RAISING CAPITAL THROUGH PRIVATE PLACEMENTS: DEAL POINTS

September 2021 Update

2020 - 2021 Updates (updates shown in text boxes throughout):

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- **Regulation D, Rule 506(b) General Solicitation Liberalization: Section I(c), p. 8**
- **Resale of Restricted Securities and Qualified Institutional Buyer Liberalization: Section I(e), p. 10**
- **Regulation D, Rule 502 Financial Disclosure Harmonization with Regulation A: Section I(c), p. 8, Section I(f), p. 11**
- **Integration Rules Explanation and Amendments: Section I, p. 12**
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Executive Summary

Any attempt to raise capital by the offer and sale of securities in the U.S. market must be made with a publicly filed registration statement pursuant to section 5 of the U.S. Securities Act of 1933, as amended (the “Securities Act”), which governs the initial issuance of securities, unless an exemption from registration is available. Exemptions from the registration requirement are valuable because the registration process, especially for an initial public offering, or “IPO,” is costly, rigorous, and leads to extensive ongoing compliance obligations under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), which regulates both offers and sales of securities after their initial issuance and the reporting obligations of public companies.

Exemptions from the registration requirement fall into two categories: securities that are always exempt from registration pursuant to section 3 of the Securities Act (for example, government securities and short term commercial paper), and certain transactions in securities that are not themselves generally exempt from registration requirements, but which for that specific transaction are exempted pursuant to section 4 of the Securities Act.

For most companies attempting to raise capital without public registration, the most important section 4 exemption is section 4(a)(2), which exempts from the registration requirement the sale of securities by a securities-issuing company (or "Issuer") "not involving any public offering," meaning generally and traditionally a "private placement" of the securities without solicitation or advertising to the general public. Section 3(b) provides another route for Issuers to offer exempt securities (as opposed to exempt transactions in securities) when the aggregate amount and nature of the offering is limited. Registration-exempt securities offerings can be made pursuant to the relevant Securities Act provisions themselves, and also pursuant to rules and regulations that the U.S. securities regulatory agency, the Securities and Exchange Commission ("SEC") has promulgated pursuant to the Securities Act. Following is a discussion of the 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 their respective requirements, advantages and disadvantages. In each case, the discussion of the exemption is organized in the same categories to facilitate their comparison and determination of which may be the appropriate choice for the Issuer seeking outside investment capital, as follows:

(a) Aggregate Offering Price Limitation (the amount of capital that can be raised at one time using that exemption);
(b) Issuer and Investor Requirements (restrictions on what kinds of securities issuing business can use each exemption and what kinds of investors can buy the securities issued);
(c) Limitations on Manner of Offering (restrictions on how the securities may be offered);
(d) SEC and State Filing Requirements (federal and state filings, if any, required to use each exemption);
(e) Limitations on Resales (restrictions on resale of the securities issued using each exemption);
(f) Information Requirements (what information must be furnished to prospective investors using each exemption);
(g) Advantages (positive reasons for using each available exemption); and
(h) Disadvantages (negative reasons militating against use of each available exemption).

Appendix 1 at the end of this advisory presents a condensed version of the same information in chart form. Following the discussion, are "Deal Points" on important considerations in the exempt-from-registration offering process and *what at all costs not to do.*

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I. Regulation D, Rule 506: the Securities Act Section 4(a)(2) Safe Harbor for Private Placements

a. Aggregate Offering Price Limitation: Rule 506 has no aggregate offering price limitation; if the other requirements of the Rule are met, an unlimited dollar amount of securities may be offered in a single Rule 506 offering. This is a material and nearly unique advantage of Rule 506 compared to the other Securities Act exemptions covered here (but see Section V on Securities Act section 4(a)(2)). This, the non-exclusive "safe harbor" for section 4(a)(2) that Rule 506 provides (see subsection I(g) below) and the lack of ongoing reporting obligations (see subsection I(d)), account for the popularity and frequent use of Rule 506 compared to the other exemptions (see Section XI on SEC Initiatives and Data Metrics), and is the reason to discuss it here before all the other exemptions.

b. Issuer and Investor Requirements: There are no Issuer qualifications to issue securities under the Rule 506 registration exemption, although an Issuer may be disqualified under Rule 506(d) "bad actor" provisions. Issuers may be U.S. or foreign (non-U.S.), private or Exchange Act reporting companies. As we will see, many of the other Securities Act exemptions are not available to foreign issuers, Exchange Act reporting companies, certain investment funds and "blank check" companies, defined by Securities Act Rule 419 as companies formed without a specific business purpose or with a business plan to go public in an IPO and then merge with or acquire an operating company, such as "SPACs," or Special Purpose Acquisition Companies (see "SPACs: An IPO and Private Equity Raising Capital Alternative: Deal Points," available at [Kurtin PLLC Whitepapers and Advisories]). Any of those entities, as well as more typical early stage private company Issuers, may use Rule 506, which accounts for the nearly universal use of Rule 506 as a financing device in M&A, or mergers and acquisitions; "PIPE," or Private Investment in Public Equity financings by reporting companies; and SPACs during or after their IPOs.

Under Rule 506(b), there may be unlimited "Accredited Investors" (see next paragraph in this subsection) and up to 35 "sophisticated" but non-accredited investors (in fact or in Issuer's "reasonable belief") (but see subsection I(h) and Section XII, "Deal Points" no. 2 on why as a general rule not to sell to non-accredited investors) in any 90-day period. Under Rule 506(b), investors may "self-certify" their Accredited Investor status with subscription documents, questionnaires or stock purchase agreements. Under Rule 506(c), all purchasers must be Accredited Investors, and the Issuer also must take Rule-specified "reasonable steps" to confirm their Accredited Investor status, a heavier burden on Issuer which is not required under Rule 506(b).

Central to the Regulation D exemptions from Securities Act registration and others is the distinction between potential purchasers of securities who are "Accredited Investors" and those who are not. Because the SEC recently (August 2020) liberalized the qualifications to be an Accredited Investor, it is worth focusing on the Accredited Investor definition anew, even for those who were already familiar with it. Investor protection is the focus of the securities laws and the SEC regulatory regime. Investor protection is mainly achieved by ensuring adequate disclosure by the Issuer of the offered securities to prospective purchasers, in order to allow them to make an informed decision about whether to invest. For Securities Act section 5 public offering registration statements, the disclosure requirements, both of financial and accounting information and of qualitative, or unquantifiable, information are extensive. However, "Accredited Investors," defined in Securities Act section 2(a)(15) and Regulation D, Rule 501(a) to include institutions such as banks and insurance companies, registered broker-dealers and investment advisors and investment companies, certain companies, trusts, certain family offices, and persons who, by reason of their income, net worth, financial sophistication, or "insider" status such as director or officer of the Issuer company, are deemed not to need the benefit of the Securities Act's full disclosure scheme. The net worth and net income requirements are relatively modest for any individual investor who is likely to be a potential private placement investor: at least $1 million in net worth (excluding primary residence) or net income of more than $200,000 in each of the two most recent years (or $300,000 including spousal income). Rule 502 of Regulation D contains rules against general solicitation of prospective purchasers of securities in most private placements (but see discussion of Rule 506(c) in subsection I(c)), financial and non-financial information required to be offered to prospective purchasers and restrictions on resale of exempted securities sold under Regulation D.

