

CHAPTER 18¹

OREGON SECURITIES LAW

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I. (§18.1) INTRODUCTION

2007 Supplement

The 2007 Legislature added new provisions to ORS chapter 59 authorizing the Attorney General to investigate and enforce violations of the Oregon Securities Law when the allegations involve companies whose securities are listed on a major stock exchange or when the allegations also include racketeering, unlawful trade practices,

or antitrust violations. See 2007 Or Laws ch 481, §1 (effective January 1, 2008). In most cases, the Attorney General must obtain the consent of the Department of Consumer and Business Services before undertaking an investment or enforcement action. The remedies and sanctions that may be imposed in an action under the new provisions include restitution, injunctive relief, attorney fees, and a fine of up to \$20,000 for each violation.

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The Oregon Securities Law is set forth in ORS chapter 59. See ORS 59.005. In connection with any offer or sale of a security (“transaction”) in Oregon, the Oregon Securities Law requires the following:

(1) The securities transaction must be registered with the Director of the Department of Consumer and Business Services (the “Director”), Division of Finance and Corporate Securities, Corporate Securities Section (the “Agency”), unless exempt or preempted (ORS 59.055(2));

(2) The person effecting the transaction must be licensed with the Director unless the person is excluded from the definition of broker-dealer, mortgage banker, mortgage broker, or salesperson or is preempted from licensing (ORS 59.165); and

(3) No material misrepresentation or omission may occur (ORS 59.135).

This chapter briefly discusses the registration procedures and, in somewhat more detail, the exemptions and federal preemptions from registration available under the Oregon Securities Law. ORS 59.345 sets forth the criteria for determining when an offer to sell or purchase is made in this state and, accordingly, subject to the Oregon Securities Law. In addition to state securities law provisions, federal securities law requirements must be considered. See chapters 14–17, *supra*. It should be noted that the requirement that no material misrepresentation or omission occur exists whether or not the transaction or the securities involved are registrable, exempt, or preempted. The exemptions and federal preemptions relate solely to filings with the Agency; they in no way diminish the need for compliance with the fraud and disclosure provisions of the securities law.

Ten types of registration are available in Oregon. One of these, “registration by qualification,” is a general registration available for all securities offerings. See §18.4, *infra*. The other nine types of registration are specialized and may be used only in certain offerings. Generally, the nine specialized registrations limit the scope of the selling campaign but have the advantage of significantly shortening the time frame for review by the Agency staff.

Two categories of registration exemption are available in Oregon: exempt securities (ORS 59.025) and exempt transactions (ORS 59.035). See §§18.18–18.39, *infra*. The first focuses on the instrument itself (e.g., government bonds, federally

chartered bank stock, and stock listed on the New York Stock Exchange); the second focuses on the individual transaction (e.g., certain sales to an institutional purchaser, certain sales by a licensed broker, and certain sales to a limited number of purchasers).

In addition, certain securities and transactions are deemed preempted from nearly all provisions of the Oregon Securities Law pursuant to §18 of the Securities Act of 1933 (the “1933 Securities Act”). See §18.3, *infra*.

Likewise, certain security-type instruments have been excluded from coverage by the Oregon Securities Law. ORS 59.015(19)(b).

In 1996, Congress passed and the President signed into law the National Securities Markets Improvement Act of 1996 (NSMIA), Pub L No 104-290, 110 Stat 3416. NSMIA preempts or significantly alters certain areas of state regulation of securities and the securities industry. Some of the provisions of NSMIA took effect on signing, October 11, 1996. Other provisions of NSMIA took effect on July 8, 1997. The areas of NSMIA that affect the subject matter of this chapter are discussed in §18.3, *infra*, and throughout this chapter. The reader is cautioned to consult appropriate sections of federal securities laws and other chapters of *Advising Oregon Businesses* for other subject-matter treatments of NSMIA.

II. REGISTRATION

(§ 18.2) Generally

Federally, regulatory review falls into two broad categories: (1) disclosure review and (2) merit review. Disclosure review involves a requirement that the offering document provide full and complete disclosure to prospective investors. Rules generally exist regarding the nature and scope of the disclosures that need to be included in the offering document. Federal review by the Securities and Exchange Commission (SEC) is disclosure review.

