

Small Business Notes

In this issue:

- **Securities and Exchange Commission Adopts Changes to Definition of Accredited Investor**
- **Securities and Exchange Commission (SEC) Approves New IPO Alternative But With High Market Value of Shares Requirement**
- **New Treasury Notice on Deferral of Social Security Taxes Leaves Questions Unresolved**
- **A Reminder to Minnesota Sole Proprietor Businesses to Check Their Business Registration**

Securities and Exchange Commission Adopts Changes to Definition of Accredited Investor

On August 26 the U.S. Securities and Exchange Commission (SEC) adopted a rule proposed in December 2019 amending the definition of a natural person “accredited investor” under Rule 501(a)(10). That definition is one of the principal tests for determining who can participate in private securities offerings. Prior to this amendment, the definition had focused exclusively on the net worth and income of an individual, requiring a net worth (alone or with spouse) in excess of \$1 million not including the value of the individual or couple’s primary residence, or an income in excess of \$200,000 (\$300,000 with spouse) in each of the last two years with reasonable expectation of the same level of income in the current year. The intent being to ensure that the investor had the means to bear the risk of loss.

The new amended rule keeps in place the current net worth and income tests but also adds the possibility of being defined as an accredited investor based on demonstrated level of financial sophistication and knowledge evidenced by holding one or more of three credentials: a Series 7 license (general securities representative), a Series 65 license (investment advisor representative), Series 82 license (private securities representative). In addition, “knowledgeable employees” of an investment fund can qualify as accredited investors for investments in the fund.

In keeping with its June 2019 “Concept Release on the Harmonization of Securities Offering Exemption,” the SEC in the new rule left open the possibility of adding new credentials at a later date.

The change was made by SEC Order 33-10823.

Small Business Notes

Securities and Exchange Commission (SEC) Approves New IPO Alternative But With High Market Value of Shares Requirement

In Release No. 34-89684 (August 26, 2020), the SEC approved a rule change sought by the New York Stock Exchange to permit a new category of company direct share listing on the Exchange. Historically, the Exchange has required “a firm commitment underwritten initial public offering” for listing of shares for sale to the public. It has, however, provided an exception in the “Selling Shareholder Direct Listing” which allowed a company to list for sale shares received in a private placement. The listing was for the sole purpose of allowing the shareholder to cash out their holdings; it could not be used to raise additional capital.

The new rule creates a “Primary Direct Floor Listing” which allows a company to list and sell its equity shares at time of registration without the expense of an underwritten initial public offering. The Exchange allows listing in connection with an IPO market where the market value of publicly held shares is \$40 million. To ensure sufficient liquidity for market trading of the new Primary Direct Floor Listing, the new rule provides for a much higher requirement—at least \$100 million in market value of shares sold in the Exchange’s opening auction on the first day of trading on the Exchange. If the market value of shares offered for sale is less than \$100 million, the Exchange will require that the combined market value of opening day shares and shares already publicly held totals at least \$250 million.

The new rule was the subject of considerable controversy during its public comment period with concern that it could harm investors by allowing companies to bypass the investor protections of the initial public offering process. Nasdaq has released a similar proposal that will also require SEC approval.

Small Business Notes

New Treasury Notice on Deferral of Social Security Taxes Leaves Questions Unresolved

On August 28 the Treasury issued Notice 2020-65 “Relief With Respect to Employment Tax Deadline Applicable to Employers Affected by the Ongoing Coronavirus (COVID-19) Disease 2019 Pandemic.” That notice extended to the period January 1, 2021 to April 30, 2021 the time in which an employer that had voluntarily participated in deferring payment to the government of an employee’s 6.2 percent share of Social Security taxes during the period September 1, 2020 to December 30, 2020 was required to ratably pay those funds to the federal government.

Since the taxes will be deferred and not abated, the employer will be required to repay the federal government the tax amounts for the covered 2020 period by withholding additional amounts of tax from the net wages of employees in 2021. The Notice states that failure to make such repayment will expose the employer to liability for interest and penalties.

Such repayment collection will result in lower net pay for employees.

Two major questions raised by the deferral will be:

- Does the deferral and repayment process violate Minnesota’s Wage Theft Law and, if so, to what effect?
- How will employers collect the amount of deferred taxes from employees who have left their employment?

There are growing voices calling for the Congress to address these and other questions in Fall of 2020.

A Reminder to Minnesota Sole Proprietor Businesses to Check Their Business Registration

The Minnesota Department of Employment and Economic Development’s recent experience with the administration of small business disaster relief grants turned up the fact that many small businesses were not registered, or had expired registrations, with the Office of the Minnesota Secretary of State. This was particularly true of businesses organized as sole proprietorships. In some cases, business owners were unaware of the registration requirement for sole proprietorships or found completing the necessary forms confusing. The Small Business Assistance Office will make available assistance to new sole proprietorships with understanding the requirements for business registration and naming and for completing the necessary forms.

Contact the Small Business Assistance Office by phone at: 651-259-7476 | 800-310-8323

Email: deed.mnsbao@state.mn.us

Small Business Notes

Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at [Small Business Notes](#)

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