdfunding might result in mutually reinforcing benefits for capital formation. In a related vein, the proposed amendments to raise offering limits for individual offering exemptions might lead to increased substitution between exemptions. Finally, we recognize that the proposed amendments to exemptions that are currently little used might have limited aggregate economic effects in absolute terms even if the relative changes to the rate of use of those exemptions are substantial.

In a recent release, the Commission has proposed to amend and expand the accredited investor definition.[377] If adopted, those amendments would affect the economic impacts of the amendments proposed here. In particular, some of the effects of the changes to the exempt offerings proposed here that are intended to facilitate exempt offering financing under Regulation D (*e.g.*, expanded integration provisions) or under other exemptions (*e.g.*, exempting accredited investors from the investment limits under Regulation Crowdfunding) might have relatively greater economic effects if issuers can offer securities to an expanded pool of accredited investors as contemplated by the proposed accredited investor definition amendments. In turn, some of the anticipated effects of the proposed changes to facilitate exempt offerings to non-accredited investors (*e.g.*, amendments to the disclosure requirements for sales to non-accredited investors under Rule 506(b); expanded offering limits under Rule 504, Regulation A, and Regulation Crowdfunding; and test-the-waters provisions for Regulation Crowdfunding) might have relatively smaller economic effects if issuers can access an

377 *See* Accredited Investor Definition Proposing Release.

expanded accredited investor pool as contemplated by the proposed accredited investor definition amendments, and thus become less reliant on offerings to non-accredited investors.

B. Baseline

We examine the economic effects of the proposed 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 proposed amendments include current and prospective issuers and investors in exempt offerings. To the extent that the proposed amendments affect how issuers choose between registered and exempt offerings, the proposed 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 would also be affected by the proposed 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 proposed 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 proposed increase in the offering limit makes the underwriting role more cost-effective).

Table 11[378] summarizes recent data on the Regulation D market.

Table 11: Offerings under Regulation D in 2019

	Rule 504	**Rule 506(b)**	**Rule 506(c)**
Number of New Offerings	476	24,636	2,269
Amount Reported Raised	$0.2 billion	$1,491.9 billion	$66.3 billion

As can be seen from Table 11, 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.[379]

Table 12[380] summarizes amounts sought and reported raised in offerings under Regulation Crowdfunding since its inception.[381]

378 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.

379 *See supra* Section II.E.. For a discussion of trends in the Regulation D markets, *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, DERA White Paper, Aug. 1, 2018), *available at* https://www.sec.gov/dera/staff-papers/white-papers/dera_white_paper_regulation_d_082018.

380 *See supra* note 12. 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.

381 For a discussion of the Regulation Crowdfunding market, *see also* 2019 Regulation Crowdfunding Report.

Table 12: 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. Table 13[382] presents data on the characteristics of issuers in crowdfunding offerings.[383]

Table 13: 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.

382 *See supra* note 12. The estimates are based on data from Form C or the latest amendment to it, excluding withdrawals.

383 *See also* 2019 Regulation Crowdfunding Report.

Table 14[384] summarizes amounts sought and reported raised in offerings under Regulation A since the effective date of the 2015 Regulation A amendments.[385]

Table 14: 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.

384 *See supra* note 12. The estimates include post-qualification amendments, and exclude abandoned or withdrawn offerings. *See also* 2020 Regulation A Review.

385 *See also* Figures 1 and 2 in the 2020 Regulation A Review, which provide a graphic depiction of the data conveyed in Table 14.

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 proposed 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 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.

C. Economic Effects of the Proposed Amendments

1. Integration

We are proposing to revise the framework relating to the integration analysis. As discussed in greater detail in Section II.A, the proposed amendments would update and expand existing integration provisions to provide greater uniformity and flexibility to issuers regarding integration of offerings.

Considered together, the proposed amendments are expected to facilitate compliance and promote greater consistency and uniformity across exemptions, and thus promote the use of exemptions by issuers that undertake multiple offerings.

Benefits

The proposed 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 proposed amendments are expected to reduce the cost of compliance with the integration requirements for issuers. In particular, we expect that the reduction in the safe harbor period from six months to 30 days would 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 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, as proposed, is expected to reduce integration-specific compliance efforts. The proposed 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, especially in light of the expansion of capital raising options following the JOBS Act. The resulting decrease in compliance costs might encourage additional issuers to pursue one or more exempt offerings or to pursue a private placement and a registered offering.

The proposed 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 benefits of the proposed amendments to issuers discussed above also are expected to accrue to the shareholders of those issuers by enhancing shareholder value, particularly if the increased flexibility in accessing external financing enables issuers to more efficiently pursue high-growth investment opportunities.

We recognize that the benefits of the proposed rules may be limited in a range of circumstances:

- In cases where the proposed amendments are codifying existing guidance, to the extent that the market has already developed practices aligned with the existing guidance, the effects of the proposed amendments relative to the baseline would be limited;
- Given that the vast majority of exempt offerings, and the capital raised through such offerings, relies on Rule 506(b) under Regulation D (or Section 4(a)(2)), the benefits of

expanding the integration safe harbors for other types of offerings under the proposed amendments could be limited;[386] and

- Rule 506(b) offerings do not have offering limits, and most do not involve non-accredited investors, thus a change in integration provisions is unlikely to affect issuers that continue to engage in such offerings in practice because such issuers would likely be able to meet all of their financing needs without having to conduct multiple offerings and would not have to resort to other offering types that permit greater non-accredited investor participation.[387]

Costs

The proposed amendments could result in additional financing being raised from non-accredited investors without registration requirements.[388] The disclosure requirements of all of these exemptions are less extensive than the requirements associated with a registered offering, which may in some cases lead to a weakening of investor protections. 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 that 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

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386 We recognize that other amendments we are proposing today might increase the use of Rule 506(c), Rule 504, Regulation A, and Regulation Crowdfunding.

387 We recognize that the amendments we are proposing today to non-accredited investor disclosure requirements might increase the incidence of non-accredited investors in Rule 506(b) offerings.

388 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).

subsequent private placement offering. This may potentially increase risks to any non-accredited investors participating in the subsequent private placement offering if such investors rely on the information communicated through general solicitation because private placement offerings do not afford the same investor protections as, for instance, Regulation A and Regulation Crowdfunding.

We anticipate a number of factors would mitigate these potential costs. The proposed amendments do not alter the substantive requirements of individual offering methods, including ones relating to investor protection. In addition, the proposed amendments would more closely align issuer efforts to comply with integration provisions and requirements of the respective exemptions, including, importantly, the provisions deemed important for investor protection in the context of each respective exemption. Moreover, nothing in the proposed amendments would enable a scheme to evade the requirements of the respective exemption or, in the context of registered offerings, the registration and gun jumping provisions of the Securities Act. In this regard, proposed Rule 152 specifies that the safe harbors 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. Further, issuers would remain prohibited from using general solicitation in a Rule 506(b) offering, through any means, irrespective of the proposed integration amendments.

The proposed amendments contain several other safeguards that are expected to minimize potential costs to investors. The provision in proposed Rule 152(a)(1)—that an issuer who is conducting or has conducted an offering that permits general solicitation ("Offering 1") and is conducting a concurrent offering or has conducted a subsequent offering that does not permit general solicitation ("Offering 2") must have a reasonable belief, based on the facts and circumstances, that the prospective investors in Offering 2 were not solicited through general solicitation from Offering 1 or that the investors established a substantive relationship with the issuer prior to the commencement of the offering not permitting general solicitation —is expected to minimize the effect of possible solicitation overlaps for multiple offerings. This provision would bolster existing solicitation restrictions in the individual exemptions and focus the integration analysis on issuer compliance with solicitation restrictions. Further, proposed Rule 152(a)(2) specifying that an issuer conducting an exempt offering for which general solicitation is permitted concurrently with an offering under another exemption for which general solicitation is permitted must include appropriate legends in its general solicitation would provide notice to investors and thereby help minimize potential confusion about the offering method, reducing the risk of uninformed investor decisions as a result of reliance on preliminary information contained in such solicitations.

The proposed safe harbors from integration are designed to minimize potential risks to investors. The 30-day period in the first proposed 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. Moreover, the proposed safe harbor would provide that if an offering that does not permit general solicitation follows a registered offering or an exempt offering that permits general solicitation, the investors in the private offering either must not have been solicited through the use of the registration statement or the prior general solicitation or must have developed a substantive relationship with the issuer prior to the commencement of the private offering. In addition, the proposed amendment to Rule 506(b) providing that 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 is expected to address the concern that failure to integrate multiple such offerings could result in sales to a large number of non-accredited investors.

The second proposed safe harbor concerns offerings under Rule 701 or Regulation S. As discussed above, Rule 701 offerings involve compensation agreements with employees and other parties with a pre-existing relationship with the issuer, and thus excluding such offerings from integration is not likely to raise meaningful investor protection concerns. The proposed amendments would permit an issuer conducting an offering with general solicitation to undertake a Regulation S offering using general solicitation so long as the general solicitation activity is not undertaken for the purpose of conditioning the U.S. market for any of the securities being offered in reliance on Regulation S. The proposed amendments also would require a Regulation S issuer that engages in general solicitation activity to 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 (which are expected to have the financial sophistication and ability to sustain the risk of loss of investment or fend for themselves). We expect these provisions would strengthen protections for United States investors from the risk of flowback of such securities to the United States.

The third proposed safe harbor concerns offerings for which a Securities Act registration statement has been filed following a completed or terminated private placement. Because private placements would continue to restrict general solicitation, the impact on investors in the private placement, most of which are deemed to have 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 would apply to the registered offering, it is unlikely to have any impact on investors in the registered offering. The third proposed safe harbor also provides that a registered offering would 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 took place more than 30 days prior to the 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, the proposed 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 proposed integration safe harbor would meaningfully affect investor protection. The proposal 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 proposed safe harbor extends the approach in Regulation A and Rules 147 and 147A and in the guidance regarding Regulation Crowdfunding to exclude any prior offer or sale from integration with offers and sales under Rule 147, Rule 147A, Regulation Crowdfunding, Rule 504(b)(1)(i), (ii), or (iii), and Rule 506(c). 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 proposed 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 proposed amendments require that issuers continue to meet the conditions of each exemption they are relying upon, and because investor protection provisions of each exemption as well as general anti-fraud provisions would continue to apply, we believe that the proposed amendments would not have significant adverse effects on investor protection.

We recognize that issuers seeking to rely on one or more of the proposed integration provisions would incur costs of analyzing the facts and circumstances of the contemplated offerings and/or the respective integration safe harbors. While we believe that the proposed 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 the integration safe harbors would remain voluntary, we expect that issuers would only rely on the safe harbors if such reliance might reduce their compliance costs. This would not affect all issuers. For instance, new entrants to the market would have to conduct this analysis presently, with more a more confusing and difficult to navigate integration framework.

Effects on Efficiency, Competition, and Capital Formation

The proposed integration provisions are expected to increase capital formation through exempt offerings and to enable issuers to combine financing under different exemptions more optimally as part of their financing strategy. However, the net capital formation benefits may be modest to the extent that issuers currently can avoid the need for multiple offerings (*e.g.*, by 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 proposed integration amendments would affect competition for investor capital. To the extent the proposed amendments might reduce issuer compliance costs associated with accessing a broader range of offering exemptions (*e.g.*, multiple JOBS Act exemptions), competition for investor capital in those market segments might increase. However, net effects on overall competition for investor capital might be limited to the extent that issuers reallocate between offering exemptions or additional investor capital is drawn to these markets under the proposed 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 proposed amendments are expected to improve the efficiency of an issuer's compliance efforts, particularly for issuers conducting multiple offerings.

