Buchalter
CLIENT ALERT

March 13, 2025

SEC Issues Modified CDI's on Private Placements and Offering Exemptions

By: Alison M. Pear

On March 12, 2025, the SEC dropped a massive amount of changes to their Compliance and Disclosure Interpretations (CDI's) related to Regulation D and other forms of exempt offerings, including clarification (and flexibility!) with respect to what constitutes a general solicitation and when general solicitations can be made. CDI's espouse SEC staff positions (i.e. not binding regulations) on various frequently asked questions. The changes also withdraw a number of obsolete previous interpretations. The new interpretations are aggregated below:

REGULATION D

Question 254.02

Question: May foreign issuers use Regulation D?
Answer: Yes. [March 12, 2025]

Question: May a Canadian issuer use financial statements contained in an MJDS filing to satisfy the information requirements of Rule 502(b)?
Answer: Yes. Rules 502(b)(2)(i)(B)(1) and (2) permit a foreign private issuer to use financial statements prepared in accordance with IFRS to meet Rule 502's information requirements. Financial statements prepared in accordance with IFRS that are included in an MJDS filing may be used to satisfy Rule 502(b)'s information requirements. [March 12, 2025]

Question 255.33

Question: Do non-U.S. investors need to be counted under Rule 501(e) in calculating whether an issuer has exceeded the limit of 35 non-accredited investors in any 90-calendar-day period for all offerings by the issuer made in reliance on Rule 506(b) under Regulation D?
Answer: As explained in Rule 500(g), if the foreign offering meets the safe harbor conditions set forth in Regulation S relating to offerings made outside the United States, then the foreign offering is not required to comply with the conditions of Regulation D, including those limiting the number of investors. But if the issuer elects to rely on Regulation D for offers and sales to non-U.S. investors, the issuer must count the non-U.S. investors in calculating whether it meets the conditions of Regulation D limiting the number of investors. [March 12, 2025]

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Question 256.15

Question: May a Canadian issuer use financial statements contained in an MJDS filing to satisfy the information requirements of Rule 502(b)?
Answer: Yes. Rules 502(b)(2)(i)(B)(1) and (2) permit a foreign private issuer to use financial statements prepared in accordance with IFRS to meet Rule 502's information requirements. Financial statements prepared in accordance with IFRS that are included in an MJDS filing may be used to satisfy Rule 502(b)'s information requirements. [March 12, 2025]

Question 256.27

Question: Are there circumstances under which an issuer, or a person acting on the issuer's behalf, can communicate information about an offering to persons with whom it does not have a pre-existing, substantive relationship without having that information deemed a general solicitation?
Answer: Yes. Under Rule 148, issuers may participate in "demo days" or similar events, pursuant to which such communications that meet the requirements of Rule 148 are not deemed to constitute general solicitation or general advertising. See also Question 256.33.

In addition, the staff is aware of long-standing practices where issuers and persons acting on their behalf are introduced to prospective investors who are members of an informal, personal network of individuals with experience investing in private offerings. For example, we acknowledge that groups of experienced, sophisticated investors, such as "angel investors," share information about offerings through their network and members who have a relationship with a particular issuer may introduce that issuer to other members. Issuers that contact one or more experienced, sophisticated members of the group through this type of referral may be able to rely on those members' network to establish a reasonable belief that other offerees in the network have the necessary financial experience and sophistication.

Whether there has been a general solicitation is a fact-specific determination. In general, the greater the number of persons without financial experience, sophistication or any prior personal or business relationship with the issuer that are contacted by an issuer or persons acting on its behalf through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation. [March 12, 2025]

Question 256.33

Question: Does a demo day or venture fair necessarily constitute a general solicitation for purposes of Rule 502(c)?
Answer: No. Rule 148 provides an exemption from general solicitation or general advertising for communications if made in connection with a seminar or meeting in which more than one issuer participates that is sponsored by a group or entity (such as a university, angel investors, an accelerator, or an incubator) that invites issuers to present their businesses to potential investors with the aim of securing investment, provided that such communications meet the requirements of the rule. The Commission stated that, "[b]ecause communications that comply with proposed Rule 148 would not be deemed a general solicitation or general advertising, the limitations on the manner of offering in Rule 502(c) of Regulation D would not apply." See Securities Act Release No. 10884 (November 2, 2020).

