**recent DEVELOPMENTS in**

**OKLAHOMA business and corporate law ‑ 2013**

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**Introduction**

The economic recession and the Federal regulatory response have dominated this topic since 2007. We have talked about the mortgage crisis, the derivatives markets, the collapse of global financial institutions, an unsettling, world-wide economic downturn, Federal bailouts and sweeping regulatory changes. And the dominance is rightfully so. The pace and degree of change in this area of law race to catch markets and industries that come and go and morph in unexpected ways.[[1]](#footnote-1) The combination of technological advances, increased information flows, greater productivity, and globalized expansion have produced a rate of global economic change not witnessed since the Industrial Revolution.[[2]](#footnote-2) One could argue that the rapid pace of change within the financial markets – and the inability of investors and regulators to fully understand the changes – was a principal cause of the financial collapse and resulting recession.[[3]](#footnote-3)

But as we note the recession and regulatory response, we should not neglect other developments that are notable in their own right. We covered the massive JOBS Act last year.[[4]](#footnote-4) A comprehensive update is not warranted, but two significant developments in the area of exempt securities offerings deserve attention: the elimination of the general solicitation prohibition under Rule 506 of Regulation D and the release of proposed rules for the crowdfunding exemption.

National events have not diminished state level activity. There are notable Delaware developments that may influence Oklahoma law. We also have activity in Oklahoma. Two major bills are pending before the Legislature dealing with business entities. HB 1995 would update the OGCA and LLC Act. HB 1996 would adopt the Revised Uniform Unincorporated Nonprofit Association Act. We also have recent cases touching on business and corporate law.

### The JOBS Act – Exempt Offering Changes

#### Elimination of the General Solicitation Prohibition

In addition to opening the crowdfunding door, the JOBS Act liberalized the rules for exempt private offerings.[[5]](#footnote-5) The private offering exemption has long been a staple under Federal and state securities laws and serves as the primary exemption from registration.[[6]](#footnote-6) For just as long, a key element of the exemption has been a prohibition on general solicitation.[[7]](#footnote-7) In other words, an issuer could not advertise its private offering or publicly solicit investors.[[8]](#footnote-8)

The JOBS Act removes the venerable general solicitation prohibition. While the prohibition will remain for some private offerings, the JOBS Act removes the general solicitation and advertising prohibition on offerings sold only to accredited investors under a revised Rule 506 of Regulation D.[[9]](#footnote-9) The prior Rule 506 had permitted issuers to raise theoretically an unlimited amount of funds from an unlimited number of accredited investors and up to 35 non-accredited investors. Issuers could not, however, advertise their Rule 506 offerings and had to have some pre-existing relationship with potential investors, which constrains their access to capital.

The revised Rule 506 permits alternatives.[[10]](#footnote-10) An issuer can use the prior Rule 506 and remain subject to the general solicitation prohibition. Or the issuer can avoid the prohibition and advertise the offering. The trade-off is in the confirmation of accredited investor status. An accredited investor most commonly is a person with $200,000 or more of annual income or $1.0 million or more of net worth.[[11]](#footnote-11) Under the prior Rule 506, an issuer could rely upon an investor’s representations. If an issuer chooses to advertise, the alternative Rule 506 will require that the issuer “take reasonable steps to verify” the investor’s income or net worth. Verification might come from the investor’s tax returns for net income or bank and brokerage statements for net worth. An issuer could rely on confirmation by a licensed third party such as a registered broker-dealer, investment advisor, lawyer or CPA. An issuer may not rely solely on an investor’s representations if the issuer is using advertising or public solicitation.[[12]](#footnote-12)

Securities sold under either Rule 506 exemption are not subject to state registration or exemption rules.[[13]](#footnote-13) The new Rule 506 changes became effective September 23, 2013.

#### The Crowdfunding Exemption

One of the most interesting parts of the JOBS Act was its endorsement of crowdfunding.[[14]](#footnote-14) Crowdfunding began as an internet-based networking process that matches people willing to contribute funds to people pursuing an identified project. The matches typically provided small amounts of seed capital for persons who presumably could not access conventional debt or equity funding. Its earliest iterations often involved musicians and other artists who solicited funds from their fans to finance a tour or a recording or a film. The concept grew with websites that would aggregate the projects to facilitate matching. Kickstarter is the best known of the domestic crowdfunding websites.[[15]](#footnote-15)

Many of these crowdfunding projects raised money from hundreds or even thousands of small contributors.[[16]](#footnote-16) These contributors generally received tickets or t-shirts, but no true investment returns, which would invoke the Federal and state securities laws. There was no exemption for these offerings and registration was prohibitively expensive. In addition, a website that hosted a securities offering could be charged with acting as an unregistered broker-dealer by facilitating the offer and sale of securities.[[17]](#footnote-17)

The JOBS Act unknotted the conundrum by exempting crowdfunding offerings providing a regulatory framework for the broker-dealers and “funding portals”.[[18]](#footnote-18) The exemption permits companies to raise up to $1.0 million over 12 months. Investors with a net worth or income of less than $100,000 may invest the greater of $2,000 or 5% of their net worth or income. Investors with a net worth or income of $100,000 or more may invest up to 10% of their net worth or income, subject to a cap of $100,000. The number of investors is not limited. Before the offering begins, an issuer must file a simplified disclosure with the SEC describing its business, the risk factors, and its intended use of funds and providing financial statements. The issuer must also file annual reports while the securities remain outstanding. An issuer may not advertise the offering or pay persons to promote the offering.

The securities must be sold through an SEC-registered broker-dealer or a registered funding portal. These intermediaries act as the gatekeepers to guard against abuse. They ensure that investors receive the disclosures, understand the investment and can bear the investment loss. They also must conduct background checks on the company’s owners and management to confirm the absence of regulatory infractions. The intermediaries may not have a financial interest in any issuer. The funding portals cannot solicit sales, offer investment advice or make recommendations.

