

Small Business and Startup Edition: *Bar News* asked business law and business litigation contributors to write about issues related specifically to advising New Hampshire small businesses and startups for this special section.

# Recent Developments in NH Small Business Laws

## Sweeping changes are improving the landscape for entrepreneurs

By Emily Bolton and Matthew Benson

Several recent changes to New Hampshire's laws are creating an improved landscape for businesses within the state, particularly for entrepreneurs, startups and small businesses. Along with being a wonderful place to live that offers a high quality of life to its residents, New Hampshire continues its efforts to become the ideal place for entrepreneurs to start, launch and grow their businesses.

The modernization of the state's business laws brings New Hampshire in line with other states that have passed startup-friendly legislation and will help ensure the prosperity of New Hampshire's businesses and economy. These changes are part of an ongoing effort to strengthen the state's entrepreneurial system and improve the business landscape.

In just the past three years, New Hampshire has overhauled its business corporation laws, its limited liability company (LLC) laws, and, most recently, its securities laws, as well as authorizing the formation of benefit corporations (so-called "B corporations"). These modernized laws reflect many of the current best



practices and acknowledge the technological advances that have changed the way we do business.

Below is a run-down of recent changes to the state's business laws.

### Business Names

Selecting a name for a new business is an important part of the business formation process. Besides appealing to the company's founder(s), the name may be-

come closely tied to the company's business and service and product offerings. That said, due to the existing naming standard, selecting a permissible company name was becoming a difficult task in some cases.

Under New Hampshire's existing (through the end of 2015) trade name statute (RSA 349), a trade name could not be used if it was likely to be confused with or mistaken for the name of any other entity that was formed or registered to do business in the state. The rules pertaining to the names of corporations, LLCs, partnerships, and other business entities applied the same standard. This somewhat subjective standard was making it increasingly difficult for a new business to determine whether its name would be permitted.

Beginning in January 2016, it will become easier for New Hampshire businesses to select and use the name of their choosing. Senate Bill 223, which was signed into law by Governor Maggie Hassan in July 2015 and will be codified in various sections of state law, including RSA 349 (tradenames), RSA 293-A (corporations), and RSA 304-C (limited

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# New State Securities Law Overhauls Offering Practices in NH

By Michael Drooff

On July 27, New Hampshire Governor Maggie Hassan signed into law a comprehensive revision to New Hampshire's securities laws, which will take effect Jan. 1, 2016.

The new securities law repeals and replaces the current securities law, RSA 421-B, in its entirety and is based on the 2002 Uniform Securities Act (2002 RUSA) developed by the Uniform Law Commission. The new law brings New Hampshire generally into line with 18 other jurisdictions in the US, including Maine and Vermont, which have adopted versions of 2002 RUSA. Although the New Hampshire version of 2002 RUSA contains a large number of variances from the 2002 RUSA prototype, it promises to substantially change offering practices in New Hampshire and facilitate capital-raising by small- and medium-sized companies.

Many corporate practitioners believe that the current securities statute, which is based on the 1956 Uniform Securities Act, is seriously deficient. The structure of the statute is outdated, and various provisions were retrofitted into the statute over the years following the growth in offering activity under federal Regulation D under the Securities Act of 1933, the federal preemption of state offering restrictions introduced with the National

Securities Markets Improvements Act of 1996 (NSMIA), and many other innovations in the securities markets.

In perhaps the most important provisions of the existing state law, the exemptions from the general requirement to register the offer and sale of securities, the current law is arguably dysfunctional. The current set of exemptions include a pre-incorporation subscriptions exemption, RSA 421-B:17,II,(k), which does not cover most founders' stock issuances and an isolated sales exemption, RSA 421-B:17,II(a)(2),

which is far too limited to be of use to dynamic early-stage companies. The current statute is widely perceived by out-of-state lawyers and influential investment managers who provide capital to early-stage companies as being odd and a significant deterrent to capital formation in the Granite State.

One factor that delayed the repeal of the current statute was the way in which the federal National Securities Markets

Improvement Act (NSMIA) preemption allowed corporate practitioners to bypass the state statute by conducting offerings under federal Rule 506, for which a preemption applies under Section 18(b)(4) (D) of the Securities Act.

“Over time, it is likely that many early-stage companies will learn to take advantage of the liberalized state exemption rules and rely on the federal preemption less than they currently do.”

Under the NSMIA preemption rules, a company is not required to secure a state registration exemption as long as the offering complies with the Rule 506 requirements and a preemption claim and short-form issuer-dealer license application is filed with the Bureau of Securities Regulation within 15 days after the first sale of securities in the offering. One significant disadvantage to claiming the federal preemption is that the required filing fees in New Hampshire are greater than \$600, not including renewal fees.

