

**Navigating Private Placements and Capital Raising
in the Wake of the JOBS Act of 2012 and Crowdfunding**

**Oregon State Bar
Securities Regulation Section**

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1. General Solicitation: Avoiding the Inadvertent 506(c) Offering

- a. Pitch Events and Demo Days
 - i. What are they?
 - 1. Pitch Event = an event organized for the purpose of helping presenting companies raise capital
 - 2. Demo Day = an event in which companies present their new products or services
 - ii. Have Pitch Events and Demo Days Been Violating the Prohibition on General Solicitation?
 - 1. Heath Abshire, NASAA Chair and the Arkansas Securities Commissioner was quoted at the SEC Advisory Committee on Small and Emerging Companies on 9/9/2013 to the effect that all venture capital days sponsored by states are general solicitations but no enforcement action is taken because they are sponsored by the government
 - 2. Michigan Growth Capital Symposium 1995 No Action Letter gives no meaningful guidance
 - a. The conference itself does not generally solicit
 - b. Presenting companies need to find their own exemptions from registration
- b. Drilling Down on General Solicitation
 - i. What the SEC Says About General Solicitation
 - 1. 502(c) states that “neither the issuer nor any person acting on its behalf shall offer or sell securities by any form of general solicitation or general advertising, including, but not limited to:
 - a. Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and
 - b. Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising
 - 2. 1957 SEC Release states that a communication that does not mention an issuer’s securities or offering may be deemed an offer

if they have the effect of conditioning the market or arousing public interest in an issuer or its securities (*SEC Release No. 33-3844 (Oct. 8, 1957, at p.2)*)

3. Facts and Circumstances Test
- ii. What the SEC Doesn't Say About General Solicitation
 1. "General Solicitation" is undefined
 2. "Pre-existing substantive relationship" avoids a general solicitation
 3. SEC won't give No Action letters
- c. Best Practices for Companies Raising Capital
 - i. Avoid pitch events (and demo days?) unless 506(c) path selected
 - ii. Presentations at demo days should not include capital raising topics, including capital sought and financial projections, and avoid Q&A that discusses capital raising

2. Understanding Non-Securities Crowdfunding

- a. Impact of Non-Securities Crowdfunding
 - i. Economic Game Changer
 - ii. Capital Raised in 2013: \$5.1 Billion (up from \$2.7B in 2012)
 - iii. Individual Companies:
 1. Pebble (smartwatch) raised \$10 million from 69,000 backers in 2012
 2. Ubuntu Edge (smartphone) raised \$12 million in one month in 2013
 3. Star Citizen (video game) raised \$40 million in 2013 and ongoing
- b. Different Types of Non-Securities Crowdfunding
 - i. Pre-Purchase of Products
 - ii. Donations
 - iii. Sale of Rewards
 - iv. Sale of Yourself (Upstart.com)
- c. Why Do I Care? Could Non-Securities Crowdfunding be the Sale of Securities?
 - i. Application of the Howey Test
 1. Fails the expectation of profits test
 - ii. Would the Risk Capital Test Apply?
 1. Risk Capital Test = whether or not one party is putting capital at significant risk for the development or start-up of the business of another
 2. Good law in Oregon?
 3. Statutory law in Washington [RCW 21.20.005(17)(a)]

3. Will Securities Crowdfunding Take Flight?

- a. Federal CROWDFUND Act (*Sounds great, but who can afford it?*)
 - i. Title III of the JOBS Act of 2012
 - 1. “Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure” Act
 - 2. Still in Rulemaking Process
 - ii. Many Onerous Provisions
 - 1. \$1 Million ceiling on amount raised per year
 - 2. Audited financial statements if raising \$500k or more, and reviewed financial statements if raising \$100k-500k
 - 3. Required use of a broker or funding portal
 - 4. Investment amounts per investor capped
 - iii. Practical Impact for Successful CROWDFUNDERS
 - 1. High initial and ongoing compliance costs
 - 2. Many small shareholders
 - 3. Burdensome annual reporting requirements
 - 4. Impact on future capital raising???
 - iv. Is CROWDFUND the next SCOR?
- b. State Crowdfunding (*Sounds great, but who qualifies?*)
 - i. Growing Adoption
 - 1. Adopted in Michigan, Wisconsin, Kansas and Georgia
 - 2. Pending in Washington, N. Carolina, Maine, Alabama and NJ
 - ii. Rule 147 Compliance
 - 1. 80% of assets test
 - 2. 80% of revenues test
 - iii. Washington HB2023
 - 1. No broker or funding portal requirement
- c. Accrediteds Only Crowdfunding
 - i. Gaining solid momentum through websites like Angels List, Crowdfunder and Circleup
 - ii. Relies on 506(c), so reasonable steps to verify investors as accredited investors are required

4. Can I Just Use the Old Fashioned 506 (now 506(b)) Offering?

- a. Still the Structure of Choice
- b. Notable Changes and Potential Changes
 - i. Bad Actors: issuer disqualified from using Rule 506 if certain felons and bad actors are involved
 - ii. Form D Filing Requirements
 - 1. Proposed rules provide for severe penalties for failure to timely file
 - a. One year ban from using Rule 506