Reasonable Alternatives

As an alternative, we could propose a uniform safe harbor with a time period other than 30 days (*e.g.*, 15, 45, 60, 75, or 90 days). Compared to the proposed amendments, the alternative of a universal safe harbor with a shorter (longer) time period than proposed would reduce (increase) the likelihood that multiple offerings would be integrated and, accordingly, reduce (increase) issuer costs of compliance. Compared to the proposed amendments, the alternative of a safe harbor with a shorter (longer) time period than proposed would provide issuers with greater (lower) flexibility in tailoring their capital raising strategy to changing financing needs and market conditions. Compared to the proposed amendments, such an alternative also could increase (reduce) the number of instances where issuers improperly divide a single plan of financing into multiple offerings.

The proposed amendments would replace the five factor test. As another alternative, we could codify the use of the five factor test for all analyses of integration. Compared to the proposed 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.

Request for Comment

86. Would the proposed amendments facilitate issuer compliance and enhance their ability to access capital markets and meet their financing needs?
87. Would an alternative integration approach achieve greater capital formation benefits? If so, which one? Would it impose additional costs?
88. Would the proposed approach to integration allow issuers to reduce their compliance costs or other costs of raising capital? Would the proposed approach to integration facilitate transition to a registered offering for issuers that previously relied on offering exemptions? Would the proposed approach to integration allow issuers to transition more easily among offering exemptions?
89. Which categories of issuers would benefit the most from the proposed approach to integration? Would the proposed approach to integration benefit smaller and younger issuers and promote competition?
90. Would there be costs to investors as a result of the proposed approach to integration? What would those costs be? What categories of investors would be most affected? What factors could mitigate such costs? Would an alternative integration safe harbor or guideline reduce costs to investors? If so, which one?

91. What would be the costs and benefits of shortening the period in the integration safe harbor to 30 days, as proposed? What would be the economic effects of an alternative time period, such as 15, 45, 60, or 90 days? What would be the economic effects of eliminating the waiting period entirely?

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 proposing to add certain "demo day" communications to the list of communications that would not be deemed general solicitation.

Benefits

The proposed 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. 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.

Costs

We do not expect significant costs to investors due to the proposed amendments specifying that certain limited "demo day" activities would not be deemed general solicitation because the proposed exclusion significantly restricts permissible activities of "demo day" sponsors. In particular, under the proposed amendment, the sponsor of the seminar or meeting would 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 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 advisor. 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.

Effects on Efficiency, Competition, and Capital Formation

The proposed 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 proposed 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.

Reasonable Alternatives

As an alternative, we could have proposed a definition of general solicitation that would either narrow or expand the scope of communications that constitute general solicitation. The 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 the requirements on sales.[389] This alternative would significantly expand the options for pre-offering and offering-related communications, giving issuers greater flexibility and reducing costs compared to the proposed amendments, some of which expand pre-offering

[389] *See* CrowdCheck Letter.

communications but impose additional conditions (such as filing and legending). However, by shifting the investor protections to requirements for sales and anti-fraud provisions, this alternative might result in increased risk of confusion among those investors that rely on information in offers and fail to compare the information in offers to disclosures required in conjunction with a sale.

Request for Comment

92. What are the economic effects of the proposed "demo day" amendments? Would the proposed amendments encourage greater reliance on "demo days"? Would the proposed amendment benefit issuers and investors?
93. Should we prescribe a definition of general solicitation that either narrows or broadens the scope of that term? If so, how should we define the term, and what would be the economic effects of adopting such a definition?

b. Offering communications

As discussed in greater detail in Section II.B.2 above, we are proposing a generic testing-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 proposing to require that the 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 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 proposed generic testing-the-waters exemption. We are also proposing to expand permissible offering communications under Regulation Crowdfunding by permitting testing-the-waters prior to filing a Form C with the Commission. Under the proposed rule, issuers would be required to use legends and to include any solicitation materials as an exhibit to Form C that is filed with the Commission.

The economic effects of the proposed amendments would be limited to the extent that issuers are reluctant to test-the-waters in reliance on the proposed amendments, for example, as a result of the proposed filing requirements or applicable state restrictions.

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. Allowing solicitation prior to filing would enable issuers to determine market interest in their securities before incurring the costs of preparing and filing an offering statement. 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 proposed 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.

The proposed amendments to enable issuers to engage in generic test-the-waters communications prior to determining the specific exemption type might 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, the proposed amendments to permit issuers to solicit investor interest, orally or in writing, in Regulation Crowdfunding offerings are 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 in the proposed test-the-waters exemptions to include legends is expected to provide notice to investors of the preliminary nature of these communications. We propose to require issuers that proceed with an offering under Regulation A or Regulation Crowdfunding after testing-the-waters to include as exhibits to the offering statement any written materials used in a generic test-the-waters communication within 30 days prior to the filing of a Regulation A or Regulation Crowdfunding offering statement. We also propose to require issuers to include as exhibits any Regulation Crowdfunding test-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 proposed requirement to provide materials used for a generic test-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 proposed 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. 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. Oral off-portal communications about the terms of the offering might incrementally 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.

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 test-the-waters communications, and if investors rely on test-the-waters materials when making investment decisions, this might lead investors to make less informed investment decisions. For example, if the information conveyed through test-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 investors in Regulation Crowdfunding offerings are likely to be small and relatively less sophisticated and thus less equipped to process information contained in test-the-waters communications.

These potential investor protection concerns are expected to be alleviated by several factors:

- The application of the anti-fraud provisions of the federal and state securities laws;[390]
- 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 proposed requirement that written test-the-waters materials be included as an exhibit to 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

[390] Test-the-waters communications under Regulation Crowdfunding would be treated as offers of securities, similar to test-the-waters communications under Regulation A, Section 5(d), and the recently adopted Rule 163B.

    - The continued application of 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; 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 test-the-waters communications).

Further, concerns about costs of expanding test-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 prospective crowdfunding investments. While some unscrupulous issuers might seek to disseminate misleading information through test-the-waters communications, such issuers or intermediaries already could engage in misleading communications today, and such misleading offering communications would remain in violation of the anti-fraud provisions of the federal securities laws.

The proposed 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.

Several factors are expected to mitigate potential costs to investors due to expanded off-portal communications under the proposed amendments:

- 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 anti-fraud 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
- The reputational incentives of issuers, as well as the risk of litigation (for issuers with assets).

The proposed 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 upon 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 test-the-waters materials must be filed as an exhibit to the offering statement, enabling investors and the Commission staff to review test-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.

For 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 conducted under the proposed amendments, but that choose instead to undertake an exempt offering under an exemption that does not permit general solicitation, the proposed 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 test-the-waters communications would remain voluntary under the proposed amendments, we anticipate that issuers would elect to rely on test-the-waters communications only if the benefits anticipated by issuers justify the expected costs. Issuers that elect to test-the-waters under the proposed amendments might incur costs, including direct costs of identifying prospective investors and developing test-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 test-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.

Effects on Efficiency, Competition, and Capital Formation

The proposed amendments to expand permissible testing-the-waters prior to exempt offerings are 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 proposed 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 switching of issuers 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.

Reasonable Alternatives

The proposed amendments permit test-the-waters communications in connection with Regulation Crowdfunding offerings prior to the filing of Form C. As an alternative, we could permit test-the-waters communications both before and after the filing of Form C.[391] This alternative would provide greater flexibility to issuers compared to the proposed 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 test-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

[391] 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, differently from 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 test-the-waters communications before the filing of Form C would be more consistent with the test-the-waters communications permissible under Regulation A, before investor commitments may be accepted.

because of the advertising permitted under Rule 204 and because the incremental costs of filing test-the-waters materials might discourage the use of testing-the-waters after the filing of Form C under this alternative.

We are proposing to extend the filing requirement to written test-the-waters communications for issuers that proceed with a Regulation Crowdfunding offering, consistent with the requirements of Rule 255 of Regulation A. As an alternative, we could allow test-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 test-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 test-the-waters communications under Rule 255 and under the proposed amendments could be directed at any investor, including non-accredited investors. On balance, we believe that the proposed rule's requirements governing the use of test-the-waters communications appropriately balance the goals of providing flexibility to issuers and protection to investors.

We are proposing to permit test-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 test-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 test-the-waters communications be filed. As an alternative, we could have proposed permitting test-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 proposed amendments in light of the legending requirements, anti-fraud 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.

We are proposing to amend Rule 204 to state that oral communications with prospective investors are permitted once the Form C is filed, so long as the communications comply with the requirements of Rule 204. 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. 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.

Request for Comment

94. Would extending the option to test-the-waters about a contemplated Regulation Crowdfunding offering, as proposed, benefit issuers? If so, how? Would it impose costs on investors? If so, which costs? How could such costs be mitigated?
95. Would extending the option to test-the-waters about a contemplated exempt offering, as proposed, for issuers still determining the offering exemption they plan to rely on, benefit issuers? Which issuers would benefit the most from such an extension? Would it impose costs on investors? If so, which costs? How could such costs be mitigated?
96. Which factors might increase the utility of the proposed amendments to issuers?

97. What would be the economic effects of the alternative of permitting test-the-waters communications for Regulation Crowdfunding issuers without a filing requirement? Would it result in costs to investors?

98. Would issuers benefit from the proposed amendments specifying that oral communications are permitted in Regulation Crowdfunding offerings once the Form C is filed? What would be the costs and benefits of the alternative of expanding the scope of permissible advertising or not limiting the scope of permissible advertising?

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 proposed amendments would add a new item to the non-exclusive list in Rule 506(c) that would allow 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 to that effect 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.

Benefits

The proposed addition to the non-exclusive list in Rule 506(c) concerning verification of investors for which the issuer previously took reasonable steps to very accredited investor status is 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. 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.

Costs

Generally, because the proposed amendment represents an incremental revision to the principles-based approach to verification already incorporated in Rule 506(c), the costs of the proposed amendment are expected to be modest. However, we recognize that some previously verified investors that lose accredited investor status over time might provide written representations that they are accredited investors, 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.

Effects on Efficiency, Competition, and Capital Formation

Generally, because the proposed amendments represent an incremental revision to the principles-based approach to verification already incorporated in Rule 506(c), the anticipated effects of the proposed amendments on efficiency, competition, and capital formation are expected to be modest.

Reasonable Alternatives

We are proposing amendments to the existing non-exclusive list of verification methods. As an alternative, we could rescind the non-exclusive list. Compared to the proposed 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 have proposed to allow issuers to establish that a previously verified investor remains accredited if the investor provides a representation to that effect and the issuer is not aware of information to the contrary. As an alternative, we could allow issuers to make such a determination only for a specific period of time, after which an issuer must verify investor status again to account for potential changes in investor income or net worth. This alternative would result in greater costs, relative to the proposed amendments, stemming from more frequent verification of investor status for repeat purchasers of the issuer's securities. At the same time, this alternative could reduce the likelihood of 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.

Request for Comment

99. What are the economic effects of the alternative of rescinding the non-exclusive list of verification methods?

100. What are the economic effects of the alternative of allowing issuers to establish that a previously verified purchaser remains an accredited investor, provided that an investor makes a written representation to that effect, on a time-limited, rather than indefinite, basis?

4. Disclosure Requirements

a. Required Disclosures to Non-Accredited Investors in Rule 506(b) Offerings

The proposed amendments to Rule 502(b) would scale financial disclosure requirements for non-reporting companies that sell to non-accredited investors under Rule 506(b) generally to align those requirements with the disclosures required for offerings under Tier 1 and Tier 2 of Regulation A, which also allows sales to non-accredited investors.

Benefits

The proposed amendments to the Rule 502(b) disclosure requirements for sales to non-accredited investors would 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.[392] 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 $321,695 ($83,000) for years ending in 2018 or 2019.[393] We recognize that these costs may differ from the costs incurred by issuers in Rule 506(b) offerings to non-accredited investors. We estimate that in 2019 among new Rule 506(b) offerings by non-reporting issuers other than pooled investment

[392] *See, e.g.*, letter from McCarter & English LLP dated September 24, 2019 (stating that the "[t]he [Rule 506(b)] exemption imposes significant disclosure requirements for issuances made to such non-accredited investors, which, when combined with the relatively low number of permitted non-accredited investors, makes this particular facet of the Rule 506(b) exemption impracticable in the vast majority of private placement transactions and therefore little-used.").