Merit review combines a disclosure requirement, as described above, with a determination that the reviewing agency find the offering to be “fair, just and equitable.” ORS 59.085, 59.095(3). The reviewing agency, in effect, looks to the fairness of the offering. Dilution, promoter compensation, investor rights, and the feasibility of the proposed activity are examples of the terms of the offering that may be evaluated. Oregon is a merit-review state, ORS 59.085, and the Agency has broad discretion in determining fairness. *Standard Ins. Co. v. Olin*, 81 Or App 405, 725 P2d 934 (1986); 25 Op Att’y Gen 85 (Or 1950). Merit review does not mean that the Agency has passed on the truthfulness, completeness, or worth of the registered security nor that it has recommended the investment. ORS 59.145.

B. (§18.3) Federal Covered Securities 2007 Supplement

Fees are now established by rule. See OAR 441-049-1001 for covered securities notice filing fees. The Agency has determined that annual renewal of the notice filing is not required for specific types of covered securities. Those covered securities types are securities subject to § 18(b)(3) or (4) of the Securities Act of 1933 for which only an initial filing is required. See 15 USC §§77a–77aa.

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Pursuant to federal legislation enacted in 1996 (NSMIA, see §18.1, *supra*), “covered securities” are preempted from the registration and licensing requirements of the Oregon Securities Law. Covered securities include:

- (1) Securities listed or approved for listing on the NYSE, the AMEX, the Nasdaq-NMS, certain recognized exchanges maintaining listing requirements comparable to the NYSE, the AMEX, or the Nasdaq-NMS, and securities equal to or senior to the listed securities;
- (2) Securities of investment companies registered under the Investment Company Act of 1940;
- (3) Securities sold to “qualified purchasers” as defined by the SEC (the SEC has not yet defined *qualified purchaser* for purposes of this provision);
- (4) Securities sold pursuant to §4(1) or 4(3) of the 1933 Securities Act, provided that the issuer of the securities is filing reports pursuant to §13 or 15 of the Securities Exchange Act of 1934 (the “1934 Securities Exchange Act”);
- (5) Securities sold pursuant to §4(4) of the 1933 Securities Act;
- (6) Securities sold pursuant to exemption under §3(a) of the 1933 Securities Act except for securities sold pursuant to paragraph (4), (10), or (11) and municipal securities sold pursuant to paragraph (2) to the extent that the securities are sold in the jurisdiction in which the municipality is located; and
- (7) Securities sold pursuant to SEC Rule 506.

NOTE: For purposes of item (7) above, only securities sold pursuant to SEC Rule 506 are deemed “covered securities.” Securities sold pursuant to either SEC Rule 504 or SEC Rule 505 under Regulation D of the 1933 Securities Act or pursuant to §4(2) of the 1933 Securities Act are not deemed to be covered securities.

NSMIA provides that the states retain antifraud jurisdiction over covered securities, and a state can require notice filings and notice fees for all sales of covered securities in that state, except for exchange-listed securities.

The Oregon Securities Law defines a *federal covered security* as “any security that is a covered security under § 18 of the Securities Act of 1933, as amended, and for

which such Act provides that the Director may require filing of a notice and payment of a fee.” ORS 59.015(5). The Oregon Securities Law also includes definitions and provisions for *federal covered investment advisers*, *investment adviser representatives*, and *state investment adviser*. ORS 59.015(4), (8)(a), (20)(a).

The notice filing provisions for covered securities are contained in ORS 59.049: ORS 59.049(1) provides for notice filing and fees for investment companies (mutual funds, unit investment trusts); ORS 59.049(2) provides for notice filings for all other covered securities except Rule 506; and ORS 59.049(3) provides for notice filings for Rule 506 offerings.

PRACTICE TIP: A security may be a “covered security” and simultaneously be exempt under ORS 59.025 or 59.035. In such cases, no notice filing under ORS 59.049 is required.

