

UNIFORM SECURITIES ACT (EXCERPT)
Act 265 of 1964

***** 451.704a THIS SECTION IS REPEALED BY ACT 551 OF 2008 EFFECTIVE OCTOBER 1, 2009

451.704a Small company offering registration.

Sec. 304a. (1) A security that is exempt from registration under the federal exemption set forth in 17 C.F.R. 230.504 may be registered under this section. An issuer eligible to register a security under this section shall use a registration form approved by the administrator as the disclosure document for the offering. A registration under this section shall be known as a small company offering registration.

(2) An application for a small company offering registration shall comply with this section. The offering is exempt pursuant to 17 C.F.R. 230.504, 17 C.F.R. 230.251, or section 3(a)(11) of the securities act of 1933. However, the administrator may waive provisions of this section.

(3) A small company offering registration under this section is not available to either of the following:

(a) Investment companies subject to the investment company act of 1940.

(b) Issuers subject to the reporting requirements of section 13 or section 15(d) of title I of the securities exchange act of 1934, 15 U.S.C. 78m and 78o.

(4) All of the following provisions apply to the availability of a small company offering registration:

(a) A small company offering registration shall not be utilized by the following issuers and programs unless the administrator grants written permission based upon a showing that adequate disclosure can be made to investors using the small company offering registration format:

(i) Holding companies, or companies that have a principal purpose of owning stock in, or supervising the management of, other companies.

(ii) Portfolio companies, such as real estate investment trusts.

(iii) Issuers with complex capital structures.

(iv) Commodity pools.

(v) Equipment leasing programs.

(vi) Real estate programs.

(b) A small company offering registration under this section is available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resale of the issuer's securities. In addition, each of the following requirements shall be met:

(i) The issuer is a domestic corporation, a foreign corporation, or a manager managed limited liability company organized under the laws of any state, territory, or possession of the United States or province or territory of Canada. The administrator may allow other entities to file a small company offering registration.

(ii) The offering is not a blind pool or other offering for which the specific business to be engaged in or property to be acquired by the issuer cannot be specified.

(iii) The offering price for securities; the exercise price if the securities offered are options, warrants, or rights for common stock or membership interests; or the conversion price if the securities are convertible into common stock or units of membership interest is at least \$1.00 per share or unit of membership interest. The issuer shall enter into an agreement with the administrator that the issuer will not split any class of security or declare a dividend for 2 years after the effective date of the registration if such action has the effect of lowering the price below \$1.00 per share.

(iv) The aggregate offering price of the securities offered, within or outside this state, is not more than \$1,000,000.00, or a greater amount established under 17 C.F.R. 230.504, or \$5,000,000.00 if a federal exemption is granted to this state pursuant to section 3(b) of the securities act of 1933, 15 U.S.C. 77c, or an amount authorized under 17 C.F.R. 230.251, if the issuer is utilizing a registration form approved by the administrator.

(c) A small company offering registration under this section is only available for debt offerings if the issuer can demonstrate a reasonable ability to service its debt.

(5) Except as otherwise provided in this subsection, financial statements shall be prepared in accordance with generally accepted accounting principles or the Canadian equivalent. If the issuer has not conducted significant operations, statements of receipts and disbursements shall be included in lieu of statements of income. Interim financial statements may be unaudited. Annual financial statements shall be audited by independent certified public accountants or chartered accountants, as appropriate, except that annual financial statements in lieu of being audited may be reviewed by independent certified public accountants or chartered accountants, in accordance with the accounting and review services standards promulgated by the American institute of certified public accountants or the Canadian equivalent, consistently applied, rather than audited, if

all of the following conditions are satisfied:

(a) The issuer has not previously sold securities through an offering involving general advertising or the solicitation of prospective investors.

(b) The issuer has not been previously required under federal, state, provincial, or territorial securities laws to provide audited financial statements in connection with any sale of its securities.

(c) The aggregate amount of all previous sales of securities by the issuer within the last 24 months does not exceed \$1,000,000.00.

(d) The amount of the small company offering for which a small company registration is sought does not exceed \$1,000,000.00.

(6) A small company offering registration under this section is not available if any of the following provisions apply to the issuer, to any of the issuer's officers, directors, managers, 10% security holders, promoters, or selling agent of the securities to be offered, or to any officer, director, or partner of the selling agent of the securities to be offered:

(a) The person has filed a registration statement that is the subject of a currently effective registration stop order entered pursuant to any federal or state securities law within 5 years before the small company offering registration application is filed.