[393] Data on audit fees for years ending in 2019 is incomplete and reflects data as recorded in Audit Analytics as of February 20, 2020.

funds seeking up to $20 million, only 4.6 percent (565 out of 12,404) had at least one non-accredited investor.[394]

Lowering costs of sales to non-accredited investors under Rule 506(b) might 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 might be more willing to sell securities 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 any increase in sales to non-accredited investors under Rule 506(b) as a result of the proposed amendments would involve the participation of 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

394 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. Most Rule 506(b) offerings had no or few non-accredited investors. *See supra* note 94.

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.

Costs

The proposed amendments to scale and streamline Rule 502(b) requirements regarding disclosures applicable to sales to non-accredited investors, particularly the repeal of the requirement to provide audited balance sheets in offerings up to $20 million, could result in less informed investor decisions by some non-accredited investors. For instance, to the extent that audited financial statements are valuable for informed investment decisions,[395] scaled

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395 *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 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).

disclosures in offerings of up to $20 million might cause some non-accredited investors to incorrectly value the offered securities and to make less well informed investment decisions. Further, the proposed 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. The requirement that non-accredited investors must satisfy the knowledge and experience standard of 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 proposed 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 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 of the proposed amendments on costs to investors may be limited. However, the aggregate impacts of the proposed amendments on investor protection could be amplified if the scaled requirements encourage additional issuers to accept non-accredited investors in Rule 506(b) offerings.

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 in the offering, the proposed amendments might incrementally promote capital formation through Rule 506(b). If non-accredited investor capital drawn to Rule 506(b) offerings under the proposed amendments 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 might be limited. However, in that instance, issuers might benefit under the proposed amendments if non-accredited investor offerings under Rule 506(b) enable them to obtain a lower cost of capital (*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 proposed 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.[396] 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

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396 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 R&D 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*, J. BANKING & FIN. (in-press, 2019); 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).

portfolio.[397] However, as discussed above, the proposed amendments also might in some cases result in less informed investment decisions, lowering the efficiency of capital allocation.

The incremental economic effects of the proposed 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 which 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 VCs 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 proposed amendments, the direct and indirect costs of such

[397] In portfolio theory, constraining the set of investment opportunities yields a potentially inferior optimal portfolio. *See, e.g.*, Bodie et al. 2013, *supra* note 375. 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 375.

disclosures (such as risks of disclosure of proprietary information to a broader range of investors) might discourage issuers from selling to non-accredited investors in Rule 506(b) offerings.

Reasonable Alternatives

We are proposing to repeal 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.

We are proposing not to require audited financial statement disclosures 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 propose not to 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 anti-fraud provisions of the federal securities laws, might mitigate some of the investor protection risks under this alternative.

We are proposing to extend 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 propose to 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 proposed 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 proposed 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 proposal. 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 approximately 12 (3.1 percent) offerings involved non-accredited investors.[398] This

[398] This estimate is based on the analysis of Form D data for initial Form D filings during 2018 by issuers other than pooled investment funds and reporting issuers. Reporting issuers are identified based on 2018 filings of annual reports or amendments to them.

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.

Request for Comment

101. What would be the benefits of scaling disclosure requirements for sales to non-accredited purchasers in Rule 506(b) offerings by non-reporting issuers, as proposed? Would the proposed amendments encourage additional non-reporting issuers to sell securities to non-accredited investors in Rule 506(b) offerings? Would sophisticated non-accredited investors participating in such offerings incur costs as a result of the amendments waiving the audit requirements in offerings up to $20 million?

102. What would be the costs and benefits of the alternative of extending scaled disclosure requirements to non-reporting issuers in Rule 506(b) offerings up to $75 million that involve sales to non-accredited investors?

103. What would be the costs and benefits of alternative approaches to reducing the costs of disclosures to non-accredited purchases in Rule 506(b) offerings, such as conditioning the disclosure requirement on the number or amount of sales to non-accredited investors rather than aggregate offering size or waiving the audit requirement irrespective of offering size? Would such alternative approaches result in additional investment opportunities for sophisticated non-accredited investors? Would such alternative approaches result in a decrease in investor protection? What additional investor protections (such as investment limits) would effectively mitigate potential costs to investors in this scenario?

b. Simplification of Disclosure Requirements in Regulation A Offerings

The proposed amendments would 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; and (2) the option of incorporating by reference financial statement information into Regulation A offering statements. The proposed amendments also would eliminate the requirement to file a draft offering statement as a separate exhibit with Form 1-A and would instead enable automated public dissemination of the draft offering statement through EDGAR, similar to the framework in place for registered offerings. In addition, the proposed amendments would 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.

Benefits

The proposed amendments 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, are 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. This accommodation is currently available to reporting companies pursuant to amendments recently adopted in the FAST Act Modernization Release. 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 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 proposed amendments, filers would still need to determine whether information they are redacting is material, they would 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 proposed 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 rulemaking estimated that legal fees for confidential treatment requests ranged from \$35,000 to over \$200,000,[399] while another commenter estimated that attorneys and paralegals at the company

[399] *See* FAST Act Modernization Release, at note 341.

spend an average of 80 hours each quarter preparing redacted exhibits and related confidential treatment requests.[400] 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 companies have a lower threshold for determining whether a contract is material and therefore required to be filed publicly, as well as for companies in industries that are associated with more confidential treatment requests, such as biotechnology.[401] We generally expect similar cost savings from extending this accommodation to Regulation A issuers.

Similarly, the proposed amendments 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, are expected to incrementally reduce Form 1-A preparation costs.

The proposed amendments that would enable automated dissemination of draft offering statements in lieu of the existing exhibit filing requirement, consistent with the process of dissemination of draft registration statements, are expected to incrementally reduce filer effort to prepare the offering statement and promote greater efficiency of the filing process and regulatory harmonization.

Similarly, the proposed amendments that would 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, are expected to promote greater regulatory harmonization and to incrementally promote efficiency of the filing process in cases

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400 *See* FAST Act Modernization Release, at note 342. Under the proposed amendments, filers would still need to prepare redacted exhibits and in some cases filers would incur costs to respond to a staff request to demonstrate that redacted information was not material.

401 *See* FAST Act Modernization Release, at note 343 and accompanying text.

where only a post-qualification amendment, rather than the entire offering, is abandoned. The proposed amendments are expected to benefit investors by reducing potential investor confusion arising from the presence of the unqualified post-qualification amendment on EDGAR.

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 treatment application.[402] One potential cost of the proposed 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.[403]

The proposed amendment to allow Regulation A issuers to rely on incorporation by reference of financial statement information from previously filed periodic reports could 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

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402 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 redacted information is not material and would likely cause it competitive harm if publicly disclosed, which might result in additional costs.

403 *See* FAST Act Modernization Release, at Section VI.D.2.

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.

Effects on Efficiency, Competition, and Capital Formation

The proposed amendments extending certain disclosure accommodations presently available to reporting companies to Regulation A issuers are 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 proposed amendments might, on the margin, have a favorable effect on competition. Compliance cost savings might have relatively greater benefits for smaller issuers to the extent that compliance costs involved in the preparation of disclosures being omitted or subject to forward incorporation include a fixed component.

To the extent that the proposed amendments might marginally reduce the amount of information available to investors such that the ability to make informed investment decisions is affected for the typical investor, the proposed amendments might result in less efficient capital allocation and, for Regulation A securities with a secondary market (*e.g.*, OTC-quoted Regulation A securities), less informationally efficient security prices in the secondary market.

Reasonable Alternatives

The proposed amendments would 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.[404] 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 this alternative, the increase in investor information gathering costs under this alternative might be small.

[404] 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.

The proposed disclosure simplification amendments would apply to all Regulation A issuers. As an alternative, we could propose to 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.[405]

Request for Comment

104. Would Regulation A issuers benefit from the proposed option to redact certain information from material contracts and similar agreements? What would be the costs to investors and other market participants, if any?

105. Would Regulation A issuers benefit from the proposed option to incorporate previously filed financial statements by reference? What would be the costs to investors and other market participants, if any?

106. What would be the costs and benefits of the alternative of allowing Regulation A issuers to rely on forward incorporation by reference, subject to the conditions imposed on SRC issuers that rely on forward incorporation by reference in Form S-1?

5. Offering and Investment Limits

[405] 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.

a. Offering Limits under Regulation A, Regulation Crowdfunding, and Rule 504

The proposed amendments would raise 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. Table 15 examines total proceeds per issuer reported raised during 2016-2019.

Table 15: Capital Raising during 2016-2019 by Repeat Issuers Using Offering Exemptions Proposed to be Amended

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 Rule 504 issuers other than pooled investment funds that raised at least $5 million	7
Average (median) amount reported raised	$384,200 ($100,000)
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)

Some of the existing issuers under the exemptions proposed to be 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.[406] Generally, however, we do not know whether those issuers used Rule 506 because the offering limits of the exemptions proposed to be amended were too low for their needs or because other types of offerings were optimal for their capital raising strategy for other reasons. Table 16 shows the capital raising under Rule 506 in 2019 by issuers using offering exemptions proposed to be amended.[407]

Table 16: Capital Raising under Rule 506 in 2019 by Issuers Using Offering Exemptions Proposed to Be Amended

Number of Regulation A issuers raising under Rule 506	34
Average (median) amount reported raised under Rule 506 per issuer	$5.8 million ($0.2 million)
Number of Rule 504 issuers raising under Rule 506	110
Average (median) amount reported raised under Rule 506 per issuer	$1.4 million ($0.3 million)
Number of Regulation Crowdfunding issuers raising financing under Rule 506	139
Average (median) amount reported raised under Rule 506 per issuer	$2.4 million ($0.2 million)

Evidence in Tables 15 and 16 suggests that most issuers that rely on Regulation A, Regulation Crowdfunding, and Rule 504 tend to raise amounts of financing, both under these

406 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. Finally, 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 have 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.

407 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.

exemptions and when they raise financing under Rule 506, which has no offering limit, that are below the existing offering limits. As an important caveat, this inference 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 would forgo the exemptions with offering limits that are too low for their financing needs. Expanding the offering limits as proposed thus might attract additional issuers to these exemptions.

It is difficult to predict how many new issuers would be drawn to Regulation Crowdfunding, Regulation A, and Rule 504 under the proposed offering limits. Because of potential unobservable differences in issuer characteristics, comparisons presented below are intended purely as illustrative examples and not as estimates of the amounts that would be raised under Regulation A, Regulation Crowdfunding, and Rule 504 if the offering limits are amended as proposed. Table 17[408] examines the use of other securities offering methods by issuers that raised amounts above the existing limits but below the proposed offering limit thresholds, some of which might consider the amended exemptions. We consider (1) Rule 506 and registered offerings for purposes of analyzing alternative offering limit thresholds under Regulation A; (2) Regulation A, Rule 504, and Rule 506 offerings for purposes of analyzing alternative offering limit thresholds under Regulation Crowdfunding; and (3) Regulation A and Rule 506 offerings for purposes of analyzing alternative offer limit thresholds under Rule 504. For low offering limit thresholds, we do not consider registered offering activity as registered offerings are not likely to be a cost-effective alternative for such issuers. Information on

[408] 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.

amounts raised under Section 4(a)(2), Section 3(a)(11), and Rules 147/147A is not available to us.

Table 17: Evaluation of Proposed Amendments to Offering Limits Based on Evidence from Select Other Securities Offering Methods in 2019

Regulation A: proposed offering limit increase from \$50 million to \$75 million	
Number of issuers in offerings that raised above \$50 million and up to \$75 million:	
Rule 506 [a]	171
Registered offerings [b]	57
Rule 504: proposed 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 [c]	10
Rule 506 [d]	1,618
Regulation Crowdfunding: proposed 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 [e]	13
Rule 504 [f]	55
Rule 506 [g]	4,004

[a] Regulation A eligibility criteria exclude investment companies and blank checks 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 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.

[d] Rule 504 eligibility criteria exclude Exchange Act reporting companies, so for comparability we exclude reporting companies from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019. For comparability with other analyses, although pooled investment funds are eligible to rely on Rule 504, we focus on operating companies and exclude pooled investment funds.