The Director, by rule or otherwise, may waive any or all of the provisions of ORS 59.049. ORS 59.049(7).

A notice filed under ORS 59.049 expires one year after its effective date. ORS 59.075(2); OAR 441-049-1021(5). The Director is authorized to establish procedures for renewing notice filings. ORS 59.075(3). See OAR 441-049-1021(6).

PRACTICE TIP: See OAR chapter 441, division 49, for procedures to be used in notice filing and renewal.

C. (§18.4) Registration by Qualification

2007 Supplement

ORS 59.065 no longer sets forth fees for registering an application. ORS 59.065 and 59.175 now direct the Agency to set by rule initial and renewal fees in an amount that is equal as nearly as possible to the national midpoint for similar fees charged by all other state regulatory agencies within the United States responsible for regulating securities. ORS 59.065(3)(a), 59.175(8)–(9)(a). The Agency may adjust the amount of the fee every two years to reflect changes in the national midpoint for a similar fee. ORS 59.065(3)(b), 59.175(9)(b). See OAR 441-065-001 for registration fees and OAR 441-175-0002 for fees for licensing of issuer agents.

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The general registration procedure is registration by qualification. See OAR 441-065-0020. The registrant must submit an application form, a fee computed in accordance with ORS 59.065, a disclosure document, and various supporting exhibits (articles and bylaws, financial statements, title reports, etc.). The Agency then reviews the submitted documents for disclosure and fairness. The registration application must be amended when there are material changes in the terms and conditions of the original registration. ORS 59.070.

PRACTICE TIP: Registration by qualification is the most burdensome of the registration procedures, but one in which the registrant is allowed the greatest selling flexibility. Virtually everything about the offering is negotiable with the Agency, fairness being the bottom line. All securities eligible for any of the specialized registrations, described in §§18.5–18.12, *infra*, also may be registered by qualification.

Generally, the initial review of the document occurs from two to four weeks after submission. Changes are almost always required in the initial documents that are filed. The Agency generally reviews the amended document within one week of submission and frequently requires additional changes. A typical offering will probably undergo three drafts and take four to eight weeks from original submission to final approval.

PRACTICE TIP: The Agency staff is available for prefiling conferences. Persons undertaking their first registration by qualification or whose client is pursuing a unique financing plan would be well advised to seek such a conference while the offering is in the planning stage in order to avoid the need for a major rewrite after the first comment letter. It should be noted, however, that the Agency declines to be bound by positions taken in these prefiling conferences.

D. (§18.5) Private Placement

See chapter 17, *supra*, for an in-depth discussion of the private placement of securities, involving an abbreviated form of registration.

E. (§18.6) Registration by Filing

An expedited registration procedure is provided by OAR 441-065-0030 for offerings by certain operating companies currently subject to SEC reporting requirements. The availability of this procedure is limited to securities of issuers who:

- (1) Are subject to state or federal jurisdiction;
- (2) Have actively engaged in business in the United States for at least three years;
- (3) Have at least 500 shareholders;
- (4) Have a net worth of at least \$4 million;
- (5) Have been subject to SEC reporting requirements for at least three years; and
- (6) Have a public float of at least 400,000 units.

An applicant must submit to the Agency a Form U-1, certain of the disclosure materials filed with the SEC, and a fee. Unlike other forms of registration, this registration becomes effective automatically unless the Agency raises objections.

NOTE: Issuers who qualify to use this type of registration may also qualify as issuers of “covered securities” preempted from registration under NSMIA.

F. (§18.7) Condominium Registration

Registration of condominium securities is provided for in OAR 441-065-0050. Condominium securities generally involve the sale of condominium units with investment contract characteristics. See chapter 15, *supra*, for a discussion of what constitutes an “investment contract” security. As applied to this registration procedure, the term includes condominium units sold pursuant to rental pools or mandatory rental arrangements. The rule mandates certain specific disclosures, rental pool restrictions, and prohibitions on excessive costs or compensation.

To apply for this form of registration, the registrant must file a Form U-1 application form, certain documents described in the regulation (including the disclosure material to be given prospective purchasers), and a fee.

