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Integration of Private and Public Offerings 2022

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INTEGRATION OF PRIVATE AND PUBLIC OFFERINGS 2022

I. INTRODUCTION AND BACKGROUND

A. Outline Coverage

This outline focuses on the rules and interpretations of the Securities and Exchange Commission (SEC) that relate to the integration of private and public offerings and how they affect the capital formation process, as well as reviewing the SEC's approach to integration of offerings generally as it has evolved to date, including the major revision adopted in November 2020 that became effective in March 2021. The outline also describes current policies of the SEC that affect so-called "PIPE" offerings and "private equity lines," each of which implicates integration principles.

B. Development of the Current Approach to Integration

1. The concept of integration of offerings was developed and has long been applied by the SEC to prevent circumvention of the registration requirements under the Securities Act of 1933 through the separation of a single non-exempt offering into several offerings that ostensibly each met the requirements for an exemption. The several offerings, when integrated, are treated as a single offering to determine whether an exemption is available. Integration historically has been applied to test two or more otherwise exempt offerings. The concept also has been applied to test exempt private offerings with registered offerings to determine whether there is gun-jumping in connection with the registered offering or impermissible general solicitation defeating the exemption for the private offering, as well as to determine whether securities issuable on conversion or exercise of underlying securities may be registered.

2. Until the November 2020 revision referred to below, a five-factor test announced by the SEC in 1962 in Release No. 33-4552 was the primary basis to determine whether separate offerings should be integrated. See III.C below. The five-factor test was difficult to apply, in part because it was not clear how to weight and apply the different factors. Moreover, rather than just being used for its basic purpose of avoiding circumvention of the registration requirements, the five-factor test took on independent significance and satisfying it became a hurdle to overcome in order to establish an exemption. This sometimes created friction between different offerings and interfered with legitimate capital raising activities.

3. In the past, the SEC tried to address some of these difficulties by adopting safe harbors, by issuing helpful interpretations and guidance and, in connection with more recent rulemaking, by adopting a series of exemptions, some at the direction of Congress, that included the principle that an offering under the particular exemption would not lose its status as an exempt offering due to integration with another offering if each offering satisfied its own requirements. The difficulties, however, although mitigated, persisted.

4. In November 2020, in Release No. 33-10844, *"Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets"* (November 2, 2020) (the "2020 Adopting Release"), the SEC adopted a new integration framework (the "New Integration Framework") to replace the five-factor test, building upon the

general principle reflected in the series of specific exemptions and the several safe harbors that previously had been adopted, as well as upon earlier guidance. The New Integration Framework, adopted as revised Rule 152 under the Securities Act and effective March 15, 2021, includes the general principle that separate offerings will not be integrated if each offering, based on its particular facts and circumstances, meets the requirements for an exemption or complies with the registration requirements, along with four non-exclusive safe harbors. The New Integration Framework is described in IV below. Although the five-factor test was replaced, aspects of it may still be relevant as part of a facts and circumstances analysis. In view of its having been recently adopted, it will take time to learn how the New Integration Framework will be applied and what issues might arise.

5. The new Democratic-controlled Commission has indicated that it is considering revisiting the actions taken by the prior Commission in 2020 to expand the availability of exempt transactions, including the definition of "accredited investor" and the new integration framework, as well as the ability of larger companies to remain non-public. Thus, further changes are possible.

C. Merging of the Public/Private Distinction

1. The SEC's positions on the integration of public and private offerings are attributable in part to the strains placed upon basic Securities Act concepts by the blurring of distinctions between public and private offerings, accelerated in more recent years by the Jumpstart Our Business Startups Act of 2012 (JOBS Act) described in II.9 below, and market participants becoming more aggressive with respect to issues under § 5 of the Securities Act. Issuers sought the flexibility of quick access to the public or private markets, both domestically and offshore, based on which is available and which will produce the most favorable terms. They filed shelf registration statements to cover public sales, which may be to one or a few investors, while also doing private placements, which might be to a large number of eligible investors. Investment bankers might act as underwriters or placement agents, often interchangeably. At the same time, there has been a trend toward combining the speed and certainty of a private placement with the pricing benefits that flow from the greater liquidity of having registered securities. This was accomplished through techniques such as PIPES, A/B exchange offers and private equity lines, as well as through the use of Rule 144A offerings. Public offerings also evolved to obtain some of the benefits of private transactions through such techniques as registered direct offerings and confidentially marketed public offerings. Following the JOBS Act, Rule 506(c) exempt offerings can be conducted like public offerings and there is test-the-waters private solicitation of institutional accredited investors in connection with public offerings, with the flexibility to complete the offering either publicly or privately or both. The foregoing factors, along with the increase made by the JOBS Act in the threshold before a company becomes subject to the registration requirements of § 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act"), expanded the availability of private capital and the ability of a company to remain a non-public company longer, which has put further pressure on the tension between private and public offerings.

2. As the market for PIPES and private equity lines became more developed, institutional investors in those markets became more creative in efforts to achieve liquidity, reduce risks and increase returns. These financing alternatives became an increasingly important source

of capital for small and mid-sized companies, and continue to be an important source despite the emergence of special purpose acquisition companies (SPACs) as an alternative source of financing. In fact, PIPES have taken on new importance in connection with de-SPAC mergers by SPACs.

3. One consequence of the focus on the public/private offering issues was an expanded use by eligible issuers of shelf registrations, particularly a universal shelf, facilitated by the adoption in 2005 of Securities Offering Reform referred to below. The SEC's Division of Corporation Finance has focused on the availability of the benefits of resale registration under Rule 415 and the application of limitations.

4. Another development was the shortening of holding periods under Rule 144, especially for non-affiliates. This shortening, and the resulting increased liquidity, took some of the pressure off the resale registration component, although resale registration typically is still required in PIPE transactions. On the other hand, the increase in the threshold for registration under § 12(g) of the Exchange Act made by the JOBS Act and implemented in SEC rules that permit companies to remain non-public longer has increased pressures for resale liquidity. This has resulted in active markets emerging for the resale of shares in non-public companies, along with other techniques, in order to provide liquidity to holders in the absence of public trading markets. These resale transactions raise various issues, such as the basis for their exemption from registration, their impact on the exemption for the original issuer transaction, the extent to which general solicitation affects availability of the exemption and the consequences of the absence of information about the issuer of the securities being resold. The FAST Act of 2015 added § 4(a)(7) to the Securities Act to provide a safe harbor exemption for certain resale transactions, similar to the so-called "4(1 ½) exemption" applied in practice for resale transactions based by analogy upon § 4(a)(1) and principles under the § 4(a)(2) issuer private offering exemption. For a discussion of private offering exemptions outside the safe harbors, including for resales, see Committee on Federal Regulation of Securities, ABA Business Law Section, *"Law of Private Placement (Non-Public Offerings) Not Entitled to Benefits of Safe Harbors – A Report*," 66 Bus. Law. 85 (Nov. 2010); see also Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee, ABA Business Law Section, *"Legal Opinions on Section 4(1½) Resale Transactions*," 77 Bus. Law. 191 (Winter 2021 – 2022).

II. A BRIEF HISTORY OF THE INTEGRATION OF PRIVATE AND PUBLIC OFFERINGS

1. The integration of private and public offerings as part of the overall integration doctrine might be dated to the early 1990's when the SEC initially had to confront the issue of roll-ups, as mandated by Congress, but subject to the constraint that the roll-up rules applied only to public offerings. Roll-up transactions frequently took place in the context of a reorganization or conversion of private partnerships coupled with an initial public offering of a real estate investment trust. In order to bring these "private" roll-ups under the roll-up rules, the SEC sought to integrate the "private" roll-up with the REIT public offering. Having taken this position in the case of roll-ups, as a matter of consistency the SEC carried over the same restrictive interpretations to more traditional transactions. This author's article, *"Basic Securities Act Concepts Revisited,"* INSIGHTS, May 1995 at p. 5, discussed some of these issues and the policy implications of the SEC's approach to them, as they existed at that time.

2. In 1996, the Commission issued a concept release, Release No. 33-7314, "*Securities Act Concepts and Their Effects on Capital Formation*" (July 25, 1996), in which it asked for comment on what changes should be made to reform the current regulation of the capital formation process, including addressing problems of integrating public and private offerings. This followed a report of the Commission's Advisory Committee on the Capital Formation and Regulatory Process issued in July 1996, which recommended adoption of a "company registration" system, and a report of an SEC internal Task Force on Disclosure Simplification issued in March 1996.

3. The American Bar Association's Federal Regulation of Securities Committee responded by letter dated December 11, 1996 commenting on the various proposals, endorsing some of them and proposing a model for a long-term solution. This model reflected many of the concepts suggested by Linda C. Quinn, then Director of the SEC's Division of Corporation Finance, in a speech to the ABA Committee in November 1995. The ABA Committee updated its reform proposal in a letter dated August 22, 2001 to then Director of the SEC's Division of Corporation Finance, David B.H. Martin, and then in its comment letter on the Securities Offering Reform proposal referred to below.

4. In a January 1997 speech entitled "Corporate Finance in the Information Age," then SEC Chairman Arthur Levitt recognized the problems created by these integration "metaphysics" and the need to begin to address them, including possibly removing some of the barriers between private and public offerings.

5. On November 3, 1998, the Commission issued a release that proposed far-reaching changes to the securities registration system and sought to address the problems created by the integration "metaphysics," Release No. 33-7606, *"The Regulation of Securities Offerings"* (Nov. 13, 1998) (the "Comprehensive Revision Release"). See this author's article, *"The SEC Integration Proposals,"* INSIGHTS, January 1999 at p. 23. Because of the controversy over the proposed changes to the securities registration system, many of the proposals in the Comprehensive Revision Release were not pursued. Although not adopted, these proposals were relevant in understanding the SEC's positions, particularly where the Release sought to clarify the SEC's existing positions on these issues.

6. The integration proposals in the Comprehensive Revision Release were widely applauded. They were eventually adopted on January 26, 2001 in scaled-back form as Rule 155 (now rescinded by the 2020 Adopting Release) in Release No. 33-7943, *"Integration of Abandoned Offerings"* (the "2001 Release"). See this author's article, *"Understanding the New Integration Safe Harbors under Rule 155,"* INSIGHTS, April 2001 at p. 2, and III.C.8 below.

7. The underlying mission of the Comprehensive Revision Release to streamline the securities registration process was subsequently accomplished by Securities Offering Reform, adopted in 2005 in Release No. 33-8591, *"Securities Offering Reform"* (July 19, 2005). However, this initiative, in order to avoid unnecessary complexity that was a problem for the Comprehensive Revision Release, did not address problems with private offerings or integration of public and private offerings.

8. In August 2007, in the Proposing Release for revision of Regulation D, Release No. 33-8828, *"Revision of Limited Offering Exemption in Regulation D"* (Aug. 3, 2007) (the "Reg. D Proposing Release"), the SEC provided helpful interpretive guidance on certain public/private offering integration issues. This guidance, which remained relevant and is reflected in the New Integration Framework, is discussed below. See III.E.6 below.

9. Among other things, the JOBS Act, especially by directing the SEC to amend Rule 506 to permit general solicitation in some circumstances and by creating § 5(d) under the Securities Act to permit test-the-waters communications by "emerging growth companies" (EGCs) before or after the filing of a registration statement for a public offering, has had a significant impact on various aspects of the integration analysis for private and public offerings. See III.E below. As directed by the JOBS Act, the SEC in Release No. 33-9415, *"Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings"* (July 10, 2013) (the "Rule 506 Adopting Release"), amended Rule 506 to create a Rule 506(b) for traditional private offerings and Rule 506(c) to permit general solicitation in an offering solely to purchasers who are accredited investors and verified as such. The definition of "accredited investor" was expanded in 2020 when the Commission adopted Release No. 33-10824, *"Accredited Investor Definition"* (August 26, 2020). Also, as directed by the Dodd-Frank Act of 2010, the SEC added in Release No. 33-9414, *"Disqualification of Felons and Other 'Bad Actors' from Rule 506 Offerings"* (July, 10, 2013), "bad actor" disqualification provisions to Rule 506 when it amended the rule in 2013. In addition, at that time, the SEC proposed for comment restrictive changes to Regulation D relating primarily to use of Rule 506, but the changes have not been adopted[1].

10. In other relevant actions, the SEC (i) adopted amendments to Regulation A as mandated by § 401 of the JOBS Act, effective June 19, 2015 (see Release No. 33-9741, *"Amendments for Small and Additional Issues Exemptions under the Securities Act"* (March 25, 2015)), and further amended Regulation A as mandated by the Economic Growth Act of 2018 to permit SEC reporting companies to use Regulation A (see Release No. 33-10591, "*Amendments to Regulation A*" (December 19, 2018)), (ii) adopted Regulation Crowdfunding to implement Title III of the JOBS Act, effective May 16, 2016 (see Release No. 33-9974, *"Crowdfunding"* (October 30, 2015)), and (iii) adopted amendments to Rule 147 and a new Rule 147A relating to intrastate offerings and adopted amendments to expand the availability of Rule 504 under Regulation D relating to smaller offerings, along with repealing Rule 505 as no longer necessary (see Release No. 33-10238, *"Exemptions to Facilitate Intrastate and Regional Securities Offerings"* (October 26, 2016)). As noted below, these rulemakings addressed the integration of the applicable offerings with other offerings. See III.C.3 below. On September 25, 2019, the SEC extended the ability to test-the-waters that was available to EGCs to all issuers in Release No. 33-10699, *"Solicitation of Interest Prior to a Registered Public Offering."*

11. In 2019, the Commission issued a concept release seeking comment on ways to improve the exempt offering framework, including integration of different offerings, in

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[1] Adoption of those proposals would create challenges for dealing with integration issues. For example, the proposals to require advance filings and additional information if general solicitation is used could make it harder to know what exemption is available if general solicitation is unplanned. Moreover, the disqualification provision if the Form D filing requirement was not satisfied would mean that every prior offering during the lookback period would have to be examined to determine if Rule 506 is available to exempt the current offering.

Release No. 33-10649, *"Concept Release on Harmonization of Securities Offering Exemptions"* (June 26, 2019). This was followed by issuance on March 4, 2020 of proposed amendments in Release No. 33-10763, resulting in adoption of the amendments to expand and harmonize the exempt offering framework in the 2020 Adopting Release, the same release that created the New Integration Framework. See this author's article, *"SEC Adopts Significant Changes to Regulation of Exempt Offerings,"* INSIGHTS, December 2020 at p. 3.

12. The SEC and the federal courts are usually the source of interpretations of the provisions of the Securities Act and the rules under it relevant to the matters discussed in this outline. However, (i) state courts in determining whether state blue sky laws apply or are preempted by the securities offered being "covered securities" under a federal exemption (see, e.g., *Billingsley v. Arizona Corporation Commission*, 2019 WL 6130830 (Ariz. Ct. App. Nov. 19, 2019) (holding investor check-the-box certification does not establish reasonable belief of accredited investor status), and (ii) FINRA in regulating broker-dealer regulatory compliance (see, e.g., *D.H. Hill Securities, LLLP*, FINRA No. 2019063187001 (July 22, 2021) (finding broker-dealer commenced participation in offering before establishing preexisting, substantive relationship with investor, resulting in impermissible general solicitation)), can also be sources of such interpretations.

III. SUMMARY OF BASIC CONCEPTS

The following is a brief summary of some of the basic Securities Act concepts involved in the SEC's analysis of public/private integration issues.

