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ATTORNEYS

LEGAL UPDATE

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SEC Issues Final Rules to Implement Changes in Accredited Investor Definition

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The Securities and Exchange Commission ("SEC") recently adopted amendments to the definition of "accredited investor," implementing certain requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The amendments affect companies seeking to raise money through private offerings because they change the rules for determining if a potential investor qualifies as an "accredited investor."

Among other rules, the amended definition of "accredited investor" affects Regulation D, which is a series of private placement federal securities registration exemption safe harbors adopted by the SEC under the Securities Act of 1933 (the "1933 Act"). Rule 506 under Regulation D is a popular exemption because it provides relatively clear-cut requirements. Also, because of federal preemption of state securities law for Rule 506 offerings, it allows companies to make simple state notice filings instead of following more burdensome state securities registration or exemption requirements.

The "accredited investor" definition is a crucial part of Rule 506 compliance. Under Rule 506, if an issuer sells securities solely to "accredited investors," it does not need to follow certain detailed narrative and financial disclosure requirements. In addition, an issuer may sell to an unlimited number of "accredited investors" in a private placement qualifying for Rule 506, whereas the number of unaccredited investors is limited to 35.

One of the tests by which an individual investor may qualify as an "accredited investor" is if that individual's net worth, or joint net worth with his or her spouse, exceeds $1 million. The Dodd-Frank Act revised the net worth calculation to exclude the value of the investor's primary residence. This change was effective upon enactment in July 2010, but the Dodd-Frank Act also required the SEC to revise its rules to effect this change.

For the most part the recently adopted final rules are consistent with an SEC interpretation issued shortly after the enactment of the Dodd-Frank Act. Under the Dodd-Frank Act the value of the principal residence must be excluded from net worth. With respect to related debt, generally, under the SEC 2010 interpretation, the amount of any debt secured by the investor's primary residence is not deducted from the investor's net worth up to the fair market value of the residence. However, any portion of the debt exceeding the fair market value of the residence must be deducted from the investor's net worth.

The final rules followed the SEC interpretation, but also added a new wrinkle to the net worth calculation. There is a "look-back" for any debt secured by the primary residence added within 60 days prior to the date of investment. This debt must be deducted from the investor's net worth even if the fair market value of the primary residence exceeds all the debts secured by the residence, including the new debt. There is one exception to the 60-day look-back deduction – no deduction is necessary if the debt was incurred in acquiring the primary residence.

The revised "accredited investor" definition went into effect February 27, 2012.

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Florida Legislature Enacts Last-Minute Extension of the Distressed Condominium Relief Act

By: David R. Brittain
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If you've been involved in mortgage lending or distress investing involving Florida condominium projects over the last two years, you probably have grown to know and love the Florida Distressed Condominium Relief Act of 2010 ("DCRA"). The law, which is part of the Florida Condominium Act (F.S. Chapter 718) has been a timely and critical help to lenders and investors alike, significantly reducing risk in the acquisition of units in distressed condominium developments during one of the worst commercial real estate markets in modern history.

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Agencies Issue Final Rule for Summary of Benefits Requirement

FAQs Issued on Automatic Enrollment, 90-Day Waiting Period Limits, and Employer Shared Responsibility Rule

By: Douglass A. Farnsworth, J.D., M.B.A.

SUMMARY OF BENEFITS FINAL RULE

The Patient Protection and Affordable Care Act ("PPACA," commonly known as the health reform law) requires insurance companies and employers to provide simple-to-understand summaries of the benefits and coverage ("SBC") provided under both individual and group health plans. The Departments of Health and Human Services ("HHS"), Labor ("DOL"), and Treasury – Internal Revenue Service ("IRS") on February 10, 2012 issued final regulations on these requirements, easing some of the requirements from the earlier-issued proposed regulations.

Effective Date

Under PPACA, the SBC requirements were to have taken effect in March 2012. With the final rule going to print in the Federal Register on February 14, 2012, the effective date has been postponed to give plans and issuers time to prepare. For most participants who enroll in coverage during an open enrollment period, the SBC requirements will apply on the first day of the first open enrollment period occurring on or after September 23, 2012. For those enrolling outside of an open enrollment period (such as HIPAA special enrollees), the SBC requirements begin to apply on the first day of the first plan year beginning on or after that same date (so January 1, 2013 in the case of a calendar year plan).

