

Report to the Chairmen of the House and Senate
Commerce and Labor Committees

Equity Crowdfunding in Virginia

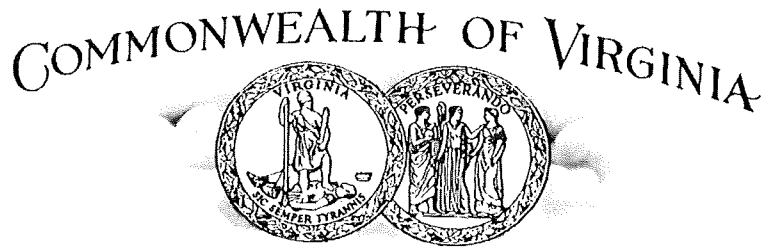
Prepared by the
Virginia State Corporation Commission

July 1, 2016

MARK C. CHRISTIE
COMMISSIONER

JAMES C. DIMITRI
COMMISSIONER

JUDITH WILLIAMS JAGDMANN
COMMISSIONER



JOEL H. PECK
CLERK OF THE COMMISSION
P.O. BOX 1197
RICHMOND, VIRGINIA 23218-1197

STATE CORPORATION COMMISSION

July 1, 2016

The Honorable Frank W. Wagner
Chairman, Senate Committee on Commerce and Labor

The Honorable Terry G. Kilgore
Chairman, House Committee on Commerce and Labor

Gentlemen:

Chapters 400 and 354 of the 2015 Virginia Acts of Assembly direct the State Corporation Commission ("Commission") to provide an annual report on activity related to the implementation of a "crowdfunding" securities offering exemption authorized by § 13.1-514 B 21 of the Code of Virginia.

The Commission is pleased to transmit the attached report regarding the above-referenced directive. As always, we will provide additional information or assistance upon request.

Please let us know if you need additional information or assistance.

Respectfully submitted,

James C. Dimitri, Chairman

Judith Williams Jagdmann, Commissioner

Mark C. Christie, Commissioner

Attachment

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EXECUTIVE SUMMARY

Chapters 400 and 354 of the 2015 Virginia Acts of Assembly¹ direct that,

[T]he State Corporation Commission ("Commission") shall report by July 1, 2016, and each year thereafter until 2020, to the Chairmen of the House and Senate Commerce and Labor Committees on the implementation of this act, including (i) any updates on federal action, (ii) the number of filings in the Commonwealth made pursuant to this act, (iii) the means, median, and total values related to money raised under offerings made pursuant to this act, and (iv) any recommendation for revisions to this act.

The Commission is pleased to submit its initial report to the Chairmen of the House and Senate Commerce and Labor Committees on the implementation of the crowdfunding legislation.

Chapters 400 and 354 authorize the Commission to adopt, by rule or order, an exemption for certain offerings of securities by small and startup companies from the registration provisions of the Virginia Securities Act ("Act").² These small offerings, known as equity "crowdfunding," are intended to cover the offer and sale of securities to a broad base of persons who invest small amounts of money. Effective July 31, 2015, the Commission, by rule, adopted the Intrastate Crowdfunding Exemption ("ICE") that provides the exemption and sets forth certain conditions and filing requirements to be met by the offerors and purchasers of the security. ICE is closely aligned with the federal intrastate exemption so that the state exempted offering also will be exempt from federal securities registration requirements. As of the date of this report, the Commission has not received any notice filings under ICE. With respect to crowdfunding regulations on the federal level, the Securities and Exchange Commission's ("SEC") Regulation Crowdfunding exemption went into effect on May 16, 2016. This federal rule permits companies to use crowdfunding offerings to raise money from investors residing in any state. The SEC also has proposed rule changes to make it easier for a company to qualify for its Rule

¹ Codified in Va. Code § 13.1-514.

² Va. Code § 13.1-501 *et seq.*

147³ intrastate offering exemption. If adopted, these changes will increase the number of companies eligible to use Virginia ICE because ICE is premised on compliance with Federal Rule 147. The Commission has no recommended changes to ICE at this time due to its limited history and the undetermined impacts of the proposed federal rule amendments.

³ Rule 147 is a federal rule that permits small companies to raise a limited amount of funds without actually registering securities with the SEC, thereby not incurring expensive fees associated with registering such securities with the SEC. This rule applies to Section 3(a)11 of the Securities Act of 1933, or intrastate offering exemptions. 17 C.F.R. § 230.147 (2013).

INTRODUCTION AND BACKGROUND

The legislation authorizing the crowdfunding exemption was introduced by Senator John S. Edwards (Senate Bill 763, Chapter 354) and Delegate Scott W. Taylor (House Bill 1360, Chapter 400).

Chapters 400 and 354 authorize the Commission to create, by rule or order, a new securities exemption under the Act for certain offerings of securities by entities formed under the laws of the Commonwealth.

The exemption, known as the intrastate “crowdfunding” exemption, would, under certain specified conditions and to the extent permitted by the Commission, exempt the securities offered and sold in the crowdfunding offering from the securities registration requirements of the Act.⁴ And, as determined by the Commission, the exemption also would exempt broker-dealers and agents from the registration requirements of the Act.⁵

As stipulated in Chapters 400 and 354, in order to qualify for ICE the company must be based in Virginia, organized under Virginia law and must only offer and sell the securities to investors who live in Virginia. The ICE rule also requires the company to provide material disclosures and financial statements to potential investors and to file a prescribed form of notice and fees with the Commission.

Crowdfunding began as a way for the public to donate small amounts of money, often through social networking sites, to help artists, musicians, film makers, charities and other people to finance projects. Then, to facilitate capital formation, a small number of states adopted crowdfunding exemptions intended for community-based securities offerings, permitting members of the public to become investors in small, early-stage businesses and to share in any

⁴ Va. Code § 13.1-507.

⁵ Va. Code § 13.1-504.

profits or revenues of the business. These “equity crowdfunding” exemptions allowed crowdfunding transactions between businesses to solicit the public for investments in securities. To avoid conflicts with federal securities law and its registration requirements, issuers and investors are required to conduct only intrastate transactions.

In 2012, the United States Congress passed the Jumpstart Our Business Startups Act ("JOBS Act") that contained federal crowdfunding legislation.⁶ The JOBS Act authorized the SEC to implement rules that would provide the basis for a federal exemption for equity crowdfunding offerings. On October 23, 2013, the SEC released its proposed rules.⁷ Significantly, the SEC rules featured a requirement that issuers use an intermediary, or website platform, called a “funding portal” to offer and sell the securities using the Internet or other electronic means. Provisions to allow (or mandate) Internet-based offerings started to appear in most state exemption proposals following passage of the JOBS Act. During the federal rulemaking process, several states, in an effort to provide support to local small businesses, determined to move forward to provide crowdfunding options for their citizens.

Prior to the 2015 Session of the Virginia General Assembly ("General Assembly"), the federal crowdfunding rules had not yet been adopted. The General Assembly moved forward with a crowdfunding exemption proposal for Virginia, and Chapters 400 and 354 were enacted effective July 1, 2015 (see Appendix A).

Chapters 400 and 354 prescribed specific standards to be included by the Commission in the crowdfunding exemption. The exemption must apply to offerings that qualify for the federal

⁶ Pub. L. No. 112-106 , 126 Stat. 306 (2012.)

⁷ SEC Release Nos. 33-9470; 34-70741; File No. S7-09-13, RIN 3235-AL37.

“intrastate” offering exemption (§ 3(a)(11) of the Securities Act of 1933⁸ and Rule 147 adopted under the Securities Act of 1933), and the securities must be offered and sold only to residents of Virginia.

To implement the exemption, Chapters 400 and 354 gave the Commission authority to condition the offering in several major respects, including the: (i) aggregate offering proceeds, (ii) maximum consideration paid by an investor, (iii) compensation to be paid to persons for the solicitation of the securities, (iv) disqualification of the issuer or any person related to the issuer, (v) disclosure required to be provided to investors, (vi) escrow of proceeds, (vii) notice filings and fees, and (viii) reporting requirements.

IMPLEMENTATION OF CHAPTERS 400 AND 354

The Commission’s Division of Securities and Retail Franchising (“Division”) submitted a set of rules to the Commission to implement Chapters 400 and 354 after the Governor’s approval of the crowdfunding legislation. The Division proposed adoption of a new rule at 21 VAC 5-40-190 of the Virginia Administrative Code titled "Intrastate Crowdfunding Exemption." Before drafting ICE, the Division reviewed the provisions of other state crowdfunding exemptions in order to be as consistent as possible with intrastate crowdfunding in other states.

On March 30, 2015, the Commission issued its Order to Take Notice (see Appendix B) giving notification of the proposed ICE rule to interested persons and affording the opportunity for public comment and hearing. The Order to Take Notice appended the newly proposed ICE rule as well as minor revisions to certain other Commission rules unrelated to crowdfunding. The public comment period closed on May 22, 2015.