A. Offer and Sale

1. Under § 2(a)(3), "offer" is defined broadly to encompass not only the common law concept of an offer sufficient to form a contract upon acceptance but any attempt to dispose of a security. The meaning of the term, which triggers § 5(c) of the Securities Act, remains elusive. Some relief is provided by § 2(a)(3), which excludes from the definition of "offer" a right to acquire a security which is not exercisable until some future date, as well as preliminary negotiations and agreements with underwriters in privity of contract with the issuer.

2. The SEC has adopted rules excluding certain communications and activities from the term "offer" and the related concept "prospectus." See, e.g., Rules 134 through 139; see also Rule 255 under Regulation A. The SEC also has provided interpretive guidance regarding certain activities that do not constitute "offers." See E.11 below. The JOBS Act excludes research reports by broker-dealers, including underwriters of a public offering, from being offers. Certain promotional activity that does not reference capital raising also might not be an "offer."

3. The term "sale" presents less interpretive difficulty and includes every contract of sale or disposition of a security for value. Securities Offering Reform in particular focused on the importance of the concept of "contract of sale." See Rule 159.

4. The foregoing terms are important because of the SEC's strongly-held traditional view that a transaction commenced as a private offering cannot be completed as a registered sale — rather both the offer and sale must be either private or registered. This position was confirmed by the Commission in note 122 of the Reg. D Proposing Release. See also Division

of Corporation Finance Compliance and Disclosure Interpretations ("C&DI") (available at *www.sec.gov/divisions/corpfin/cfguidance.shtml*) §§ 139.29, 139.30 and 239.13 discussed in VII.B below.

5. The terms "commencement of an offering" and "termination or cancellation of an offering" are defined in revised Rule 152. See IV.5 below.

B. Underwriter

1. The term underwriter under § 2(a)(11) means not only the traditional market professional but also others who purchase from the issuer or an affiliate of the issuer with a view to, or assists in connection with, a distribution. Its purpose is to deny the § 4(a)(1) exemption and therefore to impose the registration requirements on not only the issuer but also on anyone acting as a conduit for the issuer or its affiliates. Over the years, the SEC has sought to characterize various parties as underwriters so as to extend the protection of registration to investors who purchase from these parties. See Zacharias v. SEC, 569 F3d 458 (DC Cir. 2009).

2. Another consequence of characterizing a party as an underwriter is to convert that party's resale into an issuer primary offering. One of the results of conversion to a primary offering is to change the standard for availability of Rule 415 allowing delayed and continuous offerings and the ability to use Form S-3 short-form registration. In addition, the exemption for the original offering may be called into question.

3. Prior to 1983, the SEC treated the purchaser of a large block of a public offering (typically in excess of 10%) as a presumptive underwriter, restricting the purchaser's ability to resell freely the purchased securities. In *American Council of Life Insurance* (avail. June 10, 1983), the SEC put to rest the presumptive underwriter doctrine, at least in the case of an institutional investor purchasing in the ordinary course of its investment activities without arrangements for a redistribution. The SEC has since confirmed that the presumptive underwriter doctrine will not be applied to the initial purchasers in a registered offering regardless of the percentage of the offering purchased or the nature of the purchaser (assuming it is not a market professional, *i.e.*, a broker-dealer). However, as discussed below, this concept has reappeared in another guise in the case of certain PIPE transactions. See VII.B.4 and 5 below.

4. A similar liberalization of the underwriter concept is reflected in the A/B exchange offer line of no-action letters beginning with *Exxon Capital Holding Corp.* (avail. May 13, 1988). These letters permit certain privately placed securities to be exchanged for similar registered securities without the holders being classified as underwriters. However, this does not apply to market professionals, which continue to be considered statutory underwriters. See *Shearman & Sterling* (avail. July 2, 1993).

C. Integration

1. The SEC first addressed the concept of integration in 1933 in Release No. 33-97 (December 28, 1933), and then again in 1961 in Release No. 33-4434, *"Section 3(a)(11) Exemption for Local Offerings"* (December 6, 1961).

2. In 1962, in Release No. 33-4552, *"Non-Public Offering Exemption"* (November 6, 1962), the SEC announced the five-factor test to determine whether separate offerings should be integrated. The five-factors were: (1) whether the offerings are part of a single plan of financing; (2) whether the offerings involve issuance of the same class of security; (3) whether the offerings are made at or about the same time; (4) whether the same type of consideration is to be received; and (5) whether the offerings are for the same general purpose. These factors were reflected in the note to Rule 502(a) of Regulation D, which rule now refers to revised Rule 152 with respect to integration. The SEC has indicated that there are circumstances in which offerings by affiliated issuers can be integrated. See *Intuit Telecon Inc.* (avail. Jan. 26, 2009) and C&DI § 256.02. The five-factor test did not bring certainty to the area because its application was subjective and the SEC did not provide definitive guidance as to what weight to give to the various factors or indeed how many of them had to be met. See *Sonnenblick, Parker & Selvers* (avail. Jan. 1, 1986). An ABA Task Force proposed an integration safe harbor rule to provide increased certainty, but the suggested rule was not adopted by the SEC. See ABA Task Force Report on *"Integration of Securities Offerings,"* 41 Bus. Law. 595 (1986). As noted above, the five-factor test has now been replaced by the New Integration Framework. Whether there is relevance to the five-factor test or parts of it remains to be seen, although it is likely that aspects of it will be relevant to a facts and circumstances analysis (e.g., when one offering is for equity and the other for straight debt).

3. In order to provide some certainty, the SEC adopted integration safe harbors under certain of the specific exemptions. These included (i) Rule 502(a) under Regulation D excluding from integration offerings more than six months before or six months after the Regulation D offering; (ii) Rule 147(g) and (h) and Rule 147A(g) and (h) separating out intrastate offerings in certain circumstances and establishing a similar six-month safe harbor; (iii) Rule 701(f) separating out employee benefit plans; (iv) Rule 251(c) under Regulation A providing a safe harbor for all prior offers and sales and for specified subsequent offerings, including registered offerings and offerings more than six months after completion of the Regulation A offering; (v) Rule 144A(e) separating Rule 144A offerings from other offerings; and (vi) the position reflected in Rule 500(g) (formerly Preliminary Note 7 to Regulation D) and the former Note to Rule 502(a), as well as in Release No. 33-6863, *"Offshore Offers and Sales"* (Apr. 24, 1990), and confirmed in the 2020 Adopting Release, that offshore sales under Regulation S will generally not be integrated with domestic offerings. These safe harbors have generally now been replaced by those in revised Rule 152.

4. The Commission also addressed integration issues more generally in the releases proposing and adopting these separate exemptions. In connection with the revision of Regulation A, the Commission stated in the proposing release at p. 57 that "… we believe that an offering made in reliance on Regulation A should not be integrated with another exempt offering made by the issuer, provided that each offering complies with the requirements of the exemption that is being relied upon for the particular offering" (see Release No. 33-9497, *"Proposed Rule*

Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act" (Dec. 18, 2013), at pp. 55-59). It then gave examples of a concurrent offering for which general solicitation is not permitted (citing the Reg. D Proposing Release interpretation) and one for which it is (see note 154 and related text). This was confirmed in the Regulation A adopting release at § II.B.5 (see II.10 above). The Commission followed a similar approach on crowdfunding (see proposing Release No. 33-9470, *"Crowdfunding"* (October 23, 2013), text accompanying fn. 33-34, and the Regulation Crowdfunding adopting release at p. 19 (see II.10 above)). It also followed this approach in the proposing release to amend Rule 147 (see Release No. 33-9973, "*Proposed Rule Amendments to Facilitate Intrastate and Regional Securities Offerings*" (October 30, 2015)), at § II.B.4.d) and in the release amending Rule 147 and adopting Rule 147A (see II.10 above, at § II.B.5 (see in particular note 181)).[2] The general approach reflected in these rulemakings is now included as the general integration principle in revised Rule 152. See IV below.

5. Rule 152, as adopted in 1935 in Release No. 33-305 and in effect until March 15, 2021 when revised Rule 152 adopted by the 2020 Adopting Release became effective, was a safe harbor for issuers undertaking a public offering, including under Rule 506(c) (see C&DI § 256.34), or filing a registration statement after conducting a private offering. As interpreted by the SEC, a completed private offering was not integrated with a subsequently commenced public offering. See *Verticom, Inc.* (avail. Feb. 12, 1986), which reversed *LaserFax, Inc.* (avail. Sept. 16, 1985); see also *Vulture Petroleum Corporation* (avail. Feb. 2, 1987) and *Quad City Holdings, Inc.* (avail. April 8, 1993). This position was confirmed by the Commission in the Reg. D Proposing Release. Note that the prior Rule 152 provided protection for private offerings under § 4(a)(2) and the Rule 506 safe harbors under it but not for other exemptions, including the § 3(b) exemption under Rule 504 or, before its repeal, under Rule 505 or the North American Securities Administrators Model Accredited Investor Exemption, such as the one adopted in California and recognized by the SEC in Rule 1001 under Regulation CE (the "State Accredited Investor Exemption").

6. *Black Box Incorporated* (avail. June 26, 1990), as amplified by *Squadron, Ellenoff, Pleasant & Leher* (avail. Feb. 28, 1992), addressed the availability of Rule 152 and other integration issues in the context of related private and public offerings. These interpretations were augmented by the Commission's guidance in the Reg. D Proposing Release. In point 4 of the *Black Box* letter, the SEC made clear that the private offering had to be completed before filing of the registration statement for prior Rule 152 to apply and that the offering would be considered completed if there are binding commitments subject only to conditions outside the investor's control. The SEC indicated that renegotiation of terms after the registration statement is filed could make Rule 152 inapplicable. Abandonment of a private offering could also constitute its completion. See also *United States Enrichment Corporation* (avail. May 13, 1998). As noted below (see IV.5), the concept of completion or termination of an offering has been defined in revised Rule 152.

7. The *Black Box* interpretive position has been applied judicially in *Anegada Master Fund, Ltd. v. PXRE Group LTD.*, 680 F. Supp. 616 (SDNY 2010), in which the court

[2]In C&DI § 141.06, the SEC indicated that an issuer doing an offering under Rule 147 would be able to transition to an offering under Rule 147A, citing the Rule 147A(g)(1) safe harbor that offers and sales under Rule 147A will not be integrated with prior offers and sales, reminding, however, that state securities law requirements must be complied with.

recognized the "nature and number of offerees" as a sixth integration factor based on the SEC's guidance.

8. In 2001, the SEC adopted Rule 155, which provided two non-exclusive safe harbors from integration, one for doing a registered public offering after terminating a private offering (Rule 155(b)) and the other for doing a private offering after terminating a registered public offering (Rule 155(c)). Under Rule 155(a), the rule's relief was limited to private offerings under § 4(a)(2), including pursuant to Rule 506 of Regulation D, and the limited accredited investor exemption under § 4(a)(5) (formerly § 4(a)(6)) of the Securities Act. See Harms, *"Integration Under The 1933 Act: The SEC Provides New Safe Harbors,"* 34 Review of Securities & Commodities Regulation 259 (2001). Rule 155 was rescinded by the 2020 Adopting Release and replaced by the New Integration Framework, which reflected Rule 155 but on a more simplified basis. The following briefly describes Rule 155 before it was rescinded and may be helpful in understanding the correlative provisions of revised Rule 152.

(a) The Rule 155(b) safe harbor for an abandoned private offering followed by a registered offering had four conditions, designed to insure that there was a separation of the two offerings and that investors understood this separation. The first condition was that no securities were sold in the private offering. The second condition was that all offering activity in the private offering ceased before the registration statement was filed. According to the SEC, because of this condition the rule did not apply to shelf registrations. The third condition was that the preliminary and final prospectus in the registered offering disclose the size and nature of the private offering, the date it was abandoned, that any offers to buy or indications of interest in the private offering were not accepted, and that the prospectus supersedes any offering material used in the private offering. The final condition was that the registration statement not be filed for 30 days after termination of all private offering activity unless all offerees were or were reasonably believed by the issuer to be accredited investors or financially sophisticated within the meaning of Rule 506.

(b) The Rule 155(c) safe harbor for conducting a private offering after an abandoned registered offering (which would not have been needed if the registration statement was only submitted confidentially since there would not be deemed general solicitation from a filed registration statement) had five conditions, designed to insure that the private offering was separate and distinct from the registered offering and that offerees in the private offering were aware of the more limited legal protections they receive in the private offering. The first condition was that no securities were sold in the registered offering, which included the receipt of funds or placing funds in escrow. Second, the registration statement must have been withdrawn, which was made easier under Rule 477 by permitting automatic effectiveness of the withdrawal. According to the SEC, the safe harbor would not have been available in the case of an offering under a shelf registration merely by terminating the offering and putting the securities back on the shelf. Third, the private offering could not be commenced until 30 days after the withdrawal of the registration statement regardless of the nature of the investors.[3] Fourth, each offeree in the

[3] This 30-day period, along with the 30-day safe harbor periods proposed in the Comprehensive Revision Release for offerings following abandoned private and public offerings, influenced the time periods with which practitioners felt comfortable for purposes of treating offerings as separate and is now reflected in revised Rule 152.

private offering is notified that the offering was not registered, that the securities were restricted, that purchasers did not have the protection of § 11 of the Securities Act, and that a registration statement had been filed and withdrawn. The final condition was that any private placement memorandum that was used disclosed any material changes in the company's business or financial condition since the registration statement was filed. In an important gloss, the SEC stated that Rule 155(c) provided a safe harbor only from integration and that the private offering must have met the requirements for a valid exemption, including (to the extent applicable) the absence of general solicitation. In a key paragraph of the 2001 Release, the Commission stated:

> We believe that ordinarily an issuer would not be inclined to incur the costs of preparing and filing a registration statement with the intention to withdraw it later and commence a private offering. Nevertheless, we wish to assure that issuers do not use this integration safe harbor merely as a mechanism to avoid the private offering prohibition on general solicitation and advertising. At the time the private offering is made, in order to establish the availability of a private offering exemption, the issuer or any person acting on its behalf must be able to demonstrate that the private offering does not involve a general solicitation or advertising. Use of the registered offering to generate publicity for the purpose of soliciting purchasers for the private offering would be considered a plan or scheme to evade the registration requirements of the Securities Act.

Following the JOBS Act changes, this proscription would be read to apply only to a private offering that did not permit general solicitation, and thus would not apply to an offering under Rule 506(c). In any event, the availability of an exemption will now be tested under revised Rule 152, which supersedes Rule 155. The foregoing proscription should be read to apply to revised Rule 152, as reflected in the 2020 Adopting Release.

9. In adding § 4(a)(6) to the Securities Act in the JOBS Act to permit creation of a "crowdfunding" exemption, subsection (g) was included to indicate that a crowdfunding offering will not affect use of other exemptions. However, general solicitation that may be permitted for a concurrent Rule 506(c) offering could be inconsistent with the limitations on advertising contemplated by § 4(a)(6) for a crowdfunding offering and as provided in Regulation Crowdfunding. This concept is now incorporated into revised Rule 152(a)(2).

10. As noted above, in November 2020 the SEC adopted a new framework for dealing with the integration of ostensibly separate offerings under a revised Rule 152, which became effective on March 15, 2021. This New Integration Framework is described in IV below.