If a demo day or venture fair does not comply with Rule 148, it still may not constitute a general solicitation, depending on the facts and circumstances. See Question 256.27. [March 12, 2025]

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Question 256.35

Question: If an issuer does not satisfy any of the verification safe harbors in Rule 506(c)(2)(ii), are there other methods an issuer can use that will satisfy the requirement to take reasonable steps to verify accredited investor status?
Answer: Yes. The list of methods of verification in Rule 506(c)(2)(ii) are "non-exclusive and non-mandatory." Specifically, the Commission stated that "issuers ... are not required to use any of the methods set forth in the nonexclusive list and can apply the reasonableness standard directly to the specific facts and circumstances presented by the offering and the investors." Securities Act Release No. 10884 (November 2, 2020). As the Commission explained in Securities Act Release No. 9415 (July 10, 2013), "whether the steps taken are 'reasonable' will be an objective determination by the issuer (or those acting on its behalf), in the context of the particular facts and circumstances of each purchaser and transaction. Among the factors that issuers should consider under this facts and circumstances analysis are:

- the nature of the purchaser and the type of accredited investor that the purchaser claims to be;
- the amount and type of information that the issuer has about the purchaser; and
- the nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount."

These factors should be considered in an interconnected manner, and are intended to help guide an issuer in assessing the reasonable likelihood that a purchaser is an accredited investor – which would, in turn, affect the types of steps that would be reasonable to take to verify a purchaser's accredited investor status ... [T]he more likely it appears that a purchaser qualifies as an accredited investor, the fewer steps the issuer would have to take to verify accredited investor status, and vice versa." Securities Act Release No. 9415 (July 10, 2013) [March 12, 2025]

Question 256.36

Question: An issuer is conducting a Rule 506(c) offering where each accredited investor is required to make a high minimum investment in cash. Do the terms of the offering, in particular the minimum investment amounts, satisfy the reasonable steps to verify requirement of Rule 506(c)(2)(ii) for purchasers meeting the minimum investment amount? The issuer has no actual knowledge of any facts indicating that any purchaser is not an accredited investor and the issuer has confirmed with each purchaser that its investment is not being financed in whole or part with funds from a third party.
Answer: Whether the issuer has taken reasonable steps to verify that a purchaser is an accredited investor is an objective determination by the issuer (or those acting on its behalf), in the context of the particular facts and circumstances. See Securities Act Release No. 9415 (July 10, 2013); and Question 256.35. Depending on the facts and circumstances, the issuer may be able to reasonably conclude that reasonable steps to verify have been taken when an offering requires a high minimum investment amount. As explained in Securities Act Release No. 9415 (July 10, 2013), "if the terms of the offering require a high minimum investment amount and a purchaser is able to meet those terms, then the likelihood of that purchaser satisfying the definition of accredited investor may be sufficiently high such that, absent any facts that indicate that the purchaser is not an accredited investor, it may be reasonable for the issuer to take fewer steps to verify or, in certain cases, no additional steps to verify accredited investor status other than to confirm that the purchaser's cash investment is not being financed by a third party." See also the Latham & Watkins LLP no-action letter (Mar. 12, 2025) issued by the Division; and Securities Act Release No. 10884 (Nov. 2, 2020). [March 12, 2025]

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234.02 Rule 506(b) sanctions the use of a representative who advises unsophisticated participants in the offering and thus furnishes the business sophistication required by Section 4(a)(2) that the participants lack personally. Because of the safe-harbor character of the rules and because no-action positions generally are unavailable under Section 4(a)(2), the Division will not express a view whether the use of a purchaser or offeree representative outside Rule 506(b) is an acceptable method to provide the sophistication requirement of Section 4(a)(2) as construed by the courts and the Commission. [March 12, 2025]