(b) The person has been convicted of any felony or misdemeanor in connection with the offer, purchase, or sale of any security or any felony involving fraud or deceit, including any of the following, within 5 years before the small company offering registration application is filed:

(i) Forgery.

(ii) Embezzlement.

(iii) Obtaining money under false pretenses.

(iv) Larceny.

(v) Conspiracy to defraud.

(c) The person is currently subject to either of the following:

(i) A state administrative enforcement order or judgment entered against that person by a state securities administrator or the securities and exchange commission within 5 years before the small company offering registration application is filed.

(ii) A federal or state administrative enforcement order or judgment in which fraud or deceit, including making untrue statements of material facts or failing to state material facts, was found and the order or judgment was entered within 5 years before the small company offering registration application is filed.

(d) The person is subject to a federal or state administrative enforcement order or judgment that prohibits, denies, or revokes the use of any exemption for registration in connection with the offer, purchase, or sale of securities.

(e) The person is currently subject to a court order, judgment, or decree entered within 5 years before the small company offering registration application is filed that does either of the following:

(i) Temporarily, preliminarily, or permanently restrains or enjoins that person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security.

(ii) Involves the making of a false filing with any state or with the securities and exchange commission.

(f) A person who is disqualified under this subsection shall not act in any capacity other than that for which the person is licensed or registered. A disqualification under this subsection is automatically waived if the administrator or other state or federal agency that created the basis for disqualification determines, upon a showing of good cause, that it is not necessary under the circumstances to deny the exemption.

(g) Subdivisions (a), (b), (c), and (e) do not apply if the person disqualified under those subdivisions is licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against that person or if the broker-dealer who employs the person is licensed or registered in this state and the form BD filed in this state discloses the order, conviction, judgment, or decree relating to that person.

(7) An applicant who files a small company offering registration application in this state shall not split its securities or declare a stock or membership dividend for any security issued under this section for 2 years after the registration is effective without the prior written approval of the administrator.

(8) In addition to a properly completed application form, an applicant for a small company offering registration under this section shall file all of the following exhibits with the administrator:

(a) The form of the selling agency agreement.

(b) The issuer's articles of incorporation or other charter documents and all amendments.

(c) The issuer's bylaws or operating agreement, as amended.

(d) Copies of any resolutions by directors or managers setting forth terms and provisions of securities to be issued.

(e) Any indenture, form of note, or other contractual provision containing terms of notes or other debt or of options, warrants, or rights to be offered.

(f) A specimen of the security to be offered, including any legend restricting resale.

(g) Consent to service of process accompanied by an appropriate resolution.

(h) Copies of all material directed or furnished to investors in the offering.

(i) The form of escrow agreement for escrow of proceeds. An escrow agreement shall comply with all of the following:

(i) The administrator may require that the issuer impound the proceeds from the sale of a registered security in this state until the issuer receives a specified amount from the sale of that security in this state or elsewhere that is sufficient to accomplish the stated purposes of the offering or until the issuer's stipulated requirements are met.

(ii) The administrator may require that the issuer return any impounded proceeds, together with any accrued interest, to investors if the issuer fails to raise the specified amount while the registration is effective or within 1 year or if the issuer's stipulated requirements are not met.

(iii) A bank or trust company may act as the depository or escrow agent for impounded proceeds. Checks, drafts, and money orders shall be made payable to the depository. If a broker-dealer is acting as selling agent for the issuer, the broker-dealer shall promptly remit payments made directly to the broker-dealer to the depository or escrow agent.

(iv) A request to release impounded funds shall be in writing. The request shall confirm compliance with the registration and shall be accompanied by a statement from the depository or escrow agent setting forth the total amount on deposit.

(j) Consent to inclusion in the disclosure document of an accountant's report.

(k) Consent to inclusion in the disclosure document of a tax advisor's opinion or a description of tax consequences.

(l) Consent to inclusion in the disclosure document of an evaluation by a licensed attorney of any pending or anticipated litigation or administrative action.

(m) The form of any subscription agreement for the purchase of securities in the offering.

(n) An opinion of a licensed attorney that the securities to be sold in the offering are duly authorized and binding on the issuer in accordance with the terms of the securities.

(o) A list of the residence street addresses of officers, directors, managers, and principal security holders.

(9) Information provided to the administrator under subsection (8) is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(10) An applicant for a small company offering registration under this section shall pay a filing fee of 1/10 of 1% of the maximum aggregate offering price at which the registered securities are to be offered in this state, but in no case less than \$100.00 or more than \$1,250.00, to the administrator with the application form. If the applicant withdraws the application before the small company offering registration is effective or before a preeffective stop order is issued, the administrator shall retain the entire filing fee if review of the application has commenced, or shall retain a \$100.00 fee and refund the balance of the filing fee to the applicant if review of the application has not commenced.

