

SEC Consider Capital Raising Enhancements, Including Concept Release on Exemptive Offerings

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In a [recent speech](#), SEC Chairman Jay Clayton said “To sum up my remarks in a sentence, we have taken a lot of steps intended to promote capital formation, and we have an ambitious capital formation agenda ahead of us.” Here’s what may be next:

Thresholds for SOX 404 reporting. The SEC has heard that the costs associated with providing auditor attestation reports on internal control over financial reporting can be a burden for smaller companies. Currently, companies with a public float of less than \$75 million or no public float have relief from these auditor attestation requirements. Clayton has directed the Commission staff to formulate recommendations for possible amendments that would reduce the number of companies that need to provide the auditor attestation report.

As a possible harbinger of where the SEC may set the revised threshold, Clayton noted that more than 1,200 listed companies have a market cap of less than \$250 million.

Expansion of “test the waters.” The Commission staff is also working on a recommendation to expand the ability of companies that are contemplating raising capital to “test the waters” to communicate with certain potential investors before or following an IPO registration statement filing.

Private company exemptions. Clayton asserted that the framework for private companies to raise capital through exempt offerings is too complex, representing an “elaborate patchwork.” This includes intrastate exemptions, crowdfunding, Regulation A or Regulation D. Over 900 offerings raising more than \$90 million collectively have benefited from crowdfunding regulations. Regulation A has been used in over 300 offerings raising over \$1 billion. But both are eclipsed by Regulation D offerings under Rule 506(c) that has raised \$147 billion in 2017, as well as the traditional private placement exemption in Rule 506(b) of Regulation D responsible for over \$1.7 trillion in capital.

A concept release to harmonize exempt offerings will evaluate the current system, including whether there are (a) overlapping exemptions that create confusion or (b) gaps that impact capital raising. The question of who can invest in certain offerings will also be considered to extend beyond investor wealth, and perhaps the sophistication of the investor, the amount of the investment or other criteria will be added. Finally, the concept release will address whether more can be done to allow issuers to transition from one exemption to another and, ultimately, to a registered IPO, without undue friction.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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