

Act No. 529
Public Acts of 1996
Approved by the Governor
January 12, 1997
Filed with the Secretary of State
January 13, 1997

**STATE OF MICHIGAN
88TH LEGISLATURE
REGULAR SESSION OF 1996**

Introduced by Senator Rogers

ENROLLED SENATE BILL No. 1108

AN ACT to amend sections 305, 306, and 307 of Act No. 265 of the Public Acts of 1964, entitled as amended "An act to enact the uniform securities act relating to the issuance, offer, sale or purchase of securities and commodity contracts; to prohibit fraudulent practices in relation thereto; to establish civil and criminal penalties for violations of the act and civil penalties for violation of the rules promulgated pursuant to the act; to require the registration of broker-dealers and their principals, agents, investment advisers, commodity issuers, and securities; to make uniform the law with reference thereto; and to repeal certain acts and parts of acts," section 305 as amended by Act No. 150 of the Public Acts of 1990, being sections 451.705, 451.706, and 451.707 of the Michigan Compiled Laws; and to add section 304a.

The People of the State of Michigan enact:

Section 1. Sections 305, 306, and 307 of Act No. 265 of the Public Acts of 1964, section 305 as amended by Act No. 150 of the Public Acts of 1990, being sections 451.705, 451.706, and 451.707 of the Michigan Compiled Laws, are amended and section 304a is added to read as follows:

Sec. 304a. (1) A security that is exempt from registration under the federal exemption set forth in 17 C.F.R. 230.504 may be registered under this section. An issuer eligible to register a security under this section shall use a registration form approved by the administrator as the disclosure document for the offering. A registration under this section shall be known as a small corporate offering registration.

(2) An application for a small corporate offering registration shall comply with this section. However, the administrator may waive provisions of this section.

(3) A small corporate offering registration under this section is not available to either of the following:

(a) Investment companies subject to the investment company act of 1940, title I of chapter 686, 54 Stat. 789, 15 U.S.C. 80a-1 to 80a-64.

(b) Issuers subject to the reporting requirements of section 13 or section 15(d) of title I of the securities exchange act of 1934, 15 U.S.C. 78m and 78o.

(4) All of the following provisions apply to the availability of a small corporate offering registration:

(a) A small corporate offering registration shall not be utilized by the following issuers and programs unless the administrator grants written permission based upon a showing that adequate disclosure can be made to investors using the small corporate offering registration format:

(i) Holding companies, companies that have a principal purpose of owning stock in, or supervising the management of, other companies.

(ii) Portfolio companies, such as real estate investment trusts.

(iii) Issuers with complex capital structures.

(iv) Commodity pools.

(v) Equipment leasing programs.

(vi) Real estate programs.

(b) A small corporate offering registration under this section is available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resale of the issuer's securities. In addition, each of the following requirements shall be met:

(i) The issuer is a domestic corporation or a foreign corporation organized under the laws of any state, territory, or possession of the United States. The administrator may allow other entities to file a small corporate offering registration.

(ii) The offering is not a blind pool or other offering for which the specific business to be engaged in or property to be acquired by the issuer cannot be specified.

(iii) The offering price for common stock; the exercise price if the securities offered are options, warrants, or rights for common stock; and the conversion price if the securities are convertible into common stock is at least \$5.00 per share, unless the administrator authorizes a lower price per share.

(iv) The aggregate offering price of the securities offered, within or outside this state, is not more than \$1,000,000.00, under the federal exemption set forth in 17 C.F.R. 230.504, or \$5,000,000.00 if a federal exemption is granted to this state pursuant to section 3(b) of the securities act of 1933, title I of chapter 38, 48 Stat. 75, 15 U.S.C. 77c.

(c) A small corporate offering registration under this section is only available for debt offerings if the issuer can demonstrate a reasonable ability to service its debt.

(5) A small corporate offering registration under this section is not available if any of the following provisions apply to the issuer, to any of the issuer's officers, directors, 10% stockholders, promoters, or selling agent of the securities to be offered, or to any officer, director, or partner of the selling agent of the securities to be offered:

(a) The person has filed a registration statement that is the subject of a currently effective registration stop order entered pursuant to any federal or state securities law within 5 years before the small corporate offering registration application is filed.

