BURNS & LEVINSON LLP

SECURITIES LAW UPDATE

December 2016

NEW SEC RULES FACILITATE REGIONAL AND INTRASTATE PRIVATE PLACEMENTS

On October 26, 2016 the Securities and Exchange Commission (the "SEC") adopted final rules in order to modernize certain capital-raising options that are exempt from SEC registration.

RULE 504 AMENDMENTS/REPEAL OF RULE 505

Rule 504 of Regulation D currently allows for the offering of up to $1 million in securities to an unlimited number of accredited and non-accredited investors and without the requirement of any specific disclosure documents. In addition, Rule 504 allows for solicitation and advertising of securities sales in multiple states if the offering is registered in a state requiring use of a substantive disclosure document or sold under a state exemption that permits general solicitation or advertising so long as sales are made only to accredited investors. As a result of the rule changes:

- The cap on the aggregate amount of securities that may be offered or sold in any 12-month period will be raised from $1 million to $5 million.
- Certain "bad actor" disqualification provisions of Rule 506 of Regulation D have been incorporated by reference, such that Rule 504 offerings will not be permitted if the issuer or other "covered persons" (such as officers, directors, underwriters, placement agents and other key people associated with the issuer) have been convicted of specified securities violations, or are subject to certain sanctions imposed by courts, regulators or self-regulatory organizations.

"The higher offering ceiling amount will promote capital formation by increasing the flexibility of state securities regulators to implement coordinated review programs to facilitate regional offerings," the SEC stated.

Rule 505 of Regulation D, which currently allows for offerings up to $5 million but with no general solicitation and up to a maximum of 35 unaccredited investors (along with an unlimited number of accredited investors), is being repealed by the SEC. Historically, Rule 505 has been used by issuers only sparingly (most issuers rely on Rule 506 of Regulation D, which has no maximum offering size). Now that Rule 504 offerings can be made up to the same $5 million limit as Rule 505 offerings, the SEC determined that Rule 505 would be used even less and repealed it.

The Rule 504 changes will be effective January 20, 2017. Rule 505 will be repealed effective May 22, 2017.

RULE 147 AMENDMENTS AND ADOPTION OF NEW RULE 147A

The SEC also updated Rule 147 and created new Rule 147A, which will facilitate broader advertising and promotion of certain exempt intrastate offerings. Rule

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SECURITIES LAW GROUP:

Burns & Levinson's Securities Law group represents public and private companies, underwriters and investment banks, venture capital and investment funds, real estate investment funds, investment advisors, stockholder groups and individuals in public and private securities offerings and transactions, SEC, FINRA and stock exchange compliance, corporate governance, fund formation and offerings, SEC enforcement, securities litigation, and mergers and acquisitions.

The group's practical and proactive approach to understanding the rapidly changing securities disclosure and corporate governance laws enables them to provide clients with updates and guidance regarding specific situations in which clients may be impacted, and to implement the changes that are either required or advisable to comply with the new regulatory schemes and investor sentiment.

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147 provides a safe harbor for intrastate offerings under Section 3(a)(11) of the Securities Act, relating to offerings offered and sold only to persons resident within a single state by an issuer residing or incorporated in and doing business in that state. The changes to Rule 147 make the safe harbor easier for companies to use, and the adoption of Rule 147A (which is not a safe harbor under Section 3(a)(11)) expands the use of the intrastate offering to companies incorporated in one state but whose primary place of business is in another state.

Under the revised Rule 147, issuers can offer and sell securities in the state where they are organized and of their principal place of business, as long as sales are limited to residents of that state. So for example, a company incorporated in Massachusetts and whose principal place of business is in Massachusetts, is able to utilize this exemption. Under new Rule 147A, issuers incorporated in one state can offer and sell securities in a second state if that second state is the state of their principal place of business. This will allow, for example, a company incorporated in Delaware but whose principal place of business is Massachusetts to utilize the exemption to offer and sell securities only in Massachusetts.

In addition, Rule 147A will have no intrastate restrictions on offers, but sales can only be made to residents of the state where the issuer is doing business. This will enable companies to use a variety of technologies to advertise their offerings, including Internet and social media platforms across state lines, as long as sales are ultimately only made to residents of its state.

Both the amended Rule 147 and new Rule 147A will facilitate exempt intrastate offerings through provisions that:

1. Enable issuers to more easily satisfy the requirement to demonstrate the in-state nature of their business (the "principal place of business," meaning the "location from which the officers, partners or managers of the issuer primarily direct, control and coordinate activities of the issuer") by satisfying one of several "doing business" requirements, such as deriving 80% of its consolidated gross revenues within the state or having the majority of its employees based in the state. Previously, the Company had to have its "principal office" in that state, which the SEC deemed to be too restrictive.
2. Provide a "reasonable belief" standard for determining the residence of purchasers at the time of the sale (i.e., that the Company reasonably believed that the investor was a resident of the state).
3. Require that issuers obtain a written representation from each purchaser as to residency.
4. Limit the resale of the securities to persons resident in the same state for the first six months after the initial sale of the securities.
5. Provide an integration safe harbor that precludes the integration of the offering with certain prior or subsequent offers or sales of securities.

Revised Rule 147 and new Rule 147A will be effective April 20, 2017.

THE SEC RELEASE

For a more detailed examination of these rule changes, see **SEC Release No. 33-10238; 34-79161**.

OTHER RELEVANT BURNS & LEVINSON UPDATES

For more details about the existing "bad actor" rules, see our July 2013 Securities Law update entitled "**SEC Amends Rules on Advertising, Solicitation and 'Bad Actors' for Certain Private Offerings and Proposes Changes to Form D**."

ABOUT BURNS & LEVINSON:

Burns & Levinson is a Boston-based, full service law firm with more than 125 attorneys and offices in Massachusetts, New York and Rhode Island. The firm has grown steadily and strategically throughout the years, and has become a premier law firm with regional, national and international clientele. Core areas of practice are Business Law, Business Litigation, Intellectual Property, Private Client Legal Services and Real Estate. For more information, visit burnslev.com.

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