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# SEC Revises Integration Framework and its Associated Safe Harbors

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The Securities and Exchange Commission (SEC) recently published extensive rules to modernize the private placement framework of the federal securities laws. On March 15, 2021, the Final Rules became effective. The SEC goal with these changes is to promote capital formation while preserving or enhancing important investor protections.

This post summarizes the key takeaways from the SEC's amendments to the integration doctrine, its related safe harbors for private placements of securities and other key changes made in conjunction therewith.

**The integration doctrine historically**

The SEC integration doctrine seeks to stop issuers from evading the Securities Act of 1933 (Securities Act) registration requirements by breaking apart what is substantively a single securities offering possibly requiring registration into multiple exempt offerings.  To do this, the doctrine provides guidelines for when two or more securities offerings will be deemed the same offering under federal securities laws.

Since the 1960s, the SEC had used a five-factor test to determine whether offerings should be integrated. These five factors are whether the:

1. Different offerings were part of a single plan of financing;
2. Offerings involved issuance of the same class of security;
3. Offerings were made at or about the same time;
4. Same type of consideration was to be received in each offering; and
5. Offerings were made for the same general purpose.[1]

Additionally, the Rule 502(a) safe harbor in Regulation D promulgated under the Securities Act (Regulation D) provided that offers and sales of securities made more than six months before the beginning or after the completion of an offering exempt under Regulation D would not be integrated with such offering. Thus, only offerings exempt from registration under Regulation D and those surrounding offerings were analyzed under the five-factor test. Other safe harbors from integration were contained in SEC rules, too (e.g., Rule 251(c), 147(g) and 147A(g)), each applying to its own specific sets of facts or exemptions from registration.

**The new streamlined integration doctrine**

New Rule 152 builds on the approach to integration in the SEC's recent rulemakings and provides a comprehensive integration framework composed of a general principle of integration set forth in new Rule 152(a) and four safe harbors applicable to all securities offerings under the Securities Act, including registered and exempt offerings, set forth in new Rule 152(b).

*General principle of integration in new Rule 152(a)*

New Rule 152(a) provides that if the integration safe harbors in new Rule 152(b) do not apply, then offerings of securities will avoid integration only if the issuer establishes that each offering—based on its particular facts and circumstances—either (1) complies with the registration requirements of the Securities Act or (2) is exempt from registration.  This general principle extends the SEC approach to integration in recent years as previously seen in the contexts of Regulation Crowdfunding, Rule 147, and Rule 147A.

In addition to the general principle of integration, new Rule 152(a)(1) and (2) provide special considerations for analyzing how SEC rules on general solicitation affect the analysis of whether offerings will be integrated:

1. **If the exempt offering prohibits general solicitation,** the issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in such exempt offering, that the issuer (or any person acting on the issuer's behalf) either:

    i. Did not solicit the purchaser through general solicitation; or

    ii. Established a substantive relationship with the purchaser prior to the exempt offering.

   Under new Rule 152(a)(1), an issuer could not, for example, generally solicit purchasers in a Rule 506(c) offering and then sell to one of the same purchasers in a Rule 506(b) offering without integration being a concern, unless the issuer either:

Did not solicit the purchaser in the Rule 506(b) offering using general solicitation in the Rule 506(c) offering; or

Established a "pre-existing substantive relationship" with the purchaser *before* the beginning of the Rule 506(b) offering.

2. **If the exempt offering allows general solicitation,** in addition to satisfying the requirements of the exemptions used for each offering, a general solicitation permitted in connection with an offering that mentions the material terms of a concurrent or subsequent exempt offering prohibiting general solicitation may constitute an offer of securities of the concurrent offering, thus the general solicitation offering must comply with the exemption being relied upon for the concurrent offering.

   Under new Rule 152(a)(2), offering materials in a Rule 506(c) offering that, for example, mention the material terms of a concurrent or subsequent general solicitation offering must comply with all of the requirements and restrictions applicable to such other general solicitation offering.

*Integration safe harbors in new Rule 152(b)*

There are four safe harbors in new Rule 152(b), but an issuer may still rely upon new Rule 152(a) should none of the following four apply.

