

OFFICE OF THE
KANSAS SECURITIES COMMISSIONER (KSC)

The INVEST KANSAS EXEMPTION - “IKE”

The Invest Kansas Exemption is provided by K.A.R. 81-5-21 in order to remove some of the regulatory hurdles for small businesses based in Kansas. The exemption is unique and innovative in comparison with other exemptions under the Kansas Uniform Securities Act and similar laws in other states.

The most significant provisions of the exemption are as follows:

- The issuer of securities must be a business entity or organization that is organized in Kansas by registration with the Kansas Secretary of State and must be located in Kansas with at least 80% of its assets and operations within Kansas.
- All investors in securities of the issuer must be Kansas residents and all offers and sales transactions must occur within Kansas, and any resales during the offering and for a period of 9 months after the offering is completed must be limited to Kansas residents.

Note: The first two conditions above are required for compliance with Rule 147 under the federal Securities Act of 1933 for intrastate offerings in order to be exempt from registration with the U.S. Securities and Exchange Commission (SEC). There are other important requirements under Rule 147 that should be reviewed carefully and thoroughly. A copy of the version of Rule 147 applicable to your filing is attached for further review.

- Up to \$1,000,000 of new capital can be raised, less the total amount from securities sold within the previous 12 months in order to claim the exemption for the current offering. Larger offerings would need to be registered or comply with some other exemption. Sales to controlling persons are not counted for the \$1 million limit.
- The investment for each Kansas resident is limited to \$5,000 in equity or debt securities unless they qualify as an Accredited Investor as defined by the version of Rule 501 of federal Regulation D applicable to your filing [an individual with net worth of at least \$1,000,000 or annual income of \$200,000 (\$300,000 if joint income with spouse) and any officer, director, general partner or managing member of the issuer]. A copy of the applicable definition of accredited investor is attached for further review.
- All funds from Kansas investors must be deposited in a bank or depository institution authorized to do business in Kansas, and all funds must be used for the purposes disclosed to investors in offering documents.
- Form IKE must be filed with the KSC office in Topeka before any advertising or general solicitation of investors occurs. The Form IKE is a simple one-page form which requires information about the business and persons involved in the offering. No fee is required with the filing.
- The offering document must disclose that the securities have not been registered and the fact that investors would need to comply with an exemption for resales.
- Issuers without a specific plan of business or involving persons with criminal or disciplinary history specified in regulations are disqualified from using this exemption.

81-5-21. Invest Kansas exemption. (a) Exemption from registration requirements.

The offer or sale of a security by an issuer shall be exempt from the requirements of K.S.A. 17-12a301 through 17-12a306 and K.S.A. 17-12a504, and amendments thereto, if the offer or sale is conducted in accordance with each of the following requirements:

(1) The issuer of the security shall be a business or organization formed under the laws of the state of Kansas and registered with the secretary of state.

(2) The transaction shall meet the requirements of the federal exemption for intrastate offerings in section 3(a)(11) of the securities act of 1933, 15 U.S.C. § 77c(a)(11), and SEC rule 147, 17 C.F.R. 230.147, as adopted by reference in K.A.R. 81-2-1.

(3) The sum of all cash and other consideration to be received for all sales of securities in reliance upon this exemption shall not exceed \$1,000,000, less the aggregate amount received for all sales of securities by the issuer within the 12 months before the first offer or sale made in reliance upon this exemption.

(4) The issuer shall not accept more than \$5,000 from any single purchaser unless the purchaser is an accredited investor as defined by rule 501 of SEC regulation D, 17 C.F.R. 230.501, as adopted by reference in K.A.R. 81-2-1. Two or more individual purchasers residing at the same primary residence who are not accredited investors and have a close family relationship shall be treated as a single purchaser for purposes of the \$5,000 limit.

(5) A commission or other remuneration shall not be paid or given, directly or indirectly, for any person's participation in the offer or sale of securities for the issuer unless the person is registered as a broker-dealer or agent under the act.

