

Developments in Corporate Finance
2016 Ohio Securities Conference

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I. Notice Filings

A. R.C. § 1707.092(C) and (D) state:

(C) (1) For offerings involving covered securities, as defined in section 18 of the “Securities Act of 1933,” 15 U.S.C. 77r, that are not subject to section 1707.02, 1707.03, 1707.04, 1707.06, 1707.08, 1707.09, or 1707.091 of the Revised Code, or division (A) of this section, a notice filing shall be submitted to the division together with a consent to service of process pursuant to section 1707.11 of the Revised Code and a filing fee as provided in division (A)(2) of this section.

(2) The notice filing described in division (C)(1) of this section shall consist of any document filed with the securities and exchange commission pursuant to the Securities Act of 1933, together with annual or periodic reports of the value of the securities sold or offered to be sold to persons located in this state.

(D) A notice filing submitted under this section shall be effective for thirteen months.

B. Section 18(c)(2)(A) states:

(2) Preservation of Filing Requirements.

(A) Notice Filings Permitted. Nothing in this section prohibits the securities commission (or any agency or office performing like functions) of any State from requiring the filing of any document filed with the Commission pursuant to this title, together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee.

C. Fees. Section 18(c)(2)(B) states:

(B) Preservation of Fees.

(i) In General. Until otherwise provided by law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof, adopted after the date of enactment of the National Securities Markets Improvement Act of 1996, filing or registration fees with respect to securities or securities transactions shall continue to be collected in amounts determined pursuant to State law as in effect on the day before such date.

(ii) *Delays.* For purposes of this subparagraph, delays in payment of fees or underpayments of fees that are promptly remedied shall not constitute a refusal to pay fees.

D. Specific Designated “Covered Securities”:

1. Rules 506(b) and (c), and R.C. § 1707.03(X).

a. Section 18(b)(4)(F) states:

(4) *Exemption in Connection With Certain Exempt Offerings.* A security is a covered security with respect to a transaction that is exempt from registration under this title pursuant to:

...

(F) Commission rules or regulations issued under Section 4(2), except that this subparagraph does not prohibit a state from imposing notice filing requirements that are substantially similar to those required by rule or regulation under Section 4(2) that are in effect on September 1, 1996;

b. R.C. § 1707.03(X) states:

(X) Any offer or sale of securities made in reliance on the exemption provided in Rule 506 of Regulation D under the Securities Act of 1933, and in accordance with Rules 501 to 503 of Regulation D under the Securities Act of 1933, is exempt provided that all of the following apply:

(1) The issuer makes a notice filing with the division on form D of the securities and exchange commission within fifteen days of the first sale in this state;

(2) Any commission, discount, or other remuneration for sales of securities in this state is paid or given only to dealers or salespersons licensed under this chapter;

(3) The issuer pays a filing fee of one hundred dollars to the division; however, no filing fee shall be required to file amendments to the form D of the securities and exchange commission.

2. Listed Securities. Sections 18(b)(1)(A), (B), and (C), Section 18(c)(2)(D), and Securities Act Rule 146(b). R.C. § 1707.02(E)(1) and rule 1301:6-3-02(A) and (B) of the Ohio Administrative Code.

a. Section 18(b)(1) states:

(b) *Covered Securities.* For purposes of this section, the following are covered securities:

(1) *Exclusive Federal Registration of Nationally Traded Securities.* A security is a covered security if such security is:

(A) Listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing on the National Market System of the Nasdaq Stock Market (or any successor to such entities);

(B) Listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) A security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

b. Section 18(c)(2)(D) states:

(D) *Fees Not Permitted on Listed Securities.* Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(1), or will be such a covered security upon completion of the transaction, or is a security of the same issuer that is equal in seniority or that is a senior security to a security that is a covered security pursuant to subsection (b)(1). [*Emphasis Added.*]

c. Securities Act Rule 146 states:

(b) *Covered Securities For Purposes of Section 18.*

(1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing standards that are substantially similar to those of the New York Stock Exchange (“NYSE”), the NYSE Amex LLC (“NYSE Amex”), or the National Market System of the Nasdaq Stock Market (“Nasdaq/NGM”), and that securities listed, or authorized for listing, on such exchanges shall be deemed covered securities:

- (i) Tier I of the NYSE Arca, Inc.;
- (ii) Tier I of the NASDAQ OMX PHLX LLC;
- (iii) The Chicago Board Options Exchange, Incorporated;
- (iv) Options listed on the International Securities Exchange, LLC;
- (v) The Nasdaq Capital Market; and
- (vi) Tier I and Tier II of BATS Exchange, Inc.

