

Small Business Notes

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U.S. Securities and Exchange Commission (SEC) Seeks Comment on Major Questions Surrounding Harmonization of Securities Offering Exemptions

The federal Securities Act of 1933 (the Act) requires that every offer and sale of securities be registered with the SEC unless an exemption from registration has been provided for in the Act or in regulations adopted by the SEC. Registration is intended to provide investors with full disclosure of all material information on the offering and risks associated with investment such that investors can make informed decisions. Exemptions are in place for offerings where there is not a perceived need for the level of information disclosure required in a registered offering; as, for example, for offerings of securities to be sold only to “accredited investors” defined as persons who have sufficient financial sophistication to assess an offering without complex disclosure and who also have the personal financial capacity to bear the risk of loss of their investment. Other exemptions exist based on the type of sale; for example, a private resale of previously purchased securities to an accredited investor.

The amount of capital raised in the exempt market has increased steadily over the past ten years both in absolute terms and in comparison to capital raised through public offerings. For example, in 2018 exempt offerings provided \$2.9 trillion in capital compared with \$1.4 trillion raised in registered offerings.

On June 26, the SEC published in the *Federal Register* a request for comments on ways the SEC might simplify exempt offerings (especially, the request note, for small businesses that may find it difficult to navigate the complexity of the exemptions). Likewise, the SEC’s request sought comment on the need for harmonization of exempt offering requirements (as, for example, to ease an issuer’s movement from one type of exemption to another or to a registered offering as the business grows); and also sought comment on steps that might improve the actual offering process (as, for example, by the use of social media and other new forms of communication). In all cases, the request noted, a continuing goal was to ensure investor protection.

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Across the range of exempt offerings types, Reg. D 506(b); Reg. D 506(c); Reg. D 504; Reg. A; Intrastate Rule 147; Intrastate Rule, 147A; Regulation Crowdfunding; the SEC's notice asks for comments on 19 questions.

1. Does the existing exempt offering framework provide appropriate options for different types of issuers to raise capital? Do the current exemptions meet the needs of small businesses, start ups, businesses in specific industries or regions of the country, businesses led by women, minorities or veterans. What legislative changes would be necessary or beneficial to address any gaps?
2. Do the existing exemptions appropriately address capital formation and investor protection issues? If so should the current exempt offering framework be retained? Are there burdens imposed by the regulations that can be lifted while still providing adequate investor protections?
3. Is the existing exempt offering framework too complex? If so, should the focus of regulation be based on the amount of capital sought or on the number of investors allowed to participate? Would legislative changes be necessary or beneficial to replace the current offering framework?
4. Are the exemptions themselves too complex? Can issuers understand their options and effectively choose the one best suited to their needs? Are there pitfalls in the current exemptions for small offerors that may be unfamiliar with federal securities laws?
5. Should exemptions across the board be revised to focus on investor protection at time of sale rather than at time of offering? Should offers be deregulated entirely? Would legislative changes be necessary or beneficial to change to a time-of-sale focus?
6. What metrics should the SEC consider in evaluating the impact of our exemptions on efficiency, competition, and capital formation?
7. How has technology affected an issuer's ability to communicate with potential and current investors? Are there technologies like online chat or message boards that could provide updated disclosure to potential investors but which are not being used now because of current regulations?
8. Are there rule changes that should be considered to ease the transition from exempt offering to another as the issuer's business develops and grows?
9. What effect, if any, would simplification of exempt offerings have on the registered public markets? Would an exempt issuer remain private longer or forgo registered offerings altogether?
10. What conditions or requirements are most effective or least effective at protecting investors in exempt offerings? Should the SEC add new investor protection conditions and/or eliminate current ones?

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11. Should the SEC consider rule changes that would make exempt offerings more accessible to a broader group of investors than those who now qualify as accredited investors? For example, should the definition of accredited investor be expanded to take into account characteristics other than a person's wealth? Should investors who receive disclosure materials be allowed to opt into accredited status? Should current exemptions be amended or new exemptions put in place to allow for some form of non-accredited investor participation?
12. When current exemptions include offering limits or limits on the amount an individual investor may invest, what standards should there be to determine whether limits and amounts are appropriate?
13. Should initial and continuing disclosure requirements be harmonized across all exemptions?
14. Should the availability of any exemption be conditioned on the involvement of a registered intermediary, such as a registered funding portal or broker-dealer in a crowdfunding offering, particularly where the offering is open to retail investors who may not currently qualify as accredited investors?
15. Should the availability of any exemption be conditioned on particular characteristics of the issuer or lead investor?
16. Should the SEC consider a more unified approach to the exempt offering framework that focuses on the types of investors permitted to invest in the offering and the size of the offering with the investor protections and conditions tailored to those characteristics?
17. Should the SEC consider rule changes that would allow non-accredited investor participation in exempt offerings of all types subject to conditions such as size of offering and amount to be invested that would then allow an investor—after receiving specific disclosure requirements—to opt into the offering? If so, how should the SEC scale the amount of information: by characteristics of the investor or characteristics of the offering?
18. Should the SEC move one or more exemptions into a single regulation as now happens with Reg. D 506(b), 506(c), and 504?
19. How can the SEC improve its communication on the exempt offering framework to issuers and investors?

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Interested and affected parties may submit comments electronically not later than September 24, 2019, at [SEC Concept Releases](#).

Alternatively, an email may be sent to rule-commens@sec.gov. Reference File Number S7-08-19 in the subject line.

Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at [Small Business Notes](#).

Hard copy paper comments should be sent to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, D.C. 20549-1090. Reference File Number 57-08-19.

Respondents should use only one of the above methods.

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