(6) All funds received from investors shall be deposited into a bank or depository institution authorized to do business in Kansas, and all the funds shall be used in accordance with representations made to investors.

(7) Before the use of any general solicitation, the issuer shall file a notice with the administrator on form IKE, providing the names and addresses of the following persons:

(A) The issuer;

(B) all persons who will be involved in the offer or sale of securities on behalf of the issuer; and

(C) the bank or other depository institution in which investor funds will be deposited.

(8) The issuer shall not be, either before or as a result of the offering, an investment company as defined in section 3 of the investment company act of 1940, 15 U.S.C. § 80a-3, or subject to the reporting requirements of section 13 or 15(d) of the securities exchange act of 1934, 15 U.S.C. § 78m and 78o(d), as adopted by reference in K.A.R. 81-2-1.

(9) The issuer shall inform all purchasers that the securities have not been registered under the act and, therefore, cannot be resold unless the securities are registered or qualify for an exemption from registration under K.S.A. 17-12a202 and amendments thereto, K.A.R. 81-5-3, or another regulation. In addition, the issuer shall make the disclosures required by subsection (f) of SEC rule 147, 17 C.F.R. 230.147(f), as adopted by reference in K.A.R. 81-2-1.

(b) Interaction with other exemptions and sales to controlling persons. This exemption shall not be used in conjunction with any other exemption under these regulations. Sales to controlling persons shall not count toward the limitation in paragraph (a)(3).

(c) Disqualifications. This exemption shall not be available if the issuer is subject to a disqualifying event specified in K.A.R. 81-5-13(b), except as permitted under K.A.R. 81-5-13(c). (Authorized by K.S.A. 17-12a605(a); implementing K.S.A. 17-12a203; effective Aug. 12, 2011; amended Jan. 4, 2016 .)

SEC Rule 147. “Part of an issue”, “person resident”, and “doing business within” for purposes of section 3(a)(11).

17 C.F.R. § 230.147 (as in effect on May 12, 2015)

Preliminary Notes:

1. This rule shall not raise any presumption that the exemption provided by section 3(a)(11) of the Act is not available for transactions by an issuer which do not satisfy all of the provisions of the rule.

2. Nothing in this rule obviates the need for compliance with any state law relating to the offer and sale of the securities.

3. Section 5 of the Act requires that all securities offered by the use of the mails or by any means or instruments of transportation or communication in interstate commerce be registered with the Commission. Congress, however, provided certain exemptions in the Act from such registration provisions where there was no practical need for registration or where the benefits of registration were too remote. Among those exemptions is that provided by section 3(a)(11) of the Act for transactions in *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 resident and doing business within * * * such State or Territory*. The legislative history of that Section suggests that the exemption was intended to apply only to issues genuinely local in character, which in reality represent local financing by local industries, carried out through local investment. Rule 147 is intended to provide more objective standards upon which responsible local businessmen intending to raise capital from local sources may rely in claiming the section 3(a)(11) exemption.

All of the terms and conditions of the rule must be satisfied in order for the rule to be available. These are: (i) That the issuer be a resident of and doing business within the state or territory in which all offers and sales are made; and (ii) that no part of the issue be offered or sold to non-residents within the period of time specified in the rule. For purposes of the rule the definition of *issuer* in section 2(4) of the Act shall apply.

All offers, offers to sell, offers for sale, and sales which are part of the same issue must meet all of the conditions of Rule 147 for the rule to be available. The determination whether offers, offers to sell, offers for sale and sales of securities are part of the same issue (*i.e.* , are deemed to be *integrated*) will continue to be a question of fact and will depend on the particular circumstances. See Securities Act of 1933 Release No. 4434 (December 6, 1961) (26 FR 9158). Securities Act Release No. 4434 indicated that in determining whether offers and sales should be regarded as part of the same issue and thus should be integrated any one or more of the following factors may be determinative:

- (i) Are the offerings part of a single plan of financing;
- (ii) Do the offerings involve issuance of the same class of securities;
- (iii) Are the offerings made at or about the same time;
- (iv) Is the same type of consideration to be received; and
- (v) Are the offerings made for the same general purpose.

