



The Office of Secretary of State
Securities & Charities Division

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AGENCY: Georgia Securities and Charities Division

ACTION: Final Rule

SUMMARY: The Securities and Charities Division of The Office of the Secretary of State (“Division”) is adopting an amendment to Rule 590-4-2-.08, the Invest Georgia Exemption, to reflect changes implemented by the Securities and Exchange Commission (“SEC”). The SEC changes are designed to modernize the intrastate offering exemption of Section 3(a)(11) of the Securities Act of 1933 by updating the Rule 147 safe harbor and introducing a new exemption, Rule 147A. The purpose of the Division’s amendment is to facilitate greater investment through the offer or sale of a security by an issuer by providing greater flexibility to those seeking to use the Invest Georgia Exemption to facilitate investment and entrepreneurial activities within Georgia. Additionally, the amendment to the Invest Georgia Exemption is intended to reduce the regulatory impact of the SEC’s amendment on existing and future issuers of securities.

EFFECTIVE DATE: July 11, 2017

I. Introduction and Background

The Invest Georgia Exemption (“IGE”) was created in 2011 by the Secretary of State Brian P. Kemp in his capacity as Commissioner of Securities (“Commissioner”). In its original format, IGE allowed for-profit businesses formed under Georgia law to raise up to \$1 million from Georgia resident investors. Additionally, IGE filers are limited to selling no more than \$10,000 in securities to non-accredited Georgia investors, but there is no selling limited to accredited Georgia investors. Before the use of any general solicitation by the issuer or by the 25th sale, whichever comes first, the Issuer must file a Form GA-1 with the Commissioner.

On September 24, 2015 Secretary Kemp adopted an amendment to IGE that increased the aggregate limit an issuer was allowed to raise pursuant to the exemption from \$1 million to \$5 million. This amendment was finalized and became effective on October 15, 2015.

As of June 15, 2017, the Commissioner received 50 separate filings for issuers utilizing IGE to issue securities. This has allowed Georgia businesses to raise over \$3 million in funding and allowed Georgia investors to have access to investments that were traditionally unavailable.

II. Amendment to Rule 590-4-2-.08, Invest Georgia Exemption

A. Subsection 1

The SEC's amendment of Rule 147 and creation of Rule 147A expands the criteria for determining where an entity is domiciled while still remaining eligible for the intrastate exemption. The amendment to IGE reflects the SEC's expansion and has removed the requirement that IGE filers be formed under the laws of the state of Georgia. However, the requirement that the filers be for-profit businesses registered with the Georgia Secretary of State has remained. Under the amended IGE, issuers that meet the residency requirements prescribed in amended Rule 147 and Rule 147A are eligible for filing under IGE. This amendment allows for-profit businesses incorporated or organized outside of Georgia to potentially qualify for IGE if the principal place of business is located in Georgia.

The amendment to Rule 590-4-2-.08(1)(b) with the addition of section 2 reflects the creation of Rule 147A. Under the amended IGE, transactions must meet the requirements of the federal exemption for intrastate offerings in either: (1) the traditional combination of Section 3(a)(11) and SEC Rule 147; or (2) SEC Rule 147A. This amendment lowers the regulatory burden to Georgia IGE issuers by adding a secondary avenue for filers to still meet the eligibility requirements. This addition is also designed to provide greater clarity to Georgia issuers in light of the SEC's creation of Rule 147A.

Under the original IGE, issuers were only required to file with the Commissioner if the issuer wished to utilize a general solicitation or before the 25th sale pursuant to IGE. In practice, the majority of issuers filed with the Commissioner prior to the initial offering, regardless if the issuer intended to use a general solicitation. The amended IGE requires issuers to file with the Commissioner before an offer is made in reliance of the exemption. The benefit of this amendment is twofold. First, the filing requirement provides greater clarity to the issuer of when a filing is required. Second, the filing requirement provides the Commissioner with greater knowledge of issuers taking advantage of the exemption. Knowing the identity of the issuers increases investor protection and allows the Commissioner the ability to track the performance and utilization of IGE for potential future amendments.

The amendment to Rule 590-4-2-.08(1)(h) reflects the creation of Rule 147A. Under the original IGE, issuers were required to inform all purchases that the securities are subject to

limitations on resale. The addition of section 2 extends the notification requirement regarding the limitations of resale to offerings conducted under Rule 147A. This requirement is important to investor protection by providing investors with the disclosure of an additional risk involved with the investment.

B. Subsection 5

Subsection 5 is designed to exempt individuals from the registration requirements as a broker-dealer pursuant to O.C.G.A. § 10-5-30. The amendment to Rule 590-4-2-.08(5) reflects the Commissioner's increased understanding of what businesses are utilizing IGE and how those businesses are using the exemption. The majority of IGE filers are small and emerging businesses that conduct an offering without the use of brokers, internet portals, or other "middlemen." As a result, most issuers are responsible for the solicitation, offer, and/or sale of the underlying securities and potentially not eligible for the broker-dealer registration exemption. Removing the prohibition reduces the regulatory burden on issuers by expanding the broker-dealer registration exemption. This amendment allows issuers to be more active in the solicitation, offer, and/or sale of their securities while still remaining eligible for the broker-dealer registration exemption.

The Division received one comment on its proposal which was from a law firm.¹ The written commenter addresses the potential for issuers to have temporary custody of investor funds before depositing investor funds into the issuer's depository bank. This situation would potentially lead an issuer to violate the prohibition from custody of investor funds or securities and require registration as a broker-dealer pursuant to O.C.G.A. § 10-5-30. In the opinion of the Commissioner, the prohibition from custody is important to preserve investor protection. At the same time, the Commissioner is cognizant of the practicality of issuers and individuals associated with an issuer soliciting, offering, and/or selling the securities through IGE. This issue is magnified when considering early stage and smaller businesses. In light of these circumstances, the Commissioner interprets the prohibition from custody, codified as Rule 590-4-2-.08(5)(c) in the amended IGE, similarly to "custody" contained in Rule 590-4-4-.20(4)(b). Under this interpretation, the Commissioner views issuers that receive funds drawn by investors and made payable to the issuer, will not be deemed to have custody under IGE if the investor's funds are deposited into the issuer's depository account within three (3) business days of receipt and the issuer maintains appropriate records of the transaction.

¹ Comment from Parker MacIntyre, dated June 5, 2017.

C. Subsection 6

In its original form, IGE was silent regarding the necessity of issuers filing amendments with the Commissioner. In discussions with issuers and potential issuers, the Commissioner received multiple inquiries about IGE amendment filings. The addition of subsection 6 creates a mandatory filing requirement for the issuer if the information contained in the current filing with the Commissioner becomes inaccurate for any reason. This mandatory filing requirement must be received by the Commissioner within thirty (30) days. The mandatory filing is designed to clarify the requirements of the issuer and to provide the Commissioner with a greater understanding of the current status of the issuers' filing information to better serve the Commissioner's investor protection duty.

III. Additional Information

To date, the Commissioner has received fifty (50) separate IGE filings. This amendment provides greater flexibility for issuers to become eligible for IGE and conduct the offering. The current filers of IGE conducted or are conducting their offerings under the pre-amended Rule 147 and Section 3(a)(11). For open offerings, currently filed issuers can continue to solicit, offer, and sell IGE filed securities, without additional filings, if the offerings are conducted pursuant to the pre-amended Rule 147 and Section 3(a)(11) requirements. However, current issuers wishing to conduct offerings pursuant to the amended IGE are required to file new or amended filings with the Commissioner.