34th ANNUAL FEDERAL SECURITIES INSTITUTE

February 4, 2016

Miami, Florida

"New Life for Intrastate Offerings and More Capital for Small Businesses"

GREGORY C. YADLEY *

Shumaker, Loop & Kendrick, LLP

I. INTRODUCTION AND BACKGROUND

Small businesses are the "lifeblood of our economy," employing half of the workforce in the United States and creating nearly two out of every three new American jobs.[1] Raising capital for new ventures starts out "locally" with funding by private money, initially from friends and family. Later funding comes from a wider circle of acquaintances, typically also close to home and then, perhaps, from angel investors and, only later, venture capitalists and private equity groups. Angel investors, for example, provide approximately 90% of outside equity raised by start-up companies, and are virtually the only source of seed funding. In 2014, angels invested $24 billion in more than 73,000 companies, approximately 25% of which were seed capital or startup stage transactions.[2]

While the Internet and social media have made the universe of potential funding sources theoretically unlimited – including by geography – as a practical matter, for an entrepreneur with

---

* The author is a member of the U.S. Securities and Exchange Commission Advisory Committee on Small and Emerging Businesses. The views expressed in this article are those of the author. They do not reflect the views of the Advisory Committee or the staff or members of the Securities and Exchange Commission.

[1] President Barack Obama, Proclamation, National Small Business Week, 2014 (May 9, 2014) ("Small businesses represent an ideal at the heart of our Nation's promise – that with ingenuity and hard work, anyone can build a better life. They are also the lifeblood of our economy, employing half of our country's workforce and creating nearly two out of every three new American jobs.")

[2] *See* Jeffrey Sohl, *The Investor Angel Market in 2014: A Market Correction in Deal Size*, *Center for Venture Research*, May 14, 2015, *available at* https://paulcollege.unh.edu/sites/paulcollege.unh.edu/files/webform/2014%20Analysis%20Report.pdf.

untested products or new services, raising capital begins with people he or she knows, usually in the same community, or at least the same state. Therefore, the securities laws of the entrepreneur's state are particularly important. Given the pervasive reach of the federal securities laws, compliance with the Securities Act of 1933, as amended (the "Securities Act"), and the rules of the U.S. Securities and Exchange Commission ("SEC") is required, and often an impediment. While Section 3(a)(11) of the Securities Act contains an "intrastate exemption," small businesses seeking capital have had a difficult time limiting their activities to fall within the exemption.

Section 3(a)(11) provides an exemption from federal registration for *"[a]ny security which is a part of an issue offered and sold only to persons resident within a single state or territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such state or territory."*[3] SEC Rule 147 provides a "safe harbor" for companies seeking to meet the requirements for the Section 3(a)(11) exemption.[4] The Commission adopted Rule 147 in 1974 to provide objective standards for local businesses seeking to rely on the statutory intra-state exemption.[5]

Rule 147 has not been substantively updated since it was promulgated more than 40 years ago, notwithstanding the exponential developments in communications technologies and the increasingly interstate nature of small business activities. Given the prescriptive threshold requirements that an issuer must satisfy in order to be considered "doing business" in-state, the

[3] Section 3(a)(11), Securities Act of 1933, 15 USCA s. 77c(a)(ll).

[4] 17 CFR 230.147. SEC Rel. No. 33-5450 (Jan. 7, 1974) [39 FR 2353 (Jan. 21, 1974)] ("Rule 147 Adopting Release"); SEC Rel. No. 33-5349 (Jan. 8, 1973) [38 FR 2468 (Jan. 26, 1973)] ("Rule 147 Proposing Release").

[5] *See* Rule 147 Adopting Release. *See also* SEC Rel. No. 33-4434, at 4 (Dec. 6, 1961) [26 FR 11896 (Dec. 13, 1961)] ("1961 Release").

availability of the Rule 147 safe harbor for local companies that would otherwise conduct intrastate offerings has been extremely limited.[6]

It is a particularly opportune time for the SEC to modernize Rule 147 because a majority of states have adopted some form of equity "crowdfunding" provisions. According to the North American Securities Administrators Association ("NASAA"), as of December 2015, 29 states and the District of Columbia had enacted some form of state-based crowdfunding exemption from state registration through legislation, regulation or administrative order.[7] Additional states have crowdfunding legislation pending or are investigating whether to adopt state-based crowdfunding provisions. Most of the states that have crowdfunding provisions require that the issuer comply with Section 3(a)(11) of the Securities Act or SEC Rule 147. Therefore, cooperation and coordination between the SEC and the states is critical to achieve harmonious regulation, avoid confusion and facilitate access to capital for smaller businesses.

