

UNIFORM LIMITED OFFERING EXEMPTION

Adopted September 21, 1983; Amendments Adopted through April 29, 1989

STATUTE

Statute Section. [Section ____.] The administrator is hereby granted authority to create by rule a limited offering transactional exemption which shall further the objectives of compatibility with federal exemptions and uniformity among the states.

PRELIMINARY NOTES

1. Nothing in this exemption is intended to or should be construed as in any way relieving issuers or persons acting on behalf of issuers from providing disclosure to prospective investors adequate to satisfy the anti-fraud provisions of this state's securities law.
2. In view of the objective of this rule and the purposes and policies underlying this act, the exemption is not available to any issuer with respect to any transaction which, although in technical compliance with this rule, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this rule.
3. Nothing in this rule is intended to relieve registered broker/dealers or agents from the due diligence, suitability, or know your customer standards or any other requirements of law otherwise applicable to such registered persons.

RULE

By authority delegated the administrator in [Section ____] of this act to promulgate rules, the following transaction is determined to be exempt from the registration provisions of this act:

1. Any offer or sale of securities offered or sold in compliance with Securities Act of 1933, Regulation D, Rules 230.505 and/or 230.506¹, including any offer or sale made exempt by application of Rule 508(a), as made effective in Release No. 33-6389 and as amended in Release Nos. 33-6437, 33-6663, 33-6758, and 33-6825, and which satisfies the following further conditions and limitations:

A. No commission, fee or other remuneration shall be paid or given, directly or indirectly, to any person for soliciting any prospective purchaser in this state unless such person is appropriately registered in this state.² & ³

It is a defense to a violation of this subsection if the issuer sustains the burden of proof to establish that he or she did not know and in the exercise of reasonable care could not have known that the person who received a commission, fee or other remuneration was not appropriately registered in this state.

B. No exemption under this rule shall be available for the securities of any issuer if any of the parties described in Securities Act of 1933, Regulation A, Rule 230.252 sections (c), (d), (e) or (f):

1. Has filed a registration statement which is subject of a currently effective registration stop order entered pursuant to any state's securities law within five years prior to the filing of the notice required under this exemption.

2. Has been convicted within five years prior to the filing of the notice required under this exemption of any felony or misdemeanor in connection with the offer, purchase or sale of any security or any felony involving fraud or deceit, including but not limited to forgery, embezzlement, obtaining money under false pretenses, larceny or conspiracy to defraud.

3. Is currently subject to any state administrative enforcement order or judgment entered by that state's securities administrator within five years prior to the filing of the notice required under this exemption or is subject to any state's administrative enforcement order or judgment in which fraud or deceit, including but not limited to making untrue statements of material facts and omitting to state material facts, was found and the order or judgment was entered within five years prior to the filing of the notice required under this exemption.

4. Is subject to any state's administrative enforcement order or judgment which prohibits, denies or revokes the use of any exemption from registration in connection with the offer, purchase or sale of securities.

5. Is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction, permanently restraining or enjoining, such party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the state entered within five years prior to the filing of the notice required under this exemption.

6. The prohibitions of paragraphs 1-3 and 5 above shall not apply if the person subject to the disqualification is duly licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against such person or if the broker/dealer employing such party is licensed or registered in this state and the Form B-D filed with this state discloses the order, conviction, judgment or decree relating to such person. No person disqualified under this subsection may act in a capacity other than that for which the person is licensed or registered.

7. Any disqualification caused by this section is automatically waived if the state securities administrator or agency of the state which created the basis for

disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

It is a defense to a violation of this subsection if issuer sustains the burden of proof to establish that he or she did not know and in the exercise of reasonable care could not have known that a disqualification under this subsection existed.

C. The issuer shall file with the state administrator a notice on Form D (17CFR239.500):

1. No later than (10 days prior)⁴ to the receipt of consideration or the delivery of a subscription agreement by an investor in this state which results from an offer being made in reliance upon this exemption and at such other times and in the form required under Regulation D, Rule 230.503 to be filed with the Securities and Exchange Commission.

2. The notice shall contain an undertaking by the issuer to furnish to the state securities administrator, upon written request, the information furnished by the issuer to offerees, except where the state administrator pursuant to regulation requires that the information be filed at the same time with the filing of the notice.⁵

3. Unless otherwise available, included with or in the initial notice shall be a consent to service of process.

4. Every person filing the initial notice provided for in 1 above shall pay a filing fee of [\$ ____]

D. In all sales to nonaccredited investors in this state one of the following conditions must be satisfied or the issuer and any person acting on its behalf shall have reasonable grounds to believe and after making reasonable inquiry shall believe that one of the following conditions is satisfied:

1. The investment is suitable for the purchaser upon the basis of the facts, if any, disclosed by the purchaser as to the purchaser's other security holdings, financial situation and needs. For the purpose of this condition only, it may be presumed that if the investment does not exceed 10% of the investor's net worth, it is suitable.