REGULATION A

Question 182.01

Question: An issuer elects to non-publicly submit a draft offering statement for staff review pursuant to Rule 252(d) of Regulation A before publicly filing its Form 1-A. The issuer elects to make the non-public, draft offering statements public on the EDGARLink Online submissions page of EDGAR at the time it publicly files its Form 1-A. Would the issuer also be required to refile (1) any non-public, draft offering statement previously submitted pursuant to Rule 252(d), or (2) any related, non-public correspondence submitted by or on behalf of the issuers as an exhibit to Part III?
Answer: No. An issuer may make its initial non-public draft offering statement and all subsequent non-public amendments publicly available on EDGAR at the time it first publicly files its Form 1-A offering statement by logging into its EDGAR account, accessing the webpage "File Regulation A Forms," and selecting the link "Disseminate Draft Offering Statement." The Commission staff, upon completion of the review of the offering statement, will make public on EDGAR all non-public correspondence related to the non-public initial draft offering statement and its amendments. [March 12, 2025]

Question 182.02

Question: If an issuer elects to submit a draft offering statement for non-public staff review before public filing pursuant to Rule 252(d), and, as part of that process, submits correspondence relating to its offering statement, what must it do if it wants to protect portions of that correspondence from public release?
Answer: During the review of the draft offering statement, the issuer would request confidential treatment of any information in the related correspondence pursuant to Rule 83, in the same manner it would during a typical review of a registered offering. It would submit a redacted copy of the correspondence via EDGAR, with the appropriate legend indicating that it was being submitted pursuant to a confidential treatment request under Rule 83. At the same time, it would submit an unredacted version to the Commission, non-publicly on EDGAR, in the manner required by that rule.

EDGAR does not allow an issuer to publicly disseminate any correspondence on EDGAR. Upon the completion of the review, and after qualification, the Commission staff will make all review correspondence public, including correspondence related to the publicly filed Form 1-A and the DOS, as well as staff comment letters. See also Question 182.01 above. [March 12, 2025]

Question 182.10

Question: Are state securities law registration and qualification requirements preempted with respect to resales of securities purchased in a Tier 2 offering, due solely to the securities having initially been sold in a Tier 2 offering?
Answer: No. Pursuant to Section 18(b)(4)(D)(ii) of the Securities Act, state securities law registration and qualification requirements are only preempted with respect to primary offerings of securities by the issuer or secondary offerings by selling securityholders that are qualified pursuant to Regulation A and offered or sold to

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qualified purchasers pursuant to a Tier 2 offering. See [Securities Act Release No. 9741] (March 25, 2015) ("In the final rules, a 'qualified purchaser' for purposes of Section 18(b)(4)(D)(ii) of the Securities Act includes any person to whom securities are offered or sold *in a Tier 2 offering*." [Emphasis added]. Unless otherwise preempted under Section 18 of the Securities Act, resales of securities purchased in a Tier 2 offering must be registered, or offered or sold pursuant to an exemption from registration, with state securities regulators. [March 12, 2025]

CROWDFUNDING (REG CF)

Question 100.01

Question: What information can an issuer disseminate prior to filing the Form C with the Commission and providing it to the relevant intermediary?
Answer: Subject to certain conditions, an issuer may communicate orally or in writing at any time prior to filing a Form C in order to determine whether there is any interest in a contemplated securities offering. These communications are deemed to be offers of a security for purposes of the antifraud provisions of the Federal securities laws. Pursuant to Rule 206, the issuer must clearly state that (i) no money or other consideration is being solicited, and if sent, will not be accepted; (ii) no offer to buy securities can be accepted and no part of the purchase price can be received until the offering statement is filed and only through an intermediary's platform; and (iii) a prospective purchaser's indication of interest involves no obligation or commitment of any kind. Rule 201(z) requires that the issuer include any Rule 206 solicitation materials with the Form C that is filed with the Commission.

For an issuer considering an offering of securities exempt from registration under the Act, but that has not determined a specific exemption from registration on which it intends to rely, Rule 241 permits an issuer to make communications orally or in writing, similar to that permitted under Rule 206, to determine whether there is any interest in a contemplated offering of securities, provided legends similar to those detailed above are included.

