CHAPTER 20:08:07

NOTICE FILINGS FOR COVERED SECURITIES AND REGISTRATION EXEMPTIONS

Section

20:08:07:17 Foreign cooperatives.

20:08:07:18 Repealed.

20:08:07:19 Repealed.

20:08:07:20 Unsolicited orders.

20:08:07:21 Real estate and mortgage-backed securities.

20:08:07:22 Repealed.

20:08:07:23 Sales to existing security holders/standby commissions.

20:08:07:24 Limited offerings general rules.

20:08:07:25 Intrastate limited offering transactional exemption.

20:08:07:26 Repealed.

20:08:07:27 Testing-the-waters exemption.

20:08:07:28 Repealed.

20:08:07:29 Model accredited investor exemption.

20:08:07:30 Manual exemption.

20:08:07:31 Viatical settlements.

20:08:07:32 Canadian-United States cross-border trading exemption.

20:08:07:33 Church extension fund securities.

20:08:07:34 Solicitation of interest.

20:08:07:35 Merger and consolidation.

20:08:07:36 Designated foreign jurisdiction.

20:08:07:37 Twenty-five purchasers exempt transaction.

20:08:07:38 Entities for economic development.

20:08:07:39 Isolated non-issuer exemption.

20:08:07:40. Request for Transactional Exemption Pursuant to a Fairness Determination.

(1) Any person seeking the director's approval, pursuant to SDCL § 47-31B-202(9), of the fairness of the terms and conditions of the issuance and delivery of securities in exchange for outstanding securities, claims, or property interests, shall make application with the director as described in paragraph (2) below. The director may in his sole discretion reject any application. The director will only consider an application for a proposed exchange transaction where five percent (5%) or more of the persons to whom it is proposed to issue securities or to deliver other consideration in an exchange under SDCL § 47-31B-202(9) are persons who are South Dakota residents, and:

(a) The applicant is a domestic business entity formed, organized, or incorporated under the laws of South Dakota; or

(b) The applicant is a business entity whose headquarters or principal place of business is located in South Dakota.

(2) The application and all accompanying documents shall be type-written and submitted to the director in triplicate. The application shall be signed and dated by the applicant or by a person authorized to act in the applicant's behalf. The application shall request that the director conduct a hearing pursuant to SDCL § 47-31B-202(9) and shall contain the following information:

(a) The full legal name, state of formation, organization or incorporation, and principal office address of any person proposing to issue securities or deliver other consideration in the proposed exchange.

(b) A description of the proposed transaction, including but not limited to all parties to the transaction, all major lines of business engaged in by such parties, expected benefits of the transaction, a chronological description of the transaction to date, a projected timetable and description of all events necessary to consummate the transaction, all legal and financial advisors providing advice to any party to the transaction, and identification of any persons providing any valuation or fairness opinions to any party with respect to the securities or other consideration to be issued or exchanged in the proposed transaction.

(c) A description of the securities or other consideration to be issued or delivered in the proposed exchange.

(d) A description of the bona fide securities, claims or property interests for which the securities or other consideration referred to in paragraph (2)(c) are to be exchanged, including the full legal name, state of formation, organization or incorporation, and principal office address of the issuer of any such bona fide securities.

(e) A brief statement of the terms and conditions under which the securities or other consideration referred to in paragraph (2)(c) will be issued and exchanged or delivered and exchanged for the bona fide securities, claims or property interests.

(f) A list of the full legal names, addresses, and percentage interest owned of all persons to whom the securities will be issued or other consideration delivered in the exchange. If some or all of such persons are to receive the securities or other consideration by virtue of their ownership of shares of stock in a corporation, the applicant may comply with this requirement by submitting a list which shows the shareholders of the corporation and the number of shares and percentage of total shares held by each shareholder as of a date not more than 30 days prior to the filing of the application.

(g) A statement setting forth the distinct number of and percentage total of all persons named on the list to be provided pursuant to paragraph (2)(f) who are residents of South Dakota.

