

some DAC6 features to existing processes. For some businesses, this may be the most efficient route to a solution, but the growing number of reporting regimes and governance obligations in recent years should be prompting firms to consider whether a more comprehensive rethink of their processes is required.

With European politicians already looking ahead to how DAC6 itself might be extended further, this is unlikely to be the end of the challenges firms face in this area. A modern, flexible system which adapts to evolving regulatory requirements has obvious attractions for those willing to invest.

What Should Firms Be Doing Now?

Despite the ambiguities in its application, with less than three months remaining, firms need to make a start instead of waiting for a moment of complete clarity that simply may not arrive before the deadline.

While it may not be perfect, something is better than nothing.

- Apply DAC6 in the context of their own businesses. The first port of call should be a thorough impact assessment, which should dictate the extent of work required.
- Integrate the wider business—this will ensure that firms are not concentrating all their firepower on one element of the regime or missing the broader implications for how the firm does business.
- Employ smarter solutions. Where some firms are struggling with the physical adaptation of data for electronic submission or reviewing purposes, technology is the best way forward. One in five (18%) firms still are not employing technology to tackle DAC6, and while this might work for them in the short term, for many complex businesses there is little chance of consistently meeting the demands of this regime in the long term without it.

SEC/SRO UPDATE: SEC PROPOSES RULE CHANGES TO HARMONIZE, SIMPLIFY, AND IMPROVE THE EXEMPT OFFERING FRAMEWORK; SEC AMENDS RULES TO IMPROVE DISCLOSURE AND ENCOURAGE ISSUERS TO CONDUCT DEBT OFFERINGS ON A REGISTERED BASIS; SEC PROPOSES AMENDMENTS TO MODERNIZE AND ENHANCE FINANCIAL DISCLOSURES

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SEC Proposes Rule Changes to Harmonize, Simplify and Improve the Exempt Offering Framework

On March 4, the Securities and Exchange Commission (the “SEC,” or “Commission”) proposed a set of rule amendments to harmonize, simplify, and improve the exempt offering framework under the Securities Act of 1933 (the “Act”).¹

Background

Federal law requires every offering of securities to either be registered with the SEC or qualify for an exemption from registration.² The Act contains a number of exemptions from registration which have evolved over time. Each exemption is different in its requirements and

conditions, and complexities arise for issuers attempting to navigate the various exemptions and their applicability. The proposed rule amendments are the SEC's latest efforts to address such complexities and the relationships among the various exemptions.

Proposed Rule Amendments

The proposed rule amendments would, among other things:

- Clarify the ability of issuers to move from one exemption to another under the "integration" determination framework of the Act;
- Set clear and consistent rules regarding "test the waters" and "demo day" communications between issuers and investors;
- Increase offering and investment limits under the exemptions provided for in Regulation A, Regulation Crowdfunding, and Rule 504 of Regulation D; and
- Harmonize disclosure and eligibility requirements to reduce the number of differences between exemptions.

Integration

The SEC proposed rule amendments to the "integration" framework of the Act, which determines whether a series of securities transactions should be considered part of the same offering in evaluating whether registration is required or if an exemption is available. The proposed rule amendments focus on whether an issuer can establish that each offering qualifies for an exemption from registration. The SEC has proposed four non-exclusive safe harbors from integration with another offering:

- Any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, subject to certain conditions;
- All offers and sales made in compliance with Rule 701, pursuant to an employee benefit plan, or made

in compliance with Regulation S, regardless of when such offerings occur;

- An offering for which a registration statement under the Act has been filed if made subsequent to: (i) a terminated or completed offering for which general solicitation is not permitted; (ii) a terminated or completed offering for which general solicitation is permitted but is made only to "qualified institutional buyers" and "institutional accredited investors"; or (iii) an offering terminated or completed more than 30 calendar days prior to the commencement of the registered offering; and
- Offers and sales made in reliance on an exemption for which general solicitation is permitted if made subsequent to any prior terminated or completed offering.

Communications

The SEC has proposed several rule amendments to the rules governing communications between issuers and investors that would:

- Permit an issuer to use generic solicitation of interest materials to "test-the-waters" prior to determining which exemption to use for actual sales of its securities;
- Permit Regulation Crowdfunding issuers to "test-the-waters" prior to filing offering documentation with the SEC; and
- Provide that certain communications related to "demo days" would not qualify as general solicitation or general advertising that would constitute an "offer" and require registration of the offering under the Act.

Offering and Investment Limits

The proposed rule amendments would revise the current offering and investment limits for certain exemptions.

