

Small Business Notes

Minnesota Department of Employment and
Economic Development (DEED)

2017 Legislature Clarifies Exemptions From Securities Integration for Offerings Using MNvest Crowdfunding

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Minnesota's MNvest crowdfunding statute provides the limits that an issuer under that statute may raise in any given 12 month period: \$2 million for companies that have financial statements that have been audited or reviewed by a CPA firm, and \$1 million for companies whose financials have not been so audited or reviewed.

New 2017 amendments to the crowdfunding statute will enable issuers to avoid the problem of integration of offering amounts where a company makes more than one offering in a given period of time and the amounts of the offerings are summed together providing the possibility of exceeding the statutory limit on offering amounts.

The new amendments effectively follow the new integration exemptions for federal crowdfunding offerings found in U.S. Securities and Exchange Commission Rule 147. Offers or sales made in reliance on the MNvest crowdfunding statute will not be integrated with:

1. Offers or sales of securities made prior to commencement of a MNvest offering or
2. Offers or sales of securities made after completion of a MNvest offering that are:
 - A. Registered offerings under the Securities Act of 1933 ; or
 - B. Exempt from registration under SEC Regulation A;
 - C. Exempt from registration under SEC Rule 701 (dealing with equity offered to employees as compensation);
 - D. Made pursuant to an employee benefit plan;
 - E. Exempt from registration under SEC Regulation S (dealing with equity offerings outside the United States);
 - F. Exempt from registration under the federal crowdfunding securities exemption;
 - G. Made more than six months after completion of a MNvest offering.

The amendment notes also that "for purposes of clarity" the new section does not permit a MNvest issuer to conduct simultaneous securities offerings.

2017 Legislature Imposes Sales Tax Obligation on Some Marketplaces That Facilitate Sales by Third Party Sellers Located Outside Minnesota

Without once using the term “internet sales” the 2017 legislature enacted (as part of the Omnibus Tax Bill) a new requirement for the collection of, and remittance to the state of, sales taxes on sales effected through or facilitated by a “marketplace provider.”

In the 1992 U.S. Supreme Court case of *Quill v. North Dakota* [504 U.S. 298 (1992)] the Court held that before a state may impose a liability to collect and remit sales taxes on sales by an out-of-state seller, a sufficient nexus must exist between the seller and the state (for example: where an out-of-state company operates brick and mortar sales offices within the state or had “continuous and widespread solicitation of business” in the state through dedicated salespeople).

Several states have addressed the issue of the nexus of online retailers sales tax obligation in basically two ways: by imposing tax liability of retailers who compensate state businesses for placing links on the businesses’ website directing the user to the retailer’s out-of-state site (the model used by the State of New York), or by requiring an out-of-state seller to provide information about sales and customers to the state (the model used by Colorado). Both laws remain in place despite constitutional challenges in the courts.

The new law includes in the definition of “retailer maintain a place of business in the state” to include an out-of-state retailer that makes sales in Minnesota in excess of \$10,000 per year using the newly defined category of a “marketplace provider” that does maintain a place of business in Minnesota. It requires that the marketplace provider be the party that collects and remits sales tax on sales it facilitates for out-of-state retailers.

The term “marketplace provider” means any person who facilitates a retail sale by a retailer by:

1. Listing or advertising for sale by the retailer in any forum, tangible personal property, services, or digital goods that are subject to Minnesota sales tax; and
2. Directly or indirectly through agreements with third parties collecting payment from the customer and transmitting payment to the retailer regardless of whether it receives compensation for its services.

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No obligation exists for a marketplace provider to collect and remit sales tax if the remote retailer provides the marketplace provider with a copy of its Minnesota sales and use tax registration, or upon inquiry by the marketplace provider the Minnesota commissioner of revenue discloses that the remote seller is registered to collect Minnesota sales tax.

It would appear to be a measure of expectation of constitutional challenge to this legislation that it provides its effective date as the earlier of an overturning of *Quill* by the U.S. Supreme Court; July 1, 2019; or new federal authorization for state to impose sales tax collection and remittance obligations on out-of-state seller.

U.S. House of Representatives Committee on Small Business Takes Testimony On Reversing the Decline in Entrepreneurial Activity

Noting that entrepreneurship and the formation of new businesses has declined by almost fifty percent over the last forty years, the U.S. House Committee on Small Business heard testimony on ways to reverse that decline. While topics of that testimony included broad categories of possible change (e.g., tax reform and tax simplification, regulatory relief and reform) one of the witnesses offered more specific agenda for action specifically focused on access to equity capital.

Joseph L. Schoken, founder and president of Broadmark Capital LLC, offered five suggestions:

- Change the burdensome investor verification requirements of Regulation D by allowing investors to self-certify to accredited investor status;
- Raise the capital threshold for audit requirements under federal equity crowdfunding. The current limits are burdensome for small business as is shown by the clustering of offerings just below the threshold for required audits.
- Ease the costs and regulatory burdens that make initial public offerings unattractive to small companies. Firms with initial public offerings, rather than firms with private placements, are the engines of longer term economic and job growth.

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- Expand the pool of accredited investors by easing expanding the standards defining an accredited investor. Schoken gave the example of allowing knowledgeable employees of early stage companies in high-growth who may not have the assets necessary to meet the current income and net worth standards to be able to invest in their own companies on the basis of employment and education.
- Allow early stage companies to treat net operating losses as a financial asset and to sell those losses to raise capital without further investor risk or equity dilution. In this way profitable companies could provide new funding to businesses not yet earning a profit.

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A bill will shortly be introduced in both House and Senate to create a Commission on the Innovation Economy which would study suggestions such as presented in this testimony and make recommendations for long term policy goals.

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