The implementing rules are not yet effective. The SEC released proposed rules on October 23, 2013. Financial Industry Regulatory Authority (FINRA), which regulates U.S. broker-dealers, simultaneously released rules for intermediaries.[[19]](#footnote-19) Comments on the crowdfunding rules are due by February 3, 2014, and may be effective by the summer of 2014.

Crowdfunding is an innovative concept. It expands social networking to the capital markets. It opens a new avenue for small businesses to access start-up capital from a broad pool of potential investors instead of the exclusive pools of financial angel investors and ventures capitalists. Can crowdfunding live to its potential? The gatekeeper function imposes much more responsibility than websites bear under the current Kickstarter model, which has no governmental registration and does not deal with disclosures or investor suitability. The gatekeeper functions will impose significant costs. Issuers will incur significant costs too, both in preparing the initial disclosures and in maintaining the disclosures through the annual reports. Whether offerings capped at $1.0 million will support these costs remain to be seen.[[20]](#footnote-20)

#### Delaware Developments

Delaware’s preeminent position in corporate law and our use of the Delaware General Corporation Law as the model for our Oklahoma General Corporation Act invite our review of Delaware developments.[[21]](#footnote-21) These developments often presage changes in Oklahoma law.

*Fiduciary Duties in LLCs*. An interesting debate has been ongoing in Delaware about the default duties owed by LLC managers if the duties were not specified in the operating agreement. The debate was between the Chancery Court and the Chief Justice of the Supreme Court. Seven Chancery Court decisions authored by five Chancellors or Vice Chancellors have held that managers owed the same fiduciary duties as corporate directors and officers if the operating agreement does not expressly alter the duties.[[22]](#footnote-22) Chief Justice Steele disagreed. He wrote a prominent article arguing that LLCs are creatures of contract and, if the contract (the operating agreement) is silent, the managers owe no fiduciary duties, but are obligated only under the implied contractual covenant of good faith and fair dealing.[[23]](#footnote-23) In a recent case, he admonished the Chancery Court for discussing default fiduciary duties when the issue was not before it.[[24]](#footnote-24)

The Delaware legislature stepped in to resolve the judicial dispute by amending the LLC Act to provide that the “rules of law and equity relating to fiduciary duties” apply to LLCs.[[25]](#footnote-25) With this change, the Delaware legislature ensures that fiduciary duties will apply by default to LLC managers if the duties were not set forth in the operating agreement.

The Oklahoma courts have not addressed the issue of whether LLC managers owe fiduciary duties by default. A venerable line of Oklahoma cases apply fiduciary duties to corporate directors and officers,[[26]](#footnote-26) and there is no support in Oklahoma case law for Chief Justice Steele’s contractarian theory. But the amended Delaware statute was identical to the Oklahoma statute before the former’s amendment, which could permit a litigant to argue the absence of default fiduciary duties in Oklahoma LLCs.[[27]](#footnote-27) A similar amendment to the Oklahoma LLC Act would resolve any doubt and ensure the presence of default fiduciary duties.

*The Business Judgment Rule in Controlling Shareholder Transactions*. In a business combination between third parties, the board’s decisions are reviewed under the business judgment rule.[[28]](#footnote-28) If a business combination involves a controlling shareholder, however, the decisions are subject to the entire fairness test, which is more stringent than the business judgment rule.[[29]](#footnote-29) The board must show that its decisions are fair to all shareholders (including the minority) both as to price and procedure. To meet this test, the board often appoints a special committee composed solely of independent directors, who are empowered to make all relevant decisions (not just recommendations). Another device used to meet the entire fairness test is conditioning the business combination upon approval of a majority of the minority shareholders. Use of a special committee or approval by minority shareholders would then shift the burden to those challenging the combination to show the lack of fairness.[[30]](#footnote-30)

In *In re MFW Shareholder Litigation*[[31]](#footnote-31), the Delaware Chancery Court held for the first time that a business combination involving a controlling shareholder could be reviewed under the business judgment rule – instead of the entire fairness test – if the combination was initially structured by an independent special committee and subject to approval by a majority of the minority shareholders. The Chancery Court reasoned that an independent special committee functionally duplicates the arms’ length bargaining in a third party transaction, and the minority’s approval acts as a check on the special committee’s work. By preserving the business judgment rule when both devices are used, boards are incentivized to use both special committees and minority approvals, which benefits the minority shareholders. The corporation avoids the uncertainties and costs of the entire fairness test, the application of which effectively precludes dismissal of any challenge at the pleading stage. The ruling affirms the traditional deference to the directors’ judgment and expertise, which is presumed to create value for the shareholders.

*Benefit Corporations*. Last year, we discussed the trending development of benefit corporations.[[32]](#footnote-32) These are for-profit corporations that combine an explicit public benefit with a for-profit business activity. For example, the benefit corporation might pursue affordable housing or commit to donate some of its profits to charity. These entities arose from the corporate social responsibility movement, which believes that businesses can create a better society while selling goods and services. This idea implies a balancing of the interests for the shareholders, who presumably want to maximize profits, with the broader interests of other constituencies, such as employees and the community.[[33]](#footnote-33)

Maryland was the first state to adopt benefit corporation legislation, which it did in 2010. Since then, benefit corporation legislation has been adopted in 20 states and the District of Columbia.[[34]](#footnote-34) Notably, Delaware adopted “public benefit corporation” statutes this year.[[35]](#footnote-35) Given Delaware’s preeminent position in corporate law, some discussion of the Delaware public benefit corporation is warranted.

