



SEC Staff Issues New C&DI on Integration Analysis of Successive Offerings Made Under Different Provisions of Regulation D

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Background

Per Rule 502(a) of Reg. D, offers and sales of securities made more than six-months before or after a Reg. D offering of similar securities will not be considered part of (i.e., “integrated” with) that Reg. D offering. If an issuer offers or sells securities within this six month window, (i.e., during the time period for which the non-integration safe harbor is unavailable), the determination as to whether separate sales of securities are considered integrated depends on the particular facts and circumstances. The note to Rule 502(a) lists five factors that should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Reg. D.

New Guidance

In C&DI 256.34, the Staff states that the integration factors listed in the note to Rule 502(a) are not the sole means by which an issuer should determine whether successive Reg. D offers and sales constitute a single offering. In broadening the integration analysis under Reg. D, the Staff relies on Rule 152 of the Securities Act of 1933, as amended (the **Securities Act**), which states that transactions by an issuer not involving any public offering (as contemplated by the registration exemption in Section 4(a)(2) of the Securities Act) shall continue to be deemed private transactions, even though subsequent thereto an issuer decides to make a public offering and/or files a registration statement.

In reliance upon the provisions of Rule 152, the Staff asserts that in the specific example of a Rule 506(b) private offering followed by a Rule 506(c) general solicitation less than six months

later, an issuer's reliance on Rule 506(b) prior to the general solicitation would not be nullified (i.e., the offerings would not be integrated), so long as all of the applicable requirements of Rule 506(b) were met for offers and sales that occurred prior to the general solicitation. The Staff further notes that the Rule 506(c) offering would also be exempt from registration and the issuer would be able to make offers and sales pursuant to Rule 506(c), so long as all of the applicable requirements of Rule 506(c) were met for the subsequent offers and sales.

Analysis

By expressly allowing issuers to rely on the provisions of Rule 152 to prevent the integration of a Rule 506(b) private placement followed by a Rule 506(c) general solicitation, the Staff has expanded the ability of issuers to conduct multiple proximate offerings without the concern that the offerings would be integrated and the Reg. D non-registration safe harbor violated.

Categories

Compliance

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