

Explanatory note: Guidance superseded by Rule 152.

Question 139.25

Question: Does the five factor integration analysis in Securities Act Rule 502(a) apply to the situation in which an issuer is conducting concurrent private and public offerings?

Answer: No. The Commission's integration guidance in Securities Act Release No. 8828 (Aug. 3, 2007) sets forth a framework for analyzing potential integration issues in the specific situation of concurrent private and public offerings. The guidance clarifies that, under appropriate circumstances, there can be a side by side private offering under Securities Act Section 4(2) or the Securities Act Rule 506 safe harbor with a registered public offering without having to limit the private offering to qualified institutional buyers and two or three additional large institutional accredited investors, as under the Black Box (June 26, 1990) and Squadron, Ellenoff (Feb. 28, 1992) no action letters issued by the Division, or to a company's key officers and directors, as under our so-called "Macy's" position. The filing of the registration statement does not eliminate the company's ability to conduct a concurrent private offering, whether it is commenced before or after the filing of the registration statement. This guidance does not negate the five factor integration analysis outlined in Securities Act Release No. 4552 (Nov. 6, 1962) and in Rule 502(a), which should be used to test whether two or more otherwise exempt offerings should be treated as a single offering to determine whether an exemption is available.

Specifically, the Commission's guidance focuses on how the investors in the private offering are solicited—whether by the registration statement or through some other means that would not otherwise foreclose the availability of the Section 4(2) exemption. If the investors in the private offering become interested in the private offering by means of the registration statement, then the registration statement will have served as a general solicitation for the securities being offered privately and Section 4(2) would not be available. On the other hand, if the investors in the private offering become interested in the private offering through some means other than the registration statement—for example, there is a substantive, pre-existing relationship between the investors and the company—then the registration statement would not have served as a general solicitation for the private offering and Section 4(2) would be available, assuming the offering is otherwise consistent with the exemption. Hence, there would be no integration of the private offering with the public offering.

In short, in the specific situation of concurrent public and private offerings, only the guidance set forth in the Securities Act Release No. 8828 applies. [Nov. 26, 2008]<https://www.sec.gov/rules/proposed/2007/33-8828.pdf><https://www.sec.gov/rules/final/33-4552.htm><https://www.sec.gov/rules/proposed/2007/33-8828.pdf>

[Withdrawn January 23, 2026]