[e] 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.

[f] 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.

[g] 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.

Evidence from Table 17 indicates that most of the Rule 506 activity by the types of issuers that would be eligible to take advantage of the proposed offering limits was concentrated at lower offering limit thresholds. Although there are relatively few Rule 506 or registered offerings in the $50 million to $75 million range, those numbers were comparable with the relatively modest absolute numbers of Regulation A offerings and thus might suggest potential for a significant percentage jump in Regulation A activity under the proposed offering limit. As a crucial caveat, issuers choosing to rely on Rule 506 or registered offerings today might be inherently different from the types of issuers that might find Regulation A attractive under the proposed offering limit. Importantly, we recognize that historical use of other offering methods may not fully represent potential future use of the exemptions being amended, particularly if the amended rules facilitate offerings by issuers that might not currently rely on securities offerings. We lack data or a methodology that would allow us to predict how many new issuers that would not have otherwise undertaken any securities offering would be drawn to Regulation Crowdfunding, Regulation A, and Rule 504 under the proposed offering limits. Finally, the economic effects of the proposed amendments are expected to be limited in cases of issuers seeking and raising amounts of financing below existing, or amended, offering limits.

Benefits

The proposed amendments to raise Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 offering limits might increase the potential for 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 may be deterred by relatively low offering limits today. The benefits under the proposed approach are expected to be partly attenuated to the extent that some issuers drawn to the amended exemptions might be switching from other securities offering methods; however, such issuers might still be able to optimize their financing strategy and lower their cost of capital.

Amendments that increase the offering limits of Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 also might improve the composition of the pool of issuers relying on these exemptions. The amended exemptions could draw a larger and more diversified set of issuers with high growth potential that may require financing in excess of the existing limits. Today such startups might forgo an exemption with an offering limit in favor of a Rule 506 offering, which does not cap the offer amount. A broader and more diversified range of investment opportunities might 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 might make the exemptions more attractive to a broader range of intermediaries. Some intermediaries might be deterred from participating in these markets today by fixed costs (*e.g.*, due diligence, compliance, crowdfunding platform operation, etc.) in proportion to potential transaction-based compensation.

Costs

The proposed amendments to raise Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 offering limits might increase aggregate potential investor losses in those offerings. Amendments that increase the offering limits of Regulation A Tier 2, Regulation Crowdfunding, and Rule 504 could make the exemptions more attractive to issuers that are unable to meet more restrictive requirements applicable to larger offerings today, resulting in higher-risk issuers potentially being overrepresented among the issuers relying on the amended exemptions. 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.[409] 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 Regulation FD 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 also seeking to avoid restrictions on test-the-waters communications with individual investors and unlisted companies seeking to avoid blue sky restrictions on primary offers and sales might also find Regulation A Tier 2 to be relatively more attractive than a registered offering under the proposed amendments. These investor costs are expected to be partly mitigated by the investor protection provisions of each exemption, as well as by the continued application of the anti-fraud provisions of federal and state securities laws and the role of reputational incentives of issuers and, if applicable, intermediaries, in these offerings.

[409] *See also, e.g.,* Mercer Bullard (2019) Crowdfunding's Culture of Noncompliance: An Empirical Analysis, 24 Lewis & Clark L. Rev. (forthcoming).

Effects on Efficiency, Competition, and Capital Formation

The proposed amendments to the Regulation Crowdfunding, Regulation A, 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 proposed amendments are expected to be partly attenuated if issuers raise amounts of financing below amended offering limits or if some of the capital raised under the amended exemptions would have been otherwise raised through other securities offering methods, such as Rule 506. As another example, raising the Regulation Crowdfunding offering limit might draw some of the issuers that would have otherwise sought between \$1.07 and \$5 million under Rule 504 or Regulation A. As a further example, raising the Rule 504 offering limit might draw some issuers that would have otherwise used Regulation A to raise up to \$10 million in a regional offering.

As discussed above, these amendments might 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 three discussed exemptions, combined with the proposed amendments expanding the integration safe harbors, might allow a broader range of issuers to raise capital from non-accredited investors to meet their financing needs without registration. As a result some of these non-accredited investors might receive less disclosure and face lower liquidity of their holdings. However, this possibility must be weighed against the baseline conditions in which those issuers might have relied on Rule 506, which significantly limits non-accredited investor access and, for non-accredited investors that invest, restricts resales and limits the ability to obtain current information about the issuer. Under the baseline, those same issuers on the margin between a Regulation A and a registered offering might have alternatively 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 would afford only marginal benefits, if any, of liquidity and information availability compared to, for instance, 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 proposed amendments could expand the set and nature of investable opportunities for non-accredited investors seeking exposure to companies that have not yet registered an offering. Depending on how the additional investor capital drawn to the affected markets compares to the amount of additional financing sought by issuers in these markets under the amendments, the amendments might affect competition among issuers for investor capital. By promoting access to external financing for smaller issuers, the proposed amendments might increase product market competition among small issuers and between small issuers and more established industry firms.

Reasonable Alternatives

We are proposing to raise the 12-month offering limits for Regulation A from $50 million to $75 million; for Rule 504, from $5 million to $10 million; and for Regulation Crowdfunding, from $1.07 million to $5 million. As an alternative, we could have proposed different offering limits. For example, we could have proposed smaller increases in 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.[410] As another alternative, we could have proposed larger increases in the offering limits.[411] Compared to the proposed amendments, a higher (lower) offering limit could make an offering under the exemption more (less) cost-effective for issuers (and if applicable, intermediaries) facing fixed offering and due diligence costs, resulting in larger (smaller) capital formation benefits. Compared to the proposed 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

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[410] 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 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).

[411] For instance, some commenters have suggested raising the Regulation A offering limit to $100 million. *See, e.g.*, Goodwin Letter (recommending a $100 million limit); and CrowdCheck Letter (noting that life sciences companies would benefit from a $100 million limit).

offering limits.[412] 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 proposed offering limits. Table 18 below examines the use of alternative securities offering methods that are most likely to be relied upon 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 and footnotes that accompany Table 17 continue to apply.

Table 18: Evaluation of Alternatives to the Proposed Offering Limits Using Evidence from Capital Raising in 2019 through Select Other Securities Offering Methods

Evaluation of Alternative Regulation A Offering Limits		
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 (proposed offering limit)	171	57
$80 million	198	72
$90 million	231	90
$100 million	270	122
$110 million	298	143
$120 million	315	151

412 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; the average (median) Rule 504 issuer (excluding pooled investment funds) reported raising a total of $386,162 ($100,000) across Rule 504 offerings in 2016 through 2019.

$125 million		325	162
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 (proposed offering limit)		1,618	10
$15 million		2,315	16
$20 million		2,695	18
$25 million		2,974	19
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 [e]	Number of issuers in offerings under Rule 506 [f]	Number of issuers in offerings under Regulation A [g]
$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 (proposed 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

[a] Regulation A eligibility criteria exclude investment companies and blank checks 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 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.

[d] Rule 504 eligibility criteria exclude Exchange Act reporting companies, so for comparability we exclude reporting companies from Rule 506 proceeds used in this estimate. Reporting companies are identified based on annual reports or amendments to them filed in 2019. For comparability with other analyses, although pooled investment funds are eligible to rely on Rule 504, we focus on operating companies and exclude pooled investment funds.

[e] 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.

[f] 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.

[g] 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.

After considering these alternatives, we believe that the proposed 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 proposing to amend 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. For example, we could raise the Tier 1 offering limit proportionately to the proposed 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.[413] Even in that case, some

[413] 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 greater confidence and 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

issuers switching from Tier 2 or other offering methods might be able to decrease their cost of capital.

We are proposing to raise the Rule 504 offering limit, which further increases potential redundancies between Regulation A Tier 1 and Rule 504. As an alternative, we could eliminate one of these two offering exemptions after amending the other one as proposed (*e.g.*, eliminate Rule 504, or eliminate Regulation A Tier 1 and raise the Rule 504 offering limit to $20 million). Such an alternative might contribute to regulatory simplification. However, it also might be disruptive for those issuers that rely upon the exemption eliminated or find it to be cost-effective for their financing strategy (*e.g.*, a lack of Commission review or extensive Commission disclosure requirements in Rule 504 offerings or the higher offering limit of Regulation A Tier 1).

We have proposed to increase the Regulation Crowdfunding offering limit to make the offering process more cost-effective and to promote capital formation under this exemption. However, we have not proposed to amend the Regulation Crowdfunding thresholds for different tiers of financial statement requirements, which govern the required standard of financial statement review, and accordingly, costs. As an alternative, we could raise such thresholds, for instance, in proportion to the proposed 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

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 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.

initial offerings (in lieu of $1.07 million).[414] 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.[415] 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 less efficient allocation of capital. Moreover, this alternative could attract issuers of greater risk to the lower crowdfunding offering tier, which could undermine future capital raising in that market tier.

Request for Comment

107. What are the economic effects of the proposed increases to the offering limits under Regulation A, Regulation Crowdfunding, and Rule 504? What are the likely effects of the

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[414] *See, e.g.*, Wefunder Letter (recommending a $1 million threshold for reviewed financial statements and a $5 million threshold for audited financial statements).

[415] *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.")

proposed changes on issuers, investors, and other market participants? Which categories of issuers are most likely to benefit from the proposed changes? Are the proposed changes likely to change the pool of issuers drawn to these offering exemptions? Are the proposed changes likely to affect intermediaries in these markets?

108. Are the proposed changes to Regulation A, Regulation Crowdfunding, and Rule 504 offering limits likely to promote capital formation? Would the proposed changes improve access to capital for new issuers that are presently unable to access securities markets, or would the proposed changes mainly result in switching of issuers between offering methods? Would the proposed changes be likely to allow issuers to decrease their cost of raising capital under these exemptions?

109. What alternative offering limits should we consider for Regulation A Tier 2, Regulation Crowdfunding, and Rule 504, relative to the proposed limits of $75 million, $5 million, and $10 million, respectively? For example, should we instead consider adjusting those limits for inflation? What would be the economic effects of such a change on issuers, investors, and other market participants?

110. Should we consider the alternative of also amending the Regulation A Tier 1 offering limits? If so, what would be the economic effects of such a change on issuers, investors, and other market participants?

111. Would the offering limits as proposed to be revised introduce redundancies (for instance, between Rule 504 and Regulation A Tier 1)? If so, how should we address those redundancies? For example, should we eliminate any of the existing exemptions to promote greater harmonization? What would be the economic effects of such changes on issuers, investors, and other market participants?

112. What would be the costs and benefits of the alternative of scaling up financial statement thresholds in Regulation Crowdfunding in proportion to the proposed change in the offering limit (from $107,000, $535,000, and $1.07 million to $500,000, $2.5 million, and $5 million, respectively)?

113. What would be the costs and benefits of the alternative of waiving certain disclosure requirements (*e.g.*, review and/or audit of financial statements, progress updates, and periodic reports) for issuers in the smallest Regulation Crowdfunding offerings (*e.g.*, up to $1 million)?

b. Investment Limits under Regulation Crowdfunding

We are proposing to increase Regulation Crowdfunding investment limits.[416] The amended limits would be based on the greater of, rather than the lower of, an investor's annual income or net worth and would only apply to non-accredited investors.

Benefits

The proposed amendments to Regulation Crowdfunding investment limits would increase the amounts that can be invested by a given investor, potentially resulting in greater capital formation or lower aggregate costs of soliciting investors and investor relations. The proposed amendments also would allow some investors, particularly non-accredited investors with a significant disparity between income and net worth and accredited investors, to invest a larger amount in crowdfunding securities. Relaxing such investment restrictions might enable some of those investors to reach more efficient investment allocations in their portfolios as well as realize enhanced upside from investing in successful early stage companies. Given the investment minimums established by the issuer for each offering, some investors might be able

[416] *See supra* Section II.E.3.

to invest in a larger number of crowdfunding issuers, resulting in greater diversification within the crowdfunding category of their portfolio (but not necessarily within the portfolio overall) under the proposed amendments to the investment limits.

