

HB0171S01 compared with HB0171

~~deleted text~~ shows text that was in HB0171 but was deleted in HB0171S01.

Inserted text shows text that was not in HB0171 but was inserted into HB0171S01.

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Representative Brian M. Greene proposes the following substitute bill:

SECURITIES EXEMPTIONS AMENDMENTS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian M. Greene

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies provisions of the Utah Uniform Securities Act related to exemptions.

Highlighted Provisions:

This bill:

- ▶ enacts an intrastate exemption from registration and disclosure requirements; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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61-1-14, as last amended by Laws of Utah 2016, Chapter 25

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **61-1-14** is amended to read:

61-1-14. Exemptions.

(1) The following securities are exempt from Sections 61-1-7 and 61-1-15:

(a) a security, including a revenue obligation, issued or guaranteed by the United States, a state, a political subdivision of a state, or an agency or corporate or other instrumentality of one or more of the foregoing, or a certificate of deposit for any of the foregoing;

(b) a security issued or guaranteed by Canada, a Canadian province, a political subdivision of a Canadian province, an agency or corporate or other instrumentality of one or more of the foregoing, or another foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

(c) a security issued by and representing an interest in or a debt of, or guaranteed by, a depository institution organized under the laws of the United States, or a depository institution or trust company supervised under the laws of a state;

(d) a security issued or guaranteed by a public utility or a security regulated in respect of its rates or in its issuance by a governmental authority of the United States, a state, Canada, or a Canadian province;

(e) (i) a federal covered security specified in the Securities Act of 1933, Section 18(b)(1), 15 U.S.C. Sec. 77r(b)(1), or by rule adopted under that provision;

(ii) a security listed or approved for listing on another securities market specified by rule under this chapter;

(iii) any of the following with respect to a security described in Subsection (1)(e)(i) or (ii):

(A) a put or a call option contract;

(B) a warrant; or

(C) a subscription right on or with respect to the security;

(iv) an option or similar derivative security on a security or an index of securities or

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foreign currencies issued by a clearing agency that is:

(A) registered under the Securities Exchange Act of 1934; and

(B) listed or designated for trading on a national securities exchange, or a facility of a national securities association registered under the Securities Exchange Act of 1934;

(v) an offer or sale, of the underlying security in connection with the offer, sale, or exercise of an option or other security that was exempt when the option or other security was written or issued; or

(vi) an option or a derivative security designated by the Securities and Exchange Commission under Securities Exchange Act of 1934, Section 9(b), 15 U.S.C. Sec. 78i(b);

(f) (i) a security issued by a person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association; and

(ii) a security issued by a corporation organized under Title 3, Chapter 1, General Provisions Relating to Agricultural Cooperative Associations, and a security issued by a corporation to which that chapter is made applicable by compliance with Section 3-1-21;

(g) an investment contract issued in connection with an employees' stock purchase, option, savings, pension, profit-sharing, or similar benefit plan;

(h) a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940; and

(i) a security as to which the director, by rule or order, finds that registration is not necessary or appropriate for the protection of investors.

(2) The following transactions are exempt from Sections 61-1-7 and 61-1-15:

(a) an isolated nonissuer transaction, whether effected through a broker-dealer or not;

(b) a nonissuer transaction in an outstanding security, if as provided by rule of the division:

(i) information about the issuer of the security as required by the division is currently listed in a securities manual recognized by the division, and the listing is based upon such information as required by rule of the division; or

(ii) the security has a fixed maturity or a fixed interest or dividend provision and there is 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

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principal, interest, or dividends on the security;

(c) a nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy;

(d) a transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(e) a 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;

(f) a transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(g) a transaction executed by a bona fide pledgee without a purpose of evading this chapter;

(h) an offer or sale to one of the following whether the purchaser is acting for itself or in a fiduciary capacity:

(i) a depository institution;

(ii) a trust company;

(iii) an insurance company;

(iv) an investment company as defined in [~~the Investment Company Act of 1940~~] 15 U.S.C. Sec. 80a-3;

(v) a pension or profit-sharing trust;

(vi) other financial institution or institutional investor; or

(vii) a broker-dealer;

(i) an offer or sale of a preorganization certificate or subscription if:

(i) no commission or other remuneration is paid or given directly or indirectly for soliciting a prospective subscriber;