To remedy the negative perception of New Hampshire's securities laws, the governor's Live Free and Start Advisory Council formed a committee of state officials, private practitioners and academics

to adapt 2002 RUSA to New Hampshire practice and prepare a bill for the legislature.

Following several months of drafting work, the bill was introduced in the Senate as SB 266 in February 2015, where it received broad bipartisan support. Broad support for the bill continued through its passage in the House. The new law goes into effect on Jan. 1, although offerings commenced under the current statute will be required to comply with the current rules through the duration of the offering.

The new offering rules, and in particular the new registration exemptions and the revised state licensure requirements, will significantly change offering procedures for early-stage companies in New Hampshire in several respects:

- The current pre-incorporation subscriptions exemption will be repealed and effectively replaced with a much more user-friendly limited-offering exemption, which appears in Section 202(14) of the new law. An issuer of securities will have the ability to sell securities to up to 25 purchasers as part of the same offering in any 12-month period, provided that the offering does not involve a general solicitation of investors, no commissions are paid, and the issuer reason-

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programs that allow discounts on travel or credit on future purchases. Consider talking with your bank or another vendor about setting up credit card merchant processing services to accept payment of invoices by credit card. By doing so, you are giving small business clients the ability to better manage their cash flow. If your billing system can issue invoices with enabled payment features to accept payment by EFT or credit card, you may find efficiency in your own operations in the manner of reduced staff time receiving and booking payments. You may also find that payments come in a lot more quickly.

**Streamline the Drafting Process**

Nothing inflates legal bills more quickly than excessive drafting cycles. Whether it is having several attorneys work on a single document or drafting a document littered with legalese that clients can't decipher, innovative attorneys need to find ways to simplify the drafting process so that clients end up with work product that they can understand and use. One method is to systematically go through your forms library and weed out archaic, redundant and ambiguous language and phrases from basic contracts. By having all drafters starting from the same clean forms, drafting quality is maintained across a number of drafters and reduces proofreading time of senior attorneys.

If maintaining an internal forms library is too labor intensive, consider an online document assembly subscription, such as ContractExpress offered by Thomson Reuters. By having a computer-generated first draft produced in minutes, drafters can get to the heart of drafting deal terms more quickly and without risk that extraneous or inapplicable client references or deal teams from previous deals are carried over into new documents.

When you implement some of these strategies or others that you devise on your own, although your startup clients may never see the innovation in your practice up-close, they will certainly appreciate the proactive, budget-friendly solutions that you are able to provide.

The result will be that you will have more than a loyal client. You will have a partner who will give you repeat business and sing your praises to their friends and associates for many years to come.

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ably believes that the investors are purchasing for investment purposes. If a different offering takes place within the same 12-month period, involving different securities or to raise capital for different purposes, the new offering may involve up to 25 additional purchasers.

- The current isolated issuer sales exemption will also be repealed and will be effectively replaced with the much more user-friendly limited offering exemption described above.
- Issuances of securities to certain significant institutional investors will be exempt under Section 202(13).
- Issuers will be able to take advantage of a new extraterritorial exemption from the New Hampshire registration requirements under Section 202(20) of the new law, if the offers and sales are solely to out-of-state residents and the offering complies with the rules of the states in which the investors are present.
- Issuers will need to make disclosures to investors of certain "bad acts" by any partner, officer, director or similar person in any offering relying on a New Hampshire registration exemption. This requirement roughly parallels the "bad actor" disqualification contained in Rule 506(d) in federally-preempted offerings. This new requirement will lead issuers to institute

additional procedures, such as circulating questionnaires to company insiders, as part of offerings relying on state law.

- The New Hampshire issuer-dealer license requirements will be repealed, in favor of a much more limited registration provision under Section 402 of the new law for "agents." The new agent registration provisions will not apply to an offering conducted by the issuer through its officers and directors, as long as the issuer is not paying a commission in connection with the offering.

Under the new statute, issuers will still be able to rely on the federal preemption for offerings conducted under Rule 506, if they are prepared to make the required preemption claim filing and pay the same filing fees. Over time, it is likely that many early-stage companies will learn to take advantage of the liberalized state exemption rules and rely on the federal preemption less than they currently do.

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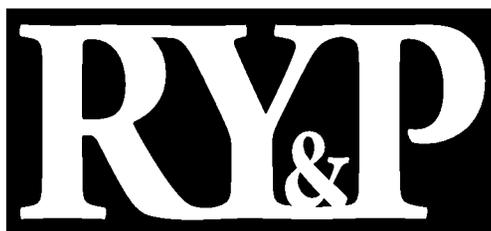
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