Accredited investors in particular are expected to possess the capability to evaluate larger crowdfunding investments and the ability to bear resulting financial risk. Thus, allowing such investors to invest a larger amount in crowdfunding offerings, if desired, might enable them to allocate their capital more efficiently. Allowing accredited investors to invest in crowdfunding issuers without a limitation also might create stronger incentives to perform due diligence and screening before a crowdfunding investment as well as to continue to monitor the issuer's activities after investing, relative to investors that only commit a nominal amount of capital. Under the baseline, accredited investors are not subject to investment limitations in offerings under Regulation A and Regulation D offerings or in private placements. It is therefore possible that some accredited investors would simply reallocate capital between holdings of securities issued under other exemptions, including, in some cases, securities of the same issuer issued under other exemptions (for instance, in cases of side-by-side Regulation Crowdfunding/Rule 506(c) offerings). It is also possible that accredited investors investing large amounts might continue to prefer private placements, even if Regulation Crowdfunding investment limits are amended, because private placements allow accredited investors greater bargaining power to negotiate more favorable terms with issuers. In addition, private placements result in fewer information spillovers than Regulation Crowdfunding offerings (*e.g.*, depending on the platform, small investors may be able to observe large investments, and thus free-ride on large investors' screening and due diligence efforts).

We lack the data to assess how many investors may be affected by the proposed amendments to Regulation Crowdfunding investment limits, in part because investor information generally is not available and is not required to be disclosed in the course of an offering or upon completion of an offering. Based on a subset of data made available by one crowdfunding intermediary,[417] among non-accredited investors with available information on annual income and net worth, revising the investment limits as proposed could 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 would no longer be subject to investment limits under the proposed amendments. The economic effects of the proposed amendments would be mitigated to the extent that investors might invest amounts below the investment limits.[418] 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 proposed amendments if new investors are drawn to Regulation Crowdfunding.

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[417] *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.

[418] *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 look-back 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.").

Costs

The proposed amendments to Regulation Crowdfunding investment limits may increase the magnitude of investor losses if some investors inefficiently increase portfolio allocations to the crowdfunding category resulting in under-diversification. In particular, relaxing investment limits might enable some less sophisticated investors to make larger investments in crowdfunding securities based on an incomplete assessment of information about those securities, with the resulting potential for increased investor losses. The resulting increased risk of investor losses might be relatively more costly for investors with a decreased ability to bear risk due to their more limited income or net worth. However, other investor protection provisions of Regulation Crowdfunding, such as issuer disclosure requirements and investor education and other intermediary requirements, might partly mitigate these risks to investors. Further, such potential costs of the proposed amendments should be weighed against the baseline, which includes provisions generally allowing non-accredited investors to invest unlimited amounts in listed and unlisted registered securities and in Regulation A Tier 1 securities,[419] as well as up to ten percent of the higher of income or net worth in each offering of Regulation A Tier 2 securities, which also may result in considerable risk to investor portfolios.

The proposed amendments removing investment limits for accredited investors in Regulation Crowdfunding offerings are not expected to result in significant costs to investors 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 and in private placements, they may simply

[419] 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.

reallocate capital between holdings of securities issued under other exemptions. It is also possible that accredited investors investing large amounts might continue to prefer private placements, as discussed above.

Effects on Efficiency, Competition, and Capital Formation

The proposed amendments relaxing Regulation Crowdfunding investment limits might incrementally promote capital formation through Regulation Crowdfunding, particularly for issuers that might be attractive to accredited investors or non-accredited investors who have a greater disparity between income and net worth (*e.g.*, retired investors with high net worth relative to income or young investors with high income relative to savings). The net impacts of the proposed amendments on aggregate capital formation might be limited to the extent that some of the issuers and investors, and some of the financing raised, could be reallocated from other offering methods that either do not have investment limits (*e.g.*, some of the accredited investors in Regulation Crowdfunding offerings under the proposed amendments might be switching from Rule 506 or Regulation A offerings) or that have less stringent investment limits (*e.g.*, some of the non-accredited investors in Regulation Crowdfunding offerings under the proposed amendments might be switching from Regulation A offerings). On the one hand, raising investment limits might allow some investors, particularly accredited investors and more sophisticated non-accredited investors, that were previously constrained by existing investment limits to attain a more efficient portfolio allocation. On the other hand, for some less sophisticated investors, relaxing investment limits might enable an inefficiently high exposure to crowdfunding investments resulting in overall under-diversification in their portfolios.

If the proposed amendments increase the participation of accredited investors in Regulation Crowdfunding offerings, the average intensity of monitoring and screening of issuers by investors might increase as a result, with potential positive spillovers for small investors that lack the expertise and incentives to engage in comparable monitoring and screening. This might lead to greater alignment of valuations in Regulation Crowdfunding offerings with underlying fundamental values and overall greater efficiency of capital allocation in this market.

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 might affect competition among issuers for investor capital.

Reasonable Alternatives

We are proposing to revise Regulation Crowdfunding investment limits for non-accredited investors (to be based on the greater of, rather than the lesser of, an investor's net worth or annual income) and to rescind the investment limits for accredited investors, similar to Tier 2 of Regulation A. As an alternative, we could make other changes to Regulation Crowdfunding investment limits to increase the utility of the exemption to issuers and to expand access of non-accredited investors to startup investment opportunities. For example, one alternative would be to align the Regulation Crowdfunding investment limits fully with those of Regulation A Tier 2 (*i.e.*, to define the limit per offering as 10 percent of the greater of net worth or annual income instead of the two-tier 5 percent/10 percent limit for all Regulation Crowdfunding offerings an investor invests during a given twelve-month period). Compared to the proposed amendments, this alternative would expand investment limits, particularly for non-accredited investors with lower income and net worth and for investors that participate in multiple Regulation Crowdfunding offerings, which might potentially increase capital formation benefits relative to the proposed amendments, as well as expand non-accredited investor access to startup investment opportunities. However, this alternative also might result in increased magnitude of investor losses per investor and an inefficient decrease in diversification for some non-accredited investors, compared to the proposal.

As another alternative, we could increase or lower 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 proposed 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 a low income and net worth, compared to the proposal.

Request for Comment

114. What would be the economic effects of the proposed changes to the Regulation Crowdfunding investment limits? Would the proposed changes to remove the limits on accredited investors benefit issuers and investors? Would the proposed changes to use the greater of, rather than the lesser of, standard with respect to a non-accredited investor's net worth or annual income benefit issuers and investors? Are the proposed changes likely to promote capital formation? Would the proposed changes impose costs on issuers, investors, and other market participants?

115. What would be the economic effects of the alternative amendments to Regulation Crowdfunding investment limits, such as adjusting the investment limit thresholds in proportion to the adjustment in the offering limit; using different (lower or higher) numerical thresholds for non-accredited investor investment limits; or aligning non-accredited investor investment limits with those in Regulation A Tier 2? Would such

alternatives benefit issuers, investors, and other market participants? Would such alternatives impose costs on issuers, investors, and other market participants? What alternative investment limit amendments should we consider, and what would be the economic effects of those alternatives?

6. Eligibility Requirements in Regulation Crowdfunding and Regulation A

a. Eligibility of Crowdfunding Vehicles under Regulation Crowdfunding

The Commission is proposing a new rule under the Investment Company Act that would allow crowdfunding issuers to raise capital through a crowdfunding vehicle. Such crowdfunding vehicles would 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 would 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.

Benefits

The proposed rule would benefit issuers by enabling them to maintain a simplified capitalization table after a crowdfunding offering (versus having an unwieldy number of shareholders), which can make issuers more attractive to future VC and angel investors, and by reducing the administrative complexities associated with a large and diffuse shareholder base. Several commenters have indicated that these factors may have contributed to the relatively modest use of the Regulation Crowdfunding exemption since its adoption.[420] A crowdfunding vehicle may constitute a single record holder for purposes of Section 12(g), rather than treating each of the crowdfunding vehicle's investors as record holders as would be the case if they had invested in the crowdfunding issuer directly. An issuer's use of a crowdfunding vehicle therefore could allow crowdfunding issuers to raise capital in certain circumstances without being required to register under Section 12(g).[421]

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 their capitalization table. By alleviating these concerns, the proposed rule might 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 proposed rule might benefit non-accredited investors by expanding their access to investment opportunities in startups with high growth potential that are early in their lifecycle.

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[420] *See* 2017 Treasury Report; 2017 Forum Report; Iownit Letter; Rep. McHenry Letter; Wefunder Letter; AOIP Letter; MainVest Letter; and J. Schocken Letter. *See also* Rep. McHenry Letter (with respect to later financing rounds). The SPV structure has been successfully adopted as an option in crowdfunding offerings in other countries. *See, e.g.*, Robert Wardrop & Tania Ziegler, *A Case of Regulatory Evolution – A Review of the UK Financial Conduct Authority's Approach to Crowdfunding*, CESIFO DICE REP., June 2016, at 23 (referencing the use of SPVs in real-estate crowdfunding in the UK). Today, SPVs are allowed to participate in Rule 506 offerings without limitation.

[421] However, securities issued pursuant to Regulation Crowdfunding are conditionally exempted from the record holder count under Section 12(g) if the following conditions are met: the issuer (i) is current in its ongoing annual reports required pursuant to Regulation Crowdfunding; (ii) has total assets as of the end of its last fiscal year of $25 million or less; and (iii) has engaged the services of a transfer agent registered with the Commission. Thus, the concern about exceeding the Section 12(g) thresholds would be most pronounced for Regulation Crowdfunding issuers whose assets, including funds raised in the offering, might exceed $25 million.

As discussed in Section II.F.1 above, the use of a crowdfunding vehicle would be subject to certain conditions designed to ensure that investors attain 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 permitting such an offering structure. The crowdfunding vehicle and the crowdfunding issuer also would be co-issuers in the offering, with the resulting joint liability for offers and sales.

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 anti-fraud provisions of the federal and state securities laws, are expected to provide significant investor protections for crowdfunding vehicle investors under the proposed rule.

Costs

The use of crowdfunding vehicles could result in additional offering costs. The costs of forming and operating the crowdfunding vehicle would be incurred by the crowdfunding issuer, which could decrease the overall economic benefits of the offering for all shareholders and for investors in the crowdfunding vehicle. However, to the extent that the crowdfunding vehicle could yield benefits for the crowdfunding issuer, including expanded potential for future funding rounds due to reduced capitalization table concerns and greater efficiency of administration of a large and diffuse investor base, these economic benefits of a crowdfunding vehicle could 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 creation and administration of the crowdfunding vehicle, and the number of small investors participating in the crowdfunding offering. Because the use of the crowdfunding vehicle structure would be voluntary, we expect issuers would use a crowdfunding vehicle only where the issuer determined that the benefits justify the costs.

If the crowdfunding vehicle is administered by an external entity on behalf of the issuer, the associated fees might depend on other business between the external administrator and the issuer. On the one hand, administration fees might 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 might 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 might put downward pressure on such fees. The requirement that crowdfunding vehicle costs be incurred by the crowdfunding issuer rather than the crowdfunding vehicle ensures 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, as proposed, would further limit potential discretion related to fees.

As discussed above, the proposed conditions for the use of crowdfunding vehicles are expected to minimize agency conflicts incremental to a crowdfunding vehicle.[422] 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

[422] Small investors in a direct crowdfunding offering might face agency conflicts today. However, we do not expect the proposed amendments would result in significant additional agency conflicts for investors in crowdfunding vehicle offerings.

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.

*Effects on Efficiency, Competition, and Capital Formation *

The proposed rule is 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 securities offering methods to Regulation Crowdfunding, the net impact of the proposed amendments on the aggregate amount of capital formation might be minimal. However, the proposed amendments might affect the cost of capital. By giving crowdfunding issuers the flexibility to conduct a crowdfunding offering via a crowdfunding vehicle, the proposed rule might make crowdfunding offerings to individual investors 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 amounts of capital than they would otherwise. The amendments might be especially beneficial for crowdfunding businesses 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 might expand the investment opportunities available to non-accredited investors and, as a result, potentially affect the efficiency of their capital allocation. If the proposed amendments draw additional issuers that would have otherwise considered only private placements to Regulation Crowdfunding, broader access to those investment opportunities could enable non-accredited investors to allocate their capital more efficiently.

