PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

ALERT: California Revised Uniform Limited Liability Company Act

A new California law governing limited liability companies ("LLC"s) is set to take effect January 1, 2014. The California Revised Uniform Limited Liability Company Act ("RULLCA") replaces in full the current Beverly-Killea Limited Liability Company Act ("Beverly-Killea") and

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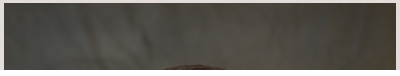

will apply automatically to all existing California LLCs; provided, however, that Beverly-Killea will still apply to acts, transactions and contracts entered into by an LLC or its members or managers before January 1, 2014.

While most of RULLCA is similar to current law, it includes certain substantive changes, most notably:

(a) New provisions concerning which code provisions can be, and which cannot be, overridden by the operating agreement;
(b) More detail regarding withdrawal and the consequences of withdrawal of an LLC member;
(c) New detailed rules concerning the fiduciary duties of members and managers in both manager-managed and member-managed LLCs; and
(d) Expansion of the consent rights of LLC members.

LLCs are not required to file any new documents with the California Secretary of State, nor are there mandatory requirements to update or amend LLC operating agreements as a result of the new law.

Nevertheless, this is an opportune time for our LLC clients to revisit their operating agreements and determine whether any changes are necessary. We strongly recommend that the members and managers of LLCs take advantage of this opportunity to update and modify their existing operating agreements to the extent necessary take advantage of the new rights within, and to ensure compliance with, the new law. Please contact Bill Scherer at wms@sfcounsel.com, Brandon Smith at bds@sfcounsel.com or Heather G. Sapp at hgs@sfcounsel.com for further information and to

Bill Scherer

August 2nd marked the 20th anniversary of this firm's founding. It's been a long, gratifying road from the single office that we began with on the fourth floor at 214 Grant Avenue to the full service firm we are today.

Our path has largely been directed by the clients we've been privileged to serve, and marked by the steady growth and increasing depth of

discuss whether modifications are necessary for your LLC.

Let's Go, Public! A Cautionary Tale

As of Monday, September 23, 2013, the ban on general solicitation or general advertising in certain private securities offerings was lifted by the Securities and Exchange Commission ("SEC"). The elimination of the ban came out of the Jumpstart Our Business Startups Act, or "JOBS Act," and is an effort by Congress to make it easier for companies to find investors and raise capital.

The ban on advertising that has now been eliminated was originally adopted in the 1930's, as part of a series of investor protection laws enacted in reaction to the Great Depression. Since its enactment, businesses have been limited to word-of-mouth, networking, and other close connections to raise money, which arguably stifled the ability of start-ups to conduct broad fundraising efforts.

Unquestionably, the lifting of the ban represents a strong leap forward for companies interested in raising money, and the immediate benefits to small business are obvious. Now, start-ups can reach out to potential investors by mass email and/or use their websites and social media platforms to solicit funding, allowing them to access a bigger audience and receive public name recognition.

Of course, grand legislative changes are never without a downside, and this case is no exception. The ability to advertise and publicly

knowledge of our lawyers and staff. And for me, this journey has been made memorable and immeasurably easier by my compassionate, intelligent partners and co-workers who I have the honor to work with each day.

I am proud of the foundation we've established here, and we have every intention of building upon that foundation to continue our growth and further improve service to our clients in the coming months and years. Ultimately our success is due to the trust our clients have placed in us, and we intend to continue to earn that trust.

solicit investments comes with some potentially significant catches, and we caution our clients in making any immediate decisions in this regard.

A few things to bear in mind:

Most notably, although the ban has been lifted and no longer prohibits who can be solicited, the SEC still restricts who can actually invest, namely accredited investors. “Accredited investors” by SEC standards are (a) those investors that have a net worth of more than $1 million, excluding the value of a primary residence, (b) individuals with income that exceeds $200,000 for the last two years, or (c) individuals whose joint net worth with a spouse exceeds $300,000 for the last two years.

Historically, before the lift on the ban, the determination of who is accredited has been a quick and painless process. Businesses can request, and more importantly rely on, a check-box certification from an investor that he or she was accredited. Not so with public solicitation. Along with the lift on the ban came more stringent verification requirements.

Specifically, businesses utilizing the public solicitation option must take reasonable steps to verify the accreditation of their investors. According to the SEC, the determination of whether the verification process is “reasonable” is an objective assessment, but at a minimum should include: (a) reviewing copies of any IRS form that reports the income of the purchaser and obtaining a written representation that the purchaser will likely continue to earn the

A primary motive in opening the firm was my desire to provide service to our clients in an honest and transparent manner, providing clear options to the people and companies we serve, with the best analysis of potential outcomes. I don’t intend to imply that other businesses are or were being dishonest, but it is my observation that too many businesses cannot carry out this basic function.

I believe that this failure generally results from a lack of consensus among management as to the manner in which services are to be provided. This in turn

necessary income in the current year; and (b) receiving a written confirmation from a registered broker-dealer, SEC-registered investment adviser, licensed attorney, or certified public accountant that the start-up has taken reasonable steps to verify the purchaser's accredited status.

Obviously, these new requirements may make the process significantly more time consuming, and expensive, and could have the potential to delay securities transactions, especially if dealing with numerous investors.

In addition, while the point of advertising is to bring a lot of investors to the table, it is important that our clients understand the potential problems when this happens. As most companies who have gone through fundraising rounds know, dealing with even a minimal number of well-known sophisticated investors can be tricky. Clients should be wary of forging business relationships with numerous unknown and potentially unsophisticated investors, who are interested simply because they saw an ad on Facebook or Twitter. Not only could this lead to an unmanageably diverse list of investors, but it also might potentially scare away seasoned investors who are less interested in investing in a start-up that has employed undiscerning general solicitation methods to seek funds.

