
New York Adopts Changes to Modernize Regulation D Filings

On April 6, 2020, New York Attorney General Letitia James announced proposed revisions to existing rules to modernize and streamline the process for making required filings in New York State related to private placements of securities conducted pursuant to Rule 506 of Regulation D promulgated under the Securities Act of 1933, as amended (the “Securities Act”).¹ The proposed revisions, which move New York toward consistency with other states on notice filings arising from Rule 506 offerings, were adopted in December 2020.

Background

Article 23-A of the New York General Business Law (commonly referred to as the “Martin Act”), New York’s securities law, imposes registration and disclosure requirements on participants in the securities industry, including issuers of securities. However, many practitioners have long argued that the Martin Act goes beyond the scope of, and is inconsistent with, state regulation permitted by the National Securities Markets Improvement Act of 1996 (“NSMIA”) with respect to its requirements for offerings of securities conducted under Rule 506. NSMIA preempts the ability of states to require registration or qualification of federal “covered securities,” which include those securities issued pursuant to Rule 506. Under NSMIA, states are limited to requiring notice filings and filing fees related to the issuance of covered securities.

The Martin Act, however, requires registration, which process includes the manual filing of a signed Form 99 together with a signed and notarized Form U-2 (Uniform Consent to Service of Process) and a State Notice and Further State Notice. As such, practitioners have argued that NSMIA preempts the more onerous requirements under the Martin Act. Issuers who otherwise provide notice and pay a fee to the various other states involved in a Rule 506 offering, where required under the securities laws of such other states, have in many cases been advised by legal counsel that no such filing, nor the payment of any such fee, need be made in New York with respect to such offering as a result of the NSMIA preemption. This interpretation was bolstered by a New York State Bar Association position paper to this effect that was issued in 2002 (the “Position Paper”), which argued that the Martin Act requirements constituted an impermissible regulatory scheme running parallel to the Securities Act.

¹ See the Pryor Cashman LLP Legal Update available here: <https://www.pryorcashman.com/michael-t-campoli/news/ny-attorney-general-proposes-changes-to-modernize-securities-filings>.

Summary of Amendments

The proposed amendments to the Martin Act that were adopted by the NY Attorney General revise existing regulations to require, beginning on December 2, 2020, notice filings for “covered securities” that are offered within or from New York under Rule 506. Specifically, within 15 days of the first sale of securities in a Rule 506 offering within or from New York, issuers must file with the Investor Protection Bureau of the Department of Law (the “IPB”) a copy of the Notice of Exempt Offering of Securities on Form D that the issuer filed with the Securities and Exchange Commission (the “SEC”) with respect to such offering. Issuers must also pay a filing fee of either (i) \$300 for offerings in an amount less than \$500,000 or (ii) \$1,200 for offerings in an amount equal to or greater than \$500,000. The filings and payments are to be effectuated through the North American Association of Securities Administrators’ electronic filing depository system (“EFD”), through which such filings are effectuated for most states.

Issuers will be required to file an amended Form D with New York when an amendment is filed with the SEC. Annual updates to Form D that do not include any amended information will not be subject to any filing fee, while annual updates that include updated information, as well as amendments other than annual amendments, will be subject to a \$30 filing fee. Further, any offering that continues for more than four years will incur a renewal fee.

The IPB will not accept any new Form 99 or Form 99 renewal submissions after February 1, 2021.

Conclusion

As a result of the amendments to the Martin Act described above, issuers who engage in private placements of securities under Rule 506 of the Securities Act in New York must be prepared to make the requisite notice filings in, and pay the corresponding fees to, New York. This will be the case regardless of the position that such issuers took regarding securities filings in New York arising from private placements that they conducted in the past.

Further, given that the New York Attorney General, in its assessment of the comments that it received in response to the proposed changes to the Martin Act, rejected the ABA’s interpretation articulated in the Position Paper, those issuers who previously elected not to file a Form 99 in New York with respect to private placements under Rule 506 may wish to file a Form D notice through EFD to ensure compliance with New York law.

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The above legal update was written by partner [Michael Campoli](#), a member of Pryor Cashman's Corporate and Investment Management Groups. He advises public and private companies and is focused on middle-market domestic and multinational entities.

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