(b) The person has been convicted of any felony or misdemeanor in connection with the offer, purchase, or sale of any security or any felony involving fraud or deceit, including any of the following, within 5 years before the small corporate offering registration application is filed:

(i) Forgery.

(ii) Embezzlement.

(iii) Obtaining money under false pretenses.

(iv) Larceny.

(v) Conspiracy to defraud.

(c) The person is currently subject to either of the following:

(i) A state administrative enforcement order or judgment entered against that person by a state securities administrator or the securities and exchange commission within 5 years before the small corporate offering registration application is filed.

(ii) A federal or state administrative enforcement order or judgment in which fraud or deceit, including making untrue statements of material facts or failing to state material facts, was found and the order or judgment was entered within 5 years before the small corporate offering registration application is filed.

(d) The person is subject to a federal or state administrative enforcement order or judgment that prohibits, denies, or revokes the use of any exemption for registration in connection with the offer, purchase, or sale of securities.

(e) The person is currently subject to a court order, judgment, or decree entered within 5 years before the small corporate offering registration application is filed that does either of the following:

(i) Temporarily, preliminarily, or permanently restrains or enjoins that person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security.

(ii) Involves the making of a false filing with any state or with the securities and exchange commission.

(f) A person who is disqualified under this subsection shall not act in any capacity other than that for which the person is licensed or registered. A disqualification under this subsection is automatically waived if the administrator or other state or federal agency that created the basis for disqualification determines, upon a showing of good cause, that it is not necessary under the circumstances to deny the exemption.

(g) Subdivisions (a), (b), (c), and (e) do not apply if the person disqualified under those subdivisions is licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered

against that person or if the broker-dealer who employs the person is licensed or registered in this state and the form BD filed in this state discloses the order, conviction, judgment, or decree relating to that person.

(6) An applicant who files a small corporate offering registration application in this state shall not split common stock or declare a stock dividend for any security issued under this section for 2 years after the registration is effective without the prior written approval of the administrator.

(7) In addition to a properly completed application form, an applicant for a small corporate offering registration under this section shall file all of the following exhibits with the administrator:

- (a) The form of the selling agency agreement.
- (b) The issuer's articles of incorporation or other charter documents and all amendments.
- (c) The issuer's bylaws, as amended.
- (d) Copies of any resolutions by directors setting forth terms and provisions of capital stock to be issued.
- (e) Any indenture, form of note, or other contractual provision containing terms of notes or other debt or of options, warrants, or rights to be offered.
- (f) A specimen of the security to be offered, including any legend restricting resale.
- (g) Consent to service of process accompanied by an appropriate corporate resolution.
- (h) Copies of all material directed or furnished to investors in the offering.
- (i) The form of escrow agreement for escrow of proceeds. An escrow agreement shall comply with all of the following:
 - (i) The administrator may require that the issuer impound the proceeds from the sale of a registered security in this state until the issuer receives a specified amount from the sale of that security in this state or elsewhere that is sufficient to accomplish the stated purposes of the offering or until the issuer's stipulated requirements are met.
 - (ii) The administrator may require that the issuer return any impounded proceeds, together with any accrued interest, to investors if the issuer fails to raise the specified amount while the registration is effective or within 1 year or if the issuer's stipulated requirements are not met.
 - (iii) A bank or trust company may act as depository or escrow agent for impounded proceeds. Checks, drafts, and money orders shall be made payable to the depository. If a broker-dealer is acting as selling agent for the issuer, the broker-dealer shall promptly remit payments made directly to that broker-dealer to the depository or escrow agent.
 - (iv) A request to release impounded funds shall be in writing. The request shall confirm compliance with the registration and shall be accompanied by a statement from the depository or escrow agent setting forth the total amount on deposit.
- (j) Consent to inclusion in the disclosure document of an accountant's report.
- (k) Consent to inclusion in the disclosure document of a tax advisor's opinion or a description of tax consequences.
- (l) Consent to inclusion in the disclosure document of an evaluation by a licensed attorney of any pending or anticipated litigation or administrative action.
- (m) The form of any subscription agreement for the purchase of securities in the offering.
- (n) An opinion of a licensed attorney that the securities to be sold in the offering are duly authorized and binding on the issuer in accordance with the terms of the securities.
- (o) A list of the residence street addresses of officers, directors, and principal stockholders.

