

# AN OVERVIEW OF SECURITIES LAWS

---



Raising money for a business can come from the owner's pocket, a bank, an institutional investor, or sometimes friends, relatives, or other private investors. Any investment of funds in the managerial efforts of others with an expectation of profits is deemed a sale of securities under state and federal laws.



# AN OVERVIEW OF SECURITIES LAWS

---

Any sale of a security must be registered with the appropriate agency unless an exemption is available. For an offering made to a limited number of investors, the typical federal exemption requires a transaction by an issuer involving a private offering. The statute traditionally has been interpreted as applying to bank loans, private placements of securities with institutions, and the promotion of a business venture by a few closely related persons. The exemption was not intended to be available for offerings of speculative securities to unrelated and uninformed persons.

Regulation D, one of the most commonly used exemptions to registration, is the safe harbor rule for complying with the private offering exemption if there are no more than 35 unaccredited investors. There is no limit on accredited investors. An accredited investor generally has joint net worth with that person's spouse of \$1,000,000 or joint income with that person's spouse in excess of \$300,000 per year. Other requirements include providing a disclosure document (prospectus), not allowing general solicitation or advertising, and filing a form with the Securities and Exchange Commission (the "SEC") within 15 days after the first sale. State securities laws ("blue sky" laws) have similar exemptions which may involve a limitation on the number of purchases.

For sales to more than the de minimis number of investors, most states have adopted a form of the Uniform Limited Offering Exemption which provides a registration exemption for offerings made pursuant to the federal Regulation D. Commissions may be paid for sales only to registered brokers. Within 15 days after a triggering event, certain documents and a filing fee usually must be filed with each state where securities are sold. For nonaccredited investors, there may be suitability and sophistication standards to meet.

If no exemption is available, the company may need to register the stock offering under federal and state laws. This requires filing a registration statement, which includes the prospectus, with the SEC which strictly scrutinizes the filing before the shares can be offered to the public. Besides the added expense and delay of the registration process, the shares also become subject to the continuing disclosure requirements under federal law unless a deregistration is available where there are less than 300 shareholders at the end of a fiscal year.

# AN OVERVIEW OF SECURITIES LAWS

---

All stock offerings, whether or not exempt from registration requirements, are subject to federal and state anti-fraud rules. Rule 10b-5 adopted by the SEC states that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national security exchange, (a) to employ any device, scheme or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. State blue sky laws are similar.

To comply with the anti-fraud rules, it is considered prudent to prepare a prospectus that provides potential investors all information they might deem material to their investment decision. The SEC provides guidelines on what should be included in a prospectus for offerings that must be registered with the SEC. Even if a registration exemption is available, following SEC guidelines as closely as possible will reduce the risk that a disgruntled investor or a securities regulator will sue the company later.

Any person who sells securities must be licensed unless a licensing exemption is available. In any offering, even those conducted by the company itself, the individual involved directly in soliciting sales of the securities runs the risk of being deemed an unlicensed "broker/dealer" or "BD" under both federal and state law. In addition, most state laws require that no commission, fee, or other remuneration shall be paid or given directly or indirectly, to any person for soliciting any prospective purchaser unless such person is appropriately registered in the state.

An exemption from BD licensing is available for officers, directors, employees, and certain other persons associated with a company. The compensation of this employee cannot be based upon the aggregate amount of securities sold, and he must have other duties in addition to the sale of securities. If a registered BD is used, their fees may run from 3% to 13% of the offering proceeds in addition to other costs such as due diligence and legal fees. For a new enterprise, the BD usually will not agree to a firm commitment to sell securities but will only sell on a best efforts basis.