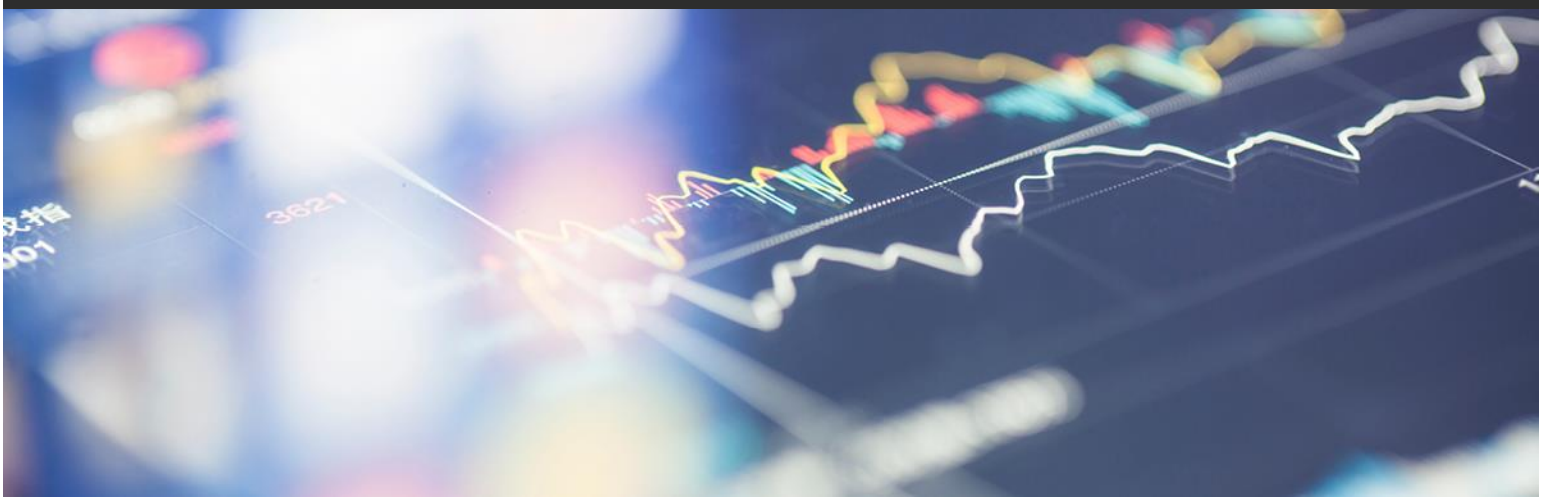
GT GreenbergTraurig

Alert | Corporate/Capital Markets



December 2020

Guidance on the New York Regulations and Mandatory Filings with Electronic Filing Depository

New York recently adopted new regulations that redefine the categories of "dealer" that would require mandatory notice and fee filings. The new regulations outline that the following issuers selling securities will be "dealers" (Dealers) under the New York Martin Act, and will be subject to new filing requirements, with mandatory compliance effective Feb. 1, 2021:

- Federal Covered Regulation D Dealers
- Federal Tier 2 Dealers
- Federal Covered Investment Company Dealers

All other dealers that are issuers not falling under Section 359-e(1)(a) definition[1] of dealer that issue real estate securities, and/or are not defined as any of the Dealers listed above, will be required to file the

[1]Section 359-e(1)(a) provides that: A "dealer" shall mean and include any person, firm, association or corporation engaged in the business of buying and selling securities from or to the public within or from this state for his or its own account, through a broker or otherwise, except a bank unless such bank is considered a dealer under the federal Securities Exchange Act of 1934, but does not include any person, firm, association or corporation in so far as he or it buys or sells securities for his or its bona fide investment account, either individually or in some fiduciary capacity. The term "dealer" shall, except as otherwise provided in this article, also include a person, firm, association or corporation selling or offering for sale from or to the public within or from this state securities

Form M-11, unless an available exemption from filing the Form M-11 is available and written application for the exemption is submitted.

Current new regulations for Form D filings relate only to general securities offerings filed with Investor Protection Bureau, are NOT APPLICABLE to issuers of real estate securities that will continue to file the Notification Filings Form 99 filings with the Real Estate Finance Bureau.

A. **Federal Covered Regulation D Dealers**: For Regulation D Offerings, these issuers are defined as any person, firm, association, or corporation that satisfy the definition of a "dealer" as defined in Section 359-e(1)(a) that offer or sell Federal Regulation D Covered Securities, defined as securities that are "covered securities," or upon completion of the transaction will be "covered securities," under Section 18(b)(4)(F) of the Securities Act of 1933, as amended (the Securities Act) and preempted from state registration but not notice and fee requirements.