Update:

In August 2020, the SEC adopted rule amendments that expanded and liberalized the Accredited Investor qualification definitions. The amendments did not alter the net worth or income qualification thresholds, unchanged for 38 years, a potential risk for unsophisticated but nevertheless threshold-qualifying Accredited Investors criticized in public statements by two SEC commissioners, who noted that since the Accredited Investor qualification thresholds were adopted in 1983, the number of qualifying households, never indexed for inflation, has increased by 550%, raising the possibility that many qualifying Accredited Investors were not as sophisticated as the exemption from the full public disclosure regime assumed them to be. The effect of the SEC not indexing the income and net worth Accredited Investor qualifications for inflation therefore constitutes its own liberalization of those qualifications, as each year, more and more households meet the thresholds without necessarily gaining in financial sophistication. The new rule amendments further liberalize and expand the Accredited Investor definitions by:

- qualifying natural persons as Accredited Investors by reason of professional certifications such as a Series 7, 65 or 82 broker-dealer license or other educational credentials (in other words, even if the other net worth or net income or insider status qualifications are not met);

- including investments in private funds, including "knowledgeable employees" of the fund (again, irrespective of meeting the other qualifying thresholds);

- including in the list of qualified business entities limited liability companies ("LLCs") with $5 million in assets, SEC and state-registered investment advisers, exempt reporting advisers and rural business investment companies ("RBICs");

- including any entity, including Native American tribes, governmental bodies, funds and entities existing under the laws of foreign countries, owning "investments," as defined in the Investment Company Act, in excess of $5 million and that is not a "blank check" company (one formed for the specific purpose of investing in the offered securities);

- including "family offices" with at least $5 million in assets under management and their "family clients" as those terms are defined in the Investment Advisers Act; and

- adding the term "Spousal Equivalent" to the Accredited Investor definition to allow spousal equivalents to pool their finances for the purposes of Accredited Investor qualification (for example, the net worth or net income qualifications) (as noted above, the proposed amendments do not affect those monetary thresholds themselves).

c. Limitations on Manner of Offering: No general solicitation or advertising to the public at large in the terms of Rule 502(c) is permitted under Rule 506(b) (but see text box below for amendments allowing limited use of general solicitation and advertising materials under Rule 506(b)). General solicitation and advertising under Rule 506(c) *is* permitted *if* all eventual actual purchasers are Accredited Investors. In practice, under Rule 506(b), a pre-existing relationship with or connection to the prospective investors is required, and no general media outreach is permitted. Under Rule 506(c), no pre-existing relationship with the investors is needed, and general media outreach is permitted, as long as the actual eventual purchasers are Accredited Investors, which explains Rule 506(c)'s more stringent and Rule-specified requirement for the Issuer to take affirmative "reasonable steps" to confirm "Accredited Investor" status, compared to Rule 506(b)'s Accredited Investor "self-certification."

Update:

The November 2020 SEC rule amendments liberalize and harmonize the General Solicitation and Information Requirements for Rule 506(b) as set forth in Rule 502(c). The amendments:

- Allow Issuers to engage in "Test-the-Waters" and "Demo Day" (organized pitch presentations by one or a series of Issuers under the auspices or sponsorship of a university, investment bank or fund, accelerators, incubators and other parties) communications with generic solicitation-of-interest materials for a prospective exempt sale of securities prior to determining which exemption it will use pursuant to a new Rule 148, without violating the no "general solicitation"/"general advertising" requirements of Rule 506(b) if that exemption (by far the most popular) is eventually chosen, provided, among other things, that the "Demo Day" sponsor made no investment recommendations at the event, received no payments in the nature of a brokerage commission, nor charged a fee to attend it;

- Change the financial information that must be provided to non-accredited investors under Rule 506(b) private placements to align with the information that non-reporting company Issuers must provide to investors in Regulation A offerings pursuant to Form 1-A (See Section III on Regulation A); and

- Add a new item to Accredited Investor verification to permit Issuers to confirm that a previously verified Accredited Investor remains one under Regulation D, Rule 506(c) (which, unlike Rule 506(b), permits general solicitation, but which requires greater Accredited Investor due diligence by the Issuer and which permits actual sales only to Accredited Investors); the general solicitation permission explains the heightened Accredited Investor verification requirements compared to Rule 506(b).

d. SEC and State Filing Requirements: SEC: The Issuer must file SEC Form D within 15 days of first sale pursuant to Regulation D, Rule 503. However, the filing is not a condition of receiving the exemption. There is no ongoing reporting reporting requirement. State: Rule 506 securities are exempt from state filing requirements as "Covered Securities" under Securities Act section 18 (Note: Broker-Dealers and others who aid in placing the securities may also have Financial Industry Regulatory Authority ("FINRA") filing obligations).

e. Limitations on Resales: Since resales of securities issued by the Issuer do not directly raise capital for it, discussion of resale of the Issuer's securities by their original purchaser is not specifically germane to this advisory. Nevertheless, the ability to resell those securities will obviously affect the investment market for the Issuer's original issuance of them; all purchasers prefer liquidity, and therefore the ability to resell the securities they've purchased if they can get it. For that reason, a brief overview of resale restrictions is relevant here. For a more detailed description, see our "Resales of Restricted Securities: Deal Points," available at Kurtin PLLC Whitepapers and Advisories.

   Securities sold under many of the Securities Act exemptions, including Regulation D, are "Restricted Securities," as defined in Securities Act Rule 144, meaning securities acquired from the issuer or its affiliate in a transaction or chain of transactions not involving a public offering. Restricted Securities cannot be resold unless they are subsequently registered or unless another exemption from registration is available for their resale. Most such resale exemptions are found under Rule 144, which relies on the Securities Act's section 4(1) exemption from registration of securities sold "by a person other than an issuer, underwriter, or dealer." The term "underwriter," defined in Securities Act section 2(a)(11), means someone who purchased the securities with the intention to distribute them to others, like a traditional investment bank underwriter. A person who is not an underwriter can therefore resell Restricted Securities without registering them under section 4(1), and Rule 144 provides a "safe harbor" for doing so. As a general matter, Rule 144(d) provides that Restricted Securities issued by a company that is not a "reporting company" under Exchange Act sections 13 or 15(d) cannot be resold by the holder until at least one year from their issuance to him or her has passed (the required "holding period" is six months in the case of reporting company issuers). Rule 145 provides another set of rules for the resale of Restricted Securities acquired in the course of business combinations such as mergers and acquisitions, and for which Reg. D is often used as a resale exemption.

   Rule 144A provides that an exemption for resale of Restricted Securities is also available to "Qualified Institutional Buyers," or "QIBs." QIBs are deemed, much like Accredited Investors in the case of original issuance of securities, sufficiently sophisticated so as not to need the protections provided by the disclosures required in the registration process upon their purchase by resale of those securities. QIBs include insurance companies, investment companies and small business investment companies, investment advisers, employee benefit plans, trust funds, securities dealers registered under Exchange Act section 15 and banks. QIBs generally must own and invest on a discretionary basis an aggregate at least $100 million in the securities of issuers unaffiliated with them (or, in the case of registered securities dealers, at least $10 million, or be acting in a "riskless principal transaction" on behalf of a QIB). For banks, there is an additional $25 million audited net worth requirement for QIB status. Obviously, QIB qualification is a far higher threshold than Accredited Investor qualification, but provides an avenue for resale of Restricted Securities when the holding period cannot be waited for to expire.

Finally, in this abbreviated discussion of resale of restricted securities, the 2015 FAST Act enacted an amendment to the Securities Act, section 4(a)(7), which provides an exemption for private resales of Restricted Securities. Section 4(a)(7) provides a safe harbor for the so-called Securities Act section 4(a)(1½) exemption, private resales by persons other than the Issuer. It is generally used for resales to Accredited Investors who are not QIBs (but see updates to Rule 144A in text box below), Because section 4(a)(7) requires Issuer information and therefore cooperation, and because the resale purchaser receives Restricted Securities (unlike purchasers who purchase Restricted Securities after the Rule 144 holding period expires), the utility of section 4(a)(7) has been limited.