(ii) the number of subscribers acquiring a legal or beneficial interest therein does not exceed 10;

(iii) there is no general advertising or solicitation in connection with the offer or sale; and

(iv) no payment is made by a subscriber;

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(j) subject to Subsection ~~(6)~~, a transaction pursuant to an offer by an issuer of its securities to its existing securities holders, if:

(i) no commission or other remuneration, other than a standby commission is paid or given directly or indirectly for soliciting a security holder in this state; and

(ii) the transaction constitutes:

(A) the conversion of convertible securities;

(B) the exercise of nontransferable rights or warrants;

(C) the exercise of transferable rights or warrants if the rights or warrants are exercisable not more than 90 days after their issuance;

(D) the purchase of securities under a preemptive right; or

(E) a transaction other than one specified in Subsections (2)(j)(ii)(A) through (D) if:

(I) the division is furnished with:

(Aa) a general description of the transaction;

(Bb) the disclosure materials to be furnished to the issuer's securities holders in the transaction; and

(Cc) a non-refundable fee; and

(II) the division does not, by order, deny or revoke the exemption within 20 working days after the day on which the filing required by Subsection (2)(j)(ii)(E)(I) is complete;

(k) an offer, but not a sale, of a security for which a registration statement is 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 such an order is pending;

(l) a distribution of securities as a dividend if the person distributing the dividend is the issuer of the securities distributed;

(m) a nonissuer transaction effected by or through a registered broker-dealer where the broker-dealer or issuer files with the division, and the broker-dealer maintains in the broker-dealer's records, and makes reasonably available upon request to a person expressing an interest in a proposed transaction in the security with the broker-dealer information prescribed by the division under its rules;

(n) a transaction not involving a public offering;

(o) an offer or sale of "condominium units" or "time period units" as those terms are defined in Title 57, Chapter 8, Condominium Ownership Act, whether or not to be sold by

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installment contract, if the following are complied with:

(i) Title 57, Chapter 8, Condominium Ownership Act, or if the units are located in another state, the condominium act of that state;

(ii) Title 57, Chapter 11, Utah Uniform Land Sales Practices Act;

(iii) Title 57, Chapter 19, Timeshare and Camp Resort Act; and

(iv) Title 70C, Utah Consumer Credit Code;

(p) a transaction or series of transactions involving a merger, consolidation, reorganization, recapitalization, reclassification, or sale of assets, if the consideration for which, in whole or in part, is the issuance of securities of a person or persons, and if:

(i) the transaction or series of transactions is incident to a vote of the securities holders of each person involved or by written consent or resolution of some or all of the securities holders of each person involved;

(ii) the vote, consent, or resolution is given under a provision in:

(A) the applicable corporate statute or other controlling statute;

(B) the controlling articles of incorporation, trust indenture, deed of trust, or partnership agreement; or

(C) the controlling agreement among securities holders;

(iii) (A) one person involved in the transaction is required to file proxy or informational materials under Section 14(a) or (c) of the Securities Exchange Act of 1934 or Section 20 of the Investment Company Act of 1940 and has so filed;

(B) one person involved in the transaction is an insurance company that is exempt from filing under Section 12(g)(2)(G) of the Securities Exchange Act of 1934, and has filed proxy or informational materials with the appropriate regulatory agency or official of its domiciliary state; or

(C) all persons involved in the transaction are exempt from filing under Section 12(g)(1) of the Securities Exchange Act of 1934, and file with the division such proxy or informational material as the division requires by rule;

(iv) the proxy or informational material is filed with the division and distributed to all securities holders entitled to vote in the transaction or series of transactions at least 10 working days before any necessary vote by the securities holders or action on any necessary consent or resolution; and

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(v) the division does not, by order, deny or revoke the exemption within 10 working days after filing of the proxy or informational materials;

(q) subject to Subsection ~~ff~~(7)~~ff~~(8), a transaction pursuant to an offer to sell securities of an issuer if:

(i) the transaction is part of an issue in which there are not more than 15 purchasers in this state, other than those designated in Subsection (2)(h), during any 12 consecutive months;

(ii) no general solicitation or general advertising is used in connection with the offer to sell or sale of the securities;

(iii) no commission or other similar compensation is given, directly or indirectly, to a person other than a broker-dealer or agent licensed under this chapter, for soliciting a prospective purchaser in this state;

(iv) the seller reasonably believes that all the purchasers in this state are purchasing for investment; and

