

## **Chapter 7. Private Offering Exemptions**

### **§701. Preliminary Notes**

- A. The exemption contained in §703 of this Chapter is intended to provide a state safe-harbor exemption for private placements similar to the federal exemption provided by rules 501, 502, 503, 505, 506, 507 and 508 promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended. The exemption contained in §705 of this Chapter is intended to provide a state exemption similar to the federal exemption provided by §4(2) of the Securities Act of 1933. As with the federal §4(2) exemption, the determination whether an offer or sale does not involve any public offering is to be made upon the basis of a consideration of all the relevant facts.
- B. Nothing in Chapter 7 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 the Louisiana Securities Law.
- C. In view of the objective of this Chapter and the purposes and policies underlying the Louisiana Securities Law, these exemptions are not available to any issuer with respect to any transaction that, although in technical compliance with this Chapter, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this Chapter.
- D. Nothing in this Chapter is intended to relieve registered dealers or salesmen from the due diligence, suitability or know-your-customer standards or any other requirements of law otherwise applicable to such registered persons.
- E. Attempted compliance with the following Sections of this Chapter does not act as an exclusive election the seller can also claim the availability of any other applicable exemption.

AUTHORITY NOTE: Promulgated in accordance with R.S. 51:709(15).

HISTORICAL NOTE: Promulgated by the Department of Commerce, Office of Financial Institutions, LR 10:742 (October 1984), amended by the Department of Economic Development, Office of Financial Institutions, LR 16:677 (August 1990).

Title 10, Part XIII

*Louisiana Administrative Code September 2004 119*

### **§703. Uniform Limited Offering Exemption**

- A. By authority delegated to the commissioner in R.S. 51:709(15) to promulgate rules thereunder, a transaction described in Subsection B is determined to be exempt from the registration provisions of R.S. 51:705.
- B. Any offer or sale of securities offered or sold in compliance with the Securities Act of 1933, Regulation D, Rules 230.501-503 and 230.507-508, and any one of 230.505, or 230.506, as made effective in Release No. 33-6389 and as amended in Release Nos. 33-6437, 33-6663, 33-6758 and 33-6825 and as may be hereafter amended from time-to-time, and which satisfies the following further conditions and limitations:
  - 1. 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. It is a defense to a violation of

this Paragraph B.1 if the issuer sustains the burden of proof to establish that it 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.

2. No exemption under this Section 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):
  - a. has filed a registration statement which is the 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;
  - b. has been convicted within five years prior to the filing of the notice required under this Section 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;
  - c. is currently subject to any state administrative enforcement order or judgment entered by the state securities administrator within five years prior to the filing of the notice required under this Section or is subject to any state's administrative enforcement order 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;
  - d. 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;
  - e. is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily 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 false filing with the state entered within five years prior to the filing of the notice required under this Section:
    - i. the prohibitions of Subparagraphs 2.a-c and e 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 Paragraph 2 may act in a capacity other than that for which the person is licensed or registered;
    - ii. any disqualification caused by Paragraph 2 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.

3. If notice on Form D is then required by Regulation D under the Securities Act of 1933 to be filed with the Securities and Exchange Commission by the issuer, then the issuer shall file with the commissioner a notice on Form D (17 CFR 239.500):
    - a. no later than 15 days after the receipt of consideration from an investor in this state that results from an offer being made in reliance upon this exemption and at such other times thereafter and in the form required under Regulation D, Rule 230.503 to be filed with the Securities and Exchange Commission;
    - b. the notice shall contain an undertaking by the issuer to furnish to the commissioner, upon written request, the information furnished by the issuer to offerees, except where the commissioner pursuant to regulation requires that the information be filed at the same time with the filing of the notice;
    - c. unless otherwise available, included with or in the initial notice shall be a consent to service of process;
    - d. a person filing the initial notice provided for in Subparagraph 3.a above shall pay a filing fee of \$300.
  4. In all sales to non-accredited investors in this state 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.
    - a. The investment is suitable for the purchaser upon the basis of the facts, if any, disclosed by the purchaser as to his other security holdings and as to his financial situation and needs. For the purpose of this condition only, it may be presumed that if the investment does not exceed 25 percent of the investor's net worth, it is suitable.
    - b. 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 risk of the prospective investment.
- C. Transactions which are exempt under this Section may not be combined with offers and sales exempt under any other section of the Louisiana Securities Law; 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.
- D. Any general partner, or executive officer of any general partner, of an issuer of an issuer or executive officer of an issuer, shall not be deemed to be in violation of §703.B.1 so long as he is not paid or given, directly or indirectly, any commission, fee, or other remuneration for soliciting any prospective purchaser in this state and such solicitation activities do not constitute his principal service to such issuer or such partner of such issuer. Such persons shall not be deemed to have received a commission, fee, or other remuneration within the meaning of §703.B.1 by reason of having received payments from an issuer or from a partner