⁸ 15 U.S.C. 77c(a)(11) (exempting “any security which is a part of an issue offered and sold only to persons resident within a single state or territory, where the issuer of such security is a person residing and doing business within, or, if a corporation, incorporated by and doing business within such state or territory.”).

On July 20, 2015, following the public comment period, the Commission issued its Order Adopting Amended Rules ("Order"). That Order is attached hereto as Appendix C. The Order summarized the public comments received on the proposed ICE rule and the revisions made thereto by the Division in response. The Commission's Order adopted the ICE rules, as amended, effective July 31, 2015.

Summary and Highlights of the Intrastate Crowdfunding Exemption

ICE permits Virginia companies to raise capital from Virginia investors in intrastate securities offerings and sales. The exemption is designed to be used for Internet offerings that typically would raise capital from a large number of investors, each of whom would invest a limited amount of money in purchasing the security.

General Offering Requirements of the Intrastate Crowdfunding Exemption

- Companies may raise up to \$1 million in a 12-month period, or up to \$2 million if the company has audited financial statements.
- ICE is aligned with the federal intrastate offering exemption provided under § 3(a)(11) of the Securities Act of 1933 and Rule 147. Companies will be responsible for making sure their transactions meet the requirements of those federal exemptions.
- No commission or fee may be paid to any person for soliciting a transaction under ICE unless that person is registered in Virginia as a broker-dealer or agent. An executive officer, director or managing member of the issuer is exempt from registration if he or she does not receive any commission for offering or selling the exempt securities.
- Companies must specify a minimum offering amount to be raised under ICE. Investor funds must be held at a depository institution located in Virginia until the minimum offering amount is reached.

Issuer Requirements

- ICE is available to corporations, limited liability companies ("LLCs") and other entities that are formed under Virginia law, have their principal place of business in Virginia and are authorized to do business in Virginia. Entities that are authorized to transact business in Virginia but not formed, organized or existing under Virginia law are not eligible for ICE.

- Companies may only offer equity securities under ICE. Debt securities are prohibited.
- Consistent with federal law, under Virginia ICE the issuer may not be an investment company, a hedge fund, or a company that is required to file periodic reports under the federal Securities Exchange Act of 1934. Also, “blank check” companies (those with no defined business operations or business plan) and companies that engage in petroleum exploration or mining are not eligible.
- ICE is not available for companies whose officers, directors, or major shareholders have been found to have violated securities laws or other financial regulations, or have committed other types of misconduct or fraud.

Investor Requirements

- The company may not accept more than \$10,000 from any single investor unless the purchaser is an accredited investor as defined by Rule 501 of Federal Regulation D.⁹

Disclosure Requirements

- ICE requires companies to provide full and fair disclosure of material facts relating to the company and the offering, including a description of the company and the planned use of proceeds of the offering, the risks involved, and the company’s financial statements.
- Disclosure may be made by completing the Commission’s Form ICE and providing it to investors, or by providing a separate disclosure document to investors.
- ICE requires all companies to provide a disclosure that the offering is not registered under federal and state laws.
- Companies also are required to provide written disclosure of the limitations on the resale of securities that are purchased under the Federal Rule 147 exemption.

Reporting Requirements

- A company will have annual reporting obligations to the Commission and investors for three years after the start of the offering. The company can satisfy these obligations by making the report information available on its website, provided a written copy is filed with the Commission and, upon request, is provided to any investor of the ICE offering.
- The report must include, among other items, the compensation received by each executive officer and director of the company and management’s analysis of the company’s business operations and financial position.

⁹ 17 C.F.R. § 230.501.

Financial Statement Requirements

- **Companies offering \$500,000 or less:** The financial statements for the company's previous year may be prepared internally but must be certified by the principal executive officer. No external review, examination or audit of the financial statements by an independent certified public accountant ("CPA") is required.
- **Companies offering more than \$500,000 but not more than \$1,000,000:** The financial statements for the company's most recently completed fiscal year must have undergone a financial review conducted by an independent CPA. A financial review is a limited examination much narrower in scope than an audit, done for the purpose of expressing limited assurance that the statements are prepared according to generally accepted accounting principles ("GAAP").
- **Companies offering more than \$1,000,000:** The financial statements for the company's most recently completed fiscal year must be audited by an independent CPA. An audit is the highest level of analysis and examination and is done to obtain an independent CPA's opinion that the statements are prepared according to GAAP and are free from material misstatement.

Filing Requirements

- The company must make a notice filing of its ICE offering with the Commission and pay a \$250 nonrefundable filing fee.
- The notice filing must include a Form ICE and a copy of the disclosure statement to be provided to prospective investors. The Form ICE is a "fill in the blank" document developed by the Division that also may serve as the company's disclosure statement.
- The notice filing must be made with the Commission at least 20 days before any offer of a security under ICE.
- Use of the Internet for the offering is not permitted until the required notice filing is made.

UPDATES ON FEDERAL CROWDFUNDING ACTION

Crowdfunding

The final federal crowdfunding rules required by the JOBS Act went into effect on May 16, 2016.¹⁰ These final rules are known collectively as "Regulation Crowdfunding."

Below are some key provisions of Regulation Crowdfunding.

¹⁰ SEC Release Nos. 33-9974; 34-76324; File No. S7-09-13, RIN 3235-AL37.

- Eligible companies can raise up to \$1 million in a 12-month period.
- Companies are required to make available to investors and file with the SEC an offering statement and annual reports, each containing financial statements.
- The following limits apply to the amount that an investor may invest in crowdfunded offerings over a 12-month period, in the aggregate:
 - If either annual income or net worth is less than \$100,000, the greater of (1) \$2,000 or (2) 5% of the lesser of the investor's annual income or net worth; or
 - If both annual income and net worth are \$100,000 or more, 10% of the lesser of the investor's annual income or net worth, not to exceed \$100,000.
- Each crowdfunding transaction must be conducted through one intermediary. Each intermediary must be registered with the SEC as a broker-dealer or as a funding portal.
- Continuing disclosure must be made annually by filing a report with the SEC that updates all material information in the company's initial offering statement.

Unlike under Virginia's ICE, a Virginia-based company that elects to conduct a crowdfunding offering under the Regulation Crowdfunding rules may offer and sell the securities to potential investors in multiple states, including Virginia. Also, a foreign company (one not organized under Virginia law) that is based in Virginia may use Regulation Crowdfunding for an interstate crowdfunding offering because compliance with the federal intrastate exemption is not applicable.

The JOBS Act contains a provision that preempts states from registering or reviewing securities sold in their state under Regulation Crowdfunding. States retain the authority to require notice filings of crowdfunding offerings if a state is the principal place of business of the issuer or if a state is home to purchasers of 50% or more of the aggregate value of the securities offered in the crowdfunding campaign. However, unless and until Virginia adopts such notice filing requirements, which would require new legislative authority and a new Commission rule,

companies relying on Regulation Crowdfunding will not be required to make any filing with the Commission.

There are significant differences between the Regulation Crowdfunding and Virginia's ICE that may make ICE a more attractive vehicle under which to conduct a crowdfunding offering. For example, ICE allows the company to raise a higher aggregate amount of offering proceeds (up to \$2 million with financial statements audited by a CPA) than Regulation Crowdfunding (\$1 million with financial statements reviewed by a CPA). The requirements for a company to provide continuing disclosures and ongoing reports are not as stringent under ICE. Regulation Crowdfunding ongoing reporting requirements necessitate regular updates to more information than ICE, which likely will mean additional costs to the company. Also, ICE does not mandate the company's use of a funding portal as does Regulation Crowdfunding.

Proposed Amendments To Rule 147

It is important to monitor any changes to Federal Rule 147 because ICE is premised on the offering qualifying under § 3(a)(11) of the Securities Act of 1933, the federal intrastate offering exemption, and its "safe harbor" Rule 147. Any modification of Rule 147 may require legislative or rulemaking action in Virginia.

The SEC has proposed a series of changes to Rule 147 to modernize and expand this intrastate exemption.¹¹ The proposed changes would update parts of the rule that no longer comport with modern business practices or communications technology and ease some of the issuer eligibility requirements in the current rule.

Among other objectives, the SEC states that by proposing the Rule 147 changes, it seeks to increase the number of businesses that are eligible to seek intrastate financing. By increasing

¹¹ SEC Release Nos. 33-9973; 34-76319; File No. S7-22-15, RIN3235-AL80.

the utility of the federal intrastate exemption, more companies may be able to rely on the new state crowdfunding exemptions to raise capital.

From a state perspective, it appears that several of the proposed Rule 147 changes will make it easier for companies based in Virginia to take advantage of ICE. For example, one of the changes would permit a company with its principal place of business¹² in Virginia to meet the requirements of the federal intrastate exemption, even if it were incorporated in a different state. Under the current framework, this “foreign” company would not meet Rule 147's residency requirement and therefore would be unable to take advantage of ICE.

Chapters 400 and 354 and ICE explicitly reference Rule 147 as it exists today. As currently proposed, the SEC would remove Rule 147 from § 3(a)(11), make amendments to that rule and create a stand-alone exemption. In order to keep Virginia's exemption tied to Rule 147, as amended, the Act and ICE may need to be amended to reference the new exemption.