(v) the transaction is part of an aggregate offering that does not exceed \$1,000,000, or a greater amount as prescribed by a division rule, during any 12 consecutive months;

(r) a transaction involving a commodity contract or commodity option;

(s) a transaction in a security, whether or not the security or transaction is otherwise exempt if:

(i) the transaction is:

(A) in exchange for one or more outstanding securities, claims, or property interests; or

(B) partly for cash and partly in exchange for one or more outstanding securities, claims, or property interests; and

(ii) the terms and conditions are approved by the director after a hearing under Section 61-1-11.1;

(t) a transaction incident to a judicially approved reorganization in which a security is issued:

(i) in exchange for one or more outstanding securities, claims, or property interests; or

(ii) partly for cash and partly in exchange for one or more outstanding securities, claims, or property interests;

(u) a nonissuer transaction by a federal covered investment adviser with investments under management in excess of \$100,000,000 acting in the exercise of discretionary authority

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in a signed record for the account of others; ~~and~~

(v) a transaction as to which the division finds that registration is not necessary or appropriate for the protection of investors~~[-]; and~~

~~(w) a transaction pursuant to an offer to sell securities of or sale of a security by an issuer, if:~~

~~(i) the transaction is part of an issue that is subject to an offering memorandum that requires that the net proceeds from the issue are used to directly purchase real estate;~~

~~(ii) issuer is a business entity that is authorized to do business in the state;~~

~~(ii) the issuer's principal place of business is in the state;~~

~~(iii) the transaction is an exempt intrastate offering under 15 U.S.C. Sec. 77c(a)(11);~~

~~(iii) the transaction is part of an issue in which the issuer:~~

~~(A) except as provided in Subsection (2)(w)(iii)(B), accepts no more than \$25,000 from each nonaccredited investor;~~

~~(B) has no limit for a nonaccredited investor who acquires the issue as replacement property in an exchange under 26 U.S.C. Sec. 1031; and~~

~~(C) has no limit for an accredited investor, as defined by Rule 501 of Securities Exchange Commission Regulation D, 17 C.F.R. 230.501, except the total limit under Subsection (2)(w)(v);~~

~~(iv) the issuer reasonably believes that all the purchasers in the state are purchasing the security for investment purposes;~~

~~(v) and 17 C.F.R. Sec. 230.147 or 17 C.F.R. Sec. 230.147A;~~

~~(iv) the sum of all cash and other consideration that the issuer receives for the sale all sales of securities in a 12-month period the security does not exceed \$5,000,000;~~

~~(vi) each purchaser and each offeree is a resident of the state;~~

~~(vii):~~

~~(A) \$500,000; or~~

~~(B) \$2,000,000, if the issuer makes available to each prospective purchaser and the division, the documentation resulting from a financial audit of the issuer's most recently completed fiscal year that complies with generally accepted accounting principles;~~

~~(v) the issuer does not accept more than \$5,000 from any single purchaser, unless the purchaser is an accredited investor as defined in 17 C.F.R. Sec. 230.501;~~

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(vi) unless waived by written consent of the division, at least 10 days before the day on which the issuer commences the offering, the issuer:

(A) makes a notice filing with the division in accordance with any rule made by the division in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;

(B) pays the fee established by the division in accordance with Section 61-1-18.4;

(C) provides the division a copy of the disclosure document described in Subsection (2)(w)(ix); and

(D) provides the division a copy of the escrow agreement described in Subsection (2)(w)(vii);

(vii) the issuer enters into an escrow agreement with a depository institution, as defined in Section 7-1-103, authorized to do business in the state, where the issuer will deposit the proceeds of the offering, that states that:

(A) the depository institution is required to act only at the direction of the issuer and does not have any duty or liability to any other person;

(B) the issuer may not access the escrow funds until the aggregate amount of the funds raised from all purchasers is equal to or greater than an amount specified in the escrow agreement;

(C) a purchaser may cancel the purchaser's commitment to invest and receive a refund equal to the amount of the purchaser's commitment if the issuer does not raise the amount specified in the escrow agreement in accordance with Subsection (2)(w)(vii)(B) on or before the time stated in the escrow agreement;

(viii) the issuer is not, either before or as a result of the offering:

(A) an investment company as defined in 15 U.S.C. Sec. 80a-3;