(8) Information provided to the administrator under subsection (7) is exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

(9) An applicant for a small corporate offering registration under this section shall pay a filing fee of 1/10 of 1% of the maximum aggregate offering price at which the registered securities are to be offered in this state, but in no case less than \$100.00 or more than \$1,250.00, to the administrator with the application form. If the applicant withdraws the application before the small corporate offering registration is effective or before a preeffective stop order is issued, the administrator shall retain the entire filing fee if review of the application has commenced, or shall retain a \$100.00 fee and refund the balance of the filing fee to the applicant if review of the application has not commenced.

(10) A small corporate offering registration statement filed under this section is effective for 1 year from its effective date, except during the time a stop order is in effect under this section. A small corporate offering registration statement may be extended by the administrator by rule or order. All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction so long as the small corporate offering registration statement is effective. A small corporate offering registration statement may not be withdrawn for 1 year from its effective date if any securities of the same class are outstanding. A small corporate offering registration statement may be withdrawn otherwise only in the discretion of the administrator.

(11) For the period that a small corporate offering registration statement is effective, the administrator may by rule or order require the person who filed the small corporate offering registration statement to file reports, not more often than quarterly, to keep reasonably current the information contained in the small corporate offering registration statement and to disclose the progress of the offering.

(12) A small corporate offering registration statement relating to a security may be amended after its effective date to increase the securities specified as proposed to be offered. As to securities not yet sold, an amendment becomes effective upon the administrator's order. In the case of securities that are sold in an amount in excess of the amount or number of securities specified in an effective small corporate offering registration statement, as proposed to be offered, the person or persons who filed the small corporate offering registration statement may, in accordance with rules the administrator shall promulgate as necessary or appropriate in the public interest and for the protection of investors, elect to have the small corporate offering registration of those securities considered effective as of the time of their sale, upon payment to the administrator within 6 months after the sale of a registration fee equal to the difference between the registration fee previously paid and the amount of the fee that would have otherwise been applicable to those additional securities if they had been included in the small corporate offering registration statement, if any, plus a late registration fee of \$250.00. Upon the election and payment, the small corporate offering registration statement shall be considered to have been in effect with respect to those shares. Every person filing an amendment under this section shall pay a filing fee, calculated in the manner specified in subsection (9), with respect to the additional securities.

(13) Fees, expense reimbursements, and fines received under this section shall be deposited in the state treasury to the credit of the administrator, to be used pursuant to legislative appropriation by the corporation and securities bureau in carrying out those duties required by law. After the payment of the amounts appropriated by the legislature for the necessary expenses incurred in the administration of this act, the money remaining shall be credited to the general fund of this state.

(14) Fees and fines received under this section shall not be expended for partisan political activity.

(15) All of the following apply to orders under this subsection:

(a) The administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any small corporate offering registration statement if it finds that the order is in the public interest and any of the following:

(i) The small corporate offering registration statement as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment under subsection (12) as of its effective date, or any report under subsection (11) is incomplete in any material respect or contains any statement that was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact.

(ii) Any provision of this section or any rule, order, or condition lawfully imposed under this section has been violated in connection with the offering by any of the following:

(A) The person filing the small corporate offering registration statement.

(B) The issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the small corporate offering registration statement is directly or indirectly controlled by or acting for the issuer.

(C) Any underwriter.

(iii) The security registered or sought to be registered is the subject of an administrative stop order or similar order or a permanent or temporary injunction of any court entered under any other federal or state act applicable to the offering. However, the administrator shall not institute a proceeding against an effective small corporate offering registration statement under this subdivision more than 1 year from the date of the order or injunction relied on, and may not enter an order under this subdivision on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts that would currently constitute a ground for a stop order under this section.

(iv) The issuer's enterprise or method of business includes or would include activities that are illegal where performed.

(v) The offering has worked or has tended to work a fraud, deception, or imposition or would operate to work a fraud, deception, or imposition.

