



## Bad Actor Disqualification Provisions of Regulation A, Regulation CF and Regulation D

### Overview

Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) requires the Securities and Exchange Commission (“SEC”) to adopt rules that would make the exemption from registration under the Securities Act of 1933 (“Securities Act”) provided by Rule 506 of Regulation D thereof unavailable for any securities offering in which certain “felons” or other “bad actors” are involved. Effective September 23, 2013, the SEC adopted bad actor disqualifications provisions codified under section (d) of Rule 506.<sup>1</sup>

The disqualification provisions in Rule 506(d) prohibit issuers or other “covered persons” from participating in Rule 506 offerings, if they have been convicted of, or are subject to court or administrative sanctions for, securities fraud or other violations of specified laws.

Similar disqualification provisions are found in Rule 504(b)(3) of Regulation D, Rule 262 of Regulation A and Rule 503 of Regulation Crowdfunding (“Regulation CF”) of the Securities Act, each of which regulations provides a transactional exemption from the registration requirements of the Securities Act.

Under Regulation D, Regulation A or Regulation CF, a disqualification from the use of the applicable exemption occurs if (1) a covered person is involved in the offering, (2) that covered person is subject to one or more of the relevant disqualifying events and (3) the disqualifying event occurs within the lookback period provided by the regulation.

Since 2013, the staff of the SEC Division of Corporation Finance has issued several sets of Securities Act Rules Compliance and Disclosure Interpretations (“C&DI”) relating to the bad actor disqualifications.<sup>2</sup> There has been a noticeable trend of companies steering away from using the Rule 506 exemption in order to avoid the burden of compliance, and instead relying on Section 4(a)(2) of the Securities Act to raise capital.

In early 2020, the SEC, in a proposed rule, noted that while the existing framework governing “bad actor” disqualifications in Regulation D, Regulation A, and Regulation CF was substantially similar in substance across the different exempt offerings, there was inconsistency in the periods of time for determining whether a covered person had engaged in disqualifying acts, the so-called “lookback.”<sup>3</sup> Regulation D measured the lookback from the time of sale, while Regulation A and Regulation CF measured lookback from the time the issuer filed the offering statement. On November 2, 2020, SEC amended<sup>4</sup> the lookback periods in Regulation A and Regulation CF to align with that of Regulation D, to make consistent all their lookback periods to refer to the time of sale. This amendment became effective on March 15, 2021.<sup>5</sup>

### Covered Persons

The Rule 506(d) disqualification provisions are substantially the same as those found in Regulation A and Regulation CF.<sup>6</sup> We note below any material differences. The disqualification provisions apply to the following “covered persons”:

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<sup>1</sup> Release No. 33-9414 (July 10, 2013) (the “Adopting Release”). The Adopting Release is available at: <https://bit.ly/3uPOeul>.

<sup>2</sup> C&DI 260.14 – 260.38 of the SEC’s Securities Act Rules C&DIs can be found at: <https://bit.ly/3ppjVKh>.

<sup>3</sup> See SEC Release 33-10763 (Mar. 4, 2020) at II.G, available at: <https://bit.ly/3pe5g4b>.

<sup>4</sup> Release Nos. 33-10884; 34-90300 (November 2, 2020). The releases are available at: <https://bit.ly/3pcE4D3>.

<sup>5</sup> *Id.*

<sup>6</sup> The disqualification provisions of Rule 504(b)(3) of Regulation D cite Rule 506(d), so they are not separately discussed in this article except where there are material differences.

- the issuer and any predecessor of the issuer;
- any affiliated issuer;
- any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer;<sup>7</sup>
- any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power (based on the Securities Exchange Act of 1934 (the "Exchange Act") Rule 13d-3);
- any promoter (as defined in Rule 405 under the Securities Act) connected with the issuer in any capacity at the time of such sale;<sup>8</sup>
- any investment manager of an issuer that is a pooled investment fund;<sup>9</sup>
- any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities (a "compensated solicitor");
- any general partner or managing member of any such investment manager or solicitor;<sup>10</sup> or
- any director, executive officer or other officer participating in the offering of any such investment manager or solicitor or general partner or managing member of such investment manager or solicitor.<sup>11</sup>

A discussion of some of the terms included in the covered person categories follows.