of an issuer for services performed for the payor that are not directly related to the solicitation of prospective purchasers.

- E. The commissioner may, by rule or order, increase the number of purchasers or waive any other conditions of the exemption.
- F. The exemption authorized by this Section shall be known and may be cited as the "Uniform Limited Offering Exemption."

AUTHORITY NOTE: Promulgated in accordance with R.S. 51:709(15).

HISTORICAL NOTE: Promulgated by the Department of Commerce, Office of Financial Institutions, LR 10:742 (October 1984), amended by the Department of Economic Development, Office of Financial Institutions, LR 16:677 (August 1990).

### **§705. Private Offering Exemption**

- A. By authority delegated to the commissioner in R.S. 51:709(15) to promulgate rules thereunder, a transaction described in Subsection B is determined to be exempt from the registration provisions of R.S. 51:705.
- B. Any offer or sale of securities, other than an offer or sale described in §703.B, made in compliance with §4(2) of the Securities Act of 1933 and which satisfies the following further conditions and limitations:
  - 1. The transaction meets the requirements of §703.B.1.
  - 2. The transaction meets the requirements of §703.B.2.
  - 3. Neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:
    - a. any advertisement, article, notice, or other communications published in any newspaper, magazine or similar media or broadcast over television or radio;
    - b. any seminar or meeting whose attendees have been invited by any general solicitation or general advertising.
  - 4.a. Any offer or sale not involving any public offering so long as:
    - i. the issuer or other seller shall reasonably believe that there are no more than 35 purchasers of securities from the issuer or other seller in any offering during any period of 12 consecutive months; and
    - ii. the buyers represent that they are buying for investment and not for public distribution or resale.
  - b. For purposes of calculating the number of purchasers under this Paragraph 4, Rule 501(e) promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended, as that rule now exists and as it may hereafter be amended from time-to-time, shall apply.

- c. For purposes of determining whether a purchaser is a resident of Louisiana within the meaning of this Paragraph 4, Rule 147(d) promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended, as that rule now exists and as it may hereafter be amended from time-to-time, shall apply.
  5. The transaction meets the requirements of Rule 502(d) promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended, as that rule now exists and as it may hereafter be amended from time-to-time.
- C. Without excluding other types of communications which may not constitute general solicitation or general advertising, the following types of communications shall not be deemed to violate the prohibitions of §705.B.3 of this Section:
1. a notice, circular, advertisement, letter, article, or other communication published or transmitted by an issuer, a sponsor, a dealer or an affiliate of an issuer, whether or not such communication is published during the time when an offering (the "current offering") is being made by such issuer, sponsor, dealer, or affiliate, that another offering has been completed, that another program has sold property owned by such program, that another program has been completed, or any similar notice not making any reference to the current offering;
  2. generic advertising by a dealer which refers to the types of investments offered by such dealer and which does not make reference to any specific offering sponsored by the dealer or an affiliate of the dealer;
  3. a notice, circular, advertisement, letter, article or other communication concerning the business of the issuer, a sponsor or one or more of their affiliates or concerning the industry in which the issuer, a sponsor or one or more of their affiliates is engaged and which communication does not make reference to the offering of securities by the issuer, the sponsor or their affiliates;
  4. an article, speech, letter or other communication concerning the issuer, a sponsor, a dealer or one or more of their affiliates which is not paid for by any of such persons, and which is by nature more educational or informative than solicitatory, even though such article, speech, letter or other communication makes reference to offerings by such persons in general;
  5. an article, speech, letter or other communication concerning the issuer, a sponsor, a dealer or one or more of their affiliates, which is not paid for by any of such persons, which is by nature more educational or informative than solicitatory, and which is published by someone other than such issuer, sponsor, dealer or one or more of their affiliates, even though such article, speech, letter or other communication makes references to offerings of such persons in general and to specific offerings of such persons currently being made;
  6. a seminar or meeting whose attendees have not been invited by any general solicitation or general advertising.
- D.1. For purposes of this Section, offers and sales that are made more than six months before the start of an offering or are made more than six months after completion of an offering will not be considered part of that offering, so long as during those six-month periods there are no offers or sales of securities by or for the issuer that are of the same or similar class as