II. INADEQUACY OF THE INTRASTATE EXEMPTION

Rule 147 under the Securities Act was adopted by the SEC to provide objective standards for local businesses seeking to rely on Section 3(a)(11). This "safe harbor" rule was promulgated to provide assurances that the intrastate offering exemption would be used for the purpose intended by Congress, the local financing of companies by investors within the company's state or territory.[8] Nothing in Rule 147 obviates the need for compliance with any state law relating to the offer and sale of the securities, and the anti-fraud provisions of the federal securities laws apply to Rule 147 offerings.

---

[6] 17 CFR 230.147(c)(2)(i)-(iii). To satisfy the safe harbor requirements, an issuer must, among other things, derive at least 80% of its consolidated gross revenues in-state; have at least 80% of its consolidated assets in-state; and intend to use and use at least 80% of the net proceeds from the offering in connection with the operation of an in-state business or real property.

[7] *See* Intrastate Crowdfunding Directory, NASAA, http://www.nasaa.org/industry-resources/corporation-finance/instrastate-crowdfunding-resource-center/intrastate-crowdfunding-directory/.

[8] *See* H.R. REP. NO. 73-85, at 6-7 (1933), H.R. REP. NO. 73-1838, at 40-41 (1934) (Conf. Rep.).

The prescriptive provisions of Rule 147, including the issuer "doing business" conditions discussed below, restrictions on the manner of sale and on resales of securities, among others, have limited the use of the exemption and, as a result, acted as an impediment to capital-raising, particularly for small businesses seeking local financing. A number of business leaders and other capital market participants have called for modernization of the federal securities laws to facilitate small business capital formation, as has the SEC Advisory Committee on Small and Emerging Companies (the "Advisory Committee").[9]

The Advisory Committee was formed to advise and consult with the Commission on such issues as capital raising through private placements and public securities offerings; trading in securities of small and emerging, and small publicly-traded, companies; and public reporting requirements for such companies. Recommendations to modernize Rule 147 to facilitate recently enacted and future state-based crowdfunding initiatives were discussed at a meeting of the Advisory Committee on June 3, 2015. The Advisory Committee concluded that, in practice, there are three primary areas that currently make it difficult for issuers to utilize the Rule 147 exemption:[10]

- The rule does not allow offers to out-of-state residents; therefore, an offering placed on a publicly-available website or actively promoted on social media and viewable by out-of-state residents is impermissible under the rule.

[9] The Advisory Committee was organized on September 13, 2011, to focus on the interests and priorities of small businesses and smaller public companies. It was re-chartered for additional two-year terms on September 24, 2013, and again on September 23, 2015. The Advisory Committee is comprised of 17 members, including executives, owners, investors and advisors of privately-held small businesses and smaller public companies. There are also two "observer members," a representative from the U.S. Small Business Administration and a state securities regulator. The press release containing the announcement stated that the Committee is intended to provide a formal mechanism through which the agency can receive advice and recommendations specifically related to privately-held small businesses and publicly-traded companies with less than $250 million in public market capitalization.

[10] *See, e.g.*, Transcript of Record at 84, SEC Advisory Committee on Small and Emerging Companies (June 3, 2015), *available at* http://www.sec.gov/info/smallbus/acsec/acsec-minutes-060315.pdf.

- The rule requires three 80% tests for an issuer to be deemed "doing business" within a state: that the issuer generates at least 80% of its revenues in-state, holds at least 80% of its assets in-state, and uses at least 80% of the gross proceeds of the offering in-state.
- Issuers must be incorporated or organized in the state where the intrastate offering is conducted.