Delaware corporate law, like corporate laws generally, requires directors to act for the best interests of the shareholders and not for any other constituency.[[36]](#footnote-36) This requirement conflicts, however, with the desire of benefit corporations to consider the interests of other constituencies.[[37]](#footnote-37) To accommodate the broader interests of the benefit corporations, Delaware amended its DGCL.

The Delaware public benefit corporation elects “to operate in a responsible and sustainable manner” and to identify a specific public benefit purpose.[[38]](#footnote-38) In their decision-making, the directors must balance the economic interests of the shareholders with the best interests of those affected by the corporation’s conduct and the specific public benefit. At least biannually, the directors must report to the shareholders about the corporation’s social and environmental impact and its pursuit of the specific public benefit. In contrast to the proposed Model Business Corporation Act provisions for benefit corporations,[[39]](#footnote-39) the Delaware public benefit corporation is not required to submit public reports or to measure its performance against a third party standard. Public reporting and use of a third party standard is permitted, but not required.

The adoption of benefit corporation statutes has progressed quickly and the concept of matching social responsibility with economic gain is popular. Monitoring the developments will be interesting. As with any new concept, there are unsettled issues. Principal among them will be the application of fiduciary duties to public benefit corporation directors. The statutes say that directors must balance the competing interests, which implies a diminution of the duties owed the shareholders and an increase in the duties owed to those affected by the corporation’s conduct. But how do those affected enforce those duties? The statutes do not confer derivative rights to persons other than shareholders.

There is also the concern that directors might use the balancing of interests to pursue personal interests at the expense of the shareholders’ interests. An example arose in the dispute between Craig Newmark, the founder, director and controlling shareholder of Craigslist, and eBay, a minority shareholder.[[40]](#footnote-40) Newmark caused the adoption of a shareholder rights plan (poison pill), which impeded eBay’s acquisition of additional shares and ensured Newmark’s continued control. Newmark did not claim that the plan’s adoption added shareholder value, but argued that blocking eBay was intrinsic to the preservation of Craigslist’s culture. The Delaware court struck the plan finding that Newmark’s pursuit of objectives unrelated to shareholder value were a breach of his fiduciary duties.[[41]](#footnote-41) Would the court have affirmed the plan if Craigslist had been a benefit corporation?[[42]](#footnote-42)

### Oklahoma Developments

#### Legislation

The Legislature considered three bills in 2013 dealing with business entities. House Bill 1995 would update the Oklahoma General Corporation Act (the “*OGCA*”) and Oklahoma Limited Liability Company Act (the “*LLC Act*”). House Bill 1996 would adopt the Revised Uniform Unincorporated Nonprofit Associations Act (the “*RUUNAA*”). House Bill 1646 repealed provisions requiring large, publicly held Oklahoma corporations to have classified boards.

*House Bill 1995*. House Bill1995 is an extensive bill covering over 300 pages and designed to maintain the OGCA and LLC Act.[[43]](#footnote-43) The most significant changes in the bill would implement recent amendments to the Delaware General Corporation Law (“*DGCL*”) for non-profit corporations.[[44]](#footnote-44) Other changes in the bill include expanded short-form mergers, separate record dates for notice and voting, and improved definitions of LLC capital interests and membership interests.

*‑ Non-Profit Corporation Provisions*. The OGCA covers both for-profit and non-profit corporations within its scope. Before these changes – which are largely draw from changes to the DGCL ‑ application of the OGCA to non-profit corporations was unclear in many instances. The comprehensive changes in the proposed amendments will fill in the statutory gaps and bring better clarity to non-profit corporations.

The clarifying amendments begin with a new section that “translates” the terms of the OGCA as they apply to nonstock corporations. For example, while the OGCA provides that a stock corporation has “shareholders” and a “board of directors”, the new section translates those terms as the “members” and “governing body” of the non-profit corporation. References to “stock” become “memberships”. This section also identifies the OGCA sections that will not apply to non-profit corporations, such as those dealing with capital and surplus. Other sections are changed to clarify the procedures for setting record dates, the calling of special meetings of members and the required vote that must be obtained for corporate action. These clarifications make it easier for nonstock corporations to take action and deal with corporate governance matters.

*‑ Short Form Mergers*. The OGCA presently provides for a short form merger between an Oklahoma parent corporation and its corporate subsidiary. A new provision would authorize short-form mergers between a corporate subsidiary and its non-corporate parent entity and between a corporate subsidiary and its non-profit parent entity. A short-form merger dispenses with the need for a shareholder vote when the parent owns 90% or more of the subsidiary.

*‑ Separate Record Dates for Notice and Voting*. Currently, a board must fix a record date for notice and voting at a shareholder meeting at no more than 60 days or less than ten days before the meeting. Public companies can face the problem of “empty voting”, in which a person held shares at the record date, disposed of the shares before the meeting, and still votes at the meeting. Since the voter no longer owns the shares – and may have “shorted” the shares – he may be motivated to vote against the best interests of the corporation and its shareholders generally. By allowing the board to fix a second record date for voting shortly before the meeting, the shortened period reduces the chance that a person may be voting at the meeting without owning shares.

*‑ LLC Act Changes*. In LLCs, there is a distinction between a member’s economic rights – the rights to allocations of income and loss and the rights to distributions – and a member’s non-economic or managerial rights, such as the right to vote or obtain information. The economic rights are presumably transferable while the non-economic rights are not. These distinctions were not always apparent in the LLC Act. The proposed amendments revise the definitions of these terms and ensure their usage is consistent in the LLC Act. Further changes are made in the LLC Act to clarify a member’s position upon withdrawal from the LLC and to conform the LLC Act to the non-profit changes in the OGCA.