Historically, through the Martin Act, New York regulates those persons who are selling securities and not the securities themselves. An issuer can be regulated as "dealer" and if an issuer is offering and selling securities "to the public," then the Martin Act applies to such issuer and requires its registration as a dealer, or it must make a filing to claim an exemption from such a filing. But the term "to the public" is not otherwise defined by the Martin Act and we have looked to an offering as being a "public offering" unless it fits under Section 4(a)(2) of the Securities Act where no solicitation or advertising is allowed.[2] However, now, New York is attempting to define as an offering "to the public" an offering that not only is already defined as a private offering/placement by the SEC, but is also a federal covered security under Section 18 of the Securities Act. As we know, Rule 506 is promulgated under Section 4(a)(2) and by statute, an offering qualifying as a Section 4(a)(2) is a private offering not involving any public offering. The SEC has made it clear that offerings under both Rule 506(b) and Rule 506(c) are private placements under Section 4(a)(2) of the Securities Act.

Issuers choosing to offer/sell securities in transactions under Section 4(a)(2) and Rule 506 promulgated thereunder, are considered "covered securities" under Section 18(b)(4)(F) of the Securities Act, and private placements. New York's definition of "Federal Covered Regulation D Dealers" as offering securities "to the public" contradicts the federal statutes and the SEC's pronouncements and interpretations of the types of offering that are conducted under Rule 506(b) and

---

issued by it. *No person shall be deemed to be a "dealer," as defined in this subdivision, or a broker, as defined in subdivision (b) of this section, solely by reason of the fact that he is engaged in the business of (i) selling, offering for sale, purchasing or offering to purchase any security or securities to, from or through any bank, dealer or broker, or to or from any syndicate, corporation or group formed for the specific purpose of acquiring such securities for resale to the public directly or through other syndicates or groups, or (ii) any offer, sale or distribution by an issuer of stock dividends, nontransferable warrants or transferable warrants exercisable within ninety days of their issuance to existing stockholders, securities issued upon conversion of convertible securities and exercise of warrants and securities issued as part of a recapitalization or reclassification to existing stockholders of the same issuer, or (iii) selling, offering for sale, purchasing or offering to purchase any security or securities on the floor of any securities exchange registered as a national securities exchange under the securities exchange act of nineteen hundred thirty-four. No person, firm, association or corporation shall be deemed to be a "dealer," as defined in this subdivision, solely by reason of selling or offering for sale any security or securities to any bank, corporation, savings institution, trust company, insurance company, investment company, as defined in the federal investment company act of nineteen hundred forty, pension or profit-sharing trust, or other financial institution or institutional buyer, whether the purchaser is acting for himself or itself or in some fiduciary capacity, as part of a private placement of securities.*

[2] Section 4(a)(2) of the Securities Act exempts from registration transactions by an issuer "not involving any public offering." Availability of reliance on this exemption is dependent on the following conditions: (i) the nature of (i.e. "sophisticated investors") and the number of offerees (i.e. no the state-imposed limitation on the number of non-accredited investors who may invest), (ii) the size of each individual investment, (iii) the imposition of transfer restrictions on the subsequent transfer of the securities, (iv) the investment intent of each investor, and (v) the absence of any general solicitation or general advertising.

(c).

New Regulatory Requirements for Filings:

Despite the fact that the SEC has affirmed that Rule 506(c) offerings are private placements and therefore "covered securities" under Section 18(b)(4)(F), offerings which allow public solicitation and advertising may make it more difficult to argue that the offering is not "to the public." Therefore, filings are recommended for such offerings in New York, although a conservative approach would be to make filings for these offerings in all states.

In accordance with the new regulations, for all Rule 506(b) and Rule 506(c) offerings that are, in fact, filed in New York with the Department of Law, the following requirements apply:

i. The following forms are required to be filed within 15 calendar days of first sale: Form D. Since the Form D incorporates a consent to service, there is no longer a requirement for a separate Form U-2 Consent to Service filing with the Department of Law and the NYS Department of State.

ii. "Related Persons" listed in Item 3 of Form D are not required to register as agents/salespersons in New York.

iii. Mandatory filing of the Form D online through EFD and file annually without a filing fee at the time of renewal. However, amendment filings (Form D/A) require a $30.00 "supplemental fee" filed within 30 days of the amendment.

   a. At each filing, the Form D must be accurate and complete, including information in Item 3 "Related Persons" and Items 12 and 15 "Sales Compensation."

   b. A Form D accepted for filing may be later invalidated if the filing is found to be incomplete; upon knowledge of inaccurate information, the issuer is required to immediately file an amendment on Form D/A with the SEC and in all states in which the Form has been filed.

iv. Form D is effective for a four (4)-year period, after which time it must be renewed if the offering is on-going.

v. Form 99 will no longer be accepted after February 2, 2021

   a. OPTIONAL FORM 99 Filers: For a current Form 99 on file, the issuer has option to file a Form D through EFD but it must pay the initial fee for a new four (4)-year period with a new registration date through EFD.

   b. Once filed through EFD, all future related filings (amendments/renewals) must be made through EFD.