NUMBER OF EXEMPTION FILINGS IN THE COMMONWEALTH

As of the date of this report, the Commission has not received any filings under ICE. Any information regarding the mean, median, and total values of proceeds raised pursuant to ICE is unavailable at this time.

The Division website highlights information about ICE, including a summary description of the exemption, convenient access to Form ICE, and a direct link to the language of ICE as it appears in the Virginia Administrative Code. *See* www.scc.virginia.gov/srf/bus/crowd.aspx

¹² An issuer's “principal place of business” in proposed Rule 147 is defined as the location in which its officers, partners, or managers primarily direct, control and coordinate the activities of the issuer and further require the issuer to satisfy at least one of four threshold requirements that would help ensure the in-state nature of the issuer's business.

RECOMMENDATIONS FOR REVISIONS TO CHAPTERS 400 AND 354

The Commission has no recommended changes to Chapters 400 or 354 at this time. ICE is a relatively new state registration exemption for small offerings of securities that should become better known to Virginia businesses in the near future. The implementation of the federal crowdfunding rules may bring additional interest to this method of capital formation in general. This increased awareness also may lead Virginia companies to discover the many advantages of ICE over its federal counterpart.

The Division will continue to monitor federal actions that may impact crowdfunding in Virginia. If adjustments to the Act or ICE are necessary, the Division will advise the Commission and suggest the appropriate changes in future ICE reports to the General Assembly.

APPENDIX A

Chapters 400 and 354

2015 Acts of Assembly

VIRGINIA ACTS OF ASSEMBLY -- 2015 SESSION

CHAPTER 400

An Act to amend and reenact § 13.1-514 of the Code of Virginia, relating to the Securities Act; exemption.

[H 1360]

Approved March 23, 2015

Be it enacted by the General Assembly of Virginia:

1. That § 13.1-514 of the Code of Virginia is amended and reenacted as follows:

§ 13.1-514. Exemptions.

A. The following securities are exempted from the securities registration requirements of this chapter:

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

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

3. Any security issued by and representing an interest in or a debt of, or guaranteed by, the International Bank for Reconstruction and Development, or any national bank, or any bank or trust company organized under the laws of any state or trust subsidiary organized under the provisions of Article 3 (§ 6.2-1047 et seq.) of Chapter 10 of Title 6.2;

4. Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association or savings bank, or by any savings and loan association or savings bank which is organized under the laws of this Commonwealth;

5. Any security issued or guaranteed by an insurance company licensed to transact insurance business in this Commonwealth;

6. Any security issued by any credit union, industrial loan association or consumer finance company which is organized under the laws of this Commonwealth and is supervised and examined by the Commission;

7. Any security issued or guaranteed by any railroad, other common carrier or public service company supervised as to its rates and the issuance of its securities by a governmental authority of the United States, any state, Canada or any Canadian province;

8. Any security which is listed or approved for listing upon notice of issuance on the New York Stock Exchange or the American Stock Exchange or any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants admitted to trading in any of said exchanges; or any warrant or right to subscribe to any of the foregoing securities;

9. Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months after the date of issuance, exclusive of days of grace, or any renewal thereof which is likewise limited, or any guaranty of such paper or of any such renewal;

10. Any security issued in connection with an employee's stock purchase, savings, pension, profit-sharing or similar benefit plan. The Commission may by rule or order, as to any security issued pursuant to such plan, specify or designate persons eligible to participate in such plan;

11. Any security issued by a cooperative association organized as a corporation under the laws of this Commonwealth;

12. Any security listed on an exchange registered with the United States Securities and Exchange Commission or quoted on an automated quotation system operated by a national securities association registered with the United States Securities and Exchange Commission and approved by regulations of the State Corporation Commission;

13. Any security issued by any issuer organized under the laws of any foreign country and approved by rule or regulation of the Commission.

B. The following transactions are exempted from the securities, broker-dealer and agent registration requirements of this chapter except as expressly provided in this subsection:

1. Any isolated transaction by the owner or pledgee of a security, whether effected through a broker-dealer or not, which is not directly or indirectly for the benefit of the issuer;

2. Any nonissuer distribution by a registered broker-dealer and its registered agent of a security that has been outstanding in the hands of the public for the past five years, if the issuer in each of the past three fiscal years has lawfully paid dividends on its common stock aggregating at least four percent of its current market price;

3. Any transaction by a registered broker-dealer and its registered agent pursuant to an unsolicited order or offer to buy;

4. 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 indebtedness secured thereby is offered and sold as a unit;

5. Any transaction in his official capacity by a receiver, trustee in bankruptcy or other judicially appointed officer selling securities pursuant to court order;

6. Any offer or sale to a corporation, investment company or pension or profit-sharing trust or to a broker-dealer;

7. a. Any sale of its securities by an issuer or any sale of securities by a registered broker-dealer and its registered agent acting on behalf of an issuer if, after the sale, such issuer has not more than 35 security holders, and if its securities have not been offered to the general public by advertisement or solicitation; or

b. To the extent the Commission by rule or order permits, any sale of its securities by an issuer or any sale of securities by a registered broker-dealer and its registered agent acting on behalf of an issuer to not more than 35 persons in the Commonwealth during any period of 12 consecutive months, whether or not the issuer or any purchaser is then present in the Commonwealth, if the issuer or broker-dealer reasonably believes that all the purchasers in the Commonwealth are purchasing for investment, and if the securities have not been offered to the general public by advertisement or general solicitation. The Commission may, by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption, increase or decrease the number of purchasers permitted, or waive the condition relating to their investment intent. The Commission may assess and collect in connection with any filing pursuant to this exemption a nonrefundable fee not to exceed \$250.

With respect to this subdivision 7, and except to the extent the Commission by rule or order may otherwise permit, the number of security holders of an issuer or the number of purchasers from an issuer, as the case may be, shall not be deemed to include the security holders of any other corporation, partnership, limited liability company, unincorporated association or trust unless it was organized to raise capital for the issuer. Notwithstanding the provisions of subdivision 15, the merger or consolidation of corporations, partnerships, limited liability companies, unincorporated associations or other entities shall be a violation of this chapter if the surviving or new entity has more than 35 security holders or purchasers and all the securities of the parties thereto were issued under this exemption, unless all of the parties thereto have been engaged in transacting business for more than two years prior to the merger or consolidation;

8. Any transaction pursuant to an offer to existing security holders of the issuer including holders of transferable warrants issued to existing security holders and exercisable within 90 days of their issuance, if either (i) no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this Commonwealth or (ii) the issuer first notifies the Commission in writing of the terms of the offer and the Commission does not by order disallow the exemption within five full business days after the date of the receipt of the notice;

9. Any offer (but not a sale) of a security for which registration statements have been filed, but are not effective, under both this chapter and the Securities Act of 1933; but this exemption shall not apply while a stop order is in effect or, after notice to the issuer, while a proceeding or examination looking toward such an order is pending under either act;

10. The issuance of not more than three shares of common stock to one or more of the incorporators of a corporation and the initial transfer thereof;

11. Sales of an issue of bonds, aggregating \$150,000 or less, secured by a first lien deed of trust on realty situated in Virginia, to 30 persons or less who are residents of Virginia;

12. Any offer or sale of any interest in any partnership, corporation, association or other entity created solely to provide residential housing located in the Commonwealth, provided that such offer or sale is by the issuer or by a real estate broker or real estate agent duly licensed in Virginia;

13. The Commission is authorized to create by rule a limited offering exemption, the purpose of which shall be to further the objectives of compatibility with similar exemptions from federal securities regulation and uniformity among the states; providing that such rule shall not exempt broker-dealers or agents from the registration requirements of this chapter, except in the case of an agent of the issuer who either (i) receives no sales commission directly or indirectly for offering or selling the securities or (ii) effects transactions in a security exempt from registration under the Securities Act of 1933 pursuant to rules and regulations promulgated under § 4(2) thereof. Any filing made with the Commission pursuant to any exemption created under this subdivision shall be accompanied by a \$250 fee;

14. The issuance of any security dividend, whether the corporation distributing the dividend is the issuer of the security or not, if nothing of value is given by stockholders for the distribution other than the surrender of a right to a cash dividend where the stockholder can elect to take a dividend in cash or in a security;

15. Any transaction incident to a right of conversion or a statutory or judicially approved reclassification, recapitalization, reorganization, quasi-reorganization, stock split, reverse stock split,

merger, consolidation, sale of assets, or exchange of securities;

16. Any offer or sale of a security issued by a Virginia church if the offer and sale are only to its members and the security is offered and sold only by its members who are Virginia residents and who do not receive remuneration or compensation directly or indirectly for offering or selling the security;

17. Any offer or sale of securities issued by a professional business entity (as defined in subsection A of § 13.1-1102) to a person licensed or otherwise legally authorized to render within this Commonwealth the same professional services (as defined in subsection A of § 13.1-1102) rendered by the professional business entity. Notwithstanding the foregoing, nothing in this subdivision shall be deemed to provide that shares of stock, partnership or membership interests or other representations of ownership in a professional business entity are securities except to the extent otherwise provided by subsection A of this section;

