

Deciding Among Exempt Offering Alternatives

In recent years, there has been a proliferation of exempt offering alternatives. In advising clients regarding which exempt offering alternative may best meet their objectives, we often suggest that they consider, among other things, the amount of capital they seek to raise, whether the ability to use general solicitation or the ability to test the waters is important to their distribution plans, which categories of investors are most likely to participate in the proposed offering, the constraints on resales of the offered securities by investors, and whether state securities registration will be required. We have organized the comparative chart to frame the answers to these questions for issuers and their financial intermediaries.

| Exemption | Section 3(a)(11) | Rule 147 | Rule 147A | Section 4(a)(2) | Rule 504 Regulation D |
|---|---|---|--|---|---|
| Is there a dollar limit? | None. | None. | None. | None. | \$5 million within prior 12 months. |
| Are there filing requirements? | None. | None. | None. | None. | File Form D with SEC not later than 15 days after first sale. Filing not a condition of the exemption. |
| Are there restrictions on the manner of offering? | No limitation other than to maintain intrastate character of offering. | No limitation other than to maintain intrastate character of offering. | General solicitation permitted provided that sales are made only to residents of the state or territory in which the issuer is resident. Offers may be made to out-of-state residents. | No general solicitation or general advertising. | No general solicitation or general advertising unless registered in a state requiring use of a substantive disclosure document or sold under state exemption for sales to accredited investors with general solicitation. |
| Are there issuer and investor requirements? | Issuer and investors must be resident in state. No limitation on number of investors. | Issuer must be resident in state, using "principal place of business" and jurisdiction of organization to determine residency, and meet at least one "doing business" requirement. Investors must be resident in state, using "principal place of business" to determine residency. No limitation on number of investors. | Issuer must be resident in state, using "principal place of business" to determine residency, and meet at least one "doing business" requirement. Investors must be resident in state, using "principal place of business" to determine residency. No limitation on number of investors. | Investors must meet sophistication and access to information test so as not to need protection of registration. | Available to non-reporting companies only if they are not investment companies or blank check companies. Certain "bad actors" are disqualified from participating in Rule 504 offerings. |
| Are there resale restrictions? | Securities must rest within the state. | Limits on resales to persons residing within the state or territory of the offering for 6 months. | Limits on resales to persons residing within the state or territory of the offering for 6 months. | Restricted securities. | Restricted unless registered in a state requiring use of a substantive disclosure document or sold under state exemption for sale to accredited investors with general solicitation. |
| Are the securities exempt from blue sky? | Need to comply with state blue sky laws by registration or state exemption. | Need to comply with state blue sky laws by registration or state exemption. | Need to comply with state blue sky laws by registration or state exemption. | Need to comply with state blue sky laws by registration or state exemption. | Need to comply with state blue sky laws by registration or state exemption. |

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| Type of Offering | Rule 506(b) | Rule 506(c) | Tier 1 Regulation A | Tier 2 Regulation A | Regulation Crowdfunding |
|---|--|---|--|--|--|
| Dollar Limit | None. | None. | \$20 million within prior 12 months but no more than \$6 million by selling security holders. | \$50 million within the prior 12 months but no more than \$15 million by selling security holders. | Up to \$1.07 million in a 12-month period. |
| Filing Requirement | File Form D with SEC not later than 15 days after first sale. | File Form D with the SEC not later than 15 days after first sale. | File test-the-waters documents, Form 1-A, any sales material and report of sales and use of proceeds with the SEC. | File test-the-waters documents, Form 1-A, any sales material and report of sales and use of proceeds with the SEC. Issuer subject to ongoing reporting requirements. | Requires the preparation of a Form C, which resembles a Form 1-A. |
| Manner of Offering | No general solicitation or general advertising under Rule 506(b). | General solicitation permitted provided that all purchasers are accredited investors. | “Testing the waters” permitted before and after filing Form 1-A. Sales permitted after Form 1-A qualified. | “Testing the waters” permitted before and after filing Form 1-A. Sales permitted after Form 1-A qualified. | Offering must be made solely through a platform. |
| Issuer and Investor Requirements | Unlimited number of accredited investors and 35 non-accredited investors that are sophisticated. | Under Rule 506(c), all purchasers must be accredited investors. Issuer must take reasonable steps to verify accredited investor status. Certain “bad actors” are disqualified from participating in Rule 506(c) offerings. | Issuer must be eligible issuer. No investor requirement. | Issuer must be eligible issuer. No investor requirement, but investors who are natural persons and are not accredited investors are subject to an investment limit. | Issuers that are not reporting companies, not funds and not subject to disqualification. |
| Restriction on Resale | Restricted securities. | Restricted securities. | Not restricted securities. | Not restricted securities. | Securities sold in an offering are subject to certain transfer restrictions for 1 year. |
| Blue Sky Exemption | Need to comply with state blue sky laws by registration or state exemption. | Need to comply with state blue sky laws by registration or state exemption. | Subject to state blue sky laws regarding pre-offering review, filing, and anti-fraud. | Not subject to state blue sky laws regarding pre-offering review but subject to state blue sky filing and anti-fraud requirements. | No need to comply with state blue sky laws. |

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