House Bill 1995 originated in the House where it passed out of the Economic Development and Financial Services Committee, but did not reach a vote on the House floor. The bill remains active for the 2014 legislative session.

*House Bill 1996*. The Revised Uniform Unincorporated Nonprofit Associations Act (the “*RUUNAA*”) would fill a statutory void in the law dealing with unincorporated associations.[[45]](#footnote-45) Oklahoma has no statutory framework for these voluntary associations, which are generally small volunteer organizations such as church groups, youth organizations, neighborhood associations and garden clubs. Their legal status and that of their members is uncertain. Their members can face liability for the obligations of the association. They may have difficulty opening bank accounts. They cannot own real property.

The RUUNAA would address these issues. It would recognize associations as separate legal entities. As such, the associations could own and dispose of property, open accounts and sue and be sued in their own name. The RUUNAA would protect members and managers from personal liability. The association would be responsible for its own obligations. The members and managers would not be responsible solely because they are members or managers of the association. The RUUNAA would provide default rules for the association’s operations – member admission and resignation, roles of members and managers, rights to financial information, and restrictions on personal gain – if the association has no rules of its own. The RUUNAA also has provisions for dissolution and winding up of an association. The RUUNAA does not change existing laws applicable to specific associations, such as churches, or existing laws regarding charitable solicitations.

House Bill 1996 passed the House, but stalled in the Senate where it remains for the continuation of the legislative session in 2014.

*House Bill 1646*. This bill repealed statutory provisions requiring large, publicly held Oklahoma corporations to have classified boards.[[46]](#footnote-46) The requirement was adopted in 2010 at Chesapeake Energy’s behest to alleviate pressure from shareholder activists urging repeal of Chesapeake’s classified board. Shareholder pressure mounted in 2012 for Chesapeake, and it agreed that it would “seek relief” from the classified board requirement.[[47]](#footnote-47) The repeal of the requirement was a part of the governance changes within Chesapeake that were negotiated in 2012. The use of a classified board remains permissible under Section 1027.D of the OGCA if provided in the corporation’s initial constituent documents or approved by the shareholders.

#### New Oklahoma Cases

Two recent Oklahoma cases deserve mention. One deals with shareholder derivative actions and the other deals with agency issues.

*Kurtz v. Clark[[48]](#footnote-48)* began as a shareholder derivative suit brought by the shareholders of Kefftec International, Inc. against two individuals who were also shareholders and were employed by a Kefftec subsidiary. The plaintiffs asserted that the defendants were attempting to form a competing corporation using the trade secrets of Efftec. The plaintiffs initially obtained a temporary restraining order against the defendants prohibiting them from destroying evidence or disclosing any trade secrets. The defendants later moved for summary judgment based on the plaintiffs’ lack of standing to pursue the derivative claims, which the trial court granted. The plaintiffs appealed and the Court examined the plaintiffs’ standing to pursue the derivative claims.[[49]](#footnote-49)

To bring a derivative claim, a plaintiff must show that he or she was a shareholder at the time of the alleged wrong and continues to be a shareholder and that he or she has made demand upon the corporation to right the wrong or that making demand would be futile.[[50]](#footnote-50) Having received a demand, a corporation’s board must investigate the basis of the demand and determine in good faith whether pursuit of the claim is in the corporation’s best interests.[[51]](#footnote-51)

While some question existed about the form of demand, the defendants acknowledged that a shareholder and former legal counsel of the corporation had told the plaintiffs that he had investigated the claims and determined that the corporation lacked the financial ability to file suit. The Court found that this was insufficient as a matter of law to show a good faith investigation and determination that suit was not in the corporation’s best interests.

The Court noted that the corporation had sued the defendants after dismissal of the plaintiffs’ claims, which supported the legitimacy of the plaintiffs’ claims. The defendants argued that the business judgment rule should protect the decision to dismiss the plaintiffs’ claims. But it was the defendants in their individual capacities who moved to dismiss. Whether the corporation’s board had made any decision regarding the plaintiffs’ claims was unclear from the record. Without a board decision, there was no business judgment to protect. The Court held that this was yet another reason for reversing the trial court’s summary judgment.[[52]](#footnote-52)

*Kurtz v. Clark* offers a good discussion of the often complex issues surrounding shareholder derivative actions and is worthy of note.

*Thornton v. Ford Motor Company[[53]](#footnote-53)* examines questions of agency in the context of an automobile dealership and the manufacturer. The plaintiffs were purchasers of vehicles from a dealership that was approved by the manufacturer and that failed seven months later. The plaintiffs sued the defunct dealership, certain principals of the dealership and the manufacturer. Of the defendants, only the manufacturer remained at trial.[[54]](#footnote-54)

The dealership and manufacturer were parties to a dealership agreement, which the plaintiffs alleged gave the manufacturer control over the dealership and made the dealership its agent. As such, the manufacturer would be vicariously liable for the acts of its agent. The trial court found that the manufacturer was negligent in its approval of the dealership, had thrown “its considerable weight” into the Oklahoma Motor Vehicle Commission’s approval of the dealership, and had handled certain administrative tasks as the dealership began operations. These findings were the basis for trial court’s ruling that the manufacturer’s actions were the proximate cause of the plaintiffs’ damages.[[55]](#footnote-55)

The Court first analyzed whether the dealership was the actual agent of the manufacturer. It said that the existence of an agency relationship is determined by the intent of the contract language and the parties’ actual conduct. The dealership agreement said explicitly that the relationship was that of an independent contractor and the allocation of responsibilities under the agreement were consistent with that of an independent contractor.[[56]](#footnote-56) Moreover, the Court noted authority for the position that a manufacturer could exercise some control to preserve its goodwill without creating an agency relationship.[[57]](#footnote-57) The Court concluded that no actual agency relationship existed.

