Beyond the IPO: Exempt Securities Offerings
LAWG-3026-10
LAWJ-3026-10

Syllabus

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Georgetown University Law Center
Fall 2016
Mondays 7:55 PM-9:55 PM

General Information:

- **Course objectives:** The ability to conduct exempt offerings of equity and debt securities provides companies, venture capitalists, investment funds, and entrepreneurs with a vital alternative means by which to obtain financing to fund their operations and growth. Exempt offerings enable these parties to have comparatively quicker access to capital without the attendant costs and delays associated with registered offerings under the Securities Act of 1933. This course will provide students with a comprehensive understanding, from the regulator’s and private practitioner’s perspectives, of how parties in need of financing can raise capital by relying upon exemptions from the otherwise applicable registration requirements of the Securities Act.

- **Evaluation:** Course grades will be based on a mid-semester assignment (15%), class participation (10%), and a final exam (75%).
  
  - Mid-semester assignment: You will be asked to draft a short memo (3 to 5 pages) providing analysis on one or more transaction exemptions. We will assign the mid-term assignment on or before October 11, 2016. The mid-semester assignment will be due on October 24, 2016. Late assignments will not be accepted unless excused by one of the course instructors before the due date.
  
  - Final examination: The final examination will be open book and consist of a combination of multiple choice and short- and long-answer questions.

- **Class attendance and participation:** We highly encourage class participation and strive for a lively and engaging seminar format. Students will be permitted one or more excused absences. An excused absence is one that is discussed beforehand with one of the course instructors or as soon as practicable in the event of an unplanned absence. Unexcused absences may negatively impact the course grade.

- **Canvas:** Along with the syllabus, we will post PowerPoint slides and announcements on Canvas. We may also post additional recommended reading materials.
• **Laptop policy:** Laptops will be allowed in class to take notes or review materials being discussed in class. Accessing the Internet during class is otherwise not allowed.

• **Office hours:** We will be available to meet with students, by appointment, before class on Mondays and at other times, depending on our availability. Please schedule an appointment in advance by email.

• **Changes to syllabus:** To maximize student learning, class content is subject to change. We will seek to provide at least a week’s notice of any changes.

• **Disclaimer:** The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any publication or statement by any of its employees. Views expressed in the course are the views of Professors Kwon and Lopez and do not necessarily reflect the views of the SEC or other staff of the SEC.

**Class 1 (August 29) – Introduction and overview of the course**

- Overview of the Securities Act registration and liability provisions
- Key issues under the Securities Act
- Registered securities offerings vs. exempt securities offerings
- Sources of law and guidance on Securities Act exemptions
- State blue sky laws and preemption
- Introduction to Section 3 and Section 4 exemptions

Reading:
Larry D. Soderquist & Theresa A. Gabaldon, *Securities Law* (5th ed. 2014), Chapters 2 – 4, 6

**Class 2 (September 12) – Section 4(a)(2) private offering exemption, Regulation D, Rule 506 and general solicitation**

- The *Ralston Purina* case
- History and background of Regulation D
- “Accredited investor” status
- Requirements of Rule 506(b) offerings under Regulation D
- JOBS Act and Rule 506(c) of Regulation D
- “Bad actor” disqualification under Rule 506(d)
- Interpretive issues under Regulation D

Reading:
Rules 501, 502 and 506 of Regulation D
Woodtrails–Seattle, Ltd., SEC Staff Interpretive Letter (Aug. 9, 1982)
Citizen VC, Inc., SEC Staff Interpretive Letter (Aug. 6, 2015)

Class 3 (September 19) – Regulation D and Rule 506 (continued), Section 4(a)(1) “ordinary market trading” exemption, and Rule 144

- Private placements in practice (preparation of offering documents, use of restrictive legends, registration rights)
- Securities Act Section 2(a)(11) and the definition of “underwriter”
- Section 4(a)(1) exemption
- History and background of Securities Act Rule 144
- Requirements of Rule 144 – restricted and control securities
- Interpretive issues under Rule 144

Reading:
In re Ira Haupt & Co., 23 S.E.C. 589 (1946)
Soderquist & Gabaldon, Securities Law, Chapter 7
Securities Act Section 2(a)(11) and Securities Act Rule 144
Hale and Dorr, SEC Staff Interpretive Letter (June 12, 1991)
Hygeia Sciences, Inc., SEC Staff Interpretive Letter (Mar. 13, 1986)
SEC v. Cavanaugh, 445 F.3d 105 (2d Cir. 2006)
Securities Act Rules Compliance and Disclosure Interpretations 128.01 through 137.02 and 528.01 through 536.06 (skim)

Class 4 (September 26) – Section 4(a)(1) “ordinary market trading” exemption (continued), resales, and Section 4(a)(7)