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Update:

In August 2020, at the same time that the SEC adopted the expanded and liberalized the Accredited Investor qualification definitions, it adopted amendments to Rule 144A adding, as for Accredited Investors, LLCs and RBICs to the types of entities eligible for QIB status if they meet the $100 million securities ownership and investment thresholds, and establishing a QIB "catch-all" category that would permit institutional Accredited Investors, as defined in Rule 501(a) to the extent not already qualified under Rule 144A to qualify as QIBs when they satisfy the $100 million threshold.

On December 22, 2020, the SEC proposed further Rule 144 amendments to confirm that the holding period for so-called "market-adjustable securities," securities with a discounted conversion or exchange right based on market shifts, are subject to the above-stated six month (reporting company) and one year (non-reporting company) holding periods *from the date of conversion* to prevent resale of the underlying securities by converting them and then taking advantage of the built in discount in reselling, a kind of self-arbitrage. Form 144 will become electronic filing only.

f. Information Requirements: There are no information requirements if only Accredited Investors are sold to; *however*, if any – *even one* – of the permitted up-to-35 non-accredited investors is sold to under Rule 506(b), an information disclosure document – an offering circular or private placement memorandum ("PPM") – must be furnished to the non-accredited investor(s) containing quantitative financial and non-quantitative information as provided for Regulation D, Rule 502 (Rule 502's requirements for financial information scaled up with the size of the offering, were widely considered too burdensome, and were amended by the November 2020 amendments to align with the information that Issuers must provide to investors in Regulation A offerings on Form 1-A (see Section III(f)).

The antifraud provisions of the securities laws and regulations also apply, notably Securities Act section 17, Exchange Act Rule 10(b) and Rule 10(b)(5) promulgated thereunder. As discussed in the "Deal Points" Section XII of this advisory, use of a PPM or offering circular is a good practice in most cases as both an "insurance policy" and as a "prospectus" for prospective investors, but if any non-accredited investors are sold to, the requirements for the PPM under Rule 502 and Form 1-A are mandatory and stringent, whereas they are relaxed if only Accredited Investors are sold to, meaning the antifraud provisions, which always apply, are the principal legal/regulatory concern (see Section XII, "Deal Points" nos. 4 and 5).

g. Advantages: The advantages of Rule 506 include the unlimited dollar size of the offering (no limit on the amount of capital that may be raised); the unlimited number of Accredited Investors who may be sold to, no limitations on the type of Issuer, no ongoing reporting obligations and no Rule 502 information requirements if selling only to Accredited Investors (but see Section XII, Deal Points nos. 4 and 5, recommending the use of a PPM or offering circular in nearly all cases for antifraud "insurance" and "prospectus" purposes). Also, Rule 506 is a section 4(a)(2) "safe harbor," meaning that if its rules are complied with, compliance with section 4(a)(2) is presumed (see Section V). In the event of inadvertent non-compliance with Rule 506, the private placement may still comply with the underlying section 4(a)(2), a valuable "fallback" safety valve feature. Rule 506 may be combined with other exemptions on the same private placement. Finally, Rule 506(c) allows general solicitation of investors, although the eventual actual investors must all be Accredited Investors (but see subsection (h) below for the disadvantage that general solicitation brings with it). All of these advantages have combined to make Rule 506 by far the most popular Securities Act registration exemption.

h. Disadvantages: The general solicitation permission in Rule 506(c) makes it less likely that the fall back on section 4(a)(2) would be available and more likely that antifraud provisions would be breached. Under Rule 506(c), the Issuer must take "reasonable steps" to verify Accredited Investor status, raising the compliance burden. Selling to any – even one - non-accredited investors activates the Rule 502 requirement of specified Rule 502 PPM quantitative and qualitative disclosure material, somewhat increasing the expense, risk and time required for the private placement (a PPM may optionally be provided even to Accredited Investors, of course, and notes to Rule 502 recommend furnishing information to Accredited Investors even when not required; see Deal Point no. 4, Section XII) and may encourage their investment (the PPM's "prospectus" function) as well as providing an evidentiary record of full disclosure against later claims of misrepresentation or omission to disclose material facts (the PPM's "insurance policy" function)). For these reasons, we encourage the use of PPM's in all cases except (usually) when the Accredited Investors are venture capital, private equity, family office or other institutional investment professionals, which generally do their own due diligence and which are usually accustomed to make investment decisions without a PPM (see Section XII, "Deal Points" nos. 4 and 5). In sum, if the sought–for capital may be raised through only Accredited Investors without general solicitation, using Rule 506(b) instead of Rule 506(c), the compliance burden is decreased and risks are lowered.

A Word about "Integration" and Update:

"Integration" is an SEC concept that seeks to avoid Issuers evading the aggregate offering limits of some of the Securities Act registration exemptions this advisory covers by providing that securities issuances pursuant to those exemptions are or are not "integrated" with recent prior offerings, meaning the prior offerings do or do not count against the aggregate offering price limitation for the current offering. Integration does not matter for Rule 506, because there is no aggregate offering limitation for prior offerings to count against. However, as we will see for Regulation D, Rule 504 in the next Section, and other exemptions following, that do have aggregate offering limitations, the integration rules must be kept in mind, because if the exemption becomes unavailable because of integration rules violation, the offering might be subject to registration, the whole point of the exemption scheme to avoid. In the November 2, 2020 amendments, the SEC adopted a new, simplified, liberalized and harmonized integration framework in recognition that as Securities Act registration exemptions have increased, the integration rules had become more complex, disjointed and unwieldy. The new integration framework is set forth in a new Rule 152, replacing former Rules 152 and 155 for integration of non-public and public offerings.

Amended Rule 152(a) establishes a unified, facts-and-circumstances based analysis to determine whether an issuer can establish that an offering and the prior offerings fit into an exemption or require Securities Act registration.

Amended Rule 152(b) eliminates a prior, difficult-to-apply-and-rely-upon "five-factor" test and establishes four non-exclusive safe harbors from integration, meaning that if they are complied with, the prior offering will *not* count against the aggregate offering limit, if any, of the current offering:

- That any offering made more than 30 calendar days before the commencement of another offering, or more than 30 calendar days after completion or termination of any other offering, will not be integrated with the other offering, provided that for an exempt offering for which general solicitation is not permitted, the purchasers were not solicited though general solicitation or established a substantive relationship with the issuer prior to the commencement of the offering for which general solicitation is not permitted. This safe harbor replaces a previous generally, but not universally, applicable six-month safe harbor. Former Rule 155 is eliminated, replaced by new Rule 152(b)(1).

- Rule 701 (employee benefit/stock option and other equity compensation, see Section IV) and Regulation S offerings (offshore offerings not directed to the U.S. market, see Section VIII) will not be integrated with other offerings per new Rule 152(b)(2).

- A Securities Act registered offering will not be integrated with another offering if made subsequent to (i) a terminated or completed offering for which general solicitation was not permitted; or (ii) a terminated or completed offering for which general solicitation was permitted but which was made only to QIBs or "Institutional Accredited Investors") ("IAI's"); or (iii) an offering that was terminated or completed more than 30 calendar days prior to the commencement of the registered offering, per new Rule 152(b)(3).

- Offers and sales made in reliance on an exemption for which general solicitation is permitted will not be integrated with another offering if made subsequent to any prior terminated or completed offering, per new Rule 152(b)(4). This safe harbor includes offerings made under Regulation A (Section III), Securities Act section 4(a)(6) and Regulation Crowdfunding (Section VI), Securities Act section 3(a)(11) and Rules 147 and 147A (governing intrastate offerings; Section VII), and Regulation D, Rules 504 (Section II) and 506(c).

II. Regulation D, Rule 504: a Securities Act section 3(b) Limited Offering Exemption

a. Aggregate Offering Price Limitation: $10 million, less the aggregate amount of securities sold in the prior 12 months.