(2) The designation of securities in paragraphs (b)(1)(i) through (vi) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, NYSE Amex, or Nasdaq/NGM.

d. R.C. § 1707.02(E) states:

(E)(1) A security is exempt if it meets any of the following requirements:

(a) The security is listed, or authorized for listing, on the New York stock exchange, the American stock exchange, or the national market system of the NASDAQ stock market, or any successor to such entities.

(b) The security is listed, or authorized for listing, on a national securities exchange or system, or on a tier or segment of such exchange or system, designated by the securities and exchange commission in rule 146(b) promulgated under section 18(b)(1) of the Securities Act of 1933.

(c) The security is listed, or authorized for listing, on a national securities exchange or system, or on a tier or segment of such exchange or system, that has listing standards that the division of securities, on its own initiative or on the basis of an application, determines by rule are substantially similar to the listing standards applicable to securities described in division (E)(1)(a) of this section.

(d) The security is a security of the same issuer that is equal in seniority or that is a senior security to a security described in division (E)(1)(a), (b), or (c) of this section.

e. Rule 1301:6-3-02(A) and (B) of the Ohio Administrative Code states:

(A) For purposes of division (E) of section 1707.02 of the Revised Code, the division finds that securities listed on the national securities exchanges, or segments or tiers thereof, as identified by rule 146 under the Securities Act of 1933, 15 U.S.C.A. 77a shall be deemed exempt securities.

(B) The designation of securities in paragraphs (A) of this rule as exempt securities is conditioned on such exchanges' listing standards, or segments or tiers thereof, continuing to be substantially similar to those exchanges identified in section 18(b)(1) of the Securities Act of 1933.

3. *Investment Companies*. Section 18(b)(2) and R.C. § 1707.092(A).

a. Section 18(b)(2) states:

(2) *Exclusive Federal Registration of Investment Companies.* A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940.

b. R.C. section 1707.092(A) states:

(A) For the purposes of selling securities in this state, except securities that are the subject matter of transactions enumerated in section 1707.03 of the Revised Code, an investment company, as defined by the Investment Company Act of 1940, that is registered or has filed a registration statement with the securities and exchange commission under the Investment Company Act of 1940, shall file the following with the division of securities:

(1) A notice filing consisting of either of the following:

(a) A copy of the investment company's federal registration statement as filed with the securities and exchange commission; or

(b) A form U-1 or form NF of the North American securities administrators association.

(2) Appropriate filing fees consisting of both of the following:

(a) A flat fee of one hundred dollars; and

(b) A fee calculated at one-tenth of one per cent of the aggregate price at which the securities are to be sold to the public in this state, which calculated fee, however, shall in no case be less than one hundred or more than one thousand dollars.

4. Regulation A, Tier 2.

a. Pursuant to Rule 251(a)(1), a Regulation A offering under \$20 million may elect to be Tier 1. Tier 2 offerings may be offerings under \$20 million and are all offerings over \$20 million. Tier 1 offerings are subject to state registration and may register by coordination including using NASAA coordinated review. Tier 1 offerings are subject to less stringent periodic reporting requirements pursuant to Rule 257. Tier 2 offerings may only be sold to accredited investors under Rule 501 of Regulation D or limited in a purchase amount that does not exceed 10% of the greater of the annual income or net worth of the natural person. See Rule 251(d)(2)(i)(C).

Purchasers under Regulation A, Tier 2 are deemed “Qualified Purchaser” pursuant to Rule 256 which states, “For purposes of Section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a “qualified purchaser” means any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A.”

b. Section 18(b)(3) states:

(3) Sales to qualified purchasers. A security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule. In prescribing such rule, the Commission may define the term “qualified purchaser” differently with respect to different categories of securities, consistent with the public interest and the protection of investors.

The notice filing requirements will be required pursuant to R.C. § 1707.092(A) and section 18(c)(2)(A) of the Securities Act of 1933:

- Copies of any documents filed with the U.S. Securities and Exchange Commission, including the final offering circular, Form 1-A, and any testing the waters materials that have been filed;
- Consent to service of process on Form U-2/U-2A or Division Form 11;
- Filing fee ranging from \$200 to \$1,100 depending on the aggregate price at which the securities are to be sold in Ohio; and
- A statement of the value of the securities sold or offered to be sold to persons in Ohio, which information may be provided in a cover letter or on Form U-1.