The general concept of a recommendation was unanimously approved by the members of the Advisory Committee present and voting at the June 3, 2015, meeting. Based on the conclusions reached at that meeting, the following specific recommendation was voted upon and unanimously approved by the Advisory Committee on September 23, 2015:[11]

> The Committee recommends that the Commission modernize Securities Act Rule 147 through the use of its exemptive authority to facilitate recently enacted and future state-based crowdfunding initiatives. The Commission should consider the following:
>
> - Allowing offers made in reliance on Rule 147 to be viewed by out-of-state residents, but requiring that all sales be made only to residents of the state in which the issuer has its main offices;
> - Removing the need to use percentage thresholds for any type of issuer eligibility requirement, and evaluating whether alternative criteria should be used for determining the necessary nexus between the issuer and the state where all sales occur; and
> - Eliminating the requirement that the issuer be incorporated or organized in the same state where all sales occur.

Participants at the annual SEC Government-Business Forum on Small Business Capital Formation (the "Forum") have also endorsed efforts to modernize the intrastate exemption.[12] A major purpose of the Forum is to provide a platform to highlight perceived unnecessary impediments to small business capital formation and address whether they can be eliminated or

[11] The recommendation was formally delivered by to SEC Chair Mary Jo White by the Advisory Committee by letter dated September 23, 2015.

[12] As mandated by the Small Business Investment Incentive Act of 1980, the SEC conducts the Forum annually and prepares a report under 15 U.S.C. 80c-1 (codifying section 503 of Pub. L. No. 96-477, 94 Stat. 2275 (1980)).

reduced. In recent years, attendees at the annual Forum have emphasized the need for flexibility for small business seeking capital, including through crowdfunding, and encouraged federal-state cooperation to facilitate capital-raising activities while at the same time protecting investors.

One of the three breakout groups at the November 19, 2015, Forum focused on proposed amendments to Rules 147 and 504. As of January 2016, the formal report of the 2015 Forum had not yet been issued. However, following the breakout group discussion, the following recommendations to the SEC were presented at the Forum's plenary session:

- Because the average size of investment is likely to be small resulting in issuers acquiring a large number of non-accredited investors, a permanent exemption from Section 12(g) registration under the Exchange Act for securities sold in a Rule 147 or Rule 504 offering, which exemption should "follow the securities," is essential if these rules are to be an effective means of capital-raising.
- Because many states' intrastate crowdfunding laws or regulations specifically refer to Section 3(a)(11), unless the Commission believes it can make all the proposed changes to Rule 147 in its current form as a safe harbor under Section 3(a)(11), we recommend that the Commission take a "side-by-side" approach in introducing a new Rule 147 - as it did with Rule 506 and Regulation A - keeping old Rule 147 in place as a safe harbor under Section 3(a)(11) (but amending it as far as possible under the statutory limitations of Section 3(a)(11)) at the same time as it adopts a new Rule 147.
- Increase the proposed limit on Rule 504 to $10 million, and remove the implicit $5 million limit in Rule 147, permitting the states to set their own limits as appropriate.
- Create a safe harbor for determining the "place of business" of a non-natural person investor in Rule 147 offerings, which could be as simple as a self-certification as to its place of business.
- Make a public statement for the benefit of FINRA that Rule 147 offerings are not "public offerings" for the purposes of FINRA Rule 5110, and that FINRA Rule 5123 is the appropriate rule to apply.

III. SEC PROPOSALS TO REVISE RULE 147

On October 30, 2015, the SEC proposed amendments to Rule 147's safe harbor for the intrastate offering exemption.[13] In its release, the agency stated that, consistent with the suggestions of market participants and state securities regulators, the proposals would modernize the rule and establish a new exemption to facilitate capital formation, including through offerings relying upon recently adopted intrastate crowdfunding provisions under state securities laws.[14] The SEC stated further that the proposed amendments would eliminate the restriction on offers and ease the issuer eligibility requirements, while limiting the availability of the exemption at the federal level to issuers that comply with certain requirements of state securities laws. In the same release, the SEC proposed amendments to Rule 504 of Regulation D under the Securities Act.[15] The Commission requested comments on the rule proposals by January 11, 2016, but the agency is continuing to accept public comments. The comments are available on the SEC website, www.sec.gov/rules/proposed.shtml; File Number S7-22-15, as are studies, memoranda and other substantive items that may be added by the Commission or staff.