#### *Affiliated issuer*

An "affiliated issuer" is an affiliate (as defined in Rule 501(b) of Regulation D) of the issuer that is issuing securities in the same offering, including offerings that are subject to integration under Rule 502(a) of Regulation D.<sup>12</sup> The term "affiliated issuer" would generally not include an affiliate of a fund, such as a portfolio company, unless that affiliate was issuing securities in the same offering.

#### *Officer participating in the offering*

Participation in an offering means more than transitory or incidental involvement. Participation in an offering is not limited to solicitation of investors. The term could include activities such as participation or involvement in due diligence activities, involvement in the preparation of disclosure documents, the offer of structuring or other advice, and communication with the issuer, prospective investors or other offering participants. Administrative functions, such as opening brokerage accounts, wiring funds, and bookkeeping activities, are generally not deemed to constitute participating in the offering. The SEC staff has also indicated that persons whose sole involvement with an offering are as members of a compensated solicitor's deal or transaction committee that is responsible for approving the entity's participation in the offering are not "participating" in the offering.<sup>13</sup>

<sup>7</sup> The phrase "other officer participating in the offering" is not in the covered person definition in Rule 503(a) of Regulation CF.

<sup>8</sup> Rule 262(a) of Regulation A also looks for promoters at the time of filing and at the time of any offer after qualification.

<sup>9</sup> Investment managers are not covered persons for the purposes of Regulation A or Regulation CF.

<sup>10</sup> Regulation A and Regulation CF do not include "investment manager" here.

<sup>11</sup> Rule 262(a) of Regulation A does not refer to an "investment manager" here. Rule 503(a) of Regulation CF includes only "any general partner, director, officer or managing member of any such solicitor."

<sup>12</sup> See C&DI 260.16.

<sup>13</sup> See C&DIs 260.18 and 260.19.



### *Beneficial owner of 20% or more of the issuer's outstanding voting equity securities*

A shareholder that becomes a 20% beneficial owner of the issuer's voting equity securities upon completion of the sale of securities in a Rule 506 offering is not a 20% beneficial owner at the time of the sale, for purposes of determining who is a covered person with respect to that offering.<sup>14</sup>

The term "beneficial owner" in Rule 506(d) is interpreted the same way as under Exchange Act Rule 13d-3. "Beneficial owner" under Rule 506(d) means any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, under Exchange Act Rule 13d-3 has or shares, or is deemed to have or share (1) voting power, which includes the power to vote, or to direct the voting of, such security; and/or (2) investment power, which includes the power to dispose of, or to direct the disposition of, such security.<sup>15</sup> For purposes of determining 20% beneficial owners under Rule 506(d), it is necessary to "look through" entities to their controlling persons.<sup>16</sup> In the case where some of the shareholders of a Rule 506 issuer have entered into a voting agreement pursuant to which each shareholder agrees to vote its shares of voting equity securities in favor of director candidates designated by one or more of the other parties, the shareholders have formed a group, and the group beneficially owns the shares beneficially owned by its members.<sup>17</sup> The parties to the voting agreement that have or share the power to vote or direct the vote of shares beneficially owned by other parties to the agreement will beneficially own such shares. Parties that do not have or share the power to vote or direct the vote of other parties' shares would not beneficially own such shares solely as a result of entering into the voting agreement. If the group is a 20% beneficial owner, then disqualification or disclosure obligations would arise from court orders, injunctions, regulatory orders or other triggering events against the group itself. If a party to the voting agreement becomes a 20% beneficial owner because shares of other parties are added to its beneficial ownership, disqualification or disclosure obligations would arise from triggering events against that party.

### **Disqualifying Events**

The disqualifying events under Rule 506(d) of Regulation D, Rule 503(b) of Regulation CF and Rule 262(a) of Regulation A include:

- criminal convictions;
- court injunctions and restraining orders;
- "final orders" of certain state regulators (such as securities, banking and insurance) and federal regulators, including the U.S. Commodity Futures Trading Commission ("CFTC") and the National Credit Union Administration ("NCUA");
- SEC disciplinary orders relating to brokers, dealers, municipal securities dealers, investment advisers, and investment companies and their associated persons;
- certain SEC cease and desist orders;
- suspension or expulsion from membership in, or suspension or barring from association with, a member of a securities self-regulatory organization ("SRO");
- SEC stop orders and orders suspending a Regulation A exemption; and
- U.S. Postal Service false representation orders.