See Ohio Securities Bulletin, Issue 2016:1, available at http://www.com.ohio.gov/documents/secu_Bulletin2016FirstQuarter.pdf

5. Regulation Crowdfunding pursuant to Section 4(a)(6) of the Securities Act of 1933. Federal crowdfunding rules became effective May 16, 2016. <https://www.sec.gov/rules/final/2015/33-9974.pdf> Section 4A(b) requires issuers to comply with other information as the SEC prescribes by rule.

a. Section 18(b)(4)(C) states:

(4) Exemption in connection with certain exempt offerings. A security is a covered security with respect to a transaction that is exempt from registration under this title [15 U.S.C. §§ 77a *et seq.*] pursuant to:

...

(C) section 4(6) [15 USCS § 77d(a)(6)];

b. Section 18(c)(2)(F) states:

(F) Fees not permitted on crowdfunded securities. Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(4)(B)¹, or will be such a covered security upon completion of the transaction, except for the securities commission (or any agency or office performing like functions) of the State of the principal place of business of the issuer, or any State in which purchasers of 50 percent or greater of the aggregate amount of the issue are residents, provided that for purposes of this subparagraph, the term “State” includes the District of Columbia and the territories of the United States.

The Division asserts that a filing is only required if the issuer’s principal place of business is in Ohio or if purchasers of 50% or greater of the aggregate amount of the offering are residents of Ohio. See: “Securities Exchange: A Summary of the SEC and Ohio Crowdfunding Provisions” by Tomas E. Geyer, Ohio Securities Bulletin, Issue 2016:2 at page 12, http://www.com.ohio.gov/documents/secu_Bulletin2016SecondQuarter.pdf The “50% of the offering” that triggers a filing is somewhat unclear in the federal provision and could represent a moving target as offerings continue to progress towards their maximum offering.

Filing requirements are also within section 18(c)(2)(A) and R.C. § 1707.092(C). The initial filing requirement will be:

- Form C (Offering Statement). Rule 203(a)(1).
- Filing fee of \$200-\$1,100. R.C. § 1707.092(C).

R.C. § 1707.092(C) states that the filing “shall consist of any document filed with the Securities and Exchange Commission pursuant to the Securities Act of 1933, together with annual or periodic reports of the value of the securities sold or offered to be sold to persons located in this state.” See also section 18(c)(2)(A). As such, additional filing requirements will include:

- Form C/A (Amendments). Rule 203(a)(2).
- Form C-U (Progress Updates). Rule 203(a)(3).
- Form C-AR (Annual Report). Rule 203(b).
- Form C-AR/A (Amendments to Annual Report). Rule 203(b)(2).
- Form C-TR (Termination of Reporting). Rule 203(b)(3).

¹ Subsection (b)(4)(B) correlates with section 4(a)(4). However, the Division has interpreted the provision as applicable to crowdfunding offerings.

II. New Federal Developments

A. Section 4(a)(7) – “Accredited Investor Private Resales”

1. Section 4(a)(7) states:

(a) The provisions of section 5 [15 USCS § 77e] shall not apply to:

...

(7) transactions meeting the requirements of subsection (d).

2. Section 4(d) states:

(d) Certain accredited investor transactions. The transactions referred to in subsection (a)(7) are transactions meeting the following requirements:

(1) Accredited investor requirement. Each purchaser is an accredited investor, as that term is defined in section 230.501(a) of title 17, Code of Federal Regulations (or any successor regulation).

(2) Prohibition on general solicitation or advertising. Neither the seller, nor any person acting on the seller’s behalf, offers or sells securities by any form of general solicitation or general advertising.

(3) Information requirement. In the case of a transaction involving the securities of an issuer that is neither subject to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m; 78o(d)), nor exempt from reporting pursuant to section 240.12g3-2(b) of title 17, Code of Federal Regulations, nor a foreign government (as defined in section 230.405 of title 17, Code of Federal Regulations) eligible to register securities under Schedule B, the seller and a prospective purchaser designated by the seller obtain from the issuer, upon request of the seller, and the seller in all cases makes available to a prospective purchaser, the following information (which shall be reasonably current in relation to the date of resale under this section):

(A) The exact name of the issuer and its predecessor (if any);

(B) The address of the issuer’s principal executive offices;

(C) The exact title and class of the security;

(D) The par or stated value of the security;

(E) The number of shares or total amount of the securities outstanding as of the end of the issuer’s most recent fiscal year;

(F) The name and address of the transfer agent, corporate secretary, or other person responsible for transferring shares and stock certificates;

