

Vermont Department of
Financial Regulation

Division of Securities

Securities Bulletin No. 15-01-S

Guidance on Utilizing the Rule Providing for
the Vermont Small Business Offerings (“VSBO”)

This Bulletin is designed for small businesses that may be considering raising capital through a VSBO offering and provides clarification as to the contents of an offering document, certain financial disclosures, and other requirements. This guidance summarizes other key considerations, however it is not comprehensive information relevant to a VSBO offering.

VSBO is designed as a user friendly way for Vermont businesses to raise capital, whether directly from fellow Vermonters or through interstate offerings. In that spirit, the Securities Division of the Department of Financial Regulation (the “Division”) issues this Bulletin to help guide small business owners prepare to offer securities under VSBO.

VSBO Offering Documents

A VSBO offering document must provide potential investors with material information necessary to evaluate the business, the offering, and whether to invest. In connection with a VSBO offering, it is 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.” (See VSBO §(c)(6)). Therefore, misrepresenting, concealing, or failing to disclose information that a reasonable investor would consider material in making the decision to invest in a VSBO offering may constitute securities fraud. Full and accurate disclosure is critical.

Vermont businesses contemplating a VSBO offering should consult legal counsel and/or contact the Department of Financial Regulation early in their planning process to discuss questions and concerns.

I. Disclosure of Financial Statements

VSBO requires companies raising between one million (1,000,000) dollars and two million (2,000,000) dollars to disclose audited financial statements to each prospective investor.

The following is guidance as to the proper financial disclosure for companies seeking to raise one million (1,000,000) dollars or less. As outlined below, the appropriate level of financial disclosure depends on the operational history of the company and the nature of the security offered.

Companies with Less Than One Year of Operating History. Companies with limited or no operational history are unable to provide historical financial statements. The Commissioner, however, expects these companies to provide a balance sheet listing assets and liabilities with the offering document. The balance sheet may be unaudited and prepared internally.

Companies with More Than One Year of Operating History. Companies with more than one (1) year of operating history should provide balance sheets and income statements for the previous three (3) fiscal years in which they operated. Balance sheets and income statements may be unaudited and prepared internally. A company that has had audited or unaudited financial statements prepared by a third party must include such financial statements in the company's offering documents.

Companies Issuing Preferred Stock, Convertible Debt Notes, or Debt Instruments. Companies wishing to offer preferred stock, convertible debt notes, or issue debt instruments with fixed interest payments for the duration of the subscription agreement under VSBO must include, statements of cash flow in addition to balance sheets and income statements for the three (3) previous fiscal years in which they operated.

Companies must demonstrate a reasonable expectation that they are able to pay any dividend or interest obligations under the offering. Companies unable to demonstrate a reasonable expectation of this ability should not issue preferred stock, convertible debt notes, or debt instruments with fixed interest payments for the duration of the subscription agreement.

Further, a company offering preferred stock must disclose:

- Whether dividends on the preferred stock are cumulative;
- The risks of failure to declare or pay dividends on the preferred stock; and
- The equity characteristics of any convertible preferred stock being offered.

II. Financial Condition Discussion

In addition to providing financial statements, a company making a VSBO offering should provide a narrative discussion of its financial condition. This discussion should address, to the extent material, the company's historical results of operations, its liquidity, and its capital resources. A company with no prior operating history should focus the discussion on financial and operational milestones and challenges. A company with prior operating history should focus the discussion on whether historical earnings and cash flows represent what investors should expect in the future. Discussion of financial condition should take into account the proceeds of the offering, how the proceeds from the offering will affect liquidity, whether offering proceeds or any other additional funds are necessary to the viability of the business, and other available sources of capital to the business, such as lines of credit or required contributions by principal shareholders.

III. Legend and Other Disclosure Items

The Offering Document must contain a legend which substantially conforms to the following:

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.

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 representations made to the contrary is a criminal offense.

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.

VSBO offering documents should also disclose:

- A description of the company's business and the anticipated business plan;
- The purpose and intended use of the proceeds of the offering with respect to the target offering amount;
- The company's ownership and capital structure including debt;
- General and specific potential risks facing the company;
- The potential risks facing the investor participating in the offering;
- The name, legal status and physical address of the company;
- The names of all directors and officers (and any persons occupying a similar status or performing a similar function), and each person holding more than twenty (20) percent of the shares of the company;
- Prominent disclaimer that intrastate exemption offerings are only available for Vermont residents;
- Prominent disclaimer that the maximum investment is per person is \$10,000, unless the person is an Accredited or Certified Investor;
- The offering's minimum raise amount, the deadline for reaching that goal and what will happen if the goal is not reached;
- The price of the securities and the method for determining the price; and
- Prominent disclosure of the offering's exempt or registration status.

IV. Plain English Disclosure

The Division does not prescribe a set format for the offering document; however, companies should strive to write such documents in plain English.