- Securities Act Rule 144A
- “Section 4(a)(1½)” exemption
- Case law on underwriter status
- Section 4(a)(7) and the FAST Act
- Primary vs. secondary offerings

Reading:
Securities Act Rule 144A
Carl W. Schneider, Section 4(1-1/2) – Private Resales of Restricted or Control Securities, 49 Ohio St. L.J. 501 (1988)
Zacharias v. SEC, 569 F.3d 458 (D.C. Cir. 2009)

The pages numbers for SEC releases in this syllabus are based on the versions of the releases on the SEC website, not the Federal Register versions of the releases.
Securities Act Section 4(a)(7)
Securities Act Rules Compliance and Disclosure Interpretation 612.09

Class 5 (October 3) – Section 4(a)(6) Crowdfunding

- Types of crowdfunding
- Section 4(a)(6) and Regulation Crowdfunding
- State crowdfunding laws
- Issues in crowdfunding securities offerings

Reading:
Regulation Crowdfunding, 17 CFR Part 227

Class 6 (October 11) – Section 3(b)(1) exemptions

- History and scope of Section 3(b)(1) of the Securities Act
- Rules 504 and 505 of Regulation D
- Rule 701 and employee benefit plans
- Regulation CE
- Proposed amendments to Rule 504

Reading:
Securities Act Rules 504 and 505
Securities Act Rule 701
Arclight Systems, LLC, SEC Staff Interpretive Letter (Jan. 17, 2002)

Class 7 (October 17) – Section 3(a)(11) and Rule 147

- Section 3(a)(11) and intrastate offerings
- Securities Act Rule 147
- Proposed amendments to Rule 147

Reading:
Securities Act Rule 147
First Commerce of America, Inc., SEC Staff Interpretive Letter (Sept. 30, 1991)
Chapman v. Dunn, 414 F.2d 153 (6th Cir. 1969)
Busch v. Carpenter, 827 F.2d 653 (10th Cir. 1987)
Class 8 (October 24) – Regulation A

- History and background
- JOBS Act and the adoption of “Regulation A+”
- “Offering circulars” and “testing the waters” solicitations

Reading:
Regulation A (Securities Act Rules 251 – 263)
Securities Act Rules Compliance and Disclosure Interpretations 182.01 – 182.11

Class 9 (October 31) – Integration analysis under the Securities Act

- Securities Act Release No. 4552 and the five-factor test
- Integration safe harbors under the Securities Act
- Sources of guidance on integration analysis

Reading:
Securities Act Rules 147(b)(2), 701(f), 251(c), 255(e), 144A(e), 152 and 155
Rules 500(g) and 502(a) of Regulation D

Class 10 (November 7) – Section 3(a)(9) exemption for exchanges of securities

- Overview of exchange offers
- Advantages and drawbacks of Section 3(a)(9)
- Requirements of the Section 3(a)(9) exemption
- Interpretive issues under Section 3(a)(9)

Reading:
Securities Act Rules 149 and 150
David M. Lynn & Ze’ev D. Eiger, Section 3(a)(9) Exchange Offers, 23 Insights 8 (June 2009)
Securities Act Sections Compliance and Disclosure Interpretations 125.01 through 125.11 and 225.01 through 225.05
Section 3(a)(9) Upstream Guarantees, SEC Staff No-Action Letter (Jan. 13, 2010)

Class 11 (November 14) – Section 3(a)(10)

- Advantages and drawbacks of Section 3(a)(10)
- Staff Legal Bulletin No. 3A
- Interpretive issues under Section 3(a)(10)
- Fairness hearings under state law
- Recent examples of Section 3(a)(10) transactions

Reading:
SEC Staff Legal Bulletin No. 3A (June 18, 2008)
Nabi Biopharmaceuticals, SEC Staff No-Action Letter (June 20, 2012)
Keith P. Bishop, California Fairness Hearings: A Low-Cost Alternative to Federal Registration in Acquisition Transactions, 15 Insights 23 (Feb. 2001)

Class 12 (November 21) – Rule 144A and Regulation S

- History and background of the rules
- Requirements of Rule 144A and Regulation S
- Issues in Rule 144A and Regulation S offerings

Reading:
Securities Act Rule 144A
Charles J. Johnson, Joseph McLaughlin & Eric S. Haueter, Corporate Finance and the Securities Laws, § 7.05
Securities Act Rules 901 through 905
Offshore Offers and Sales (Regulation S), Securities Act Release No. 6863 (April 24, 1990), pages 1 – 27
Offshore Offers and Sales (Regulation S), Securities Act Release No. 7505 (Feb. 17, 1998), pages 1 – 30
In re GFL Ultra Fund Ltd., Securities Act Release No. 7423 (June 18, 1997)

Class 13 (November 28) – Review

- Comparing the different Securities Act exemptions
- Common themes under the Securities Act exemptions
- Format and content of final examination

Reading: None