



DOCUMENTING A PRIVATE PLACEMENT OFFERING

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OVERVIEW

The private placement of securities is the most prevalent method of raising capital in the U.S. To effectively raise capital through a private placement, an entity offering securities (issuer) must safely navigate the complex regulatory structures that govern the offering, including the documents necessary to effectuate the offering. Experienced securities counsel plays a vital role in guiding companies through the various responsibilities to avoid devastating mistakes when raising capital.

This white paper discusses the particular documentation used to conduct a private placement. The documentation of a private placement of securities falls into three categories: (1) formation documents; (2) offering documents; and (3) regulatory filings.

FORMATION DOCUMENTS

Formation documents are the documents filed with the appropriate government authority (typically the Secretary of State Office in the state in which the entity will be formed) that will establish the existence of the issuer. Depending on the state of formation, the formation document may take the form of a limited partnership certificate, certificate of formation, articles of organization or articles of incorporation.

OFFERING DOCUMENTS

Offering documents are the particular documents an issuer will provide to a prospective investor before it invests. The offering documents include: (i) a private placement memorandum (PPM); (ii) an operating agreement or limited partnership agreement (assuming the entity conducting the private placement is a limited liability company or limited partnership); and (iii) a subscription agreement, which includes an investor questionnaire. If the issuer is conducting a debt offering, the offering documentation will also include the form promissory note to be executed by the issuer in connection with a prospective investor's purchase.

PRIVATE PLACEMENT MEMORANDUM

The anti-fraud provisions of the federal securities laws require issuers to provide prospective investors with full, fair and complete disclosure of all material facts about the issuer, the management, and the issuer's business, operations and finances. If an offering will be sold to any non-accredited investors under a Rule 506(b) offering, the issuer must provide the narrative and financial disclosures required by Rule 502(b)(2).

A PPM is intended to fulfill the disclosure requirements of Rule 502(b)(2). A properly prepared PPM should contain fair and balanced disclosures regarding the issuer and the prospective offering. The PPM should be prepared to fulfill the issuer's disclosure requirements while shielding the issuer and its management team from any future charges of violating the anti-fraud provisions of the federal securities laws.

If the issuer, its management or any placement agent or broker dealer makes any oral or written representations that differ from, or are inconsistent with, the PPM, the value of the PPM can be significantly diminished. Consequently, all marketing materials used in connection with the offer and sale of the securities and all correspondence with prospective investors should align with disclosures made in the PPM. Additionally, if during the offering, new material information related to the issuer or its business and/or financial condition arises, the issuer must update the PPM to reflect such new material information.

GOVERNING DOCUMENTS

Each type of entity has governing documents such as an operating agreement for limited liability companies, bylaws for a corporation or a limited partnership agreement for limited partnerships. An entity's applicable governing documents dictate how the entity will operate on a daily basis. Some of the foundational items include how and when distributions occur, the rights and responsibilities of the management and owners and allocations of income to the owners. Governing documents need to be tailored to the specific terms of the offering. For example, if an LLC will have multiple classes of equity, the operating agreement must authorize these different equity classes and set forth the preference of distributions and the voting rights of each class. When conducting an offering, the summary of the governing documents contained in the PPM must match the terms of the governing documents. If they do not, this could result in material misrepresentations and legal liability.

SUBSCRIPTION AGREEMENT

A subscription agreement serves as an application by a prospective investor to participate in the debt or equity securities transaction by the issuer, where the issuer agrees to sell the equity or debt securities to the investor. The investor is agreeing to purchase the equity or debt securities at the price set forth in the PPM. In essence, the subscription agreement is a contract between the investor and the issuer, which outlines the terms of how the investor is to purchase the equity or debt securities. The subscription agreement also contains the relevant and applicable representations and warranties made by the investor to the issuer.

A subscription agreement for the purchase and sale of equity will be accompanied by a signature page or joinder agreement to the issuer's governing documents (operating agreement, limited partnership agreement or stockholder agreement). If the issuer is conducting a debt offering, the subscription agreement should be accompanied by a promissory note. An investor questionnaire, used by the issuer to establish an investor's suitability and qualification to participate in the offer, is normally integrated into the subscription agreement.

REGULATORY FILINGS

Regulatory filings are the specific filings made with the U.S. Securities and Exchange Commission (SEC) and the applicable state regulatory agency in any state where an investor resides or is incorporated in, if the investor is an entity. These filings are required under both federal and state securities law.

SEC FILING REQUIREMENTS

The filing required by the SEC is called Form D. This is the federal notice filing and must be filed within 15 days of the first sale to an investor. As a notice filing, Form D is not subject to review or approval. Form D discloses certain information about the offering, the issuer, use of proceeds and the principals of the issuer. If the issuer's offering is ongoing, the issuer must file Form D updates each year that the offering is open.

STATE FILING REQUIREMENTS

Each state requires a notice filing to be filed when selling securities to a resident within that state. Most states require the notice-filing to be made within 15 days after a resident of the state makes an investment; however, certain states require that the notice-filing be made before any offer of securities within the state

ABOUT THE AUTHOR

As a results-oriented dealmaker, Jason enjoys creating solutions that bring together great people, projects and capital.

When working on sophisticated business and financing transactions, Jason focuses on the big picture to ascertain his clients' strategic business direction and formulate risk mitigation strategies to protect corporate capital and profitability. His extensive experience includes advising businesses, lenders, investors, startups, and real estate investment companies and developers across the United States, on business transactions from formation to exit, acquisition, due diligence, real estate securities offerings, joint ventures, disposition and financing of real estate.

Passionate about real estate investing, Jason frequently speaks, writes and teaches on the topic, and is also a real estate investor himself. He has authored two books about private money lenders and is working on an eBook focusing on real estate syndication. Jason leads Foster Garvey's Real Estate Funds & Syndications Team.

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