D. Gun-Jumping

1. Gun-jumping is a concept that applies to activities before or during the registration process that violate § 5 of the Securities Act. Typically, gun-jumping has been applied to impermissible publicity during the pre-filing or waiting periods. However, it is also used to describe any offer prior to the filing of the registration statement that violates § 5(c) of the Securities Act.

2. It has been the SEC's position that securities offered to investors based on the private offering exemption cannot subsequently be registered for sale to those investors since, viewed as a single transaction, the offer before filing of the registration statement would involve gun-jumping. See C&DI § 139.09.

3. The JOBS Act added a new subsection (d) to § 5 of the Securities Act to provide that test-the-waters oral or written communications by or on behalf of "emerging growth companies" to qualified institutional buyers (QIBs) and institutional accredited investors before or after the filing of a registration statement are permissible and therefore do not constitute gun-jumping. As noted above, the SEC extended the ability to test-the-waters to all issuers in Rule 163B. Rule 255 under Regulation A also permits an issuer to test-the-waters with any investor before the qualification of an offering statement. In the 2020 Adopting Release, the Commission added Rule 206 under Regulation Crowdfunding to permit issuers to test-the-waters before filing a Form C and Rule 241 to permit generic test-the-waters before an issuer decides which exemption to use for sales. Also as noted above, the JOBS Act permits underwriters to issue research reports.

E. General Solicitation

1. A fundamental premise for the private offering exemption, in the historic view of the SEC, is the absence of general solicitation of investors. This principle took on increased importance with the adoption of Regulation D, which eliminated offeree, as opposed to purchaser, qualification requirements. Rule 502(c) of Regulation D prohibited general solicitation in Rule 505 offerings (before its repeal) and in Rule 506 offerings and, after September 23, 2013, prohibits general solicitation in Rule 506(b) offerings. The Commission requested comment in Release No. 33-7185, *"Exemption for Certain California Limited Issues"* (June 27, 1995), and again in Release No. 33-7314, *"Securities Act Concepts and Their Effect on Capital Formation"* (July 25, 1996), and in the Reg. D Proposing Release as to whether this prohibition of general solicitation should be eliminated or modified. The Commission considered a step to soften this prohibition by proposing Rule 157, which would have permitted limited advertising to a defined category of "super-accredited investors," but it did not adopt this rule. As noted above, as directed by the JOBS Act the Commission adopted Rule 506(c) to permit general solicitation in certain private offerings.

2. Another partial step in eliminating the general solicitation prohibition was taken in 1996 with the adoption of Rule 1001 exempting offerings that complied with California's State Accredited Investor Exemption, but only for offerings up to $5 million. The Commission indicated that it would extend the exemption to other states that adopted requirements similar to those of California but to date that has not happened. General solicitation can also occur in a Rule 504 offering, provided that certain state blue sky law requirements are met.

3. The SEC had taken the position that the mere filing of a registration statement for a specific offering, even without offering activity (i.e., a quiet filing), constituted general solicitation of the security that is registered. See Letter dated March 23, 1984 from John J. Huber, Director of the Division of Corporation Finance, to Michael Bradfield, General Counsel of the Board of Governors of the Federal Reserve System (the "Bradfield Letter"). See also SEC Litigation Release No. 10241 (December 19, 1983) regarding *Traiger Energy Investments* and *Circle Creek AquaCulture V, L.P.* (Mar. 26, 1993). Consequently, the exemption for a private offering of the same or a similar security undertaken during the pendency of a filed registered

offering would not have been available as a result of general solicitation if the private offering was integrated with the registered offering. To the extent this remains a concern, emerging growth companies and now other issuers in certain circumstances have the ability to submit their registration statements to the SEC for review confidentially, which should negate the presumed general solicitation since the registration statement is not deemed "filed."

4. The *Black Box* letter (point 3) carved out on policy grounds a limited exception for a private offering during the pendency of a registration statement to "qualified institutional buyers" and a few other institutional accredited investors. In the *Squadron, Ellenoff* letter the SEC indicated that this exception is to be narrowly construed, stating that it is limited to QIBs and no more than two or three large institutional accredited investors.

5. There were questions regarding the scope of the *Black Box* exception. For example, did it apply to "underwritten" Rule 144A offerings taking place contemporaneously with a registered offering? The SEC indicated that it did apply, pointing to the non-fungibility requirement of Rule 144A. Did it apply to private offerings involving management along with QIBs? The prevailing view was that it did apply pursuant to the so-called "Macy position" (see C&DI § 139.25). Another question, discussed below under VII.B.8, is whether additional tranches of similar securities can be sold in Rule 144A offerings to QIBs while the first tranches are being registered either as part of an A/B Exchange Offer or for resale in a PIPE transaction? Some of these questions have been resolved with the elimination of the prohibition on general solicitation in a Rule 144A offering.

6. In the Reg. D Proposing Release, the SEC put to rest the "presumptive general solicitation" concept reflected in the Bradfield Letter, and instead said that whether or not there was general solicitation of investors after a registration statement had been filed was a facts and circumstances determination that, unlike *Black Box*, did not turn on the nature of the investors. See this author's commentary in *"SEC Provides Private/Public Offering Integration Guidance,"* INSIGHTS, September 2007 at p. 19. The relevant analysis was whether the investor was obtained through a general solicitation, such as because of the filing or public offering marketing. On the other hand, if the company can demonstrate that the investor was reached through other means, such as a preexisting, substantive relationship or direct contact outside the public offering process, a private offering exemption could be available. This was easier to show if there was a quiet filing without the commencement of marketing activities. In addition, as noted above, issuers might be able to confidentially submit the registration statement. The Commission's guidance provided increased flexibility for companies in registration to raise needed capital privately. See also C&DI § 139.25 in which the SEC confirmed that the then applicable five-factor integration test did not have to be satisfied in order to utilize the Commission's 2007 guidance on concurrent private and public offerings. With the adoption of Rule 506(c) to permit general solicitation if all purchasers are accredited investors and verified as such, the facts and circumstance analysis under the Commission's guidance would not have been necessary for those offerings. On the other hand, the guidance could have taken on even more significance in other contexts. However, although the SEC Chairman in 2011 in a letter to Congressman Issa, *avail. http://www.wowlw.com/White%20Response%20to%20McHenry%20Letter.pdf*, acknowledged that the guidance could apply outside the IPO context, a 2017 decision of the Commission (which then had only two members), in affirming a FINRA disciplinary action against a broker-dealer for violating § 5 in a planned private offering that involved impermissible general solicitation although

it completed the offering by selling only to its customers with whom it had a preexisting, substantive relationship, took an unnecessarily narrow view of the application of the 2007 guidance. See *KCD Financial Inc.*, SEC Opinion 34-80340 (Mar. 29, 2017). In this author's view, given that the *KCD* decision was in the context of whether to uphold a FINRA disciplinary sanction and in view of the Commission guidance in the releases implementing the JOBS Act and now with the 2020 Adopting Release establishing the New Integration Framework that reflects the 2007 guidance and focuses on the integration of exempt offerings in which general solicitation is not permitted and other exempt offerings in which it is and in registered offerings, the *KCD* decision does not need to be read as narrowing the 2007 guidance. See also this author's article, "*SEC Opinion Raises Questions About 2007 General Solicitation Guidance,"* INSIGHTS, June 2017 at p. 32. The *KCD* decision did, however, stand for the proposition, at least under the then applicable five-factor test, that the 2007 guidance applied to different offerings and could not be used when it is the same offering because the absence of general solicitation is a condition to the exemption for that offering. The JOBS Act addressed general solicitation in Rule 506 offerings by directing the SEC to amend Rule 506 to eliminate the prohibition on general solicitation if all purchasers are accredited investors (which is defined in Rule 501(a) as anyone who is or who the issuer reasonably believes is an accredited investor) and an issuer takes reasonable steps to verify that purchasers are accredited investors using methods prescribed by the SEC. The JOBS Act also added § 4(b) to the Securities Act providing that a Rule 506 offering shall not be deemed a public offering as a result of general solicitation. In addition, the JOBS Act directed the SEC to permit general solicitation for Rule 144A offerings by eliminating the prohibition on offers to non-QIBs. The SEC adopted amendments to Rule 506 and Rule 144A to implement these provisions of the JOBS Act in the Rule 506 Adopting Release. In doing so, the SEC made clear that general solicitation in a Rule 144A offering would not, on its own, be directed selling efforts for a concurrent Regulation S offering and confirmed this view in the 2020 Adopting Release in II.2.b.iii.

7. The amendment of Rule 506 retained the existing Rule 506 exemption as Rule 506(b) and added a new exemption as Rule 506(c) under which there could be general solicitation if all purchasers are accredited investors and the issuer takes reasonable steps to verify their status as accredited investors[4]. What are reasonable steps to verify will depend upon the particular facts and circumstances, although the SEC provided non-exclusive safe harbors for verifying the status of natural persons. See C&DI §§ 260.35 - 260.38, in which the SEC makes clear that the safe harbor must strictly be complied with but emphasizes that the principles-based approach applied to the particular facts and circumstances may be relied upon, especially applying principles derived from the safe harbors. As noted above, the definition of "accredited investor" was expanded in 2020, and in the 2020 Adopting Release the SEC expanded the accredited investor verification safe harbor to permit an issuer to rely on a written representation by an investor whose status as an accredited investor was verified within the prior five years. The SEC made clear in *CoinAlpha*, Release No. 33-10582 (December 7, 2018), that verification actions before sales was a condition to the Rule 506(c) exemption even though the investors were in fact accredited

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[4] The amendment of Regulation D requires checking a box on Form D to indicate whether the offering is under Rule 506(b) or Rule 506(c). Aside from the question of what are the consequences of checking the wrong box, a question was whether checking the 506(c) box is itself general solicitation (akin to the Bradfield letter "presumptive general solicitation" from filing a registration statement). Support for the answer that checking the box in a filed Form D should not itself be general solicitation absent other solicitation activity can be found in C&DI § 260.11.

investors. The SEC also added "bad actor" provisions to Rule 506 in Release No. 33-9414, "*Disqualification of Felons and Other 'Bad Actors' from Rule 506 Offerings*" (July 10, 2013), as directed by the Dodd-Frank Act. See C&DI §§ 260.14 - 260.32. As noted above, at the same time it adopted these changes, the Commission proposed (but has not adopted) additional changes to enable it to obtain information to monitor developments in the new exempt offering market in the interest of investor protection. See Release No. 33-9416, *"Amendments to Regulation D, Form D and Rule 156 under the Securities Act"* (July 10, 2013). See this author's article *"General Solicitation: What Congress Giveth, the SEC Proposes to Taketh Away,"* INSIGHTS, August 2013 at p. 15.

8. The two key principles underlying the SEC's position that an offering must be both commenced and completed either privately or publicly are (i) general solicitation from a public offering that would prevent completing it privately and (ii) gun-jumping that would prevent converting a private offering into a public offering. The JOBS Act created exceptions to these two principles by directing the SEC to amend Rule 506 to permit general solicitation if sales are made solely to verified accredited investors, which the SEC has done with the adoption of Rule 506(c), and authorizes (without SEC rulemaking) test-the-waters activity by "emerging growth companies" with QIBs and institutional accredited investors before or after the filing of a registration statement, which the SEC has expanded to all issuers. These changes affect the integration analysis when they apply. For example, if there is general solicitation in connection with a completed Rule 506(c) offering sold only to accredited investors, will a subsequent registered public offering be compliant or will the general solicitation be considered gun-jumping? This was not clear under prior Rule 152, but in my view, the answer should have been that Rule 152 did apply and compliant general solicitation should not have been treated as impermissible gun-jumping. Similarly, test-the-waters activity could involve general solicitation that would foreclose some exempt offerings. The Commission provided some transition guidance in the Rule 506 Adopting Release at p. 19. See also C&DI §§ 260.05, 260.11, 260.12, 260.33 and 260.34. As discussed below, revised Rule 152 now addresses these situations.

9. In addition, these permitted activities can create integration issues for related offerings under traditional integration concepts and reduce the flexibility companies otherwise would have. For example, general solicitation activity in a Rule 506(c) offering could make it more challenging to complete an offering to non-accredited investors and could foreclose use of other exemptions outside Rule 506(c), such as the statutory 4(a)(2) private offering exemption or Rule 506(b), in which general solicitation is not permitted. The New Integration Framework, however, as described below, should make it more manageable to navigate related offerings.

10. In addition to raising issues under § 5 of the Securities Act, integration concepts can raise issues under the antifraud provisions. For example, in the situation in which a registered offering follows a Rule 506(c) offering with general solicitation, even if the general solicitation is not gun-jumping, can it be considered a written offer in connection with the registered offering for which there can be antifraud liability? Similarly, can test-the-waters communication be the basis for antifraud liability in a subsequent registered offering in which the investors who were communicated with purchase in the registered offering or in a Rule 506(c) offering to them? In adopting Rule 241 to permit generic test-the-waters, the Commission made

clear that the communications were still an offer for purposes of the antifraud provisions. The answers should depend upon the particular facts and circumstances.

11. What constitutes general solicitation can be an elusive concept. Although the JOBS Act changes resulting in Rule 506(c) did not affect what is general solicitation, and any activities that were permissible in a Rule 506 offering before Rule 506(c) was adopted should still be permissible under Rule 506(b) (see Rule 502(c)), the adoption of Rule 506(c) establishing a means of engaging in general solicitation while having an exempt offering has caused renewed focus on what activities can be undertaken without there being general solicitation and triggering the requirements of Rule 506(c). The SEC provided guidance regarding certain activities that do not constitute "offers" and other activities that do not involve general solicitation, including as a result of a preexisting, substantive relationship with the offeree. See C&DI §§ 256.23 to 256.33 and *Citizen VC Inc.* (Aug. 6, 2015). See also this author's article, *"SEC Guidance on General Solicitation Provides New Opportunities,"* INSIGHTS, September 2015 at p. 16.

12. General solicitation, along with the issuer's or its agent's relationship with investors, is a focus of the 2020 Adopting Release and the New Integration Framework under it in order to differentiate exempt offerings in general from registered offerings, and this focus on the method of offering is a further step in the Commission's deregulation of "offers" as such. The 2020 Adopting Release addresses general solicitation directly by excluding in new Rule 148 "demo day" communications as defined under the rule from being a general solicitation and therefore does not foreclose the ability of an issuer that participates in such a demo day from using an exemption that does not permit general solicitation. A qualifying demo day in general terms is an investor event involving more than one issuer that is sponsored by certain specified organizations, such as a university, government or non-profit entity or angel investor group, where the role of the sponsor and the information provided meets certain limitations.

13. On the other hand, while generic test-the-waters with any potential investor is permitted under new Rule 241 if the issuer has not determined the exemption to use and therefore does not constitute an impermissible offer or gun-jumping, that activity, as noted above, is considered an "offer" for antifraud purposes and, if done in a manner involving general solicitation, could affect the availability for a subsequent offering of an exemption that does not permit general solicitation. For example, test-the-waters activity using general solicitation can foreclose the ability to rely on an exemption, such as Rule 506(b), that does not permit general solicitation if the general solicitation activity is considered part of the subsequent exempt offering unless the issuer has a reasonable belief that each purchaser in that offering was not solicited through the use of general solicitation or the issuer had established a substantive relationship with such purchaser prior to the commencement of such exempt offering. Moreover, the Commission has made clear in the 2020 Adopting Release (see text at 92-93 and note 248) that an issuer cannot use test-the-waters activity involving general solicitation to identify investors for the exempt offering that does not permit general solicitation, in the absence of otherwise establishing a preexisting, substantive relationship, because that activity may be deemed to be commencement of the offering or may be considered a plan or scheme to evade the registration requirements. The Commission chose to retain the requirement under Rule 241 that the issuer not have determined which exemption to use, notwithstanding comments questioning the feasibility or need for that requirement. Thus, issuers who want to do generic test-the-waters are likely to engage in a charade of preserving uncertainty.

