

G A R V E Y S C H U B E R T B A R E R

# SECURITIES LAW AND REAL ESTATE OFFERINGS IN WASHINGTON

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# OVERVIEW AND INTRODUCTION

## What are the Securities Laws?

### Registration Requirements

Apply to virtually all offers and sales of securities

Registration is not required if an exemption can be found

### Anti-Fraud Rules

Apply to virtually all offers, sales and purchases of securities

No exemptions, only mitigation of risk

# State and Federal Regulation



- Securities Act of 1933  
(15 U.S.C. § 77)
- Securities Act Rules  
(17 C.F.R. § 230)



- Securities Act of Washington  
(RCW Ch. 21.20)
- WAC Title 460

- Federal regulation of securities preempts state law only to a limited extent.
- State and federal law are both usually in play.
- States are limited to copies of federal notice filings and fees connection with private placements of "Federal Covered Securities."

# What is a Security?

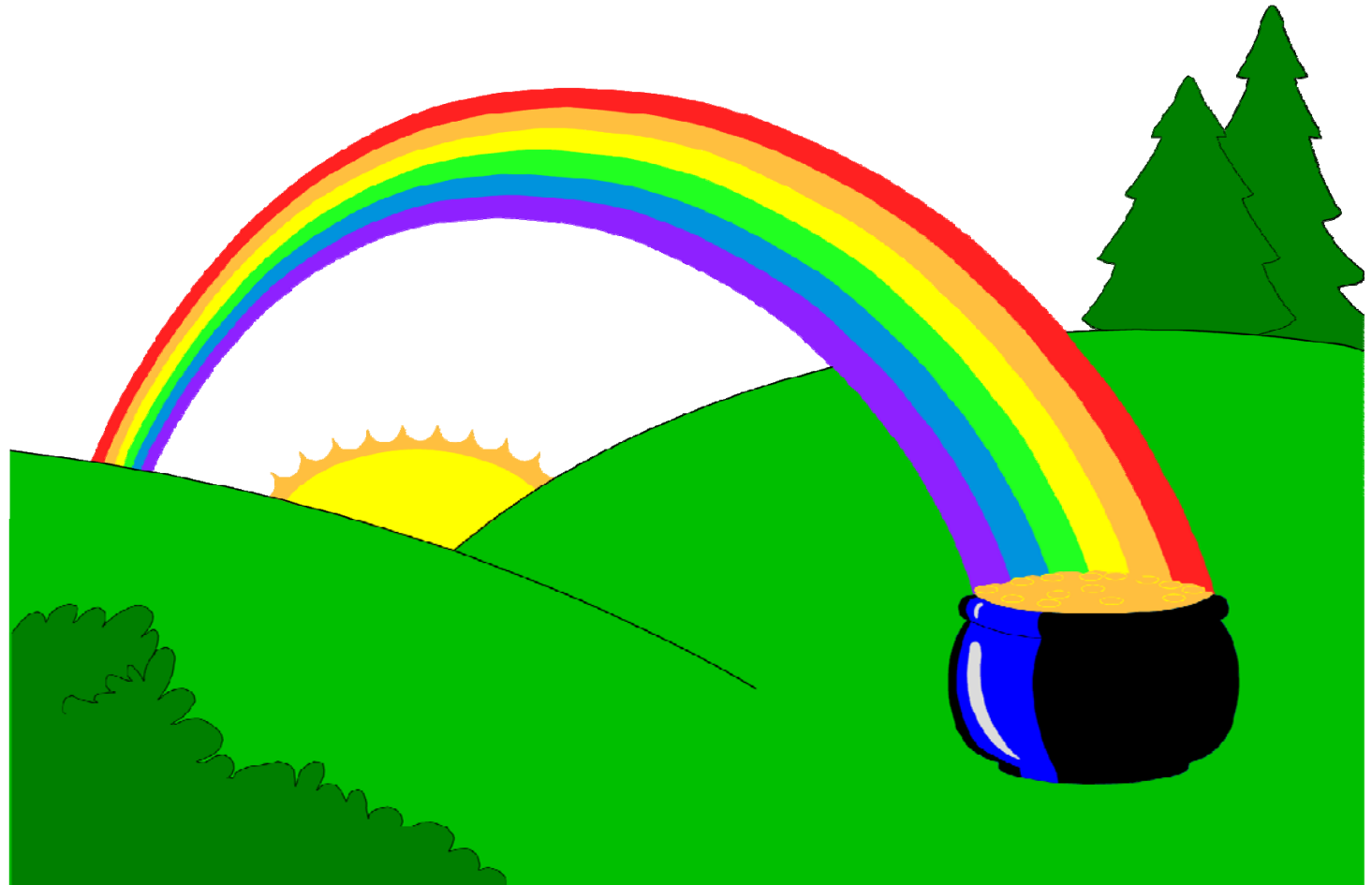


Stocks, bonds, notes, debt instruments, limited partnership and LLC member interests, TIC interests, investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture.

# Offer and Sale

- Offer: “every attempt to offer or dispose of, or solicitation of an offer to buy, a security or interest in a security for value.”
- Sale: “every contract of sale or disposition of a security or interest in a security for value.”

# Private Placement Exemptions



# Securities Act Section 4(2)

- Exempts from registration  
“transactions by an issuer not involving any public offering.”
- Offerees must be “sophisticated.”
- Succinct, but uncertain.