Who Must Provide SBCs

Both insurance companies and employers that sponsor group health plans (regardless of employer size or number of participants in the plan) have obligations to provide SBCs. For the individual insurance market, the insurer is responsible for providing the SBC in each of the instances (described below) to individuals.

Employers will need to speak with their insurers to discuss how the SBC will be delivered to participants. For group health plans that provide coverage through a policy of insurance, the insurer is only required to provide the SBC to the plan sponsor (the employer), but many employers may look to have the insurer administer the SBC obligations, similar to how they have the insurer handle COBRA notices. Employers that self-insure their group health plans will be responsible for providing the SBCs, but may look to outsource these obligations to their third-party administrators.

Timing and How Provided

SBCs must be provided at any time upon request, within seven business days. This is a change from the proposed rules, which would have required that the SBC be provided within seven calendar days.

A group health plan is required to provide an SBC to participants and beneficiaries, generally as part of any written enrollment application materials. For special enrollees, the final rule adopts the same timing as that used for distribution of SPDs, which is 90 days after enrollment. Other times SBCs must be provided vary depending on the situation. For instance, an insurer must provide an SBC to a plan sponsor or an individual upon application for a new policy, and at the time of renewal.

An SBC may be provided as a stand-alone document, or may be incorporated as part of a plan's summary plan description, so long as it is maintained in its entirety, and printed in the front of the document, immediately following the table of contents.

The SBC may be provided either in paper form, or electronically so long as certain safeguards are met. For participants in group health plans, the plan must comply with the existing DOL regulations for providing documents electronically. For those eligible but not currently enrolled, the plan must: notify of the availability of the document if posted on the Internet, provide the electronic document in a readily-accessible format (such as .pdf), and notify the individual that the document is available in paper free of charge.

Contents

The contents of the SBC, as well as the font, type size, form, and format, are all precisely specified in the regulations and the accompanying guidance. That guidance includes a template in Microsoft Word format, sample answers to specific "yes" and "no" questions, and a sample template entirely filled-in.

Required information includes descriptions of the coverage, cost-sharing (deductibles, coinsurance/copayments), limitations on coverage, and whether benefits are greater if in-network providers are used. In addition, the SBCs each will include the same two "coverage examples," which are visually similar to consumer nutrition labels. Both examples (having a baby and managing diabetes) will include calculations based on the cost-sharing for the plan. By using the same two scenarios for all SBCs, the idea is to allow an individual to compare plans on an apples-to-apples basis.

THE SBC also must provide an internet address or phone number where the uniform glossary may be obtained. The glossary, developed by the agencies, provides simple definitions for standard terms used in the SBCs, so that each plan is using the same terminology to explain its coverage. A plan must provide the glossary within seven business days of receiving a request from a participant or beneficiary.

Failure To Comply
A failure to comply with the SBC requirements can subject the responsible entity(ies) (the insurer and/or plan sponsor) to a fine of $1,000 per failure. Each missed SBC for each participant or beneficiary counts as a separate offense, so fines can quickly add up.

DEPARTMENTS ISSUE FAQS

Also on February 10th, the Departments issued notices addressing three of the PPACA requirements due to take effect in 2014 in a question and answer format (collectively referred to here as the "Notice" for simplicity).

Automatic Enrollment
PPACA added a new 18A to the Fair Labor Standards Act ("FLSA"), requiring employers to automatically enroll new full-time employees in their group health plan coverage. This requirement is due to take effect in 2014, but in previous guidance, DOL has indicated that it would defer the compliance date until such time as it promulgated regulations and employers have sufficient time to come into compliance.

In the Notice, DOL again noted the importance of providing employers sufficient time to comply once regulations are issued. Because it is still working on coordinating with stakeholders on developing proposed regulations, DOL stated that it has "concluded that its automatic enrollment guidance will not be ready to take effect by 2014." Employers will not be required to comply with automatic enrollment requirements until DOL develops guidance saying so.

