

## SEC SEEKS PUBLIC COMMENT ON REVISING AND HARMONIZING SECURITIES EXEMPT OFFERING REGIME

July 8, 2019

In June, the U.S. Securities and Exchange Commission (“SEC”) issued a request for public comments, by ninety (90) days after publication in the Federal Register, on the overall regime of exemptions from registration under the Securities Act of 1933 (the “Securities Act”) and the SEC’s rules and regulations promulgated pursuant to it. The SEC is specifically requesting input from investors and entrepreneurs on how to harmonize and streamline the exempt registration framework to allow startups, early stage companies, and investors readier access to capital and to investment opportunities. Among the issues on which input is sought by the SEC are whether the limitations on who can invest in certain exempt offerings, and the amount they can invest, appropriately balance investor protection and access to capital for enterprises and access to investment opportunities for investors; the process of transitioning from one exemption to another or from an exempt offering to a registered offering; expansion of use of pooled investment funds, including to give greater access to investment opportunities for retail investors; and revision of the exemptions governing secondary trading of securities issued in exempt offerings. The SEC specifically requests comments on:

- Whether the exempt offering framework as a whole is consistent, accessible, and effective for both companies and investors, or whether the SEC should consider changes to simplify, improve, or harmonize the framework, with specific reference to Regulation D, Rules 504 and 506; Regulation A; the intrastate offering exemptions, and the Crowdfunding regulations;
- Whether there are gaps in the exempt offering framework that make access to capital, especially for smaller companies, difficult;
- Whether the current limitations on who may invest in exempt offerings, and how much they may invest, provide an appropriate balance of investor protection or pose an undue obstacle to capital formation by companies or investor access to investment opportunities, including the qualifications for persons and companies to fall within the “Accredited Investor” definition of Securities Act Section 2(a)(15) and Regulation D, Rule 501;
- Whether the SEC should revise its “integration” rules to allow companies to more easily transition from one exempt offering to another and to a registered public offering;
- Whether the SEC should take steps to facilitate capital formation in exempt offerings through pooled investment funds, and whether retail investors should be allowed greater exposure to growth-stage companies through pooled and other closed-end investment funds; and

- Whether the SEC should revise its rules governing exemptions for resales of restricted securities issued in exempt offerings to facilitate capital formation and investor protection by improving secondary market liquidity.

We will be happy to facilitate submission of comments to the SEC by our clients and other recipients of this advisory and our “Raising Capital through Private Placements: Deal Points” advisory. Following is the previously published Appendix 1 Exemption Chart to “Raising Capital” (January 2019 edition), presented in stand-alone form for convenience in reviewing the existing exempt offering regime and considering comments to make to the SEC. To obtain a copy of “Raising Capital” itself, which compares in detail Regulations D, A, and S and other principal Securities Act sections, rules, and regulations that may be used for registration-exempt offers and sales of securities for the purpose of raising capital and discusses their respective uses, requirements, advantages, and disadvantages, and to discuss submission of comments to the SEC, please contact us at [info@kurtinlaw.com](mailto:info@kurtinlaw.com).

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**Appendix 1**  
**Exemption Chart**

Type of Offering	Aggregate Offering Price Limitation	Issuer & Investor Requirements	Limitations on Manner of Offering	SEC and State Filing Requirements	Limitations on Resales	Information Requirements
Regulation D Rule 506	None.	Rule 506(b): unlimited Accredited Investors and up to 35 non-Accredited Investors permitted.  Rule 506(c): all purchasers must be Accredited Investors.	Rule 506(b): No general solicitation or advertising permitted.  Rule 506(c): General solicitation and advertising permitted if all purchasers are Accredited Investors.	SEC: File Form D not later than 15 days after first sale. No ongoing reporting.  State: Exempt as “Covered Security” pursuant to Securities Act s. 18.	Restricted Securities that can only be sold if registered or with a resale exemption.	No information requirements for only Accredited Investors; if any non-accredited investors are sold to under Rule 506(b), must furnish a PPM per Rule 502.
Regulation D Rule 504	\$5 million within prior 12 months.	No requirements.	No general solicitation or advertising (with certain state law-based exceptions).	SEC: File Form D not later than 15 days after first sale. No ongoing reporting.  State: Must comply with state law by registration or exemption.	Restricted Securities. (state law exceptions)	No specific information requirements.