The Court then analyzed whether an apparent agency existed even though actual agency did not. A principal may be vicariously liable for the acts of a non-agent if the principal’s conduct would reasonably lead a third party to believe that the non-agent was authorized to act for the principal.[[58]](#footnote-58) The plaintiffs argued that display of the manufacturer’s trademark indicated the apparent authority. But the Court cited precedent rejecting that argument. The mere display of a manufacturer’s trademark and trade dress does not imply an apparent agency.[[59]](#footnote-59)

Finally, the Court addressed plaintiffs’ claim that the manufacturer was negligent in its approval of the dealership. The trial court had found that it was foreseeable that an inexperienced, undercapitalized dealership would harm its customers if the manufacturer did not exercise care in the approval of the dealership. The Court determined this finding was unsupportable. The finding could not be predicated on the common law theory of negligent hiring or supervision since no employment or agency relationship was shown.[[60]](#footnote-60) The plaintiffs argued for application of a corporate responsibility theory that the Oklahoma Court had applied to hospitals when granting physician privileges.[[61]](#footnote-61) But the Court rejected an extension of that theory noting that hospitals have a unique responsibility for their patients, which is not present in the sale of automobiles.[[62]](#footnote-62) The Court continued saying that a manufacturer cannot be liable for general negligence because the manufacturer has no relationship with a dealership’s customer that would create a duty of care.[[63]](#footnote-63)

### Conclusion

While many interesting changes have and will occur at the Federal level, the Oklahoma legislation and cases remind us that state laws matter too. Thousands of new businesses are formed each year in Oklahoma. Add to those the existing businesses. Each of these many businesses depends on Oklahoma statutes and case law to guide their formation and operation. The law guides relationships among owners, between owners and managers, and between the entity and persons with whom it does business. As lawyers, we are uniquely positioned to assist these business and to encourage best business practices. Good corporate governance means better relationships. It also makes for a better marketplace.[[64]](#footnote-64) Markets are more efficient where transparency and trust are found, and transactional risk decreases. The resulting economic benefits help us all.

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1. The derivatives markets have expanded in 30 years from a small U.S. market to a globalized market with an outstanding notional value of $693 trillion at June 30, 2013, for OTC derivatives and exchange-traded derivatives. Bank for International Settlement, Semiannual OTC derivatives statistics (updated 7 Nov 2013) (at <http://www.bis.org/statistics/derstats.htm>). The global private equity market grew from approximately $38 billion in new capital in 1995 to approximately $321 billion in 2012. In 2012, the global private equity industry had nearly $900 billion of uninvested cash and along with $2.2trillion in unrealized capital. *Global Private Equity Report for 2013*, Bain & Company (at [http://www.bain.com/publications/ business-insights/global-private-equity-report.aspx](http://www.bain.com/publications/%20business-insights/global-private-equity-report.aspx)).

