

1 SB44
2 155637-1
3 By Senator Orr
4 RFD: Finance and Taxation General Fund
5 First Read: 14-JAN-14
6 PFD: 11/26/2013

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8 SYNOPSIS: Under current law, certain investments
9 meeting set parameters within or without the State
10 of Alabama are exempt from various regulations of
11 the Alabama Securities Commission.

12 This bill would provide for this exemption
13 to apply solely to offerings of securities
14 conducted in the State of Alabama to residents of
15 the State of Alabama and set new parameters for
16 such investments.

17
18 A BILL
19 TO BE ENTITLED
20 AN ACT

21
22 To amend Section 8-6-11 to provide for an exception
23 to Section 8-6-3 through 8-6-9 for certain investments.

24 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

25 Section 1. To amend Section 8-6-11 of the Code of
26 Alabama 1975.

27 "§8-6-11.

1 "(a) Except as hereinafter in this section expressly
2 provided, Sections 8-6-3 through 8-6-9 shall not apply to any
3 of the following transactions:

4 "(1) Any isolated nonissuer transaction, whether
5 effected through a dealer or not;

6 "(2) Any nonissuer transaction in an outstanding
7 security by a registered dealer if:

8 "a. The issuer has a class of securities subject to
9 registration under Section 12 of the Securities Exchange Act
10 of 1934 and has been subject to the reporting requirements of
11 Sections 13 or 15(d) of the Securities Exchange Act of 1934
12 for not less than 180 days before the transaction; or has
13 filed and maintained with the commission for not less than 180
14 days before the transaction information, in such form as the
15 commission, by rule, specifies, substantially comparable to
16 the information which the issuer would be required to file
17 under Section 12(b) or Section 12(g) of the Securities
18 Exchange Act of 1934, or the securities have been the subject
19 of an effective registration statement within 180 days before
20 the transaction, or the issuer is required to file and has
21 filed all reports under Section 13 of the Securities Exchange
22 Act of 1934, or the issuer is exempted from registration by
23 Section 12(g)(3) of the Securities Exchange Act of 1934, it or
24 its predecessor in interest has been in existence for at least
25 five years, the security is listed for trading on a foreign
26 securities exchange and has been trading for at least six
27 months and continues to trade on such exchange, and the

1 aggregate market value of shares, the ownership of which is
2 unrestricted, is not less than \$500,000,000; or

3 "b. The issuer is an investment company registered
4 under the Investment Company Act of 1940 and has been subject
5 to the reporting requirements of Section 30 of that act for
6 not less than 180 days before the transaction; or

7 "c. The security has a fixed maturity or a fixed
8 interest or dividend provision and there has been no default
9 during the current fiscal year, within the three preceding
10 fiscal years, or during the existence of the issuer and any
11 predecessors if less than three years in the payment of
12 principal, interest, or dividends on the security;

13 "(3) Any nonissuer transaction effected by or
14 through a registered dealer pursuant to an unsolicited order
15 or offer to buy;

16 "(4) Any transaction between the issuer or other
17 person on whose behalf the offering is made and an underwriter
18 or among underwriters;

19 "(5) Any transaction in a bond or other evidence of
20 indebtedness secured by a real or chattel mortgage or deed of
21 trust or by an agreement for the sale of real estate or
22 chattels if the entire mortgage, deed of trust, or agreement,
23 together with all the bonds or other evidences of indebtedness
24 secured thereby, is offered and sold as a unit;

25 "(6) Any sale or the offering for sale of any
26 security at any judicial, executor's, administrator's,

1 guardian, or conservator's sale, or at any sale by a receiver
2 or trustee in insolvency or bankruptcy;

3 "(7) Any transaction executed by a bona fide pledge
4 without any purpose of evading this article;

5 "(8) Any offer or sale to a bank, savings
6 institution, credit union, trust company, insurance company or
7 investment company as defined in the Investment Company Act of
8 1940, pension or profit-sharing trust, or other financial
9 institution or institutional buyer, or to a dealer, whether
10 the purchaser is acting for itself or in some fiduciary
11 capacity;