Update:

In the November 2, 2020 amendments, the SEC adopted rule amendments to:

- increase the aggregate offering limit of Rule 504 from $5 million to $10 million; and
- Allow "Test-the-Waters" and "Demo Day" communications with a new rule allowing an Issuer to use generic solicitation-of-interest materials to "test-the-waters" and use "Demo Day" materials for a prospective exempt sale of securities prior to determining which exemption it will use, without violating the "no general solicitation" rules.

b. Issuer and Investor Requirements: In contrast to Rule 506 (and in consequence of being authorized under Securities Act section 3(b) rather than Rule 506's section 4(a)(2)), Rule 504 is not available to Issuer Exchange Act section 13 or 15(d) reporting companies; investment companies required to register under the Investment Company Act of 1940 ("ICA") (typically, venture capital and private equity firms are structured to be exempt from ICA registration); and "blank check" companies (companies formed without a business plan or with a business plan only to merge with or acquire another company). Rule 506(d) "bad actor" disqualifications apply. Under Rule 504, there is no limit on the number of investors and no requirement that they be Accredited Investors or that non-accredited investors be "sophisticated." While Regulation D, Rule 506 (see Section I) is authorized under Securities Act section 4(a)(2) as not involving a public offering, Rule 504 is a Securities Act section 3(b) exemption, in which the principal protection for investors other than the antifraud rules is deemed to be the limited maximum dollar amount that may be raised.

c. Limitations on Manner of Offering: Under Rule 504, generally no general solicitation or advertising is permitted, with some state law exceptions, and with the "Test-the-Waters" and "Demo Day" activities set forth in the Update box in Section II(b), above.

d. SEC and State Filing Requirements: SEC: The Issuer must file SEC Form D within 15 days of first sale. The filing is not a condition of exemption. There is no ongoing reporting. State: Must comply with state law.

e. Limitations on Resales: Rule 504-issued securities are Restricted Securities that can only be sold if registered or with a resale exemption.

f. Information Requirements: Rule 504 has no specific information requirements. The antifraud provisions of securities laws and regulations apply.

g. Advantages: Rule 504 has no limit on number of investors and no requirement they be accredited; no information requirements. There is no requirement that investors be "sophisticated." The nominal protection for investors is provided not by limitation on the kind or type of investors, but by the Securities Act section 3(b) limitation on aggregate offering size. The aggregate offering increase from $5 million to $10 million is pursuant to authority granted to the SEC by Securities Act section 28.

h. Disadvantages: The prior low aggregate price limitations led to decreased use of Rules 504 and 505 compared to Rule 506, leading to Rule 505's 2017 repeal and adoption of its $5,000,000 aggregate offering limit in amended Rule 504, which previously had a $1,000,000 limit; the current increase to a $10 million aggregate offering limit should largely eliminate this disadvantage. Rule 504 is *not* a safe harbor for Securities Act section 3(b) compliance, because section 3(b) does not itself grant a statutory exemption as section 4(a)(2) does, but only authorizes the SEC to promulgate rules like Rule 504 that provide exemptions on an aggregate offering amount-limited ($5 million) basis (Securities Act section 3(a) *does*, by contrast, offer specific exemptions, several of which have safe harbors like Rule 506). Therefore, if Rule 504 is not complied with, there is no "fallback" on section 3(b), although fallback on sections 4(a)(2) or

3(a)(11) (purely intrastate offerings) (see Sections V and VII below) might be available, depending on circumstances. However, Securities Act section 28 has modified the aggregate offering price limitations under section 3(b), permitting the SEC to authorize higher dollar amounts, which it has done for other rules and now Rule 504 (see, for example, discussion of Regulation A and Rule 701 exemptions, Sections III and IV, below).

III. Regulation A, Rules 251 - 263: the Conditional Small Offerings Exemption

a. Aggregate Offering Price Limitation: Tier 1: No more than $20 million in the prior 12 months, including no more than $6 million by all selling Issuer-affiliated security holders. Tier 2 (often called "Reg. A+"): No more than $75 million in the prior 12 months, including no more than $22.5 million by all Issuer-affiliated selling security holders. Like Regulation D, Rule 504, Regulation A is a Securities Act section 3(b) exemption and represents a Securities Act section 28 modification of section 3(b) aggregate offering price limitations.

Update:

On November 2, 2020, the SEC adopted rule amendments to

- Increase the aggregate offering limit of Regulation A, Tier 2 ("Reg. A+) from $50 million to $75 million;
- Increase the aggregate offering limit for secondary sales under Tier 2 from $15 million to $22.5 million;
- Simplify some of the Regulation A offering requirements and establish greater consistency between registered offerings and Regulation A offerings (Regulation A is actually a type of public offering, although a less expensive and complicated one than Securities Act section 5 registered offerings; Regulation A securities are consequently freely resalable); and
- Harmonize the "bad actor disqualification provisions from Regulation D.

b. Issuer and Investor Requirements: Regulation A is only available to U.S. and Canadian Issuers, and is not available to investment companies required to register by the ICA and "blank check" companies. Like Reg. D, Rule 506 but unlike Rule 504, Reg. A is available to Issuer Exchange Act section 13 or 15(d) reporting companies. There are no requirements for number or type of investors under Tier 1; Tier 2 has restrictions on investment limits by investors who are not Accredited Investors pursuant to Regulation D, Rule 501(a) unless the offering is listed on a national securities exchange upon qualification.

c. Limitations on Manner of Offering: "Testing the waters" written and oral communications are permitted both before and after filing the Form 1-A offering statement or offering circular. "Testing the waters" communications are subject to the antifraud laws and rules. Sales are permitted only once Form 1-A is qualified. Written offers of sales may be made after filing the offering statement but before its qualification pursuant to a filed "red herring" preliminary offering circular meeting the requirements of Rule 254.

d. SEC and State Filing Requirements: SEC: The Issuer must file a Form 1-A offering statement, any sales material and Form 2-A report of sales and use of proceeds and two years of financial statements, which must be audited for Tier 2 but which may be unaudited for Tier 1. Tier 1: Must file an "Exit Report" on Form 1-Z within 30 days of completion or termination of offering, but no ongoing reporting. Tier 2: Ongoing reporting; must file annual reports on Form 1-K as well as special financial, semiannual and current reports on Forms 1-SA and 1-U, as well as Form 1-Z Exit Report. State: Tier 1: Must comply with state law. Tier 2: Exempt from state filing as "Covered Securities" under Securities Act section 18. Ongoing reporting requirements are also deemed to have been met if the Issuer is or becomes an Exchange Act section 13 or 15(d) reporting company and files the reports thereby required.

e. Limitations on Resales: None; securities are not Restricted Securities and are freely resalable.

f. Information Requirements: File detailed Form 1-A offering statement/offering circular pursuant to Regulation A, Rule 252 with the SEC, along with any sales material and Form 2-A report of sales and use of proceeds. Antifraud provisions of securities laws and regulations apply.

g. Advantages: The important thing to understand about Regulation A is that it is actually a type of public offering, but one not conducted pursuant to a Securities Act section 5 registration. There are no investor qualifications for Tier 1, and modest requirements for Tier 2. "Testing the waters" communications are permitted. Existing Issuer-affiliated security holders can sell into the offering subject to the Tier 1 and Tier 2 limits. Securities are not restricted and freely resalable. Disclosure documents, while more onerous than a typical Regulation D Rule 502 PPM, are less onerous and costly than a full Securities Act section 5 registration statement. There is no integration of prior sales to limit aggregate size of offering. Limited integration for post-offering sales.

h. Disadvantages: Despite providing a Securities Act section 5 registration exemption, Regulation A is itself a type of public offering requiring (1) a significant public offering statement filing on Form 1-A (less than a typical section 5 registration statement, but more than a typical Regulation D Rule 502 PPM, and which must be filed with the SEC); and (2) ongoing reporting for Tier 2 offerings. Regulation A is not available to non-U.S. or Canadian companies, Exchange Act reporting companies, some investment companies and "blank check" companies. As with Regulation D, Rule 504, Regulation A does *not* provide a safe harbor with a fallback to Securities Act section 3(b).