(h) A statement setting forth proposed findings of fact which the applicant requests that the director find and incorporate in the director's written decision with respect to the application.

(i) A statement as to whether the applicant intends to rely on the exemption from federal securities registration provided for in section 3(a)(10) of the Securities Act of 1933, 15 U.S.C. §77c(a)(10).

(j) Any additional information which the applicant desires the director to consider. The director may require the applicant to submit other information in addition to the information required by this rule. The director may also waive or modify the requirements of this rule by allowing the applicant to submit less information than this rule would otherwise require.

(3) The application shall be accompanied by the following documents:

(a) All written agreements, and accompanying appendices, exhibits and attachments, governing the proposed transaction.

(b) All press releases or other media announcements regarding the proposed transaction disseminated by any party to the proposed transaction.

(c) A draft copy of the notice of the requested hearing to be held by the director in connection with the application that the applicant plans to mail to all persons to whom the applicant proposes to issue securities or to deliver other consideration in the proposed transaction.

(d) An audited balance sheet, prepared in accordance with generally accepted accounting principles applicable in the United States ("US GAAP"), as of the close of the most recent fiscal year, and, in the case of a proposed roll up transaction, a pro forma balance sheet, as of the close of most recent fiscal year, disclosing the effect of the transaction, in each case, of any person whose securities will be issued or exchanged in the proposed transaction.

(e) An audited income statement, prepared in accordance with US GAAP, for the most recent fiscal year, and, in the case of a proposed roll up transaction, a pro forma income statement, as of the close of most recent fiscal year, disclosing the effect of the transaction, in each case, of any person whose securities will be issued or exchanged in the proposed transaction.

(f) All valuation or fairness opinions identified in paragraph (2)(c), including all materials supporting any parties' valuation of the securities or other consideration to be issued or exchanged in the proposed transaction.

(g) Any other documents which the applicant desires the director to consider. The director may require the applicant to submit other documents in addition to the documents required by this rule. The director may also waive or modify the requirements of this rule by allowing the applicant to submit fewer documents other than those which this rule would otherwise require.

(h) A non-refundable filing fee of five hundred dollars ($500.00).

(i) A written undertaking to pay, upon receipt of an invoice from the director, the fees and costs required by paragraph (4)(d) of this rule.

(j) A completed and notarized Form U-2, Uniform Consent to Service of Process.

(4) The procedure following application is as follows:

(a) The director may inform the applicant of any deficiencies in the application or of any additional information or documents required and may require the applicant to amend or resubmit the application prior to setting a date for the hearing.

(b) The director, in his sole discretion, may retain an independent valuation consultant to review all of the materials submitted in paragraph (2)(f) of this rule.

(c) Upon the filing of an application complying with the provisions of this rule, correction of any deficiencies and amendment of the application as necessary, and receipt of all materials requested by the director, the director will, within a reasonable period of time, inform the applicant of the date, hour and place of the hearing.

(d) Upon the director's issuance of a notice of hearing pursuant to SDCL 1-26-17, the applicant shall remit to the director a non-refundable fairness proceeding fee of seven thousand five hundred dollars ($7,500.00) and shall reimburse the director for all costs incurred by the director in connection with the fairness proceeding, including any costs in connection with the retention of any independent valuation consultant.

(e) The applicant shall mail by United States mail, postage prepaid, notice of the hearing to all persons to whom it is proposed to issue securities or to deliver the other consideration in such exchange, not less than 14 days prior to the hearing. The applicant shall provide to the director, on or before the date of the hearing, a certification that the notice of hearing has been so mailed.

(f) An evidentiary hearing shall be held by the director pursuant to chapter 1-26 and SDCL 47-31B-604.

(g) The applicant has the burden of proving the applicability of its claim for exemption under SDCL 47-31B-202(9).

(h) Within a reasonable period of time after the hearing, the director of securities shall issue an order either granting or denying approval of the terms of conditions of the proposed transaction.

Source:

General Authority: SDCL 47-31B-605(a)

Law Implemented: SDCL 47-31B-103, 47-31B-202(9).