12 "(9) Any transaction which is part of an issue of
13 which there are no more than 10 purchasers [other than those
14 designated in subdivision (a) (8) of this section] wherever
15 located, of securities from the issuer during any period of 12
16 consecutive months if:

17 "a. The issuer reasonably believes that all the
18 buyers are purchasing for investment and not with a view to
19 distribution, and such issuer exercises reasonable care to
20 assure this investment intent, which reasonable care shall be
21 presumed if the following conditions are satisfied:

22 "1. Reasonable inquiry to determine if the purchaser
23 is acquiring the securities for himself or herself or for
24 other persons;

25 "2. Written disclosure to each purchaser prior to
26 sale that the securities have not been registered under the
27 act and, therefore, cannot be resold unless they are

1 registered under the act or unless an exemption from
2 registration is available;

3 "3. Placement of a legend on the certificate or
4 other document that evidences the securities stating that the
5 securities have not been registered under the act and setting
6 forth or referring to the restrictions on transferability and
7 sale of the securities; and

8 "b. No commission or other remuneration is paid or
9 given directly or indirectly for soliciting any prospective
10 buyer; and

11 "c. No public advertising or general solicitation is
12 used in connection with the issue of which the transaction in
13 reliance on this exemption is a part.

14 "Sections 8-6-3 through 8-6-9 shall not apply to any
15 offer made pursuant to this subdivision (a) (9) in which no
16 sale results.

17 "But the Securities Commission may by rule or order,
18 as to any security or transaction or any type of security or
19 transaction, withdraw or further condition this exemption or
20 decrease or increase the number of purchasers permitted, or
21 waive the conditions in paragraphs a. and b. of this
22 subdivision (9) with or without the substitution of a
23 limitation on remuneration.

24 "(10) Any transaction pursuant to an offer to
25 existing security holders of the issuer, including persons who
26 at the time of the transaction are holders of convertible
27 securities, nontransferable warrants or transferable warrants

1 exercisable within not more than 90 days of their issuance,
2 if:

3 "a. No commission or other remuneration, other than
4 a standby commission, is paid or given directly or indirectly
5 for soliciting any security holder in this state; or

6 "b. The issuer first files a notice specifying the
7 terms of the offer and the Securities Commission does not by
8 order disallow the exemption within the next five full
9 business days;

10 "(11) Any offer, but not a sale, of a security for
11 which registration statements have been filed under both this
12 article and the Securities Act of 1933 if no order of denial,
13 suspension, or revocation is in effect and no public
14 proceeding or examination looking toward such an order is
15 pending under either act;

16 "(12) The issuance of any stock dividend, whether
17 the corporation distributing the dividend is the issuer of the
18 stock or not, if nothing of value is given by stockholders for
19 the distribution other than the surrender of a right to a cash
20 dividend where the stockholder can elect to take a dividend in
21 cash or stock;

22 "(13) Any transaction incident to a right of
23 conversion or a statutory or judicially approved
24 reclassification, recapitalization, reorganization,
25 quasi-reorganization, stock split, reverse stock split,
26 merger, consolidation, or sale of assets; or

27 ~~"(14) Any transaction by an issuer if:~~

1 ~~"a. The aggregate amount of the total offering,~~
2 ~~within or without this state, shall not exceed \$500,000, less~~
3 ~~the aggregate offering price of all securities sold within 12~~
4 ~~months before the start of and during the offering of~~
5 ~~securities under this subsection or in reliance on the~~
6 ~~exemption contained in paragraph a. of subdivision (a) (9) of~~
7 ~~this section or which have been sold in violation of Section~~
8 ~~8-6-4.~~

9 ~~"b. No person purchases more than \$15,000 of the~~
10 ~~securities offered and sold in reliance upon the exemption~~
11 ~~contained in this paragraph, except that this limitation on~~
12 ~~the amount that may be purchased shall not apply to~~
13 ~~"accredited investors" as defined in 17 Code of Federal~~
14 ~~Regulations §230.501.~~

15 ~~"c. A disclosure document is delivered to any~~
16 ~~purchaser of the securities sold pursuant to this exemption~~
17 ~~prior to or simultaneously with the execution by the purchaser~~
18 ~~of a written agreement to purchase, the delivery of a~~
19 ~~confirmation of sale, or the payment for securities offered by~~
20 ~~means of such disclosure document, whichever occurs first. The~~
21 ~~disclosure document under which securities are sold pursuant~~
22 ~~to this exemption shall contain the following:~~