IV. Rule 701: Securities Issued as Compensation Pursuant to Stock Option or Other Plans

a. Aggregate Offering Price Limitation: During the prior 12 months, the greater of: $1 million, or 15% of Issuer's total assets (or Issuer's parent if Issuer is a wholly-owned subsidiary of parent and parent unconditionally guarantees the securities), or 15% of Issuer's outstanding securities of the same class (on November 24, 2020, the SEC proposed amendments to the alternative aggregate offering limits, and to allow Issuer subsidiaries to use the exemption, whether or not Issuer majority-owned. There is no integration with any other exempt or registered offers or sales. Rule 701 is a Securities Act section 3(b) exemption and is a Securities Act section 28 modification of section 3(b) aggregate offering price limitations.

b. Issuer and Investor Requirements: Rule 701 is not available to Exchange Act section 13 or 15(d) reporting companies or investment companies required to register by the ICA. The investors must be officers, directors, employees and consultants or advisors of the Issuer receiving securities as compensation, for example, in a stock purchase or award, stock option plan, or as part of an individual employment agreement. There are no other investor sophistication requirements.

Update:

On November 24, 2020, the SEC proposed Rule 701 amendments to:

- Revise the additional disclosure requirements for transactions exceeding $10 million;
- Raise two of the three alternative regulatory ceilings that cap the aggregate number of securities an Issuer may sell in a 12-month period;
- Extend the consultant and advisor eligibility categories to entities meeting ownership criteria designed to link the securities to the performance of services;
- Make the exemption available for offers and sales of securities under written compensatory benefit plans established by the Issuer's subsidiaries, whether or not majority owned; and
- Expand eligibility of Issuer online "platform workers" and former employees.

c. Limitations on Manner of Offering: Limited to offerings to officers, directors, employees and consultants or advisors of Issuer as compensation, for example, in a stock purchase or award, stock option plan, or as part of an individual employment agreement.

d. SEC and State Filing Requirements: SEC: None. State: Must comply with state law.

e. Limitations on Resales: Rule 701 securities are Restricted Securities that can only be resold if registered or with a resale exemption, including the exemption provided by Rule 701 itself if the Issuer becomes an Exchange Act reporting company.

f. Information Requirements: The compensatory benefit plan or contract, as the case may be, must be provided. There are no other specific information requirements unless more than $10 million in securities are offered in a 12-month period, in which case certain specific disclosure information must be provided, including financial statement required by the Form 1-A Regulation A offering statement. The antifraud provisions of securities laws and regulations apply. Rights to purchase securities granted as "incentive stock options" pursuant to Internal

Revenue Code section 422 must be issued pursuant to a written "plan" and meet other qualifying conditions not required of "nonqualified" stock options.

g. Advantages: The limited applicability of Rule 701 is expressly adapted for executive and employee securities-based compensation. Because exempted securities become available for resale only months after the Issuer becomes an Exchange Act reporting company, the Rule 701 exemption is ideal for executive stock awards and stock option plans for which the Issuer wishes to bind the employee to the company until it conducts an initial public offering or a reverse merger. When the exemption is combined with vesting cliffs in a stock option plan, for example, the Issuer has extensive leverage to retain key employees.

h. Disadvantages: Rule 701 is not available for any purpose other than executive and employee-based compensation; however, it is included here as a commonly used Securities Act exemption, particularly for early stage companies, that can free up existing capital for other uses by paying key employees in stock or rights to purchase stock in lieu of cash.

V. Securities Act Section 4(a)(2): The General Private Placement Exemption

a. Aggregate Offering Price Limitation: No aggregate price limitation.

b. Issuer and Investor Requirements: Section 4(a)(2), like its Rule 506 safe harbor, has no Issuer qualifications, and is therefore available to non-U.S. Issuers (who, in the interest of U.S. investor confidence, might nevertheless wish to use or form a U.S. subsidiary as the investment vehicle. Section 4(a)(2) is also commonly used by investment professionals like venture capital and private equity firms and family offices, which are institutional Accredited Investors and accustomed to doing their own due diligence in the absence of a PPM or offering circular. Therefore, investors must meet sophistication and access to information test, but no formal limit on number and quality.

c. Limitations on Manner of Offering: No general solicitation or advertising is permitted.

d. SEC and State Filing Requirements: SEC: No SEC filing. State: Must comply with state law.

e. Limitations on Resales: Section 4(a)(2)-issued securities are Restricted Securities that can only be sold if registered or with a resale exemption.

f. Information Requirements: There are no formal requirements. The antifraud provisions of securities laws and regulations apply.

g. Advantages: Section 4(a)(2) has a low documentary and regulatory burden when dealing with only institutional investors that easily pass the "sophistication" test and which do their own due diligence (venture capital funds, etc.). There are no price limitations, information requirements or SEC filing requirements. Section 4(a)(2) can be used as a stand-alone exemption, and also serves as a fallback to the Regulation D, Rule 506 non-exclusive Safe Harbor.

h. Disadvantages: No safe harbor, no protection if investors turn out not to have met sophistication and access to information test or if the transaction is later determined to have violated the rule of "not involving any public offering."

VI. Securities Act Section 4(a)(6) and Regulation Crowdfunding

a. Aggregate Offering Price Limitation: $5 million less the aggregate amount of securities sold in the prior 12 months (the Crowdfunding monetary thresholds are adjusted every five years).

b. Issuer and Investor Requirements: Issuer must be a U.S. company, and may not be an Exchange Act section 13 or 15(d) reporting company, an investment company required to register by the ICA or a "blank check" company. Issuer must register with a broker or a "funding portal" pursuant to the Exchange Act. Unlimited investment up to the aggregate offering limit for Accredited Investors; in a 12 month period, non-accredited investor individuals may invest pursuant to a formula based on the greater of their annual income or net worth.

c. Limitations on Manner of Offering: Issuance must be conducted through a broker or funding portal compliant with Securities Act section 4A(a) and in compliance with "crowdfunding" requirements of section 4A(b). "Test-the-Waters" activity similar to that used in Regulation A prior to filing an offering document is permitted per the November 2, 2020 rule amendments.

d. SEC and State Filing Requirements: SEC: Issuer must file offering statement on Form C and comply with ongoing reporting requirements. State: Securities are exempt from state filing as "Covered Securities" under Securities Act section 18.

e. Limitations on Resales: Section 4(a)(6)-issued securities are Restricted Securities that can only be sold if registered or with a resale exemption.

f. Information Requirements: Antifraud provisions of securities laws and regulations apply.

g. Advantages: Relatively low barriers to entry. The real attraction is being able to seek investment over an Internet portal with general solicitation and advertising, as long as it directs investors to the portal. If large numbers of non-accredited investors not known to the Issuer must be solicited and sold to Crowdfunding may be useful. But compare Regulation D Rules 506 (up to 35 non-accredited investors) and 504 (unlimited number of non-accredited investors).

h. Disadvantages: Low aggregate offering price limitation; regulatory burden, including ongoing reporting requirements, may not be justified for the aggregate sale limit, especially given ongoing reporting, unless no other exemption is available (compare Regulation D, Rule 504,). It is important to realize that a Crowdfunding offering, like a Regulation A offering, is a kind of public offering, albeit one exempt from the Securities Act section 5 registration requirements. In the case of Crowdfunding (and unlike Reg. A), the securities sold are Restricted Securities. If only one or a few Accredited Investors are sold to, Crowdfunding would probably not be the efficient route in terms of the Form C filing and ongoing reporting. However, for general solicitation and selling to larger numbers of non-accredited investors, perhaps mixed with Accredited Investors to fill out the offering, Crowdfunding's efficiencies may come into play.