1. **30-Day integration safe harbor:** Any offering made more than 30 calendars days before the commencement or after the termination or completion of any other offering will not be integrated with such other offering; *provided, however,* that, for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of new Rule 152(a)(1) apply.
2. **Rule 701 and Regulation S:** Offers and sales made in compliance with Rule 701 or Regulation S will not be integrated with other offerings.
3. **Subsequent registered offerings:** An offering for which a Securities Act registration statement has been filed will not be integrated if it is made subsequent to: (i) a terminated or completed offering for which general solicitation is not permitted; (ii) a terminated or completed offering for which general solicitation is permitted that was made only to qualified institutional buyers and institutional accredited investors; or (iii) an offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the commencement thereof.
4. **Offers or sales preceding exempt offerings permitting general solicitation:** Offers and sales made in reliance on an exemption for which general solicitation is permitted will not

be integrated if made after any terminated or completed offering. According to the SEC, offers and sales that precede an exempt offering that permits general solicitation generally are not the type of transactions that condition the market for the subsequent offering.

*Commencement and termination of offerings*

New Rule 152 is dependent on the concept of when offerings "commence," "terminate" or "complete." New Rules 152(c) and (d) provide nonexclusive lists of factors to consider in determining when an offering has commenced, and when it has terminated or been completed. Generally, new Rule 152(c) provides that an offering is deemed to "commence" when the first offer of securities in the offering is made by either the issuer or its agent. On the other hand, new Rule 152(d) provides that an offering is generally deemed to "terminate" or be "complete" when an issuer and its agents cease all efforts to make offers and sales of the issuer's securities in the offering.

**What this means to you**

This new approach to the integration doctrine completely replaces the disparate array of safe harbors for integration and the generally unsatisfying five-factor test. In keeping with the SEC's more recent approach to integration, the SEC is providing firmer guideposts for issuers to navigate the task of having contemporaneous or sequential offerings.

New Rule 152(a) exists to provide additional protection from integration to issuers who cannot rely upon new Rule 152(b)'s safe harbors. Rather than having to guess at whether one's own calculus in the five-factor test will match up with that of the SEC, issuers and counsel can rely on the general principle and its special considerations to analyze integration concerns for non-safe harbor offerings. Importantly, new Rule 152(a)(1) provides issuers with a greater idea of what the SEC is looking for when analyzing the integration of contemporaneous or sequential offerings with differing rules on general solicitation. By establishing clear bases that an issuer must have a reasonable belief about to avoid integration, the SEC opens the door to firmer decision making from issuers and a wider spectrum of contemporaneous or sequenced offering strategies through which issuers may raise capital.

New Rule 152(b) provides four nonexclusive safe harbors from integration. For offers and sales meeting the conditions of these safe harbors, the issuer should develop a significant degree of assurance their offerings will not be considered integrated. Simpler yet, these safe harbors apply to the full spectrum of securities offerings, rather than the piecemeal array of specific safe harbors for specific exemptions that existed before. Notably, new Rule 152(b)(2) codifies the long-standing SEC position that offshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act.  It also restates the prior integration safe harbor for offers and sales made under Rule 701 and extends it to employee benefit plans.

Perhaps most notably, new Rule 152(b)(1) shortens the six-month integration time period in Rules 502(a), 251(c), 147(g) and 147A(g) to 30 days, providing the same 30-day safe harbor time period throughout the Securities Act's integration provisions.  This opens the door for issuers of all sizes to have more frequent and more targeted offerings with greater flexibility over timing.  Overall, these changes bring much needed clarity to the integration doctrine and provide issuers in a recovering economy with sharper tools and increased latitude with which to access private capital markets.

**Contact us**

Husch Blackwell's Securities & Corporate Governance team will continue to monitor these changes and their implications for our clients. Should you have any questions, please do not hesitate to contact Steve Barrett, Kirstin Salzman, Scott Brunner, Brandon Warrington or your Husch Blackwell attorney.

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[1] See SEC, *Final Rule: Nonpublic Offering Exemption*, Release No. 33-4552 (Nov. 6, 1962).