The proposed amendments might promote competition. By making Regulation Crowdfunding attractive to a broader subset of small issuers, the proposed amendments are expected to 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 might, on the margin, encourage new entry and promote competition between small issuers and more established industry competitors. The aggregate effects of the proposed amendments on competition among prospective issuers for investor capital are difficult to predict and would depend on the relative effects of the proposed amendments on issuer and investor willingness to participate in Regulation Crowdfunding offerings.

Reasonable Alternatives

As an alternative, we could require that a registered investment adviser manage the crowdfunding vehicle, as suggested by some commenters and the 2017 Treasury Report.[423] Under this alternative, investors in crowdfunding vehicles could benefit because an investment adviser is a fiduciary subject to the requirements of the Investment Advisers Act and regulations thereunder. The proposed rule's conditions, however, are designed to limit the crowdfunding vehicle's activities to that of acting as a conduit to hold the securities of the crowdfunding issuer without the ability for independent investment decisions to be made on behalf of the crowdfunding vehicle. Any incremental benefits of this alternative to investors therefore could be limited. In addition, given the relatively small amount of capital that can be raised through Regulation Crowdfunding, it may not be economically feasible to require a registered investment adviser to manage the crowdfunding vehicle.

423 *See* Iownit Letter; NASAA Letter; and CrowdCheck Letter. *See also* 2017 Treasury Report.

As another alternative, we could allow crowdfunding vehicles but remove some of the requirements in the proposed rule, 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 proposed rule's conditions. Some of these additional costs to investors might be partly mitigated by the substantive and disclosure requirements of Regulation Crowdfunding, however, and might be compensated in the form of higher returns.

Similarly, we could modify some of conditions in the proposed 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 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 cast all of its votes in accordance with the instructions of a 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 as proposed.

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 relative to the proposal. 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 proposed rule and the terms of those offerings.

Request for Comment

116. What would be the costs and benefits of extending eligibility under Regulation Crowdfunding to crowdfunding vehicles as proposed?

117. What would be the costs and benefits of the alternative of imposing additional conditions on crowdfunding vehicles? What would be the costs and benefits of the alternative of eliminating or revising some of the proposed conditions?

b. Security types eligible under Regulation Crowdfunding

The proposed amendments would narrow the types of securities eligible under Regulation Crowdfunding to debt securities, equity securities, and debt securities convertible or exchangeable into equity securities, including guarantees of such securities, to harmonize the provisions of Regulation Crowdfunding regarding eligible security types with those of Regulation A. Other types of securities would be excluded from eligibility under the proposed amendments. For example, Simple Agreements for Future Equity (SAFE) securities would no longer be eligible under Regulation Crowdfunding.

Benefits

The proposed amendments limiting the scope of securities eligible under Regulation Crowdfunding are expected to strengthen investor protection in some instances, to the extent that investors in Regulation Crowdfunding offerings may have less sophistication and resources to analyze novel security types with complex payoff structures that may pose significant valuation challenges.[424] Further, by providing greater uniformity in security types available in Regulation Crowdfunding offerings and conforming the types of securities eligible under Regulation Crowdfunding to those presently eligible under Regulation A, the proposed amendments are expected to make it easier for investors to compare securities offered by different issuers under Regulation Crowdfunding, as well as potentially compare securities offered under Regulation Crowdfunding with those offered under Regulation A, facilitating better informed investment decisions. These benefits of the proposed amendments to Regulation Crowdfunding investors might be limited for those investors that already take advantage of the existing disclosures required by Regulation Crowdfunding (including a

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424 *See* 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). *But see* Jack Wroldsen, *Crowdfunding Investment Contracts*, 11 VA. L. & BUS. REV. 543 (2017). *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.

See also 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.

description of the terms of securities and the valuation method used). Further, the continued application of other Regulation Crowdfunding investor protection provisions (including other offering circular and periodic disclosure requirements, investment limits, investor education, and other crowdfunding intermediary requirements) might reduce the overall benefits of these amendments for investors.

Costs

The proposed amendments limiting the scope of securities eligible under Regulation Crowdfunding might impose costs on issuers. Limiting the flexibility to offer the types of securities that are most compatible with their desired capital structure and financing needs and most advantageous given the issuer's assessment of market conditions might cause such issuers to incur a higher cost of capital or forgo a Regulation Crowdfunding offering. It is difficult to predict what share of issuers that rely on security types, such as SAFEs, that would no longer be eligible under Regulation Crowdfunding would change the security type but continue to rely on Regulation Crowdfunding versus switching to an offering method that does not limit security types (such as Regulation D or a Section 4(a)(2) offering) or forgo a securities offering altogether. Existing data on Regulation Crowdfunding offerings suggests that a significant share of issuers relied on security types other than debt and equity.

We estimate that from inception of Regulation Crowdfunding in May 2016 through December 2019:[425]

[425] *See supra* note 12. 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. In addition, 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,

- Equity accounted for 46 percent of the number of offerings and 41 percent of the aggregate target amount sought;
- Debt accounted for 31 percent of the number of offerings and 33 percent of the aggregate target amount sought; and
- SAFEs accounted for 21 percent of the number of offerings and 24 percent of the aggregate target amount sought.

The remainder comprised securities not elsewhere classified (*e.g.*, revenue participation agreements and miscellaneous tokens).

However, if some of these issuers previously relied on SAFEs as a means of simplifying their capitalization table, the proposed crowdfunding vehicle provisions might reduce demand for SAFEs and mitigate the incremental impact of the proposed amendments to eligible security types. To the extent that the range of security types permitted under the proposed amendments provides sufficient flexibility to most issuers with respect to selecting debt and equity features and voting and non-voting securities, and to the extent that security payoff structures are priced efficiently by the market, the effects of limiting security types as proposed on issuer cost of financing might be limited.

Some investors might incur costs under the proposed amendments, particularly investors that relied on existing disclosures about the terms of offered securities to accurately value such securities and that found securities with payoff structures other than equity or debt optimal for their investment strategy. Those investors might opt for offerings under other exemptions or might have to adjust their investment strategy to focus on eligible security types.

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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.

Effects on Efficiency, Competition, and Capital Formation

Limiting the scope of eligible types of securities is likely to limit capital formation under Regulation Crowdfunding for some issuers that otherwise would undertake the offering of excluded types of securities. If some of these issuers switch to a type of securities permitted under the proposed amendments, or offer the excluded type of securities using another offering method, such as Regulation D, the net impact of the proposed amendments on the aggregate amount of capital formation might be minimal. However, reducing issuer flexibility with respect to security design in Regulation Crowdfunding offerings might cause some Regulation Crowdfunding issuers to incur a higher cost of capital.

The proposed amendments might yield efficiencies for investors by making it easier to analyze and compare payoff structures of securities across different offerings, potentially enabling investors to allocate their capital more efficiently. However, for some investors that have a sufficient ability to analyze the excluded types of securities and that seek to include those securities in their portfolio, the proposed amendments might limit the set of available investment opportunities and as a result, potentially affect the efficiency of their capital allocation.

The aggregate effects of the proposed amendments on competition among prospective issuers for investor capital are difficult to predict and would depend on the relative effects of the proposed amendments on issuer and investor willingness to participate in Regulation Crowdfunding. On the one hand, if the proposed amendments lead issuers to exit the Regulation Crowdfunding market, the extent of competition for investor capital in that market segment might be reduced. On the other hand, if the proposed amendments draw more investors to the Regulation Crowdfunding market by making comparisons across offerings incrementally easier, the effects on competition might be offset. The reallocation of issuers of excluded securities types to the Regulation D or other market segments might mitigate such effects.

Reasonable Alternatives

The proposed amendments would conform the security types eligible under Regulation Crowdfunding to those of Regulation A. As an alternative, we could make other modifications to the range of security types permissible in Regulation Crowdfunding offerings. For example, we could amend Regulation Crowdfunding to exclude only particular security types (such as SAFEs or SAFTs) that might be difficult to value for small investors. The costs and benefits of this alternative, compared to the proposal, would depend on several factors: reliance on the excluded security type today; costs to issuers of using another offering exemption, such as Regulation D, to offer the excluded security type; costs to issuers of using a different security type under Regulation Crowdfunding; and the level of sophistication of investors in analyzing information and valuing excluded types of securities. As a further caveat, provisions proscribing highly specialized security designs might have limited long-term economic effects in the presence of financial innovation, whereby issuers and intermediaries might develop security designs that share some but not all features of the excluded security type and thus comply with the restriction. We believe that the proposed amendments would provide sufficient capital structure flexibility for the majority of issuers while enhancing comparability of payoff structures across Regulation Crowdfunding offerings.

Request for Comment

118. How would the proposed amendments to eligible security types affect Regulation Crowdfunding issuers, investors, and other market participants?

119. What would be the costs and benefits of a different set of eligible security types?

c. Excluding Delinquent Reporting Companies from Eligibility under Regulation A

The proposed amendments would 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. This exclusion would be consistent with the exclusion from eligibility under Regulation A 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.

Benefits

The proposed amendments to make reporting companies that are not current in periodic reports required under Section 13 or 15(d) of the Exchange Act ineligible under Regulation A 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. Excluding companies 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 incrementally increase investor interest in securities offered in this market.

To the extent that the effects of the proposal are driven by reallocation of reporting companies that are current in reporting obligations from registered offerings to Regulation A, the effects may be minimal. As a caveat, the use of Regulation A by reporting companies has been modest to date,[426] which may attenuate the effects of changes to reporting company eligibility under Regulation A. By extending similar requirements regarding being current in

[426] *See supra* note 406.

periodic reports that presently apply in follow-on Regulation A offerings to reporting companies in initial Regulation A offerings, the proposed amendments would increase uniformity in eligibility requirements across different categories of Regulation A issuers and could reduce potential for investor confusion.

Costs

The proposed amendments to limit the ability of issuers that are not current in periodic reports required under Section 13 or 15(d) of the Exchange Act to raise capital under Regulation A might lead to higher financing costs or reduced ability to raise the required financing for such issuers.

Effects on Efficiency, Competition, and Capital Formation

The proposed amendments to make reporting companies that are not current in periodic reports required under Section 13 or 15(d) of the Exchange Act ineligible under Regulation A might, on the margin, limit capital formation by those issuers. At the same time, by ensuring more timely availability of information in periodic reports to prospective Regulation A investors, the proposed 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, the proposed amendments might promote greater investor interest in Regulation A securities, increasing aggregate capital formation in the Regulation A market.

These effects on capital formation and efficiency of capital allocation might be modest if the proposed 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 proposed amendments.

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.[427] 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.[428] 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 proposed 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 downgraded to a lower OTC market tier, future eligibility for a streamlined registration process, reduced legal liability, and a reputation for transparency).

Request for Comment

120. What would be the costs and benefits of excluding reporting companies that are not current in Exchange Act reporting obligations from eligibility under Regulation A, as proposed?

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427 *See* General Instruction I.A.3 to Form S-3 [17 CFR 239.13]; and General Instruction I.A.2 to Form F-3 [17 CFR 239.33].

428 *See* 2018 Regulation A Release, at Section IV.B.c.2.

121. What would be the costs and benefits of imposing additional Regulation A eligibility conditions on issuers that are subject to Exchange Act periodic reporting obligations, such as timeliness in periodic reporting?

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 constituted a disqualifying event at the time of filing.[429] In order to harmonize the disqualification provisions of Regulation A and Regulation Crowdfunding with those of Rule 506(d) of Regulation D, we propose to 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 proposing to retain the disqualification lookback period through the time of filing, rather than through the time of sale, for disqualification events affecting beneficial owners.

[429] 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.

