Concurrent online offerings

There are now a variety of different types of offerings that can be made online. These include:

- Offerings made under updated Regulation A, which permits offerings to be made for amounts up to $50 million after review by the SEC. These are treated by the SEC as public offerings (although exempt from registration with the SEC).
- Offerings under Rule 506(c) of Regulation D, which permits offerings to accredited investors only to be "generally solicited," including advertised over the internet. These are non-public offerings, even though they are generally solicited.
- Offerings under Rule 506(b) of Regulation D, which permits private placements to accredited investors and a limited number of non-accredited investors, but which prohibits general solicitation. The internet can be used for such offerings, but in a much more restricted way (for example, displaying offering-related information only behind a firewall). These are non-public offerings.
- Offerings made under Regulation Crowdfunding (Regulation CF), which permits public offerings of up to $1 million to be made through registered brokers or funding portals upon filing with the SEC.
- Intrastate crowdfunding or limited-size offerings. These must comply with both the federal requirements set out in Rule 147 (as proposed to be amended) and in accordance with the rules of the specific state, which vary widely.

Companies making online offerings of securities may choose to do more than one type of offering, either close in time or at exactly the same time as each other.

Doing so may raise the issue of "integration"—where the SEC or courts treat the offerings as being part of the same offering and therefore subject to the rules of each. When the rules of each offering are in conflict, it may not be possible to comply with both, leading the issuer to violate federal securities law. The integration doctrine, which has existed since 1933, was originally intended to prevent an issuer from avoiding registration by structuring a transaction in two or more apparently exempt offerings that should properly be considered as a single, non-exempt transaction. Determining whether particular offering should be integrated usually requires an analysis of the particular facts and circumstances. In the 1960s, the SEC issued two interpretative releases identifying five factors to consider in making this determination (known, unsurprisingly, as the "five-factor test"):

- Are the offerings part of a single plan of financing?
- Do the offerings have the same general purpose?
- Are the offerings of the same class of security?
- Are the offerings made at or about the same time?
- Are the securities sold for the same class of consideration?

Having established that some offerings may be subject to integration, the SEC also created various "safe harbors," either by rule or by no-action letter, providing that situations that fit within certain parameters would not trigger the integration doctrine. Additionally, in a 2007 rule proposal on Regulation D, the SEC published a statement setting out a framework for integration analysis, setting out the SEC's views on the proper approach to be used when conducting contemporaneous public and private offerings. The analysis in the 2007 Release depends on the manner in which the investors in the private offering are solicited. This "manner of solicitation" analysis has been referred to by the SEC in subsequent releases and has broader implications than just contemporaneous public and private offerings; we are referring to this analysis as the "2007 Integration Principles."

The following tables set out the various combinations of online offerings, both where one offering is followed by another (first table), and where both offerings are made simultaneously (second table). (Some parts of some offerings, especially under Rule 506(b), may be made offline; the analysis does not change.) Note that the analysis specifically relates to completed offerings; slightly different analyses may apply to abandoned offerings.

Offerings close in time

	Reg A	**Rule 506(c)**	**Rule 506(b)**	**Reg CF**	**Intrastate***
Reg A followed by	N/A	Any offering made more than six months after completion of the Reg A offering is not integrated under the Rule 251(c)(2)(v) safe harbor. An offering closer in time (even a contemporaneous offering—see below) should be permitted under the 2007 Integration Principles, but if any general solicitation includes the terms of the Reg A offering, the appropriate Reg A legends and/or links to	Any offering made more than six months after completion of the Reg A offering is not integrated under the Rule 251(c)(2)(v) safe harbor. 2007 Integration Principles would permit closer in time, even concurrent offerings, provided that issuer is satisfied that 506(b) investors were not solicited by means of the offering made in reliance on Reg A, including TTW communications. (See Reg A	A Reg CF offering that follows a Reg A offering (no minimum time required) is not integrated. Rule 251(c)(2)(vi) safe harbor.	Any offering made more than six months after completion of the Reg A offering is not integrated under the Rule 251(c)(2)(v) safe harbor. 2007 Integration Principles should permit closer-in-time offerings for federal purposes, but state law may be more complex.

