

Vermont Department of Financial Regulation

Rule No. S-2015-01

Vermont Small Business Offerings

(a) *Definitions*. The following terms as used in this regulation are defined as:

(1) “*Accredited Investor*” means an investor that satisfies the definition of “accredited investor” pursuant to 17 C.F.R. § 230.501(a).

(2) “*Bad Actor*” means an issuer; any predecessor of an issuer; any affiliated issuer; any director, executive officer, other officer participating in an offering, general partner or managing member of the issuer; any beneficial owner of twenty (20) percent 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 person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; 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; who:

(A) Was 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 in connection with the purchase or sale of any security; involving the making of any false filing with the Commissioner or the SEC; or 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;

(B) 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: in connection with the purchase or sale of any security; involving the making of any false filing with the Commissioner or the SEC; or 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;

(C) 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: at the time of

such sale, bars the person from: association with an entity regulated by such commission, authority, agency, or officer; engaging in the business of securities, insurance or banking; or engaging in savings association or credit union activities; or 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;

(D) Is subject to an order of the SEC pursuant to 15 U.S.C. § 78o(b) or 78o-4(c) or 15 U.S.C. § 80b-3(e) or (f) that, at the time of such sale: suspends or revokes such person's registration as a broker, dealer, municipal securities dealer, or investment adviser; places limitations on the activities, functions, or operations of such person; or bars such person from being associated with any entity or from participating in the offering of any penny stock;

(E) 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: any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 15 U.S.C. § 77q(a)(1), 15 U.S.C. § 78j(b) and 17 CFR § 240.10b-5, 15 U.S.C. § 78o(c)(1), 15 U.S.C. § 80b-6(1), or any other rule or regulation thereunder; or 15 U.S.C. § 77e.

(F) 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;

(G) Filed (as a registrant or issuer), 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

(H) 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) Subsection (H) may not apply: 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; 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 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). Instruction to subsection (a)(1)(I): 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.

(J) For purposes of paragraph (viii), events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not: in control of the issuer; or (ii) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(3) “*Vermont Certified Investor*” means any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

(A) Any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in between \$2,500,000 and \$5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in between 2,500,000 and \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are certified investors;

(B) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in between \$2,500,000 and 5,000,000;

(C) Any natural person whose individual liquid net worth, or joint net worth with that person's spouse, exceeds \$500,000.

(i) Except as provided in paragraph (3)(C)(ii) of this section, for purposes of calculating net worth under this paragraph (3)(C)(i):

(I) The person's primary residence must not be included as an asset;

(II) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at

the time of the sale of securities, must not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess must be included as a liability); and

(III) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities must be included as a liability;

(ii) Paragraph (3)(C)(i) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:

(I) Such right was held by the person on July 20, 2010;

(II) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and

(III) The person held securities of the same issuer, other than such right, on July 20, 2010.

(D) Any natural person who had an individual income in excess of \$100,000 in each of the two most recent years or joint income with that person's spouse in excess of \$150,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(E) Any trust, with total assets in between \$2,500,000 and \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in 17 C.F.R. § 230.506(b)(2)(ii); and

(F) Any entity in which all of the equity owners are Vermont Certified Investors.

(4) “*Vermont Main Street Investor*” means any person who does not satisfy the definition of “Vermont Certified Investor” or “Accredited Investor.”

(b) *Vermont Small Business Offerings.*

(1) *Intrastate Exemption.* An issuer is exempt from the requirements of 9 V.S.A. §§ 5301 and 5504 if the offer or sale of the security is conducted in accordance with the filing requirements of this section and section (c)(3) below.

(A) The issuer of the security must be an entity formed under the laws of the State of Vermont and registered with the Vermont Secretary of State;

(B) The offering must only be made to residents of Vermont; and

(C) The offering must meet all other requirements of the federal exemption for intrastate offerings pursuant to 15 U.S.C. § 77c(a)(11).

(D) Aggregate Offering Limit. The maximum aggregate amount in cash and other consideration from all sales of the security sold under this exemption within any twelve (12) month period must not exceed:

(i) 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.

(ii) Two million dollars (\$2,000,000) if:

(I) 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; or

(II) The issuer has entered into an enforceable revenue producing contract that is satisfactory to the Commissioner.