(G) A statement of the nature of the business of the issuer and the products and services it offers, which shall be presumed reasonably current if the statement is as of 12 months before the transaction date;

(H) The names of the officers and directors of the issuer;

(I) The names of any persons registered as a broker, dealer, or agent that shall be paid or given, directly or indirectly, any commission or remuneration for such person's participation in the offer or sale of the securities;

(J) The issuer's most recent balance sheet and profit and loss statement and similar financial statements, which shall:

(i) be for such part of the 2 preceding fiscal years as the issuer has been in operation;

(ii) be prepared in accordance with generally accepted accounting principles or, in the case of a foreign private issuer, be prepared in accordance with generally accepted accounting principles or the International Financial Reporting Standards issued by the International Accounting Standards Board;

(iii) be presumed reasonably current if:

(A) with respect to the balance sheet, the balance sheet is as of a date less than 16 months before the transaction date; and

(B) with respect to the profit and loss statement, such statement is for the 12 months preceding the date of the issuer's balance sheet; and

(iv) if the balance sheet is not as of a date less than 6 months before the transaction date, be accompanied by additional statements of profit and loss for the period from the date of such balance sheet to a date less than 6 months before the transaction date.

(K) To the extent that the seller is a control person with respect to the issuer, a brief statement regarding the nature of the affiliation, and a statement certified by such seller that they have no

reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.

(4) Issuers disqualified. The transaction is not for the sale of a security where the seller is an issuer or a subsidiary, either directly or indirectly, of the issuer.

(5) Bad actor prohibition. Neither the seller, nor any person that has been or will be paid (directly or indirectly) remuneration or a commission for their participation in the offer or sale of the securities, including solicitation of purchasers for the seller is subject to an event that would disqualify an issuer or other covered person under Rule 506(d)(1) of Regulation D (17 CFR 230.506(d)(1)) or is subject to a statutory disqualification described under section 3(a)(39) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(39)].

(6) Business requirement. The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that the issuer's primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person.

(7) Underwriter prohibition. The transaction is not with respect to a security that constitutes the whole or part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the security or a redistribution.

(8) Outstanding class requirement. The transaction is with respect to a security of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

(e) Additional requirements.

(1) In general. With respect to an exempted transaction described under subsection (a)(7):

(A) Securities acquired in such transaction shall be deemed to have been acquired in a transaction not involving any public offering.

(B) Such transaction shall be deemed not to be a distribution for purposes of section 2(a)(11) [15 USCS § 77b(a)(11)].

(C) Securities involved in such transaction shall be deemed to be restricted securities within the meaning of Rule 144 (17 CFR 230.144).

(2) Rule of construction. The exemption provided by subsection (a)(7) shall not be the exclusive means for establishing an exemption from the registration requirements of section 5 [15 USCS § 77e].

The securities in transactions pursuant to section 4(a)(7) of the Securities Act of 1933 are covered securities pursuant to section 18(b)(4)(G) of the Securities Act of 1933.

B. Proposal to Rule 147 and Rule 504. SEC Release No. 33-9973, October 30, 2015. <https://www.sec.gov/rules/proposed/2015/33-9973.pdf> Proposal to Rule 147 to ease restrictions on local entities conducting local offerings and to increase Rule 504 from \$1 million to \$5 million and add bad actor disqualifiers.

1. Rule 147 proposed changes would relax restrictions on “offers” so long as all sales are solely within the same state or territory and the offering is registered or exempt within the state. The proposal would also eliminate the requirement that the issuer is incorporated in or organized in the state of their principal place of business. The 80% tests (revenues, assets, use of proceeds) would remain along with an alternative test of a majority of employees. Only one of the tests rather than all three would be required. A “reasonable belief” of residency is proposed, but must be more than mere representations by the purchaser under the proposal. As the proposed rule falls outside of the statutory framework of section 3(a)(11), the SEC proposes new rule 147 under their general exemptive authority under section 28 of the Securities Act.

2. Requests comments on whether Rule 505 should be repealed or redrafted as a smaller issuer exemption.

III. Private Offering Case Law Update

A. Burden of Proof.

1. SEC v. Torchia, 2016 U.S. Dist. LEXIS 54793 (ND GA, April 25, 2016). Here, Defendants do not argue that the allegations in the Complaint conclusively show the promissory notes are exempt from registration. They argue, instead, that the SEC does not allege sufficient facts to show that the promissory notes *are not* exempt from registration. The SEC, however, does not have the burden to prove that the promissory notes are not exempt from registration. It is Defendants’ burden to show the promissory notes are, in fact, exempt. Big Apple, 783 F.3d at 807. Defendants fail to identify any Complaint allegations clearly showing the promissory notes are exempt from registration. Defendants’ Motion to Dismiss the SEC’s Section 5 claims is denied.