14. A detailed discussion of general solicitation is beyond the scope of this outline. However, because it is an important focus of the New Integration Framework, a few points about general solicitation are worth noting:

(a) Rule 502(c) of Regulation D prohibits the use of any form of general solicitation or general advertising (referred to together in this outline as "general solicitation") in connection with certain exempt offerings (e.g., Rule 506(b) offerings).The term is not defined specifically but Rule 502(c) includes as communications that may involve general solicitation (i) "any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio" (which now would be understood to include over the internet) and (ii) "any seminar or meetings whose attendees have been invited by any general solicitation or general advertising." The SEC has provided additional guidance regarding general solicitation through no-action letters, C&DIs and commentary in releases. In general terms, the guidance gives a broad reading to what communications can constitute general solicitation.

(b) General solicitation can be negated by the issuer or a person acting on its behalf (an "agent") having a preexisting, substantive relationship with the prospective investor. To be "preexisting" the relationship must be formed by an issuer prior to its commencement of an offering and by a registered broker-dealer or registered investment adviser prior to its participation in the offering (funds that conduct continuous offerings can form the relationship before offering to the particular investor). No minimum waiting period is required but having a waiting period (for example, to evaluate the investor's information) can be helpful. To be "substantive" the issuer or its agent must have sufficient information to evaluate, and does in fact evaluate, a prospective investor's financial circumstances and sophistication to determine that person's status as an accredited or sophisticated investor – in other words, it is the quality of the relationship between the issuer or its agent and the investor that matters. Self-certification alone by the investor will not be sufficient (see note 79 of the 2020 Adopting Release). Examples of possible preexisting, substantive relationships are when the investor is a prior investor of the issuer or participates in other deals with issuer insiders, friends and family of insiders, or clients of broker-dealers, investment advisers or others who on the issuer's behalf established the relationship.

(c) For an issuer to establish a preexisting, substantive relationship can be challenging (e.g., cold calling even without referring to an offering), absent reasons apart from the offering for doing so, because an issuer is presumed to be contacting unrelated persons for purposes of an offering unless it can establish another purpose. The challenge is magnified when the internet is used.

(d) Broadly disseminated communications can be deemed to involve a general solicitation for an offering even in the absence of referring to a particular offering. On the other hand, the SEC has provided safe harbors that permit certain broad communications that do not relate to a specific offering, such as regularly released "factual information" about an issuer's business, products or services, and financial condition. Another example is the safe harbor under Rule 135(c) for a limited announcement of a planned public offering, although, as the SEC indicates in note 73 of the 2020 Adopting Release, offering

material for one offering that mentions material terms of another offering may be considered a communication regarding the other offering.

(e) As noted above, new Rule 148 provides that communications at a "demo day" event will not be considered a general solicitation if the requirements of Rule 148 are met. Also as noted above, new Rule 241 permits generic test-the-waters communications to potential investors who do not have to be QIBs or institutional accredited investors without those communications being considered an "offer" for purposes of § 5. However, the 2020 Adopting Release at text at note 248 makes clear that if those communications involve a general solicitation, the issuer must consider, if it proceeds with an exempt offering that does not permit general solicitation, whether it can reasonably determine with respect to each purchaser that it did not solicit that purchaser through a general solicitation or that it had established a substantive relationship with that purchaser prior to the commencement of the exempt offering.

IV. NEW INTEGRATION FRAMEWORK – REVISED RULE 152

The following is a description of the New Integration Framework created by the 2020 Adopting Release through the adoption of revised Rule 152. Application of the New Integration Framework is discussed in X below.

1. Revised Rule 152 will be helpful in reducing the uncertainty and legal risk associated with the integration of otherwise separate offerings by establishing, in place of the historic but often limiting and difficult to apply five-factor test, a general principle that no integration is required if each offering, based on its particular facts and circumstances, meets the requirements for an exemption or complies with the registration requirements. The general principle in Rule 152(a) is accompanied by four non-exclusive safe harbors in Rule 152(b). This New Integration Framework applies across the board to registered and exempt offerings (i.e., public and private offerings).

2. The general principle reflects the approach followed by the Commission in recent years in adopting several specific offering exemptions and in recent SEC interpretive guidance, including reflecting in Rule 152(a)(1)(ii) the guidance in the Reg. D Proposing Release. Under Rule 152(a)(1), for an exempt offering prohibiting general solicitation, the issuer must have a reasonable belief that each purchaser in that offering either (i) was not solicited through general solicitation or (ii) the issuer or someone (e.g., a broker) acting on its behalf established a substantive relationship with that purchaser prior to commencement of that offering. The Commission reaffirmed the guidance on what is necessary to establish a preexisting, substantive relationship (see the 2020 Adopting Release, text at notes 78 and 79 and examples that follow). Under Rule 152(a)(2), for concurrent exempt offerings permitting general solicitation, offering materials for one offering that includes information about the material terms of the other exempt offering may be an offer for that other offering and, therefore, that offer must comply with the requirements for offers under the exemption relied on for the other offering (for example, a Regulation Crowdfunding offering has more restrictive requirements for offering materials even though general solicitation is permitted).

3. Rule 152 will not apply to avoid integration for any transaction or series of transactions that are part of a plan or scheme to avoid the registration requirements. This anti-evasion principle reflects the basic purpose of the integration doctrine to prevent an issuer from improperly avoiding registration by artificially dividing a single offering into multiple offerings to ostensibly satisfy an exemption that would not be available for the combined offering.

4. The four safe harbors under Rule 152(b), which consolidate in one rule some safe harbors that have previously existed, can be useful to avoid uncertainties in applying the general principle. They are as follows:

- *30-calendar day separation.* Offerings separated by 30 calendar days (a reduction from the existing six-month separation period) will not be integrated, provided in the case of an exempt offering that does not permit general solicitation that follows an offering that permits general solicitation, the issuer has a reasonable belief that each purchaser was not solicited through general solicitation or it or someone acting on its behalf had a preexisting, substantive relationship with the purchaser. In order to prevent avoidance of the numerical non-accredited investor limitation through use of a series of offerings, there may not be more than 35 non-accredited investors in offerings under Rule 506(b) during a 90-calendar day period.

- *Rule 701 and Regulation S.* As is now the case, a two-way firewall will exist for offerings exempt under Rule 701 (employee compensatory plans) and under Regulation S (offshore offerings) so that neither will be integrated with other offerings. The SEC recently proposed amendments to Rule 701 that would expand its availability,[5] as well as a proposed temporary rule that would expand for a five-year period the availability of Rule 701 for awards to internet-based service providers who might not be employees.[6]

- *Subsequent registered offerings.* Offerings for which a registration statement has been filed would not be integrated with a prior terminated or completed offering for which general solicitation is not permitted or, if the terminated or completed offering permitted general solicitation, if sales were made only to QIBs or institutional accredited investors or that offering was terminated or completed more than 30 days before commencement of the registered offering. This safe harbor addresses "gun-jumping" concerns related to the registered offering and replaces prior Rules 152 and 155. Unlike prior Rule 152, revised Rule 152 is not limited to a statutory 4(a)(2) offerings and private offerings under the Regulation D safe harbor but applies to all other offerings.

- *Subsequent exempt offerings with general solicitation.* Exempt offerings for which general solicitation is permitted will not be integrated with any prior

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[5] Release No. 33-10891, *"Modernization of Rules and Forms for Compensatory Securities Offerings and Sales"* (Nov. 24, 2020).

[6] Release No. 33-10892, *"Temporary Rules to Include Certain 'Platform Workers' in Compensatory Offerings under Rule 701 and Form S-8"* (Nov. 24, 2020).

terminated or completed offering. Other provisions of Rule 152 also can apply to protect the prior terminated or completed offering from being integrated with the subsequent exempt offering that involved general solicitation. For example, general solicitation used after the completion of an exempt offering for which general solicitation is not permitted normally will not be attributed to the prior completed offering. Thus, the Commission makes clear in the 2020 Adopting Release in II.A.2.d.iii that an issuer can do sequential Rule 506(b) and Rule 506(c) offerings and can switch from a Rule 506(b) offering to a Rule 506(c) offering, as long as each offering complies with its own requirements.

5. In view of the significance of the concepts of "commencement" and "termination and completion" of offerings, Rule 152(c) and (d) includes a non-exclusive list of factors relevant to applying those concepts, which otherwise depend upon the particular facts and circumstances.

(a) Rule 152(c) provides that an offering commences at the time of the first offer of securities in the offering by the issuer or its agents. It then lists several non-exclusive factors to consider, including when interest is first solicited in connection with permitted test-the-waters activities, when an offer in reliance on private and intrastate offering exemptions is first made and when a registration statement for a continuous offering that will commence promptly on effectiveness or a Regulation A or Regulation Crowdfunding offering statement is publicly filed. In the case of a registered delayed shelf offering, the offering will commence when public efforts to offer and sell the securities begin, which could be when a prospectus supplement for the offering is filed or a press release or other public disclosure announcing commencement of the offering is issued. However, private communications with QIBs and institutional accredited investors, such as to test-the-waters, will not be commencement of a registered public offering. In contrast, private communications with potential investors in an exempt offering in which general solicitation is not permitted may be commencement of the non-public exempt offering if the communications involved an "offer" of securities.

(b) Rule 152(d) provides that an offering is terminated or completed when the issuer and its agents cease efforts to make further offers to sell the securities under that offering. It then lists non-exclusive factors to consider for offerings under exemptions and for registered, Regulation A and Regulation Crowdfunding offerings. In the case of private and intrastate exempt offerings, the offering can be considered completed when the issuer entered into a binding commitment to sell all the securities to be sold, subject only to conditions outside of the control of the investors. In the case of registered offerings or offerings under Regulation A, the offering can be considered terminated or completed when the filing with the SEC is withdrawn, a filing is made indicating that the offering has been terminated or completed, or the date, after three years, that sales can no longer be made under the filing or any earlier date on which the offering terminates by its terms. In the case of a Regulation Crowdfunding offering, the offering can be considered terminated or completed when the deadline of the offering indicated in the offering materials or indicated by the intermediary occurs.

6. It will take further experience and SEC interpretations for the new integration provisions under revised Rule 152, especially the general principle under Rule 152(a), to be fully understood. For example, what activities may an issuer engage in to locate investors before undertaking an exempt offering that does not permit general solicitation. Also, while sequential offerings may present fewer issues under the new provisions, concurrent offerings, such as a concurrent Rule 506(b) offering and Rule 506(c) offering using general solicitation or two concurrent offerings that use general solicitation with offering materials that refer to each other, can raise some issues. The Commission makes clear in the 2020 Adopting Release that, similar to the guidance in the Reg. D Proposing Release regarding the ability to do a private offering during the pendency of a registered offering,[7] an issuer would be able to do the concurrent offerings if it can meet the burden of establishing that investors in the offering that did not permit general solicitation (i.e., the Rule 506(b) offering) were not obtained through the general solicitation activity, with one way of doing so being the issuer having a preexisting, substantive relationship with the investor. The issuer, however, will have the burden of establishing the exemption, and the Commission cautions that mentioning in offering materials for an offering in which general solicitation is permitted the material terms of the exempt offering in which general solicitation is prohibited may constitute an offer for that exempt offering and thus violate its prohibition on general solicitation. It is not clear how this proscription will apply and how it can be avoided (for example, can the material used in the offering with general solicitation that discloses the material terms of the other offering be segregated, such as through a separate password protected site, so it is only accessible by investors eligible to participate in the offering with general solicitation?). Similar questions exist for concurrent offerings using general solicitation with respect to restrictions and legending requirements.

7. The challenges of dealing under revised Rule 152 with the prohibition on general solicitation in offerings in which general solicitation is not permitted as a core concept of the New Integration Framework can be illustrated by an example. Other examples are discussed in X below. Assume that an issuer undertakes a bona fide Rule 506(c) offering using general solicitation and identifies several interested investors who, after verification efforts, do not qualify as accredited investors. A question is whether the issuer can wait for expiration of the 30-calendar days safe harbor period and then do a Rule 506(b) offering with these non-accredited investors? The SEC has answered this question "no" in the 2020 Adopting Release (see note 75 and related text and text at note 128) because, notwithstanding the safe harbor period, these investors were obtained through impermissible general solicitation (noting the anti-evasion introductory language of revised Rule 152 and that seeking to identify potential investors in an offering permitting general solicitation may be deemed to be commencement of the offering in which general solicitation is not permitted). This does not mean that these investors are forever foreclosed from participating in an exempt offering by the issuer in which general solicitation is not permitted, but rather that there is no fixed cleansing period. Instead, a facts and circumstances analysis should apply. For example, apart from the prior solicitation, the issuer could establish a substantive relationship with the investor, directly or through an intermediary, before the new offering or the investor could have become an accredited investor and eligible to participate in a subsequent Rule 506(c) offering. Also, as a practical matter, it should be possible for some period of time to have elapsed to have a cleansing effect on the prior solicitation based upon such factors as the a change in the nature of

[7] Release No. 33-8828, *"Revision of Limited Offering Exemptions in Regulation D"* (Aug. 3, 2007), at Section II.C.1.

the issuer or of the investment to negate the earlier solicitation continuing to be considered a current offer.

8. It also remains to be seen whether the superseded five-factor test or aspects of it will continue to have any vitality. Although the five-factor test often resulted in integrating otherwise separate offerings, that test also could be applied to keep offerings separate - for example, (i) when the nature of the securities being offered were different, such as one being equity and the other straight debt, or (ii) when the nature of the transaction in which securities were being issued were different, such as one being for capital raising and the other a business combination.

9. The following sections discuss some special situations that pre-date the New Integration Framework but continue to raise integration issues. The outline then illustrates the application of the New Integration Framework to various typical situations.

V. CONVERTIBLE SECURITIES AND WARRANTS

A. Registering Issuance of Underlying Securities

1. The SEC's position has been that privately placed convertible securities and warrants represent an ongoing private offering of the underlying securities, at least if they are then currently convertible or exercisable, and therefore the issuance of the underlying securities cannot be registered. Rather, an exemption would have to be found for the issuance of the underlying securities on conversion (e.g., § 3(a)(9), if available) or exercise (e.g., a net exercise making § 3(a)(9) available) and those securities could be registered for resale. The SEC has indicated that a shelf resale registration of the underlying securities would not prevent those securities from being issued pursuant to a private offering exemption upon conversion or exercise.

2. On the other hand, if the convertible securities or warrants are not convertible or exercisable "until some future date," there would be no "offer" under § 2(a)(3) and consequently a registration statement covering issuance of the underlying securities could be filed before the convertible securities or warrants become convertible or exercisable.

3. The question exists as to how long conversion or exercisability must be deferred for there not to be an "offer." The SEC has not provided definitive guidance on the required period but rather requires that there be a significant period prior to exercisability and points to its longstanding position taken in the registration process that a one-year non-exercisability period is necessary to avoid the need to register the underlying securities upon a public offering of convertible securities or warrants. See C&DI § 139.01. Some counsel have been comfortable with a shorter period, at least in some circumstances.