## Washington Isolated Transaction Exemption

- Exempts any “isolated transaction, or sales not involving a public offering, whether effected through a broker-dealer or not; or any transaction effected in accordance with any rule by the director establishing a nonpublic offering exemption pursuant to this subsection where registration is not necessary or appropriate in the public interest or for the protection of investors.”
- Limited to three sales by an issuer in 24 months, whether occurring inside or outside Washington.





# Regulation D



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# General Requirements

- Avoidance of “General Solicitation”
- Concept of “Restricted Securities” and limitations on resale.
  - Rule 144 imposes a one year holding period on non-affiliates of private issuers.



# Key Concept: Accredited Investor

- \$1,000,000 net worth excluding value of primary residence, or
- \$200,000 annual income (\$300,000 jointly with spouse)
- Directors and executive officers
- Entities in which all owners would be “accredited” if investing individually



# Rule 504

- Up to \$1 million of securities in a 12-month period.
- No specific disclosure requirements or limitation on number of purchasers.
- Form D must be filed
- Washington's corollary rule imposes additional requirements:
  - Investment Suitability for non-accredited investors
  - Limitation to 20 purchasers within Washington
  - Commissions are prohibited
  - Filing must be made 10 days *prior* to sale



# Rule 505

- Up to \$5 million in a 12 month period.
- Unlimited number of accredited investors and up to 35 “unsophisticated and unaccredited” investors.
- **Non-accredited investors must be provided with specific and extensive disclosure.**
- Form D must be filed
- Washington Requirements
  - Suitability
  - No commissions to brokers or agents soliciting non-accredited investors unless registered in Washington.



