

## Structuring Concurrent Regulation S and Regulation D Securities Offerings: Navigating the Process, Closing the Deal

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Today's faculty features:

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# Structuring Concurrent Regulation S and Regulation D Securities Offerings: Navigating the Process, Closing the Deal

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# Structuring Concurrent Regulation D and Regulation S Offerings

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## ▶ The Securities Act of 1933

- Registration v. Exemption
- Private Placements – 4(a)(2)/Regulation D
- Certain Offers and Sales Outside the U.S. – Regulation S

## ▶ Concurrent Regulation D and Regulation S allow:

- domestic and international offers and sales of securities
- without SEC registration

## ▶ U.S. Regulatory Risks and Considerations

- Sanctions
- Rescission
- Personal Liability

# Regulation D

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- ▶ **Regulation D Safe Harbor Requirements**
  - ▶ **Accredited Investors**
  - ▶ **Information Requirements for Non-Accredited Investors**
  - ▶ **No General Solicitation or Advertising – Rule 504, Rule 505, and Rule 506(b)**
  - ▶ **General Solicitation and Advertising Permitted – Rule 506(c)**
  - ▶ **Resale Limitations**
  - ▶ **Bad Actor Disqualification**
- ▶ **Form D Filing**
- ▶ **Blue Sky – NSMIA Notice Filings for 506 Offerings**

# Regulation S

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## ▶ “Safe Harbor”

## ▶ Basic Requirements:

- Offshore Transaction – Rule 903(a)(1)
- No “directed selling efforts” in the United States – Rule 902(c)
- Category 2 and Category 3 – Post-Offering Distribution Compliance Period

## ▶ Fewer Restrictions

- No size or manner limit (“directed selling efforts” in U.S. caveat)
- No level of sophistication requirement
- General solicitation offshore permitted



# The Offering Memorandum: Best Practices and Liability Considerations

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- ▶ **The Offering Memorandum (Disclosure)**
  - Marketing Considerations
  - Liability Considerations
- ▶ **Terms, Risk Factors, and Use of Proceeds**
- ▶ **Antifraud Provisions**
  - Securities Exchange Act of 1934
    - ◆ Section 10 and Rule 10b-5
    - ◆ *Scienter* – liability mitigation
  - Due Diligence
    - ◆ Materiality
    - ◆ “Due Diligence Defense”

# The Purchase Agreement(s): Understanding Terms

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- ▶ **Exemption Disclaimers**
- ▶ **Finder's Fees and Sales Restrictions**
- ▶ **Regulation D – “accredited investor” representation**
- ▶ **Regulation S**
  - **Investor Certification**
  - **Resale Restrictions**
  - **Transfer Prohibition Legend**

## Integration of Concurrent Securities Offerings:

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# AGENDA

- **The SEC's evolving integration doctrine**
- **U.S. tax and regulatory considerations beyond the Securities Act**

# SEC INTEGRATION DOCTRINE

- **Purpose: prevent issuers from improperly avoiding registration by artificially dividing a single offering into multiple offerings**
- **SEC's 5-Factor test for integration of offerings**
  - **Single plan of financing**
  - **Same class of securities**
  - **Same type of consideration**
  - **Offerings are made at or about the same time**
  - **Same general purpose**
- **How to conduct an integrated offering**
- **Consequences of failing to comply with integration restrictions**
  - **Rescission under both integrated offerings**
  - **“Bad actor” disqualification: Rule 506 and proposed Rule 504(b)(3)**

# SEC INTEGRATION DOCTRINE

- **Pre-2015 Integration Exceptions**
  - Side by side Rule 144A and Regulation S offerings
  - Reg. D offerings before Reg. A offerings (rule 151)
  - Side-by-side Reg. D private offering and registered offering
  - Abandoned and completed offerings
- **Expansion of integration exceptions in three 2015 releases:**
  - Regulation Crowdfunding
  - Regulation A+ -- Rule 251(c)
  - Proposed Rule 147(g)
- **Specific cases**
  - Concurrent offerings permitting general solicitation
  - Concurrent offerings under Regulation D
  - Serial offerings:
    - R. 506 / § 4(a)(6) → Regulation A or proposed Rule 147
    - Regulation A ↔ Proposed Rule 147

# OTHER INTEGRATION IMPLICATIONS

- Investment Company Act § 3(c)(1)
- Exchange Act § 12(g)
- Publicly Traded Partnership determinations
- EB-5 Immigrant Investor Visa Program