

How Do The Business Plan, The Limited Liability Agreement And The Private Placement Memorandum Interact When Making A Feature Film?

The business plan, the limited liability agreement and the private placement memorandum are commonly utilized when making an independent feature film. They are designed to compliment each other as part of an integrated plan that addresses the legal and economic issues involved in making a feature film.

The Business Plan

The business plan outlines the details of the business and/or project. It contains information regarding the film project, the principal individuals involved in making the film and discloses risks associated with the making of the project and the risks of the industry. It is not (and should not be used as) a solicitation or offer to sell securities and should not be used to accept money from parties in exchange for interests in the film. It is informational in nature whereas the limited liability agreement (or limited partnership agreement for a limited partnership; or articles of incorporation and by-laws for a C-corporation and S-corporation) and the private placement memorandum serve legal functions.

The Private Placement Memorandum

A private placement memorandum addresses the state and federal rules governing the offer and sale of securities. In general, the state and federal laws require registration of securities. These laws are designed to monitor and police the offering and distribution of securities to the public. There are many different investment vehicles that are considered "securities" under the law, including for example, offerings of stock in a corporation, limited partnership interests, or limited liability company interests.

The facts and circumstances of each situation determines whether a particular offering falls within the technical definition of a "security," but the overall concept is that individuals of the public are entrusting money (and/or property) to other parties with the hope that as a result of the work of the parties to whom the money was entrusted, there will be a return of the investment and a profit. When individuals converge to produce a feature film and they accept money and/or property from other individuals, the rules of the state and federal securities laws must be complied with or else the parties involved can be subject to possible civil and criminal liability.

Formal filing of securities with the proper state and federal authorities is time consuming and often cost prohibitive for small businesses. However, there are "exemptions" under the law that specifically "exempt" certain transactions (and in some cases, certain securities) from the requirements of filing and registration. Specific exemptions available to feature film producers include Regulation D and the series 500 rules (501, 502, 503, 504, 505, 506) and the provisions under section 4(2) of the 1933 Securities Act.

These are safe harbor provisions that are also called "private offering exemptions." These are complicated and detailed rules that must be rigidly complied with, so anyone

contemplating involvement in any securities transaction should do so only with guidance from their personal legal counsel.

Included within the rules of "private offering exemptions" are strict guidelines regarding what is required to be disclosed to prospective investors, when this information is to be disclosed, the forms that must be filed with the appropriate authorities regarding the exemptions, and other pertinent information. The "private placement memorandum" is designed to comply with the necessity of disclosing to a prospective investor the material information regarding the financial endeavor including the potential risks involved in investing. A private placement memorandum must be tailored to the facts and circumstances of each film project and must integrate with the information provided in the business plan and the operating agreement of the entity that is created.

The Limited Liability Agreement

Most producers choose to create a new entity when making a feature film. Often a limited liability company is created, but a limited partnership or an S-corporation also can serve well in certain circumstances. When an individual invests in a film to be produced through an entity, they receive an ownership interest in that entity. The operation of this company is governed by a set of rules, some are mandated by law and some are created among the participants. These rules are contained in the agreement that governs the entity and they must be known and agreed upon by the investors before they invest and become subject to them. For example, the limited liability company has a limited liability company agreement, a limited partnership has a limited partnership agreement and an S-corporation has articles of incorporation and by-laws. In general, the information in the latter agreements governs the key issues in making the film and running the company. For example, covered in these documents are the management and control of the entity; the allocation of profits and losses; the division of interests in the entity; the rights, powers and duties of investors; the rules regarding dissolution and liquidation of the entity; and other important aspects.

Similar to the business plan and the private placement memorandum, the limited liability company agreement (or limited partnership agreement or articles of incorporation and by-laws) must be drafted for each particular film project and the information it contains must be integrated with the information provided in the business plan and the private placement memorandum.