4. The SEC has indicated that the convertible securities or warrants could themselves be registered for resale, in which case the issuance of the underlying securities upon conversion or exercise could also be registered, although not for issuance to the private purchaser of the convertible securities or warrants.

5. Although the logic of the SEC's position would extend to employee stock options, the SEC recognizes that the practice has been to include in the Form S-8 registration statement the shares underlying employee stock options that were granted and may have become

exercisable prior to filing. This practice was confirmed by the SEC in the Division of Corporation Finance Manual of Publicly-Available Telephone Interpretations – July, 1997, Securities Act Forms Item 61 and now appears in C&DI § 239.15. The SEC has traditionally been more accommodating regarding employee benefit plans since they present fewer concerns than capital raising activity.

B. Integrating Convertible Securities with a Registered Offering

1. The question arose in the past whether a separate public offering of the same class of securities as were issuable upon conversion or exercise of privately offered convertible securities or warrants would be integrated with, and therefore defeat the exemption for, that private offering since there was a continuing offering of the underlying security. For example, this question was raised in the past by the SEC in the context of an initial public offering of common stock following the private offering of convertible preferred stock, a typical form of investment in venture-capital backed companies. The SEC subsequently indicated that the integration analysis should be based on the status at the time of the private placement of the convertible securities and warrants. If that placement was completed before the filing of the registration statement, prior Rule 152 (and presumably revised Rule 152) could be applied to avoid integration with the public offering. This position was reflected in the Comprehensive Revision Release proposal.

2. Sometimes warrants are issued for nominal consideration in order to avoid later integration with a public offering. The SEC's position is that warrants issued for nominal consideration are not treated as issued for this purpose and therefore are not entitled to the benefit of being tested at the time of their issuance for purposes of the integration analysis. If the warrants are being issued as part of a larger transaction (e.g., convertible securities with warrants), it seems appropriate to take into account the entire transaction to see if more than just nominal consideration was paid. The issuance of warrants for nominal consideration, while not treated as issued for purpose of the integration analysis, could still raise gun-jumping issues. See VII.E below.

VI. PRIVATE FORMATION TRANSACTIONS

1. The SEC has confirmed that restructuring or formation transactions outside the roll-up context will not be integrated with the initial public offering which they were undertaken to facilitate. This position would have been partially codified by the Comprehensive Revision Release proposal. Examples of such transactions are the combination of several private companies to form the entity that goes public, the issuance of common stock to founders followed by an initial public offering, or the conversion of outstanding founder debt to common stock in connection with the initial public offering. This position has relevance for SPAC transactions and a subsequent de-SPAC merger in connection with which there is often a PIPE transaction.

2. The SEC emphasized, however, that the restructuring or formation transactions in and of themselves have to comply with the Securities Act (e.g., the combination of several entities with outside investors may have to be tested for an exemption on an integrated basis).

VII. PRIVATE TO PUBLIC OFFERINGS

A. A/B Exchange Offers

1. The *Exxon Capital* line of letters has created a procedure under which securities are privately placed and then promptly exchanged for similar securities which have been registered and therefore are freely resalable. See *Exxon Capital Holding Corp.* (avail. May 13, 1988), *Morgan Stanley & Co. Incorporated* (avail. June 5, 1991), *Mary Kay Cosmetics, Inc.* (avail. June 5, 1991), *Warnaco Inc.* (avail. Oct. 11, 1991), *Epic Properties, Inc.* (avail. Oct. 21, 1991), *Vitro, S.A.* (avail. Nov. 19, 1991), *Corimon C.A.S.A.C.A.* (avail. Mar. 22, 1993), *K-III Communications Corporation* (avail. May 14, 1993) and *Brown & Wood LLP* (avail. Feb. 7, 1997). However, this procedure is only available for nonconvertible debt securities, certain types of straight preferred stock and initial public offerings of common stock of foreign issuers, and the SEC has not been prepared to extend its use. The SEC has indicated that the A/B exchange offer does not double count for purposes of determining the amount of debt issued to test the issuer's status as an EGC. On the other hand, it is not clear that A/B exchange offer securities will count toward an issuer's status as a debt-only "well-known seasoned issuer" (WKSI).

2. Typically, the issuer will place the securities privately to institutional investors or sell them pursuant to the private offering exemption to investment bankers who resell them to QIBs under Rule 144A, to accredited investors under Regulation D and offshore pursuant to Regulation S. Upon the registered exchange offer the holders get freely tradable securities if they are not affiliates of the issuer, acquired the original securities in the ordinary course of business and do not have any arrangement for the distribution of the exchange securities.

3. In the *Shearman & Sterling* letter, the SEC placed special requirements on broker-dealers participating in the exchange offer.

4. The availability of the exemption in an A/B exchange offer utilizing Rule 144A in contemplation of a registered exchange offer was at issue, based on its being a "plan or scheme to evade" registration under Note 3 to Rule 144A, in the *HealthSouth Securities Litigation*. The SEC filed an amicus letter dated November 28, 2006 supporting the availability of the exemption. This letter provides helpful analysis of the SEC's views regarding the A/B exchange offer transaction and related concepts.

B. PIPES

1. PIPE transactions involve a procedure in which investors agree to purchase the securities in a private offering on the understanding that a registration statement covering the resale of the securities will be filed and become effective. A PIPE can be viewed as an evolution of registration rights. These rights began as the grant of contractual demand and piggyback registration rights; then there was a contractual covenant to provide a shelf registration within a prescribed period, often coupled with a penalty for noncompliance in the form of an increased rate of interest or dividends, adjustment of conversion price or even redemption; this was followed by having as a condition of the closing that the registration statement be filed; and in its ultimate form the closing condition could require that the shelf resale registration statement be effective. A PIPE can be traditional or structured. In a traditional PIPE, the investor agrees to buy the security at a

fixed price or a fixed conversion ratio. In a structured PIPE, a convertible security typically is used and the conversion price is adjusted based on a formula usually tied to the market price of the underlying common stock during a period prior to the conversion. Warrants may also be involved.

2. The SEC has confirmed that PIPE transactions are permissible if done correctly and the Comprehensive Revision Release proposal reflected this position. See also, the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations Supplement – March 1999 ("Telephone Interpretations Supplement"), #3S(b) and C&DI § 134.01 (same as §139.06) and §139.11. To be done correctly, the private offering must be completed before the resale registration statement is filed so that Rule 152 (both prior and presumably as revised) is available. The *Black Box* letter (points 1 and 2) made clear that the offering is completed if commitments are in place from all investors subject only to conditions outside their control so that there is no further investment decision. This is confirmed in note 197 of the 2020 Adopting Release. Revised Rule 152 now defines completion of an offering. See IV.5 above. Examples of acceptable conditions are the filing or effectiveness of a resale registration statement or receipt of regulatory approvals. A no material adverse change condition should be an acceptable condition since there is an objective standard but a diligence out would not be acceptable. See C.3 below. The SEC also has indicated that an express right of an investor to waive a condition would be problematic, but this is a questionable concern because as a matter of contract law a party always has the ability to waive a condition to its performance even if not expressly stated. In addition, the SEC has indicated that a closing condition based on the market price of the issuer's securities would not be acceptable because the investors would not be at risk at the time the registration statement is filed and therefore the private offering would not have been completed at the time of filing. On the other hand, the SEC has indicated that convertible securities with the conversion price tied to the market price of the underlying common stock (e.g., formula preferred) would not prevent the investor from being at risk. The SEC also has confirmed that the use of a market price formula and collars in merger and acquisition transactions is permissible since these do not involve capital raising and therefore are not subject to the same abuse. See C&DI § 139.10. The SEC has concerns about potential abuses involving securities with variable price or market price provisions and whether these securities will prevent having a completed private offering or would relate to the status of the investor as an underwriter. See B.6 below. The SEC also requires that the closing take place promptly after the resale registration becomes effective so that it is a valid secondary offering and not a delayed primary offering. See C below.

3. If not done correctly, you have a "burst PIPE." See C&DI § 139.11. Renegotiation of terms, at least if they are material, after the registration statement is filed is not permissible. In addition, if the issuer obtains additional commitments from private investors after the filing, these post-filing offers could be considered part of the same offering, putting into question whether Rule 152 (whether in its prior or revised form) is available. Since filing the registration statement could be considered to be general solicitation, the private offering exemption for the subsequent commitments might not be available and this, in turn, could defeat the exemption for the prior commitments because of integration. The Commission guidance in the Reg. D Proposing Release might not be helpful here because the post-filing offers could be viewed as part of the same offering as opposed to a separate private offering. See C&DI § 139.08.

4. Shelf registration of PIPE shares for resale from time to time is dependent upon the availability of Rule 415(a)(1)(i). The SEC sometimes questions that rule's availability

for delayed or continuous secondary offerings of securities issued in PIPE transactions by issuers that are not eligible for an unlimited primary S-3 when the amount being registered is disproportionately large in relation to the issuer's capitalization, sometimes characterizing the investors as affiliates and the offering as a primary offering. If the availability of Form S-3 for a primary offering is based on Instruction I.B.6 for limited primary offerings by issuers who do not meet the $75 million float test, the portion of the resale offering characterized as a primary offering most likely would have to satisfy the one-third market value cap taking into account under the instruction offerings in the prior 12 months. The consequences for an issuer not eligible to use Form S-3 for an unlimited primary offering if the PIPE resale is found to be a disguised or indirect primary offering are that the securities would have to be registered on Form S-1 for a fixed price offering, common shares underlying convertible securities and warrants can only be registered on conversion or exercise, and the selling shareholders would have to be named as underwriters. The SEC sometimes referred to Telephone Interpretation, Rule 415, Item 29, which provided that a purported secondary offering may, in some circumstances, really be a primary offering and the selling shareholders actually are underwriters selling on behalf of the issuer. Relevant factors include the nature of the securities being registered, whether they are listed on an exchange with substantive standards, how long the shares have been held, the circumstances under which the shares were acquired, the relationship between the selling shareholder and the issuer, the amount of securities involved, the nature of the seller and whether it is in the business of underwriting securities, and whether it appears the seller is acting as a conduit for the issuer. The SEC provided useful guidance, but how these factors will be applied to convert a secondary offering of PIPE shares into an ineligible primary offering was, by and large, developed on a case by case basis during the comment process, thus creating uncertainty for these types of financings. Depending on the particular circumstances, capping the percentage of shares registered at one-third of the public float may permit the use of Rule 415. The problem is most acute when convertible securities or warrants with variable conversion or exercise prices are involved because of the large number of shares sought to be registered to cover a potential decline in price. The SEC has indicated that ownership caps often included in PIPE documentation (but typically waivable on not less than 60 days' notice by the investor) will be disregarded in determining whether the investor is an affiliate. An area of continuing uncertainty is the status of shares not included in the registration statement because they exceed the cap on the number that can be registered. Alternatives for dealing with those shares range from being able to register additional tranches on Form S-3 in the future, being able to use Rule 144 for resales, to not being able to resell the securities at all except as a registered primary offering because of "underwriter" status. However, in C&DI § 116.25, the SEC indicated that an issuer subject to the Instruction I.B.6 limitation could not use an S-3 resale registration for the sale by investors of securities that were privately placed if it had used up its available capacity for a primary offering because this would be an evasion of the offering size limitation. The SEC has also focused on the adequacy of disclosure to investors, including costs to the issuer, fees paid, relationships with the seller or its affiliates and impact of potential dilution. See the article by this author and William Hicks, *"Unblocking Clogged PIPEs: SEC Focuses on Availability of Rule 415,"* INSIGHTS, May 2007 at p. 2.

5. The SEC previously informally confirmed that its focus under Rule 415 is more likely to be on a "toxic" PIPE and that a traditional "non-toxic" PIPE is unlikely to raise issues. This position creates planning opportunities for smaller public companies because, while use of Form S-3 for a registered primary offering under Rule 415 would be limited under

Instruction I.B.6 to one-third of the market value cap, a company might be able to do a PIPE with resale registration on Form S-3 without being subject to that limitation.

6. The SEC has been concerned about securities like those used in toxic PIPE transactions that are convertible at a conversion price tied to a lower market price of the underlying common stock at the time of conversion under a plan for the securities, instead of being registered for resale, to be distributed using § 4(a)(1) following satisfaction of the Rule 144 holding period, which permits tacking from the time the convertible security was purchased, sometimes with the use of aggressive sales practices. Recently, the SEC responded to this method of distribution, which it viewed as abusive, by bringing an enforcement action against a distributor of these securities for failure to register as a "broker" (see *John M. Fife, et al,* Litigation Release No. 24886 (Sept. 3, 2020)), and by proposing to amend Rule 144 to eliminate tacking for these securities under certain circumstances so that the holding period would not begin to run until the conversion price is fixed, when the holder would then be at sufficient risk. See Release No. 33-10911, "*Rule 144 Holding Period and Form 144 Filings*" (Dec. 22, 2020). The proposal to amend Rule 144 is still on the SEC's list for regulatory action. Neither of these responses, however, addresses directly the SEC's concerns by challenging this method of distribution as a plan or scheme to evade the registration requirements, resulting in Rule 144 being unavailable, or by characterizing the distributor as an "underwriter."

7. PIPE transactions also can raise accounting issues that need to be considered to avoid delays in the resale registration statement becoming effective. These issues are beyond the scope of this outline.

8. The question has arisen regarding tack-on offerings in Rule 144A transactions where an additional tranch of securities is sold. This occurs in two forms. One involves an A/B exchange offer and the other a PIPE transaction.

(a) In the A/B exchange offer, there should be no issue in doing the additional offering if it is completed before the filing of the exchange offer registration statement because Rule 152 would apply. There also should be no issue conducting the additional offering following completion of the exchange offer either in reliance on *Black Box* or by waiting 30 days and relying on revised Rule 152. It also might be possible to conclude that the registered offering as an exchange offer should not be integrated with the Rule 144A offering involving capital raising for cash. An issue is whether the additional offering can be done contemporaneously with the registered exchange offer. Many lawyers believe it can be done contemporaneously based upon a *Black Box* or non-integration analysis applying the general principle of Rule 152(a). The principles underlying the Commission guidance in the Reg. D Proposing Release also might be helpful. The ability to have general solicitation in a Rule 144A offering should make reaching this conclusion easier.

(b) In the case of a PIPE transaction, the issue is whether the Rule 144A additional offering can be done after filing the resale registration statement for the first tranches or whether it is a "burst PIPE." Many lawyers had gotten comfortable with this offering when limited to QIBs and 2 or 3 large institutional investors based on a *Black Box* analysis, taking into consideration that the pending registration statement is for resale rather than for a primary offering. An integration analysis under Rule 152(a) could be helpful.

Again, the principles underlying the Commission guidance in the Reg. D Proposing Release and the amendment of Rule 144A to permit general solicitation might be helpful.