(B) an entity that would be an investment company but for the exclusions provided in 15 U.S.C. Sec. 80a-3(c); or

(C) subject to the reporting requirements described in 15 U.S.C. Sec. 78m or 15 U.S.C. Sec. 78o(d);

(ix) the issuer provides each prospective purchaser ~~an offering memorandum that includes the following disclosures:~~

~~(A) the disclosures required by the form described in 17 C.F.R. Sec. 239.90 or a disclosure document that contains the following:~~

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(A) a clear statement that the security is not registered under federal or state securities laws and that the security is subject to limitations on resale;

(B) a conspicuous legend on the cover page of the disclosure document that meets the requirements established by the division by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;

(C) a description of the issuer's company, including the type of entity, the address, and phone number of the company's principal place of business, the company's history, business plan, and intended use for the proceeds of the offering, including the amounts to be paid as compensation or otherwise to any owner, executive officer, director, managing member, or other person who occupies a similar status or performs similar functions on behalf of the issuer;

(~~B~~)D) the ~~name~~ identity of each person who has more than a 20% ownership interest of any class of securities in the company;

(E) the identity of each executive officer, director, managing member, or other person who occupies a similar status or performs similar functions ~~in the name of or~~ on behalf of the issuer;

~~(C)~~, including each individual's title and prior experience related to business and securities;

(F) the terms and conditions of the security being offered, including the minimum and maximum total number of the securities being offered; the percentage ownership of the company that the offered securities represent or the valuation of the company implied by the price of the offered securities; the price per share, unit, or interest of the offered securities; any restrictions on transfer of the offered securities; and a disclosure of any anticipated future issuance of securities that may dilute the value of the offered securities;

(~~D~~)G) any outstanding securities of the company;

(~~E~~)H) the ~~percentage ownership of the company represented by the offered securities or the valuation of the company implied by the price of the offered securities;~~

~~(F) the price per share, unit, or interest of the securities being offered;~~

~~(G) the general proposed use of the proceeds of the offering;~~

~~(H) the reporting that the issuer will provide each purchaser;~~

~~(I) any restrictions on the transfer of the securities being offered;~~

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~~_____ (J) any anticipated future issuance of securities that may dilute the value;~~ identity of any person, other than a person acting solely as an accountant or an attorney or an employee whose primary job responsibilities involve the issuer's operating business rather than raising capital, who the issuer has or will retain to assist the issuer in conducting the offering and sale of the securities ~~{ being offered }~~, including any website operator;

~~(~~(K)~~I) a description of any litigation, legal proceedings, or pending regulatory~~ ~~{actions that involve}~~ action involving the issuer or the issuer's management;

~~(~~(L)~~ a description of the parcel of real estate that the proceeds will be used to acquire, including, if applicable, a copy of any lease or sublease that affects the real estate; a copy of any environmental or engineering reports related to the real estate; a copy of any loan document related to the real estate; a copy of any management agreement related to the real estate; a copy of any rent rolls, operating history, or tenant financials; and any other~~ ~~{J) the name and address, including the uniform resource locator, of each website that the issuer may use to offer or sell the securities~~;

(K) any additional information that ~~{an ordinarily prudent real estate purchaser would consider material in deciding to acquire real property; and~~

~~_____ (M) a narrative of any material or significant risk factors that might have a negative effect on the securities being offered that includes the following statement: "In making an investment decision, purchasers must rely on their own examination of the issuer and the terms of~~ is material to the offering, ~~including { the merits and risks involved. These securities have not been registered under federal or state law, nor have these securities been recommended or approved by any federal or state regulatory authority. Furthermore, no federal or state authority has confirmed the accuracy or determined the adequacy of any disclosure pertaining to these securities.";~~ and

~~_____ (viii) the issuer of the securities;~~

~~_____ (A) is a business entity organized under the laws of the state;~~

~~_____ (B) is authorized to do business in the state;~~

~~_____ (C) is not an investment company as defined in 15 U.S.C. Sec. 80a-3, either before or as a result of the offering;~~

~~_____ (D) pays no commission or compensation based on the offering size or dollar amount of the transaction, directly or indirectly, to a person other than a broker-dealer or agent licensed~~

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~~under this chapter; and~~

~~— (E) offers or sells the securities through the issuer's own efforts, through one or more agents licensed under this chapter, or through the issuer's owners, members, officers, employees, or affiliates;~~