In addition, information not constituting an offer of securities may be disseminated by an issuer prior to the commencement of a Regulation Crowdfunding offering. For example, factual business information that does not condition the public mind or arouse public interest in a securities offering is not an offer and may be disseminated widely. The Commission has interpreted the term "offer" broadly and has explained that "the publication of information and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer..." Securities Act Release No. 8591 (July 19, 2005). See also Securities Act Rule 169 and Securities Act Rule C&DI 256.25. [March 12, 2025] [Comparison to prior version]

Question 100.02:

Question: Are non-natural persons that invest in Regulation Crowdfunding offerings subject to investment limits?
Answer: Yes. The investment limits in Rule 100(a)(2) of Regulation Crowdfunding apply to all non-accredited investors. Instead of calculating investment limits based on annual income or net worth, a non-natural person calculates the limits based on its revenue or net assets (as of its most recent fiscal year end). Accredited investors are not subject to investment limits in Regulation Crowdfunding offerings. [March 12, 2025]

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Question 204.01

Question: May an issuer advertise the "terms of the offering" under Regulation Crowdfunding?
Answer: Yes, but any such advertising that is made other than through communication channels provided by the intermediary on the intermediary's platform will be limited to notices that include no more than the information described in Rule 204(b) of Regulation Crowdfunding. "Terms of the offering" is defined to include "the amount of securities offered, the nature of the securities, the price of the securities, the closing date of the offering period, the planned use of proceeds, and the issuer's progress towards its funding target." See Instruction to Rule 204. [March 12, 2025]

WITHDRAWN GUIDANCE

Question 182.04

Question: Is a company that was previously required to file reports with the Commission under Section 15(d) of the Exchange Act, but that has since suspended its Exchange Act reporting obligation, an eligible issuer under Rule 251(b)(2) of Regulation A?
Answer: Yes. A company that has suspended its Exchange Act reporting obligation by satisfying the statutory provisions for suspension in Section 15(d) of the Exchange Act or the requirements of Exchange Act Rule 12h-3 is not considered to be subject to Section 13 or 15(d) of the Exchange Act for purposes of Rule 251(b)(2) of Regulation A. [June 23, 2015] **[Withdrawn March 12, 2025]**

Question 182.06

Question: Is a private wholly-owned subsidiary of an Exchange Act reporting company parent eligible to sell securities pursuant to Regulation A?
Answer: Yes, although the Exchange Act reporting company parent could not be a guarantor or co-issuer of the securities of the private wholly-owned subsidiary. [June 23, 2015] **[Withdrawn March 12, 2025]**

Question 182.17

Question: Paragraph (c)(1)(i) of Part F/S of Form 1-A requires an issuer and, when applicable, other entities for which financial statements are required, to comply with Article 8 of Regulation S-X, as if the issuer was conducting a registered offering on Form S-1, with the exception of the age of financial statement requirements. What are the age of financial statement requirements for Tier 2 offerings?
Answer: While paragraph (c)(1)(i) of Part F/S specifies that Tier 2 offerings may follow paragraphs (b)(3)-(4) of Part F/S for the age of interim financial statements, as the Commission discussed in the Regulation A adopting release, an issuer in a Tier 2 offering may follow the age of financial statements requirements specified in paragraphs (b)(3)-(4) of Part F/S for financial statements covering both the fiscal year and interim periods. See SEC Rel. No. 33-9741 (March 25, 2015), at Section II.C.3.b.(2). [March 31, 2017] **[Withdrawn March 12, 2025]**

Question 256.09
Question: Under Rule 502(b)(2)(i)(B)(2) and (3), if a limited partnership issuer cannot obtain the required financial statements for a Regulation D offering without unreasonable effort or expense, it may provide tax basis financials. Do these provisions also apply to the financial statements required in a Regulation D offering for general partners as well as properties to be acquired?
Answer: Yes. [Jan. 26, 2009] [Withdrawn March 12, 2025]

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Question 257.01

Question: Where must an issuer's notice to the SEC of an exempt offering on Form D be filed?
Answer: On September 15, 2008, a transition period of six months began during which filers have the option of making Form D filings with the SEC in three different ways:

- The old Form D (called "Temporary Form D"), on paper at the SEC's main office, 100 F Street, N.E., Washington, D.C. 20549;
- The new Form D, on paper at the address noted above; and
- The new Form D, electronically, through the Internet, on the SEC's EDGAR filing system.