G. (§18.8) Resale and Trading Registration

Licensed broker-dealers wishing to avail themselves of the exemption provided by ORS 59.035(9) may register all or part of any securities that they have acquired in the ordinary course of business. Registration for resale and trading is available under OAR 441-065-0040 if the securities are outstanding in the hands of the public and:

- (1) The issuer is organized under the laws of the United States or any state, or the issuer has at least 300 beneficial owners domiciled in the United States;
- (2) The issuer has not had an offering of the same class of securities in the previous six months, except for offerings to employees;
- (3) Prices and commissions are related to the market; and
- (4) The issuer agrees to provide, or is otherwise required to provide, audited financial statements annually to holders of the class registered, and the issuer is solvent, is not subject to administrative sanction, and has not engaged in certain activities.

To use this registration procedure, the broker-dealer must file with the Agency an application that includes the detailed information regarding the issuer specified in OAR 441-065-0040(4), together with a fee. This information must also be made available to purchasers.

H. (§18.9) Mortgage/Real Estate Paper Registrations

Offerings of real estate paper are often significantly different from other types of securities offerings. For example, the dollar amount of a typical mortgage security is frequently less than \$50,000, making the cost of drafting the offering materials quite high in relation to the size of the offering. As a consequence, the Agency created a

special registration procedure for real estate paper offerings that addressed the special aspects of these types of offerings. See OAR 441-065-0250, 441-065-0260.

This procedure allows the applicant to register an aggregate dollar amount of unspecified real estate paper on an annual basis. Each specific mortgage security is covered by this generic registration. The applicant must submit a disclosure document covering real estate paper generally. In addition, the written disclosure format proposed to be used for a specific transaction must be submitted to the Agency for review at the time the general application is filed. It is not necessary to file a specific disclosure document each time a mortgage broker transaction is actually made. Along with the necessary documents, the applicant must file Form U-1 and the appropriate fee.

The following types of securities cannot be offered or sold under a generic registration unless permission is obtained from the Director based on a showing that the investors are adequately protected:

- (1) Offerings involving construction loans and loans exceeding 90% of the appraised value of the property;
- (2) Offerings on behalf of the broker, its officers, agents, affiliates, and persons controlling the broker or affiliates (called “principal transactions”);
- (3) Offerings involving real estate paper that reserves the right to subordinate the position of any investor to any mortgage, trust deed, or lien created at or after the sale; and
- (4) Offerings involving pooling or participations involving more than 10 investors. OAR 441-065-0260(6)(a).

In any event, the general registration by qualification procedures remain available for all offerings, including real estate paper offerings.

I. (§18.10) Registration by Multijurisdictional Coordination

A type of registration that is extremely limited in application is set forth in OAR 441-065-0035. It is currently available only to certain Canadian “blue chip” companies that have filed registration statements with the SEC on Form F-7, F-8, F-9, or F-10. This type of registration, referred to at the federal level as the “Multijurisdictional Disclosure System,” is designed to expedite certain cross-border transactions. The registration is “automatic” in Oregon as long as both the SEC and either the Quebec Exchange or the Ontario Exchange have reviewed and cleared the offering. The applicant must file Form U-1, the current prospectus, and the appropriate registration fee. OAR 441-065-0035.

J. (§18.11) Small Corporate Offering Registration

The small corporate offering registration (OAR 441-065-0225), commonly known by the acronym SCOR, is located within the series of rules relating to so-called private

placements, although it is designed to be used in connection with a public offering proposing to raise a relatively small amount of capital.

SCOR is available to any issuer that is organized as a corporation or a limited liability company under the laws of any state or territory of the United States. It is available only to the issuer. It is not available for any corporation involved in petroleum exploration or production, mining, or other extractive industries, or for so-called blind pool or blank-check companies. See OAR 441-065-0080(3). See §18.37, *infra*, for additional restrictions on exempt securities transactions involving “blank-check companies.”

The aggregate amount of securities that may be sold under this type of registration may not exceed \$1 million. If the offering includes debt securities, the application for registration must include information demonstrating the issuer’s ability to service its debt. The offering price for any common stock must be no less than \$1 per share.

