

**Early “Advertising” for Crowdfunding** by Bruce E. Methven

This is part two of what is now a four-part series on crowdfunding; this part covers using a test-the-waters approach to get advertising out now for an upcoming crowdfunding offer.

Publicly advertised crowdfunding that allows the sale of stock, LLC units, promissory notes, etc. begins May 16 of this year. Advertising a crowdfunding offer cannot begin until then.

SEC Reg. A+, though, allows a company or fund to “test the waters” for interest by potential investors in a proposed offering. A “test the waters” proposal can be publicly circulated now without endangering a proposed crowdfunding offering if care is taken.

More specifically, a company can publicly advertise a proposed offering and ask potential investors whether they might be interested in investing. The proposal can be placed on a website, social-media site, emailed, etc. The proposal can ask those who might be interested to send an email or text or “like” a social-media page. Then starting May 16 communications can be sent to those potential investors giving them the crowdfunding tombstone ad and directing them to the crowdfunding portal/intermediary that the company has signed up with.

Note that the SEC has stated that it would have a problem with a company using a “test the waters” proposal to direct investors into a subsequent private offering (like a traditional Rule 506b offering). There is no warning, though, about subsequent publicly advertised offerings like a crowdfunding offering.

There are restrictions on the information that can be provided, though. The “test the waters” communication must be limited to factual business information. The regulations say that this means information about the issuer, its business, financial condition, products, and services. The regulations specifically forbid such things as predictions, projections, forecasts or opinions with respect to the value of the company or its stock.

Also, the communication must bear a disclaimer stating that: (1) no money or other consideration is being solicited, and if sent, will not be accepted; (2) no sales will be made or commitments to purchase accepted until the offering statement is qualified; and (3) a prospective purchaser’s indication of interest is non-binding.

If the company follows these rules, it can publicly advertise its proposed offering.

Still, it is strongly recommended that a company or fund have an attorney review its test-the-waters proposal before releasing the proposal publicly. As is generally the case with securities law, it is often easy to cross over the line between what is allowed and what is not.

Regards,  
Bruce

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