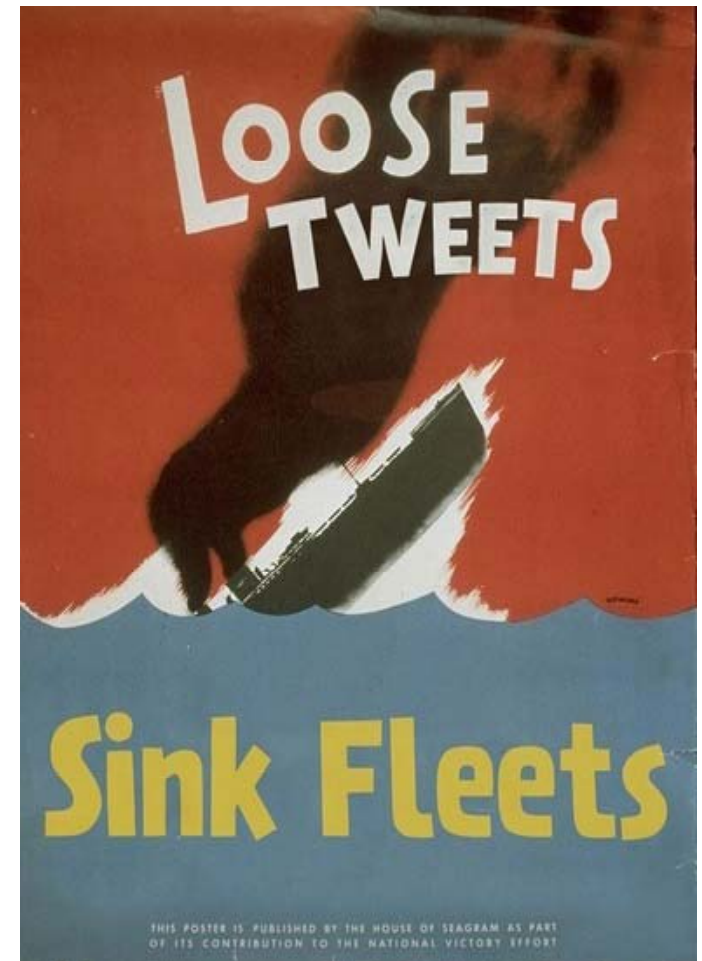
# Rule 506

- Unlimited offering amount.
- Unlimited number of accredited investors, up to 35 non-accredited investors.
- All investors must be “sophisticated.”
- **Non-accredited investors must be provided substantial disclosure.**
- Form D must be filed in Washington, but exemption is otherwise self-executing.



# Practice Points

- Obtain representations and questionnaires to qualify investors
- Legend certificates
- Timely complete federal and state filings



# Form D

- Must be filed within 15 days of “first sale” (but see Washington’s Rule 504)
- Filed electronically with the SEC and is publicly available.
- New filers must allow time prior to the deadline to register for electronic filing.
- Amendments required under certain circumstances.





# Other Exemptions



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# Intrastate Offerings

- Federal law provides exemptive rules for securities offered exclusively to residents of a single state, by issuers resident and doing business in that state.
- Caution: It is very easy to cross state lines on either the investor or issuer side.
  - Rule 147 Standards re: “doing business”
- State law exemption must still be found.
- Reg S Offering – overseas investors

# Limited General Solicitation – JOBS Act

- 506 offerings – but must confirm qualification as “accredited investors”
- Extensive diligence required – examination of tax returns, statements from accountant/financial advisers that issuer has “taken reasonable steps to verify purchaser’s accredited status.”
- Final SEC rules haven’t been adopted for “crowdfunding” – but this may be a source of funds in the future.



# Small Offer Registrations



# Regulation A

- Provides an abbreviated method for non-public issuers meeting certain requirements to make a public offering of up to \$5 million in a 12-month period.
- Requires SEC review and approval
- Disclosures are relatively extensive, including requirement for GAAP (but not audited) financials.

# State Registration

- Small Company Offering Registration ("SCOR) process offered by Washington and a number of other states.
- Limited to \$1 million aggregate offering.
- GAAP financials required.
- Federal exemption must still be claimed (Rule 504 or 147).
- Must register with the State



## Violations of the Registration Requirements



The primary remedy for a registration violation is rescission, plus interest on invested funds.

Registration violations can sometimes be cleansed under state law with by conducting a rescission offer...which brings its own set of challenges.



# Anti-Fraud Rules



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# Statutory Bases for Liability

- Section 12(a)(2) – provides for liability of sellers making untrue or misleading statements to purchasers.
- Section 15 – provides for joint and several liability of “controlling persons” of a person liable under Section 12, unless they lacked knowledge of the misleading statements.
- Rule 10b-5: provides for liability arising from false, misleading or fraudulent activities in connection with a securities transaction. Includes requirement as to *scienter*.
- State statutes generally run parallel.
- Willful violators are subject to criminal prosecution under both state and federal law.