(11) A small company offering registration statement filed under this section is effective for 1 year from its effective date, except during the time a stop order is in effect under this section. A small company offering registration statement may be extended by the administrator by rule or order. All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction so long as the small company offering registration statement is effective. A small company offering registration statement may not be withdrawn for 1 year from its effective date if any securities of the same class are outstanding. A small company offering registration statement may be withdrawn otherwise only in the discretion of the administrator.

(12) For the period that a small company offering registration statement is effective, the administrator may by rule or order require the person who filed the small company offering registration statement to file reports, not more often than quarterly, to keep reasonably current the information contained in the small company offering registration statement and to disclose the progress of the offering.

(13) A small company offering registration statement relating to a security may be amended after its effective date to increase the securities specified as proposed to be offered. As to securities not yet sold, an amendment becomes effective upon the administrator's order. In the case of securities that are sold in an amount in excess of the amount or number of securities specified in an effective small company offering registration statement as proposed to be offered, the person or persons who filed the small company offering registration statement may, in accordance with rules the administrator shall promulgate as necessary or appropriate in the public interest and for the protection of investors, elect to have the small company offering

registration of those securities considered effective as of the time of their sale, upon payment to the administrator within 6 months after the sale of a registration fee equal to the difference between the registration fee previously paid and the amount of the fee that would have otherwise been applicable to those additional securities if they had been included in the small company offering registration statement, if any, plus a late registration fee of \$250.00. Upon the election and payment, the small company offering registration statement shall be considered to have been in effect with respect to those securities. Every person filing an amendment under this section shall pay a filing fee, calculated in the manner specified in subsection (10), with respect to the additional securities.

(14) Fees, expense reimbursements, and fines received under this section shall be deposited in the state treasury to the credit of the administrator, to be used pursuant to legislative appropriation by the administrator in carrying out those duties required by law. After the payment of the amounts appropriated by the legislature for the necessary expenses incurred in the administration of this act, the money remaining shall be credited to the general fund of this state.

(15) Fees and fines received under this section shall not be expended for partisan political activity.

(16) All of the following apply to orders under this subsection:

(a) The administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any small company offering registration statement if it finds that the order is in the public interest and any of the following:

(i) The small company offering registration statement as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment under subsection (13) as of its effective date, or any report under subsection (12) is incomplete in any material respect or contains any statement that was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact.

(ii) Any provision of this section or any rule, order, or condition lawfully imposed under this section has been violated in connection with the offering by any of the following:

(A) The person filing the small company offering registration statement.

(B) The issuer, any officer, director, or manager of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the small company offering registration statement is directly or indirectly controlled by or acting for the issuer.

(C) Any underwriter.

(iii) The security registered or sought to be registered is the subject of an administrative stop order or similar order or a permanent or temporary injunction of any court entered under any other federal or state act applicable to the offering. However, the administrator shall not institute a proceeding against an effective small company offering registration statement under this subdivision more than 1 year from the date of the order or injunction relied on, and may not enter an order under this subdivision on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts that would currently constitute a ground for a stop order under this section.

(iv) The issuer's enterprise or method of business includes or would include activities that are illegal where performed.

(v) The offering has worked or has tended to work a fraud, deception, or imposition or would operate to work a fraud, deception, or imposition.

(b) The administrator may by order summarily postpone or suspend the effectiveness of the small company offering registration statement pending final determination of any proceeding under this section. Upon the entry of the order, the administrator shall promptly notify each person specified in subdivision (c) that the order has been entered, the reasons that the order has been entered, and that within 15 days after the receipt of a written request the matter will be scheduled for hearing. If no hearing is requested and none is ordered by the administrator, the order shall remain in effect until it is modified or vacated by the administrator. If a hearing is requested or ordered, the administrator, after notice and opportunity for hearing to each person specified in subdivision (c), may modify, vacate, or extend the order until final determination.

(c) A stop order shall not be entered under this section except under the first sentence of subdivision (b) without all of the following:

(i) Appropriate prior notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered.

(ii) Opportunity for hearing.

(iii) Written findings of fact and conclusions of law.

(d) The administrator may vacate or modify a stop order if it finds that the conditions that prompted entry of the stop order have changed or that it is otherwise in the public interest to vacate or modify the stop order.

History: Add. 1996, Act 529, Imd. Eff. Jan. 13, 1997;—Am. 2000, Act 494, Imd. Eff. Jan. 11, 2001.