23 ~~"1. With respect to the issuer: its name, street~~
24 ~~address, form of organization, and its telephone number; the~~
25 ~~state or foreign jurisdiction and the date of its~~
26 ~~organization; a brief description of the type and location of~~
27 ~~its business;~~

1 ~~"2. A brief description of the material risks~~
2 ~~associated with the purchase of the securities;~~

3 ~~"3. The use of proceeds from the offering, including~~
4 ~~a description of expenses, commissions and fees paid in~~
5 ~~connection with the offering and the net proceeds available~~
6 ~~for use by the issuer;~~

7 ~~"4. A description of the capital stock of the issuer~~
8 ~~if a corporation or the equity ownership if an organization~~
9 ~~other than a corporation, including, where appropriate, the~~
10 ~~number of shares of capital stock issued and outstanding, the~~
11 ~~number of shares owned by management, and the options~~
12 ~~outstanding, if any, and the average exercise price for such~~
13 ~~options;~~

14 ~~"5. The dilution, if any, to purchasers of the~~
15 ~~securities offered for sale pursuant to this exemption;~~

16 ~~"6. A description of the management of the issuer~~
17 ~~and material transactions between the issuer and management;~~

18 ~~"7. A statement that additional information~~
19 ~~concerning the issuer may be obtained upon request, including,~~
20 ~~where applicable, articles of incorporation or partnership~~
21 ~~agreement;~~

22 ~~"8. The following financial statements which may,~~
23 ~~but need not, be certified: (i) a balance sheet of the issuer~~
24 ~~or a consolidated balance sheet of the issuer and its~~
25 ~~subsidiaries prepared in accordance with generally accepted~~
26 ~~accounting principles, as of a date within ninety days prior~~
27 ~~to the first offer of sale; and (ii) a profit and loss~~

1 ~~statement of the issuer or consolidated statement of the issue~~
2 ~~and its subsidiaries prepared in accordance with generally~~
3 ~~accepted accounting principles for each of the two fiscal~~
4 ~~years preceding the date of the balance sheet referred to~~
5 ~~above and for the interim period, if any, between the close of~~
6 ~~the most recent of such fiscal years and the date of the~~
7 ~~balance sheet and for the corresponding period of the~~
8 ~~preceding year or if the issuer and its predecessor have been~~
9 ~~in existence for less than two fiscal years, the profit and~~
10 ~~loss statement for the period for which it has been in~~
11 ~~existence;~~

12 ~~"9. The disclosure document shall contain~~
13 ~~substantially the following information shown boldly on the~~
14 ~~outside cover:~~

15 ~~"The securities are offered pursuant to a claim of~~
16 ~~exemption under the Alabama Securities Act. A registration~~
17 ~~statement relating to these securities has not been filed with~~
18 ~~the Alabama Securities Commission. The commission does not~~
19 ~~recommend or endorse the purchase of any securities, nor does~~
20 ~~it pass upon the accuracy or completeness of this private~~
21 ~~placement memorandum. Any representation to the contrary is a~~
22 ~~criminal offense.~~

23 ~~"10. The commission may, by rule or order, require~~
24 ~~as a condition of exemption under this subdivision (a) (14)~~
25 ~~that the disclosure document contain any designated part of~~
26 ~~the information as would be required by Part 1 of Form S-18,~~
27 ~~Code of Federal Regulations 239.28 not otherwise disclosed by~~

1 ~~this subdivision (a) (14), or permit the omission of any item~~
2 ~~of information from the disclosure document.~~

3 ~~"d. The seller reasonably believes that all buyers~~
4 ~~are purchasing for investment.~~

5 ~~"e. No commission, finders fee or other remuneration~~
6 ~~shall be paid or given, directly or indirectly, to any person~~
7 ~~for soliciting any prospective purchaser in this state, unless~~
8 ~~such person is registered in this state pursuant to Section~~
9 ~~8-6-3.~~