"Crowdfunding" was one of the centerpieces of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"), which was signed into law by President Obama on April 5, 2012.[16] The Commission adopted implementing rules which permit companies to use the Internet to offer and sell securities through crowdfunding ("Regulation Crowdfunding") on October 30,

---

[13] Release Nos. 33-9973; 34-76319; File No. S7-22-15.

[14] *See, e.g.*, Transcript of Record at 78, SEC Advisory Committee on Small and Emerging Companies (June 3, 2015), *available at* http://www.sec.gov/info/smallbus/acsec/acsec-minutes-060315.pdf; State Based Crowdfunding, presentation by Michael S. Pieciak, NASAA Corporate Finance Chair, SEC Advisory Committee on Small and Emerging Companies (June 3, 2015), *available at* http://www.sec.gov/info/smallbus/acsec/state-based-crowdfunding.pdf; Letter from Stanley Keller, Fed. Regulation of Sec. Comm. of the Bus. Law Section of the American Bar Assoc., to Linda C. Quinn and Mary E.T. Beach of the SEC Div. of Corp. Fin. ("ABA Letter"), submitted as appendix to letter from Stanley Keller to the SEC Advisory Committee on Small and Emerging Companies (June 1, 2015), *available at* http://www.sec.gov/comments/265-27/26527-50.pdf.

[15] See Section IV. below.

[16] Pub. L. No. 112-106, 126 Stat. 306.

2015.[17] As mandated by the JOBS Act, the rules are highly prescriptive, and will become effective on May 16, 2016. In the interim, as the Commission noted in the Proposing Release, state crowdfunding provisions have proliferated.[18] These provisions generally require that an issuer, in addition to complying with various state-specific requirements to qualify for the exemption, also comply with Section 3(a)(11) and Rule 147.[19] The Commission acknowledged that it had received feedback from state securities regulators and market participants indicating that the current statutory requirements in Section 3(a)(11) and regulatory requirements in Rule 147 make it difficult for issuers to take advantage of these new state crowdfunding provisions.[20]

Rule 147 Proposals. The SEC's proposed amendments to Rule 147 would address the perceived constraints addressed above and should make the intra-state offering more viable. The proposals would accomplish this and add further flexibility to issuers through the following provisions:

- Each purchaser in the offering must be, in fact, a resident of the same state or territory as the issuer's principal place of business, or the issuer must have had a reasonable belief that each purchaser was a resident of such state or territory.[21]

---

[17] The SEC's Regulation Crowding was adopted pursuant to Title III of the JOBS Act. *See* SEC Rel. No. 33-9974 (Oct. 30, 2015).

[18] *See* note 7 above. *See, e.g.,* ALA. CODE § 8-6-11 (2014); ARIZ. REV. STAT. ANN. § 44-1844 (2015); COLO. REV. STAT. § 11-51-304(6) (2014); FLA. STAT. § 571.021, 517.061, 517.0611, 517.12, 517.121, 517.161, 626.9911; IND. CODE § 6-3.1-24-14 (2014); KY. REV. STAT. ANN. § 292.410-292.415 (2015); ME. REV. STAT. ANN. tit. 32, § 16304, sub-§6-a (2014); D.C.MUN. REGS. tit. 26-B, § 250 (2014); GA. COMP. R. & REGS. 590-4-2-.08 (2011); IDAHO CODE ANN. § 30-14-203 (providing an exemption by order on a case-by-case basis); KAN. ADMIN. REGS. § 81-5-21 (2011).

[19] Of the 29 states and the District of Columbia that have adopted intrastate crowdfunding provisions, only Maine allows an issuer to rely upon a federal exemption other than a combination of Securities Act Section 3(a)(11) and Rule 147, namely the exemption provided by Rule 504 of Regulation D. *See* ME. REV. STAT. tit. 32, § 16304(6-A)(D) (2013).

