

1 SB44
2 155637-5
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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4 ENGROSSED

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7 A BILL
8 TO BE ENTITLED
9 AN ACT

10
11 To amend Section 8-6-11 to provide for an exception
12 to Section 8-6-3 through 8-6-9 for certain investments.

13 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

14 Section 1. To amend Section 8-6-11 of the Code of
15 Alabama 1975.

16 "§8-6-11.

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

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

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

24 "a. The issuer has a class of securities subject to
25 registration under Section 12 of the Securities Exchange Act
26 of 1934 and has been subject to the reporting requirements of
27 Sections 13 or 15(d) of the Securities Exchange Act of 1934

1 for not less than 180 days before the transaction; or has
2 filed and maintained with the commission for not less than 180
3 days before the transaction information, in such form as the
4 commission, by rule, specifies, substantially comparable to
5 the information which the issuer would be required to file
6 under Section 12(b) or Section 12(g) of the Securities
7 Exchange Act of 1934, or the securities have been the subject
8 of an effective registration statement within 180 days before
9 the transaction, or the issuer is required to file and has
10 filed all reports under Section 13 of the Securities Exchange
11 Act of 1934, or the issuer is exempted from registration by
12 Section 12(g)(3) of the Securities Exchange Act of 1934, it or
13 its predecessor in interest has been in existence for at least
14 five years, the security is listed for trading on a foreign
15 securities exchange and has been trading for at least six
16 months and continues to trade on such exchange, and the
17 aggregate market value of shares, the ownership of which is
18 unrestricted, is not less than \$500,000,000; or

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

23 "c. The security has a fixed maturity or a fixed
24 interest or dividend provision and there has been no default
25 during the current fiscal year, within the three preceding
26 fiscal years, or during the existence of the issuer and any

1 predecessors if less than three years in the payment of
2 principal, interest, or dividends on the security;

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

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

9 "(5) Any transaction in a bond or other evidence of
10 indebtedness secured by a real or chattel mortgage or deed of
11 trust or by an agreement for the sale of real estate or
12 chattels if the entire mortgage, deed of trust, or agreement,
13 together with all the bonds or other evidences of indebtedness
14 secured thereby, is offered and sold as a unit;

15 "(6) Any sale or the offering for sale of any
16 security at any judicial, executor's, administrator's,
17 guardian, or conservator's sale, or at any sale by a receiver
18 or trustee in insolvency or bankruptcy;

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

21 "(8) Any offer or sale to a bank, savings
22 institution, credit union, trust company, insurance company or
23 investment company as defined in the Investment Company Act of
24 1940, pension or profit-sharing trust, or other financial
25 institution or institutional buyer, or to a dealer, whether
26 the purchaser is acting for itself or in some fiduciary
27 capacity;

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

6 "a. The issuer reasonably believes that all the
7 buyers are purchasing for investment and not with a view to
8 distribution, and such issuer exercises reasonable care to
9 assure this investment intent, which reasonable care shall be
10 presumed if the following conditions are satisfied:

11 "1. Reasonable inquiry to determine if the purchaser
12 is acquiring the securities for himself or herself or for
13 other persons;

14 "2. Written disclosure to each purchaser prior to
15 sale that the securities have not been registered under the
16 act and, therefore, cannot be resold unless they are
17 registered under the act or unless an exemption from
18 registration is available;

19 "3. Placement of a legend on the certificate or
20 other document that evidences the securities stating that the
21 securities have not been registered under the act and setting
22 forth or referring to the restrictions on transferability and
23 sale of the securities; and

24 "b. No commission or other remuneration is paid or
25 given directly or indirectly for soliciting any prospective
26 buyer; and

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

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

7 "But the Securities Commission may by rule or order,
8 as to any security or transaction or any type of security or
9 transaction, withdraw or further condition this exemption or
10 decrease or increase the number of purchasers permitted, or
11 waive the conditions in paragraphs a. and b. of this
12 subdivision (9) with or without the substitution of a
13 limitation on remuneration.

