

Updates to Regulations A and D — SEC Issues New Guidance on Certain Stock Offerings

06.14.17

The Division of Corporate Finance of the Securities and Exchange Commission (SEC) issued several Compliance and Disclosure Interpretations in November of last year that provide guidance on stock offerings under SEC Regulations A and D. Will this guidance affect your company?

Price changes under Reg. A

Reg. A allows companies to sell a limited amount of unrestricted securities to anyone, subject to more stringent reporting requirements (see below) than required under Reg. D. It provides for two levels of offerings: 1) Tier 1 for offerings of up to \$20 million over a 12-month period, and 2) Tier 2 for offerings of up to \$50 million over a 12-month period. An issuer of \$20 million or less of securities can elect to proceed under either tier. Each tier is subject to different reporting requirements.

A price change in a Reg. A offering, representing a change of 20% or less in the maximum aggregate offering price in a qualified offering statement, may be made pursuant to an offering circular supplement rather than a postqualification amendment. The new guidance clarifies that, for purposes of the 20% limit, the change may be measured from either the high end of the range (if the price increases) or the low end (if the price decreases). But an issuer may not rely on the rule if the change would turn a Tier 1 offering into a Tier 2 offering or cause the offering to exceed Reg. A's limits.

The SEC also issued new Reg. A guidance related to postqualification amendments to qualify an additional class of securities and to allow an issuer to omit certain historical financial information from an offering statement in certain circumstances.

Integration of successive offerings under Reg. D

Rule 506 of Reg. D authorizes two types of offerings:

Rule 506(b) traditional, nonadvertised offerings. Under this rule, companies may sell securities to an unlimited number of accredited investors (investors who meet certain income or net worth requirements), plus up to 35 “sophisticated” nonaccredited investors. It prohibits general solicitation and general advertising.

Rule 506(c) advertised offerings. Under this guidance, companies may sell securities to any number of investors, all of whom must be accredited. It allows for general solicitation and general advertising, but issuers must take reasonable steps to ensure that purchasers are accredited.

Do you have to integrate a Rule 506(b) offering with a Rule 506(c) offering conducted less than six months later? Integrating the two offerings would endanger their eligibility under Reg. D. Historically, the rules have provided a safe harbor that protects issuers from integration of successive Reg. D offerings if the second offering starts at least six months after the first offering is completed.

The new guidance clarifies that a Rule 506(b) offering wouldn't have to be integrated with a subsequent Rule 506(c) offering, even if the offerings are less than six months apart, as long as the issuer complied with the Rule 506(b) requirements with respect to any offers or sales that occurred before the general solicitation. This outcome is consistent with a Securities Act rule, which provides that a private placement doesn't lose its exempt status just because the issuer later decides to make a public offering.

Is your company in compliance?

The rules for making public stock offerings can be complex. Consult with your financial advisor to make sure you're following the most current guidance.