

HBS Intersection of Law and Business – October 4, 2016

The Challenges to “Crowdfunding”; State Bans on Pipeline Eminent Domain Aren’t What They Seem; Isakson’s Secret Battle against a Runoff; Casino Gambling in Ga Picks Up Steam

### **Navigating Through the *Shark Tank* Crowdfunding Regulations**

The popular television show *Shark Tank* and non-equity crowdfunding platforms such as *Kickstarter* have piqued the interest of entrepreneurs looking for investors and has founders dreaming of easy capital-raising through the sale of stock. Unfortunately, until recently there was no regulatory framework for private companies to raise money by selling stock to the general public.

This changed in May when the SEC rolled out the latest of its highly anticipated equity crowdfunding regulations under the JOBS Act. Title III allows anyone to invest in an early-stage company regardless of their net worth-- and has resulted in tremendous growth in the pool of eligible investors. With this increased opportunity for funding, however, come regulatory restrictions. First, Title III only permits a company to raise up to \$1 million. Second, the offering must be conducted through an intermediary, either an approved online portal or a registered broker-dealer. Third, before being listed on a portal or making any offers to prospective investors, a company is required to undertake certain filing and disclosure obligations. These include making filings with the SEC and compiling reviewed or audited financial statements. The company must also provide an offering document to every potential investor which contains certain required disclosure information and complies with securities laws.

Finally, once a company completes a Title III offering, it must continue to file an annual report with the SEC thereafter. These restrictions present several drawbacks for companies considering using Title III. The legal and accounting work necessary to complete the financial reports, SEC filings and disclosure document must be done prior to the actual offering going live. This means that the company incurs significant costs before knowing whether the offering will be successful. Compared to a Reg D private offering, which is restricted to high net worth individuals, Title III is an expensive and risky proposition. Reg D has minimal disclosure requirements and no limit on the amount of money that can be raised. Additionally, under Reg D, no costs are incurred until the source and amount of funding have been identified. There are also state law considerations a company should be aware of when engaging in capital raising efforts. For more information about crowdfunding, capital raising and securities offerings, please contact Lisa Bashinsky in the Nashville office of Hall Booth Smith.

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## **A “Pipeline Ban” Isn’t Always a Full Ban**

Last year Kinder Morgan, a major energy construction and pipeline company, revealed its plan to construct a pipeline through parts of Georgia and South Carolina. But the company later suspended its efforts following passage of legislation by the Georgia General Assembly placing a moratorium on pipeline construction.

The legislature wanted to further consider land use policy and the impact on citizens in the exercise of eminent domain.

The South Carolina legislature followed with passage a similar law. It placed a three-year moratorium on “for-profit pipeline companies” exercising eminent domain power. But a ban in concept and perception isn’t always a full ban.

Natural gas, for example, is regulated under the federal Natural Gas Act, which trumps state law by giving natural gas companies a carve-out to use eminent domain for the construction of pipelines and facilities. Additionally the Federal Rules of Civil Procedure actually preempt the vast majority of state laws that otherwise might stand in the way of pipeline efforts. Thus, a certificate from the Federal Energy Regulatory Commission (FERC) can lead to a continued use of eminent domain in most efforts to build or expand pipelines.

It’s up in the air as to what the Georgia General Assembly will do once the composition of its new two-year elected body is determined in the November 8<sup>th</sup> election. Meanwhile, in a recent letter to the U.S. Congress, 180 environmental, energy and community planning organizations from 35 states called for a change to the Natural Gas Act which gives FERC the authority to approve pipeline requests.

The coalition argues that the federal agency is abusing its approval power. Yet insiders say that they expect no major changes on the federal level, regardless of the coalition’s efforts. For more information, contact Bob Middleton or Brad Carver with our Hall Booth Smith Energy-Regulatory-Utilities Industries team. <http://www.hallboothsmith.com/practice-areas/energy-regulatory-utilities>

## **Isakson Hoping to Avoid General Election Runoff**

Georgia’s Senior U.S. Senator Johnny Isakson is working his way around a challenging Donald Trump presidential race in hopes of crossing Georgia’s requirement that he win his November contest by over 50 percent of the vote-- even if it is just by a single vote. Isakson has generally pulled support from across political lines and his opponent Jim Barksdale has no experience in elected office. But Barksdale has dropped several million dollars on TV ads and Isakson is currently still polling at about 47 percent.

Insiders tell us that Isakson should be able to take Barksdale in November, but if Trump underperforms in Georgia the entire Republican ticket might suffer and that could force the GOP incumbent into a much dreaded January election runoff. Should that happen and control of the

Senate (which expected to be very close) still be in question, Georgia could become the political “ground zero” for the nation.

Isakson is now up with an ad touting his vote to override a veto by President Obama of legislation allowing family members who lost loved ones to sue Saudi Arabia or other countries deemed responsible for the 2001 attacks. Meanwhile Barksdale is advertising Isakson’s support of trade deals that Trump derides.

Several of our HBS team are involved in following these races and we will keep our eye on Georgia as events unfold.

## **Casino Gambling Likely Headed to Georgia**

A re-worked version of the casino gambling bill is in the hands of legislative counsel under the Gold Dome. Insiders tell us that the new bill once again will have a healthy slice of casino revenue going to the HOPE scholarship. But expect changes in who controls the handing out of limited licenses. A new gaming commission might have the sole authority over the process. Of course, a lot must happen before casino gambling or local option pari-mutual wagering (horse racing) actually comes to fruition in the state. But with 2017 an off-election year, the betting is that the first step—placing a referendum for the public to vote on—will take place in this coming year’s legislative session.

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