		Offering Circular must be included. (See Reg A Adopting Release.)	Adopting Release.)		
Rule 506(c) followed by	A Reg A offering that follows a prior offering is not integrated under the Rule 251(c)(1) safe harbor. Rule 152, which provides that non-public offerings are not affected by subsequent public offerings, also supports this position. Despite their use of general solicitation, Rule 506(c) offerings are deemed non-public.	N/A	Traditional integration principles as set out in the "five-factor" test in Rule 502(a) still apply. Offerings separated by at least six months will not be integrated. This combination of offerings might be difficult for offerings separated by a shorter period, because the burden would be on issuer to show it hadn't poisoned the well by general solicitation, and to track exactly how 506(b) investors and offerees were solicited; it might be possible to track investors but tracking offerees is hard. The SEC has not applied the principles of Rule 152 in these circumstances.	There is no specific safe harbor for a Reg CF offering that follows a Rule 506(c) offering. Securities Act Section 4A(g) provides that nothing in Reg CF should be construed as preventing an issuer from raising capital through other methods. Rule 152, which provides that non-public offerings are not affected by subsequent public offerings, is also relevant.	2007 Integration Principles should permit closer-in-time offerings for federal purposes, but state law may be more complex. Rule 152 may provide support where intrastate offering is public in nature.
Rule 506(b) followed by	A Reg A offering that follows a prior offering is not integrated under the Rule 251(c)(1) safe harbor. Rule 152, which provides that non-public offerings are not affected by subsequent public offerings, also supports this position.	Traditional integration principles as set out in the "five-factor" test in Rule 502(a) still apply. Offerings separated by at least six months will not be integrated. A 506(b) followed closely by a 506(c) should be ok if the issuer took reasonable steps to verify accreditation as soon as it started to use general	N/A	There is no specific safe harbor for a Reg CF offering that follows a Rule 506(b) offering. Section 4A(g) provides that nothing in Reg CF should be construed as preventing an issuer from raising capital through other methods. Rule 152, which provides that non-public offerings are not	2007 Integration Principles should permit closer-in-time offerings for federal purposes, but state law may be more complex. Rule 152 may provide support where intrastate offering is public in nature.

		solicitation (even for investors that may have been privately solicited previously). The SEC has not applied the principles of Rule 152 in these circumstances.		affected by subsequent public offerings, is also relevant.	
Reg CF followed by	A Reg A offering that follows a prior offering is not integrated under the Rule 251(c)(1) safe harbor.	2007 Integration Principles (repeated in Reg CF Adopting Release) would permit offerings close in time, but any general solicitation that included the "terms" of the Reg CF offering (amount, price, type of security or closing date) would be limited to the Rule 204 "tombstone" restrictions on content (unless issuer were able to show clearly that Reg CF investors weren't attracted to the offering by the broader advertising of the 506(c) offering, which would be hard). (See general discussion in 2007 Release; reiterated in Reg CF Adopting Release.) A six-month separation in time would presumably help.	2007 Integration Principles (repeated in Reg CF Adopting Release) would permit close in time 506(b) and Reg CF offerings. The issuer would have to show that the 506(b) investors (1) were not identified or contacted through the general solicitation and (2) did not independently contact the issuer as a result of the general solicitation. (See general discussion in the 2007 Release; reiterated in the Reg CF Adopting Release.)	N/A	2007 Integration Principles should permit close-in-time offerings for federal purposes, but state law may be more complex.
Intrastate followed by	A Reg A offering that follows a prior offering is not integrated under the Rule 251(c)(1) safe harbor.	2007 Integration Principles should permit close-in-time offerings for federal purposes, but state integration doctrines are less transparent and vary from state to state.	2007 Integration Principles should permit close-in-time offerings for federal purposes, but state integration doctrines are less transparent and vary from state to state.	2007 Integration Principles should permit close-in-time offerings for federal purposes, but integration doctrines are less transparent and vary from state to state.	N/A

