CORPORATE LAW UPDATE

May 2015

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RAISING MONEY? DISCLOSURE STILL ESSENTIAL

In the last year or so, you have likely heard from us and in the media about crowdfunding and other changes in the capital raising process that are intended to assist start-up, small and mid-sized businesses. These changes are certainly important and worthy of consideration for firms that need additional money for growth, expansion and operations.

However, one element that has not changed is the need to provide appropriate written disclosure to proposed and actual investors. Despite the recent updates in securities laws and regulations, it is still essential for a firm to provide the same level of written disclosure with respect to topics such as offering terms, use of proceeds, business risks, conflicts of interest and management backgrounds.

In some cases, particularly when the offering is solely to accredited investors, such disclosure can be accomplished with a shorter document as opposed to a lengthy private placement memorandum. There are various techniques for tailoring written disclosures to fit specific situations. Nonetheless, it is essential in all cases to protect the offering company from claims by disenchanted investors by providing sufficient disclosure under the circumstances so that the company can show that investors were appropriately apprised of material information and risks before they committed to invest. Good disclosure is a vital 'insurance policy' for the company.

We are sometimes asked if oral disclosure is sufficient. The answer is a resounding NO. It is necessary to be able to prove that disclosure was made. With oral statements, there is always a risk of memories fading or becoming 'opportunistically selective' or people leaving organizations or dying. Moreover, for certain types of offerings, especially those involving non-accredited investors, written disclosure may still be required under applicable federal and state law. Despite the recent changes facilitating capital formation, government regulators remain very protective of investors. Companies raising money should continue to exercise great care when it comes to making accurate disclosure, complying with laws and documenting such disclosure and compliance.

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