[20] *See* note 14 above. *See also* Recommendation to the Commission by the Advisory Committee on Small and Emerging Companies (Sept. 23, 2015), *available at http://www.sec.gov/info/smallbus/acsec/acsec-recommendation-modernize-rule-147.pdf.*

[21] The reasonable belief concept is welcome as it removes a great uncertainty from the rule. The 1961 Release also underscored the rigidity of the rule, noting that, "If any part of the issue is offered or sold to a non-resident, the exemption is unavailable not only for the securities so sold, but for all securities forming a part of the issue, including those sold to residents." *Id*.; *see also* 1937 Letter of General Counsel (stating that Section 3(a)(11) is "limited to cases in which the entire issue of securities is offered and sold exclusively to residents of the state in

- The issuer may engage in any form of general solicitation or general advertising, including the use of publicly accessible Internet websites, to offer and sell its securities, so long as all sales occur within the same state or territory in which the issuer's principal place of business is located.[22]
- The offering must either be (i) registered in the state in which all of the purchasers are resident, or (ii) exempt from state law registration in that state pursuant to an exemption that (x) limits the amount of securities an issuer may sell pursuant to such exemption to no more than $5 million in a twelve-month period, and (y) imposes an investment limitation on investors.
- The issuer's principal place of business is defined as the location in which the officers, partners, or managers of the issuer primarily direct, control and coordinate the activities of the issuer.
- The issuer must satisfy at least one of four thresholds designed to demonstrate the in-state nature of the business within the state in which the offering is conducted:[23]
    - at least 80% of its consolidated gross revenues are derived from the operation of a business or of real property located in or from the rendering of services within such state or territory;
    - at the end of its most recent semi-annual fiscal period prior to the first offer of securities pursuant to the exemption, at least 80% of its consolidated assets were located within such state or territory;

---

question.").

[22] While this concept is not new, clarification was necessary. The SEC's General Counsel had stated, as long ago as 1937, that, so long as all the statutory requirements of the exemption were satisfied, securities could be offered and sold through the mails, and even be delivered in interstate commerce to purchasers, so long as such purchasers, though resident, were temporarily out of the state. *See* SEC Rel. No. 33-1459 (May 29, 1937) [11 FR 10958 (Sept. 27, 1946)] ("1937 Letter of General Counsel"). In this context, the SEC letter further noted that securities exempt from registration pursuant to Section 3(a)(11) "may be made the subject of general newspaper advertisement (provided the advertisement is appropriately limited to indicate that offers to purchase are solicited only from, and sales will be made only to, residents of the particular state involved)."The Commission restated the staff guidance in its 1961 Release at 4. As with current Rule 147, reliance on a written representation from the purchaser as to his or her in-state residency status would not, without more, be sufficient to establish a reasonable belief that such purchaser is an in-state resident. Under the proposals, for a purchaser that is a corporation, partnership, trust or other form of business organization, residency is the entity's principal place of business at the time of sale, defined in the same manner as the proposed definition for issuer eligibility purposes - the location in which the officers, partners, or managers of the entity primarily direct, control and coordinate the issuer's activities.

[23] The first three thresholds are included in current Rule 147 but modified in the proposed rule. Further, current Rule 147 requires that *all* of the three tests be satisfied.

- at least 80% of the net proceeds from sales made pursuant to the exemption are intended to be used in connection with the operation of a business or of real property in, the purchase of real property located in, or the rendering of services within, such state or territory; or
- a majority of the issuer's employees are based in such state or territory.

- For a period of nine months from the date of the sale of the security by the issuer, resales may be made only to persons resident within such state or territory.[24]
- The scope of the integration safe harbor is expanded in a manner consistent with the SEC's most recently adopted integration safe harbor, Rule 251(c) of Regulation A.[25]
- The required disclosure regarding restrictions on resales are clarified[26] and the required disclosure may be provided to offerees in the same manner in which the offer is communicated, which might not always be in writing.[27]
- An issuer's ability to rely on Rule 147 is no longer conditioned on a purchaser's compliance with Rule 147(e) regarding resales.[28]

---

[24] Current Rule 147(e) provides a restriction on resales out of state for a period of "nine months from the date of the last sale by the issuer of such securities." The limitation on resales is a condition that must be satisfied in order for the issuer to be able to rely on the safe harbor, designed to help ensure that the securities issued in an intrastate offering have come to rest in the state of the offering before any potential redistribution out-of-state. The SEC's proposing release states that the agency believes this requirement to be unduly restrictive and gives rise to uncertainty by conditioning the availability of the safe harbor on circumstances beyond the issuer's control. This is consistent with the Commission's historical approach that the determination as to when a given purchase of securities in an intrastate offering has come to rest in-state depends less on a defined period of time after the final sale by the issuer in such offering than it does on whether a resident purchaser - that seeks to resell any securities purchased in such an offering - has taken the securities "without a view to further distribution or resale to non-residents. *See* 1961 Release at 4.

