

Kansas Administrative Regulations

Department of Insurance Assistant Commissioner, Securities Division

Article 5.—Exemptions

81-5-12. Solicitations of interest before the filing of the registration statement.

(a) Exemption. Each offer, but not a sale, of a security made by or on behalf of an issuer for the sole purpose of soliciting an indication of interest in receiving a prospectus for the security shall be exempt from the requirements of K.S.A. 17-12a301 through 17-12a306 and K.S.A. 17-12a504 and amendments thereto, if all of the following requirements are met:

(1) The issuer shall be a business entity organized under the laws of the state of Kansas having, both before and upon completion of the offering, its principal office and a majority of its full-time employees located in this state.

(2) At least 80 percent of the net proceeds from the offering shall be used in connection with the operations of the issuer in this state.

(3) The issuer shall not be engaged in or propose to engage in petroleum exploration or production, mining, or other extractive industries and shall not be a development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in merger or acquisition with an unidentified company or companies or other entity or person.

(4) The offeror shall intend to register the security in this state and conduct its offering pursuant to one of the following federal laws or regulations, as adopted by reference in K.A.R. 81-2-1:

(A) Section 3(a)(11) of the securities act of 1933;

(B) SEC regulation A, 17 C.F.R. 230.251 et seq.; or

(C) rule 504 of SEC regulation D, 17 C.F.R. 230.504.

(5) Ten business days before the initial solicitation of interest under this regulation, the offeror shall file with the administrator a solicitation of interest form KSC-15 along

with any other materials to be used to conduct solicitations of interest, including the script of any broadcast to be made and a copy of any notice to be published.

(6) Five business days before usage, the offeror shall file with the administrator any amendments to the foregoing materials or additional materials to be used to conduct solicitations of interest, except for materials provided to a particular offeree pursuant to a request by that offeree.

(7) No solicitation of interest form, script, advertisement, or other material shall be used to solicit indications of interest if the administrator has instructed the offeror not to distribute the material.

(8) Except for scripted broadcasts and published notices, the offeror shall not communicate with any offeree about the contemplated offering, unless the offeree is provided with the most current solicitation of interest form at or before the time of the communication or within five days after the communication.

(9) During the solicitation of interest period, the offeror shall not solicit or accept money or a commitment to purchase securities.

(10) No sale shall be made until seven days after the delivery of a prospectus to the purchaser.

(b) Each offeror shall comply with each of the following requirements:

(1) Each published notice or script for broadcast shall contain at least the identity of the chief executive officer of the issuer, a brief and general description of its business and products, and the following legends:

(A) "NO MONEY OR OTHER CONSIDERATION IS BEING SOLICITED AND NONE WILL BE ACCEPTED."

(B) "NO SALES OF THE SECURITIES WILL BE MADE OR COMMITMENT TO PURCHASE ACCEPTED UNTIL DELIVERY OF AN OFFERING CIRCULAR THAT INCLUDES COMPLETE INFORMATION ABOUT THE ISSUER AND THE OFFERING."

(C) "AN INDICATION OF INTEREST MADE BY A PROSPECTIVE INVESTOR INVOLVES NO OBLIGATION OR COMMITMENT OF ANY KIND."

(D) "THIS OFFER IS BEING MADE PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE FEDERAL AND STATE SECURITIES LAWS. NO SALE

MAY BE MADE UNTIL THE OFFERING STATEMENT IS REGISTERED IN THIS STATE."

(2) All communications with prospective investors made in reliance on this regulation shall cease after a registration statement is filed in Kansas, and no sale may be made until at least 20 calendar days after the last communication made in reliance on this regulation.

(3) A preliminary prospectus or its equivalent may be used only in connection with an offering for which indications of interest have been solicited under this regulation if the offering is conducted by a registered broker-dealer.