For Regulation A:

- Raise the maximum offering amount under Tier 2 from \$50 million to \$75 million; and
- Raise the maximum offering amount for secondary sales under Tier 2 from \$15 million to \$22.5 million.

For Regulation Crowdfunding:

- Raise the offering limit from \$1.07 million to \$5 million; and
- Amend the investment limits for investors by not applying any investment limits to “accredited investors” and revising the calculation method for investment limits for “non-accredited investors” by allowing them to use the greater of their annual income *or* net worth when calculating how much they may invest.

For Rule 504 of Regulation D:

- Raise the maximum offering amount from \$5 million to \$10 million.

Disclosure and Eligibility Requirements

The proposed rule amendments also seek to harmonize the disclosure and eligibility requirements between exemptions. The proposed rule amendments would, among other things, change the financial information that must be provided to “non-accredited investors” in an offering under Rule 506(b) of Regulation D to align with those of Regulation A offerings (a less-burdensome requirement) and simplify the requirements of Regulation A to establish greater consistency between Regulation A and registered offerings (*e.g.*, allowing issuers the option of filing redacted versions of material contracts and plans of acquisition, liquidation and succession consistent with Regulation S-K).

The proposed rule amendments are subject to a 60-day public comment period following publication in the Federal Register.³

SEC Amends Rules to Improve Disclosure and Encourage Issuers to Conduct Debt Offerings on a Registered Basis

On March 2, the SEC adopted amendments to the

financial disclosure requirements applicable to registered debt offerings that include credit enhancements, such as subsidiary guarantees.⁴

According to the SEC’s press release, the amended rules seek to “focus on the provision of material, relevant, and decision-useful information regarding guarantees and other credit enhancements,” and to “eliminate prescriptive requirements that have imposed unnecessary burdens and incentivized issuers of securities with guarantees and other credit enhancements to offer and sell those securities on an unregistered basis.”

The changes will affect the financial disclosure requirements for guarantors and issuers of guaranteed securities registered or being registered under Rule 3-10 of Regulation S-X, and affiliates whose securities collateralize securities registered or being registered under Rule 3-16 of Regulation S-X. As adopted, Rule 3-10 will be amended and partly relocated to new Rule 13-01, and the requirements in Rule 3-16 will be replaced with the requirements in new Rule 13-02. These new Rules 13-01 and 13-02 will comprise new Article 13 in Regulation S-X.

Rule 3-10 and New Rule 13-01

Rule 3-10 currently requires financial statements to be filed for all issuers and guarantors of securities that are registered or being registered, but also provides several exceptions. These exceptions are typically available for individual subsidiaries of a parent company when certain conditions are met, including that the parent company provides certain disclosures in its consolidated financial statements. If the conditions are met, separate financial statements of each qualifying subsidiary issuer and guarantor may be omitted.

Under the amendments, Rule 3-10 will continue to permit the omission of separate financial statements of subsidiary issuers and guarantors when certain conditions are met and the parent company provides supplemental financial and non-financial disclosure about the subsidiary issuers and/or guarantors and the guarantees. Similar to the current rule, the amended Rule 3-10 will specify the conditions that must be met in order to omit separate subsidiary issuer or guarantor financial statements. New

Rule 13-01 will specify the accompanying amended disclosure requirements. The amendments will:

- Replace the condition that a subsidiary issuer or guarantor be 100%-owned by the parent company with a condition that it be consolidated in the parent company's consolidated financial statements;
- Replace condensed consolidating financial information, as specified in existing Rule 3-10, with certain new financial and non-financial disclosures. The amended financial disclosures will consist of summarized financial information, as defined in Rule 1-02(bb)(1) of Regulation S-X, of the issuers and guarantors, which may be presented on a combined basis, and reduce the number of periods presented. The amended non-financial disclosures, among other matters, will expand the qualitative disclosures about the guarantees and the issuers and guarantors. Consistent with the existing rule, disclosure of additional information about each guarantor will be required if it would be material for investors to evaluate the sufficiency of the guarantee;
- Permit the amended disclosures to be provided outside the footnotes to the parent company's audited annual and unaudited interim consolidated financial statements in all filings; and
- Require the amended financial and non-financial disclosures for as long as an issuer or guarantor has an Exchange Act reporting obligation with respect to the guaranteed securities rather than for as long as the guaranteed securities are outstanding.

Rule 3-16 and New Rule 13-02

Rule 3-16 currently requires a registrant to provide separate financial statements for each affiliate whose securities constitute a substantial portion of the collateral, based on a numerical threshold, for any class of registered securities as if the affiliate were a separate registrant.