18. Any offer that is communicated on the Internet, World Wide Web or similar proprietary or common carrier electronic system and that is in compliance with requirements prescribed by rule or order of the Commission;

19. To the extent the Commission by rule or order permits, any offer or sale to an accredited investor, as defined by the Commission, if the issuer reasonably believes before the sale that the accredited investor, either alone or with the accredited investor's representative, has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of the prospective investment. The Commission may assess and collect in connection with any filing pursuant to this exemption a nonrefundable fee not to exceed \$250;

20. Any transaction by a bank pursuant to an unsolicited offer or order to buy or sell any security, provided such transaction is not effected by an employee of the bank who is also an employee of a broker-dealer; and

21. *To the extent the Commission by rule or order permits, any security issued by an entity formed, organized, or existing under the laws of the Commonwealth, if:*

a. The offering of the security is conducted in accordance with § 3(a)(11) of the Securities Act of 1933 and Rule 147 adopted under the Securities Act of 1933;

b. The offer and sale of the security are made only to residents of Virginia;

c. The aggregate price of securities in an offering under this exemption does not exceed \$2 million, which sum the Commission, by rule or order, may increase or decrease;

d. The total consideration paid by any purchaser of securities in an offering under this exemption does not exceed \$10,000, unless the purchaser is an accredited investor as defined by Rule 501 of the U.S. Securities and Exchange Commission's Regulation D (17 C.F.R. § 230.501). The Commission, by rule or order, may increase or decrease such limit on the total consideration to be paid by any purchaser of securities in an offering under this exemption;

e. No compensation is paid to employees, agents, or other persons for the solicitation of, or based on the sale of, securities in connection with an offering of securities under this exemption to any person who is not registered as a broker-dealer or agent, except to the extent permitted by rule or order of the Commission;

f. Neither the issuer nor any person related to the issuer is subject to disqualification as established by the Commission by rule or order; and

g. The security is sold in an offering conducted in compliance with any conditions established by rule or order of the Commission, which may include:

(1) Restrictions on the nature of the issuer;

(2) Limitations on the number and manner of offerings;

(3) Disclosures required to be provided to investors, including disclosures of risk factors related to the issuer and the offering;

(4) Requirements that all proceeds received from purchasers be placed in escrow in a depository institution located in the Commonwealth until the minimum amount of the offering is raised;

(5) Filings with the Commission of notices and other materials related to the offering; and

(6) Requirements regarding the preparation and submission of the issuer's financial statements, including (i) the form and content of such statements and (ii) whether such statements are required to be audited or reviewed by an independent certified public accountant in accordance with generally accepted accounting principles.

The Commission may assess and collect in connection with any filing pursuant to this exemption a nonrefundable fee in an amount to be set by the Commission by rule or order, provided such amount shall not exceed \$500.

C. In any proceeding under this chapter, the burden of proving an exemption shall be upon the person claiming it.

2. That the State Corporation Commission shall report by July 1, 2016, and each year thereafter until 2020, to the Chairmen of the House and Senate Commerce and Labor Committees on the implementation of this act, including (i) any updates on federal action, (ii) the number of filings in the Commonwealth made pursuant to this act, (iii) the mean, median, and total values related to money raised under offerings made pursuant to this act, and (iv) any recommendations for

revisions to this act.

3. That the provisions of this act shall expire on July 1, 2020.

VIRGINIA ACTS OF ASSEMBLY -- 2015 SESSION

CHAPTER 354

An Act to amend and reenact § 13.1-514 of the Code of Virginia, relating to the Securities Act; exemption.

[S 763]

Approved March 19, 2015

Be it enacted by the General Assembly of Virginia:

1. That § 13.1-514 of the Code of Virginia is amended and reenacted as follows:

§ 13.1-514. Exemptions.

A. The following securities are exempted from the securities registration requirements of this chapter:

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

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

3. Any security issued by and representing an interest in or a debt of, or guaranteed by, the International Bank for Reconstruction and Development, or any national bank, or any bank or trust company organized under the laws of any state or trust subsidiary organized under the provisions of Article 3 (§ 6.2-1047 et seq.) of Chapter 10 of Title 6.2;

4. Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association or savings bank, or by any savings and loan association or savings bank which is organized under the laws of this Commonwealth;

5. Any security issued or guaranteed by an insurance company licensed to transact insurance business in this Commonwealth;

6. Any security issued by any credit union, industrial loan association or consumer finance company which is organized under the laws of this Commonwealth and is supervised and examined by the Commission;

7. Any security issued or guaranteed by any railroad, other common carrier or public service company supervised as to its rates and the issuance of its securities by a governmental authority of the United States, any state, Canada or any Canadian province;

8. Any security which is listed or approved for listing upon notice of issuance on the New York Stock Exchange or the American Stock Exchange or any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants admitted to trading in any of said exchanges; or any warrant or right to subscribe to any of the foregoing securities;

9. Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months after the date of issuance, exclusive of days of grace, or any renewal thereof which is likewise limited, or any guaranty of such paper or of any such renewal;

10. Any security issued in connection with an employee's stock purchase, savings, pension, profit-sharing or similar benefit plan. The Commission may by rule or order, as to any security issued pursuant to such plan, specify or designate persons eligible to participate in such plan;

11. Any security issued by a cooperative association organized as a corporation under the laws of this Commonwealth;

12. Any security listed on an exchange registered with the United States Securities and Exchange Commission or quoted on an automated quotation system operated by a national securities association registered with the United States Securities and Exchange Commission and approved by regulations of the State Corporation Commission;

13. Any security issued by any issuer organized under the laws of any foreign country and approved by rule or regulation of the Commission.

B. The following transactions are exempted from the securities, broker-dealer and agent registration requirements of this chapter except as expressly provided in this subsection:

1. Any isolated transaction by the owner or pledgee of a security, whether effected through a broker-dealer or not, which is not directly or indirectly for the benefit of the issuer;

2. Any nonissuer distribution by a registered broker-dealer and its registered agent of a security that has been outstanding in the hands of the public for the past five years, if the issuer in each of the past three fiscal years has lawfully paid dividends on its common stock aggregating at least four percent of its current market price;

3. Any transaction by a registered broker-dealer and its registered agent pursuant to an unsolicited order or offer to buy;

4. 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 indebtedness secured thereby is offered and sold as a unit;

5. Any transaction in his official capacity by a receiver, trustee in bankruptcy or other judicially appointed officer selling securities pursuant to court order;

6. Any offer or sale to a corporation, investment company or pension or profit-sharing trust or to a broker-dealer;

7. a. Any sale of its securities by an issuer or any sale of securities by a registered broker-dealer and its registered agent acting on behalf of an issuer if, after the sale, such issuer has not more than 35 security holders, and if its securities have not been offered to the general public by advertisement or solicitation; or

b. To the extent the Commission by rule or order permits, any sale of its securities by an issuer or any sale of securities by a registered broker-dealer and its registered agent acting on behalf of an issuer to not more than 35 persons in the Commonwealth during any period of 12 consecutive months, whether or not the issuer or any purchaser is then present in the Commonwealth, if the issuer or broker-dealer reasonably believes that all the purchasers in the Commonwealth are purchasing for investment, and if the securities have not been offered to the general public by advertisement or general solicitation. The Commission may, by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption, increase or decrease the number of purchasers permitted, or waive the condition relating to their investment intent. The Commission may assess and collect in connection with any filing pursuant to this exemption a nonrefundable fee not to exceed \$250.

With respect to this subdivision 7, and except to the extent the Commission by rule or order may otherwise permit, the number of security holders of an issuer or the number of purchasers from an issuer, as the case may be, shall not be deemed to include the security holders of any other corporation, partnership, limited liability company, unincorporated association or trust unless it was organized to raise capital for the issuer. Notwithstanding the provisions of subdivision 15, the merger or consolidation of corporations, partnerships, limited liability companies, unincorporated associations or other entities shall be a violation of this chapter if the surviving or new entity has more than 35 security holders or purchasers and all the securities of the parties thereto were issued under this exemption, unless all of the parties thereto have been engaged in transacting business for more than two years prior to the merger or consolidation;

8. Any transaction pursuant to an offer to existing security holders of the issuer including holders of transferable warrants issued to existing security holders and exercisable within 90 days of their issuance, if either (i) no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this Commonwealth or (ii) the issuer first notifies the Commission in writing of the terms of the offer and the Commission does not by order disallow the exemption within five full business days after the date of the receipt of the notice;

9. Any offer (but not a sale) of a security for which registration statements have been filed, but are not effective, under both this chapter and the Securities Act of 1933; but this exemption shall not apply while a stop order is in effect or, after notice to the issuer, while a proceeding or examination looking toward such an order is pending under either act;

10. The issuance of not more than three shares of common stock to one or more of the incorporators of a corporation and the initial transfer thereof;