(c) Disqualifications. The exemption specified in subsection (a) shall not be available to an offeror who knows, or in the exercise of reasonable care should know, that the issuer or any one of its officers, directors, 10 percent shareholders, or promoters meets any of the following conditions:

(1) Has filed a registration statement that is subject to a currently effective registration stop order entered pursuant to any federal or state securities law within five years before the filing of the solicitation of interest form;

(2) has been convicted, within five years before the filing of the solicitation of interest form, of any felony or misdemeanor in connection with the offer, purchase, or sale of any security, or any felony involving fraud or deceit, including forgery, embezzlement, obtaining money under false pretenses, larceny, and conspiracy to defraud;

(3) is subject to any current federal or state administrative enforcement order or judgment entered by any state securities administrator or the securities and exchange commission within five years before the filing of the solicitation of interest form;

(4) is subject to any federal or state administrative enforcement order or judgment entered within five years before the filing of the solicitation of interest in which fraud or deceit was found;

(5) is subject to any federal or state administrative enforcement order or judgment that prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase, or sale of securities; or

(6) is subject to any current order, judgment, or decree of any court of competent jurisdiction that temporarily, preliminarily, or permanently restrains or enjoins the party

from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security, or involves the making of any false filing with the state, entered within five years before the filing of the solicitation of interest form.

(d) Effect of noncompliance.

(1) Failure to comply with any condition of subsection (a) shall constitute grounds for denying or revoking the exemption for a specific security or transaction and shall be grounds for other relief and sanctions under K.S.A. 17-12a603 and 17-12a604, and amendments thereto. However, upon application by the offeror, the failure to comply shall not result in the loss of the exemption for any offer to a particular individual or entity if the administrator determines that all of the following conditions are met:

(A) The failure to comply did not pertain to a condition directly intended to protect that particular individual or entity.

(B) The failure to comply was insignificant with respect to the offering as a whole.

(C) A good faith and reasonable attempt was made to comply with all applicable conditions of subsection (a).

(2) Failure to comply with any requirement in subsection (b) shall constitute grounds for denying or revoking the exemption for a specific security or transaction and shall be grounds for other relief and sanctions under K.S.A. 17-12a603 and 17-12a604, and amendments thereto, but shall not result in the loss of the exemption for the entire offering.

(e) Waivers.

(1) Upon application by the offeror and the showing of good cause, any condition of this exemption may be waived in writing by the administrator.

(2) Upon application by the offeror and the showing of good cause, the disqualification specified in subsection (c) may be waived in writing by the administrator under any of the following circumstances:

(A) The person subject to the disqualification is currently licensed or registered to conduct securities-related business in the state in which the administrative order or judgment was entered against the person.

(B) The broker-dealer employing the person is registered in Kansas, and the form BD filed in Kansas discloses the order, conviction, judgment, or decree relating to the person.

(C) The agency that 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, and the administrator concurs with that determination.

(3) The absence of any objection or order by the administrator with respect to any offer of securities undertaken pursuant to this regulation shall not be deemed to be a waiver of any condition of the regulation and shall not be deemed to be a confirmation by the administrator of compliance with this regulation.

(f) Integration. An offer made in reliance on this regulation shall not result in a violation of the registration requirements by virtue of being integrated with subsequent offers or sales of securities, unless the subsequent offers and sales would be integrated under federal securities laws.

(g) Effect on other exemptions. Issuers on whose behalf indications of interest are solicited under this regulation shall not make offers or sales in reliance on K.S.A. 17-12a202(1) or 17-12a202(14) and amendments thereto, or K.A.R. 81-5-6, until six months after the last communication with a prospective investor made pursuant to this regulation.

(Authorized by K.S.A. 2005 Supp. 17-12a605(a); implementing K.S.A. 2005 Supp. 17-12a202, as amended by L. 2006, Ch. 47, § 2(17) and K.S.A. 2005 Supp. 17-12a203; effective April 17, 1995; amended Jan. 19, 2007.)

***** Authenticated Kansas Administrative Regulation *****