

**ACT 214**

S.B. NO. 1071

A Bill for an Act Relating to Securities.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The legislature finds that many small businesses in Hawaii with significant potential are unable to obtain access to equity capital. Small businesses, particularly new business start-ups, often find it difficult to secure venture capital for financing in their early stages. Relatively few venture capitalists, for example, are willing to invest in early-stage financing opportunities. Furthermore, initial public

offerings may not be right for most small companies. The major sources of financing for average new small businesses are owners' savings, loans from commercial banks, and funds from relatives and friends.

Many states, however, have allowed a new kind of equity financing, the Small Corporate Offerings Registration (SCOR), a uniform registration system that allows a company to raise up to \$1,000,000 by selling common stock directly to the public for at least \$5 per share. The legislature finds that SCOR offerings, which are registered with the State, cut through many of the existing barriers that prevent small companies from obtaining financing. Offerings may be sold to anyone, including family members, acquaintances, and other interested investors, in amounts as little as \$1,000, and shares may be easily resold.

The legislature further finds that SCOR provides an additional means by which new capital may be brought to Hawaii. The Small Business Administration will allow the use of SCOR documents to establish the Angel Capital Electronic Network (ACE-Net) in Hawaii. This is a nationwide directory of "angels" or high net worth individual investors who are seeking investments in high growth companies. SCOR and the accredited investor exemption set forth in this bill will supplement and complement the small business investment program, reduce the amount of disclosure required of larger and more complicated public offerings, and attract additional private sector investment.

Existing state securities laws, however, may prevent the implementation of the SCOR uniform registration system. The federal securities laws governing the private sale of securities are collectively known as "Regulation D". The State's response to Regulation D is the Uniform Securities Act (Modified), which is contained in chapter 485, Hawaii Revised Statutes. Pursuant to the Small Business Incentive Act of 1980, the North American Securities Administrators Association has developed "Form U-7", a question and answer disclosure document for small companies that seek to provide a complete listing of all disclosure issues that could apply in any small company offering exempt from the Securities and Exchange Commission registration under Rule 504 of Regulation D.

The legislature finds that Form U-7 satisfies the prospectus required for registration by qualification under the Uniform Securities Act; provided that all of the qualifications in the instructions for use of the form are fulfilled. The legislature further finds that allowing SCOR registration will assist Hawaii's businesses to obtain needed financing and is consistent with the Hawaii State Planning Act's economic priority guidelines under section 226-103(a), Hawaii Revised Statutes, to seek "a variety of means to increase the availability of investment capital for new and expanding enterprises" to "stimulate economic growth and encourage business expansion and development to provide needed jobs for Hawaii's people and achieve a stable and diversified economy."

SECTION 2. Chapter 485, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately designated and to read as follows:

**"§485-A Prospectus; small corporate offerings registration form. (a)**

The prospectus required for registration by qualification under section 485-10(b)(3) may be satisfied by the Small Corporate Offerings Registration Form (Form U-7) adopted by the North American Securities Administrators Association; provided that all of the qualifications in the instructions for use of the form are fulfilled.

(b) The commissioner shall adopt rules pursuant to chapter 91 to implement this section.

**§485-B General announcements of proposed offerings to accredited investors. (a)** No transaction shall be exempt under section 485-6(16) unless it

complies with this section. A general announcement of a proposed offering for which the issuer is claiming the exemption under section 485-6(16), may be made by any means and shall include only the following information unless specifically permitted by the commissioner:

- (1) The name, address, and telephone number of the issuer of the securities;
- (2) The name, a brief description, and price, if known, of any security to be issued;
- (3) A brief description of the business of the issuer in twenty-five words or less;
- (4) The type, number, and aggregate number of securities being offered;
- (5) The name, address, and telephone number of the person to contact for additional information; and
- (6) A statement that:
  - (A) Sales will only be made to accredited investors;
  - (B) No money or other consideration is being solicited or will be accepted by way of this general announcement; and
  - (C) The securities have not been registered with or approved by any state securities agency or the U.S. Securities and Exchange Commission and are being offered and sold pursuant to an exemption from registration.

(b) Dissemination of the general announcement of the proposed offering to persons who are not accredited investors shall not disqualify the issuer from claiming the exemption under section 485-6(16).

(c) The issuer, in connection with an offer, may provide information in addition to the general announcement under subsection (a), if such information:

- (1) Is delivered through an electronic database that is restricted to persons who have been prequalified as accredited investors; or
- (2) Is delivered after the issuer reasonably believes that the prospective purchase is an accredited investor.

(d) No telephone solicitation shall be permitted unless prior to placing the call, the issuer reasonably believes that the prospective purchaser to be solicited is an accredited investor.

(e) For the purposes of this section, "accredited investor" shall have the same meaning as provided in 17 Code of Federal Regulations section 230.501(a)."