 While derivatives and private equity have shown remarkable growth, others sectors have retracted. For example, the number of U.S. public companies going public annually fell by half from 1997 to 2009. Davis, Gerald F., *The Twilight of the Berle and Means Corporation*, 34 Seattle L. Rev. 1121 (2011). [↑](#footnote-ref-1)
2. *See gen*. Carl Dahlman, “Technology, Globalization, and International Competitiveness”, *Industrial Development for the 21st Century* (United Nations, 2007) (available at [http://www.un.org/esa/ sustdev/publications/industrial\_development/1\_2.pdf](http://www.un.org/esa/%20sustdev/publications/industrial_development/1_2.pdf)); and Thomas Friedman, *The World is Flat* (2005); Robert E. Lucas, Jr., “The Industrial Revolution: Past and Future”, *The Region*, publication of The Federal Reserve of Minneapolis (May 2004). [↑](#footnote-ref-2)
3. *See* *Financial Crisis Inquiry Commission Report*, *Conclusions of the Financial Crisis Inquiry Commission* (January 2011); *see also* *Financial Crisis Inquiry Commission – Dissenting Statements by Keith Hennessey, Douglas Holtz-Eakin and Bill Thomas and by Peter J. Wallison* (January 2011). There is a fallacy of belief – at least in an open economy ‑ that good government policies ensure the success of the economy while poor government policies will hurt the economy. Government policy may influence an open economy, but cannot control it. [↑](#footnote-ref-3)
4. Jumpstart Our Business Startups Act, Pub. L. No: 112-106 (2012) (the “*JOBS Act*”); Gary W. Derrick, *Recent Developments in Oklahoma Business and Corporate Law – 2012*, OBA 2012 Recent Developments (Day Two). [↑](#footnote-ref-4)
5. *See* Title II, the JOBS Act. [↑](#footnote-ref-5)
6. The statutory exemption is in Section 4(2) of the Securities Act, 15 U.S.C. §77d, which was in the Securities Act at its adoption in 1933. Over the years, the Securities and Exchange Commission has promulgated several rules under Section 4(2) for private offerings. Rule 146(c), 17 C.F.R. §230.146, was adopted in 1975. It was replaced by Regulation D in 1985. Regulation D comprises Rules 501 through 508 (17 C.F.R. §230.501 - 508), which implement three exemptions, the most commonly used of which is Rule 506. [↑](#footnote-ref-6)
7. Under Section 4(2), the general solicitation prohibition was a matter of case law. *See* *SEC v. Ralston Purina Co*., 346 U.S. 119 (1953); *SEC v. Sunbeam Gold Mines Co*., 95 F.2d 699 (9th Cir. 1938) (private offerings under state securities laws prohibit broad solicitations). When the SEC later adopted rules, the rules maintained the prohibition. *See* Rule 146(c), 17 C.F.R. §230.146 (1975), as promulgated under the Securities Act, and Rule 502(c) of Reg. D (17 C.F.R. §230.502). *See also* 44 Fordham L.Rev. (1975). [↑](#footnote-ref-7)
8. Rule 506(b)(1), 17 C.F.R. §230.506(b)(1), applies the general solicitation prohibition of Rule 502(c), 17 C.F.R. §230.502(c). [↑](#footnote-ref-8)
9. The revised Rule 506 will offer alternative exemptions: one under Rule 506(b), which remains unchanged, and a new one under Rule 506(c), which does not prohibit general solicitation. 17 C.F.R. §230.506(b) and (c). [↑](#footnote-ref-9)
10. *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Release No. 33-9415 (July 10, 2013) (“*General Solicitation Adopting Release*”). *See also*, *Amendments to Regulation D, Form D and Rule 156*, Release No. 33-9416 (July 10, 2013). [↑](#footnote-ref-10)
11. See Rule 502(a) , 17 C.F.R. §230.501. [↑](#footnote-ref-11)
12. General Solicitation Adopting Release at 26-44. [↑](#footnote-ref-12)
13. Securities sold under Rule 506 are one of several categories of “covered securities” under the National Securities Markets Improvement Act of 1996, Pub. L. No: 104-290 (1996) (“*NSMIA*”), which preempts state registration and review. The states can, however, require a notice filing for use of the Rule 506 exemption and payment of fees. The NSMIA preemption does not extend to broker-dealers dealing in covered securities. Thus, if an issuer is using general solicitation and selling through a broker-dealer, the broker-dealer may be subject to general solicitation restrictions. [↑](#footnote-ref-13)
14. *See* Title III, the JOBS Act. [↑](#footnote-ref-14)
15. At <http://www.kickstarter.com/>. [↑](#footnote-ref-15)
16. Nearly three million contributors have donated a total of $300 million to fund 30,000 projects on Kickstarter. Jenna Wortham, *Success of Crowdfunding Puts Pressure on Entrepreneurs*, N.Y. Times (Sept. 17, 2012). The contributors to a Kickstarter project do not receive a financial interest in the project, which avoids the securities laws since no security is sold. The new JOBS Act provisions would permit the receipt of a financial interest. [↑](#footnote-ref-16)
17. The broker registration issue was explored by SharesPost, Inc., which provided a platform for the secondary trading of shares in private, pre-IPO companies, such as Facebook, Groupon and LinkedIn. SharesPost claimed it was merely a “passive bulletin board” and was not a “broker” “engaged in the business” of effecting securities transactions, as defined under Section 4(A) of the Securities Exchange Act of 1934, 15 USC §§78a-77kk. Because SharesPost was receiving transaction-based compensation, providing investment advice, and facilitating pricing through an auction process, the Securities and Exchange Commission disagreed and forced SharesPost to register under threat of enforcement action. *See* SEC Rel. No. 2012-43 (March 14, 2012) (SEC Announces Charges from Investigation of Secondary Market Trading of Private Company Shares). [↑](#footnote-ref-17)
18. Title III, the JOBS Act, *supra*. [↑](#footnote-ref-18)
19. FINRA Reg. Notice 13-34 (Oct. 2013) [↑](#footnote-ref-19)
20. Great Britain permits crowdfunding and the technique, while still new, is further developed. *See* “Cream of Devon”, *The Economist* (Nov. 2, 2013). [↑](#footnote-ref-20)
21. The Delaware law and its courts are viewed as the preeminent source of U.S. corporate law. Delaware corporations represent 64% of the Fortune 500 companies and more than 50% of all U.S. publicly traded companies. Dennis J. Block at al., *The Business Judgment Rule: Fiduciary Duties of Corporate Directors* 3 (5th Ed. 1998 and Supp. 2000); Delaware Division of Corporations, 2012 Annual Report (available at [http://corp.delaware.gov/pdfs/2012 CorpAR.pdf](http://corp.delaware.gov/pdfs/2012%20CorpAR.pdf)). Much of the Delaware status comes from the expertise of the Delaware courts in resolving corporate disputes. The Delaware court statistics reflect the concentration of corporate and commercial cases. From 2008 through 2012, an average of 957 civil cases were filed annually with the Delaware Court of Chancery, which disposed of an average of 1,019 civil cases annually during the period. The Court of Chancery is a specialized court dealing with matters involving corporate and commercial issues and trusts and estates. The civil cases statistics exclude trusts and estates matters. See Delaware State Courts, Administrative Office of the Courts, Publications and Statistics, Annual Reports (available at http://courts.state.de. us/AOC/publications.stm). [↑](#footnote-ref-21)
22. *Feeley v. NHAOCG, LLC*, 62 A.3d 649 (Del. Ch. 2012) (V.C. Laster) (issued three weeks after Chief Justice Steele’s admonition in *Gatz*); *Auriga Capital Corp. v. Gatz Properties, LLC*, 40 A.3d 839 (Del. Ch. 2012) (C. Strine); *Paige Capital Management LLC v. Lerner Master Fund LLC*, 2011 WL 3505355 (Del. Ch. Aug. 8, 2011) (C. Strine) *In re Atlas Energy Resources, LLC*, 2010 WL 4273122 (Del. Ch. Oct. 28, 2010) (V.C. Noble); *Kelly v. Blum*, 2010 WL 629850 (Del. Ch. Feb. 24, 2010) (V.C. Parsons); *Bay Center Apartments v. Emery Bay PKI, LLC*, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009) (V.C. Strine); *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156 (Del. Ch. May 7, 2008) (C. Chandler). [↑](#footnote-ref-22)
23. Myron Steele, *Freedom of Contract and Default Contractual Duties in the Delaware Limited Partnerships and Limited Liability Companies*, 46 Am. Bus. L.J. 221 (2009). [↑](#footnote-ref-23)
24. *Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206 (Del. Nov. 7, 2012) (Per Curiam) (Chief Justice Steele admonished the Chancery Court for addressing the default fiduciary duty issue since, among other reasons, the parties had not asked the court to address the issue and the issue was not before the court). *See also* *William Penn Partnership v. Saliba*, 13 A.3d 749 (Del. 2011). [↑](#footnote-ref-24)
25. Section 18-1104 of the LLC Act was amended to read: “In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern (added language is underscored).” [↑](#footnote-ref-25)
26. *See* *e.g., Gaines v. Gaines Bros. Co.*, 1936 OK 113, 56 P.2d 863; *McKee v. Interstate Oil & Gas Co.*, 77 Okl. 260, 188 P. 109, 112 (1920). The Oklahoma courts have also applied fiduciary duties to controlling shareholders. *See* *Warren v. Century Bankcorporation, Inc*., 1987 OK 14, 741 P.2d 846; *Beard v. Love*, 2007 OK Civ.App. 118, 173 P.3d 796. The Court has also applied fiduciary duties to the directors of cooperative corporations. *Hargrave v. Canadian Valley Elec. Co-op., Inc.*, 792 P.2d 50 (Okla. 1990). The Oklahoma Uniform Limited Partnership Act explicitly applies fiduciary duties to the general partner when dealing with the partnership. 54 O.S. §500-408A(a). The Oklahoma LLC Act affords LLC managers the protections of the business judgment rule, which could infer that LLC managers have duties like those of corporate directors and officers. 18 O.S. §2016.4. [↑](#footnote-ref-26)
27. Section 2060 of the Oklahoma LLC Act reads:

“In any case not provided for in this act, the rules of law and equity, including the law merchant, shall govern.”

18 O.S. §2060; *cf.* 6 Del. C. §18-1104. Both the Oklahoma LLC Act and Delaware LLC Act offer support for the contractarian position, which is not present in the respective corporation acts. *See e.g.*, 18 O.S. §2058.D (“It is the policy of this act to give the maximum effect to the principle of freedom of contract and the enforceability of operating agreements”); *accord* 6 Del. C. §18-1101(b). [↑](#footnote-ref-27)
28. Under the business judgment rule, the court will defer to the decisions of the board unless the terms were so poor that no rational person in good faith could have thought the terms were fair. See Sinclair Oil Corp v. Levien, 280 A.2d 717,720 (Del. 1971) (“A board of directors enjoys a presumption of sound business judgment, and its decision will not be disturbed if they can be attributed to any rational business purpose.”). [↑](#footnote-ref-28)
29. Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 110 (Del. 1952) (a majority shareholder standing “on both sides of the transaction, . . . bear[s] the burden of establishing its entire fairness”); see also Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983). [↑](#footnote-ref-29)
30. Kahn v. Lynch Commc'ns Syst., 638 A.2d 1110, 1117 (Del. Ch. 1994). [↑](#footnote-ref-30)
31. 67 A.3d 496 (Del. Ch. 2013). [↑](#footnote-ref-31)
32. Gary W. Derrick, *Recent Developments in Oklahoma Business and Corporate Law – 2012*, OBA 2012 Recent Developments (Day Two). [↑](#footnote-ref-32)
33. For a current and comprehensive discussion of benefit corporations, see Corporate Laws Committee, ABA Business Law Section, *Benefit Corporation White Paper*, to be published in the November 2013 issue of The Business Lawyer (vol. 69, issue 1) (avail. at http://meetings. abanet.org/webupload/commupload/CL870000/sitesofinterest\_files/white\_paper.pdf.) (the “*ABA White Paper*”). [↑](#footnote-ref-33)
34. Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia and Washington. *See* <http://www.benefitcorp.net/state-by-state-legislative-status>. The legislation in most of these states is based generally on a Model Benefit Corporation Act, which is promoted by a non-profit organization called B Lab Corporation. B Lab runs a certification process for qualifying entities. *See* <http://www.bcorporation.net/>. Benefit corporations are comprehensively discussed in J. William Callison’s article, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, at [http://papers.ssrn.com/sol3/papers.cfm? abstract\_id=2102655](http://papers.ssrn.com/sol3/papers.cfm?%20abstract_id=2102655) (July 9, 2012). Washington, California and Texas have adopted what is referred to as a “flexible purpose”, which is stated in the charter, but is not required to be considered by the directors. The Texas statutes do not refer to any reporting responsibilities. Maryland and Oregon allow LLCs as well as corporations to use the public benefit provisions. [↑](#footnote-ref-34)
35. DGCL, Sections 361-368. [↑](#footnote-ref-35)
36. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del.Ch. 2010) (“Promoting, protecting, or pursuing non-stockholder considerations must [ultimately] lead to value for stockholders.” Directors who cannot prove that their actions will lead to shareholder value have “failed to prove . . . that they acted in the good faith pursuit of a proper corporate purpose.”). [↑](#footnote-ref-36)
37. The benefit corporation has been described as pursuing a “triple bottom line” consisting of “profits, planet and people”. *See* “Triple Bottom Line: It Consists of Three Ps: Profits, Planet and People”, *The Economist* (Nov. 17, 2009) (attributing the description to John Elkington, a business consultant and leader in the corporate social responsibility movement). [↑](#footnote-ref-37)
38. A “public benefit” has “a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.” 8 Del.C. §362(b). [↑](#footnote-ref-38)
39. *See* ABA White Paper, Appendix A (avail. at [http://meetings.abanet.org/webupload/ commupload/CL870000/sitesofinterest\_files/white\_paper.pdf](http://meetings.abanet.org/webupload/%20commupload/CL870000/sitesofinterest_files/white_paper.pdf).) [↑](#footnote-ref-39)
40. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). [↑](#footnote-ref-40)
41. *Id* at 35. [↑](#footnote-ref-41)
42. *See* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135 (March 2012). Delaware Chancellor (Judge) Strine argues that other constituencies cannot hold directors accountable for duties the directors might owe them since the other constituencies have no mechanism to enforce those duties. Thus, allowing the directors to consider the interests of other constituencies means a diminution of duties owed to the shareholders without a corresponding increase in duties to others, which effectively increases the directors’ authority without more accountability. [↑](#footnote-ref-42)
43. House Bill 1995 was authored by Representative Randy Grau. It was prepared by the Oklahoma General Corporation Act Committee, which is a subcommittee of the Business and Corporate Law Section of the OBA. The Committee drafted the OGCA and the LLC Act and works to maintain the currency of Oklahoma’s business entity legislation. [↑](#footnote-ref-43)
44. The intent in modeling the OGCA after the DGCL was to foster reliance on the large body of Delaware case law, which offers persuasive guidance in Oklahoma. *Price v. Southwestern Bell Tel. Co.*, 812 P.2d 1355 (Okla. 1991); *Woolf v. Universal Fidelity Life Insurance Company*, 849 P.2d 1093 (Okla.Ct.App. 1992) (since the OGCA is based on the DGCL, the OGCA should be interpreted in accordance with Delaware decisions). The continued adoption of the Delaware changes is intended to ensure continued guidance from the Delaware case law. [↑](#footnote-ref-44)
45. House Bill 1996 was authored by Representative Randy Grau. It was a joint project between the OBA’s Uniform Act Committee and the Oklahoma General Corporation Act Committee, which conformed the language to fit the statutory drafting practices and to accommodate the Secretary of State’s electronic filing system. [↑](#footnote-ref-45)
46. Classified boards are those in which the terms of the directors do not expire annually. The directors are separated into classes whose terms are staggered. The typical classified board has three classes of directors, who serve staggered three-year terms. Classified boards are authorized under 18 O.S. §1027.D. [↑](#footnote-ref-46)
47. Gilbert, Daniel et al, “Chesapeake Board Revamp Curbs McClendon’s Power”, *Wall Street Journal* (June 4, 2012). [↑](#footnote-ref-47)
48. 2012 OK CIV APP 103, 290 P.3d 779 (2012). [↑](#footnote-ref-48)
49. The case history is somewhat complicated procedurally. The trial court awarded the defendants attorney fees based on its conclusion that the TRO was improvidently granted based on the plaintiffs’ lack of standing. The plaintiffs were appealing the award of attorney fees. [↑](#footnote-ref-49)
50. The pleading requirements are set forth in 12 O.S. §2023.1, which provides in part:

“In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the petition shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The petition shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.”

The opinion cites both Oklahoma and Delaware authority for determining a plaintiff’s standing to pursue a derivative action. Both parties acknowledged that Delaware law is persuasive since the applicable statute was modeled on the Delaware law and further that the Efftec was incorporated in Nevada, which follows Delaware law. *Kurtz, supra at* ¶¶19-21. [↑](#footnote-ref-50)
51. *Id.* at ¶21 (citing *Kaplan v. Peat, Marwick, Mitchell & Co*., 540 A.2d 726, 731 (Del. 1988). [↑](#footnote-ref-51)
52. *Id.* at ¶¶24-26. [↑](#footnote-ref-52)
53. 2013 OK CIV APP 7, 297 P.3d 413 (2012). [↑](#footnote-ref-53)
54. The plaintiffs raised multiple grounds for the manufacturer’s liability, including vicarious liability based on manufacturer’s agency, its negligent approval of the dealership, general negligence and liability under the motor vehicle statutes. For purposes of this paper, we shall discuss only the common law claims. *Id.* at ¶6. [↑](#footnote-ref-54)
55. *Id.* at ¶¶7-14. [↑](#footnote-ref-55)
56. *Id.* at ¶¶18, 19. [↑](#footnote-ref-56)
57. *Id.* at ¶20 (citing *Summit Automotive Group, LTD v. Clark and Kia Motors*, 681 S.E.2d 681 (Ga. App. 2009); *DaimlerChrysler Motor Company, LLC v Clemente*, 668 S.E.2d 737 (Ga.App. 2008); *Ortega v. General Motors Corp*., 392 So.2d 40 (Fla.Dist.Ct.App. 1981)). [↑](#footnote-ref-57)
58. *Id.* at ¶20. [↑](#footnote-ref-58)
59. *Id.* at ¶¶19-31 (citing *Coe v. Esau*, 1963 OK 1, 377 P.2d 815 (display of the “Conoco” name on the station does not suggest the station owner is Conoco’s agent, but only indicates that the station owner is selling Conoco products); *Stephens v. Yamaha Motors Co., Ltd*., 1981 OK 42, 627 P.2d 439 (“[I]t is a matter of common knowledge that these trade mark signs are displayed throughout the country by independent dealers.”). [↑](#footnote-ref-59)
60. *Id.* at ¶54. [↑](#footnote-ref-60)
61. *Id.* at ¶51 (citing *Strubhart v. Perry Memorial Hospital Trust Authority*, 1995 OK 10, 903 P.3d 263). [↑](#footnote-ref-61)
62. *Id.* at ¶53. [↑](#footnote-ref-62)
63. *Id.* at ¶58. [↑](#footnote-ref-63)
64. *See* “Down on the Street: A Special Report on American’s Capital Markets”, *The Economist* (Nov. 25, 2006). [↑](#footnote-ref-64)