Plain English writing does not mean deleting complex information to make the offering document easier to understand. For investors to make informed decisions, disclosure documents

must sometimes impart complex information. Using plain English assures the orderly and clear presentation of complex information so that investors have the best possible chance of understanding it.

Issuers may wish to consult the U.S. Securities and Exchange Commission's *A Plain English Handbook* for additional tips and guidance on drafting plain English disclosures, which is available at <https://www.sec.gov/pdf/handbook.pdf>.

Jurisdictional and Investor Requirements

Intrastate Exemption. VSBO offerings under subsection (b)(1) are exempt from federal securities registration under the "intrastate offering exemption." See SEC Rule 147, 17 C.F.R. § 230.147. This exemption facilitates the financing of local business operations. Therefore, a company must:

- Be organized in Vermont;
- Carry out a significant amount of its business in Vermont; and
- Make offers and sales only to residents of Vermont.

If a company holds significant assets outside of Vermont, or derives a substantial portion of its revenues outside Vermont, it may have difficulty qualifying for the exemption. It is recommended that legal counsel be consulted to ensure the requirements of Rule 147 are met. Further, a company must determine whether each investor is a resident of the State of Vermont. The residency requirement should be clearly stated in the offering documents and a certification from each investor indicating that they are a resident of the State of Vermont must be obtained. (See "Use of Websites and Social Media" below.)

Knowledgeable Investor Standard. VSBO requires that an investor possesses such knowledge, either alone or through a representative, to be capable of evaluating the merits and the risks of their investment. Accordingly, a company should clearly outline the knowledge requirement in its offering documents and obtain a certification from each investor that they read and understood the offering document and the risks associated with their investment and are capable of making such determinations.

Accredited and Certified Investors. VSBO subsection (c)(1) limits the amount an individual can invest in a VSBO offering based on the investor's financial status, as defined in subsection (a) of the rule. Individual investment limits should be clearly indicated in the offering documents. The company must verify that any investor purchasing over ten thousand (10,000) dollars in the offering satisfies the definition of Accredited or Certified Investor.

Use of Websites and Social Media

General Solicitation. Vermont law allows the use of websites and social media to promote VSBO offerings; however, the Division provides the following guidance to ensure that an offer under the intrastate exemption does not inadvertently destroy the federal Intrastate Offerings Exemption.

The SEC issued guidance regarding general advertising or solicitation of intrastate offerings through websites and social media. The SEC guidance reads in part:

[I]ssuers could implement technological measures to limit communications that are offers only to those persons whose Internet Protocol, or IP, address originates from a particular state or territory and prevent any offers to be made to persons whose IP address originates in other states or territories. Offers should include disclaimers and restrictive legends making it clear that the offering is limited to residents of the relevant state under applicable law. Issuers must comply with all other conditions of Rule 147, including that sales may only be made to residents of the same state as the issuer. [October 2, 2014]

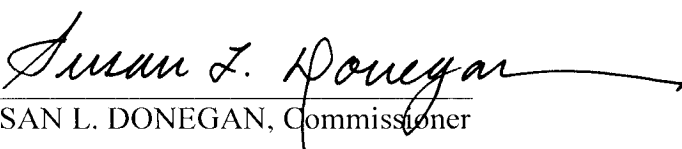
The full SEC Compliance and Disclosure Interpretation is available at:
<https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>

Other than limiting communications based on an investor's IP address, the Division also accepts other technological measures to ensure compliance with SEC General Solicitation restrictions for the intrastate exemption, such as prospective investors certifying and/or verifying Vermont residency (such as checking a box on a website landing page and/or submitting a photo of the investor's state issued ID) before accessing full offering documents, subscription agreements, fact sheets, etc. located on a company's website or social media accounts. Other methods of verification may also be permissible.

Third Party Portal Registration. Any entity acting as a third party portal must register with the Division in accordance with subsection (d)(1) of the rule. This registration must be renewed annually by filing in accordance with subsection (d)(1). Any third party portal not acting as a Broker-Dealer (i.e. is exempt from Broker-Dealer registration under subsection (d)(2)) must only register with the Division as a third party portal under subsection (d)(1). Any third party portal acting as a Broker-Dealer (i.e. is not exempt under Broker-Dealer registration under subsection (d)(2)) must also be registered with the Division as a non-FINRA member Broker-Dealer, with the state and FINRA as a FINRA member Broker-Dealer, or with the SEC as a Funding Portal. The filing fee specified under subsection (d)(1)(D) is waived for third party portals registered as a Broker-Dealer or Funding Portal.

Please note this guidance is not a full discussion of all material considerations necessary when preparing a VSBO offering. The Division encourages those contemplating a VSBO offering to contact legal counsel and/or the Division early in the planning process. Questions and concerns may be directed to Christopher Smith, Director of Capital Markets at christopher.smith@state.vt.us

Dated at Montpelier, Vermont this 20th day of July, 2015.


SUSAN L. DONEGAN, Commissioner