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Final SEC Rules Facilitating Intrastate and Regional Securities Offerings

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On October 26, 2016, the U.S. Securities and Exchange Commission (SEC) modernized the exemptions for intrastate securities offerings to facilitate capital raising for smaller companies. The SEC:

- expanded the existing Rule 147 safe harbour under section 3(a)(11) of the *Securities Act of 1933*, as amended (Securities Act);
- established Rule 147A under the Securities Act, a new intrastate offering exemption;
- increased the amount of securities that may be offered and sold under Rule 504 in any 12-month period from \$1 million to \$5 million and added a provision disqualifying bad actors from participation in Rule 504 offerings; and
- repealed Rule 505 of Regulation D.

Foreign private issuers are incorporated and typically have their principal place of business abroad and, therefore, are unlikely to benefit from (or be affected by) these changes.

Rule 147

Many state law exemptions, including crowdfunding provisions, are based on the exemption in section 3(a)(11) of the Securities Act. Rule 147 is an intrastate offering exemption that permits issuers to raise capital from investors within their state by complying with state securities or “blue sky” laws without registering the offers and sales under the Securities Act. The key requirements for an issuer to qualify for the exemption in amended Rule 147 include the following:

- The issuer must be organized and have its “principal place of business” in the state where the securities are offered and sold.
- The issuer may engage in general advertising and general solicitation to market its securities only within the state where the securities are offered and sold, and there is no limit on the amount of securities that may be sold under the safe harbour.
- The issuer must satisfy at least one of four updated “doing business” requirements to demonstrate the in-state nature of the issuer’s business.¹
- The issuer must have a “reasonable belief” with respect to the in-state residency status of the purchaser at the time of the sale of securities (determined on the basis of all facts

¹ Before the adoption of the final rules, issuers had to satisfy three “doing business” requirements to qualify for an exemption under Rule 147.

and circumstances), and the issuer must still obtain a written representation from each purchaser as to the purchaser's residency.²

- Resales of securities by purchasers to persons residing within the state of the offering are restricted for a period of six months from the date of the sale by the issuer to the original purchaser under the exemption.
- The issuer must provide certain disclosures, including securities legends, to offerees and purchasers regarding the limits on resales and other matters.

New Rule 147A

To further facilitate capital raising for smaller companies, the SEC adopted new Rule 147A, using its general authority under section 28 of the Securities Act. The requirements of Rule 147A are substantially identical to the requirements of amended Rule 147, with two exceptions.

First, while Rule 147 prohibits an issuer from making offers and sales to out-of-state residents, and requires the issuer to be incorporated or organized in the state in which the intrastate offering is being made, Rule 147A has no such limitations. An issuer may be incorporated or organized outside the state in which it conducts an offering under Rule 147A (for example, in Delaware to take advantage of well-established bodies of corporate or partnership law in that state), provided the issuer's principal place of business is in the state and it otherwise complies with the requirements of Rule 147A. For example, a Delaware corporation, limited liability company or partnership that has its principal place of business outside the state of Delaware may be able to rely on Rule 147A to conduct an offering in the state where the issuer resides but would still not satisfy the requirements of amended Rule 147.

Second, an issuer relying on Rule 147A may make offers accessible to out-of-state residents (through general solicitation or general advertising on the Internet, for example), so long as sales are limited to in-state residents. Amended Rule 147 requires that issuers make offers and sales only to in-state residents.

Section 12(g) Limits

In contrast to the provisions of the SEC's Regulation Crowdfunding and the Tier 2 exemption of Regulation A (which trigger ongoing reporting requirements), equity securities issued in intrastate or regional offerings under Rules 147, 147A and 504 are not excluded when calculating the number of record holders for purposes of registering a class of securities under section 12(g) of the *Securities Exchange Act of 1934*, as amended.³

² Obtaining a written representation from each purchaser is not dispositive of the purchaser's residency. The exemption will not be lost as a result of a sale to an out-of-state resident so long as the issuer reasonably believed that the investor was an in-state resident.

³ A U.S. issuer that, on the last day of its fiscal year, has more than \$10 million of total assets and, as a result of issuing equity securities in exempt offerings under Rules 147, 147A or 504, has securities "held of record" by either (i) 2,000 persons or (ii) 500 persons who are not "accredited investors" will be required to register the class of equity securities under section 12(g) of the Exchange Act. Foreign private issuers must also have 300 or more holders of record that are U.S. residents before triggering that requirement.

If you have any questions regarding the foregoing, please contact [Jeffrey Nadler](#) (212.588.5505) in our New York office.

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