those offered or sold under the offering, other than those offers or sales of securities under an employee benefit plan as defined in Rule 405 promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended.

2. For purposes of this Section, offers, offers to sell, offers for sale and sales of interests, including preformation interests, in a partnership shall be deemed to constitute a discrete offering not integrable with other offers or sales of interests in other entities involving the same sponsor or an affiliate thereof (a common sponsor), even if other safe harbor provisions provided by rule and administrative or judicial interpretation are not available, if all of the following conditions are met. No presumption shall arise as to whether offerings that do not meet all of the following conditions are integrable with other offerings, and the administrative and judicial interpretations on integration in effect at the time thereof shall apply.
  - a. **Separate Entity.** The partnership shall be a separate legal entity with separate books and records, and funds received by or contributed to the partnership shall not be commingled with funds of a common sponsor or any other entity with a common sponsor.
  - b. **Economic Independence.** The partnership shall, at the time interests therein are offered and sold, have an independent opportunity to meet its primary investment objectives, i.e., the economic results of its investments shall not be substantially dependent upon the creation, continued existence or economic results of the investments of another entity previously, simultaneously, or subsequently formed with a common sponsor.
  - c. **Application of Proceeds.** Whether or not the assets in which the partnership proposes to invest are specifically identified to offerees, no material portion of the gross offering proceeds of the partnership shall be invested in properties in which another entity with a common sponsor shall invest, or shall have invested (and continue to hold invested) a material portion of its gross offering proceeds.
  - d. If the assets in which the partnership intends to invest at least 50 percent of its gross offering proceeds as its principal business or businesses are not specifically identified to offerees, then:
    - i. each other entity with a common sponsor previously formed to conduct the same general types of activities shall have invested or committed for investment the major portion of its gross offering proceeds prior to the commencement of the offering of the partnership interests; and
    - ii. no simultaneous or subsequent offering of interests in another entity with a common sponsor organized for the same general types of activities shall be commenced before the partnership has invested or committed for investment the major portion of its gross offering proceeds, unless the assets in which such other entity intends to invest at least 50 percent of its gross offering proceeds are specifically identified to its offerees.

**AUTHORITY NOTE:** Promulgated in accordance with R.S. 51:709(15).

**HISTORICAL NOTE:** Promulgated by the Department of Commerce, Office of Financial Institutions, LR 10:742 (October 1984), amended by the Department of Economic Development, Office of Financial Institutions, LR 16:678 (August 1990).

**§707. Effective Date of Chapter 7**

- A. This Chapter 7 shall become effective upon publication in the *Louisiana Register* §§701-725, both inclusive, of Chapter 7 of Title 10, Part XIII of the *Louisiana Administrative Code*, which includes the private offering exemption rules adopted by the commissioner effective October 20, 1984, as supplemented on March 20, 1987, are hereby rescinded in their entirety and shall be null and void on and after the effective date of this Chapter 7.

AUTHORITY NOTE: Promulgated in accordance with R.S. 51:709(15).

HISTORICAL NOTE: Promulgated by the Department of Commerce, Office of Financial Institutions, LR 10:742 (October 1984), amended by the Department of Economic Development, Office of Financial Institutions, LR 16:679 (August 1990).