(E) Filing Fee. In addition to the filing requirements listed in subsection (c)(3) of this regulation, the issuer must file the fee prescribed in 9 V.S.A. § 5305(k).

(2) Interstate Registration. An issuer satisfies the requirements of 9 V.S.A. §§ 5301 and 5504 if the offer or sale of the security is conducted in accordance with this section and fulfills the filing requirements of 9 V.S.A. § 5304 and subsection (c)(3) below.

(A) The issuer of the security must be an entity formed under the laws of any State or Territory of the United States or the District of Columbia and be registered with the Secretary of State as an entity formed under the laws of Vermont or as an entity authorized to transact business within Vermont;

(B) Aggregate Offering Limit. The maximum aggregate amount in cash and other consideration from all sales of the security sold under this exemption within any twelve (12) month period must not exceed one million dollars (\$1,000,000).

(C) The offering must meet all other requirements of the federal exemption for limited offerings and sales of securities pursuant to 17 C.F.R. § 230.504.

(D) Filing Fee. In addition to the filing requirements listed in 9 V.S.A. § 5304 and subsection (c)(3) of this regulation, the issuer must file the fee prescribed in 9 V.S.A. § 5305(b).

(c) General Requirements

(1) Individual Investment Limit. Sales to Vermont investors must conform to the following limitations:

(A) Accredited Investors have no individual investment limit;

(B) Vermont Certified Investors are limited to twenty-five thousand dollars (\$25,000) per offering; and

(C) Vermont Main Street Investors are limited to ten thousand dollars (\$10,000) per offering.

(2) Minimum Offering Raise. The issuer must set aside all funds raised as part of the offering in a separate bank account to be held until such time as the minimum offering amount is reached. The issuer must file proof of such account to the Commissioner. The minimum offering amount must be no less than twenty-five (25) percent of the maximum offering amount set by the issuer and disclosed in the offering document. An issuer may increase the aggregate offering amount once if it reaches full subscription. The issuer must notify the Commissioner and any previously subscribed investors of the amount of the increase and the intended use of additional proceeds. All investor funds must be returned to investors if:

(A) The issuer is unable to raise the minimum offering amount during the initial twelve (12) month period from the effective date of the offering without the minimum offering amount having been received by the depository; or

(B) The Commissioner by order, suspend or revokes the effectiveness of the offering.

(3) Filing Requirements.

(A) Offering Materials. Prior to an offering's commencement, the issuer must file the following with the Commissioner:

(i) A certificate of good standing issued by the issuer's domiciliary state; and if the issuer is not domiciled in Vermont, a certificate of authority issued by the Vermont Secretary of State, both of which must be issued within thirty (30) days of filing with the Commissioner;

(ii) A copy of the offering document;

(iii) Name, address, telephone number and social security number for any of the issuer's officers, directors, partners, members, twenty (20) percent shareholders and promoters presently connected with the issuer in any capacity;

(iv) The primary contact person for communication with the Commissioner and that person's phone number and e-mail address; and

(vi) The filing fee prescribed above.

(B) *Advertising Materials*. Prior to the commencement of any advertising, the issuer must file any advertising materials intended for mass distribution with the Commissioner. The issuer may commence their advertising if the offering is effective and the issuer has not received comments to the advertising materials within five (5) business days of filing with the Commissioner.

(4) *Effective Date of Offering*. Unless the Commissioner provides written comment or clears the offering earlier, each offering will be effective fifteen (15) business days after the issuer files all required documents.

(5) *Offering Period*. The offering period must not exceed twelve (12) months. An issuer may extend the offering in twelve (12) month increments by renewing its initial filing, including payment of a renewal fee as specified above, unless the minimum offering raise is not met in the first twelve (12) month period.

(6) *Offering Document*. An issuer must deliver an offering document to each offeree at least twenty-four (24) hours prior to any sale of securities under this regulation. The offering document does not have a prescribed format; however, an issuer must fully disclose all material information and not make any factual misstatements or omissions. Further, an issuer must attempt to balance any discussion of the potential rewards of the offering with a discussion of possible risks. A duly authorized representative of the issuer must sign the offering document and thereby certify that the issuer made reasonable efforts to verify the material accuracy and completeness of the information contained therein.