10 ~~"f. If the issuer is a corporation, its principal~~
11 ~~office and a majority of its full-time employees are located~~
12 ~~in this state.~~

13 ~~"g. If the issuer is a limited partnership, at least~~
14 ~~80 percent of its assets are located in this state.~~

15 ~~"h. At least 80 percent of the proceeds of the~~
16 ~~offering under this subdivision (a) (14) are used in the~~
17 ~~issuer's operations in this state.~~

18 ~~"i. At least 80 percent of the net proceeds of the~~
19 ~~offering under this subdivision (a) (14) are committed for use~~
20 ~~in a specific business.~~

21 ~~"j. Securities offered or sold under this~~
22 ~~subdivision (a) (14) are not offered or sold on credit or~~
23 ~~credit terms.~~

24 ~~"k. Offers and sales which are exempt under this~~
25 ~~subdivision (a) (14) are not combined with offers and sales by~~
26 ~~issuers in transactions which are exempt under any other rule~~
27 ~~or section of this article.~~

1 ~~"1. No exemption under this rule shall be available~~
2 ~~for the securities of any issuer if any of the parties~~
3 ~~described in Rule 252(c), (d), (e) or (f) of Regulation A, 17~~
4 ~~Code of Federal Regulations §230.252(c), (d), (e), and (f),~~
5 ~~adopted under the Securities Act of 1933 (generally described~~
6 ~~as: the issuer, any of its predecessors or any affiliated~~
7 ~~issuer; any of the directors, officers, general partners, or~~
8 ~~beneficial owners of 10 percent or more of any equity~~
9 ~~securities of the issuer; any underwriter of the securities or~~
10 ~~any partner, director, or officer of any such underwriter; or~~
11 ~~any issuer subject to the reporting requirements of the~~
12 ~~Securities Exchange Act of 1934 who has failed to file~~
13 ~~required reports):~~

14 ~~"1. Has filed a registration statement which is the~~
15 ~~subject of a currently effective registration stop order~~
16 ~~entered pursuant to any state's securities law within five~~
17 ~~years prior to the filing of the notice required under this~~
18 ~~exemption.~~

19 ~~"2. Has been convicted within five years prior to~~
20 ~~the filing of the notice required under this exemption of any~~
21 ~~felony or misdemeanor in connection with the offer, purchase~~
22 ~~or sale of any security or any felony involving fraud or~~
23 ~~deceit, including but not limited to forgery, embezzlement,~~
24 ~~obtaining money under false pretenses, larceny, or conspiracy~~
25 ~~to defraud.~~

26 ~~"3. Is currently subject to any state administrative~~
27 ~~enforcement order or judgment entered by that state's~~

1 securities administrator within five years prior to the filing
2 of the notice required under this exemption or is subject to
3 any state's administrative enforcement order or judgment in
4 which fraud or deceit, including but not limited to making
5 untrue statements of material facts and omitting to state
6 material facts, was found and the order or judgment was
7 entered within five years prior to the filing of the notice
8 required under this exemption.

9 "4. Is subject to any state's administrative
10 enforcement order or judgment which prohibits, denies, or
11 revokes the use of any exemption from registration in
12 connection with the offer, purchase, or sale of securities.

13 "5. Is currently subject to any order, judgment, or
14 decree of any court of competent jurisdiction temporarily or
15 preliminarily restraining or enjoining, or is subject to any
16 order, judgment, or decree of any court of competent
17 jurisdiction, permanently restraining or enjoining, such party
18 from engaging in or continuing any conduct or practice in
19 connection with the purchase or sale of any security or
20 involving the making of any false filing with the state
21 entered within five years prior to the filing of the notice
22 required under this exemption.