Beginning March 16, 2009, all filers will be required to file the new Form D electronically, through the Internet, on the SEC's EDGAR filing system. Additionally, beginning March 16, 2009, whenever a company amends a Form D filing — regardless of whether it was originally submitted on paper or electronically, or on Temporary Form D or on new Form D — the company will be required to submit the amendment electronically on the revised Form D. [Jan. 26, 2009] **[Withdrawn March 12, 2025]**

Question 258.05

Question: Instruction to paragraph (b)(2) of Rule 504 contains the example as to the calculation of the aggregate offering price. Does this example contemplate integration of the offerings described?
Answer: No. The example has been provided to demonstrate the operation of the limitation on the aggregate offering price without regard to whether two or more offerings are integrated. [Sept. 20, 2017] [Withdrawn March 12, 2025] **[Withdrawn March 12, 2025]**

Question 260.05

Question: An issuer commenced an offering in reliance on Rule 506 before September 23, 2013, the effective date of the new Rule 506(c) exemption, and filed a Form D notice for the offering. If, pursuant to the transition guidance in Securities Act Release No. 9415 (July 10, 2013), the issuer decides to continue that offering after September 23, 2013 in accordance with Rule 506(c), is the issuer required to file an amendment to the previously-filed Form D to indicate that the issuer is now relying on the Rule 506(c) exemption?
Answer: Yes. As the decision to continue the offering in reliance on Rule 506(c) represents a change in the information provided in the previously-filed Form D, the issuer must file an amendment to the Form D and check the Rule 506(c) box to indicate its reliance on this exemption. If the issuer decides to continue the offering in reliance on Rule 506(b), no amendment to the previously-filed Form D is required solely to reflect this decision. [Nov. 13, 2013] **[Withdrawn March 12, 2025]**

Question 260.33

Question: An issuer commenced an offering in reliance on Rule 506 before September 23, 2013, the effective date of the new Rule 506(c) exemption. The issuer decides, at some point after September 23, 2013, to continue that offering as a Rule 506(c) offering under the transition guidance in Securities Act Release No. 9415 (July 10, 2013). In such circumstances, is the issuer required to take "reasonable steps to verify" the accredited investor status of investors who purchased securities in the offering before the issuer conducted the offering in reliance on Rule 506(c)?
Answer: No. For an offering that commenced before September 23, 2013 and that, pursuant to the Commission's transition guidance, the issuer continues in accordance with Rule 506(c) after that date, the issuer must take

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reasonable steps to verify the accredited investor status of only investors who purchase securities in the offering after the issuer begins to make offers and sales in reliance on Rule 506(c). The issuer must amend any previously-filed Form D to indicate its reliance on the Rule 506(c) exemption for its offering. See Securities Act Rules C&DI 260.05. [Jan. 23, 2014] **[Withdrawn March 12, 2025]**

Question 260.34

Question: An issuer commenced a Rule 506 offering before September 23, 2013 and made sales either before or after that date in reliance on the exemption that, as a result of Securities Act Release No. 9415 (July 10, 2013), became Rule 506(b). The issuer now wishes to continue the offering in reliance on Rule 506(c). Can the issuer rely on the transition guidance in Securities Act Release No. 9415 that permits switching from Rule 506(b) to Rule 506(c) if it already sold securities to non-accredited investors before relying on the Rule 506(c) exemption?
Answer: Yes, as long as all sales of securities in the offering after the issuer begins to offer and sell in reliance on Rule 506(c) are limited to accredited investors and the issuer takes reasonable steps to verify the accredited investor status of those purchasers. [Jan. 23, 2014] **[Withdrawn March 12, 2025]**

Question 130.11
Question: Do the changes to Form D that are effective as of March 16, 2009 require issuers to amend any Form Ds filed on earlier versions of the form?
Answer: No. The fact that the version of Form D in effect on a later date may contain information requirements different from those applicable to a prior filing will not, in and of itself, trigger an obligation to amend a prior Form D filing. [Feb. 27, 2009] **[Withdrawn March 12, 2025]**

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