An applicant for this type of registration must file Form U-7 (available from the Agency) and pay the appropriate registration fees. OAR 441-065-0170(2). Form U-7 serves as both the application form and the disclosure document. The combination of application form and disclosure document is somewhat unique and is accepted, with some variation, in Washington, Idaho, California, and approximately 30 other states as well as in Oregon.

In addition to Form U-7, an applicant must file a salesperson application on Form U-4 unless a licensed broker-dealer will be selling the securities. OAR 441-065-0170(2)(c), 441-065-0180. Form U-4 is available from the Agency.

SCOR applications are reviewed for compliance with full-disclosure standards as well as for “merit” or “fairness” standards. One of the primary merit concerns is the amount of gross proceeds from the offering that are paid out as organizational or selling expenses. See OAR 441-065-0140(2), 441-085-0010 (discussed in §18.15, *infra*). An applicant should anticipate waiting two to three weeks after filing before receiving initial comments from the Agency. The entire process, from filing to receiving an order of registration, takes approximately six to eight weeks.

CAVEAT: Rules regarding registration of private placements and small corporate offerings are contained in a series of provisions located at OAR 441-065-0060 through 441-065-0230. It is important that lawyers be familiar with this entire set of rules to ensure compliance with all substantive requirements.

One of the advantages of SCOR is the acceptance by the states of a single uniform disclosure form—Form U-7. Rather than having to prepare a separate offering circular for use in each of the states in which it wishes to sell its securities, an issuer can prepare a single disclosure document for use in all of these states. Although the disclosure form may be uniform, it must nevertheless still be reviewed and cleared by each state’s securities agency. Issuers can find themselves dealing with a multitude of

different, and even conflicting, comments from state administrators, which can lead to the necessity of attaching separate state “sticker” supplements to Form U-7, which can delay and increase the cost of the offering.

In 1995, in an effort to ease this problem, a number of western and northwestern state securities administrators implemented a regional review procedure for multistate offerings filed under SCOR as well as Regulation A offerings that elect to use Form U-7. In addition to Oregon, states participating in regional review in this area include Alaska, Washington, Idaho, Arizona, Colorado, Utah, and, to a limited extent, California. An applicant may request regional review without filing in all participating states. In connection with each application for which the applicant has requested regional review, a single lead state is designated responsible for organizing the various states’ comments into a single comment letter and for determining a uniform effective date on completion of the review process. See *NASAA Statement of Policy Regarding Small Company Offering Registrations*, NASAA Reports (CCH) ¶414 (Apr 28, 1996).

The participating states have prepared a SCOR manual to assist issuers in preparing Form U-7. NASAA Reports (CCH), *supra*, ¶415.

K. (§18.12) Registration for Compensatory Benefit Plans and Contracts

A type of registration set forth in OAR 441-065-0270 is designed for securities issued to employees and certain consultants pursuant to a written compensatory benefit plan or contract. It is not available to issuers in a capital-raising offering. The issuer must comply with SEC Rule 701 (17 CFR §230.701), which exempts from federal registration certain securities issued pursuant to a compensatory benefit plan.

Registration is limited to compensatory securities such as employee stock purchase plans, incentive and nonqualifying stock option plans, stock appreciation plans, pension plans, and profit-sharing plans. Registration pursuant to this rule is not available for purposes of raising capital.

The benefit plan or contract must have been established for the participation of employees, directors, officers, general partners, and certain consultants or advisers of the issuer, its parent, or its majority-owned subsidiaries. For consultants or advisers, the securities must be intended to be issued for bona fide services. Singled out for exclusion are services relating to a securities offering in capital-raising transactions (e.g., securities issued to brokers, lawyers, and accountants).

Registration is available only to companies that are not subject to the reporting requirements of the 1934 Securities Exchange Act. An application to register securities under this rule may not exceed the greater of \$500,000 or the amount as determined according to one of two formulas set out in the rule (i.e., a percentage-of-assets test and a percentage-of-outstanding-securities test). No company can issue, or have

outstanding offers for, more than \$5 million in such qualifying securities in a 12-consecutive-month period.

