

SEC Eases Intrastate Offering Rules

Last October, the U.S. Securities and Exchange Commission (SEC) finalized its rules on [crowdfunding](#), required under Title III of the *Jumpstart Our Business Startups (JOBS) Act*. The final rules took almost three years from the JOBS Act's issuance; in that time, 30 states enacted crowdfunding rules to let local businesses raise capital within their respective states. Those state laws allow for crowdfunding to nonaccredited investors. However, each state's laws are somewhat unique, making it challenging for issuers to navigate their offering options.

In the United States, a securities offering that can only be purchased by residents in the state in which it is issued falls under state regulators' jurisdiction. Some companies choose this type of issue because it is cheaper than registering with the SEC. If a security is offered for sale in more than one state—an intrastate offering—an issuer must register in each state the securities will be sold as well as the SEC.

On October 26, 2016, the SEC adopted final rules that modernize how companies can raise money through intrastate and small offerings while maintaining investor protections.

Securities Act Rule 147

The SEC adopted Rule 147 in 1974 as a safe harbor to a statutory intrastate exemption included in the Securities Act upon its 1933 adoption. Rule 147 provides a framework of rules to ensure securities being sold will be exempt from federal registration and subject to applicable state regulation. Both issuers and state regulators have indicated the current rules unnecessarily limit companies' ability to conduct intrastate offerings. The final rule updates the existing intrastate offering framework that allows companies to raise money from in-state investors without concurrently registering the offers and sales at the federal level.

The amendments retain Rule 147 since all of the recent state crowdfunding exemptions are premised on current SEC regulation. Issuers relying on amended Rule 147 as a safe harbor must continue to limit all offers and sales to in-state residents.

The final rules create a new intrastate offering exemption, Rule 147A, which allows an issuer to make offers accessible to *out-of-state* residents and be incorporated or organized out of state, as long as it can demonstrate the in-state nature of business. Rule 147A allows issuers to advertise their offerings—using any form of mass media, including internet—as long as sales of securities are *only* made to in-state residents.

Both new Rule 147A and amended Rule 147 include these provisions:

- A requirement that the issuer has its “principal place of business” in the state and satisfy at least one “doing business” requirement to demonstrate the in-state nature of the issuer’s business
- A new “reasonable belief” standard for issuers to rely on in determining the purchaser’s residency
- A requirement that issuers obtain a written representation from each purchaser as to residency
- A limit on resales to state residents of the offering for a period of six months from the purchaser’s sale date
- An integration safe harbor that would include any prior offers or sales of securities by the issuer made under another provision as well as certain subsequent offers or sales of securities by the issuer occurring after the offering’s completion
- Disclosure requirements to offerees and purchasers about the limits on resales

These amendments are effective 150 days after publication in the **Federal Register**.

Nothing in amended Rule 147 or new Rule 147A eliminates compliance with any applicable state law relating to the offer and sale of securities. In addition, federal and state anti-fraud provisions will continue to apply.

Regulation D, Rule 504

Rule 504 is a little-used federal safe harbor that provides an exemption from federal registration for offerings under \$1 million. Unlike Rule 147, a Rule 504 offering does not have to be conducted within a single state. The final rules increase the amount of securities offered and sold in any 12-month period from \$1 million to \$5 million and disqualify certain bad actors from participation. Bad actor triggering events will be uniform for Rule 504, Regulation D, Regulation A and Regulation Crowdfunding, simplifying due diligence. These changes will make it easier to coordinate crowdfunding across neighboring states. The increased limit under Rule 504 significantly diminishes the utility of Rule 505, which will be repealed.

Amended Rule 504 will be effective 60 days—and Rule 505’s repeal will be effective 180 days—after publication in the **Federal Register**.

Additional Resources

Companies contemplating a capital raise using a filing exemption should seek legal advice from a qualified securities attorney. Several other capital alternatives under different JOBS Act provisions are compared in Appendix A.

BKD, LLP prepared several papers on the JOBS Act and will continue to monitor updates. These resources are collected in [the Hot Topics section of bkd.com](#). For more information, contact your BKD advisor.

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Appendix A

Comparison of Small-Issue Exemptions			
	Regulation A – Tier 1	Regulation A – Tier 2	Crowdfunding
Dollar Limit (in 12-Month Period)	\$20 million	\$50 million	\$1 million
Periodic SEC Reporting	None	<ul style="list-style-type: none"> ▪ Annual report ▪ Semiannual reports ▪ Current report ▪ Special financial reports 	Annual disclosure and financials
Audited Financial Statements	No, unless prepared for other purposes	Yes, can use either U.S. generally accepted auditing standards (GAAS) or Public Company Accounting Oversight Board (PCAOB) standards	<ul style="list-style-type: none"> ▪ None if < \$100,000 ▪ Reviewed if \$100,000–\$500,000 ▪ Audited > \$500,000 (review permitted for first-time offering if < \$1 million) Can use either U.S. GAAS or PCAOB standards
Investor Verification	None	Self-certification	Self-certification
Individual Investor Limits	None	For nonaccredited investors, 10 percent of greater of income or net worth (not applicable for securities to be listed on a national securities exchange)	<ul style="list-style-type: none"> ▪ \$2,000 minimum ▪ 5 percent of income or net worth if either is less than \$100,000 ▪ 10 percent of the lesser of income or net worth if either is more than \$100,000 ▪ \$100,000 maximum
State Security Law Pre-Emption	No, coordinated review	Yes	Yes, but must make filing in home state and any state with more than 50 percent of crowdfunders
Advertising/General Solicitation	Unrestricted	Unrestricted	Limited to notices, all must occur on internet



Comparison of Small-Issue Exemptions			
	Regulation D, Rule 506b	Regulation D, Rule 506c	Regulation D, Rule 504
Dollar Limit	Unlimited	Unlimited	\$5 million
Periodic SEC Reporting	<p>Nonreporting Issuers: Specific types of financial statement information based on offering size</p> <p>Reporting Companies: Issuer's most recent annual report and, if requested, most recent Form 10-K</p>	No annual disclosure requirement or other ongoing oversight	No annual disclosure requirement or other ongoing oversight
Audited Financial Statements	<p>Financial statements need to be audited by an independent public accountant:</p> <ul style="list-style-type: none"> ▪ If too costly, a company—other than a limited partnership—only can provide the company's audited balance sheet (to be dated within 120 days of the start of the offering) ▪ If too costly, limited partnerships may furnish audited financial statements prepared under federal income tax laws 	No requirement for financial statements review or audit by independent accountants	No requirement for financial statements review or audit by independent accountants
Investor Verification	Self-certification	Self-certification not permitted	None
Individual Investor Limits	Only 35 nonaccredited investors	All investors must be accredited	None
State Security Law Pre-Emption	Yes	Yes	No
Advertising/General Solicitation	Restricted	Unrestricted	Unrestricted