9. PIPE transactions also have raised enforcement issues that relate to insider trading, market manipulation, misrepresentation and violation of § 5 through alleged impermissible short selling or other hedging activity. These issues have involved a number of enforcement actions and at least three court proceedings discussed below. See, e.g., *SEC v. Guillaume Pollet*, Civ. Action No. 05 Civ. 1937 (E.D.N.Y. 2005); *SEC v. Hilary L. Shane*, Civ. Action No. 05 Civ. 4772 (S.D.N.Y. 2005); *SEC v. Rhino Advisors and Thomas Badian*, Civ. Action No. 03 Civ. 1310 (RO) (S.D.N.Y. 2003) and Litigation Release No. 18003 (February 27, 2003); *SEC v. Langley Partners, L.P.*, 05 Civ. Action No. 467 and Litigation Release No. 19607 (March 14, 2006); *SEC v. Deephaven Capital Management,* LLC, 06 Civ. Action No. 805 and Litigation Release No. 19683 (May 2, 2006). See also *Zacharias v. SEC*, 569 F3d 458 (DC Cir. 2009), in which the court held that a scheme to replace freely tradable shares sold to the public by a non-affiliate with restricted shares held by affiliates violated § 5 because, viewing the transactions together, the sales involved a distribution on behalf of affiliates by an underwriter and therefore the claimed Regulation S and 4(1 1/2) exemptions were unavailable. Compare this broad reading of "underwriter" based on looking at the substance over form of the two transactions together with the more restrictive readings in the earlier PIPE decisions noted in B.11 below.

10. *Langley Partners* is important, not only because it involves alleged insider trading by short sales before announcement of the PIPE transaction, misleading the issuer by representing that the investor would not sell the shares in violation of the Securities Act and violating § 5 of the Securities Act by covering the short sales with the PIPE shares, wash sales and matched orders, but because it suggests that there is a correct way for PIPE investors to hedge their investment risk. *Langley Partners* can be read to validate the "double print" transaction in which PIPE shares are sold in the open market and other shares are purchased in the open market to close out the short sale (which should occur only following dissemination of the announcement of the PIPE transaction), so long as the open market purchases are separated from the PIPE share sales. What is necessary for them to be separated depends on the circumstances, including the vitality of the market in relation to the shares involved, the time between the purchase and sale as evidence of being at market risk and the identity of the broker or brokers involved. See also, *SEC v. Edwin Buchanon Lyon, IV, Gryphon Partners, L.P. et al.*, 06 Civ. Action No. 14338 and Litigation Release No. 19942 (Dec. 12, 2006), and *In the Matter of Spinner Asset Management, LLC*, Securities Act Release No. 8763 (Dec. 20, 2006), in which the Commission said:

> Many PIPE investors "hedge" their investment by selling short the PIPE issuer's securities before the resale registration statement is declared effective. There is nothing per se illegal about "hedging" a PIPE investment by selling short the issuer's securities. Such short sales do not violate the registration provisions of the Securities Act if, among other things, the investor closes out the short position with shares purchased in the open market. An investor violates Section 5 of the Securities Act, however, when it covers its pre-effective date short position with the actual shares received in the PIPE. This is because shares used to cover a short sale are deemed to have been sold when the short sale was made.

11. The SEC's position that § 5 is violated by covering the short sale (directly or by replacing borrowed shares) with the restricted shares purchased in the PIPE, even after they have been registered for resale, has been challenged in three court cases, each of which held against the SEC. See *SEC v. Mangan*, Civ. Action No. 3:06-CV-531 (WDNC Oct. 24, 2007; *SEC v. Lyon*, 529 F. Supp. 2d 444 (SDNY Jan. 2, 2008); and *SEC v. Berlacher*, No. 07-CV-3800 (EDPA Jan. 23, 2008). In *Lyon*, the only case with a written opinion, the court held that § 5 was not violated because, in the court's view, securities later used to close a short position are not sold or offered for sale at the time the short sale is made; rather the buyer received unrestricted borrowed shares used to settle the short sale. Although the SEC has not appealed these decisions, it has made clear that it continues to be its position that, in a short sale, the sale of securities for purposes of § 5 occurs at the time the short position is established, rather than when shares are delivered to close out that short position, or put another way, the delivery of the securities that were restricted to cover the short position relates back to the short sale. See Note 90 of Release No. 33-8869, *"Revisions to Rules 144 and 145"* (Dec. 6, 2007) and C&DI § 239.10. In view of the SEC's position, and the possibility that it could take actions to establish that position and in view of the *Zacharias* decision discussed in B.9 above, market participants and their advisers should consider whether to rely on the favorable PIPE decisions in connection with short sale activity. Instead, it might be advisable to follow the course the SEC has indicated works, which is the properly executed "double print." See this author's article, "*Short Selling and Section 5*," INSIGHTS, March 2009 at p. 10. See also this author's article, "*DC Circuit Gets Section 5 Right*," INSIGHTS, October 2009 at p. 32.

12. In structuring PIPE transactions, the parties need to be mindful of shareholder approval requirements under stock exchange rules, such as when 20% or more of the shares are being issued or can potentially be issued other than in a public offering. See, e.g., New York Stock Exchange Listed Company Manual Section 312.03; Nasdaq Rule 5635(d). PIPE investors also need to be concerned that in handling a multi-purchaser transaction they are not treated as part of a group triggering potential § 16(b) liability. Compare *Schaffer v. CC Investments*, 2002 WL 31869391 (SDNY 2002) (finding a group), with *Litzler v. CC Investments*, CCH Fed. Sec. Law Rep. ¶ 93,652 (SDNY 2006) (no group exists).

C. Private Equity Lines

1. Another type of transaction that has raised concerns with the SEC is a private equity line under which investors agree to buy equity from the company, with the company having the right to draw down on the commitment on a periodic basis after the resale registration statement has been filed or becomes effective. Typically, the share price is at a discount to the market price at the time of the drawdown. These can be thought of as PIPE transactions with deferred takedowns.

2. It has been the SEC's view that private equity lines, because of their delayed nature and because when the takedown price is based on a formula tied to market price of the security the purchasers would not be at risk, are indirect primary offerings. Accordingly, as a general rule, Form S-3 may be used only if the issuer is eligible to use Form S-3 for primary offerings and the purchasers under the line must be identified as underwriters and are subject to the restrictions applicable to underwriters in a primary offering (e.g., Regulation M). See "Current Issues and Rulemaking Projects Quarterly Update" dated March 31, 2001 of the SEC's Division

of Corporation Finance, at § VIII, "Equity Line Financings," which replaced Telephone Interpretations Supplement, #4S. Equity lines were addressed in C&DI §§ 139.12 to 139.24, with §§ 139.15 to 139.20 being withdrawn in November 2020. If the issuer is relying on Instruction I.B.6 for a so-called "baby shelf", the entire amount of the equity line must be used in applying the one-third market value cap.

3. Although considered an indirect primary offering, until November 2020 the SEC permitted a resale registration form to be used if the following conditions were met: (i) the private transaction must have been "completed" before filing the registration statement; (ii) the registration statement must have been on the form the company was eligible to use for a primary offering; and (iii) the investor must have been identified in the prospectus as an underwriter, as well as a selling security holder. For the transaction to be "completed," the investor must have been irrevocably bound to purchase all the securities if the company exercised the put subject only to conditions outside the investor's control. This did not permit a "diligence out" or for the investor to have the right to transfer its obligation under the equity line or to acquire additional securities (such as through the exercise of warrants) at the same time or after the issuer exercises the put. Provisions allowing the investor to affect the timing or price or allowing termination of the put were also suspect. Also, the company could not put securities convertible into the common shares being registered because the investor would have a further investment decision regarding whether to convert and purchase the underlying registered shares. If the investor had a right to take interest payments in shares, the transaction similarly might not have been considered "completed."

4. In November 2020, the SEC updated C&DI § 139.13 by eliminating the requirement that the transaction be "completed" and instead requiring that there be a binding agreement under which the number of shares registered for resale, the maximum principal amount of the equity line, the term of the agreement and the full discounted price or formula for determining the price are agreed upon. It also requires that there be an existing market for the shares as evidenced by trading on a national securities exchange or registered alternative trading system. The other two conditions regarding the form of registration statement and identification of the investor as an underwriter remain.

5. If these conditions are not met, the resale may not be registered unless the company is eligible to use Form S-3 (or Form F-3) for a primary offering and the prospectus addresses the potential violation of § 5 in connection with the private transaction.

6. The Quarterly Update referred to in C.2 above also addresses the need in private equity line transactions to comply with Regulation M and FINRA pre-filing requirements.

7. The SEC has strictly applied its interpretations that allow private equity lines. These positions were taken when the transaction being "completed" was a requirement, and so it remains to be seen which positions will continue to apply. For example, the SEC took the position that an investor cannot have convertible securities or warrants at the same time as it does an equity line, at least if the two transactions are related, because looked at as a whole, the private offering was not "completed" given the additional investment decision that could be made. Thus, the SEC questioned bridge loans closely related to equity lines, at least where the loan was convertible or accompanied by warrants. The SEC also raised questions about the amount of securities being registered being disproportionate to the size of the issuer's capitalization and

indicated that a private equity line cannot be done with an affiliate. The SEC in the past provided the following guidance on private equity line issues:

- Because the equity line had to have been completed when the registration statement was filed, there could be no renegotiation of material terms (such as extending the term of the line). This position likely will continue to apply because of the binding agreement requirement.

- The SEC position that permits an equity line to be registered as a resale registration so long as the issuer uses a form for which it is eligible for a primary offering is not available if the investor is an affiliate because the offering is then deemed to be a direct primary offering.

- Any caps imposed on the investor's ability to acquire shares will be ignored by the staff in assessing affiliate status.

- The SEC will object to the use of escrows for the committed funds.

- Because of the "completed" requirement, any floor or ceiling to the price collar could not be waived. This may continue to apply because of the binding agreement requirement.

- The investor could not be in a position to reject or delay the issuer's ability to call on the equity line, such as through a diligence provision or a certification requirement. This related to the "completed" requirement and thus may no longer apply.

- The investor's obligation cannot be transferable or assignable. This was covered by withdrawn C&DI § 139.16 and related to "completed" and so it is not clear whether it continues to apply.

- The investor cannot have a convertible security or warrants in connection with an equity line because it would then have a further investment decision. This was covered by withdrawn C&DI § 139.20 but it is not clear whether it might continue to apply.

- The equity line cannot be used to effect an initial public offering; rather there must be an existing trading market. This is now reflected expressly in updated C&DI § 139.13.

- The investor cannot receive convertible securities or warrants before registration of the equity line. This was covered by withdrawn C&DI § 139.17 but it is not clear whether it might continue to apply.

- There must be adequate disclosure of all fees, side deals and related transaction, as well as the proposed use of proceeds from the line (such as repayment of loans).

- If the amount of securities being registered is substantial in relation to the issuer's public market float the offering will be considered to be in reality an issuer primary offering, with the investor being an "underwriter".

See Keller and Hicks, *"Unblocking Clogged PIPEs: SEC Focuses on Availability of Rule 415,"* INSIGHTS, May 2007 at p.2, which was written before the SEC updated its private equity line guidance.

D. Converting to a Public Offering

1. The SEC has not permitted a transaction commenced as a private offering to be converted to a registered offering covering the issuance of the securities. They have viewed this as inconsistent with the registration provisions and a violation of § 5(c) of the Securities Act. See "Current Issues and Rulemaking Projects" dated November 14, 2000 of the SEC's Division of Corporation Finance at § VIII.A.9 (second paragraph) and C&DI §§ 139.06 and 139.09.

2. However, if the private offering is terminated, the SEC, in the past, allowed a subsequent registered offering. See point 4 of the *Black Box* letter. Prior to the Comprehensive Revision Release, the SEC had not articulated what was necessary for termination of the private offering, but had indicated that private practitioners could make that determination. The traditional five-factors of Release No. 33-4552 was considered relevant. Although sales to different investors could be helpful, the SEC indicated that investors contacted in the private offering were not necessarily foreclosed from participating in the registered offering.

3. As noted above, Rule 155, before it was rescinded, had established a safe harbor for doing a registered offering following an abandoned private offering, but it did not address what was required for termination of the private offering for purposes of prior Rule 152 outside the safe harbor. Revised Rule 152(d) now addresses the concept of "termination and completion" of offerings and safe harbor (3) under revised Rule 152(b) for subsequent registered offerings could address these concerns. See IV.4 above.

4. In addition, the ability to test-the-waters with QIBs and institutional accredited investors, as provided in the JOBS Act for EGCs and extended by the SEC in Rule 163B to all issuers, as well as under Rule 255 of Regulation A, also should be relevant to the analysis and permit discussing a private offering with these investors and then deciding whether to complete the private offering or abandon it and proceed with the public offering. Similarly, new Rule 241 permitting generic test-the-waters (i.e., before the issuer decides which exemption to use) could similarly be relevant. Moreover, with general solicitation being permitted for a Rule 506(c) offering, it should be possible to complete the private offering and include these investors in a public offering, subject to the limitations of the Rule 152(b) safe harbor addressing gun-jumping.

5. In *United States Enrichment Corporation* (avail. May 13, 1998) the question was posed whether a company could simultaneously pursue a private sale of the company and an initial public offering, with a decision which way to go being made before filing the registration statement. The facts were unique, involving the privatization of a U.S. government corporation, but the SEC confirmed that the acquisition process could be terminated before filing the registration statement and would not be integrated with the initial public offering. This was a

fairly obvious application of Rule 152 and *Black Box* point 4. A more interesting question would have been whether the efforts to privately sell the company could have continued during the pendency of the registration statement. The answer should be that, although the five-factor test no longer applies as such, nevertheless it could have continued relevance in a facts and circumstances analysis under the general integration principle of revised Rule 152(a) based on the private sale efforts not being for capital raising purposes but rather being to dispose of the entire company. The analysis could be more complicated if it were a disposition of only a partial interest in the company, particularly a minority interest. If, however, the private offering is structured as a Rule 506(c) offering with sales solely to verified accredited investors, there should be no issue, again possibly subject to the limitations of the Rule 152(b) safe harbor. An alternative situation that also should have been made easier after the JOBS Act, adoption of Rule 163B and revised Rule 152 is the now common practice of a company proceeding simultaneously with a dual track of a potential sale of the company and an initial public offering until a decision is made which route to follow.

E. Pre-IPO Options

1. A product of the era of rapidly appreciating dot.com offerings was the demand of venture capitalist and other pre-IPO investors to have the right to participate in a future initial public offering. This right, which continues to be common in the case of institutional investment in non-public companies, can take the form of a firm option similar to a preemptive right or a best efforts undertaking by the issuer to make available to the investor shares offered in a future IPO (e.g., the right to participate in a directed share program). *See* Lubowitz and Weinberg, *"IPO Participation Rights,"* INSIGHTS, July 2000 at p. 7.

2. Initially, the SEC treated these pre-IPO options as a violation of § 5 and required risk factor disclosure of rescission rights. This ceased to be the SEC's position if a *Black Box* or Rule 152 analysis applies.

3. It has been the SEC's position that if an IPO is commenced (i.e., a registration statement is filed) within one year of the grant of the pre-IPO option (whether a firm commitment or a best efforts undertaking), the private "offer" of the participation right before filing of the registration statement must be completed privately, either separately or as part of the IPO. If grant of the pre-IPO option were completed for purposes of prior Rule 152 (which may occur in this context even though the purchase price is the IPO price and the investor is therefore not at market risk) or if the investors satisfied the *Black Box* criteria of being QIBs or two or three large institutional accredited investors, exercise of the option would not be integrated with the IPO. This should continue to be the case under revised Rule 152. The securities purchased pursuant to the option would be "restricted" and eligible for resale pursuant to a resale registration statement or an exemption from registration, such as Rule 144.

4. The private bar expressed the view that, in most cases, the prospects of an IPO are sufficiently inchoate and uncertain that an "offer" should not be considered as having been made. The SEC does not appear to have accepted this view if the IPO in fact commences within one year.