Benefits

By providing greater uniformity in the bad actor disqualification provisions across Rule 506(d), Rule 262(a), and Rule 503(a), the proposed amendments might facilitate compliance for issuers, particularly issuers that undertake different types of exempt offerings over time. The proposed amendments might 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 proposed amendments are expected to give issuers leeway to raise capital while managing disqualification monitoring costs.

The proposed amendments are expected to strengthen investor protection in cases of disqualifying events occurring after the initiation of an offering. This benefit is expected to be most salient 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).

Costs

The proposed amendments to the disqualification provisions might impose costs on issuers and covered persons. 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, which could have negative effects on capital formation. 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 proposed amendments might 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. The proposed amendments also might lead some issuers to incur additional due diligence 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). 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 would remain subject to the existing lookback period (defined based on the date of filing) under the proposed amendments. In addition, issuers might incur costs related to seeking disqualification waivers from the Commission.

Effects on Efficiency, Competition, and Capital Formation

As discussed above, the proposed amendments might 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 that the incrementally more stringent bad actor disqualification provisions in the proposed rules would 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 under the proposed amendments, on the margin, increase investor interest in these offerings, overall capital formation in the Regulation A and Regulation Crowdfunding markets may increase. If the proposed 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 could also reduce the cost of capital for issuers that rely on these offering exemptions.

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. This 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 proposed 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 proposal, 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.

Request for Comment

122. What would be the costs and benefits of extending the disqualification lookback to the time of sale in Regulation A and Regulation Crowdfunding offerings as proposed?

123. What would be the costs and benefits of the alternative of extending the disqualification lookback to the time of sale for all covered persons, including beneficial owners, in Regulation A and Regulation Crowdfunding offerings?

V. PAPERWORK REDUCTION ACT

A. Summary of the Collection of Information

Certain provisions of our rules and forms that would be affected by the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[430] The Commission is submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[431] 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:[432]

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430 *See* 44 U.S.C. 3501 *et seq.*

431 44 U.S.C. 3507(d) and 5 CFR 1320.11.

432 As discussed in Section II.D.2 above, we are proposing to revise 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 proposed amendment, including Form 10-K (OMB Control No. 3235-0063), Form 10-Q (OMB Control No. 3235-0070), Form 8-K (OMB Control No. 3235-0060), Form S-1 (OMB Control No. 3235-0065), and Form 10 (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); Form F-1 (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 preliminarily believe that the proposed standard would not change the paperwork burden associated with these collections of information because the revised standard would be applied in similar circumstances and in a similar way as the current standard.

- "Regulation A (Form 1-A)" (OMB Control No. 3235-0286);
- "Regulation D" (a proposed 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. 3235-0705);
- "Form D" (OMB Control No. 3235–0076); and
- "Form C" (OMB Control No. 3235-0307).

We are proposing to combine the existing collections of information for Rule 504(b)(3), Rule 506(e), and Form D in a new collection of information that covers all of the PRA compliance burdens for Regulation D. The regulations and forms listed above were adopted under the Securities Act and set forth filing and disclosure requirements associated with exempt offerings. A description of the proposed amendments, including the need for the information and its proposed 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 proposed amendments can be found in Section IV above.

B. Summary of the Effects on the Collections of Information

PRA Table 1[433] summarizes the estimated effects of the proposed amendments on the paperwork burdens associated with the affected collections of information listed in Section V.A.

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[433] We do not believe that the proposed amendments with respect to the use of general solicitation in exempt offerings, integration of offerings, 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 or increasing the investment limits under Regulation Crowdfunding would substantially or materially modify the number of new filings or the burdens for those filings. We also do not believe that the proposed limits on the types of securities offered under Regulation Crowdfunding would

PRA Table 1. Estimated Paperwork Burden Effects of the Proposed Amendments

Proposed 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
Regulation Crowdfunding: • Requiring the filing of generic solicitation of interest materials and solicitations of interest under proposed 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

* We estimate that there is no net effect on the current burden hours per response relating to Regulation D as a result of the proposed amendments. However, as discussed above, we are proposing to establish a single collection of information for Regulation D to encompass all of the associated paperwork burdens, including the existing burdens associated with Form D, Rule 504(b)(3), and Rule 506(e). As a result, the new collection of information

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substantially or materially modify the number of Form C filings or the burdens for those filings due to the proposed amendments to allow for the use of crowdfunding vehicles.

for Regulation D would reflect 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 5 below.

** There were 125 Regulation A offerings filed in 2019. Although it is not possible to predict with any degree of certainty the increase in the number of Regulation A offerings following the proposed 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. It is possible that the increase in the offering limit may also increase the number of Form 1-K, Form 1-SA, Form 1-U, and Form 1-Z filings. However, due to uncertainties regarding whether any increase in Tier 2 offerings would be conducted by Exchange Act reporting companies, we are not proposing an increase in the number of responses for the associated collections of information at this time.

*** The number of Regulation Crowdfunding offerings has increased to 552 offerings in the second full year since effectiveness of the rules. Although it is not possible to predict with any degree of certainty the increase in the number of Regulation Crowdfunding offerings following the proposed amendments, we estimate for purposes of the PRA an approximate 10 percent increase in the number of new Regulation Crowdfunding offerings resulting in 55 additional respondents.

C. Incremental and Aggregate Burden and Cost Estimates

Below we estimate the incremental and aggregate changes in paperwork burden as a result of the proposed 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 proposed amendments would 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 would take an issuer to prepare and review disclosure required under the proposed amendments. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. PRA Table 2[434] sets forth the percentage estimates we typically use for the burden allocation for each collection of information and the estimated burden allocation for the proposed new collection of information

[434] 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).

for Regulation D. We also estimate that the average cost of retaining outside professionals is $400 per hour.[435]

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[436] below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the proposed amendments' estimated effect on the paperwork burden per response.

PRA Table 3. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Proposed Amendments

Collection of Information	Number of Estimated Affected Responses (A)[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

[a] The number of estimated affected responses 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 proposed amendments (30 responses for Form 1-A, and 55 responses for Form C). The OMB PRA filing inventory represents a three-year average.

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 proposed amendments' estimated

[435] 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.

[436] The estimated reductions in Columns (C), (D) and (E) are rounded to the nearest whole number.

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 Proposed 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 proposed amendments. Column (D) of PRA Table 5 includes additional responses estimated as a result of the proposed amendments.

PRA Table 5. Requested Paperwork Burden under the Proposed Amendments

	Current Burden			Program Change			Requested Change in 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) [aa]	Change in Professional Costs (F) [bb]	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

[aa] From Column (D) in PRA Table 3 and Column (E) in PRA Table 4.
[bb] From Column (F) in PRA Table 3.

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 proposed amendments. The estimates for this proposed 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 new Regulation D 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.[437]

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

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information

[437] 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.

on those who respond, including through the use of automated collection techniques or other forms of information technology; and

- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, with reference to File No. S7-05-20. Requests for materials submitted to OMB by the Commission with regard to the collection of information requirements should be in writing, refer to File No. S7-05-20 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549. OMB is required to make a decision concerning the collection of information requirements between 30 and 60 days after publication of the proposed amendments. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

VI. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[438] the Commission must advise OMB as to whether the proposed amendments

[438] 5 U.S.C. 801 *et seq*.

constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

Request for Comment

We request comment on whether the proposed amendments would be a "major rule" for purposes of SBREFA. In particular, we request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. INITIAL REGULATORY FLEXIBILITY ANALYSIS

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act ("RFA")[439] requires the agency to prepare and make available for public comment an Initial Regulatory Flexibility Analysis ("IRFA") that will describe the impact of the proposed rule on small entities.[440] This IRFA relates to proposed amendments or additions to the rules and forms described in Section II above.

[439] 5 U.S.C. 601 *et seq*.

[440] 5 U.S.C. 603(a).

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments are intended simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation while maintaining or enhancing important investor protections. The proposed amendments also seek to address gaps and complexities in the exempt offering framework that may impede access to investment opportunities for investors and capital for issuers. The reasons for, and objectives of, the proposed amendments are discussed in more detail in Section II above.

B. Legal Basis

The amendments contained in this release are being proposed under the authority set forth in the Securities Act, particularly, Sections 3, 4, 4A, 19 and 28 thereof; the Exchange Act, particularly, Sections 3, 10(b), 12, 15, 17, 23(a) and 36 thereof; and the Investment Company Act, particularly Sections 6(c), 8, 24, 30, 38, and 45; and Pub. L. No. 112-106, secs. 301-305, 126 Stat. 306 (2012).

C. Small Entities Subject to the Proposed Rules

The proposed amendments would affect issuers that are small entities. The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[441] 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

[441] 5 U.S.C. 601(6).

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 proposed amendments are expected to promote capital formation through exempt offerings and create additional flexibility for issuers. Because the proposed amendments would 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 proposed amendments.[442]

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

If adopted, the proposed amendments would apply to small entities to the same extent as other entities, irrespective of size. Therefore, we expect that the nature of any benefits and costs associated with the proposed amendments to be similar for large and small entities. Accordingly, we refer to the discussion of the proposed amendments' economic effects on all affected parties, including small entities, in Section IV above.[443] 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 makes it difficult to project the economic impact

[442] 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 proposed 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 proposed 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.

[443] We also discuss the estimated compliance burden associated with the proposed amendments for purposes of the PRA in Section V above.

on small entities with precision. Compliance with the proposed amendments may require the use of professional skills, including accounting and legal skills.

Many of the proposed 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 propose to amend, such as Regulation Crowdfunding and Rule 504, have eligibility requirements and other restrictions that increase the likelihood that such rules would be relied upon 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 proposed amendments are expected to be of greatest benefit to the capital raising efforts of small entities, we acknowledge that any costs of the proposed amendments borne by the affected entities, such as those related to compliance with the proposed amendments, or the implementation or restructuring of internal systems needed to adjust to the proposed 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 proposed amendments to the bad actor disqualification provisions[444] could cause some small entities to incur additional due diligence costs or modify their offerings to reduce the possibility of a

[444] *See supra* Section II.G.

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 use the proposed generic or Regulation Crowdfunding testing-the-waters provisions[445] 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.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We do not believe the proposed amendments would duplicate, overlap, or conflict with other federal rules.

F. Significant Alternatives

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, 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 proposed amendments generally would simplify, harmonize, and improve certain aspects of the exempt offering framework to promote capital formation, including for offering

[445] *See supra* Section II.B.

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.

Several of the offering exemptions that we have proposed to amend (*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 utilize these exemptions. In addition, certain of our proposals clarify, consolidate, or simplify compliance and reporting requirements under our rules, which should benefit small entities in particular. For example, we are proposing amendments to the financial statement information requirements in Regulation D to align them with the disclosure requirements in Regulation A. We are also proposing several amendments to simplify compliance with Regulation A, such as 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 proposing revisions to Regulation Crowdfunding and rules under the Investment Company Act intended 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 proposed amendments concern rules that use principles-based approaches that are more akin to performance standards. For example, we are proposing a general principle of integration 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.

G. Request for Comment

We encourage the submission of comments with respect to any aspect of this IRFA. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis;
- How the proposed amendments could further lower the burden on small entities; and
- How to quantify the impact of the proposed amendments.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

STATUTORY AUTHORITY AND TEXT OF PROPOSED RULE AMENDMENTS

The amendments contained in this release are being proposed 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

Administrative practice and procedure, Advertising, 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 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.

For the reasons set out above, the Commission proposes to amend 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, 78o, 78q, 78w, 78mm, and Pub. L. 112-106, secs. 301-305, 126 Stat. 306 (2012).

2. Amend § 227.100 by:

a. Revising paragraphs (a)(1) and (2); and

b. Adding paragraphs (b)(7) and (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) 10 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;

* * * * *

(b) *Applicability*. * * *

(7) Are not equity securities, debt securities, and securities convertible or exchangeable to equity interests, including any guarantees of such securities.

*   *   *   *   *

(e) *Integration with other offerings.* To determine whether offers and sales should be integrated, please see Rule 152 (§ 230.152 of this chapter).