Update:

On November 2, 2020, the SEC adopted Crowdfunding rule amendments to:

- Increase the aggregate offering limit in Regulation Crowdfunding from $1.07 million to $5 million;

- Amend a proposed rule to allow Test-the-Waters activity in crowdfunding prior to filing an offering document with the SEC similar to the method used for Regulation A;

- Remove investment limits for Accredited Investors, thereby theoretically allowing one or a small number of Accredited Investors to subscribe for up to the full aggregate offering, including the new $5 million aggregate offering limit (if adopted);

- Amend the calculation method for non-accredited investors to permit them to rely on the greater of their annual income or net worth when calculating how much they can invest;

- Harmonize the "bad actor" disqualification provisions from Regulation D; and

- Permit the use of Special Purpose Vehicles ("SPVs") to facilitate RegulationCrowdfunding investment, and limit the type of securities that may be offered and sold in reliance on the Regulation Crowdfunding exemption.

In addition to the permanent rules, the SEC on November 2 extended for 18 months temporary, final rules first put in place in May 2020 to relax the Regulation Crowdfunding requirements to facilitate capital raising during the Covid-19 Pandemic. The temporary Regulation Crowdfunding rules:

- Amend eligibility by providing that in addition to existing eligibility criteria (the Crowdfunding exemption is not available to non-U.S. issuers, reporting companies under Sections 13(a) or 15(d) of the Securities Exchange Act of 1934, investment companies, "blank check" companies, companies disqualified under Regulation Crowdfunding rules or which have failed to file prior Regulation Crowdfunding annual reports), to use the temporary rules, the issuer cannot have been organized and operating less than six months prior to the offering. Also, if the Issuer has previously sold securities in a Regulation Crowdfunding offering, it must have complied with Securities Act section 4A(b) and related rules;

- Allow acceptance of investment commitments after filing an offering statement that includes financial statements or an amended offering statement including financial statements in lieu of existing requirement of financial statements included in initial offering statement;

- Relax financial statement requirements when the issuer is offering more than $107,000 and not more than $250,000 in a 12-month period by allowing CEO certification in lieu of independent public accountant review;

- Allow sales as soon as issuer has received binding investment commitments covering the target offering amount (after 48-hour waiting period for "binding" commitments to vest), in lieu of 21-day waiting period after public filing of offering statement;

- Allow early closing as soon as binding commitments reaching target amount are reached if issuer has complied with temporary Rule 201(z) disclosure requirements, intermediary gives notice that target offering amount has been reached, and the target offering amount has still been reached or exceeded at the time of closing, again in lieu of 21-day waiting

  period and five-day intermediary notice period; and

- Allow cancellation of investment commitments for any reason for 48 hours after investor's commitment (or greater period specified by issuer), after which investment commitment becomes binding in the absence of material change to the offering, in lieu existing rules' 48 hours prior to deadline identified in issuer's offering materials.

VII. Securities Act Section 3(a)(11) and Rules 147 and 147A: the Intrastate Exemptions

a. Aggregate Offering Price Limitation: None.

b. Issuer and Investor Requirements: Under Rule 147, the Issuer and any investors must be residents of the same state or territory. In the case of Issuer, that means that it is incorporated in, has its principal office in, and is doing the predominant amount of its business in, that state or territory (Rule 147 provides alternative metrics for judging the predominant amount of Issuer's business). Under Rule 147A, the Issuer need not be organized in-state or managed from within the state, and may not be a company registered under the ICA. Under both Rules 147 and 147A, investors must certify their resident status to Issuer's reasonable belief.

c. Limitations on Manner of Offering: Unlike Securities Act section 3(b), section 3(a) does provide statutory exemptions from the registration requirement, like those of section 4(a). In the case of section 3(a)(11) and Rule 147, which provides the section 3(a)(11) safe harbor, the exemption is for intrastate offerings, since the Securities Act's validity and the SEC's authority is founded on the U.S. Constitution's interstate commerce clause. Under Rule 147A, general solicitation is permitted, but Rule 147A is not a section 3(a)(11) safe harbor.

d. SEC and State Filing Requirements: SEC: None. State: Must comply with state law.

e. Limitations on Resales: Under both Rules 147 and 147A, securities are restricted from resale to non-residents of the state or territory for six months.

f. Information Requirements: Securities must contain a legend against interstate sales. Antifraud provisions of securities laws and regulations apply; state law applies.

g. Advantages: Relatively low regulatory burden, low barriers to entry. Rule 147 is a section 3(a)(11) "safe harbor," meaning that if its rules are complied with, compliance with section 3(a)(11) is presumed. As with Rule 506 and section 4(a)(2), section 3(a)(11) can provide a fallback in case of inadvertent or technical noncompliance with Rule 147. Rule 147A is not a safe harbor.

h. Disadvantages: Limited to intrastate investor base, although Rule 147A substantially liberalizes Issuer-investor nexus of Rule 147. Issuer must take specified precautions against interstate offers or sales. The SEC has warned that a truly interstate offering cannot be disguised as a series of intrastate offerings and receive the benefit of the exemption.

VIII. Regulation S: Offshore Offerings Not Directed to U.S. Market

a. Aggregate Offering Price Limitation: None.

b. Issuer and Investor Requirements: Regulation S provides that securities offerings conducted pursuant to its requirements are not subject to the Securities Act at all and therefore need not be registered, if the securities are offered and sold in an "offshore transaction" and no "directed selling efforts" (both as defined in Regulation S's definitional Rule 902) are made in the United States (guidance also provides that directed selling efforts to U.S. persons outside the United States are also not permitted; for example, to U.S. military personnel stationed outside the U.S.). In addition, the Issuer, investor and other conditions of the transaction must fall into one of three categories set forth in Regulation S, Rule 903, the Regulation S offering and sale safe harbor, in part depending on whether the Issuer is a U.S. or foreign Issuer and in part how likely the securities are to enter the U.S. market (see below).

c. Limitations on Manner of Offering: Regulation S is technically not an exemption to Securities Act registration requirements, but provides rules and safe harbors – one for offerings and sales (Rule 903), one for resales (Rule 904) - to determine whether an offshore offering of securities is subject to the Securities Act at all. In practice, it is used as a Securities Act exemption.

Rule 903, Category 1 is the least onerous category, because its conditions are the least likely to allow the exempted securities to "come to rest" in the U.S. market. Issuers must be "foreign Issuers" (as defined in Rule 902). The securities being offered or sold must be securities for which there is "no substantial U.S. market interest." Rule 903, Category 1 may be satisfied by a foreign Issuer offering and selling securities in an "overseas directed offering" into a single country other than the U.S. (non-convertible debt securities by a U.S. Issuer into a single non-U.S. country may also qualify). Alternatively, Rule 903, Category 1 may be satisfied by securities backed by the full faith and credit of a foreign government; or by securities are offered by the Issuer to its employees as compensation under an employee benefit plan established under the laws of a country other than the U.S. – roughly analogous to the Rule 701 exemption for U.S. companies described above.

Rule 903, Category 2 is more onerous than Category 1, but less so than Category 3. Category 2 is available if Category 1 is not available, for equity securities of an Issuer foreign reporting company – a foreign Issuer required to file periodic reports under the Exchange Act; or for the debt securities of an Issuer U.S. domestic reporting company or a foreign non-reporting company. Additionally, offering restrictions apply, and the offer and sale, if made before the expiration of a 40-day "Distribution Compliance Period" (as defined in Rule 902) may not be made to any U.S. person other than a distributor; and finally, any offer and sale by a distributor to another distributor or other intermediary is followed before expiration of the 40-day Distribution Compliance Period by a notice from the seller distributor to the purchaser distributor stating that the purchaser is subject to the same restrictions on offers and sales that that apply to the seller distributor.