(b) The administrator may by order summarily postpone or suspend the effectiveness of the small corporate offering registration statement pending final determination of any proceeding under this section. Upon the entry of the order, the administrator shall promptly notify each person specified in subdivision (c) that the order has been entered, the reasons that the order has been entered, and that within 15 days after the receipt of a written request the matter will be scheduled for hearing. If no hearing is requested and none is ordered by the administrator, the order shall remain in effect until it is modified or vacated by the administrator. If a hearing is requested or ordered, the administrator, after notice and opportunity for hearing to each person specified in subdivision (c), may modify, vacate, or extend the order until final determination.

(c) A stop order shall not be entered under this section except under the first sentence of subdivision (b) without all of the following:

(i) Appropriate prior notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered.

(ii) Opportunity for hearing.

(iii) Written findings of fact and conclusions of law.

(d) The administrator may vacate or modify a stop order if it finds that the conditions that prompted entry of the stop order have changed or that it is otherwise in the public interest to vacate or modify the stop order.

Sec. 305. (a) A registration statement may be filed by the issuer, any other person on whose behalf the offering is to be made, or a registered broker-dealer.

(b) Every person filing a registration statement shall pay a filing fee of 1/10 of 1% of the maximum aggregate offering price at which the registered securities are to be offered in this state, but the fee shall in no case be less than \$100.00 or more than \$1,250.00. When an application for registration is withdrawn before the effective date or a preeffective stop order is issued, the administrator shall retain a fee of \$100.00 if the initial review has not been commenced, and the full filing fee after review has been commenced.

(c) Every registration statement shall specify:

(1) The amount of securities to be offered in this state.

(2) The states in which a registration statement or similar document in connection with the offering has been or is to be filed.

(3) Any withdrawal or any adverse order, judgment, or decree entered in connection with the offering by the regulatory authorities in each state or by any court or the securities and exchange commission.

(d) Any document filed under this act or a predecessor act within 5 years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the document is currently accurate.

(e) The administrator may by rule or otherwise permit the omission of any item of information or document from any registration statement.

(f) The administrator may by rule or order require as a condition of registration by qualification or coordination both of the following:

(1) That any security issued or to be issued to a promoter for a consideration substantially different from the public offering price, or to any person for a consideration other than cash, be deposited in escrow.

(2) That the proceeds from the sale of the registered security in this state be impounded until the issuer receives a specified amount from the sale of the security either in this state or elsewhere. The administrator may by rule or order determine the conditions of any escrow or impounding required under this subsection, and, after prior notice and opportunity for hearing, may order the cancellation in whole or in part of any security deposited in escrow if necessary for the protection of security holders. The administrator may not reject a depository solely because of location in another state.

(g) The administrator may by rule or order impose conditions under which a security registered by qualification may be sold, if it finds that the conditions are reasonable and in the public interest.

(h) Every registration statement is effective for 1 year from its effective date, except during the time a stop order is in effect under section 306. A registration statement may be extended by the administrator by rule or order. All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction so long as the registration statement is effective or the issuer has a class of securities that have been subject to the reporting requirements of section 13 or 15(d) of title I of the securities exchange act of 1934, 15 U.S.C. 78m and 78o, for not less than 9 months before the transaction and all reports required by that act have been filed for that period. A registration statement may not be withdrawn for 1 year from its effective date if any securities of the same class are outstanding. A registration statement may be withdrawn otherwise only in the discretion of the administrator.

(i) For the period that the registration statement is effective, the administrator may by rule or order require the person who filed the registration statement to file reports, not more often than quarterly, to keep reasonably current the information contained in the registration statement and to disclose the progress of the offering.

(j) A registration statement relating to a security may be amended after its effective date to increase the securities specified as proposed to be offered. As to securities not yet sold, an amendment becomes effective upon the administrator's order. In the case of securities that are sold in an amount in excess of the amount or number of securities specified in an effective registration statement, as proposed to be offered, the person or persons who filed the registration statement may, in accordance with rules the administrator shall promulgate as necessary or appropriate in

the public interest and for the protection of investors, elect to have the registration of those securities considered effective as of the time of their sale, upon payment to the administrator within 6 months after the sale of a registration fee equal to the difference between the registration fee previously paid and the amount of the fee that would have otherwise been applicable to those additional securities if they had been included in the registration statement, if any, plus a late registration fee of \$250.00. Upon the election and payment, the registration statement shall be considered to have been in effect with respect to those shares. Every person filing an amendment under this subsection shall pay a filing fee, calculated in the manner specified in subsection (b), with respect to the additional securities.