[25] *See* 17 CFR 230.251(c). Rule 251(c) was originally adopted as an integration safe harbor in 1992. *See* SEC Rel. No. 33-6949 (July 30, 1992) [57 FR 36442 (Aug. 13, 1992)]. The 2015 Regulation A Release did not substantively change Rule 251(c), except for the addition to the safe harbor list of subsequent offers or sales of securities issued pursuant to Securities Act Section 4(a)(6). *See* Rule 251(c)(2)(vi). Specifically, as proposed, offers and sales made pursuant to Rule 147 would not be integrated with prior offers or sales of securities; or subsequent offers or sales of securities that are registered under the Securities Act (except as provided in Rule 147(h) with respect to qualified institutional buyers and institutional accredited investors), exempt from registration under Regulation A, Regulation S or Rule 701, or made pursuant to an employee benefit plan. In other words, each offering must comply with the requirements of the exemption that is being relied upon for the particular offering. Therefore, issuers would not have to conduct an independent integration analysis of the terms of any offering being conducted under the provisions of another rule-based exemption for transactions that fall within the scope of the safe harbor to determine whether the two offerings would be treated as one for purposes of qualifying for either exemption.

[26] *See* proposed Rule 147(f)(3). Proposed Rule 147(f)(1)(i) also would retain the existing legend requirement for stock certificates but specify the exact language to be provided.

[27] The required disclosure must still be prominently provided in writing to all purchasers. This proposed approach would be consistent with the treatment of the "testing the waters" legend requirements in Rule 255(b) of Regulation A. *See* 17 CFR 230.255(b).

The SEC's proposals are adopted under the Commissions general exemptive authority under Section 28 of the Exchange Act. Accordingly, if adopted as proposed, Rule 147 would no longer be a safe harbor for conducting a valid intrastate exempt offering under Section 3(a)(11). An issuer that attempts to comply with amended Rule 147, but fails to do so, would be entitled to rely on any other applicable exemption. Therefore, while the Section 3(a)(11) statutory exemption would continue to be available for issuers with local operations seeking local financing, failure to satisfy the requirements of amended Rule 147 would likely result in a failure to satisfy the statutory requirements for the Section 3(a)(11) exemption since the requirements of Section 3(a)(11) are more restrictive. Of course, any offer or sale under the proposed amendments to Rule 147 would still need to comply with the requirements of applicable state securities laws.

IV. PROPOSED REVISIONS TO RULE 504

In the same release proposing the Rule 147 revisions, the SEC proposed amendments to Rule 504 of Regulation D under the Securities Act to facilitate issuers' capital raising efforts and provide additional investor protections.[29]

The SEC's Rule 504 proposals would increase the aggregate amount of securities that may be offered and sold pursuant to Rule 504 in any twelve-month period from $1 million to $5 million and disqualify certain bad actors from participation in Rule 504 offerings. An important aspect of the proposed increase would facilitate capital formation by increasing the flexibility that state securities regulators have to implement coordinated review programs to

[28] The SEC's proposing release expressed the belief that this proposed amendment would increase the utility of the exemption by eliminating the uncertainty for a period of nine months after the completion of the offering about whether the safe harbor was or continued to be available based on circumstances outside of the issuer's control. *See* Release Nos. 33-9973; 34-76319 at 35.

[29] 17 CFR 230.504 and 17 CFR 230.505.

facilitate regional offerings.[30] The Commission acknowledged that, if adopted, the amendments to Rule 504 could result in the diminished utility of Rule 505, which historically has been little utilized in comparison to Rule 506 of Regulation D for smaller offerings.[31] Therefore, the agency requested public comment on whether Rule 505 should be retained in its current or a modified form as an exemption from registration, or repealed.