11. Sales of an issue of bonds, aggregating \$150,000 or less, secured by a first lien deed of trust on realty situated in Virginia, to 30 persons or less who are residents of Virginia;

12. Any offer or sale of any interest in any partnership, corporation, association or other entity created solely to provide residential housing located in the Commonwealth, provided that such offer or sale is by the issuer or by a real estate broker or real estate agent duly licensed in Virginia;

13. The Commission is authorized to create by rule a limited offering exemption, the purpose of which shall be to further the objectives of compatibility with similar exemptions from federal securities regulation and uniformity among the states; providing that such rule shall not exempt broker-dealers or agents from the registration requirements of this chapter, except in the case of an agent of the issuer who either (i) receives no sales commission directly or indirectly for offering or selling the securities or (ii) effects transactions in a security exempt from registration under the Securities Act of 1933 pursuant to rules and regulations promulgated under § 4(2) thereof. Any filing made with the Commission pursuant to any exemption created under this subdivision shall be accompanied by a \$250 fee;

14. The issuance of any security dividend, whether the corporation distributing the dividend is the issuer of the security or not, if nothing of value is given by stockholders for the distribution other than the surrender of a right to a cash dividend where the stockholder can elect to take a dividend in cash or in a security;

15. Any transaction incident to a right of conversion or a statutory or judicially approved reclassification, recapitalization, reorganization, quasi-reorganization, stock split, reverse stock split,

merger, consolidation, sale of assets, or exchange of securities;

16. Any offer or sale of a security issued by a Virginia church if the offer and sale are only to its members and the security is offered and sold only by its members who are Virginia residents and who do not receive remuneration or compensation directly or indirectly for offering or selling the security;

17. Any offer or sale of securities issued by a professional business entity (as defined in subsection A of § 13.1-1102) to a person licensed or otherwise legally authorized to render within this Commonwealth the same professional services (as defined in subsection A of § 13.1-1102) rendered by the professional business entity. Notwithstanding the foregoing, nothing in this subdivision shall be deemed to provide that shares of stock, partnership or membership interests or other representations of ownership in a professional business entity are securities except to the extent otherwise provided by subsection A of this section;

18. Any offer that is communicated on the Internet, World Wide Web or similar proprietary or common carrier electronic system and that is in compliance with requirements prescribed by rule or order of the Commission;

19. To the extent the Commission by rule or order permits, any offer or sale to an accredited investor, as defined by the Commission, if the issuer reasonably believes before the sale that the accredited investor, either alone or with the accredited investor's representative, has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of the prospective investment. The Commission may assess and collect in connection with any filing pursuant to this exemption a nonrefundable fee not to exceed \$250;

20. Any transaction by a bank pursuant to an unsolicited offer or order to buy or sell any security, provided such transaction is not effected by an employee of the bank who is also an employee of a broker-dealer; and

21. *To the extent the Commission by rule or order permits, any security issued by an entity formed, organized, or existing under the laws of the Commonwealth, if:*

a. The offering of the security is conducted in accordance with § 3(a)(11) of the Securities Act of 1933 and Rule 147 adopted under the Securities Act of 1933;

b. The offer and sale of the security are made only to residents of Virginia;

c. The aggregate price of securities in an offering under this exemption does not exceed \$2 million, which sum the Commission, by rule or order, may increase or decrease;

d. The total consideration paid by any purchaser of securities in an offering under this exemption does not exceed \$10,000, unless the purchaser is an accredited investor as defined by Rule 501 of the U.S. Securities and Exchange Commission's Regulation D (17 C.F.R. § 230.501). The Commission, by rule or order, may increase or decrease such limit on the total consideration to be paid by any purchaser of securities in an offering under this exemption;

e. No compensation is paid to employees, agents, or other persons for the solicitation of, or based on the sale of, securities in connection with an offering of securities under this exemption to any person who is not registered as a broker-dealer or agent, except to the extent permitted by rule or order of the Commission;

f. Neither the issuer nor any person related to the issuer is subject to disqualification as established by the Commission by rule or order; and

g. The security is sold in an offering conducted in compliance with any conditions established by rule or order of the Commission, which may include:

(1) Restrictions on the nature of the issuer;

(2) Limitations on the number and manner of offerings;

(3) Disclosures required to be provided to investors, including disclosures of risk factors related to the issuer and the offering;

(4) Requirements that all proceeds received from purchasers be placed in escrow in a depository institution located in the Commonwealth until the minimum amount of the offering is raised;

(5) Filings with the Commission of notices and other materials related to the offering; and

(6) Requirements regarding the preparation and submission of the issuer's financial statements, including (i) the form and content of such statements and (ii) whether such statements are required to be audited or reviewed by an independent certified public accountant in accordance with generally accepted accounting principles.

The Commission may assess and collect in connection with any filing pursuant to this exemption a nonrefundable fee in an amount to be set by the Commission by rule or order, provided such amount shall not exceed \$500.

C. In any proceeding under this chapter, the burden of proving an exemption shall be upon the person claiming it.

2. That the State Corporation Commission shall report by July 1, 2016, and each year thereafter until 2020, to the Chairmen of the House and Senate Commerce and Labor Committees on the implementation of this act, including (i) any updates on federal action, (ii) the number of filings in the Commonwealth made pursuant to this act, (iii) the mean, median, and total values related to money raised under offerings made pursuant to this act, and (iv) any recommendations for

revisions to this act.

3. That the provisions of this act shall expire on July 1, 2020.

APPENDIX B

State Corporation Commission

Order to Take Notice

March 30, 2015

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, MARCH 30, 2015

SCC-CLERK'S OFFICE
DOCUMENT CONTROL CENTER

2015 MAR 30 A 11:03

COMMONWEALTH OF VIRGINIA, *ex rel.*

STATE CORPORATION COMMISSION

Ex Parte: In the matter of
Adopting a Revision to the Rules
Governing the Virginia Securities Act

CASE NO. SEC-2015-00014

ORDER TO TAKE NOTICE

Section 12.1-13 of the Code of Virginia ("Code") provides that the State Corporation Commission ("Commission") shall have the power to promulgate rules and regulations in the enforcement and administration of all laws within its jurisdiction. Section 13.1-523 of the Virginia Securities Act ("Act"), § 13.1-501 *et seq.* of the Code provides that the Commission may issue any rules and regulations necessary or appropriate for the administration and enforcement of the Act.

The rules and regulations issued by the Commission pursuant to the Act are set forth in Title 21 of the Virginia Administrative Code. A copy also may be found at the Commission's website: www.scc.virginia.gov.

Chapter 354, 2015 Acts of the Assembly, provides for a new exemption for certain securities offerings known as the "Intrastate Crowdfunding Exemption" ("ICE"). As a result of this new legislation, the Division of Securities and Retail Franchising ("Division") submitted to the Commission a set of rules to effectuate the new legislation to be placed in section 190 of Chapter 40 of Title 21 of the Virginia Administrative Code entitled "Securities Act Rules" ("Rules"). In addition, the Division has offered some additional minor, grammatical, and technical changes to its Rules in Chapter 20, Chapter 45, and Chapter 80.

Proposed Revisions to Chapter 40. Intrastate Crowdfunding Exemption.

Chapter 354, as passed by the Virginia General Assembly, provides for an exemption from the registration provisions of the Act for certain intrastate offerings known as "crowdfunding." Crowdfunding began as a way for the public to donate small amounts of money, often through social networking websites, to help artists, musicians, film makers, charities and other people to finance their projects. This initial concept has been promoted as a way of assisting small businesses and start-ups looking for investment capital to help their business ventures off the ground.

The Jumpstart Our Business Startups ("JOBS") Act was passed on April 5, 2012. The JOBS Act provided, in part, that the Federal Securities and Exchange Commission ("SEC") promulgate rules that would provide the basis for a federal exemption for these small business offerings. The SEC proposed rules on October 23, 2013,¹ but have yet to adopt the regulations. The states, in an effort to provide support to local small businesses determined to move forward to provide crowdfunding options for their citizens.

The Virginia General Assembly proposed several bills in the 2014 session, but the legislation was delayed due to the pending federal rules. Since the federal rules have not been adopted, the General Assembly moved forward with a proposal for Virginia. Several bills were introduced, and SB 763 was signed by the governor on March 19, 2015, as the Virginia Intrastate Crowdfunding Exemption.

The new legislation, Chapter 354, permits the Commission to adopt rules to effectuate ICE in several areas: (1) aggregate price of securities in an offering under this exemption; (2) total consideration paid by any purchaser; (3) compensation to be paid to employees, agents

¹ SEC Release Nos. 33-9470; 34-70741; File No. S7-09-13, RIN 3235-AL37.

or other persons for the solicitation of, or based on the sale of, securities in connection with an offering under this exemption; (4) disqualification of the issuer or any person related to the issuer; (5) conditions on the offering including: (i) restrictions on the nature of the issuer, (ii) limitations on the number and manner of offerings, (iii) disclosures required to be provided to the investors, including risk disclosures, (iv) escrow requirements, (v) notice filings and other materials related to the offering; (5) filing fee; and (6) reporting requirements.