Subparagraph (b)(2) of the rule, however, is designed to provide certainty to the extent feasible by identifying certain types of offers and sales of securities which will be deemed not part of an issue, for purposes of the rule only.

Persons claiming the availability of the rule have the burden of proving that they have satisfied all of its provisions. However, the rule does not establish exclusive standards for complying with the section 3(a)(11) exemption. The exemption would also be available if the issuer satisfied the standards set forth in relevant administrative and judicial interpretations at the time of the offering but the issuer would have the burden of proving the availability of the exemption. Rule 147 relates to transactions exempted from the registration requirements of section 5 of the Act by section 3(a)(11). Neither the rule nor section 3(a)(11) provides an exemption from the registration requirements of section 12(g) of the Securities Exchange Act of 1934, the anti-fraud provisions of the federal securities laws, the civil liability provisions of section 12(2) of the Act or other provisions of the federal securities laws.

Finally, in view of the objectives of the rule and the purposes and policies underlying the Act, the rule shall not be available to any person with respect to any offering which, although in technical compliance with the rule, is part of a plan or scheme by such person to make interstate offers or sales of securities. In such cases registration pursuant to the Act is required.

4. The rule provides an exemption for offers and sales by the issuer only. It is not available for offers or sales of securities by other persons. Section 3(a)(11) of the Act has been interpreted to permit offers and sales by persons controlling the issuer, if the exemption provided by that section would have been available to the issuer at the time of the offering. See Securities Act Release No. 4434. Controlling persons who want to offer or sell securities pursuant to section 3(a)(11) may continue to do so in accordance with applicable judicial and administrative interpretations.

(a) **Transactions covered.** Offers, offers to sell, offers for sale and sales by an issuer of its securities made in accordance with all of the terms and conditions of this rule shall be deemed to be part of an issue offered and sold only to persons resident within a single state or territory where the issuer is a person resident and doing business within such state or territory, within the meaning of section 3(a)(11) of the Act.

(b) **Part of an issue.** (1) For purposes of this rule, all securities of the issuer which are part of an issue shall be offered, offered for sale or sold in accordance with all of the terms and conditions of this rule.

(2) For purposes of this rule only, an issue shall be deemed not to include offers, offers to sell, offers for sale or sales of securities of the issuer pursuant to the exemption provided by section 3 or section 4(a)(2) of the Act or pursuant to a registration statement filed under the Act, that take place prior to the six month period immediately preceding or after the six month period immediately following any offers, offers for sale or sales pursuant to this rule, *Provided*, That, there are during either of said six month periods no offers, offers for sale or sales of securities by or for the issuer of the same or similar class as those offered, offered for sale or sold pursuant to the rule.

Note: In the event that securities of the same or similar class as those offered pursuant to the rule are offered, offered for sale or sold less than six months prior to or subsequent to any offer, offer for sale or sale pursuant to this rule, see Preliminary Note 3 hereof as to which offers, offers to sell, offers for sale, or sales are part of an issue.

(c) **Nature of the issuer.** The issuer of the securities shall at the time of any offers and the sales be a person resident and doing business within the state or territory in which all of the offers, offers to sell, offers for sale and sales are made.

(1) The issuer shall be deemed to be a resident of the state or territory in which:

(i) It is incorporated or organized, if a corporation, limited partnership, trust or other form of business organization that is organized under state or territorial law;

(ii) Its principal office is located, if a general partnership or other form of business organization that is not organized under any state or territorial law;

(iii) His principal residence is located if an individual.

(2) The issuer shall be deemed to be doing business within a state or territory if:

(i) The issuer derived at least 80 percent of its gross revenues and those of its subsidiaries on a consolidated basis.