~~— (3) In a transaction described in } , if appropriate, a discussion of each significant factor that makes the offering speculative or risky, including factors that are unique to the offering; and~~

~~(L) any other disclosures or information required by division rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;~~

~~(x) the issuer requires each purchaser to certify in a format established by division rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, that the purchaser understands and acknowledges the high-risk, speculative nature of the investment; and~~

~~(xi) neither the issuer nor any person affiliated with the issuer or the offering is subject to disqualification under division rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, or 17 C.F.R. Sec. 230.262, unless:~~

~~(A) on a showing of good cause and without prejudice to any other action by the division, the director determines that it is not necessary to deny the issuer an exemption under this Subsection (2)(w)}; the issuer may advertise through any medium, including television, radio, newspaper, the issuer's website or portal, or a third party's website or portal;~~

~~— (3)} (4)} under the circumstances; and~~

~~(B) the issuer establishes that after the issuer made a factual inquiry into whether the issuer was subject to disqualification, the issuer did not know, and, in the exercise of reasonable care, could not have known that the issuer was subject to disqualification.~~

~~(3) A person filing an exemption notice or application shall pay a filing fee as determined under Section 61-1-18.4.~~

~~((3)}(4)}((5)} With the concurrence of the commission, the director, by means of an adjudicative proceeding conducted in accordance with Title 63G, Chapter 4, Administrative Procedures Act, may deny or revoke an exemption specified in Subsection (1)(f) or (g) or in Subsection (2) with respect to:~~

~~(a) a specific security, transaction, or series of transactions; or~~

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(b) a person or issuer, an affiliate or successor to a person or issuer, or an entity subsequently organized by or on behalf of a person or issuer generally and may impose a fine if the director finds that the order is in the public interest and that:

(i) the application for or notice of exemption filed with the division is incomplete in a material respect or contains a statement which was, in the light of the circumstances under which it was made, false or misleading with respect to a material fact;

(ii) this chapter, or a rule, order, or condition lawfully imposed under this chapter has been willfully violated in connection with the offering or exemption by:

(A) the person filing an application for or notice of exemption;

(B) the issuer, a partner, officer, or director of the issuer, a person occupying a similar status or performing similar functions, or a person directly or indirectly controlling or controlled by the issuer, but only if the person filing the application for or notice of exemption is directly or indirectly controlled by or acting for the issuer; or

(C) an underwriter;

(iii) subject to Subsection ~~§(8)~~~~§(9)~~, the security for which the exemption is sought is the subject of an administrative stop order or similar order, or a permanent or temporary injunction or a court of competent jurisdiction entered under another federal or state act applicable to the offering or exemption;

(iv) the issuer's enterprise or method of business includes or would include activities that are illegal where performed;

(v) the offering has worked, has tended to work, or would operate to work a fraud upon purchasers;

(vi) the offering is or was made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options;

(vii) an exemption is sought for a security or transaction that is not eligible for the exemption; or

(viii) the proper filing fee, if required, has not been paid.

~~§(5)~~~~§(6)~~ (a) An order under Subsection ~~§(4)~~~~§(5)~~ may not operate retroactively.

(b) A person may not be considered to have violated Section 61-1-7 or 61-1-15 by

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reason of an offer or sale effected after the entry of an order under this Subsection ~~§(5)~~~~§(6)~~ if the person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the order.

~~§(6)~~~~§(7)~~ The exemption created by Subsection (2)(j) is not available for an offer or sale of a security to an existing securities holder who has acquired the holder's security from the issuer in a transaction in violation of Section 61-1-7.

~~§(7)~~~~§(8)~~ As to a security, a transaction, or a type of security or transaction, the division may:

- (a) withdraw or further condition the exemption described in Subsection (2)(q); or
- (b) waive one or more of the conditions described in Subsection (2)(q).

~~§(8)~~~~§(9)~~ (a) The director may not institute a proceeding against an effective exemption under Subsection ~~§(4)~~~~§(5)~~(b) more than one year from the day on which the order or injunction on which the director relies is issued.

(b) The director may not enter an order under Subsection ~~§(4)~~~~§(5)~~(b) on the basis of an order or injunction entered under another state act unless that order or injunction is issued on the basis of facts that would constitute a ground for a stop order under this section at the time the director enters the order.

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Legislative Review Note

Office of Legislative Research and General Counsel†