The Division proposes to adopt a new Rule at 21 VAC 5-40-190 that addresses the provisions of Chapter 354. The Division reviewed the provisions of other state crowdfunding exemptions in order to be as consistent as possible with crowdfunding in other states. Major highlights of the proposed rules are:

- Limiting the aggregate price of the offering to \$2 million;
- Requiring certain financial statements that vary depending on the amount of the offering;
- Requiring an exemption filing, which includes a Form ICE, filing fee and disclosures, at least 20 days prior to an offer of securities or use of any publicly available website in connection with the offering;
- Imposing conditions on offers and sales over the Internet;
- Requiring reports to investors and the Commission; and
- Prohibiting the use of the exemption with other exemptions, as well as disqualifications for use of the exemption.

Proposed Revisions to Chapter 20. Broker-dealers and agents.

Certain Canadian broker-dealers requested that the Commission consider granting them relief from the prohibited business conduct regulations found in Section 280 of Chapter 20.

These firms argued that they already are under a strenuous regulatory structure in Canada and

that it would be burdensome for them to also try to comply with the various state regulatory requirements. While the proposed amendments to section 86 and 155 grant these firms and their agents relief from this section of the Commission's rules, each still will be subject to the anti-fraud provisions of the Act.

In addition, the Division proposes changes to subdivision 280 D 12 to address concerns regarding customer privacy. Therefore, the Division proposes to add privacy to the list of the standards promulgated by the Financial Industry Regulatory Authority Rules or the SEC.

In today's environment and with the continued advancement in online services, certain broker-dealers requested that the Division remove the requirement that customers opt-in to electronic delivery. Therefore, the Division proposes to amend subsection 280 A 10 to allow broker-dealers to deliver prospectuses either by hard copy or by electronic means.

Broker-dealers will no longer be required to only allow electronic delivery if an investor "opts in" to such service.

Proposed Revisions to Chapter 45. Offerings conducted pursuant to Rule 506 of Federal Regulation D (17 CFR 2230.506): Filing requirements and issuer-agent exemption.

On September 23, 2013, the SEC approved rule proposals regarding Regulation D of Rule 506 of the Securities Act of 1933.² In addition to allowing general solicitation under a new provision 506 (c), the SEC adopted a new Form D. In order to allow issuers to make the appropriate notice filing under Regulation D, the Division proposes to update section 20 to reflect the adoption of new Form D. This new provision will allow filers to use the new form to file for Regulation D, Rule 506 (b) and 506 (c) offerings.

² SEC Release Nos. 33-9415; No. 34-69959; No. IA-3624; File No. 57-07-12, RIN 3235-AL34.

Proposed Revisions to Chapter 80. Investment Advisors.

Many of the proposed revisions are minor, including some technical and grammatical changes. There are proposed minor revisions in sections 130, 200 and 220.

The Division proposes to amend Subsection 130 B to clarify the examination qualifications for investment advisor representatives. Such representatives who meet the examination requirements under subsection A and are registered in any state jurisdiction will not have to retake the examination in Virginia as long as they have been registered within the two-year period immediately preceding the date of filing an application. In addition, certain examinations are waived under subsection 130 C if representatives currently hold and are in good standing with certain professional organizations.

The Division proposes to amend subdivision 200 A 14 to add privacy standards to the investment advisor rules, similar to that proposed for the broker-dealers.

The Division proposes to amend subparagraph 220 B1a to increase the dollar amount from \$750,000 to \$1 million under management for investment advisors who wish to contract with clients to be compensated on the basis of a share of the capital gains, or capital appreciation of the funds, or any portion of the funds under management. This increase will make this provision consistent with investment advisor rules imposed by the SEC.

The Division proposes to amend subparagraph 220 B1b to increase the net worth of the client from at least \$1.5 million to \$2 million. Again, this increase will make this provision consistent with investment advisor rules imposed by the SEC.

The Division recommended to the Commission that the proposed revisions should be considered for adoption. The Division also has recommended to the Commission that a hearing should be held only if requested by those interested parties who specifically indicate that a hearing is necessary and the reasons therefore.

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A copy of the proposed revisions may be requested by interested parties from the Division by telephone, by mail or e-mail request and also can be found at the Division's website: www.scc.virginia.gov/srf. Any comments to the proposed rules must be received by May 22, 2015.

Accordingly, IT IS ORDERED THAT:

(1) The proposed revisions are appended hereto and made a part of the record herein.

(2) Comments or requests for hearing on the proposed revisions must be submitted in writing to Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, on or before May 22, 2015. Requests for hearing shall state why a hearing is necessary and why the issues cannot be adequately addressed in written comments. All correspondence shall reference Case No. SEC-2015-00014. Interested persons desiring to submit comments electronically may do so by following the instructions available at the Commission's website: <http://www.scc.virginia.gov>.

(3) The proposed revisions shall be posted on the Commission's website at: <http://www.scc.virginia.gov> and on the Division's website at: <http://www.scc.virginia.gov/srf>. Interested persons also may request a copy of the proposed revisions from the Division by telephone, mail or e-mail.

AN ATTESTED COPY HEREOF, together with a copy of the proposed revisions, shall be sent to the Registrar of Regulations for publication in the *Virginia Register*.

AN ATTESTED COPY HEREOF shall be sent by the Clerk of the Commission to the Director of the Division of Securities and Retail Franchising, who shall forthwith provide notice of this Order via U.S. mail or e-mail a copy of this Order to any interested persons as he may designate.

APPENDIX C

State Corporation Commission

Order Adopting Amended Rules

July 20, 2015

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, JULY 20, 2015

15073 0192

SECURITIES OFFICE
DOCUMENT CONTROL CENTER
2015 JUL 20 P 2:36

COMMONWEALTH OF VIRGINIA, *ex rel.*
STATE CORPORATION COMMISSION

Ex Parte: In the matter of
Adopting a Revision to the Rules
Governing the Virginia Securities Act

CASE NO. SEC-2015-00014

ORDER ADOPTING AMENDED RULES

By Order to Take Notice ("Order") entered on March 30, 2015,¹ all interested persons were ordered to take notice that the State Corporation Commission ("Commission") would consider the adoption of revisions to Chapters 20, 40, 45 and 80 of Title 21 of the Virginia Administrative Code. On April 1, 2015, the Commission's Division of Securities and Retail Franchising ("Division") mailed and e-mailed the Order of the proposed rules to interested persons pursuant to the Virginia Securities Act ("Act"), § 13.1-501 *et seq.* of the Code of Virginia. The Order described the proposed revisions and afforded interested persons an opportunity to file comments and requests for hearing with the Clerk of the Commission on or before May 22, 2015. The Order provided that requests for hearing shall state why a hearing is necessary and why the issues cannot be adequately addressed in written comments.

The Commission received written comments from Carrie Roth of the Virginia Biotechnology Research Partnership Authority, which supported adopting the proposed rules. Michael Koffler, Esquire, of the law firm of Sutherland Asbill & Brennan LLP, submitted written comments on behalf of their broker-dealer clients, which supported the proposed amendments to rule 21 VAC 5-20-280 A 10.

¹ Doc. Con. Cen. No. 150330018.

The Commission also received two written comments objecting to certain portions of proposed new rule 21 VAC 5-40-190 relating to the proposed intrastate crowdfunding exemption ("ICE") passed by the 2015 Virginia General Assembly. J. Thomas O'Brien, Jr., Chairman, Business Law Council, Business Law Section of the Virginia Bar Association ("Business Law Section"), submitted written comments on behalf of the Business Law Section.² The Business Law Section discussed its concerns and requested changes regarding two aspects of the proposed rules: (1) the requirement for reviewed and audited financials for offerings of more than \$100,000 and \$500,000; and (2) the quarterly reporting requirements for so long as any shares sold in a crowdfunding offering remain outstanding.

Kirk T. Schroder, Esquire, of the law firm of Schroder Fidlow, PLC, submitted written comments and a request for hearing. Mr. Schroder's comments asserted that the proposed rules should: (1) require that intrastate crowdfunding exempt offerings occur only through registered Virginia funding portals; (2) give the funding portal the necessary authority to manage the crowd for the benefit of investors and offerors and to monitor compliance; (3) provide the funding portal a safe harbor from disputes between the investor and the offeror; and (4) establish a more appropriate cap of investor offerings at \$3 million.

By Order dated June 1, 2015,³ the Commission directed the Division to provide a written response to the comments submitted by the Business Law Section and Mr. Schroder regarding ICE and provided the Business Law Section and Mr. Schroder an opportunity to reply to the Division's comments.

On June 8, 2015, the Division filed its response ("Response"). Among other comments, the Division stated that the proposed rules provide for the development of funding portals but do

² The Business Law Section filed its comments out of time on May 27, 2015.