(A) For its most recent fiscal year, if the first offer of any part of the issue is made during the first six months of the issuer's current fiscal year; or

(B) For the first six months of its current fiscal year or during the twelve-month fiscal period ending with such six-month period, if the first offer of any part of the issue is made during the last six months of the issuer's current fiscal year from the operation of a business or of real property located in or from the rendering of services within such state or territory; provided, however, that this provision does not apply to any issuer which has not had gross revenues in excess of \$5,000 from the sale of products or services or other conduct of its business for its most recent twelve-month fiscal period;

(ii) The issuer had at the end of its most recent semi-annual fiscal period prior to the first offer of any part of the issue, at least 80 percent of its assets and those of its subsidiaries on a consolidated basis located within such state or territory;

(iii) The issuer intends to use and uses at least 80 percent of the net proceeds to the issuer from sales made pursuant to this rule in connection with the operation of a business or of real property, the purchase of real property located in, or the rendering of services within such state or territory; and

(iv) The principal office of the issuer is located within such state or territory.

(d) **Offerees and purchasers: Person resident.** Offers, offers to sell, offers for sale and sales of securities that are part of an issue shall be made only to persons resident within the state or territory of which the issuer is a resident. For purposes of determining the residence of offerees and purchasers:

(1) A corporation, partnership, trust or other form of business organization shall be deemed to be a resident of a state or territory if, at the time of the offer and sale to it, it has its principal office within such state or territory.

(2) An individual shall be deemed to be a resident of a state or territory if such individual has, at the time of the offer and sale to him, his principal residence in the state or territory.

(3) A corporation, partnership, trust or other form of business organization which is organized for the specific purpose of acquiring part of an issue offered pursuant to this rule shall be deemed not to be a resident of a state or territory unless all of the beneficial owners of such organization are residents of such state or territory.

(e) **Limitation of resales.** During the period in which securities that are part of an issue are being offered and sold by the issuer, and for a period of nine months from the date of the last sale by the issuer of such securities, all resales of any part of the issue, by any person, shall be made only to persons resident within such state or territory.

Notes: 1. In the case of convertible securities resales of either the convertible security, or if it is converted, the underlying security, could be made during the period described in paragraph (e) only to persons resident within such state or territory. For purposes of this rule a conversion in reliance on section 3(a)(9) of the Act does not begin a new period.

2. Dealers must satisfy the requirements of Rule 15c2-11 under the Securities Exchange Act of 1934 prior to publishing any quotation for a security, or submitting any quotation for publication, in any quotation medium.

(f) **Precautions against interstate offers and sales.** (1) The issuer shall, in connection with any securities sold by it pursuant to this rule:

(i) Place a legend on the certificate or other document evidencing the security stating that the securities have not been registered under the Act and setting forth the limitations on resale contained in paragraph (e) of this section;

(ii) Issue stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities make a notation in the appropriate records of the issuer; and

(iii) Obtain a written representation from each purchaser as to his residence.

(2) The issuer shall, in connection with the issuance of new certificates for any of the securities that are part of the same issue that are presented for transfer during the time period specified in paragraph (e), take the steps required by paragraphs (f)(1) (i) and (ii) of this section.

(3) The issuer shall, in connection with any offers, offers to sell, offers for sale or sales by it pursuant to this rule, disclose, in writing, the limitations on resale contained in paragraph (e) and the provisions of paragraphs (f)(1) (i) and (ii) and paragraph (f)(2) of this section.

Accredited Investor Definition

17 C.F.R. § 230.501(a) (as in effect on May 12, 2015)

Accredited investor shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

(1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(a)(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

(2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000;

(4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds \$1,000,000.

(i) Except as provided in paragraph (a)(5)(ii) of this section, for purposes of calculating net worth under this paragraph (a)(5):

(A) The person's primary residence shall not be included as an asset;

(B) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount

outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

(C) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;

(ii) Paragraph (a)(5)(i) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:

(A) Such right was held by the person on July 20, 2010;

(B) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and

(C) The person held securities of the same issuer, other than such right, on July 20, 2010.

(6) Any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(7) Any trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in § 230.506(b)(2)(ii); and

(8) Any entity in which all of the equity owners are accredited investors.