Type of Offering	Aggregate Offering Price Limitation	Issuer & Investor Requirements	Limitations on Manner of Offering	SEC and State Filing Requirements	Limitations on Resales	Information Requirements
<p>Regulation A Tier 1</p> <p>Tier 2 (Reg. A+)</p>	<p>\$20 million in prior 12 months, but no more than \$6 million by selling security holders.</p> <p>\$50 million in prior 12 months, but no more than \$15 million by selling security holders.</p>	<p>Only available to U.S. and Cdn. cos., not available to Exchange Act reporting cos., investment cos. required to register by the ICA and “blank check” cos.</p> <p>No requirements for Tier 1 investors; Tier 2 restrictions on investment limits by non-accredited investors unless offering is listed on national exchange upon qualification.</p>	<p>“Testing the waters” permitted before filing Form 1-A. Sales permitted after Form 1-A qualified.</p>	<p>SEC: File Form 1-A, any sales material and Form 2-A report of sales and use of proceeds. Tier 1: No ongoing reporting. Tier 2: Ongoing Reporting.</p> <p>State: Tier 1: Must comply with state law. Tier 2: Exempt from state law requirements as “Covered Securities.”</p>	<p>None; freely resalable.</p>	<p>File detailed Form 1-A offering statement pursuant to with the SEC, along with any sales material and Form 2-A report of sales and use of proceeds.</p>
Rule 701	<p>Greater of \$1 million in prior 12 months, or 15% of issuer’s total assets, or 15% of issuer’s outstanding securities of the same class.</p>	<p>Not available to issuer Exchange Act reporting cos. or investment cos.</p> <p>Investors must be officers, directors, employees or consultants in stock purchase or award, stock option plan, or employment agreement. No other investor sophistication requirements.</p>	<p>Limited to offerings to officers, directors, employees and consultants of issuer as compensation, for example, in a stock purchase or award, stock option plan, or as part of an individual employment agreement.</p>	<p>SEC: None.</p> <p>State: Must comply with state law.</p>	<p>Restricted Securities.</p>	<p>Benefit or option plan or contract must be provided. No specific information requirements unless more than \$10 million in securities are offered in a 12 month period.</p>

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Securities Act section 4(a)(2)	None.	All investors must meet sophistication and access to information test.	No general solicitation or advertising.	SEC: None.  State: Must comply with state law.	Restricted Securities.	Must comply with state law.
Securities Act section 4(a)(6) "Crowdfunding"	\$1.07 million within 12 months.	Issuers must use registered broker-dealer or funding portal. Investors may invest greater of \$2,200 or 5% of annual income or net worth, if both are under \$107,000; or greater of 10% of annual income or net worth, if either is \$107,000 or more.	No general solicitation or advertising except as expressly provided.	SEC: File Offering Statement on Form C. Ongoing reporting.  State: Exempt as "Covered Securities."	Restricted Securities for one year.	None.
Securities Act section 3(a)(11) and Rules 147 and 147A	None.	Rule 147: Issuer and investors must be residents of the same state or territory.  Rule 147A: Issuer need not be organized or managed in-state.	Must comply with state law.  General solicitation permitted.	SEC: None.  State: Must comply with state law.	Securities are restricted from resale to non-residents of the state or territory for six months.	Must comply with state law.

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Regulation S	None.	Issuer, investor and transaction must fall into one of three categories set forth in Regulation S Rule 903.	Regulation S is technically not an exemption to Securities Act registration requirements. No directed selling efforts into U.S. market.	SEC: None, provided that issuer is not an Exchange Act reporting company.  State: Must comply with state law.	Restricted Securities As per the Rules 903, 904 and 905.	None.
Rules 801 and 802	None.	Issuers must be “foreign private issuers,” as defined in Securities Act Regulation C.  Investors must be non-U.S. holders, U.S. holders may hold no more than 10% .	None other than regulations governing rights offerings, exchange offerings or business combinations as the case may be.	SEC: If information statement furnished, it must be filed on Form CB; if Form CB is filed, Form F-X must also be filed.  State: Must comply with state law.	Restricted Securities. For Rule 801, transfers of rights by U.S. holders must be in accordance with Regulation S.	Optional; use activates filing requirements.
Regulation CE Rule 1001	\$5,000,000.	Issuer must be California business entity or non-California corporation with majority California attributes.  Investors must be California “Qualified Purchasers.”	Compliance with California Corporations Code section 25102(n). “Testing the waters” activity is permitted by written communication containing required information.	SEC: None.  State: Must comply with California law.	Restricted Securities.	For all sales to natural person Qualified Purchasers, a disclosure document containing the information required by Regulation D must be furnished.