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<sup>14</sup> See C&DI 260.28.

<sup>15</sup> See C&DIs 260.29 and 260.30.

<sup>16</sup> See C&DI 260.30.

<sup>17</sup> See C&DI 260.31 and Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting C&DI 105.06.



A discussion of some of these categories appears below.

#### *Criminal convictions*

Rule 262(a)(1) of Regulation A, Rule 503(a)(1) of Regulation CF and Rule 506(d)(1)(i) of Regulation D each provide for disqualification if any covered person who has been convicted of any felony or misdemeanor in connection with the purchase or sale of any security, involving the making of any false filing with the SEC or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities. In the case of Regulation CF, activities in acting as a funding portal would also be included. The rules include a five-year lookback period for criminal convictions of issuers, their predecessors and affiliated issuers, and a ten-year lookback period for other covered persons. The lookback period is measured from the time of the sale, in the case of Regulation D, or the time of the filing of the offering statement or the time of sale, in the case of Regulations A and CF.

However, actions taken in jurisdictions other than the United States, such as convictions, court orders, injunctions in a foreign court or regulatory orders issued by foreign regulatory authorities will not trigger a disqualification under Rule 506(d).<sup>18</sup>

#### *Injunctions and restraining orders*

Rule 262(a)(2) of Regulation A, Rule 503(a)(2) of Regulation CF and Rule 506(d)(1)(ii) of Regulation D each disqualify any covered person if the covered person is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the sale (or the filing or such sale, in the case of Regulation A or CF), that, at the time of the sale (or filing), restrains or enjoins that person from engaging in or continuing any conduct or practice (i) in connection with the purchase or sale of any security, (ii) involving the making of a false filing with the SEC or (iii) arising out of the conduct of business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities. In the case of Regulation CF, as in the above discussion of criminal convictions, activities in acting as a funding portal would also be included.

#### *Final order*

Rule 261 and Rule 262(a)(3) of Regulation A, Rule 503(a)(3) of Regulation CF and Rules 501(g) and 506(d)(1)(iii) of Regulation D each define a "final order" as a written directive or declaratory statement issued by a federal or state agency described in Rule 262(a)(3), Rule 503(a)(3) of Regulation CF or Rule 506(d)(1)(iii), as applicable, under applicable statutory authority that provides for notice and an opportunity for a hearing, which constitutes a final disposition or action by that federal or state agency.

Each of Rule 262(a)(4) of Regulation A, Rule 503(a)(4) of Regulation CF and Rule 506(d)(1)(iv) of Regulation D will also disqualify a covered person if that person is subject to an order under Section 15(b) or 15B(c) of the 1934 Act, or Section 203(e) or (f) of the Investment Advisers Act of 1940 (the "Advisers Act"), that, at the time of the sale or filing:<sup>19</sup> (i) suspends or revokes the person's registration as a broker, dealer, municipal securities dealer or investment adviser (or funding portal, in the case of Regulation CF); (ii) places limitations on the activities, functions or operations of that person; or (iii) bars that person from being associated with any entity or from participating in the offering of any penny stock.

Rule 262(a)(3) of Regulation A, Rule 503(a)(3) of Regulation CF and Rule 506(d)(1)(iii) of Regulation D each disqualify any covered person who is subject to a final order of a state securities commission (or an agency or officer of a state performing similar functions); a state authority that supervises or examines banks, savings associations or credit unions; a state insurance commission (or an agency or an officer of a state performing similar functions); an appropriate federal banking agency; the CFTC; or the NCUA. The order must be final, and (A) at the time of the sale (or filing or sale, in the case of Regulation A or CF), bar the person from (i) association with an entity

<sup>18</sup> See C&DI 260.20.

<sup>19</sup> Rule 262(a)(4) of Regulation A has "at the time of the filing of the offering statement or such sale," while Rule 503(a)(4) of Regulation CF has "filing of the information required by Section 4A(b) of the Securities Act or such sale ...."



regulated by that commission, authority, agency or officer; (ii) engaging in the business of securities, insurance or banking; or (iii) engaging in savings association or credit union activities; or (B) constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative or deceptive conduct entered within ten years before that sale (or filing or sale, in the case of Regulation A or Regulation CF).