3. Amend § 227.201 by:

a. Revising the introductory text;

b. Removing the word "and" at the end of paragraph (x);

c. Removing the period at the end of paragraph (y) and adding in its place "; and"; and

d. 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.

*   *   *   *   *

4. Amend § 227.204 by revising paragraphs (a) and (b)(1) to read as follows:

§ 227.204 Advertising.

(a) 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 § 227.206.

* * * * *

(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;

* * * * *

5. Add § 227.206 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

(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 rule 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 e-mail address in any response form included pursuant to this paragraph (c).

6. Amend § 227.503 by revising paragraphs (a) and (b)(3) to read as follows:

§ 227.503 Disqualification provisions.

(a) *Disqualification events*. No exemption under this 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;

Instruction to paragraph (a)(3). Final order shall mean a written directive or declaratory statement issued by a federal or state agency, described in § 227.503(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. 78o(b) or 78o-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. 78o(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 of this chapter) 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

* * * * *

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

7. The authority citation for part 229 continues to read 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, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 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).

* * * * *

8. Amend § 229.601 by revising paragraphs (b)(2)(ii) and (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 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 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 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 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 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 of this chapter).

*   *   *   *   *

Part 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

9. 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, 78o, 78o-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, secs. 201(a), 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.

* * * * *

10. Amend § 230.147 by revising paragraph (g) and removing paragraph (h) to read as follows:

§ 230.147 Intrastate offers and sales.

* * * * *

(g) *Integration with other offerings.* To determine whether offers and sales should be integrated, please see Rule 152 (§ 230.152).

11. Amend § 230.147A by revising paragraph (g) and removing paragraph (h) to read as follows:

§ 230.147A Intrastate sale exemption.

* * * * *

(g) *Integration with other offerings.* To determine whether offers and sales should be integrated, please see Rule 152 (§ 230.152).

12. Add § 230.148 to read as follows:

§ 230.148 Exemption from general solicitation or general advertising.

A communication will not be deemed to constitute general solicitation or general advertising if made in connection with a seminar or meeting by a college, university, or other institution of higher education, local government, nonprofit organization, or angel investor group, incubator, or accelerator sponsoring the seminar or meeting, provided that:

(a) No advertising for the seminar or meeting references a specific offering of securities by the issuer;

(b) The sponsor of the seminar or meeting does not:

(1) Make investment recommendations or provide investment advice to attendees of the event;

(2) Engage in any investment negotiations between the issuer and investors attending the event;

(3) Charge attendees of the event any fees, other than reasonable administrative fees;

(4) Receive any compensation for making introductions between event attendees and issuers or for investment negotiations between such parties; and

(5) 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.); and

(c) 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, and the intended use of proceeds of the offering.

Instruction to §230.148: For purposes of this subsection, the term “angel investor group” means a group of accredited investors 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 is neither associated nor affiliated with brokers, dealers, or investment advisers.

13. 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 rule and the policies underlying the Act, these safe harbors 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 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 for which general solicitation is not permitted, offers and sales will not be integrated with other offerings if the issuer has a reasonable belief, based on the facts and circumstances, that:

(i) The purchasers in each exempt offering were not solicited through the use of general solicitation; or

(ii) 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 not permitting general solicitation; and

(2) For an exempt offering permitting general solicitation that includes information about the material terms of a concurrent offering under another exemption also permitting general solicitation, the offering materials must include the necessary legends for, and otherwise comply with, the requirements of each exemption.

(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, *provided that* for an exempt offering for which general solicitation is not permitted, the purchasers either:

(i) Were not solicited through the use of general solicitation; or

(ii) Established a substantive relationship with the issuer prior to the commencement of the offering for which general solicitation is not permitted;

(2) Offers and sales made in compliance with Rule 701 (§ 230.701), pursuant to an employee benefit plan, or in compliance with Regulation S (§§ 230.901 through 230.906) 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 prior terminated or completed offering.

(c) For purposes of this section, an offering would be deemed to be terminated or completed if:

(1) Made in reliance on Section 15 U.S.C. 77d(a)(2) (4(a)(2)), Regulation D (§§ 230.501 through 230.508), or Rules 147 (§ 230.147) or 147A (§ 230.147A), on the later of the date:

(i) 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 issuer and its agents ceased efforts to make further offers to sell the issuer's securities;

(2) Made in reliance on Regulation A (§§ 230.251 through 230.263), on the:

(i) Withdrawal of an offering statement under Rule 259(a) (§ 230.259(a));

(ii) Filing of a Form 1-Z (§ 239.94 of this chapter) with respect to that offering;

(iii) Declaration by the Commission that the offering statement has been abandoned under Rule 259(b) (§ 230.259(b)); or

(iv) Third anniversary of the initial qualification date of the offering statement, in the case of continuous or delayed offerings;

(3) Made in reliance on Regulation Crowdfunding, on the deadline of the offering identified in the offering materials pursuant to Rule 201(g) (§ 227.201(g) of this chapter), or indicated by the Regulation Crowdfunding intermediary in any notice to investors delivered under Rule 304(b) (§ 227.304(b) of this chapter);

(4) Made in reliance on a filed registration statement:

(i) On the withdrawal of the registration statement after the Commission grants such application under Rule 477 (§ 230.477);

(ii) On 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 Item 512(a)(3) of Regulation S-K (§ 229.512(a)(3) of this chapter);

(iii) On the entry of an order of the Commission declaring that the registration statement has been abandoned under Rule 479 (§ 230.479); or

(iv) As set forth in Rule 415(a)(5) (§ 230.415(a)(5)).

§ 230.155 [Removed and Reserved]

14. Remove and reserve § 230.155.

15. Add § 230.241 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 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 issuer makes a determination as to the exemption to be relied upon 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 upon 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 rule 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 e-mail address in any response form included pursuant to this paragraph (c).

16. Amend § 230.251 by revising paragraphs (a)(2), (b)(7), and (c) to read as follows:

§ 230.251 Scope of exemption.

* * * * *

(a) * * *

(2) *Tier 2*. Offerings pursuant to 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 security holders 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 Rule 257 (§ 230.257) or pursuant to Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78o) 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, please see Rule 152 (§ 230.152).

* * * * *

§ 230.255 [Amended]

17. Amend § 230.255 by removing paragraph (e).

18. 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.

19. Amend § 230.262 by revising paragraphs (a) and (b)(3) to read as follows:

§ 230.262 Disqualification provisions.

(a) *Disqualification events*. No exemption under this Regulation A (§§ 230.251 through 230.346) 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 ten 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 Rule 261 (§ 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

* * * * *

20. 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, please see Rule 152 (§ 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 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 communications used under the authorization of Rule 241 within 30 days of the such sale.

* * * * *

21. Amend § 230.504, by revising the section heading, paragraph (b)(2), and the instruction to paragraph (b)(2) to read as follows:

§ 230.504 Exemption for limited offerings and sales of securities not exceeding $10,000,000.

* * * * *

(b) * * *

(2) 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 twelve 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 January 1, 2020, under this § 230.504 and an additional $500,000 of its securities on July 1, 2020, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 2020, sale.

* * * * *

22. Amend § 230.506 by:

a. Revising paragraph (b)(2)(i);

b. Removing the word "or" from the end of paragraph (c)(2)(ii)(B)(*2*);

c. Removing the "." and adding in its place ";" at the end of paragraph (c)(2)(ii)(C)(*4*);

d. Removing the "." and adding in its place "; or" at the end of paragraph (c)(2)(ii)(D);

e. Adding paragraph (c)(2)(ii)(E); and

f. Revising the heading to *Instructions to paragraph (c)(2)(ii)(A) through (D) of this section.*

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.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(E) In regard to any person that the issuer has previously verified 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.

Instructions to paragraph (c)(2)(ii)(A) through (E) of this section: * * *

* * * * *

23. Amend § 230.902 by revising paragraph (c)(1) and adding paragraph (c)(3)(ix) to read as follows:

§230.902 Definitions.

* * * * *

(c) * * *.

(1) Except as specified in this section, "directed selling efforts" means 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 any of the securities being offered in reliance on this Regulation S (§§ 230.901 through 230.906, and Preliminary Notes). Such activity

includes placing an advertisement in a publication “with a general circulation in the United States” that refers to the offering of securities being made in reliance upon this Regulation S.

* * * * *

(3) * * *

(ix) Activity undertaken in connection with offers or sales under an exemption from registration under the Act that involves general solicitation or general advertising, *provided that* such 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 this Regulation S.

* * * * *

24. Add § 230.906 to read as follows:

§230.906 General solicitation; transfer restrictions.

An issuer that engages in activity in connection with offers or sales under an exemption from registration under the Act that is deemed to not be “directed selling efforts” pursuant § 230.902(c)(3)(ix) may concurrently make offers or sales in reliance on this Regulation S (§§ 230.901 through 230.906, and Preliminary Notes). However, securities acquired from the issuer, a distributor, or any of their respective affiliates in such Regulation S offering are not permitted to be resold to a U.S. person or for the account or benefit of a U.S. person for a period of six months from the date of sale, except to qualified institutional buyers, as defined in §230.144A, or accredited investors that are institutions, as defined in §230.501(a).

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

25. The authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l*, 78m,78n, 78o(d), 78o-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.

* * * * *

26. 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].

* * * * *

27. 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].

*   *   *   *   *

28. Amend Form 1-A (referenced in § 239.90) by:

a. Revising General Instruction I;

b. Revising General Instruction III(a);

c. Revising paragraphs 13 and 17 of Part III, Item 17; and

d. Adding an instruction at the end of Part III, Item 17.

The revisions and addition 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 through 230.263). 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 of this chapter) 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 Web site 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 Web site 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.

*   *   *   *   *

17. *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 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).

*   *   *   *   *

29. 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; and

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 to 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: ____

Leal 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 through 227.503). 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 through 227.503) This Form also shall be used for an annual report required pursuant to Rule 202 of Regulation Crowdfunding (§ 227.202 of this chapter) and for the termination of reporting required pursuant to Rule 203(b)(2) of Regulation Crowdfunding (§227.203(b)(2) of this chapter). 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 through 227.503). Any information provided with respect to the issuer should also be separately provided with respect to any co-issuer.

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 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

30. 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.

* * * * *

31. 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 of this chapter).

* * * * *

32. 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

* * * * *

<u>Instructions.</u>

* * * * *

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 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 of this chapter).

* * * * *

Part 270 – RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

33. The authority citation for part 270 continues to read as follows:

<u>Authority</u>: 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;

* * * * *

34. 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 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;

(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 in an offering by a crowdfunding vehicle 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 17 CFR 227.100 through 227.503.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

35. 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), 78l, 78m, 78n, 78o(d), 80a-8, 80a 24, 80a-26, 80a-29, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

36. Amend Form N-5 (referenced in §§ 239.24 of this chapter 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].

* * * * *

37. Amend Form N-1A (referenced in §§ 239.15A of this chapter and 274.11A) by:

a. Amending the last sentence of Instruction 2 to Item 28 by replacing "registrant" with "Registrant";

b. Amending Instruction 3 to Item 28 by replacing "registrant" with "Registrant"; and

c. Revising Instruction 4 to Item 28.

The revisions read 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

* * * * *

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].

* * * * *

38. Amend Form N-2 (referenced in §§ 239.14 of this chapter and 274.11a-1) by:

a. Amending the last sentence of Instruction 4 to Item 25.2 by replacing “registrant” with “Registrant”;

b. Amending Instruction 5 to Item 25.2 by replacing “registrant” with “Registrant”; and

c. Revising Instruction 6 to Item 25.2.

The revisions read 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].

*   *   *   *   *

39. Amend Form N-3 (referenced in §§ 239.17a of this chapter 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

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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].

* * * * *

40. Amend Form N-4 (referenced in §§ 239.17b of this chapter 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].

* * * * *

41. Amend Form N-6 (referenced in §§ 239.17c of this chapter 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].

* * * * *

42. 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: March 4, 2020.

Eduardo A. Aleman,

Deputy Secretary.