Securities sold pursuant to this form of registration are not aggregated with other types of securities offerings made by the issuer. Thus, a company that issues securities pursuant to this form of registration is not required to include the amount so issued in calculating the “aggregate offering price” in a “private placement” registered offering or to include the number of purchasers in calculating an offering exempted from registration under ORS 59.035(12).

NOTE: Although aggregation does not apply, the issuer must be sensitive to the requirement that the exemption pursuant to ORS 59.035(12) is not available while a registration is pending or effective. ORS 59.035(12)(a)(E).

An applicant for this type of registration must file the following with the Director:

- (1) A completed Form U-1 (Application to Register Securities), except for the documents set out in §8 of Form U-1;
- (2) Information regarding the type of business organization, the full title of the plan or a description of the contracts, the type of plan, an affirmation that the offering is exempt from federal registration, and the aggregate offering price of securities to be issued pursuant to the current offering;
- (3) An application on Form U-4 to register at least one salesperson affiliated with the issuer;
- (4) An election to have the proposed order of registration expire either at the end of a one-year period or 30 days after the issuer’s fiscal year (OAR 441-065-0270(5)); and
- (5) The appropriate registration and salesperson licensing fees. OAR 441-065-0270(2).

The issuer, its parent, or its majority-owned subsidiary must provide each participant in a compensatory benefit plan with a copy of the plan and a copy of the written contract relating to the compensation. OAR 441-065-0270(6)(a).

The registration is effective only as long as Rule 701 (17 CFR §230.701) is available to the issuer. OAR 441-065-0270(6)(b). Posteffective sales may be consummated, provided offers leading to those consummated sales were made during an effective registration or renewal. OAR 441-065-0270(7).

L. (§18.13) Fairness Hearings

Section 3(a)(10) of the 1933 Securities Act provides an exemption from registration under that act for securities issued in exchange for outstanding securities, claims, or property interests or partly in exchange for such interests and partly for cash when the terms of the offering have been approved after a hearing held by a court, a state insurance or banking commissioner, or any other governmental authority with

express authority to conduct such a hearing. The exemption is not available for exchanges in connection with bankruptcy proceedings.

Oregon is one of a few states that expressly authorizes the Director of the Department of Consumer and Business Services to conduct a hearing that complies with the provisions of §3(a)(10). ORS 59.095 provides that the proponent of a plan of exchange (or exchange and cash) may apply to the Director for approval of the plan.

The proponents of the plan must file an application to register securities on Form U-1 with the Director, pay the applicable registration fee, and submit a written request for a fairness hearing to be held pursuant to ORS 59.095(3). In addition, the proponents must file at least one application for registration of an issuer salesperson on Form U-4. The filing fee for each salesperson is \$15. There are no examination or bonding requirements for the issuer salesperson.

In addition to an executed U-1, the Agency will want a copy of the detailed plan of exchange that describes the entity or entities involved, the business plan or plans, and the principals of the entity or entities. The Agency will also expect the proponents to submit financial statements of the entity or entities, both actual year-end and interims current within 90 days, and pro forma statements to reflect the exchange. Submission of 10-Ks and 10-Qs will satisfy the financial statement requirements. In addition, the proponent must file material contracts and agreements of the proponent and a fairness opinion, if it exists. Finally, the Agency will expect the proponents to prepare a draft Notice of Hearing, which will accompany the materials to be distributed to all interested parties.

The Agency gives fairness hearing requests priority review and will be in contact with the proponents within two to five business days after receiving the application. The Agency's review will focus on the adequacy of disclosure and the fairness of the terms of the offering. The Agency will deliver comments to the proponents by telephone or e-mail, unless the comments are extensive. When the comments are delivered, the agency will set a date for the hearing that is at least 30 days after the proponents deliver the materials to interested parties. The 30-day waiting period may be adjusted downward if all the prospective offerees are accredited investors or have been involved in formulating the plan.