B. **Federal Tier 2 Dealers** – For issuers who offer/sell securities in a Regulation A – Tier 2 Offering (Regulation A+), these issuers are defined as any person, firm, association or corporation falling under the definition of "dealer" under Section 359-e(1)(a) that offers/sells federal Tier 2

Securities, defined as covered securities under Section 18(b)(3) or 18(b)(4)(D)(ii) of Securities Act.

1. Filing requirements:

    i. Uniform Notice Filing Offering Form not less than 21 calendar days prior to SEC qualification, with Further State Notice/State Notice Form

    ii. Effective for four (4)-year period

    iii. Any amendment to the Form 1-A requires also an amendment filing w/NY with $30 check– amendments must be filed within 30 days of change/amendment

    iv. While UFT is available for other Regulation A+ offerings in other states, NY has not yet implemented the electronic filing or payment system yet

C. <u>Fees for Form D Federal Covered Regulation D Dealers and Notification Filing Form for Federal Tier 2 Offerings</u>

1. $1200 for offerings over $500,000
2. $300 for offerings of $500,000 or less
3. $30 for amendment filings of Form D/A or other supplemental filing of Form 1-A/A
4. Checks payable to "Department of Law of the State of New York" or "New York State Department of Law"
5. For multiple issuers/portfolios, must pay fees for each and submit separate forms for each (unless already included as co-issuers), but separate fees for each issuer is still required

D. <u>Federal Covered Investment Company Dealers (covers open-end management type companies registered under the 1940 Act)</u>

1. File Form NF/M-1A for each fund or portfolio, and Further State Notice/State Notice forms
2. Valid for four (4) years and must be renewed
3. File prior to sale of securities, issued or to be issued by dealer, within or from New York
4. Fees payable to "Department of Law"
5. Electronic (email) or paper filings are currently acceptable, until NY accepts through EFD or UFT

Additional Regulations:

E. CRD/Investment Adviser Registration Depository (CRD/IARD) – new registration and bookkeeping requirements effective February 1, 2021, but transition period through December 2, 2021

1. Investment adviser representatives, including principals and supervisors and solicitors, must meet exam requirements and register with NY

2. State-registered IA must take reasonable steps to verify the "accredited investor" and "qualified client" status of any client

3. New regulations on registration and exam requirements of "finders" and "solicitors" - NY will issue further guidance

Impact

Concerns have been raised about whether filings are now required in New York for Rule 506(b)/Sec 4(a)(2) private offerings for new fund offerings. If a filing is made, there may be no assurance that the New York Attorney General's (NYAG) office will not ask about prior offerings for related issuers. It should be noted that many other states have alternative exemptions for private placements that do not require a filing. New York does not.

A number of questions remain:

- What if an existing offering is ongoing and a new offer is launched in a series of transactions, do you file for the new series and not for the existing, ongoing offer?
- At the time of annual renewal of an offering, and a complete Form D/A is now required, will the NYAG question about prior sales in reliance on Section 4(a)(2) as not an offering "to the public?"
- Will New York now require the filing of the Form M-11 Issuer Dealer Statement for Section 4(a)(2) offerings because they have determined that these may be considered offerings to the public and not private placement offerings?
- The NYAG has explicitly reaffirmed its position that only "firm commitment" offerings allow an issuer to avoid dealer registration on Form M-11; however, in practice, clients are advised that if selling in a "best efforts" public offering through a registered broker-dealer, no dealer registration is required.

We will continue to monitor any changes in the NYAG regulations. While Section 4(a)(2) and Rule 506(b) offerings as private placements may still be treated, as defined in Section 18(b)(4)(F) of the Securities Act, as "covered securities" and not offerings "to the public," we encourage a careful consideration of the client's needs in each circumstance until further clarification by the NYAG has been provided.

Author

This GT Alert was prepared by:

- Michele A. Kulerman | +1 212.801.6710 | kulermanm@gtlaw.com

*the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ¬Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¤Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.*