#### *Cease and desist orders*

Under Rule 262(a)(5) of Regulation A, Rule 503(a)(5) of Regulation CF and Rule 506(d)(1)(v) of Regulation D, the exemption will not be available if any covered person is subject to any order of the SEC entered within five years before the sale (or in the case of Regulation A or Regulation CF, the filing) that, at the time of the sale (or filing), orders the person to cease and desist from committing or causing a future violation of (i) any scienter-based anti-fraud provision of the federal securities laws, including Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 15(c)(1) of the Exchange Act and Section 206(1) of the Advisers Act, or any other rule or regulation thereunder; or (ii) Section 5 of the Securities Act. The disqualification provision for Section 5 of the Securities Act does not require scienter, consistent with Section 5's strict liability standards.

#### *Suspension or expulsion from self-regulatory organization ("SRO") membership or association with an SRO member*

Rule 262(a)(6) of Regulation A, Rule 503(a)(6) of Regulation CF and Rule 506(d)(1)(vi) of Regulation D each disqualify any covered person that is suspended or expelled from membership in, or suspended or barred from association with a member of, an SRO for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade. There is no lookback period for this provision.

#### *Other orders*

Under each of Rule 262(a)(7) of Regulation A, Rule 503(a)(7) of Regulation CF and Rule 506(d)(1)(vii) of Regulation D, a covered person will be disqualified if that person has filed (as a registrant or an issuer) or was named as an underwriter in a registration statement or offering statement under Regulation A filed with the SEC that, within five years before the sale (or such sale or the filing of the offering statement, in the case of Regulation A or CF) was the subject of a refusal order, stop order or order suspending the Regulation A exemption, or is, at the time of sale (or filing), the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued.

#### *U.S. Postal Service false representation order*

Rule 262(a)(8) of Regulation A, Rule 503(a)(8) of Regulation CF and Rule 506(d)(1)(viii) of Regulation D each provide that the respective exemption will not be available if a covered person is subject to a U.S. Postal Service ("USPS") false representation order entered into within five years before such sale (or sale or filing, in the case of Regulation A or Regulation CF), or is, at the time of such sale (or sale or filing, in the case of Regulation A or Regulation CF), subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the USPS to constitute a scheme or device for obtaining money or property through the mail by means of false representations.<sup>20</sup>

### **Disqualifying Events that Occurred Prior to the Adoption of the Relevant Rules**

Rule 262(b) of Regulation A, Rule 503(b) of Regulation CF, and Rules 506(d)(2)(i) and 504(b)(3) of Regulation D provide that disqualification will not arise as a result of events that occurred prior to June 19, 2015, in the case of Regulation A; May 16, 2016, in the case of Regulation CF; September 23, 2013, in the case of Rule 506 offerings; and January 20, 2017, in the case of Rule 504 offerings.

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<sup>20</sup> The U.S. False Representation Statute (39 U.S.C. § 3005) is used to protect the public from monetary loss where proving fraudulent intent is difficult. The USPS may sue a promoter that has made false representations in order to obtain money or property through the mail. If a judge rules that the promotion violates the statute, a false representation order is issued by the Judicial Officer of the USPS.



However, in the case of Regulation A, these matters must be disclosed in writing to investors in Part II of Form 1-A.<sup>21</sup> Under Regulation CF, these matters must be disclosed in the offering materials.<sup>22</sup> In the case of Regulation D, Rule 506(e) and Rule 504(b)(3) require written disclosure to purchasers, at a reasonable time prior to the sale, of matters that would have triggered disqualification except that they occurred prior to the applicable rule's effective date. This disclosure requirement applies to all Rule 506 offerings, regardless of whether purchasers are accredited investors. Failure to make these disclosures will not be an "insignificant deviation" as contemplated by the relevant exemption; consequently, relief under that rule will not be available for the failure.<sup>23</sup> Unlike some of the other aspects of the Disqualifying Provisions, the disclosure provisions are not subject to the potential for waivers.<sup>24</sup>

Rule 506(e) does not require disclosure of past events that would no longer trigger a disqualification under Rule 506(d), such as a criminal conviction that occurred more than ten years prior to an offering.<sup>25</sup>

### **Reasonable Care Exception**

Each of Rule 262(b)(4) of Regulation A, Rule 503(b)(4) of Regulation CF and Rule 506(d)(2)(iv) of Regulation D create a reasonable care exception that would apply if an issuer can establish that it did not know and, in the exercise of reasonable care, could not have known, that a disqualification existed because of the presence or participation of a covered person.