23 "6. The prohibitions of subparagraphs 1, 2, 3, and 5
24 above shall not apply if the person subject to the
25 disqualification is duly licensed or registered to conduct
26 securities-related business in the state in which the
27 administrative order of judgment was entered against such

1 ~~person or if the broker/dealer employing such party is~~
2 ~~licensed or registered in this state and the Form B-D filed~~
3 ~~with this state discloses the order, conviction, judgment, or~~
4 ~~decree relating to such person. No person disqualified under~~
5 ~~this subsection may act in a capacity other than that for~~
6 ~~which the person is licensed or registered.~~

7 ~~"7. Any disqualification caused by this section may~~
8 ~~be waived if the state securities administrator or agency of~~
9 ~~the state which created the basis for disqualification~~
10 ~~determines upon a showing of good cause that it is not~~
11 ~~necessary under the circumstances that the exemption be~~
12 ~~denied.~~

13 ~~"8. The disqualification found in 17 Code of Federal~~
14 ~~Regulations §230 of Regulation D, shall apply also to~~
15 ~~offerings made pursuant to Rule 506 of the Code of Federal~~
16 ~~Regulations.~~

17 ~~"m. The issuer shall file with the Securities~~
18 ~~Commission:~~

19 ~~"1. An application for exemption on Form D, 17 Code~~
20 ~~of Federal Regulations §239.500 no later than five full~~
21 ~~business days prior to the commencement of the offering in~~
22 ~~this state. The application for exemption shall include two~~
23 ~~copies of all information furnished by the issuer to any of~~
24 ~~the offerees. The commission shall issue an order of~~
25 ~~exemption, notice of deficiency, or denial of exemption within~~
26 ~~the five full day business period;~~

1 ~~"2. A notice of Part C of Form D, 17 Code of Federal~~
2 ~~Regulations §239.500, no later than 30 days after the~~
3 ~~completion date of the offering;~~

4 ~~"3. The notice of Form D, 17 Code of Federal~~
5 ~~Regulations §239.500, required by subparagraphs 1. and 2.~~
6 ~~above shall be manually signed by a person duly authorized by~~
7 ~~the issuer;~~

8 ~~"4. Every application for exemption provided for in~~
9 ~~subparagraph i. above shall be accompanied by a nonrefundable~~
10 ~~filing fee of \$150. Such filing fee shall be deposited in the~~
11 ~~Alabama Securities Commission Fund in the State Treasury to be~~
12 ~~drawn upon by the commission for its use in administration of~~
13 ~~this article. All applications for exemption and notices on~~
14 ~~Form D, 17 Code of Federal Regulations §239.500 shall be~~
15 ~~considered filed with the Securities Commission as of the date~~
16 ~~on which received at the office of the Securities Commission;~~

17 ~~"5. Unless otherwise available, included with or in~~
18 ~~the initial notice shall be a consent to service of process as~~
19 ~~provided for in Section 8-6-12.~~

20 ~~"But the Securities Commission may by rule or order,~~
21 ~~as to any security or transaction of any type of security or~~
22 ~~transaction, withdraw or further condition this exemption.~~

23 ~~"(14) An offering of securities conducted solely in~~
24 ~~this state to residents of this state in which:~~

25 ~~"a. The issuer of the security shall be a for-profit~~
26 ~~business or organization formed under the laws of the state of~~
27 ~~Alabama and registered with the secretary of state.~~

1 "b. The transaction shall meet the requirements of
2 the federal exemption for intrastate offerings in section
3 3(a)(11) of the Securities Act of 1933, 15 U.S.C. §
4 77c(a)(11), and SEC rule 147. As such, securities must be
5 offered to and sold only to persons who are residents of the
6 state of Alabama at the time of purchase. Prior to any offer
7 or sale pursuant to this exemption, the seller shall obtain
8 documentary evidence from each prospective purchaser that
9 provides the seller with a reasonable basis to believe that
10 such investor is a resident of the state of Alabama.

11 "c. The sum of all cash and other consideration to
12 be received for all sales of the security in reliance upon
13 this exemption shall not exceed one million dollars
14 (\$1,000,000), less the aggregate amount received for all sales
15 of securities by the issuer within the twelve months before
16 the first offer or sale made in reliance upon this exemption.

17 "d. The issuer shall not accept more than five
18 thousand dollars (\$5,000) from any single purchaser unless the
19 purchaser is an accredited investor as defined by Rule 501 SEC
20 regulation D, 17 C.F.R. 230.501.

21 "e. The issuer must reasonably believe that all
22 purchasers of securities are purchasing for investment and not
23 for sale in connection with a distribution of the security.

