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SEC Deep-Sixes Offering Integration Test: New Rules Replace the Old Five Factors

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SEC rule changes effective in March of this year have replaced the patchwork of guidance and rules developed over many decades to determine when securities offerings should be "integrated" with one another when deciding whether one or both offerings meet the requirements for an exemption under the Securities Act of 1933. Questions regarding whether such integration is required arise often in connection with privately offered investment funds and privately offered variable insurance products.

Now, major revisions to Rule 152 under the act have effectively superseded the SEC's "five-factor test" that has underpinned the integration analysis for more than five decades. Instead, the basic principle under Rule 152 is now that offerings will not be integrated if each offering either complies with the registration requirements of the act or relies on an exemption from registration that is available for the particular offering. The rule also provides further detail on how that basic principle is to be applied to avoid:

- Integration of an exempt offering under which "general solicitation" is prohibited with one or more offerings under which general solicitation is permitted; or
- Integration of an exempt offering under which general solicitation is permitted with one or more other exempt offerings permitting such general solicitation.

The rule also sets forth a number of "safe harbors" under which, irrespective of the above basic principle, there will be no integration. These safe harbors include that, generally:

- If the commencement of one offering is at least 30 days after the termination of another offering, the two offerings will not be integrated.

- Offshore offers and sales made in reliance on Regulation S under the act will not be integrated with other offerings.
- An offering for which a registration statement has been filed will not be integrated with a previously completed or terminated offering under which general solicitation (i) was not permitted or (ii) was permitted only of "qualified institutional buyers" or "institutional accredited investors."
- An exempt offering under which general solicitation is permitted will not be integrated with a previously terminated or completed offering.

Among other things, Rule 152 now also contains detailed provisions concerning when an offering will be deemed to commence or end for integration purposes of the rule. The SEC release adopting the rule's recent changes contains much explanatory material that may be useful to practitioners in applying the rule's provisions.

Although the changes to Rule 152 are a welcome simplification, codification, and clarification, they do not remove all uncertainties. In this connection, similar to a number of other SEC exemptive rules, Rule 152 now enigmatically provides that it cannot be relied upon to avoid integration of any transactions or series of transactions that, although in technical compliance with the rule, are part of a plan or scheme to evade the act's registration requirements.

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