14 "(10) Any transaction pursuant to an offer to
15 existing security holders of the issuer, including persons who
16 at the time of the transaction are holders of convertible
17 securities, nontransferable warrants or transferable warrants
18 exercisable within not more than 90 days of their issuance,
19 if:

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

23 "b. The issuer first files a notice specifying the
24 terms of the offer and the Securities Commission does not by
25 order disallow the exemption within the next five full
26 business days;

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

7 "(12) The issuance of any stock dividend, whether
8 the corporation distributing the dividend is the issuer of the
9 stock or not, if nothing of value is given by stockholders for
10 the distribution other than the surrender of a right to a cash
11 dividend where the stockholder can elect to take a dividend in
12 cash or stock;

13 "(13) Any transaction incident to a right of
14 conversion or a statutory or judicially approved
15 reclassification, recapitalization, reorganization,
16 quasi-reorganization, stock split, reverse stock split,
17 merger, consolidation, or sale of assets; or

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

19 ~~"a. The aggregate amount of the total offering,~~
20 ~~within or without this state, shall not exceed \$500,000, less~~
21 ~~the aggregate offering price of all securities sold within 12~~
22 ~~months before the start of and during the offering of~~
23 ~~securities under this subsection or in reliance on the~~
24 ~~exemption contained in paragraph a. of subdivision (a) (9) of~~
25 ~~this section or which have been sold in violation of Section~~
26 ~~8-6-4.~~

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

7 ~~"c. A disclosure document is delivered to any~~
8 ~~purchaser of the securities sold pursuant to this exemption~~
9 ~~prior to or simultaneously with the execution by the purchaser~~
10 ~~of a written agreement to purchase, the delivery of a~~
11 ~~confirmation of sale, or the payment for securities offered by~~
12 ~~means of such disclosure document, whichever occurs first. The~~
13 ~~disclosure document under which securities are sold pursuant~~
14 ~~to this exemption shall contain the following:~~

15 ~~"1. With respect to the issuer: its name, street~~
16 ~~address, form of organization, and its telephone number; the~~
17 ~~state or foreign jurisdiction and the date of its~~
18 ~~organization; a brief description of the type and location of~~
19 ~~its business;~~

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

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

26 ~~"4. A description of the capital stock of the issuer~~
27 ~~if a corporation or the equity ownership if an organization~~

1 other than a corporation, including, where appropriate, the
2 number of shares of capital stock issued and outstanding, the
3 number of shares owned by management, and the options
4 outstanding, if any, and the average exercise price for such
5 options;

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

8 "6. A description of the management of the issuer
9 and material transactions between the issuer and management;

10 "7. A statement that additional information
11 concerning the issuer may be obtained upon request, including,
12 where applicable, articles of incorporation or partnership
13 agreement;

14 "8. The following financial statements which may,
15 but need not, be certified: (i) a balance sheet of the issuer
16 or a consolidated balance sheet of the issuer and its
17 subsidiaries prepared in accordance with generally accepted
18 accounting principles, as of a date within ninety days prior
19 to the first offer of sale; and (ii) a profit and loss
20 statement of the issuer or consolidated statement of the issue
21 and its subsidiaries prepared in accordance with generally
22 accepted accounting principles for each of the two fiscal
23 years preceding the date of the balance sheet referred to
24 above and for the interim period, if any, between the close of
25 the most recent of such fiscal years and the date of the
26 balance sheet and for the corresponding period of the
27 preceding year or if the issuer and its predecessor have been

1 in existence for less than two fiscal years, the profit and
2 loss statement for the period for which it has been in
3 existence;

4 "9. The disclosure document shall contain
5 substantially the following information shown boldly on the
6 outside cover:

7 "The securities are offered pursuant to a claim of
8 exemption under the Alabama Securities Act. A registration
9 statement relating to these securities has not been filed with
10 the Alabama Securities Commission. The commission does not
11 recommend or endorse the purchase of any securities, nor does
12 it pass upon the accuracy or completeness of this private
13 placement memorandum. Any representation to the contrary is a
14 criminal offense.

15 "10. The commission may, by rule or order, require
16 as a condition of exemption under this subdivision (a) (14)
17 that the disclosure document contain any designated part of
18 the information as would be required by Part 1 of Form S-18,
19 Code of Federal Regulations 239.28 not otherwise disclosed by
20 this subdivision (a) (14), or permit the omission of any item
21 of information from the disclosure document.

22 "d. The seller reasonably believes that all buyers
23 are purchasing for investment.