The reasonable care exception will be available if the issuer conducts a factual inquiry, the nature of which depends on the facts and circumstances of the issuer and the other offering participants. In this inquiry, an issuer should consider various factors, such as the risk that bad actors may be present, the presence of screening and other compliance mechanisms, the cost and burden of the inquiry, whether other means used to obtain information about the covered persons are adequate, and whether investigating publicly available information is reasonable. If an offering is continuous, delayed or long-lived, the issuer must update its factual inquiry periodically through bring-down of representations, questionnaires and certifications, negative consent letters, periodic re-checking of public databases, and other steps, depending on the circumstances.<sup>26</sup>

The reasonable care exception will be available if the issuer can establish that it did not know and, despite the exercise of reasonable care, could not have known that a disqualification existed under Rule 506(d)(1). This may occur when, despite the exercise of reasonable care, the issuer was unable to determine the existence of a disqualifying event, was unable to determine that a particular person was a covered person, or initially reasonably determined that the person was not a covered person but subsequently learned that determination was incorrect. Issuers will still need to consider what steps are appropriate upon discovery of Rule 506(d) disqualifying events and covered persons throughout the course of an ongoing Rule 506 offering. An issuer may need to seek waivers of disqualification, terminate the relationship with covered persons, provide Rule 506(e) disclosure, or take such other remedial steps to address the Rule 506(d) disqualification.<sup>27</sup>

### **Procedures for Issuers and Placement Agents to Determine Whether Disqualifying Events Have Occurred**

As a practical matter, issuers and placement agents must implement procedures in connection with any relevant offering, in order to identify disqualifying events on the part of the issuer, any existing or potential placement agent or any other covered person. Knowledge of any disqualifying event (or any event or proceeding that could, with the passage of time, ripen into a disqualifying event) is essential in determining whether the issuer can proceed with the offering, whether it can use a potential placement agent, and whether any pre-effective disqualifying events will need to be disclosed. In an offering in which the issuer uses multiple placement

<sup>21</sup> Rule 262(d) of Regulation A.

<sup>22</sup> Rule 201(u) of Regulation CF.

<sup>23</sup> See the Adopting Release at II.F.2.

<sup>24</sup> See C&DI 260.24.

<sup>25</sup> See C&DI 260.25.

<sup>26</sup> See C&DI 260.14.

<sup>27</sup> See C&DI 260.23.



agents or other compensated solicitors, the issuer is required to provide all investors with the Rule 506(e) disclosure for all compensated solicitors who are involved with the offering at the time of sale and their covered control persons.<sup>28</sup> In a continuous offering, the issuer is not required to provide disclosure under Rule 506(e) for all solicitors that were ever involved during the course of the offering.<sup>29</sup> A reasonable time prior to the sale of securities in reliance on Rule 506, the issuer must provide the required disclosure with respect to all compensated solicitors that are involved at the time of sale. Disclosure with respect to compensated solicitors who are no longer involved with the offering need not be provided under Rule 506(e) in order for the issuer to be able to rely on Rule 506.

To address these issues, issuers have:

- added additional questions to D&O questionnaires;
- asked 20% or greater shareholders to complete questionnaires annually;
- required placement agents to complete a questionnaire or provide a representation in connection with any proposed transaction;
- required other participants (that may be covered persons) to complete questionnaires or provide representations; and
- for funds or other issuers engaged in continuous or delayed offerings, refreshed or updated their diligence, such as through periodic scheduled bring-down representations, questionnaires and certifications, negative consent letters, periodic scheduled re-checking of public databases and other steps, depending on the circumstances.

To address these issues, placement agents:

- prior to any Rule 504 offering or Rule 506 offering, conduct diligence on issuers and other offering participants so that any disqualifying events that occurred prior to the effectiveness of the amendments can be properly disclosed, and determine whether the new representations described above can be made (including discussing the potential impact of any event that, with the passage of time, could become a disqualifying event);
- review Forms U4, U5 and U6 filed with FINRA and compare any events described in those forms to the applicable disqualifying events, in preparation for the possibility of either disclosing those events as pre-effectiveness disqualifying events or to confirm compliance with any of the new representations described above;
- answer the bad actor questionnaire prepared by the issuer, if any;
- elect to provide bad actor-related certifications; and
- test for the entire lookback period specified for each disqualifying event.