The disclosure requirements in Rule 3-16 will be replaced with the amended disclosure requirements in new Rule 13-02 (although existing Rule 3-16 will remain

in place for transitional purposes). Among other things, the amendments will:

- Replace the existing requirement to provide separate financial statements for each affiliate whose securities are pledged as collateral with amended financial and non-financial disclosures about the affiliate(s) and the collateral arrangement as a supplement to the consolidated financial statements of the registrant that issues the collateralized security. The registrant will be permitted to provide the amended financial and non-financial disclosures outside the footnotes to its audited annual and unaudited interim consolidated financial statements in all filings; and
- Replace the requirement to provide disclosure only when the pledged securities meet or exceed a numerical threshold relative to the securities registered or being registered with a requirement to provide the proposed financial and non-financial disclosures in all cases, unless they are immaterial.

The amendments will be effective on January 4, 2021, but voluntary compliance will be permitted in advance of the effective date.

SEC Proposes Amendments to Modernize and Enhance Financial Disclosures

On January 30, the SEC proposed a set of rule amendments to the financial disclosure requirements of Regulation S-K.⁵ The proposed rule amendments are intended to eliminate duplicative disclosure requirements and modernize and enhance management's discussion and analysis.⁶

Background

Based on a recommendation in the SEC's Report on Review of Disclosure Requirements in Regulation S-K, published in December 2013 and mandated by Section 108 of the Jumpstart Our Business Startups Act of 2012 (the "Report"), the SEC staff initiated a comprehensive evaluation of the SEC's disclosure requirements and solicited comments on whether the requirements under Regulation S-K were outdated, unnecessary or could

otherwise be improved.⁷ The proposed rule amendments are the SEC's response to its comprehensive evaluation and the comments it received, and are intended to reduce the costs and burdens on issuers while continuing to provide material information to investors.⁸

Proposed Rules

The proposed rule amendments would, among other things, eliminate Item 301 (Selected Financial Data) and Item 302 (Supplementary Financial Data) and amend Item 303 (Management's Discussion and Analysis). The proposed rule amendments also include conforming amendments for foreign private issuers in the context of Forms 20-F and 40-F. The elimination of Items 301 and 302 is intended to reduce duplicative disclosure requirements that the SEC believes can be found in the current year financial statements or previous SEC filings. The proposed rule amendments to Item 303 include the following:

- The addition of new Item 303(a) (Objective) to more succinctly state the principal objectives of management's discussion and analysis;
- The replacement of current Item 303(a)(4) (Off-balance sheet arrangements) with an instruction to discuss such arrangements in the broader context of management's discussion and analysis;
- The elimination of Item 303(a)(5) (Tabular disclosure of contractual obligations) given the duplicative nature of the requirement with other financial disclosure requirements;
- The addition of new Item 303(b)(4) (Critical accounting estimates) to, among other reasons, promote meaningful analysis of measurement uncertainties; and
- The amendment of Item 303(b) (Interim periods) to allow increased flexibility and discretion for issuers to compare their most recently completed quarter to either the corresponding quarter of the prior year (the current requirement) or to the immediately preceding quarter.

The proposed rule amendments are subject to a 60-day public comment period ending on April 28, 2020.⁹

ENDNOTES:

¹See SEC Press Rel. No. 2020-55, available at <https://www.sec.gov/news/press-release/2020-55>.

²See 15 U.S.C.A. § 77a.

³See SEC Proposed Rule Rel. Nos. 33-10763 and 34-88321 (Mar. 4, 2020), available at <https://www.sec.gov/rules/proposed/2020/33-10763.pdf>.

⁴See SEC Press Rel. No. 2020-50 (Mar. 2, 2020), available at <https://www.sec.gov/news/press-release/2020-52>. See also SEC Rel. No. 33-10762 (Mar. 2, 2020), available at <https://www.sec.gov/rules/final/2020/33-10762.pdf> (adopting release) and SEC Rel. No. 33-10526 (July 24, 2018), available at <https://www.sec.gov/rules/proposed/2018/33-10526.pdf> (proposing release).

⁵See SEC Press Rel. No. 2020-25, available at <https://www.sec.gov/news/press-release/2020-25>.

⁶See SEC Proposed Rule Rel. Nos. 33-10750 and 33-88093 (Jan. 30, 2020), available at <https://www.sec.gov/rules/proposed/2020/33-10750.pdf>.

⁷SEC Proposed Rule Rel. Nos. 33-10750 and 33-88093 at 6-7.

⁸SEC Proposed Rule Rel. Nos. 33-10750 and 33-88093 at 8.

⁹SEC Proposed Rule Rel. Nos. 33-10750 and 33-88093 at 1.