2. SEC v. Capital Cove Bancorp LLC, C.D.Cal. No. SACV 15-980-JLS (JCx), 2015 U.S. Dist. LEXIS 174962 (Sep. 1, 2015) Khalfani asserts that the REO Fund II is exempt from registration because Defendants offered and sold Fund interests to accredited investors pursuant to Section 4(a)(2) of the Securities Act and Regulation D. Section 4(a)(2) exempts “transactions by an issuer not

involving any public offering.” 15 U.S.C. § 77d(a)(2). The Supreme Court has held that “the applicability of [the private offering exemption] should turn on whether the particular class of persons affected need[s] the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction ‘not involving any public offering.’” Ralston Purina Co., 346 U.S. at 125. . . . Defendants have failed to demonstrate any evidence that the purchasers or offerees were “able to fend for themselves.” Ralston Purina, 346 U.S. at 125. . . . Defendants also argue they fall within the safe harbor of Regulation D. Regulation D, and Rule 506 in particular, set forth specific conditions that parties must meet to justify the application of the safe harbor. 17 C.F.R. § 230.506. Under Rule 506, the party claiming an exemption must establish that:

Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description. 17 C.F.R. § 230.506(b)(2)(ii).

For the same reasons above, the Court finds that Defendants have failed to establish they fall within the safe harbor of Regulation D. Defendants must demonstrate that “[e]ach” purchaser is “capable of evaluating the merits and risks of the prospective investment,” or that the issuer “reasonably believes” in the purchaser’s sophistication “immediately prior to making any sale.” *Id.* Defendants failed to make any such showing. The Court therefore finds that Defendants have failed to demonstrate they qualify for the safe harbor of Regulation D.

B. Advertising and General Solicitation.

SEC v. Ishopnomarkurcom, Inc., 126 F. Supp. 3d 318 (E.D.N.Y.2015). Similarly, Knight has not pointed to any evidence compelling a finding that the 506 exemption was applicable. As discussed above, Knight provides no explanation for his position that the Court improperly instructed the jury that the 506 exemption is inapplicable where a defendant engaged in general solicitation by telephoning customers, with whom there are no pre-existing relationships, to sell an unregistered security. Moreover, there was evidence presented at trial that iShop was conducting a general solicitation through cold calling customers. (Tr. at 143-44, 439, 817 (discussing iShop’s “telemarketing” and cold calling methods).)

C. Information to Nonaccredited Investors.

SEC v. Ishopnomarkurcom, Inc., 126 F. Supp. 3d 318 (E.D.N.Y.2015). Additionally, the 506 exemption is unavailable where an offering is made to one or more unaccredited investors absent showing those investors an audited financial statement, and there was testimony at trial that such offerings to unaccredited investors took place. (See testimony of Rodney Davoodi, Tr. at 621-

22, 643) (discussing his status as an unaccredited investor and iShop's failure to show him any audited financial statements).

D. Issuer Requirement for 4(a)(2).

Masa Fukuda v. Nethercott, 2016 U.S. Dist. LEXIS 92462, Fed. Sec. L. Rep. (CCH) P99,233 (D. Utah July 15, 2016). Although Defendants sold the Sharla Kae stock to Mr. Fukuda, Defendants have not pointed to any evidence showing that they, and not Sharla Kae, are the issuers of the stock. Indeed, at oral argument, Defendants acknowledged that “[t]he issuer is Sharla Kae in this transaction.” Accordingly, Section 4(a)(2) and Regulation D, which apply to “transactions by an issuer not involving any public offering,” do not apply to Defendants. 15 U.S.C. § 77d(a)(2) (*emphasis added*); 17 C.F.R. § 230.506(a); see also Murphy, 626 F.2d at 642; Securities & Exchange Com. v. Tuchinsky, No. 89-6488-CIV 1-1 RYSKAMP, 1992 U.S. Dist. LEXIS 13650, 1992 WL 226302, at *4 (S.D. Fla. June 29, 1992) (“Section 4(a)(2)’s exemption for private offerings . . . is available only to transactions by the issuer.”). Thus, as a matter of law, Defendants cannot rely on the Regulation D and Section 4(a)(2) exemption from the registration requirements of Section 5.