Waiting Periods
PPACA requires that, beginning in 2014, a plan not impose a waiting period longer than 90 days. The Notice discusses this requirement, clarifying that the period begins when an employee is otherwise eligible for coverage, but for the waiting period. That means, for example, the waiting period will begin on the date of hire for a full-time employee who meets all of the other eligibility requirements for a plan.

One open issue on which the Departments intend to issue subsequent guidance is the practice of requiring a specified number of hours of service within a specified period in order to be eligible. The Notice indicates that the Departments anticipate that such a practice will not be considered a design intended to avoid the 90-day waiting period limit, and therefore allowable, provided the number of hours do not exceed the limit to be set in that upcoming guidance.

Employer Responsibility Requirement
The Notice provides some insight into how the Departments intend to handle the PPACA employer responsibility requirements, which is the provision requiring large employers to either provide group health plan coverage to full-time employees, or pay a penalty. For example, the Notice clarifies that during the allowed 90-day waiting period, an Employer will not be subject to the penalty for having not provided coverage.

With regard to newly-hired employees, for at least three months, and in some cases up to six months, the employer will be allowed a penalty-free period to make a determination whether a given employee will be treated as full-time. If, for example, it is expected that an employee will be full-time, and he does in fact work full-time during the first three months, he must be enrolled in group health plan coverage at the end of that period (i.e. the end of the 90-day waiting period) in order to avoid the penalty.

If you have questions or would like assistance with preparing the summary of benefits and coverage document, or to discuss any of the changes required by PPACA, contact:

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Condominium cont...

Among many innovations, the Act created separate categories for "bulk buyers" and "bulk assignees" to provide protection against major liabilities that otherwise could be unintentionally assumed by a purchaser or lender from the original developer. At the same time, the Act permits a new bulk buyer or assignee to exercise certain valuable rights created by the original developer of the project to facilitate its marketing and sales program for condominium units in the ordinary course of business.

Because DCRA was controversial at the time of its passage, the Florida legislature gave the protections afforded to "bulk buyers" and "bulk assignees" under the Act a relatively short lifespan: from July 1, 2010 until June 30, 2012. With the original expiration date fast approaching, state legislators introduced two bills, House Bill 319 and Senate Bill 680, at the beginning of this year's legislative session. Both bills contained amendments to DCRA that extended the effectiveness of all its provisions until June 30, 2015.

In a late-session cliffhanger, both of these bills stalled in committees in the House and Senate, with the last day of the 2012 legislative session looming. **Fortunately, however, the extension passed both houses of the legislature as an amendment to a third bill (CS/HB 517), and thus the provisions of DCRA pertaining to bulk buyers and bulk assignees remain effective until June 30, 2015.**

For more information about the Florida Distressed Condominium Relief Act, please contact:

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Five Trenam Kemker attorneys named Tampa Bay's 2012 "Lawyer of the Year" by *The Best Lawyers in America*®

Trenam Kemker is pleased to announce that five of our lawyers have been recognized in the 2012 edition of *The Best Lawyers in America* as "Lawyer of the Year" in the Tampa Bay area for their practice area. *The Best Lawyers in America* is the oldest and most respected peer-review publication in the legal profession. The following attorneys were recognized, pictured below from left to right:

Marvin E. Barkin, Litigation - Banking & Finance

Nelson T. Castellano, Securities/Capital Markets Law

Roberta Casper Watson, Employee Benefits (ERISA) Law

Roberta A. Colton, Bankruptcy/Creditor-Debtor Rights/ Insolvency & Reorganization Law

Harold W. Mullis, Jr., Corporate Law

SEC cont...

Failing to use the new "accredited investor" definition could cause serious problems for an otherwise exempt private offering. The transaction might no longer qualify for a Regulation D federal exemption. The failure might also jeopardize qualification for federal preemption of state securities registration requirements.

Companies involved in ongoing offerings or using older forms of subscription agreements or other investment documents should review the definition of "accredited investor" and make appropriate revisions to account for the new rules.

For more information about the new rules, including changes to existing investment documents, please contact:

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