VIII. PUBLIC TO PRIVATE OFFERINGS

A. Limited Public Offerings

The SEC has confirmed that a registered offering to a limited number of investors, such as a registered direct offering, is permissible and, based on the *American Council of Life Insurance* letter, the investors will not be presumptive underwriters and will receive freely tradable securities so long as they purchased in the ordinary course, were not market intermediaries and had no arrangements for redistribution. Although the *American Council of Life Insurance* letter focused on institutional investors, its principle should also apply to non-institutional investors.

B. Withdrawn Registrations

1. As noted above, the SEC's position has been that the filing of a registration statement constitutes the commencement of a public offering and, in broad terms, a general solicitation. There is no indication in the 2020 Adopting Release that this position has changed as a result of adoption of the New Integration Framework. Presumably, the pendency of the filed registration statement may constitute a continuing general solicitation. The confidential submission of a registration statement by an issuer should not, however, itself constitute general solicitation. In view of the SEC's historic position, a filed registration statement might have to be withdrawn before a private offering that does not permit general solicitation and that would otherwise be integrated with the registered offering could be undertaken. Withdrawal of the registration statement was an express condition of the former Rule 155 safe harbor. However, under revised Rule 152, the private offering might be able to be done without withdrawal of the registration statement if the provisions of Rule 152, for example the existence of a preexisting, substantive relationship with each purchaser, are satisfied as discussed below. An alternative to withdrawal for a public company eligible to use Form S-3 for a primary offering might be to convert the registration statement to a generic shelf registration. See D below.

2. Prior to the adoption of revised Rule 152, the SEC expressed concern over the availability of an exemption for a private offering that followed a withdrawn registration statement of the same class of securities. See the CorpFin Outline at § VIII.A.9 (first paragraph) and C&DI § 139.08; see also note 122 to the Reg. D Proposing Release. That concern is likely to continue if the general solicitation presumed from the registered offering prevents the ability to rely on Rule 152.

3. The situation could be particularly difficult for a company that files for an IPO only to have the IPO window close on it. Often, there would be a confidential submission or a "quiet filing" with no marketing activity. While not determinative, the absence of marketing activity should be a helpful factor in negating the existence of general solicitation that is attributed to the subsequent private offering.

4. It is possible that a private offering could be sufficiently separated from the registered offering, for example, by applying aspects of the former five-factor test (such as use of a different security or separation of time after the withdrawal of the registration statement), so that integration could be avoided on a facts and circumstances basis under the general principle of Rule 152(a).

5. As before the adoption of revised Rule 152, there are various alternatives for a company faced with the need to raise capital privately after filing a registration statement. These might include (i) use of a different security or the passage of time in order to avoid integration and permit an exempt private offering, as well as carefully limiting the private purchasers to those who were not solicited through general solicitation or with whom there was a preexisting, substantive relationship, (ii) use of Regulation S for sales offshore,[8] (iii) proceeding under the registration statement for sales to the investors to whom the securities would have been sold privately, or (iv) using Rule 506(c) under which general solicitation is permitted (having in mind the limitation in safe harbor (3) of Rule152(b), if it is relied on). Some companies have structured the security so that the underlying common stock cannot be acquired for at least a year in order to avoid integration with a failed registered common stock offering based on there not being a current offer of the common stock under § 2(a)(3).[9] Other companies have relied on *Black Box* and completed the private offering to *Black Box* eligible investors, either immediately if there had been no marketing activity or after waiting a suitable interval (sometimes as little as 30 days) to complete the private offering if there had been marketing activity, or they have otherwise satisfied themselves after a suitable interval that the nature of the investors was such and their relationship with the company existed independent of the marketing of the registered offering that a private offering exemption could be relied on. See this author's article, *"What Can We Do Now That Our Public Offering Has Aborted,"* INSIGHTS, July 2000 at p. 3, written before the adoption of former Rule 155, Rule 506(c) or revised Rule 152.

6. The principles underlying the Commission's guidance in the Reg. D Proposing Release, and now reflected as part of the New Integration Framework in revised Rule 152, might come into play here based on a facts and circumstances analysis under Rule 152(a). If an issuer can do a private offering while a registration statement is pending, it should be able to do that same offering after the registration statement has been withdrawn, assuming the criteria for an exempt private offering can be met.

7. The ability to test-the-waters before or after the filing of a registration statement might provide another alternative since the test-the-waters activity is not gun-jumping in violation of § 5(c) and therefore should not foreclose switching to a private offering without

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[8]As to Regulation S offerings, see Release No. 33-6863, *"Offshore Offers and Sales"* (Apr. 24, 1990) at III.C.1; Release No. 33-7392, *"Offshore Offers and Sales"* (Feb. 20, 1997), in which the Commission proposed amendments to Regulation S to address abusive practices; and Release No. 33-7190, *"Problematic Practices Under Regulation S"* (June 27, 1995), an interpretive release addressing certain abusive practices. The amendments were adopted in Release No. 33-7505, *"Offshore Offers and Sales (Regulation S)"* (Feb. 17, 1998). See also the 2020 Adopting Release at II.A.2.b.

[9]A question when convertible securities are being used is whether they can be made mandatorily convertible upon an IPO which may occur within the one year period. Some lawyers believe that this should not affect the no "offer" analysis for purposes of integration since the conversion would be outside the investor's control and would not involve an investment decision. Other lawyers are concerned that the analysis of mandatorily exchangeable securities in which the sale of the underlying security is deemed to occur when the primary security is sold might be applied and result in a current offer. Given the customary nature, for the benefit of issuers, of provisions requiring mandatory conversion of convertible securities upon an IPO and the uncertainty that an IPO will occur, the SEC could reach a conclusion that it is not necessary to apply the mandatorily exchangeable securities analysis in this circumstance and that therefore such a provision would not result in a current offer that would be integrated being present.

general solicitation based on a facts and circumstances analysis under Rule 152(a) or as a Rule 506(c) offering.

C. Completed Public Offering

The SEC applied the same analysis to private offerings following a completed registered public offering. Accordingly, it is important to structure the subsequent private offering so that it is separate from the registered public offering for purposes of Rule 152 and, if necessary, to negate the existence of general solicitation to private purchasers if the exemption relied upon does not permit general solicitation.

D. Shelf Registrations

1. The SEC has indicated that the pendency of a shelf registration, whether a traditional shelf of a specific security or a generic or universal shelf, would not prevent an exempt private offering from being done so long as the security being privately offered had not been taken off the shelf for offering under the registration statement. See the CorpFin Outline at § VIII.A.9 (first paragraph) and Release Nos. 33-7856, 34-42728, *"Use of Electronic Media"* (Apr. 28, 2000), at note 10.

2. The question comes up whether a resale shelf registration under which securities are actively being sold will constitute general solicitation preventing a private offering in which general solicitation is not permitted of similar securities by the issuer. For example, if the issuer files a resale S-3 registration statement covering common stock previously privately placed with investors, may the issuer engage in a private offering of its common stock? The answer should be that a bona fide registered secondary offering ordinarily should not be integrated with a primary offering based upon a facts and circumstances analysis under the general principle of Rule 152(a) because the offerings are for different purposes and involve different sellers.

3. One situation where there might be a problem with the resale registration is when there is a burst PIPE if the issuer's offering after filing the resale registration statement is deemed part of the same offering as the private placement of the securities subject to the resale registration statement, resulting in loss of the exemption. See VI.B.3 above. Another situation that might present a problem is where a broker-dealer that participated in the private placement is included as a selling shareholder under the resale S-3. The SEC could take the position that the broker-dealer is acting as an underwriter and its resale is really a primary offering. The mere existence of a broker-dealer as a selling shareholder, however, should not create a problem where that broker-dealer did not participate in the private placement. The SEC, however, has sometimes taken the position that any broker-dealer, and even an affiliate of a broker-dealer, is an underwriter and therefore that there is a primary offering for which the issuer might not be S-3 eligible.

IX. ACQUISITIONS AND EXCHANGE OFFERS

A. Resale Registration

The Rule 152 analysis for PIPE transactions (both before and after the revision of Rule 152) would apply in the case of acquisitions where the private offering exemption is relied upon for the offer of the acquirer's securities as the merger consideration and a registration statement

covering resales of the securities is filed before the merger is completed. This also would be the case if Regulation A is used because a Regulation A offering is encompassed in Rule 152. A condition that could prevent the private offering from being completed is the need for shareholder approval by the acquired company. As long as there are sufficient binding voting commitments in place for the merger before the registration statement is filed, the Rule 152 completion test would be satisfied.

B. Voting and Tender Commitments

1. The SEC has raised questions about the status of the shares as to which commitments to vote in favor of the merger were obtained in negotiated acquisitions prior to the filing of the Form S-4 registration statement. It has been traditional for acquirers to seek voting commitments from key shareholders in order to increase the likelihood that the transaction will be approved and the merger consummated. The SEC's concern is that a private offering took place in connection with obtaining the commitments and therefore the committed shares cannot be included under the Form S-4 for issuance in the merger but rather are restricted securities eligible for resale registration.

2. The SEC has recognized traditional practice and permits shares of major shareholders, directors and key employees that are subject to voting commitments to be included in the Form S-4, at least in the case of public companies or companies for which the acquisition could not be done as a private offering and less than 100% of the voting shares have been locked up. See the CorpFin Outline at § VIII.A.9 (third paragraph). This position was proposed to be codified in the Comprehensive Revision Release by the adoption of Rule 159. That rule was not adopted. This position has been codified in C&DI § 239.13 (also in § 225.10). That interpretation makes clear, however, that written consents, because they are the corporate action and not executory, will be treated as a sale and thus the shares to which they relate may not be included in the subsequent Form S-4.

3. In the past, the SEC sometimes was unwilling to apply this voting commitment policy to closely-held companies and even raised the question whether S-4 registration can be used at all, particularly when the committed shares are sufficient to effect the corporate action. As reflected in C&DI § 239.13, this is no longer the SEC's position so long as the conditions of C&DI § 239.13 are satisfied and the commitment is a voting agreement and not a written consent that effects the corporate action. Those conditions are that the voting commitments are only from insiders (i.e., executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the voting stock of the target), are for less than 100% of the voting shares and votes will be solicited from shareholders who have not committed to vote and would be ineligible to purchase in a private offering.

4. An alternative for dealing with these issues is use of an S-4 acquisition shelf registration statement. See *Service Corporation International* (avail. Dec. 2, 1985).

5. In November 2009, the SEC extended its voting commitment position to commitments to tender in negotiated third party exchange offers and in debt exchange offers. C&DI § 139.30 extends to negotiated third party exchange offers (i.e., share for share acquisitions) the same relief extended to voting commitments in merger or sale of assets transactions, subject to

the same limitations, together with a requirement that the tender offer be made to all shareholders of the target at the same consideration. This position does not apply to unfriendly exchange offers. Thus, commitments can now be obtained from eligible shareholders in negotiated acquisitions regardless of the form of the transaction. C&DI § 139.29 extends this relief to debt exchange offers so long as commitments to exchange are limited to accredited investors who own less than 100% of the particular series and the tender offer will be made to all holders of that series at the same consideration. This position eliminates the impediment that existed for registered debt exchange offers that was caused by the inability to obtain market-tested commitments from key debtholders. In both cases, actual tenders and signing letters of transmittal are not permitted. See this author's article, "*SEC Expands Position on Use of Lock-Up Agreements*," INSIGHTS, January 2010 at p. 35.

X. APPLICATION OF NEW INTEGRATION FRAMEWORK

1. As a result of the New Integration Framework, practitioners no longer need to apply the five-factor test that prompted looking at concurrent and subsequent offerings together to determine the availability of an exemption absent a specific safe harbor being available. Instead, revised Rule 152 addresses concurrent and sequential exempt and registered offerings and multiple exempt offerings and now permits treating the offerings separately to determine if on their own they comply with the applicable requirements for that offering or whether one of the safe harbors under Rule 152(b) applies. For exemptions that do not permit general solicitation, the analysis focuses on whether a purchaser was obtained through impermissible general solicitation or whether the issuer or its agent had a preexisting, substantive relationship with the investor. In connection with analyzing whether there was a general solicitation and whether an exemption relied upon was complied with, it also is necessary to examine whether offering material for other offerings contains material terms of the offering being undertaken that might be considered an offer and general solicitation for that offering.

2. The New Integration Framework, besides eliminating the historic five-factor test, should change the way an integration analysis is approached. Instead of having to determine whether ostensibly different offerings can be treated separately, the question should be whether they need to be integrated and therefore analyzed together to determine whether there is an exemption or compliance with the registration provisions. The focus should be, first, on whether what in reality is a single offering was ostensibly separated in order to fit within an exemption — i.e., was it in reality a device to avoid the registration requirements, and second, whether the method of offering complied with the applicable requirements — i.e., whether there was impermissible general solicitation or whether offering materials deemed to apply to the offering failed to comply with the requirements for the particular offering. This change in the approach to integration requires a new way of thinking by practitioners and by the SEC and its staff in applying and interpreting the New Integration Framework.

3. As a practical matter, the approach that practitioners usually will follow in doing the integration analysis will be first to see if a safe harbor applies. Except for the fire walls for Rule 701 and Regulation S offerings, the safe harbors under Rule 152(b) apply to sequential offerings. If, on the other hand, the analysis relates to concurrent offerings that do not involve Rule 701 or Regulation S, then the general integration principle under Rule 152(a) will be the focus of the analysis. Even if a safe harbor under Rule 152(b) is not available for particular sequential

offerings, it is possible that a facts and circumstances analysis under Rule 152(a) could result in the offerings not being integrated.

4. Applying this practical approach, if the offerings are sequential and 30 calendar days apart, the 30-calendar days safe harbor under Rule 152(b)(1) ordinarily can be relied upon. Practitioners should be aware, however, of limitations built into the New Integration Framework to prevent abuses. First, Rule 152 includes an introductory paragraph that the rule will not avoid integration when there is a plan or scheme to avoid the registration requirements. Thus, an issuer cannot commence an offering that ostensibly permits general solicitation in order to identify potential investors who it can go back to for an offering that does not permit general solicitation after 30 calendar days (see IV.7 above). Moreover, the safe harbor itself provides that in this situation, as stated in Rule 152(a)(1), the issuer must have a reasonable belief that (i) each investor was not solicited by general solicitation or (ii) a substantive relationship had been established with the investor prior to commencement of the offering, and the 2020 Adopting Release, text at note 128, makes clear that the original solicitation could have been the commencement of the offering for this purpose. In addition, Rule 506(b) was amended to provide that the 35 non-accredited investor limitation applied to any offerings within a 90-calendar day period in order to prevent use of Rule 506(b) for a series of offerings to up to 35 non-accredited investors monthly.

5. In the case of sequential offerings within the 30-calendar days period (not involving Rule 701 or Regulation S), the safe harbors under Rule 152(b)(3) or (4) could apply. Under safe harbor (3) a terminated or completed offering (applying the factors identified in Rule 152(d)) and a subsequent registered offering will not be integrated, provided if general solicitation was permitted in the prior offering that offering was made only to QIBs and institutional accredited investors or the prior offering was terminated or completed more than 30 calendar days before commencement of the registered offering (applying the factors identified in Rule 152(c)). This safe harbor essentially codifies prior Rule 152 although making it more broadly applicable but with a limitation to protect against gun-jumping. Safe harbor (4) essentially extends this protection to subsequent exempt offerings that permit general solicitation (e.g., Rule 506(c)) by providing that such an offering will not be integrated with a prior terminated or completed offering, thus recognizing that subsequent general solicitation need not be attributed to an offering that is terminated or completed (applying the Rule 152(d) factors).