E. Private Resale.

1. Masa Fukuda v. Nethercott, 2016 U.S. Dist. LEXIS 92462, Fed. Sec. L. Rep. (CCH) P99,233 (D. Utah July 15, 2016). Section 4(a)(1) exempts “transaction[s] by any person other than an issuer, underwriter, or dealer.” 15 U.S.C. § 77d(a)(1). In order to rely on the Section 4(a)(1) exemption, Defendants bear the burden of proving that they do not fall within any of these categories. Quinn, 452 F.2d at 945-46.

Defendants have failed to show that they are not underwriters. Section 2(a)(11) defines an “underwriter” as “any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security” 15 U.S.C. § 77b(a)(11). In order to qualify for the Section 4(a)(1) exemption, Defendants must point to evidence showing they did not obtain the shares “with a view to” distribution. SEC v. Big Apple Consulting USA, Inc., 783 F.3d 786, 807 (11th Cir. 2015); Quinn, 452 F.2d at 946.

Whether Defendants obtained the Sharla Kae shares “‘with a view to’ distribution focuses on their investment intent at the time of acquisition.” Big Apple, 783 F.3d at 807. Of course, “there is a distinction between acquiring shares . . . [for] an investment purpose and acquiring shares for the purpose of reselling them.” *Id.* But “it is difficult to discern a party’s intent at the time of purchase with respect to downstream sales of unregistered shares.” *Id.* Because of this, “courts . . . have typically focused on the amount of time a security holder holds on to shares prior to reselling them.” *Id.* In general, “a two-year holding period is sufficient to negate the inference that the security holder did not acquire the securities with a ‘view to distribute.’” *Id.*; Berkeley, 455 F.3d at 213; Ackerberg v. Johnson, 892

F.2d 1328, 1336 (8th Cir. 1989). A holding period requirement has similarly been incorporated into Rule 144, 17 C.F.R. § 230.144, a safe harbor that qualifies transactions as exempt under Section 4(a)(1). 17 C.F.R. § 230.144(d)(1) (outlining a six-month to one-year holding period for certain types of securities).

Here, Defendants argue that “Nethercott’s resale of the Sharla Kae stock to Plaintiff was a transaction ‘between individual investors with relation to securities already issued.’ Defendants further argue that “there is no evidence to suggest that Nethercott obtained the stock with a view to distribution or that he made the sale of the stock in connection with the initial distribution.” Yet Defendants do not point to any evidence in the record showing how long they held the stock before selling it to Mr. Fukuda.

F. Integration.

SEC v. Ishopnomarkurcom, Inc., 126 F. Supp. 3d 318 (E.D.N.Y.2015). Similarly, based on the evidence in the record a reasonable jury could find that Knight violated Section 5(a) or 5(c) of the Securities Act. It is undisputed that no registration statement was filed with the SEC with respect to iShop stock. Furthermore, the jury was not compelled to conclude that Knight was *HNI0* exempt from registration requirements pursuant to Rules 504 and 506 of the Securities Act (17 C.F.R. §§ 230.504, 230.506), exemptions which Knight had the burden of proving. Rule 504 exempts “offerings and sales of securities not exceeding \$1,000,000.” . . .The Court accurately explained to the jury, however, that this exception is not applicable where two or more “integrated” offerings exceed \$1 million. Moreover, there is no challenge to the Court’s instruction that [**20] the jury consider whether any of iShop’s three offerings were integrated, meaning that they took place within 6 months of each other and met the five factor test for determining whether offerings are integrated.⁷ Here, it was undisputed that iShop engaged in a series of three overlapping stock offerings: the first offering, from October 1999 through early March 2000, raised approximately \$1 million; the second, in early 2000, raised an additional approximately \$550,000; and the third, from early 2000 through July 2000, raised an additional approximately \$750,000, for a total of \$2.3 million. Based on the timing of the offerings, and evidence regarding the consideration received and the purpose of the offerings it was reasonable for the jury to determine that the offerings were integrated, thereby precluding the 504 exemption,⁸ and Knight has not pointed to any evidence compelling a contrary conclusion.

G. Failure to State a Claim.

Yoon Ja Kim v. Jh Song, 2016 IL App (1st) 150614-B. Plaintiff alleged a violation of Regulation D. Nonetheless, count IV fails to state a claim based on a violation of Regulation D, because Regulation D is not a basis for a claim. Regulation D outlines the requirements for an exemption from the registration requirements in section 5 of the Securities Act.