

Vermont Department of Financial Regulation

Rule No. 2014-1-S

Rule providing for the Vermont Small Business Offering Exemption

Effective: [date]

Vermont Small Business Offering Exemption (“VSBOE”)

(a) VSBOE is available under Sections 5202(13)(C) and 5203 of the Vermont Uniform Securities Act (the “Act”). Pursuant to VSBOE, the offer or sale of a security by an issuer shall be exempt from the requirements of 9 V.S.A. §§ 5301 - 5305 and 9 V.S.A §5504, and each individual who represents an issuer in an offer or sale shall be exempt from the requirements of 9 V.S.A. § 5402(a) if the offer or sale is conducted in accordance with each of the following requirements:

- (1) The issuer of the security shall be a business entity formed under the laws of the State of Vermont and registered with the Secretary of State.
- (2) The transaction shall meet the requirements of the federal exemption for intrastate offerings in section 3(a)(11) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(11), and SEC Rule 147, 17 C.F.R. 230.147.
- (3) The issuer shall not accept more than ten thousand dollars (\$10,000) from any single purchaser unless the purchaser is an accredited investor as defined by rule 501 of SEC regulation D, 17 C.F.R. 230.501

(b) VSBOE is unavailable for the following types of offerings:

- (1) Offerings in which it is proposed to issue stock or other equity interest in a development stage company without a specific business plan or purpose, or in which the issuer has indicated that its business is to engage in a merger or acquisition with an unidentified company or companies, or other unidentified entities or persons, or without an allocation of proceeds to sufficiently identifiable properties or objectives (i.e., “blind pool” or “blank check” offerings);
- (2) Offerings involving petroleum exploration or production, mining, or other extractive industries; and;
- (3) Offerings involving an investment company as defined and classified under Section 4 of the Investment Company Act of 1940.

(c) No commission, fee or other remuneration shall be paid or given, directly or indirectly, to any person for soliciting any prospective purchaser in reliance upon VSBOE.

(d) The sum of all cash and other consideration to be received for all sales of the security in reliance upon this exemption does not exceed the cap provided in this subdivision.

(1) One million dollars (\$1,000,000), if the issuer has not undergone and made available to each prospective investor and the Commissioner the documentation resulting from a financial audit with respect to its most recently completed fiscal year and meeting generally accepted accounting principles.

(2) Two million dollars (\$2,000,000), if the issuer has undergone and made available to each prospective investor and the Commissioner the documentation resulting from a financial audit with respect to its most recently completed fiscal year and meeting generally accepted accounting principles.

(e) All funds received from investors shall be deposited into a federally insured depository institution located within Vermont, and all the funds shall be used in accordance with representations made to investors.

(f) VSBOE is not available if the issuer or its affiliates have previously sold securities of such issuer or affiliate under the provisions of Sections 5303 or 5304 of the Act (registration by coordination or qualification) or under the provisions of the securities laws of any other state which pertain to registration by qualification or coordination.

(g) The duration of the offering period shall not exceed twelve months, although the issuer may extend the offering in one year increments by amending its initial filing (including payment of a renewal fee) in conformance with requirements of the Act.

(h) No exemption under VSBOE shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of such sale (including any director, executive officer, other officer participating in the offering, general partner or managing member of the promoter); any investment manager of an issuer that is a pooled investment fund; any general partner or managing member of any such investment manager or solicitor; or any director, executive officer or other officer participating in the offering of any such investment manager or solicitor or general partner or managing member of such investment manager or solicitor:

(1) Has been convicted, within ten years before such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Department or the SEC; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

- (2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before such sale, that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:
- (A) In connection with the purchase or sale of any security;
 - (B) Involving the making of any false filing with the Department or the SEC; or
 - (C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;
- (3) Is subject to a final order of a state securities administrator (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:
- (A) At the time of such sale, bars the person from:
 - (i) Association with an entity regulated by such commission, authority, agency, or officer;
 - (ii) Engaging in the business of securities, insurance or banking; or
 - (iii) Engaging in savings association or credit union activities; or
 - (B) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale;
- (4) Is subject to an order of the SEC entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b) or 78o-4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f)) that, at the time of such sale:
- (A) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;
 - (B) Places limitations on the activities, functions or operations of such person; or
 - (C) Bars such person from being associated with any entity or from participating in the offering of any penny stock;
- (5) Is subject to any order of the SEC entered within five years before such sale that, at the time of such sale, orders the person to cease and desist from committing or causing a violation or future violation of:
- (A) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR

240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or

(B) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

- (6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;
- (7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the SEC that, within five years before such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or
- (8) Is subject to a United States Postal Service false representation order entered within five years before such sale, or is, at the time of such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

(i) Paragraph (h) shall not apply:

- (1) Upon a showing of good cause and without prejudice to any other action by the Commissioner, if the Commissioner determines that it is not necessary under the circumstances that an exemption be denied;
- (2) If, before the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commissioner) that disqualification under paragraph (h) should not arise as a consequence of such order, judgment or decree; or
- (3) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (h).
- (4) Instruction to paragraph (i)(3): An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.
- (5) For purposes of paragraph (h), events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(A) In control of the issuer; or

(B) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(j) The issuer shall reasonably believe that the purchaser either alone or by or through a representative has such knowledge as to be capable of evaluating the merits and the risks of the investment.

(k) An offering document shall be delivered to each offeree twenty four hours prior to any sale of securities in reliance upon VSBOE which meets the following requirements:

(1) The offering document must contain a legend which substantially conforms to the following:

(A) INVESTMENT IN THESE SECURITIES INVOLVES SIGNIFICANT RISKS AND IS SUITABLE ONLY FOR PERSONS WHO HAVE NO NEED FOR IMMEDIATE LIQUIDITY IN THEIR INVESTMENT AND WHO CAN BEAR THE ECONOMIC RISK OF A LOSS OF THEIR ENTIRE INVESTMENT. INVESTORS SHOULD BE AWARE THAT THEY MAY BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.

(B) IN MAKING AN INVESTMENT DECISION INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING INCLUDING THE MERITS AND RISKS INVOLVED. THESE SECURITIES HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR STATE SECURITIES COMMISSION OR REGULATORY AUTHORITY. FURTHERMORE, THE FOREGOING AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

(C) THESE SECURITIES ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE SECURITIES ACT OF 1933 AND THE VERMONT UNIFORM SECURITIES ACT PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM, and

(2) The offering document must be signed by a duly authorized representative of the issuer who by such action shall certify that the issuer has made reasonable efforts to verify the material accuracy and completeness of the information therein contained.

(l) Nothing in this regulation alters the obligation of issuers under Section 5501(2) of the Act, which renders it unlawful to "make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." In addition, issuers must otherwise comply with the antifraud provisions of the Act, as well as any applicable federal and state securities laws. With the exception of the legend requirement, no format for disclosure is prescribed. However, issuers should attempt to balance any discussion of the potential rewards of the offering with a

discussion of possible risks. Issuers should take care to ensure that oral statements to prospective purchasers about the offering are consistent with the disclosures contained in the offering document. The Department of Financial Regulation retains the right to comment upon and require revisions to the offering document.

(m) The issuer or applicant shall file with the Commissioner no later than ten calendar days prior to the commencement of any offering made in reliance on VSBOE:

- (1) A notice which includes the name, address, telephone number and social security number for any of the issuer's officers, directors, partners, members, ten percent shareholders, promoters presently connected with the issuer in any capacity, a brief and general description of its business and products, and its intended use of the proceeds of the proposed offering;
- (2) A consent to service of process which is duly executed and acknowledged by the issuer and accompanied by a properly executed corporate resolution, if applicable; and
- (3) Included with the initial notice shall be the filing fee prescribed at Section 5305(k) of the Act payable to the Vermont Department of Financial Regulation.

(n) The issuer or applicant shall file with the Commissioner no later than five business days prior to initial use in Vermont, a copy of all advertising intended for publication or mass distribution including the script of any radio or television broadcast to be made. Such advertising should, to the extent practicable, conform to a standard "tombstone" format and limit the information provided to the name of the issuer of the security, the name and address of the person(s) from whom an offering document may be obtained, the full title and a description of the security and the amount being offered, a brief indication of the general type of business of the issuer, the price of the security and, in the case of a debt security, the yield or interest rate. No advertisement may be published or distributed if the issuer has been notified by the Commissioner not to use such material.

(o) The issuer or applicant shall file with the Commissioner no later than thirty calendar days after the expiration of the offering a sales report on a form prescribed by the Commissioner. The Commissioner may require any issuer to file periodic reports to keep reasonably current the information contained in the notice and to disclose the progress of the offering.

(p) A broker-dealer that does not have a place of business in Vermont shall be exempt from the registration requirements of Sections 5401 of the Act to the extent such broker-dealer limits its activities in Vermont to such transactions.