³ Doc. Con. Cen. No. 150610007.

not mandate their use. In addition, the Division provided statistical information from other states regarding their crowdfunding rules, including those states that mandate funding portals.⁴ The Division noted that only four of the 39 states that have adopted crowdfunding rules have mandated the use of funding portals, and nine additional states have pending rules that would mandate such portals.⁵ The Division also responded to comments regarding the maximum offering amount suggested by Mr. Schroder and his request that the proposal include a safe harbor for funding portals.⁶ The Division recommended that the Commission not adopt the changes requested by Mr. Schroder.

In addressing the Business Law Section's comments, the Division suggested several changes to the proposed ICE rules.⁷ These changes include: (1) adopting the Business Law Section's requested changes to the proposed rules' requirements concerning financial statements; (2) changing the reporting requirements from quarterly to annually; and (3) limiting the time period for this reporting to a period of three years after an offering closes.

With these changes the Division recommended that the Commission adopt the proposed rules with the proposed revisions.

On June 19, 2015, Mr. Schroder filed a reply to the Division's Response ("Reply").⁸ Mr. Schroder submitted additional information and argument supporting his requested changes to the proposed rules. He concluded that "[f]unding [p]ortals, not individual offerors, create, enhance and enable communities to positively affect crowdfunding efforts," and that "[w]ithout such a

⁴ Doc. Con. Cen. No. 150620051.

⁵ *Id.* at 3.

⁶ Response at 4.

⁷ *Id.* at 3-4.

⁸ Doc. Con. Cen. No. 150620368.

model, the proposed Virginia ICE rules will provide a lower than expected benefit to potential offerors and investors and may open unintended consequences from a new experimental approach that, while sounding good in theory, has no established track record."⁹ Mr. Schroder also requested that the Commission provide a safe harbor for funding portals.¹⁰ Finally, Mr. Schroder contemporaneously filed a letter with the Commission's Clerk, stating that "[t]his letter serves to amend my request in a letter to you, dated May 21, 2015, for a hearing on the above referenced matter and instead to request for oral argument on the matter," citing Rule 5 VAC 5-20-210 of the Commission's Rules of Practice and Procedure ("Commission Rules").¹¹

The Business Law Section did not file a reply to the Division's response.

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds that the proposed amendments as recommended by the Division should be adopted.

The Commission notes that Mr. Schroder requests oral argument as permitted by 5 VAC 5-20-210 of the Commission's Rules. Pursuant to this Rule, oral argument is discretionary, not mandatory. In this instance, based on the consideration of the comments filed in this matter, we find that oral argument is not necessary in order to promulgate the ICE rules herein. The Commission has provided for initial and responsive comments to be filed in this matter, and this has given interested persons an opportunity to present all of their arguments supporting their requests. We find that the requested oral argument is neither required as a matter of law nor is it necessary to consider and rule on this matter.

⁹ Reply at 8.

¹⁰ Reply at 7.

¹¹ *Virginia Pilot Ass'n. v. Commonwealth*, 145 Va. 757, 765 (Va. 1926).

The Commission has fully considered Mr. Schroder's requests and finds that, at this time, the proposed rules should not mandate the use of funding portals. Rather, we conclude that it is reasonable to allow the use of such portals to remain discretionary for the new crowdfunding business model. The Commission further observes that only four of 39 states that have decided this question mandate the use of funding portals, and only nine additional states currently have mandates pending. Moreover, without any further empirical evidence, the potential cost to issuers of a funding portal was a factor in adopting the rules without mandating such portals.

Since the rules are adopted without mandating funding portals, the Commission need not address the request for a safe harbor for said funding portals. The Commission recognizes that the initial establishment of an investor offering cap of \$2 million is consistent with the Virginia crowdfunding legislation as well as with maximum offering caps established by other states with crowdfunding legislation.¹²

For the foregoing reasons, we find it reasonable to adopt the proposed amended rules as recommended by the Division.

Accordingly, IT IS ORDERED THAT:

(1) The proposed rules are attached hereto, made a part hereof, and hereby are ADOPTED effective July 31, 2015.

(2) AN ATTESTED COPY hereof, together with a copy of the adopted rules, shall be sent by the Division in care of Ronald W. Thomas, Director, who forthwith shall give further notice of the adopted rules by mailing or e-mailing a copy of this Order to all interested persons.

¹² See, e.g., Response at 4.

(3) The Commission's Division of Information Resources forthwith shall cause a copy of this Order, together with the adopted rules, to be forwarded to the Virginia Registrar of Regulations for appropriate publication in the *Virginia Register of Regulations*.

(4) This case is dismissed from the Commission's docket, and the papers herein shall be placed in the file for ended causes.

APPENDIX D

State Corporation Commission

Intrastate Crowdfunding Exemption

Effective July 31, 2015

21VAC5-40-190. Intrastate Crowdfunding Exemption.

A. In accordance with § 13.1-514 B 21 of the Act, an offer or sale of a security by an issuer is exempt from the securities, broker-dealer and agent registration requirements of the Act if the offer or sale meets all of the following requirements:

1. The issuer of the security is a business entity:
 - a. Formed under the laws of the Commonwealth;
 - b. Authorized to do business in the Commonwealth; and
 - c. That has its principal place of business in the Commonwealth.
2. The offering is sold only to residents of the Commonwealth in compliance with the requirements for the federal exemption for intrastate offerings under § 3(a)(11) of the Securities Act of 1933, 15 USC 77c(a)(11), and SEC Rule 147, 17 CFR 230.147.
3. The securities offered and sold pursuant to this exemption are equity securities of the issuer. This exemption is not available to debt offerings.
4. The sum of all cash and other consideration to be received for all sales of the securities in reliance on this exemption does not exceed \$2 million, less the aggregate amount received for all sales of securities by the issuer within 12 months before the first offer or sale made in reliance upon this exemption, and if the offering is:
 - a. \$500,000 or less, if the issuer has financial statements prepared the previous year that have been certified by the principal executive officer of the issuer to be true and complete in all material respects;
 - b. More than \$500,000 but less than \$1 million, if the issuer has undergone a financial review of the financial statements of its most recently completed fiscal year, conducted by an independent certified public accountant in accordance with generally accepted accounting principles; or
 - c. \$1 million or more, if the issuer has undergone an audit of the financial statements of its most recently completed fiscal year, conducted by an independent certified public accountant in accordance with generally accepted accounting principles.
5. The issuer has not accepted more than \$10,000 from any single purchaser unless the purchaser is an accredited investor as defined by Rule 501 of SEC Regulation D, 17 CFR 230.501.
6. At least 20 days before an offer of securities is made in reliance on this exemption or the use of any publicly available Internet website in connection with an offering of securities in reliance on this exemption, the issuer files with the commission in writing or in electronic form, all of the following:

a. A notice of claim of exemption from registration on Form ICE specifying that the issuer intends to conduct an offering in reliance on this exemption, accompanied by a nonrefundable filing fee of \$250 payable to the Treasurer of Virginia.

b. A copy of the disclosure statement or Form ICE to be provided to prospective investors in connection with the offering. The disclosure statement or Form ICE shall contain all of the following:

(1) A description of the issuer, including type of entity, the address and telephone number of its principal office, its formation history, and its business plan;

(2) A description of the intended use of the offering proceeds, including any amounts to be paid, as compensation or otherwise, to any owner, executive officer, director, managing member, or other person occupying a similar status or performing similar functions on behalf of the issuer;

(3) The identity of each person that owns more than 10% of the ownership interests of any class of securities of the issuer and the amount of said securities held by such person;

(4) The identity of the executive officers, directors, or managing members of the issuer and any other individuals who occupy similar status or perform similar functions in the name of and on behalf of the issuer, including their titles and their prior business experience;

(5) The terms and conditions of the securities being offered including:

(a) The type and amounts of any outstanding securities of the issuer;

(b) The minimum and maximum amount of securities being offered, if any;

(c) Either the percentage ownership of the issuer represented by the offered securities or the valuation of the issuer implied by the price of the offered securities;

(d) The price per share, unit, or interest of the securities being offered;

(e) Any restrictions on transfer of the securities being offered; and

(f) A disclosure of any anticipated future issuance of securities that might dilute the value of the securities being offered;

(6) The identity of any person that the issuer has or intends to retain to assist the issuer in conducting the offer and sale of the securities, including the owner of any websites, if known, but excluding any person acting solely as an accountant or attorney and any employees whose primary job responsibilities involve the operating business of the issuer rather than assisting the issuer in raising capital;

(7) For each person identified as required in subdivision 6 b (6) of this subsection, a description of the consideration being paid to the person for such assistance;

(8) A description of any litigation or legal proceedings involving the issuer or any executive officer, director, or managing member or other person occupying a similar status or performing similar functions on behalf of the issuer;

(9) The issuer's financial statements for the three most recent fiscal years or for as much time as the issuer has been in existence, if less than three years;

(10) The name and address, including the uniform resource locator, of each Internet website that will be used by the issuer to offer or sell securities under an exemption under this section; and

(11) Any additional information material to the offering, including, if appropriate, a discussion of significant risk factors that make the offering speculative or risky. This discussion shall be concise and organized logically and may not be limited to risks that could apply to any issuer or any offering.

c. An escrow agreement with a bank or other depository institution located in this Commonwealth, in which the purchaser funds will be deposited. At a minimum the escrow agreement shall provide that all offering proceeds will be released to the issuer only when the aggregate capital raised from all purchasers is equal to or greater than the minimum target offering amount specified in the disclosure statement as necessary to implement the business plan and all purchasers will receive a return of their subscription funds if that target offering amount is not raised by the time stated in the disclosure statement. The depository institution may contract with the issuer to collect reasonable fees for its escrow services regardless of whether the target offering amount is reached; however such fees shall not be deducted from purchaser funds if the target offering amount is not raised by the time stated in the disclosure statement. The issuer shall disclose in its disclosure statement or Form ICE whether any interest earned on escrowed purchaser funds will be paid to purchasers on a pro rata basis if the minimum target amount, as described above, is not raised.