24 "f. A commission or remuneration shall not be paid
25 or given, directly or indirectly, for any person's
26 participation in the offer or sale of securities for the

1 issuer unless the person is registered as a broker-dealer or
2 agent under the Act.

3 "g. All funds received from investors shall be
4 deposited into a bank or depository institution authorized to
5 do business in Alabama, and all the funds shall be used in
6 accordance with representations made to investors.

7 "h. Not less than Ten days prior to the use of any
8 general solicitation or within fifteen days after the first
9 sale of the security pursuant to this exemption (provided no
10 general solicitation has been used prior to such sale),
11 whichever occurs first, the issuer shall provide a notice to
12 the commissioner in writing or electronically on Form CF1. The
13 notice shall specify that the issuer is conducting an offering
14 in reliance upon this exemption and shall contain the names
15 and addresses of the following persons:

16 "1. The issuer;

17 "2. Officers, directors and any control person of
18 the issuer;

19 "3. All persons who will be involved in the offer or
20 sale of securities on behalf of the issuer; and

21 "4. The bank or other depository institution in
22 which investor funds will be deposited.

23 "i. The issuer shall not be, either before or as a
24 result of the offering:

25 "1. An investment company as defined in section 3 of
26 the Investment Company Act of 1940, 15 U.S.C. § 80a-3, or
27 subject to the reporting requirements of Section 13 or 15(d)

1 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m and
2 78o(d); or

3 "2. An investment adviser as defined at Code of
4 Alabama 1975, § 8-6-2(18), nor a person who otherwise provides
5 investment advice as a service or for a fee.

6 "j. The issuer shall inform all purchasers that the
7 securities have not been registered under the act and,
8 therefore, cannot be resold unless the securities are
9 registered or qualify for an exemption from registration under
10 Code of Alabama 1975 §§ 8-6-4 through 8-6-11. In addition, the
11 issuer shall make the disclosures required by subsection (f)
12 or SEC Rule 147, 17 C.F.R. 230.147(f).

13 "k. This exemption shall not be used in conjunction
14 with any other exemption under the Act except the exemption to
15 institutional investors at § 8-6-11(a)(8) and for offers and
16 sales to controlling persons of the issuer. Sales to
17 controlling persons shall not count toward the limitation in
18 paragraph (14)c.

19 "l. This exemption shall no be available if the
20 issuer, or any it's officers, controlling people or promoters
21 is subject to a disqualifier enumerated at Code of Alabama
22 1975, §8-6-9.

23 "m. Nothing in this exemption shall be construed to
24 alleviate any person from the anti-fraud provisions at Code of
25 Alabama 1975, §8-6-17, nor shall such exemption be construed
26 to provide relief from any other provisions of this Article
27 other than as expressly stated.

1 "n. Every notice of exemption provided for in
2 paragraph h. above shall be accompanied by a nonrefundable
3 filing fee of \$150.

4 "But the Securities Commission may by rule or order,
5 as to any security or transaction of any type of security or
6 transaction, withdraw, further condition or expand this
7 exemption.

8 "(b) The Securities Commission may by order deny or
9 revoke the exemption specified in this section with respect to
10 a specific security if it finds the sale of such security
11 would work or tend to work a fraud upon the purchasers
12 thereof. No order under this subsection may operate
13 retroactively. No person may be considered to have violated
14 this article by reason of any offer or sale effected after the
15 entry of an order under this subsection if he or she sustains
16 the burden of proof that he or she did not know and in the
17 exercise of reasonable care could not have known of the order.
18 In any proceeding under this article, the burden of proving an
19 exemption from a definition is upon the person claiming it.

20 "(c) Any individual, corporation, partnership, or
21 association who makes application to the Securities Commission
22 for any exemption from full registration under subdivision
23 (a) (9) of this section shall be assessed a filing fee in the
24 amount of three hundred dollars (\$300) upon application for
25 such exemption. The fee shall accompany the application and
26 shall not be refunded whether the application is approved or
27 rejected. Fees collected under this subsection shall be

1 deposited in a special account in the State Treasury for the
2 use of the commission in the administration of this article."

3 Section 2. This act shall become effective
4 immediately upon its passage and approval by the Governor, or
5 its otherwise becoming law.