24 "e. No commission, finders fee or other remuneration
25 shall be paid or given, directly or indirectly, to any person
26 for soliciting any prospective purchaser in this state, unless

1 ~~such person is registered in this state pursuant to Section 8-6-3.~~

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

5 ~~"g. If the issuer is a limited partnership, at least~~
6 ~~80 percent of its assets are located in this state.~~

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

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

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

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

20 ~~"l. No exemption under this rule shall be available~~
21 ~~for the securities of any issuer if any of the parties~~
22 ~~described in Rule 252 (c), (d), (e) or (f) of Regulation A, 17~~
23 ~~Code of Federal Regulations §230.252 (c), (d), (e), and (f),~~
24 ~~adopted under the Securities Act of 1933 (generally described~~
25 ~~as: the issuer, any of its predecessors or any affiliated~~
26 ~~issuer; any of the directors, officers, general partners, or~~
27 ~~beneficial owners of 10 percent or more of any equity~~

1 securities of the issuer; any underwriter of the securities or
2 any partner, director, or officer of any such underwriter; or
3 any issuer subject to the reporting requirements of the
4 Securities Exchange Act of 1934 who has failed to file
5 required reports):

6 "1. Has filed a registration statement which is the
7 subject of a currently effective registration stop order
8 entered pursuant to any state's securities law within five
9 years prior to the filing of the notice required under this
10 exemption.

11 "2. Has been convicted within five years prior to
12 the filing of the notice required under this exemption of any
13 felony or misdemeanor in connection with the offer, purchase
14 or sale of any security or any felony involving fraud or
15 deceit, including but not limited to forgery, embezzlement,
16 obtaining money under false pretenses, larceny, or conspiracy
17 to defraud.

18 "3. Is currently subject to any state administrative
19 enforcement order or judgment entered by that state's
20 securities administrator within five years prior to the filing
21 of the notice required under this exemption or is subject to
22 any state's administrative enforcement order or judgment in
23 which fraud or deceit, including but not limited to making
24 untrue statements of material facts and omitting to state
25 material facts, was found and the order or judgment was
26 entered within five years prior to the filing of the notice
27 required under this exemption.

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

5 ~~"5. Is currently subject to any order, judgment, or~~
6 ~~decree of any court of competent jurisdiction temporarily or~~
7 ~~preliminarily restraining or enjoining, or is subject to any~~
8 ~~order, judgment, or decree of any court of competent~~
9 ~~jurisdiction, permanently restraining or enjoining, such party~~
10 ~~from engaging in or continuing any conduct or practice in~~
11 ~~connection with the purchase or sale of any security or~~
12 ~~involving the making of any false filing with the state~~
13 ~~entered within five years prior to the filing of the notice~~
14 ~~required under this exemption.~~

15 ~~"6. The prohibitions of subparagraphs 1, 2, 3, and 5~~
16 ~~above shall not apply if the person subject to the~~
17 ~~disqualification is duly licensed or registered to conduct~~
18 ~~securities-related business in the state in which the~~
19 ~~administrative order of judgment was entered against such~~
20 ~~person or if the broker/dealer employing such party is~~
21 ~~licensed or registered in this state and the Form B-D filed~~
22 ~~with this state discloses the order, conviction, judgment, or~~
23 ~~decree relating to such person. No person disqualified under~~
24 ~~this subsection may act in a capacity other than that for~~
25 ~~which the person is licensed or registered.~~

26 ~~"7. Any disqualification caused by this section may~~
27 ~~be waived if the state securities administrator or agency of~~

1 the state which created the basis for disqualification
2 determines upon a showing of good cause that it is not
3 necessary under the circumstances that the exemption be
4 denied.

5 "8. The disqualification found in 17 Code of Federal
6 Regulations §230 of Regulation D, shall apply also to
7 offerings made pursuant to Rule 506 of the Code of Federal
8 Regulations.

9 "m. The issuer shall file with the Securities
10 Commission:

11 "1. An application for exemption on Form D, 17 Code
12 of Federal Regulations §239.500 no later than five full
13 business days prior to the commencement of the offering in
14 this state. The application for exemption shall include two
15 copies of all information furnished by the issuer to any of
16 the offerees. The commission shall issue an order of
17 exemption, notice of deficiency, or denial of exemption within
18 the five full day business period;

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

22 "3. The notice of Form D, 17 Code of Federal
23 Regulations §239.500, required by subparagraphs 1. and 2.
24 above shall be manually signed by a person duly authorized by
25 the issuer;

26 "4. Every application for exemption provided for in
27 subparagraph i. above shall be accompanied by a nonrefundable

1 filing fee of \$150. Such filing fee shall be deposited in the
2 Alabama Securities Commission Fund in the State Treasury to be
3 drawn upon by the commission for its use in administration of
4 this article. All applications for exemption and notices on
5 Form D, 17 Code of Federal Regulations §239.500 shall be
6 considered filed with the Securities Commission as of the date
7 on which received at the office of the Securities Commission;

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

11 "But the Securities Commission may by rule or order,
12 as to any security or transaction of any type of security or
13 transaction, withdraw or further condition this exemption.