Rule 903, Category 3 is the most onerous of the Rule 903 categories, because its conditions are the most likely to permit the exempted securities to come to rest in the U.S. market. Category 3 applies to securities not covered by Categories 1 and 2. The Issuer may be a foreign or domestic company. If debt securities are offered, the offer and sale, if made before the expiration of a 40-day Distribution Compliance Period, must not be made to any U.S. person other than a distributor; only a provisional, non-exchangeable "global" security certificate is given until expiration of the 40-day period and, unless sold to a distributor, certification of beneficial ownership by a non-U.S. person or by a U.S. person in a transaction not requiring registration. If equity securities are offered, the most onerous of all Rule 903 conditions applies: the offer and sale, if made prior to the expiration of a *one year* Distribution Compliance Period (six months in the case of a reporting Issuer) may not be made to a U.S. person, unless to a distributor; the purchaser must certify that it is not a U.S. person (unless a distributor) or a U.S. person who purchased the securities in a transaction not requiring registration; and purchaser must agree to resell only in accordance with Regulation S or pursuant to Securities Act registration or exemption, for which the securities will bear the appropriate restrictive legend. Finally, any offer and sale by a distributor to another distributor or other intermediary must be followed before expiration of the 40-day (in the case of debt securities) or one year or 6 month (in the case of equity securities) Distribution Compliance Period by a notice from the seller distributor to the purchaser distributor stating that the purchaser is subject to the same restrictions on offers and sales that that apply to the seller distributor.

d. SEC and State Filing Requirements: SEC: None, provided that Issuer is not an Exchange Act reporting company. State: Must comply with state law.

e. Limitations on Resales: As set forth in the Rule 904 and the Rule 903 categories. Rule 904 repeats the "offshore transaction" and "no directed selling efforts" into the U.S. requirements, and refers to the Rule 903 resale restrictions. Additionally, Rule 904 adds conditions for resales during the applicable Distribution Compliance Period for Rule 903 Category 2 or Category 3 resales. Regulation S Rule 905 adds that equity securities of domestic Issuers sold under Regulation S are Restricted Securities in the meaning of Rule 144, and may only be resold upon registration or an exemption from registration. If a domestic Issuer's equity securities sold under Rule 903 are resold under Rule 904, they will continue to be considered Restricted Securities.

f. Information Requirements: The antifraud provisions of securities laws and regulations apply.

g. Advantages: Regulation S provides a roadmap for how to conduct offshore transactions while avoiding the applicability of the Securities Act. Regulation S is not integrated with domestic exemptions, including under Regulation D, so that concurrent combined use of the two exemptions is permissible and sales permitted under Regulation S do not count against the Regulation D aggregate offering price limitations, if any.

h. Disadvantages: Regulation S has been used by fraudulent actors and is relatively strictly scrutinized by the SEC. Offer and sale of particularly of equity securities in a Rule 903 transaction (when Categories 1 and 2 are not available) is somewhat onerous, and, given the Distribution Compliance Periods, can be time consuming.

IX. Rules 801 and 802: Rules for Private Foreign Issuers in Rights Offerings, Stock Exchanges and Business Combinations

a. Aggregate Offering Price Limitation: None.

b. Issuer and Investor Requirements: Issuer must be a foreign private Issuer, meaning that it must be a company organized under the laws of a foreign country, cannot be a foreign government, and must not have more than 50% of outstanding voting securities owned directly or indirectly by U.S. residents, or, if more than 50% of outstanding voting securities are beneficially owned by U.S. residents, must not (i) have a majority of officers and directors who are U.S. citizens or residents; (ii) have a majority of assets in the U.S.; or (iii) principally administer its business in the U.S. (see Securities Act Regulation C, Rule 405). Investors must be non-U.S. holders, provided that the exemption is still available if U.S. holders own no more than 10% of the securities that are the subject of the rights offering, exchange offering or business combination.

c. Limitations on Manner of Offering: Rules 801 and 802 (which must be read with their definitional section, Rule 800) are limited exemptions intended to facilitate foreign private Issuers in rights offerings, stock exchanges and business combinations. Rule 801 exempts from registration securities offered and sold by a foreign private Issuer in a rights offering (a grant to a class of securities holders of the right to purchase additional securities of the same class in proportion to that they already hold); Rule 802 exempts from registration securities offered and sold by a foreign private Issuer in the course of an exchange offer (a tender offer in which securities are issued as consideration to be tendered) or a business combination, such as a statutory merger or reorganization. A prescribed restrictive legend on the certificates evidencing the exempted securities is required.

d. SEC and State Filing Requirements: SEC: If informational statement is furnished to investors (see below), Form CB containing the information statement must be filed immediately after first publication or dissemination of the information statement and Form F-X must also be filed, to appoint an agent for service of process. State: Must comply with state law.

e. Limitations on Resale: Securities sold under Rules 801 and 802 are Restricted Securities. In the case of Rule 801, transfers of the rights by U.S. holders must also be in accordance with the requirements of Regulation S.

f. Information Requirements: If an optional information statement is furnished to investors, it, and any amendments, must be filed with the SEC on Form CB.

g. Advantages: For a foreign private Issuer engaged in one of the specified business transactions, a clear roadmap to avoid Securities Act registration requirements. Rule 801 and 802 offerings are not integrated with other Securities Act exemptions, and can therefore be combined with even simultaneous use of other exemptions.

h. Disadvantages: Limited to foreign private Issuers in prescribed business transactions.

X. Regulation CE Rule 1001: Exemption for Transactions Exempt Under California Corporations Code Section 25102(n)

a. Aggregate Offering Price Limitation: $5 million, notwithstanding the provisions of California Corporations Code section 25102(n) (Rule 1001 is a Securities Act section 3(b) exemption).

b. Issuer and Investor Requirements: Issuer must be a (i) corporation or other business entity formed under California law or (ii) non-California corporation if a majority of its outstanding voting securities are held by California residents and at least 50% of its property, payroll and sales are attributable to California. The exemption is not available to investment companies required to register under the ICA. Investors must be "Qualified Purchasers," as defined by section 25102(n), a concept similar, but not identical, to Accredited Investors. For example, natural person Qualified Purchasers must have $250,000 net worth and $100,000 income, compared to the $1 million net worth and $200,000 income qualifications for Accredited Investors (*see Section I, above*).

c. Limitations on Manner of Offering: Compliance with California Corporations Code section 25102(n). "Testing the waters" activity is permitted by written communication containing required information.

d. SEC and State Filing Requirements: SEC: none. State: must comply with California law.

e. Limitations on Resale: Securities sold pursuant to the Rule 1001 exemption are Restricted Securities.

f. Information Requirements: For all sales to natural person qualified purchasers, including to business entities formed by natural persons to make the investment, a disclosure document containing the information required by Regulation D must be furnished (recall that Regulation D Rule 502 has a sliding scale of information statement, or PPM, disclosure requirements depending on the aggregate size of the offering under Rules 506 or 504 (*see Sections I and II, above*).

g. Advantages: Less restrictive than Rule 504 and Rule 506(b) in permitting limited "testing the waters" activity (although Rule 504, unlike former Rule 505, does have some state law exceptions). Differences between California "Qualified Purchaser" and federal "Accredited Investor" qualifications may provide advantages in individual cases; for example, the Qualified Purchaser individual net worth and income requirements are lower, and therefore easier to qualify for, than are the Regulation D Accredited Investor requirements: the California Qualified Purchaser net worth requirement is $250,000 and income requirement is $100,000 (Regulation D requires $1 million and $200,000/$300,000 respectively; see Section I, above). In other words, a potential investor might qualify as a California Qualified Purchaser but not as a federal Regulation D Accredited Investor. Of course, a natural person California Qualified Purchaser would still have to be given a PPM, which only non-Accredited Investors under Regulation D need be given, so the advantage in access to a group of investors might be partly offset by the increased cost of preparing the PPM.

h. Disadvantages: Limited to California corporations or non-California companies majority-owned by California residents with at least 50% of property, payroll and sales attributable to California. Relatively low ($5,000,000) aggregate offering price. Information disclosure statement compliant with Regulation D is required for any natural person Qualified Purchaser, unlike the case for Regulation D Rule, 506 Accredited Investors. As with Securities Act section 3(b), Regulation CE is not itself an exemption, only an authorization to create exemptions, so in case of noncompliance with Rule 1001 (and the underlying California Corporations Code section 25102(n)), there is no fallback (Regulation CE indicates "Coordinated Exemptions for Certain Issues of Securities Exempt Under State Law," intended to provide a mechanism for qualifying state statutes to constitute an exemption to the federal Securities Act registration requirement; to date, only California has passed such a law).