(k) Fees, expense reimbursements, and fines received under this act shall be deposited in the state treasury to the credit of the administrator, to be used pursuant to legislative appropriation by the corporation and securities bureau in carrying out those duties required by law. After the payment of the amounts appropriated by the legislature for the necessary expenses incurred in the administration of this act, the money remaining shall be credited to the general fund of this state.

(l) Fees and fines received under this act shall not be expended for partisan political activity.

(m) This section does not apply to securities registered under section 304a.

Sec. 306. (a) The administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any registration statement if it finds that the order is in the public interest and any of the following:

(1) The registration statement as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment under section 305(j) as of its effective date, or any report under section 305(i) is incomplete in any material respect or contains any statement that was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact.

(2) Any provision of this act or any rule, order, or condition lawfully imposed under this act has been violated in connection with the offering by any of the following:

(i) The person filing the registration statement.

(ii) The issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer.

(iii) Any underwriter.

(3) The security registered or sought to be registered is the subject of an administrative stop order or similar order or a permanent or temporary injunction of any court entered under any other federal or state act applicable to the offering. However, the administrator may not institute a proceeding against an effective registration statement under this clause more than 1 year from the date of the order or injunction relied on, and may not enter an order under this clause on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts that would currently constitute a ground for a stop order under this section.

(4) The issuer's enterprise or method of business includes or would include activities that are illegal where performed.

(5) The offering has worked or has tended to work a fraud, deception, or imposition or would operate to work a fraud, deception, or imposition, or the offering is on unfair terms.

(6) The offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options. With respect to the sale of periodic payment plan certificates for the purchase of securities of investment companies registered under the investment company act of 1940, title I of chapter 686, 54 Stat. 789, 15 U.S.C. 80a-1 to 80a-64, commissions up to 9% of the total payments to be made during the entire term of the plan, and deductions for those commissions from any of the first 12 monthly payments, or their equivalent, up to 1/2 thereof, shall be allowed.

(7) If a security is sought to be registered by notification, it is not eligible for that registration.

(8) If a security is sought to be registered by coordination, there has been a failure to comply with the undertaking required by section 303(b)(4).

(9) The applicant or registrant has failed to pay the proper filing fee. However, the administrator may enter only a denial order under this clause and it shall vacate that order if the deficiency is corrected.

(b) The administrator may by order summarily postpone or suspend the effectiveness of the registration statement pending final determination of any proceeding under this section. Upon the entry of the order, the administrator shall promptly notify each person specified in subsection (c) that the order has been entered, the reasons that the order has been entered, and that within 15 days after the receipt of a written request the matter will be scheduled for hearing. If no hearing is requested and none is ordered by the administrator, the order shall remain in effect until it is modified or vacated by the administrator. If a hearing is requested or ordered, the administrator, after notice and opportunity for hearing to each person specified in subsection (c), may modify, vacate, or extend the order until final determination.

(c) No stop order may be entered under this section except under the first sentence of subsection (b), without all of the following:

(1) Appropriate prior notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered.

(2) Opportunity for hearing.

(3) Written findings of fact and conclusions of law.

(d) The administrator may vacate or modify a stop order if it finds that the conditions that prompted entry of the stop order have changed or that it is otherwise in the public interest to vacate or modify the stop order.

(e) This section does not apply to securities registered under section 304a.

Sec. 307. An applicant for registration or exemption may deliver a preliminary prospectus to offerees before the effectiveness of a registration or exemption order if either of the following conditions is satisfied:

(a) If the applicant has filed a registration statement under section 302 or 303 and a stop order is not in effect under this act or the securities act of 1933, title I of chapter 38, 48 Stat. 74, 15 U.S.C. 77a to 77r and 77s to 77aa, or a public proceeding or examination looking toward a stop order is not pending under this act or the securities act of 1933.

(b) If the applicant has filed a registration statement under section 304 or 304a or has filed a request for an exemption order under section 402 more than 5 business days before delivery of a preliminary prospectus, and the administrator by written notice to the applicant has not objected to the use of the preliminary prospectus, or a stop order, proceeding, or examination is not in effect or pending.

This act is ordered to take immediate effect.

Secretary of the Senate.

Clerk of the House of Representatives.

Approved -----

Governor.