6. For concurrent offerings or sequential offerings for which a safe harbor does not apply, the analysis would have to be made under the general integration principle of Rule 152(a) on a facts and circumstances basis. In doing this analysis, aspects of the historic five-factor test could be relevant, such as differences in the timing of the offerings, in the types of securities offered and in the purposes of the offerings. For an exempt offering that does not permit general solicitation, the key determination is that the issuer or its agent did not solicit the investor through use of general solicitation or that they had established a substantive relationship with the investor prior to commencement of the offering. For concurrent exempt offerings that permit general solicitation, in addition to satisfying the requirements of the exemption, the offering materials for one offering that include material terms of the other offering may be an offer for the other offering and therefore must comply with the requirements and restrictions applicable to that other offering.

7. The application of the New Integration Framework, applying the foregoing analysis, can best be understood by considering the following examples:

(a) A company that recently completed an exempt offering under § 4(a)(2) or Rule 506(b) (or another exemption for which general solicitation is not permitted) now wants to do a Rule 506(c) offering solely to verified accredited investors using general solicitation. Assuming the offerings might otherwise be subject to integration, a question has been whether the general solicitation in the subsequent offering would relate back and defeat the exemption for the prior offering and whether the presence of non-accredited investors in the prior offering would defeat the Rule 506(c) offering exemption. Before the adoption of the New Integration Framework, the SEC answered this question in C&DI § 256.34 in the case of a Rule 506(c) offering following a completed Rule 506(b) offering, indicating that prior Rule 152 applied to prevent loss of the exempt status of the 506(b) offering notwithstanding the subsequent public offering, treating the 506(c) offering as a public offering for this purpose, and that each offering would be exempt so long as it met the requirements for its exemption. This same analysis should have applied to a completed § 4(a)(2) offering but the status of other exempt offerings (such as a private Rule 504 offering) was unclear in view of the reluctance of the SEC to extend prior Rule 152 beyond exempt private offerings.[10] The SEC's guidance in C&DI §256.34 is reflected in revised Rule 152 and is not limited to "private offerings" as may have been the case with prior Rule 152. Under safe harbor (4) of Rule 152(b), the Rule 506(c) offering will not be integrated with the prior completed 506(b) or other offering in which general solicitation was not permitted. If the offerings are separated by 30 days, safe harbor (1) would apply and the prior offering will not be integrated so long as the requirements for its own exemption (e.g., no general solicitation) were met. Even if the offerings are within 30 days of each other, the prior offering will not be integrated under the general principle of Rule 152(a) so long as, for each purchaser, the issuer has a reasonable belief that the purchaser was not solicited by general solicitation or there was a preexisting, substantive relationship with the purchaser. Presumably, because the prior offering was completed before the Rule 506(c) offering was commenced, the general solicitation used in the Rule 506(c) offering would not be applicable to the purchasers in the prior offering.

Instead of completing the exempt offering that did not permit general solicitation that it began, the company, before any sales are made, decides to convert to a Rule 506(c) offering with general solicitation. This was permissible before adoption of the New

[10]Previously, the SEC indicated in the Rule 506 Adopting Release at p. 19 that general solicitation under Rule 506(c) after the effective date would not affect the exempt status of offers and sales made prior to the effective date in reliance on Rule 506 as it then existed (now Rule 506(b)). Then Chairman White also indicated in a letter dated August 8, 2013 to Congressman McHenry, *avail. http://www.wowlw.com/White%20Response%20to%20McHenry%20Letter.pdf*, that any proposed revision of Rule 506 would not apply to offerings prior to the effective date of such revision and so issuers could comfortably rely on Rule 506(c) as then in effect. On January 23, 2014, the SEC issued C&DI §§ 260.33 and 260.34 providing further transitional guidance. If an issuer began a Rule 506 offering before the September 23, 2013 effective date and after that date continued the offering under Rule 506(c), it only had to take reasonable verification steps for investors who purchased after the effective date in the Rule 506(c) offering and not those who purchased before. If the issuer sold to non-accredited investors before or after September 23, 2013 in reliance on Rule 506 or Rule 506(b), it could continue the offering in reliance on Rule 506(c) without impairing the exemption for the prior sales so long as subsequent sales are limited to accredited investors for which the issuer had taken reasonable verification steps.

Integration Framework (see C&DI § 260.12) and remains so after its adoption so long as the requirements of Rule 506(c) are met, and the same offering materials may be used. See the discussion of safe harbor (4) of Rule 152(b) in the 2020 Adopting Release in the text at notes 175 and 176.

Alternatively, before the Rule 506(b) or other offering in which general solicitation is not permitted is completed the company decides to do a concurrent Rule 506(c) offering. As before adoption of the New Integration Framework, doing concurrent exempt offerings presents challenges but can be done in particular circumstances. Thus, before adoption of the New Integration Framework, an analysis applying *Black Box*, the Macy's position or the Regulation D Proposing Release guidance might have been used to avoid integration. Under the New Integration Framework, since these are concurrent rather than sequential offerings, the safe harbors under Rule 152(b) will not apply and therefore the analysis would be under the general integration principle of Rule 152(a). Similar considerations as applied before should still be relevant for a facts and circumstances analysis under Rule 152(a), with the key issue for the non-Rule 506(c) offering being the absence of general solicitation or the existence of a preexisting, substantive relationship, with care being taken to avoid any general solicitation in the Rule 506(c) offering applying to the other offering, and for the Rule 506(c) offering to comply with the requirement that it be solely to verified accredited investors. The 2020 Adopting Release in §II.A.1.c.iii confirms that under the general integration principle of Rule 152(a) issuers may conduct concurrent Rule 506(c) and 506(b) offerings (or any other combination of concurrent offerings involving an offering permitting general solicitation and one prohibiting it) without integration concerns, so long as the provisions of Rule 152(a)(1) and all other conditions of the applicable exemptions are satisfied. It is not clear whether *Black Box* would apply by its literal terms but the QIBs and institutional accredited investors permitted under *Black Box* are likely to satisfy the criteria to avoid integration and, in any case, would be eligible to participate in the Rule 506(c) offering. The Macy's position should apply since it was bassed upon there having been a preexisting, substantive relationship. The Regulation D Proposing Release guidance is reflected in revised Rule 152.

(b) Consider the reverse of the sequence in (a) so that a company that completes a Rule 506(c) offering using general solicitation wants to do an exempt offering under § 4(a)(2) or Rule 506(b) with sales to non-accredited investors. Again, assume traditional integration principles could prevent the subsequent offering from being exempt because of the general solicitation in the prior Rule 506(c) offering. Before the adoption of the New Integration Framework, if the subsequent offering took place after 6 months, a safe harbor under Regulation D in the case of the Rule 506(b) offering could have been available. If the subsequent offering was within 6 months or if the safe harbor was not available, an analysis like that referred to in (a) might have applied, with a focus on whether the general solicitation in the Rule 506(c) offering would have been attributed to the subsequent offering. Under the New Integration Framework, if the subsequent offering takes place after 30 days, safe harbor (1) of Rule 152(b) could apply so long as the subsequent offering satisfied the requirements for its own exemption. In that connection, purchasers in the subsequent offering cannot have been obtained as a result of the Rule 506(c) general solicitation (or any other general solicitation), which requirement could be satisfied if there was a preexisting, substantive relationship. If the subsequent offering takes place within 30

days, a facts and circumstances analysis under the general principle of Rule 152(a) might result in avoiding integration.

Alternatively, what if, rather than completing the Rule 506(c) offering, the company abandons it after engaging in general solicitation but now wants to raise funds from non-accredited investors apart from the general solicitation. The same analysis as that for a completed offering would apply.

(c) Another situation is a company that undertakes a Rule 506(c) offering using general solicitation and then does a registered offering of the same or similar security. The Rule 506(c) offering may have been completed or it may have been abandoned in favor of the registered offering. Alternatively, the company may have decided to do a side-by-side Rule 506 offering and registered offering. In the case of the completed or terminated Rule 506(c) offering, safe harbor (3) of Rule 152(b) may be available to avoid integration if the registered offering commences after 30 days or, if it commences within 30 days, the Rule 506(c) offering was made only to QIBs and institutional accredited investors in order to address concerns about gun-jumping. If the offerings are made concurrently with or within 30 days of the Rule 506(c) offering being made to non-QIB and non-institutional accredited investors, then a facts and circumstances analysis under the general principle of Rule 152(a) would have to be made, using considerations similar to those that applied before adoption of the New Integration Framework as discussed above. Being satisfied in this situation that integration is not required could be challenging, but carefully structured offerings that keep the Rule 506(c) and registered offerings separate might avoid integration of the two offerings.

(d) The reverse of the situation in (c) would be a company that undertakes a registered offering that is either completed or terminated and then wants to do an exempt private offering of the same or similar security (the concurrent offerings situation is discussed in (c)). If the private offering complies with Rule 506(c), safe harbor (4) of Rule 152(b) should apply. If the private offering is made under §4(a)(2) or Rule 506(b), safe harbor (1) of Rule 152(b) might apply if made after 30 days or otherwise the analysis would be under the general principle of Rule 152(a). In either case, the key would be to be satisfied that the purchaser was not solicited through the use of general solicitation or there was a preexisting, substantive relationship with the purchaser. It also would be advisable to be satisfied that the registered offering was not part of a plan or scheme to generate publicity to identify potential purchasers for the private offering. See III.C.8 above and note 165 of the 2020 Adopting Release. Absent a plan or scheme to evade registration, a relevant question would be the extent to which marketing activity in the public offering will affect the availability of the exemption for the subsequent private offering in which general solicitation is not permitted. This would require a facts and circumstances analysis, considering such factors as the nature of the investors, when any marketing activity occurred, and the nature and timing of any relationship with the prospective investors.

(e) An example of a concurrent public and private offering is a company doing a registered offering and at the same time doing a PIPE transaction. A recent common situation with the growth of SPAC transactions is a SPAC arranging a PIPE transaction at the same time that it is engaged in a de-SPAC merger. In view of the separate nature of

these transactions, they should not present an integration issue. The Commission confirms in note 67 to the 2020 Adopting Release that revised Rule 152 applies to a series of registered and unregistered transactions involving one or more business combination transactions and/or capital-raising transactions that occur concurrently or close in time.

(f) A company does a crowdfunding offering under § 4(a)(6) and complies with the limitations on the offering process required by Regulation Crowdfunding. The company may have done a Rule 506(c) offering with general solicitation before commencing the crowdfunding offering, it may want to do a side-by-side Rule 506 offering or it may want to raise additional capital with a follow-on Rule 506 offering, with or without general solicitation. Alternatively, the company could be doing a Regulation A offering or an intrastate offering under revised Rule 147 or new Rule 147A. In the case of sequential offerings, a safe harbor under Rule 152(b) may apply. In the absence of a safe harbor or in the case of concurrent offerings, the general non-integration principle of Rule 152(a) could apply so long as the condition in clause (2) is satisfied by making sure that the general solicitation materials for one offering that includes information about the material terms of the other offering that makes it an offer for that other offering comply with the requirements for (e.g., legending) and restrictions on (e.g., communications limitations under Regulation Crowdfunding) the first offering. See II.A.1.c.iv of the 2020 Adopting Release. Clause (2) of Rule 152(a) as proposed stated flatly that including material information about the other offering required complying with the requirements and restrictions of the other offering. As adopted, clause (2) added "may constitute an offer." However, the explanation of the clause in the 2020 Adopting Release did not change and it appears that the phrase was added to clarify the reason for having to comply with the requirements and restrictions of the other offering rather than as a limitation on when that was the case. Because disclosure to investors in an offering of the material terms of another offering can be important for adequate disclosure and to avoid violating antifraud rules, and because with careful planning, including limitations on access to offering materials, an issuer should be able to avoid the information being an offer for the other offering, a more flexible approach to the requirement of clause (2) would be appropriate. It would be helpful if the SEC provided guidance to this effect.

(g) An emerging growth company (or any issuer that tests-the-waters), following filing of a registration statement, has test-the-waters communications with several institutional accredited investors to determine their interest in investing in the company and finds that these investors want to invest before the public offering occurs. Since these communications are not gun-jumping, the company should be able to complete a Rule 506 offering solely with these investors, either as a Rule 506(b) or Rule 506(c) offering depending on the circumstances. This should be the case even if marketing activity has occurred, especially if Rule 506(c) is used. Even before amendment of Rule 506 to create Rule 506(c), it was possible to complete a private offering applying a facts and circumstances analysis as permitted by the Regulation D Proposing Release and this should still be the case under revised Rule 152. Furthermore, because the permissible test-the-waters communication is not gun-jumping, an institutional accredited investor's participation in an exempt private offering should not prevent it from buying in the public offering.

(h) As a result of the amendment of Rule 144A after the JOBS Act, a company can conduct a Rule 144A offering using general solicitation following a private offering under § 4(a)(2) to the initial purchasers. As recognized in the Rule 506 Proposing and Adopting Releases, the general solicitation in the 144A offering would not affect the exemption for the offering to the initial purchasers because of Rule 144A(e). Furthermore, so long as the initial offering was done under Rule 506(c) and the initial purchasers were accredited investors, as they typically would be, there should be no hesitation to provide a copy of a prospectus used in a contemporaneous registered public offering to investors in the 144A offering.

(i) A company that does a side-by-side Regulation S offering abroad can do a Rule 506(c) or 144A offering in the United States using general solicitation. The Commission has addressed the issue of the potential integration of these offerings in Section IV of both the Rule 506 Proposing and Adopting Releases. The Commission has confirmed that the existing position reflected in Rule 500(g) and the note to Rule 502(a) that offshore sales under Regulation S will generally not be integrated with a domestic offering will continue to apply notwithstanding the use of general solicitation for the domestic offering and that the general solicitation should not be considered impermissible U.S. directed selling efforts under Regulation S so long as the offerings are conducted in compliance with their applicable exemptions. See II.A.2.b.ii of the 2020 Adopting Release discussing safe harbor (3) of Rule 152(b).

8. A company's use of Rule 506(c) with general solicitation can raise issues regarding exempt resales by selling shareholders, including resales of securities purchased in the Rule 506(c) offering. Unlike an issuer, Rule 506(c) is not available for a selling shareholder, which will need to find its own exemption. Typically, if Rule 144 is not available, an exemption for the resale, like the "4 (1 ½)" or § 4(a)(7) exemption, will not be available if there is general solicitation. An issue is the extent to which the issuer's general solicitation will be attributable to and integrated with the selling shareholder's resale. The answer may depend upon the particular facts and circumstances. See Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee, ABA Business Law Section, "*Legal Opinions on Section 4(1½) Resale Transactions*," 77 Bus. Law. 191 (2021/2022).

XI. CONCLUSION

The SEC has taken significant actions over the years, most importantly with the recent adoption of the New Integration Framework, to bring added clarity and certainty to many of the issues involved in the integration of private and public offerings and in integration generally. It would be helpful, especially in view of the newness of the New Integration Framework, for the SEC to continue to provide guidance on integration issues and application of the New Integration Framework. In doing so, the SEC should have in mind the objective to facilitate capital formation while preserving the necessary level of investor protection.

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