(7) *Limitation on Use*. This regulation is unavailable for:

(A) Offerings involving a Bad Actor;

(B) 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);

(C) Offerings involving petroleum exploration or production, mining, or other extractive industries; and

(D) Offerings involving an investment company as defined and classified under 15 U.S.C. § 80a-3(a).

(8) *Anti-Fraud Provisions.* Nothing in this regulation relieves issuers, Broker-Dealers and their Agents, or Investment Advisors and their Representatives from the Anti-Fraud and enforcement provisions of 9 V.S.A. §§ 5501-10, federal securities laws, the securities laws of other states or the rules of any Self-Regulatory Organization.

(9) *Investor Knowledge.* An issuer and any agents must reasonably believe that the purchaser, either alone or through a representative, has sufficient knowledge or is capable of evaluating the merits and the risks of the investment.

(10) *Reporting to the Commissioner.* Within thirty (30) calendar days after the expiration of the offering, an issuer must file a sales report with the Commissioner, indicating the aggregate dollar amount of securities sold and the number of investors. The Commissioner may require an issuer to file periodic reports to keep reasonably current the information contained in the notice and to disclose the progress of the offering.

(d) *Use of the Internet or Third Party Portal.* The use of the internet or a third party portal to conduct or help facilitate their offering is voluntary; however, when using the internet an issuer must be mindful of the advertising rules set forth in subsection (c)(3)(B). When engaging a third party portal, an issuer must ensure the third party portal is properly registered with the state.

(1) *Third Party Portal Registration.* A third party portal must register with the Commissioner by filing:

(A) A certificate of good standing issued by the Vermont Secretary of State within thirty (30) days of the filing indicating the third party portal is an entity formed under the laws of any State or Territory of the United States or the District of Columbia and authorized to transact business within Vermont;

(B) Name, address, telephone number and social security number for any of the third party portal's officers, directors, partners, members, twenty (20) percent shareholders and promoters presently connected with the issuer in any capacity.

(C) The primary contact person for communication with the Commissioner and that person's phone number and e-mail address;

(D) Except as provided below in subsection (d)(2) & (3), evidence that the third party portal is registered as a Broker-Dealer under 9 V.S.A. § 5406; and

(E) If the third party portal is exempt under subsection (d)(2) or (3), the filing fee prescribed in 9 V.S.A. § 5410(a).

(2) Non-Broker-Dealer Third Party Portals. A third party portal is not required to register as a Broker-Dealer under 9 V.S.A. § 5406 if all of the following apply with respect to the third party portal:

(A) It does not offer investment advice or recommendations;

(B) It does not solicit purchases, sales, or offers to buy the securities offered or displayed on the Internet site;

(C) It does not compensate employees, agents, or other persons for the solicitation or sale of securities displayed or referenced on the Internet site;

(D) It does not receive compensation based on the amount of securities sold, and it does not hold, manage, possess, or otherwise handle investor funds or securities;

(E) The fee it charges an issuer for an offering of securities on the Internet site is a fixed amount for each offering, a variable amount based on the length of time that the securities are offered on the Internet site, or a combination of such fixed and variable amounts; and

(F) Neither the third party portal, nor any director, executive officer, general partner, managing member, or other person with management authority over the third party portal, is disqualified as a Bad Actor.

(3) Federally Registered Broker-Dealers or Funding Portal. A third party portal is not required to register as a Broker-Dealer under 9 V.S.A. § 5406 if the third party portal is:

(A) Registered as a broker-dealer under the 15 U.S.C. § 78o; or

(B) A funding portal registered under 15 U.S.C. § 77d-1 and the Securities and Exchange Commission has adopted rules under authority of 15 U.S.C. § 78c(h) governing funding portals.

(4) Records. The third party portal must maintain records of all offers and sales of securities effected through the internet site and must provide the Commissioner with ready access to the records upon request. The Commissioner may access, inspect, and review any internet site registered under this subsection as well as its records.

(Authorized by 9 V.S.A. §§ 5605(a); implementing 9 V.S.A. § 5202(13)(C))