# Disclosure Practice

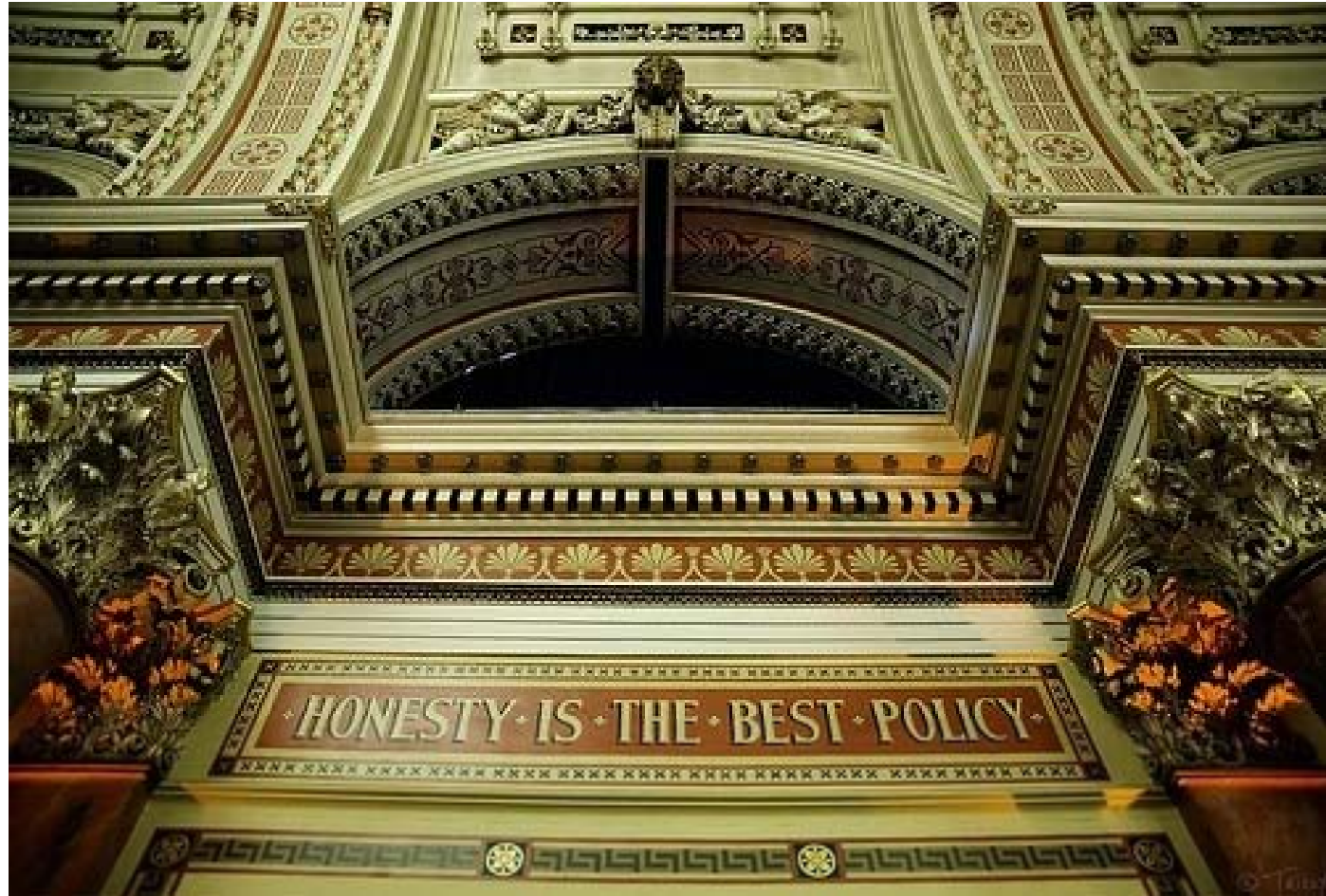


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- Risk of liability is best mitigated through the true and accurate disclosure to prospective investors of all information material to an investment decision.
- Formality and volume of disclosure is calibrated to the issuer, investor and offering context.

# Private Placement Memoranda

- Description of the offering and offered securities
- Use of proceeds
- Risk factors
- Historical and/or projected financial information
- Management, governance and capitalization
- Industry, market and operations history and prospects
- Tax and regulatory issues



# Questions?

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