

## **Offerings That Allow Public Tombstone Ads – Bruce E. Methven**

The California 25102(n) offering exemption is one of the few that allows some public advertising. Non-California companies that do more than half their business in California can use this exemption as well – or perhaps form a California subsidiary. The exemption can also be combined with an exemption 30 to 35 states have adopted that allows investors in those states to invest.

A brief, very specific “tombstone ad” is allowed to be publicly advertised. (The saying is that a “tombstone ad” allows as much information as one could put on a real tombstone – that is, not much.) Basically a tombstone ad states the name of the issuer, the type of securities, the standards for investors, the fact that no sales will be made without written disclosure documents, how further information may be obtained, a brief description of the issuer’s business and the price of the securities.

For potential investors to be allowed to see the full offering information, they must complete an investor questionnaire, and the offeror must review the responses and determine that the investor appears to be qualified. (The offeror is entitled to rely on the responses unless it has some reason to doubt them.)

Approximately 30 to 35 states (depending on how one views their statutes) have adopted the Model Accredited Investor Exemption (MAIE). California’s version of the MAIE is the 25102(n) offering.

The states were invited to ask the SEC for federal exemptions so that the MAIE could be used across state lines, but only California did so. In response the SEC passed Rule 1001, which allows a California 25102(n) offering to be exempt from federal regulation if the offering is for \$5,000,000 or less. That means that a California 25102(n) offering can be made in other states that have adopted the MAIE so long as the offering is under \$5,000,000.

Each state has small tweaks on the MAIE, so using a multi-state approach means deciding which states investors will be allowed from and then phrasing the tombstone ad so that it meets the requirements for each of those states. It is a bit of work, but it can be done.

In all situations but one, the investors must all be accredited -- being sophisticated in terms of investments is not sufficient. With an intrastate offering limited to California only where the entity is a California corporation (not a California LLC or limited partnership) and the company has only a single class of voting stock (common stock), a second class of investors is allowed. That class is investors who have either a) a minimum net worth of \$250,000 and annual income in excess of \$100,000 or b) a minimum net worth of \$500,000. (One might refer to them as “half-accredited” investors, as they must meet only roughly half the financial requirements of accredited investors.) In each case, homes, home furnishings and automobiles must be excluded in calculating net worth and the investor may only invest up to 10% of net worth. On the

other hand, an unlimited number of investors are allowed. Once the upcoming SEC regulations become effective that will allow an advertised Rule 506 offering (if it is limited to accredited investors whose accredited status is verified), there will likely be little use for a multi-state MAIE offering, unless it turns out that few potential investors are willing to provide the documentation needed to verify that they are accredited. On the other hand, California-only 25102(n) offerings will likely remain attractive because of the “half-accredited” investor class it allows for offerings by corporations.

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