SECTION 3. Section 485-6, Hawaii Revised Statutes, is amended to read as follows:

**"§485-6 Exempt transactions.** The following transactions are exempted from sections 485-4.5, 485-8, and 485-25(a)(7):

- (1) Any isolated nonissuer transaction, whether effected through a dealer or not;
- (2) Any nonissuer distribution of an outstanding security if the manual of Hawaiian securities or any other recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years (or during the existence of the issuer and any predecessors if less than three years) in the payment of principal, interest, or dividends on the security;

- (3) Any nonissuer transaction effected by or through a registered dealer pursuant to an unsolicited order or offer to buy;
- (4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;
- (5) Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;
- (6) Any transaction by a personal representative, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;
- (7) Any transaction executed by a bona fide pledgee without any purpose of evading this chapter;
- (8) Any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity;
- (9) Any transaction pursuant to an offer directed by the offerer to not more than twenty-five persons (other than those designated in paragraph (8)) in the State during any period of twelve consecutive months, whether or not the offerer or any of the offerees is then present in the State, if all buyers represent that they are purchasing for investment (rather than with a present view to resale) and the seller reasonably accepts their representations as true, and no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer;
- (10) Any offer or sale of a preorganization certificate or subscription for any security to be issued by any person if no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, and the number of subscribers does not exceed twenty-five;
- (11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within ninety days of their issuance, if no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in the State;
- (12) Any offer (but not a sale) of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933, if no stop order or refusal order is in effect and no public proceeding or examination looking toward the order is pending under either this chapter or the Act;
- (13) Any offer or sale by or through a real estate broker or real estate salesperson licensed under the laws of the State, of a security issued on or after July 1, 1961, by a corporation organized under the laws of the State, the holder of which is entitled solely by reason of the holder's ownership thereof, to occupy for dwelling purposes, or to a lease which entitles the holder to occupy for dwelling purposes a house, or an apartment in a building, owned or leased by the corporation, subject, however, to section 485-7;
- (14) Any offer or sale by or through a real estate broker or real estate salesperson licensed under the laws of the State of an apartment in a condominium project, and a rental management contract relating to the

apartment, including an interest in a general or limited partnership formed for the purpose of managing the rental of apartments if the rental management contract or the interest in the general or limited partnership is offered at the same time as the apartment is offered. The words "apartment", "condominium", and "project" are defined as they are defined in section 514A-3; [and]

- (15) Any transactions not involving a public offering, and in addition, any categories of transactions effected in accordance with any rules the commissioner may issue under chapter 91 pursuant to this paragraph with a view to uniformity with federal law<sup>1</sup>; and

- (16) (A) Any transactions involving the offer or sale of a security by an issuer to an accredited investor that meet the following requirements:

- (i) The issuer reasonably believes that the sale is to persons who are accredited investors;
- (ii) The issuer is not in the development stage, without specific business plan or purpose;
- (iii) The issuer has not indicated that the issuer's business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and
- (iv) The issuer reasonably believes that all purchasers are purchasing for investment purposes and not with the view to, or for sales in connection with, a distribution of the security. Any resale of a security sold in reliance of this exemption within twelve months of sale shall be presumed to be made with a view to distribute and not to invest, except a resale pursuant to a registration statement effective under section 485-8, or to an accredited investor pursuant to an exemption available under chapter 485;

- (B) The exemption under this paragraph shall not apply to an issuer if the issuer; any affiliated issuer; any beneficial owner of ten per cent or more of any class of the issuer's equity securities; any issuer's predecessor, director, officer, general partner, or promoter presently connected in any capacity with the issuer; and any underwriter or partner, director, or officer of the underwriter of the securities to be offered:

- (i) Within the last five years has filed a registration statement that is the subject of a currently effective registration stop order entered by any state securities administrator or the United States Securities and Exchange Commission;
- (ii) Within the last five years has been convicted of any criminal offense in connection with the offer, purchase, or sale of any security, or involving fraud or deceit;
- (iii) Is currently subject to any state or federal administrative enforcement order or judgment entered within the last five years, finding fraud or deceit in connection with the purchase or sale of any security; or
- (iv) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminarily, or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security;

- (C) Subparagraph (B) shall not apply if:

- (i) The party subject to the disqualification is licensed or registered to conduct securities-related business in the state in which the order, judgment, or decree creating the disqualification was entered against such party;
  - (ii) Before the first offer under this exemption, the commissioner, or the court or regulatory authority that entered the order, judgment, or decree waives the disqualifications; or
  - (iii) The issuer establishes that the issuer did not know and in the exercise of reasonable care, based on a factual inquiry, could not have known that a disqualification existed under this paragraph;
- (D) An issuer claiming the exemption under this section, within fifteen days after the first sale in this state, shall file with the commissioner a notice of transaction, a consent to service of process, a copy of the general announcement as required by section 485-C<sup>2</sup>, and a \$200 filing fee; and
- (E) For the purposes of this paragraph, “accredited investor” shall have the same meaning as provided in 17 Code of Federal Regulations section 230.501(a).”

SECTION 4. In codifying the new sections added to chapter 485, Hawaii Revised Statutes, by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 5. Statutory material to be repealed is bracketed. New statutory material is underscored.<sup>3</sup>

SECTION 6. This Act shall take effect upon its approval.

(Approved July 2, 1999.)

#### Notes

1. Prior to amendment “.” appeared here.
2. So in original.
3. Edited pursuant to HRS §23G-16.5.