1. **Does my transaction involve investors and the sale of securities?**

Securities are defined under ORS 59.015 (19), and they can include nearly any sort of investment vehicle such as stock, LLC membership interests, promissory notes, and investment contracts. *See, e.g., Lahn v. Vaisbort*, 276 Or. App. 468, 369 P.3d 85 (2016) (notes were securities). An “investment contract” is defined to include any investment of money in a common enterprise, for a profit, in which someone other than the investor is managing the business (i.e., investments by passive investors). *Computer Concepts, Inc. v. Brandt*, 310 Or. 706, 714–15, 801 P.2d 800 (1990).

1. **Is my client acting as a seller of securities or promoting the sale of securities?**

A sale of securities includes any contract to sell or nearly any other disposition of a security for value. ORS 59.015 (17)(a). Acting as a seller or soliciting the sale of securities can make the issuer or promoter liable for an unlawful sale of securities. ORS 59.115(1). If the company issuing securities or seeking to raise capital is your client—even in a small deal—you must take extra precautions if the Oregon Securities Law might apply. Attorneys who prepare securities-related documents can be liable for participating or material aiding in an unlawful sale of securities, even if the attorney was unaware of the facts that made the sale unlawful. ORS 59.115(3); *Prince v. Brydon*, 307 Or. 146, 149, 764 P.2d 1370 (1988).

1. **Can my client be trusted to give complete and accurate information to potential investors?**

If an issuer or promoter sold securities by means of untrue statements of material fact, misleading omissions (half-truths), deceit, fraud or other violations of the Oregon securities law, then that person may be liable to the purchaser (investor) for the amount invested. ORS 59.115 (1) and (2). Also, any person who controlled the seller or who was an officer, director, or manager of the seller is also liable to the same extent as the seller. ORS 59.115 (3). And it’s worth repeating that any person who participated or materially aided in the sale of securities is liable—including the attorney who prepared the securities offering documents or filings. ORS 59.115(3); *Prince v. Brydon*, 307 Or. at 149, 764 P.2d 1370 (1988). Clients receiving investor funds should willingly be transparent with investors about risks, have financial controls in place, and have solid business plans.

1. **Can I prove that I conducted due diligence on behalf of my client?**

A “nonseller” person who would otherwise be liable can avoid liability if they can establish the “due diligence” affirmative defense that the nonseller did not know, and in the exercise of reasonable care could not have known about the facts giving rise to securities liability. ORS 59.115(3). The attorney for an issuer or promoter should document that the attorney made a due diligence inquiry into that person’s client and others involved in the capital raise or securities offering. This might include conducting background checks of the client or client’s key personnel on financial industry databases such as FINRA brokercheck (<https://brokercheck.finra.org/>) and verifying the accuracy and completeness of all statements made in Private Placement Memorandums (PPMs), offering documents, and promotional materials. See below for more details.

1. **Does this business venture or transaction seem realistic or plausible?**

Investment opportunities that promise high rates of return also carry high risks, and startup businesses fail at alarming rates. An attorney should understand these sobering economic realities when choosing to represent a startup or business raising funds from investors. The attorney should beware of startups or investment transactions that seem too good to be true, depend heavily on market conditions, or rely on overly optimistic financial assumptions.

1. **Are the proposed investors sophisticated, experienced, and accredited?**

Private placements or startup investment opportunities are inherently risky and inappropriate investments for most people. In most instances, investors must meet the state or federal criteria for being accredited (see below). Inexperienced investors or those with modest means are unable to bear investment losses and are more likely to pursue securities claims if the investment opportunity fails—their claims are also more likely to succeed. Consider it a red flag if your client or the promotors of your client’s venture encourage potential investors to invest retirement funds through a self-directed IRA or similar self-guided investment vehicle. Also, beware of clients who promote investment opportunities to people in their religious congregation or social organization in which trust is presumed.

1. **Have I conducted an analysis of available securities exemptions under federal and state law?**

The general rule is all securities must be registered under either state or federal law unless a specific registration exemption applies. If a registration exemption does not apply, a registration violation will result in liability to the client and, potentially, to you as the lawyer. Most private placements rely on one of the accredited investor exemptions, but you should not assume that an accredited investor exemption alone will shield your client or you from Oregon securities liability. Also, depending on the circumstances, certain verifications may be required by using investor questionnaires or other procedures to obtain the exemption. You should not assist with the sale of securities or a fundraising project without an understanding of the applicable federal and state exceptions, such as SEC Regulation D Rule 506 and ORS 59.035; OAR 441-035-0010.

1. **Do I need to bring in other counsel to analyze securities exemptions?**

If you are unfamiliar with securities exemptions or documenting securities offerings and exemptions, consider associating experienced securities counsel. Using forms from the internet or even reputable sources may not protect you under the Oregon Securities Law.

1. **Does this deal involve an issuer or investors in Oregon?**

The Oregon Securities Law generally applies when the investors are Oregon residents or when the securities offering originates in Oregon, i.e., where the issuer is in Oregon. *See* ORS 59.335 and 59.345. While other states, such as Washington, impose significant liability on a seller who is involved in the unlawful promotion or sale of a security, most other states do not impose liability on professionals such as attorneys, for participating or materially aiding in the unlawful sale. *Compare* ORS 59.115 (3) with RCW 21.20.430 (3).

1. **Does the private placement memorandum or other disclosure document include disclosures specific to this particular investment, in addition to more generalized risk disclosures?**

A private placement memorandum (PPM) for a private securities offering serves the same function as a prospectus in a registered securities offering or public offering. A PPM is a disclosure document that must include all information that a reasonable investor would want to know before deciding to invest. Beware of relying too heavily on forms when drafting a PPM. Among other things, the PPM should include detailed risk disclosures specific to your client’s proposed offering. Also, the PPM should never be thought of as a marketing tool. It should not contain puffery, exaggerations, or overly confident statements about the proposed venture. Nor should the PPM inflate the experience or expertise that the key people involved in running the business. If one of the key people has a checked past, that past should be disclosed to investors.

1. **Will my client certify to me in a signed writing that every statement in the PPM or other disclosure documents is 100% accurate and not misleading?**

You should require your client to verify in writing that everything in the PPM (and any other written statement to investors) is accurate and that it does not omit facts that would be needed to prevent the PPM from being misleading, i.e., half-truths are not allowed. ORS 59.115(1)(b). If any information appears inaccurate, unreliable, or exaggerated, you should investigate further or obtain additional verification. You should document the steps you took to perform this due diligence. The due diligence defense requires you to establish that you exercised reasonable care to learn any facts that could constitute a securities violation. ORS 59.115(3).

1. **Are the financial projections, models, or “pro formas” provided to investors contained in the PPM or other disclosure based on conservative or realistic assumptions?**

PPMs and other information provided to prospective investors often contain financial projections or “pro formas” that claim to estimate the anticipated financial performance of the venture. Such financial projections should be conservative and the assumptions supporting them should be disclosed. They should be appropriately caveated so investors cannot later claim the projections were misleading. However, as a lawyer, you may not have the financial skills necessary to evaluate whether your client’s financial projections are realistic. Recommend that your client obtain an independent business or financial consultant to examine any financial projections provided to investors.

**IMPORTANT NOTICES**

This material is provided for informational purposes only and does not establish, report, or create the standard of care for attorneys in Oregon, nor does it represent a complete analysis of the topics presented. Readers should conduct their own appropriate legal research. The information presented does not represent legal advice. This information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund except that permission is granted for Oregon lawyers to use and modify these materials for use in their own practices. © 2023 OSB Professional Liability Fund