

New York Attorney General Issues Guidance Clarifying Filing Requirements for Regulation D Private Placements

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On December 1, the New York attorney general issued guidance that issuers selling “covered securities” must provide notice through the Electronic Filing Depository (EFD) of the North American Association of Securities Administrators. The guidance eliminates the need to file a pre-closing Form 99, effectively settling disagreement among practitioners as to whether New York ever had the right to require issuers of securities in Rule 506 private placements to comply with the state’s longstanding Form 99 filing requirement, in light of the blue sky preemption provisions of the National Securities Markets Improvement Act of 1996 (NSMIA).

Regulation D and NSMIA

Pursuant to Regulation D of the Securities Act of 1933 (Reg. D), an issuer offering or selling securities in reliance on Rule 506 of Reg. D must file a notice of sales on Form D with the Securities and Exchange Commission no later than 15 days after the first sale of securities in the offering. Under NSMIA, states are preempted from requiring state-level registration and qualification of “covered securities,” with the exception that states may require filing fees and notice filings similar to those required by Form D.

NSMIA recognizes securities sold in reliance on Rule 506 of Reg. D as a “covered security.” As a result, NSMIA preempts state securities laws requirements aside from those requiring a filing fee or a notice filing similar to those required by Form D.

In light of NSMIA, practitioners held contrasting views as to what New York could permissibly require and how to comply with such requirements. For example, the Committee on Securities Regulation of the Business Law Section of the New York State Bar Association published a position paper in 2002, stating that offerings exempt under Rule 506 are excluded from the registration requirements of the Martin Act, New York’s state securities law.

New York’s Form 99

Prior to the new guidance, issuers were required to file a Form 99 in connection with a Rule 506 offering. Compliance with the Form 99 filing was burdensome, including the requirements to provide substantially more information by issuers than required by Form D, file *prior* to any sale or offering of securities in the state, and include copies of the offering documents — all of which were arguably inconsistent with NSMIA.

New Rules Under the Guidance

Beginning on December 2, issuers selling “covered securities” must provide notice through the EFD system. Pending any deficiency notification provided to the filer, New York will consider the notice filing complete once the notice filing has made it through the EFD system and the appropriate filing fee paid. The filing fee will be based on the offering amount and is unchanged from the fees previously required for Form 99 filings.

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