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

16 "a. The issuer of the security shall be a for-profit
17 corporation or other for-profit entity, or business
18 cooperative with its principal place of business in the state
19 of Alabama and registered with the secretary of state.

20 "b. The transaction shall meet the requirements of
21 the federal exemption for intrastate offerings in section
22 3(a)(11) of the Securities Act of 1933, 15 U.S.C. §
23 77c(a)(11), and SEC rule 147. As such, securities must be
24 offered to and sold only to persons who are residents of the
25 state of Alabama at the time of purchase. Prior to any offer
26 or sale pursuant to this exemption, the seller shall obtain
27 documentary evidence from each prospective purchaser that

1 provides the seller with a reasonable basis to believe that
2 such investor is a resident of the state of Alabama.

3 "c. The sum of all cash and other consideration to
4 be received for all sales of the security in reliance upon
5 this exemption shall not exceed one million dollars
6 (\$1,000,000), less the aggregate amount received for all sales
7 of securities by the issuer within the twelve months before
8 the first offer or sale made in reliance upon this exemption.

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

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

16 "f. A commission or remuneration shall not be paid
17 or given, directly or indirectly, for any person's
18 participation in the offer or sale of securities for the
19 issuer unless the person is registered as a broker-dealer or
20 agent under the Act.

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

25 "h. Not less than Ten days prior to the use of any
26 general solicitation or within fifteen days after the first
27 sale of the security pursuant to this exemption (provided no

1 general solicitation has been used prior to such sale),
2 whichever occurs first, the issuer shall provide a notice to
3 the commission in writing or electronically on Form CF1. The
4 notice shall specify that the issuer is conducting an offering
5 in reliance upon this exemption and shall contain the names
6 and addresses of the following persons:

7 "1. The issuer;

8 "2. Officers, directors and any control person of
9 the issuer;

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

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

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

16 "1. An investment company as defined in section 3 of
17 the Investment Company Act of 1940, 15 U.S.C. § 80a-3, or
18 subject to the reporting requirements of Section 13 or 15(d)
19 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m and
20 78o(d); or

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

24 "j. The issuer shall inform all purchasers that the
25 securities have not been registered under the act and,
26 therefore, cannot be resold unless the securities are
27 registered or qualify for an exemption from registration under

1 Code of Alabama 1975 §§ 8-6-4 through 8-6-11. In addition, the
2 issuer shall make the disclosures required by subsection (f)
3 or SEC Rule 147, 17 C.F.R. 230.147(f).

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

10 "l. This exemption shall not be available if the
11 issuer, or any it's officers, controlling people or promoters
12 is subject to a disqualifier enumerated at Code of Alabama
13 1975, §8-6-9.

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

19 "n. Every notice of exemption provided for in
20 paragraph h. above shall be accompanied by a nonrefundable
21 filing fee of \$150. Such filing fee shall be deposited in the
22 Alabama Securities Commission Fund in the State Treasury to be
23 drawn upon by the commission for its use in administration of
24 this article.

25 "But the Securities Commission may by rule or order,
26 as to any security or transaction of any type of security or

1 transaction, withdraw, further condition or expand this
2 exemption.

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

15 "(c) Any individual, corporation, partnership, or
16 association who makes application to the Securities Commission
17 for any exemption from full registration under subdivision
18 (a)(9) of this section shall be assessed a filing fee in the
19 amount of three hundred dollars (\$300) upon application for
20 such exemption. The fee shall accompany the application and
21 shall not be refunded whether the application is approved or
22 rejected. Fees collected under this subsection shall be
23 deposited in a special account in the State Treasury for the
24 use of the commission in the administration of this article."

25 Section 2. This act shall become effective
26 immediately upon its passage and approval by the Governor, or
27 its otherwise becoming law.

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Senate

Read for the first time and referred to
the Senate committee on Finance and Taxation Gen-
eral Fund 14-JAN-14

Read for the second time and placed on
the calendar with 1 substitute and..... 15-JAN-14

Read for the third time and passed as
amended 23-JAN-14

Yeas 31
Nays 0

Patrick Harris
Secretary