7. The issuer is not, either before or as a result of the offering:

a. A company that is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities, including an investment company as defined by 15 USC § 80a-3, or a hedge fund, commodity pool, or similar investment vehicle;

b. Subject to the reporting requirements of § 13 or 15(d) of the Securities Exchange Act of 1934, 15 USC 78m and 78o(d);

c. A company that has not yet defined its business operations, has no business plan, has no stated investment goal for the funds being raised, or that plans to engage in a merger with or acquisition of an unspecified business entity or entities, or without an allocation of proceeds to sufficiently identifiable properties or objectives; or

d. A company that is engaged in or proposes to engage in petroleum exploration or production, mining, or other extractive industries.

8. The issuer informs each prospective purchaser that the securities are not registered under federal or state securities laws and that the securities are subject to limitations on transfer or

resale and displays the following legend conspicuously on the cover page of the disclosure statement:

THESE SECURITIES ARE BEING SOLD IN RELIANCE ON AN EXEMPTION TO THE FEDERAL SECURITIES REGISTRATION REQUIREMENTS UNDER SECTION 3(a)(11) OF THE SECURITIES ACT OF 1933 AND UNDER SECTION 13.1-514 OF THE VIRGINIA SECURITIES ACT. THESE SECURITIES CAN ONLY BE SOLD TO RESIDENTS OF VIRGINIA AND ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AS CONTAINED IN SUBSECTIONS (e) AND (f) OF SEC RULE 147, 17 CFR 230.147. INVESTORS SHOULD BE AWARE THAT THEY WILL BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME AND THAT THEY MAY LOSE ALL OF THE INVESTMENT AND CAN AFFORD THE LOSS OF THE INVESTMENT.

IN MAKING AN INVESTMENT DECISION, INVESTORS SHOULD RELY ON THEIR OWN EXAMINATION OF THE ISSUER AND THE TERMS REVEALED IN THESE OFFERING DOCUMENTS, INCLUDING THE MERITS AND RISKS INVOLVED.

THESE SECURITIES HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR STATE AUTHORITY OR REGULATORY COMMISSION NOR HAVE THESE ENTITIES CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

9. If the offer and sale of securities under this section is made through the Internet, all of the following requirements are met:

a. Any person acting as the Internet website operator shall be an issuer, a registered broker-dealer, or a funding portal that is in compliance with all commission, SEC, and FINRA requirements, including, if it is a funding portal, making any required notice filings with the commission;

b. Internet website operators shall comply with all commission, SEC, and FINRA requirements applicable to intrastate offerings through the Internet;

c. Internet website operators shall maintain records of all offers and sales of securities effected through its Internet website for five years from the close of the offering; and

d. The issuer and the Internet website operator shall keep and maintain records of the offers and sales of securities made through the Internet website for five years from the close of the offering. The issuer and the Internet website operator shall promptly provide ready access to the records to the commission on request. The commission may access, inspect, and review any Internet website described in this subdivision 9 and its records.

10. All payments for the purchase of securities are directed to and held by the depository institution subject to the provisions of subdivision 6 c of this subsection.

11. The issuer does not pay, directly or indirectly, any commission or remuneration to an executive officer, director, managing member, or other individual who has a similar status or performs similar functions in the name of and on behalf of the issuer for offering or selling the

securities unless he is registered as a broker-dealer agent under the Act. An executive officer, director, managing member, or other individual who has a similar status or performs similar functions in the name of and on behalf of the issuer is exempt from the agent registration requirements of the Act if he does not receive, directly or indirectly, any commission or remuneration for offering or selling securities of the issuer that are exempt from registration under this section.

12. The issuer provides a copy of Form ICE or the disclosure statement provided to the commission under subdivision 6 b of this subsection to each prospective purchaser at the time the offer of securities is made to the prospective purchaser.

13. The term of the offering does not exceed 12 months after the date of the first offer.

B. The issuer shall provide an annual report to the issuer's purchasers for each of the issuer's next three fiscal years, the first of which being that fiscal year that ends following the commencement of the offering. All of the following apply to the annual report described in this subsection:

1. The issuer shall provide the report free of charge to the purchasers;

2. An issuer may satisfy the report requirement under this subsection by making the information available on an Internet website if the information is made available within 45 days after the end of each fiscal year and remains available until the next annual report is issued;

3. The issuer shall file each report with the commission and shall provide a written copy of the report to any purchaser on request; and

4. The report shall include all of the following:

a. The compensation received by each director and executive officer of the issuer, including cash compensation earned since the previous report and on an annual basis and any bonuses, stock options, other rights to receive securities of the issuer or any affiliate of the issuer, or other compensation received; and

b. An analysis by management of the issuer's business operations and financial condition.

C. The exemption provided in this section shall not be used in conjunction with any other exemption under the Act, except offers and sales to control persons shall not count toward the limitation in subdivision A 4 of this section.

D. The exemption described in this section shall not be available to the issuer if the issuer, any of the issuer's predecessors, any affiliate of the issuer, or any control person of the issuer:

1. Within the past 10 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 SEC;

2. Within the past 10 years, has been convicted of any criminal offense in connection with the offer, purchase, or sale of any security, or involving fraud or deceit;

3. Is currently subject to any state or federal administrative enforcement order or judgment, entered within the past 10 years, finding fraud or deceit in connection with the purchase or sale of any security; or

4. Is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the past 10 years, that temporarily, preliminarily, or permanently restrains or enjoins the 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.

E. Subsection D of this section shall not apply if:

1. 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;

2. Before the first offer under this exemption, the state securities administrator, or the court or regulatory authority that entered the order, judgment, or decree, waives the disqualification; or

3. The issuer establishes it did not know and exercising reasonable care, based on a factual inquiry, could not have known that a disqualification existed under this subsection.

F. An Internet website through which an offer or sale of securities under this section is made is not subject to the broker-dealer or agent registration requirements of the Act if the Internet website meets all of the following conditions:

1. It does not offer investment advice or recommendations;

2. It does not solicit purchases, sales, or offers to buy the securities offered or displayed on the Internet website;

3. It does not compensate employees, agents, or other persons for the solicitation or based on the sale of securities displayed or referenced on the Internet website; and

4. It does not hold, manage, possess, or otherwise handle purchaser funds or securities.

G. As used in this section, "financial review" means a limited inquiry and analytical procedure of much narrower scope than an audit, undertaken by a certified public accountant for the purpose of expressing limited assurance that financial statements are presented in accordance with generally accepted accounting principles.

H. As used in this section, "control person" means (i) an officer, director, partner, managing member, trustee, or other person having the power, directly or indirectly, to direct the management or policies of the issuer, whether by contract or otherwise; or (ii) a person that owns 10% or more of any class of the outstanding securities of the issuer.

I. As used in this section, "funding portal" means any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to § 4 (6) of the Securities Act of 1933 that does not:

1. Offer investment advice or recommendations;
2. Solicit purchases, sales, or offers to buy the securities offered or displayed on its Internet website or portal;
3. Compensate employees, agents, or other persons for such solicitation or based on the sales of securities displayed or referenced on its Internet website or portal;
4. Hold, manage, possess, or otherwise handle investor funds or securities; or
5. Engage in such other activities as the SEC, by rule, determines inappropriate.

J. The issuer or other designated person shall be notified by letter or electronic communication when the exemption filing is effective. If, however, on or before the initial commencement date of the offering, and after timely filing the materials required by subdivision A 6 of this section with the commission, the issuer has not been notified that any one or more of the filed materials fails to conform to the requirements of this section, the proposed offering shall be deemed effective.

K. Upon completion of an offering made in reliance on this exemption, the issuer shall file a final sales report with the commission, by letter or electronic communication, no later than 30 days after the last sale in the offering that includes the following information:

1. The time period in which the offering was open;
2. The number of investors that purchased shares or units in the offering;
3. The dollar amount sold in the offering; and
4. The dollar amount, if any, returned to investors, purchasers, or subscribers.

Statutory Authority

§§ 12.1-13 and 13.1-514 of the Code of Virginia.

Historical Notes

Derived from Volume 31, Issue 25, eff. July 31, 2015; amended, Virginia Register Volume 31, Issue 25, eff. July 31, 2015.