Concurrent offerings

	Rule 506(c)	Rule 506(b)	Reg CF	Intrastate CF*
Reg A	2007 Integration Principles would permit concurrent offerings, but if any general solicitation includes the terms of the Reg A offering, the appropriate Reg A legends and/or links to Offering Circular must be included. (Reg A Adopting Release.) The non-integration principles set out in the Black Box and Squadron Ellenoff no-action letters also still apply.	2007 Integration Principles would permit concurrent offerings, provided that issuer is satisfied that 506(b) investors were not solicited by means of the offering made in reliance on Reg A, including TTW communications. (Reg A Adopting Release.) The non-integration principles set out in the Black Box and Squadron Ellenoff no-action letters also still apply.	There is no specific safe harbor for a concurrent Reg CF and Reg A offering. Section 4A(g) provides that nothing in Reg CF should be construed as preventing an issuer from raising capital through other methods. 2007 Integration Principles would permit concurrent offerings; possibly this might make sense to raise money under Reg CF to pay Reg A expenses. Careful attention to content of general solicitation notices is required; any notice that contains the "terms" of the Reg CF offering must be limited to Rule 204 tombstone information and the broader notices permitted by Reg A should omit the Reg CF "terms."	State laws may vary, and in addition to addressing federal law issuers will have to comply with the law of the specific state, which may have its own prohibitions on general solicitation or restrictions on content of notices. From a federal point of view, however, the 2007 Integration Principles should permit concurrent offerings once the proposed amendments to Rule 147 are adopted. State integration doctrines are less transparent and vary from state to state.
Rule 506(c)	N/A	Applying traditional integration principles as set out in the "five-factor" test in Rule 502(a) indicate that this combination is problematic. 2007 Integration Principles might permit concurrent 506(b) and 506(c) offerings, but this combination is both the most problematic and least useful. The only reason why an issuer might want to try this is to argue that some portion of a generally solicited private placement was made under 506(b) was made to persons with whom it had a pre-existing	There is no specific safe harbor for a concurrent Reg CF and Rule 506(c) offering. Section 4A(g) provides that nothing in Reg CF should be construed as preventing an issuer from raising capital through other methods. 2007 Integration Principles (repeated in Reg CF Adopting Release) would permit concurrent offerings, but any general solicitation including the "terms" of the Reg CF offering (amount, price, type of security or closing date) would be limited to the	State laws may vary, and in addition to addressing federal law issuers will have to comply with the law of the specific state, which may have its own prohibitions on general solicitation or restrictions on content of notices. From a federal point of view, however, the 2007 Integration Principles should permit concurrent offerings once the proposed amendments to Rule 147 are adopted.

		substantive relationship, in order to avoid having to take "reasonable steps to verify" those persons' accredited status. The issuer would have to show that the 506(b) investors (1) were not identified or contacted through the general solicitation and (2) did not independently contact the issuer as a result of the general solicitation. (See general discussion in the 2007 Release.)	Rule 204 "tombstone" restrictions on content (unless issuer were able to show clearly that Reg CF investors weren't attracted to the offering by the broader advertising of the 506(c) offering, which would be hard). (See general discussion in 2007 Release; reiterated in Reg CF Adopting Release.)	
Rule 506(b)		N/A	There is no specific safe harbor for a concurrent Reg CF and Rule 506(b) offering. Section 4A(g) provides that nothing in Reg CF should be construed as preventing an issuer from raising capital through other methods. 2007 Integration Principles (repeated in Reg CF Adopting Release) would permit concurrent 506(b) and Reg CF offerings. The issuer would have to show that the 506(b) investors (1) were not identified or contacted through the general solicitation and (2) did not independently contact the issuer as a result of the general solicitation. (See general discussion in the 2007 Release; reiterated in the Reg CF Adopting Release.)	State laws may vary, and in addition to addressing federal law issuers will have to comply with the law of the specific state, which may have its own restrictions on content of communications. From a federal point of view, however, the 2007 Integration Principles should permit concurrent offerings once the proposed amendments to Rule 147 are adopted.
Reg CF			N/A	2007 Integration Principles would permit concurrent offerings; possibly this might make sense to raise more money than permitted under Reg CF. Careful attention to content of

				general solicitation notices is required; any notice that contains the "terms" of the Reg CF offering must be limited to Rule 204 tombstone information and the broader notices that might be permitted under state law should omit the Reg CF "terms."

*The discussion of intrastate offerings in these charts assumes the adoption of the proposed changes to Rule 147 and in general assumes that the state laws in question permit general solicitation. State laws for intrastate crowdfunding and limited offerings vary widely.

The foregoing is not legal advice and determination of whether offerings will be integrated will depend on a facts-and-circumstances analysis. Consult your lawyer.

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