

What Subscription Agreements Should Contain – Bruce E. Methven

The investor subscription agreement is the third major document used in private placement securities offerings, along with the investor questionnaire and the private placement memorandum or PPM. A number of provisions should be included in the subscription agreement to protect the offeror, many of them representations by the investor.

One of the key provisions should be that investor meets the requirements to be an investor in this particular offering. This does not take the place of an investor questionnaire, which must be completed by the investor and reviewed by the offering company's management before the potential investor is given the PPM. Still, a "qualified investor" provision in the subscription agreement has the advantage that the investor confirms in a signed writing that responses to the questionnaire were correct and the investor does indeed meet the investor qualifications.

Another provision that should be included is a statement that the investor is buying only for his/her own account and not for the purpose of immediate resale. This is important because often the investor must hold the investment for a minimum period of time before selling it and because immediate resale to someone who did not meet the investor qualifications would make the offering illegal. In addition, some offering exemptions by statute require investors to make this kind of statement, for example the California 25102(f) exemption.

The subscription agreement should repeat a statement that should appear in the PPM that financial projections, also known as "forward-looking statements", are projections only and that actual results may be different.

Generally it's a good idea to list the written materials the investor has been given and state that investor has had full opportunity to ask questions and has received answers to any that have been asked.

If the company has any buy-back rights regarding the investor's holdings, those should be stated so that the investor agrees to them by signing the subscription agreement. Similarly, the subscription agreement should make it clear – unless the ownership is not dilutable, which is unusual – that if the company has later offerings the percentage of ownership held by the investor will decrease.

Most offerors also want to include a provision where the investor agrees to arbitrate any disputes rather than taking them to court. Arbitration is often faster and less expensive than litigation, there is no public record as there is with a lawsuit, and arbitrators are generally more predictable than juries.

Additional provisions should track parts of the PPM, such as statements that no securities agency has approved the offer and that the investor acknowledges the risks involved.

By including the appropriate provisions in a subscription agreement, offerors can minimize the risk that an investor who becomes unhappy later will pursue a claim successfully against the offeror.

–Bruce E. Methven

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Bruce E. Methven, 2232 Sixth Street Berkeley, CA 94710

Phone: (510) 649-4019; Fax: (510) 649-4024

www.TheCaliforniaSecuritiesAttorneys.com

CaliforniaSecuritiesAttorneys@gmail.com

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