A typical pre-offering diligence investigation should uncover many of the disqualifying events, as the documentary diligence request list would normally ask for any communications with regulators. Those drafting a documentary diligence request list for an offering should ensure that the list includes all relevant covered persons (i.e., the list should list each of those persons, and not use any shorthand reference to the applicable rule). Issuers may not be familiar with all of the potential covered persons. Disqualifying events uncovered by the diligence investigation will require a new level of analysis prior to commencing the offering.

Broker-dealers and other compensated solicitors will have on file various forms, such as FINRA Form U4 and Form ADV, each of which require disclosure by their employees and others of “bad acts” similar to those that may constitute a disqualification event. Reviewing those forms is likely to be helpful in identifying any covered person that may be subject to a disqualification event. Some of the responses required by those forms, however, may list past acts that would not constitute a disqualification event. As a result, a

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<sup>28</sup> See C&DI 260.26.

<sup>29</sup> See C&DI 260.27.



respondent who provides a “yes” answer to the disclosure questions of Form U4 or Form ADV will not necessarily be disqualified from participating in an offering under Regulation A, Regulation CF or Regulation D. Conversely, there are also some disqualification events under these rules that are not contemplated by Form U4 or Form ADV; accordingly, review of these forms will not be sufficient to ensure that all types of disqualification events are known.

### Disqualification Events During an Offering

If a placement agent or one of its covered control persons becomes subject to a disqualifying event while an offering is still ongoing, the issuer could rely on Rule 506 for future sales in that offering if the engagement with the placement agent was terminated and the placement agent did not receive compensation for the future sales. Alternatively, if the triggering disqualifying event affected only the covered control persons of the placement agent, the issuer could continue to rely on Rule 506 for that offering if those persons were terminated or no longer performed roles with respect to the placement agent that would cause them to be covered persons for purposes of Rule 506(d).<sup>30</sup> Since the “bad actor” disqualification is not applicable to Section 4(a)(2) of the Securities Act, an issuer may choose to do a Section 4(a)(2) private placement.

### Waivers from Disqualification Events

The SEC has articulated its standards for granting these waivers on its website: <https://bit.ly/2TFnvnL>. Waivers will also apply under each of Rule 262(b)(3) of Regulation A, Rule 503(b)(3) of Regulation CF and Rule 506(d)(2)(iii), if, before the relevant sale (or filing of an offering statement or required information, in the case of Regulation A and Regulation CF, respectively), the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the SEC or its staff) that the relevant disqualification should not arise as a result of that order, judgment or decree.

In June 2019, a bill entitled the Bad Actor Disqualification Act of 2019 was introduced by the U.S. House of Representatives. This bill is intended to increase transparency and accountability in the SEC’s process of providing bad actor waivers. It sets up a three-step process to request and obtain a waiver. First, a temporary waiver period of 180 days; second, a notice and comment period for the public; third, the SEC’s determination on the waiver petition. The bill prohibits any SEC staff from advising the person seeking a waiver regarding the likelihood of the waiver being granted and requires the SEC to maintain a database of entities who have applied for and been denied a waiver. This bill is being discussed and debated in Congress and is not enacted as of yet.

### Certifications as to Disqualifications

For Regulation A offerings, the required Form 1-A, Item 3, requires the issuer to certify that no disqualifying events have occurred and to indicate whether the related disclosure will be included in the offering’s offering circular. The form of offering statement for use in Regulation CF offerings contains a similar certification. The signature block of Form D contains a certification that applies to transactions under Rule 504 and Rule 506, confirming that the offering is not disqualified from reliance on Rule 504 or Rule 506 for one of the reasons stated in Rule 504(b)(3) or Rule 506(d).

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## Contacts

### Bradley Berman

New York

T: (212) 506-2321

E: [bberman@mayerbrown.com](mailto:bberman@mayerbrown.com)

### Gonzalo Go

New York

T: (212) 506-2390

E: [ggo@mayerbrown.com](mailto:ggo@mayerbrown.com)

### Anna Pinedo

New York

T: (212) 506-2275

E: [apinedo@mayerbrown.com](mailto:apinedo@mayerbrown.com)

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<sup>30</sup> See C&DI 206.15.





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