2. The purchaser either alone or with his/her purchaser representative(s) has such knowledge and experience in financial and business matters that he/she is or they are capable of evaluating the merits and risks of the prospective investment.

2. A failure to comply with a term, condition or requirement of Sections 1.A, [C⁶], and D of this rule will not result in loss of the exemption from the requirements of section [301] of this act for any offer or sale to a particular individual or entity if the person relying on the exemption shows:

- A. the failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and
- B. the failure to comply was insignificant with respect to the offering as a whole; and
- C. a good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Sections 1.A [C⁶], and D.

3. Where an exemption is established only through reliance upon section 2 of this rule, the failure to comply shall nonetheless be actionable by the [administrator] under section [408] of the Act.⁷

4. Transactions which are exempt under this rule may not be combined with offers and sales exempt under any other rule or section of this act; however, nothing in this limitation shall act as an election. Should for any reason the offer and sale fail to comply with all of the conditions for this exemption, the issuer may claim the availability of any other applicable exemption.

5. The administrator may, by rule or order, increase the number of purchasers or waive any other conditions of this exemption.

6. The exemption authorized by this rule shall be known and may be cited as the "Uniform Limited Offering Exemption."

¹ In those states where facts and circumstances permit, it would not be inconsistent with the regulatory objectives of this exemption for a state to elect to accept Rule 506 offerings within the ambit of this exemption. In doing so, however, the state disqualification provisions of this rule and the federal disqualification provisions of Rule 505 should be made applicable.

With inclusion of Rule 506, the major objective of the exemption is not limited to facilitating the capital-raising ability of small business. The removal of the dollar limit makes the exemption available to private placements of all sizes. In large private offerings, the problems associated with determining that all the investors are experienced enough to fully understand the risks of the offering and controlling the manner and scope of the offering so that it does not become a public offering are magnified. Also, and largely because of the removal of the dollar limit, the exemption becomes more attractive to tax shelter investments.

Tax shelter offerings that would be permitted by Rule 506, particularly those with abusively high write-off ratios, involve special facts and circumstances, and enforcement experience shows that they have a greater potential for regulatory concerns and many lack economic substance and fail to contribute to job creation. In recognition of these concerns, Rule 506 is not adopted as part of the basic ULOE.

In those states where facts and circumstances permit, it would not be inconsistent with the regulatory objectives of this exemption to further condition the exemption with the following provision:

"In the case of offerings of direct participation programs as defined in Section 34 or Article III of the National Association of Securities Dealers, Inc., Rules of Fair Practice, delivery of a disclosure document containing the information required by Rule 502(b) of Regulation D to individuals covered by subsections (5) and (6) of Rule 501(a) of Regulation D is required."

² In those states where facts and circumstances permit, it would not be inconsistent with the regulatory objectives of this exemption for a state to substitute the following for section 1.A.

a. All persons who offer or sell securities in this state to nonaccredited and/or accredited investors as defined in Securities Act of 1933, Regulation D, Rule 230.501(a)(5)—(6) shall be appropriately registered in accordance with this state's securities law.

It is a defense to a violation of this subsection if the issuer sustains the burden of proof to establish that he or she did not know and in the exercise of reasonable care could not have known that the person who received a commission fee or other remuneration was not appropriately registered in this state.

³ In those states where facts and circumstances permit, it would not be inconsistent with the regulatory objectives of this exemption for a state to provide for a system or process to simplify and facilitate the registration of broker/dealers and agents which would not otherwise be required to be registered except for this exemption. Such a system or process should as a minimum, grant jurisdiction as well as the ability to effectively limit and control persons offering and selling securities within the state.

⁴ In those states where facts and circumstances permit, it would not be inconsistent with the Regulatory objectives of this exemption for a state to consider a post-sale notice patterned after the notice provisions of Regulation D (Rule 230.503).

⁵ This latter filing requirement is not intended to provide the basis for a fairness type of review of the offering.

⁶ In those states which have adopted a post-sale notice patterned after the notice provisions of Regulation D (Rule 230.503) it would not be inconsistent with the regulatory objectives of this exemption to include the notice filing requirements of section 1.C within the substantial compliance provisions of section 2 or to eliminate the filing as a condition and adopt a rule similar to Rule 230.507.

⁷ The cited reference is to the section of the Uniform Securities Act which authorizes the state administrator to bring a civil action to enjoin rule violations. Those states which have authority to bring an administrative enforcement action for rule violations may wish to include a reference to that statutory authority. If the administrator lacks authority to bring enforcement actions based solely on rule violations, he/she may wish to consider a statutory amendment.