V. CONCLUSION

The Commission's proposed amendments are salutary and a significant step in modernizing Rule 147 and making the intrastate exemption more relevant. Fundamentally, the question is: what is a local offering? In the Internet age, with general solicitation permitted in what previously were deemed to be private offerings, what are and, more importantly, what should be the ground rules? The SEC has evidenced a sensitivity to how securities regulation should be revised to reflect current economic trends and communications advances. A small business in a rural state can have customers and employees throughout the world. Virtual companies may not have any employees and few tangible assets. The Commission has

[30] *See* Proposing Release at note 11. The SEC noted that state registration of securities offerings under coordinated review programs are examples of efforts undertaken by states to streamline the state registration process for issuers seeking to undertake multi-state registrations. These programs establish uniform review standards and are designed to expedite the registration process, thereby potentially saving issuers time and money. Participation in such programs is voluntary and imposes no additional costs on issuers. The states have created coordinated review protocols for equity, small company and franchise offerings; direct participation program securities; and for certain offerings of securities pursuant to Regulation A. For more information on coordinated review programs, *see http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review/.*

[31] *See* Proposing Release at note 12. For the period 2009 through 2014, 109,237 Forms D were filed, of which 1,409 reported an offering made in reliance upon Rule 505 of Regulation D, representing 1% of all offerings made in reliance upon Regulation D during this time period and 2% of all Regulation D offerings raising less than $5 million. During this same time period, 3,789 filings reported an offering made in reliance upon Rule 504, representing 3% of all offerings made in reliance upon Regulation D during this time period and 10% of all Regulation D offerings raising less than $1 million. The vast majority of Form D filings during this period reported an offering made in reliance on Rule 506. *See* Scott Bauguess, Rachita Gullapalli and Vladimir Ivanov, "Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009–2014" (October 2015) ("Unregistered Offerings White Paper"), *available at* http://www.sec.gov/dera/staff-papers/white-papers/unregistered-offering10-2015.pdf.

incorporated flexibility in its proposed new rules and offers a means for federal and state regulators to cooperate.

The SEC is also attempting to align its own rules as they affect private offerings, for example with respect to bad actor disqualifications and integration. With its Rule 147 proposals, the Commission has reaffirmed the view that, with regard to integration, the issuer must comply with the requirements of the exemption that is being relied upon for each particular offering. Therefore, issuers would not have to conduct an independent integration analysis of the terms of any offering being conducted under the provisions of another rule-based exemption for transactions that fall within the scope of the safe harbor to determine whether the two offerings would be treated as one for purposes of qualifying for either exemption.

The SEC recognizes that to make intrastate and regional crowdfunding a reality, more work is needed. The Proposing Release acknowledges that states that have crowdfunding provisions based on compliance with Section 3(a)(11), or compliance with both Section 3(a)(11) and Rule 147, would need to amend these provisions in order for issuers to take full advantage of the Commission's proposed amendments.[32] To this end, the Commission has sought comment on how its proposed amendments would impact state law and whether it would be better if the proposed amendments to Rule 147 were adopted as a new exemption from registration, rather than as amendments to current Rule 147.

Other issues also need to be addressed. For example, should investors acquiring securities under Rule 147 be counted in the calculation of the number of security holders that give rise to the obligation to register under Section 12(g) of the Exchange Act? How can the SEC work more closely with the states to achieve more harmonized regulation? How do the

[32] See note 20 above.

Financial Industry Regulatory Authority communications and other rules apply to offerings under revised Rule 147?

The Rule 504 proposals, another commendable step forward by the SEC, present additional issues. For example, is the $5 million limitation too restrictive? To facilitate regional exemptions, would a higher monetary limit be preferable?

As the SEC increases to full force in 2016 with two new Commissioners, there will be many opportunities to use its rulemaking authority to facilitate capital formation for smaller businesses. The Commission has done so with the adoption of Rule 506(c), Regulation A+ and, perhaps, with Regulation Crowdfunding. The Rule 147 and Rule 504 proposals offer additional promise.