XI. SEC Data Metrics

The SEC has compiled valuable statistics on filed exempt offerings for 2019, which give valuable information as to Issuers' assessment of their utility. In 2019, registered offerings accounted for 30.8% of new capital, compared with 69.2% of capital raised through exempt offerings. The SEC estimates that $1.492 billion was raised using Regulation D, Rule 506(b) (with average proceeds of approximately $25.4 million); $66 billion using Rule 506(c) (with average proceeds of approximately $17 million; $0.44 billion using Regulation A, Tier 1; $0.998 billion using Regulation A, Tier 2; $0.228 billion using Regulation D, Rule 504; $0.062 billion using Regulation Crowdfunding (with average proceeds of approximately $600,000); and $1.167 billion using other exemptions.[1]

XII. Deal Points

Deal Point No. 1: Choose what exemption features are important and let that guide the exemption choice. For example, if issuing unrestricted securities for resale is what matters, irrespective of possible registration or availability of a resale exemption, the limited rights under Regulation D, Rule 504 or Regulation A might be indicated. Regulation A has more extensive disclosure obligations, but a much higher aggregate offering limit, especially in Tier 2 (Reg. A+). If cost is a factor, if only Accredited Investors are to be sold to, and if an unlimited number of investors and an unlimited aggregate price are desired, Regulation D, Rule 506 might be indicated. The chart in Appendix 1 is intended as a graphical aide for developing a preliminary sense of the different factors, and of course experienced counsel can help weigh the factors and arrive at a decision.

Deal Point No. 2: Don't sell to non-accredited investors. It is rarely worth it. Under Regulation D, Rule 506(b), securities in unlimited dollar value can be sold to an unlimited number of Accredited Investors and to up to 35 non-accredited investors. However, if *even one* non-accredited investor is sold to, two burdensome rules come into play: first, under Rule 502, all non-accredited investors must receive a substantial disclosure document, a PPM that strictly complies with the financial and non-financial disclosure requirements of Rule 502. This substantially increases the time, expense and potential risk of the private placement. Second, under new Rule 506(c), while general solicitation and advertising efforts (previously one of the hallmark prohibitions for private placements, as opposed to publicly filed securities offerings) can be made for Accredited Investors, they may not be used for non-accredited investors. According to SEC Data Metrics, between 2009 and 2019, only 3.4 – 6.9% of the aggregate number of Rule 506(b) offerings, by far the most popular exemption, included non-accredited

[1] See, https://www.sec.gov/rules/proposed/2020/33-10763.pdf, at pp. 9, 15-16.

investor purchasers (see Section XI). Moreover, that small percentage of non-accredited investors probably accounted for a negligible amount of the capital actually raised in those offerings, according to the SEC.[2] Given the relatively low threshold of wealth for status as an Accredited Investor (especially for income) and the relatively low likelihood that anyone not qualifying would be a prospective purchaser anyway, it is not usually worth selling to non-accredited investors for the substantially enhanced regulatory burden of strict Rule 502 compliance, transaction costs of that strict compliance, and liability risks of non-compliance.

Deal Point No. 3: Use the safe harbors! Compliance with regulatory safe harbors does not cost much, especially in proportion to all but the smallest private placement and other exempt sales. For example, unless you are sure you are selling only to institutional investors, comply with Regulation D, Rule 506 to preserve section 4(a)(2) as a fallback.

Deal Point No. 4: Unless selling only to institutional investors and often even then, use a Private Placement Memorandum: it is the best insurance policy. A PPM disclosing basic quantitative and qualitative information about the Issuer and securities is not expensive, compared to the protection it provides. It memorializes the disclosures made, and can serve as the best evidentiary refutation to a later fraud claim of an allegation of misrepresentation *or* omission to state a material fact, often allowing the Issuer to successfully move to summarily dismiss the investor's complaint, avoiding being dragged into the civil discovery process and ultimately forced into a nuisance settlement. SEC notes to Regulation D, Rule 502 states: "when an issuer provides information to investors pursuant to [non-accredited investors], it should consider providing such information to accredited investors as well, in view of the antifraud provisions of the federal securities laws."

Deal Point No. 5: Unless selling only to institutional investors, and often even then, use a Private Placement Memorandum: it is the best prospectus. The foregoing review of exemptions from the registration requirements sets forth what information disclosure is legally mandated, not advisable; the requirements are a disclosure floor, not a ceiling. If the Issuer has a good investment story to tell, it should tell it in a PPM; if well executed, it will encourage the target investors to invest. Moreover, even institutional investors, and certainly Accredited Investors, family offices, trusts, and other potential investors are used to seeing "prospectus" qualitative and quantitative, including financial, information of the Issuer in the general PPM form and format, and may be disconcerted and dissuaded from investing if they are not furnished with it.

[2] See, https://www.sec.gov/rules/final/2020/33-10824.pdf, at p. 97.

Deal Point No. 6: Don't commit fraud! The antifraud prohibitions of the Securities Act, Exchange Act and associated rules and regulations apply to any offer and sale of securities, whether to Accredited Investors or non-accredited investors, and whether exempt from registration or not. Fraud can occur by the misrepresentation of material facts that a purchaser relies upon to its detriment in its decision to purchase the securities, *or by the omission to state material facts.* For this reason, even in sales to only Accredited Investors, it is sound practice to provide some form of PPM to memorialize what was represented about the securities being sold and what was not. Inadvertent technical errors in the securities offering process can often be fixed or excused. Fraud cannot. Don't commit fraud.

Owen D. Kurtin

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; new "Test-the-Waters" and "Demo Day" activity 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 Securities" 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 and Form 1-A.
Regulation D Rule 504	$10 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.

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Regulation A Tier 1 Tier 2 (Reg. A+)	$20 million in prior 12 months, but no more than $6 million by selling security holders. $75 million in prior 12 months, but no more than $22.5 million by selling security holders.	Only available to U.S. and Cdn. cos., not available to investment cos. required to register by the ICA and "blank check" cos. 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.	"Testing the waters" permitted before filing Form 1-A. Sales permitted after Form 1-A qualified.	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. State: Tier 1: Must comply with state law. Tier 2: Exempt from state law requirements as "Covered Securities."	None; freely resalable.	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.
Rule 701	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.	Not available to Issuer Exchange Act reporting cos. or investment cos. Investors must be officers, directors, employees or consultants in stock purchase or award, stock option plan, or employment agreement. No other investor sophistication requirements.	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.	SEC: None. State: Must comply with state law.	Restricted Securities.	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.

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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) and Regulation Crowdfunding	$5 million within prior 12 months.	Issuers must use registered broker-dealer or funding portal. Investors may invest greater of amount calculated by annual income or net worth.	No general solicitation or advertising except as expressly provided. "Test-the-Waters" activity like permitted prior to filing offering document under Reg. A permitted.	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 147and 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.