Along those same lines, another not insignificant risk of dealing with a multitude of investors is that small businesses are likely to experience fatigue, time delay, and complications in adhering to the pre-investment due diligence requirements that are necessary in fundraising efforts. Additionally, there is always higher risk associated with unknown investors who are typically far less forgiving

means that service providers invest too much effort internally negotiating their priorities, rather than maximizing their focus on the client and legal matters being prosecuted.

This is why, at each turn as we have grown, our partners have placed as their primary goal our clients' ability to get clear answers to their questions in a timely manner. Our larger clients often concurrently deal with several of our attorneys because their needs require the different specializations they offer. Regardless, each client always has a primary contact of their choice at this

if the company runs into problems.

Finally, and perhaps most concerning, is that the law is still evolving. The SEC is not done tinkering with Rule 506 of Regulation D of the Securities Act, which is the statute in which the ban previously resided. It is possible that future iterations of the Rule will impose much more stringent reporting requirements on businesses who advertise publicly than exist now, and clients are cautioned to start down that route without the full picture.

Of course, fundraising is not "one size fits all," and there may be many benefits if done correctly and with full understanding of the pitfalls. To discuss whether advertising or public solicitation is right for your business, please contact Bill Scherer at wms@sfcounsel.com, Brandon Smith at bds@sfcounsel.com or Heather Sapp at hgs@sfcounsel.com for more information.

- Written by Heather Sapp

What Small Businesses in California Need to Know Now About Obamacare

In response to the passing of the federal Patient Protection and Affordable Care Act in 2010 (commonly called the "Affordable Care Act" or "Obamacare"), California has implemented a new program known as "Covered California" that will go into effect as soon as

firm to which any question may be directed, no matter how many attorneys work on their matter.

We are also fortunate to have a partnership of consensus whose general priorities and approach to legal matters are clear and agreed. It goes without saying that each legal matter we work on poses its own unique facts and questions of law. Despite this, it is generally possible to approach each similarly.

Scherer Smith & Kenny focuses, first, on educating ourselves regarding these facts and legal issues, and second,

January, 2014. Covered California is a new marketplace for health insurance in which small businesses and individuals can compare plans and choose the one that fits their needs and budget.

This program was created to increase the number of insured Californians, improve the quality of health care, lower costs for those seeking to be insured, and create a competitive marketplace that empowers consumers to choose a health plan at the best value. Covered California also includes resources to help businesses and individuals learn if they qualify for free or low-cost programs such as Medi-Cal, identify affordable private health plans, and apply for federal tax credits to help pay for coverage.

The United States Department of Labor requires all employers with at least one employee and $500,000 or more in annual sales to provide notice to all of their employees (full-time or part-time) of the existence of Covered California, and to provide some of the specifics of the program by October 1, 2013. These notices are required regardless of whether or not employers currently offer health insurance to their employees. Failure to provide notice could result in penalties, though none have yet been reported and the nature and scope of potential penalties remain unknown.

The Affordable Care Act does not require employers with fewer than 50 employees to provide health insurance to their employees. However, for employers with 1 to 50 “full-time equivalent” employees, Covered California has a program for small businesses to compare health plans from private insurance companies if they so choose. This program is known as Covered California Small Business Health Options Program (“SHOP”).

upon finding alternate strategies to pursue, after which we present our analysis to our clients for direction. This provides our clients with certainty as to the services we will provide, and our attorneys with a strong foundation to comprehensively and knowledgeably prosecute our matters.

Surprisingly, we find this simple approach is not followed by most firms, which fail to initially take time to analyze the matters they handle as they come in the door. We believe such an approach does not serve anybody – it only increases the chance that clients will have little idea of what

Options Program (SHOP).

Unlike Covered California's marketplace for individuals, SHOP does not have a designated open-enrollment period, such that employers have the option to enroll based on, for example, their current policy's renewal date. According to Covered California's website, SHOP will provide side-by-side comparisons of health plans, their benefits, premiums, and quality, allow employers to offer a choice of plans to employees, and possibly save administrative costs to make insurance more affordable, among other benefits.

To create an Employer Account on SHOP[3]:

1. Visit https://www.coveredca.com/
2. From the Covered California homepage, click on the "Start Here" tab.
3. Then click on the "Create an Account" link, which leads you to "Set Up An Account" page.
4. On the "Set Up An Account Page," select the kind of account you want to create. To set up health care options for your employees, click the "Continue" button below the "Employer" box.
5. Once you have reviewed the "Terms and Conditions" – where you can review the privacy policy and terms of use for the Covered California website – click the checkbox. Then enter the appropriate information.

Please contact Negin Yazdani at nny@sfcounsel.com for a sample notice with key specifics for your employees or if you have any questions.

goals are being pursued and that the expensive legal services being provided will lead down legal "blind alleys" that provide no benefit.

Our clients are the reason we have thrived over the last 20 years, and we never forget that basic fact. Our firm's "Strength of Partnership" slogan is intended to convey as much the partnership with our clients that we continually strive to develop as the law partnership that we formed to serve you.

We are always looking to improve the services we provide to our clients, and will

- Written by Negin Yazdani

Employers with 50 or more eligible employees that do not offer minimum essential health insurance to their employees may be subject to penalties in 2014.

"Full-time" employees work 30 or more hours per week on average. The federal government has not yet defined "full-time" or "full-time equivalent" for purposes of defining whether a business is small or large. This term will be further defined in the coming months.

These directions are subject to change if and when the website is updated.

Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts

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continue to look for greater efficiencies as we grow. As we commence our 21st year in business, we thank you and welcome you to make suggestions at any time as to how we can better serve you.

- Written by Bill Scherer