After the Agency clears the proposed plan of exchange, the proponents of the plan must deliver the materials to every person to whom it is proposed to deliver securities. The materials must be accompanied by a Notice of Hearing that details the time and location at which interested parties may offer testimony and have the opportunity to question the proponents regarding the details of the plan.

The hearing itself will be conducted by a representative of the Director pursuant to the provisions of ORS chapter 183 (Oregon's APA) as an "other than a contested" case. The proponents will formally present the plan, summarize its material provisions, and submit to questions from the hearing officer, who will also give interested parties an

opportunity to pose questions to the proponents. Interested parties will also be given an opportunity to testify and comment on the plan itself for the record. In addition, interested parties may submit written comments to the hearing officer during the 30-day waiting period.

After the hearing, the hearing officer will develop proposed findings of fact and law and a recommended order of approval, approval with modifications, or denial for review by the Director. The Director may accept, modify, or refuse the recommendation and order that additional hearings be held. Proponents of a plan normally draft findings and recommendations for review and modification by the hearing officer. Final findings and orders are generally produced within several days after a hearing, save for very complex matters. The findings and orders are usually dated as of the date of the hearing.

Usually the proponents of the plan, in conjunction with any target entity, will arrange to have any requisite vote by security holders held immediately after the hearing in anticipation of receiving an order approving the terms of the plan. Rarely, the security holders' vote may be postponed if evidence presented at the hearing necessitates that modifications be made.

PRACTICE TIP: Reorganizations, mergers, or acquisitions are usually time-sensitive. Lawyers are strongly encouraged to contact the Agency early in the planning process to determine the availability of the Agency's calendar and staff.

M. (§18.14) Renewal of Registration

When an offering of securities is registered, it is usually effective for up to 12 months. See ORS 59.075. If a registrant wants to continue an offering beyond the 12-month period, the offering must be renewed.

The general procedures policy for renewal (which are essentially the same covering initial registration) are set forth in OAR 441-075-0010. The procedures assume that any concerns raised in the initial offering have been resolved and, therefore, that the review of the renewal is limited to matters occurring after the commencement of the offering.

The specific procedures to be followed in filing an application for renewal are set forth in OAR 441-075-0020. Applications for renewal must be filed at least 30 days before the expiration of the current order of registration to assure completion of the review and renewal process. Incomplete applications are not processed. All renewal applications should be on the same forms used in the initial application or in the most recent renewal.

An application for renewal is not limited to renewing unsold portions of previously authorized aggregate offering amounts; the applicant may register any aggregate offering amount permitted under the rules governing the initial registration. Registration fees are calculated in the same manner as they are for initial registrations. An updated

and current prospectus must be filed, including updated financial statements that are current within 135 days of filing the renewal application. If the applicant is using licensed issuer salespersons, the salesperson licenses must be renewed at the same time as the securities registration. An order of renewal, when issued, is effective for 12 months.

N. (§18.15) Conditions of Registration

For many years, the Agency informally applied certain merit standards to various types of registered securities offerings under authority set forth in ORS 59.085. In February 1992, the Director formally adopted specific standards relating to (1) selling expenses associated with offerings and (2) options granted to underwriters.

The rule set forth in OAR 441-085-0010, dealing with selling expenses, is generally based on a statement of policy adopted by the North American Securities Administrators Association (NASAA), an association composed of the securities administrators of all 50 states and Puerto Rico, the Canadian provinces, and Mexico.

In broad terms, the rule provides that an application to register may be denied if the selling expenses of the offering exceed 15% of the aggregate offering price. Furthermore, the selling expenses plus associated offering costs are presumed to be unreasonable if they exceed 25% of the aggregate offering price. Anything in excess of those amounts is presumed unreasonable and may prevent an offering from being registered.

Options granted to underwriters or other persons as compensation for the sale of securities must be reasonable in amount, terms, and conditions. OAR 441-085-0020. This rule is generally based on a similar statement of policy adopted by the NASAA. Under this rule, options are presumptively reasonable if they meet specified requirements, including the following: (1) the number of units subject to the options does not exceed 10% of the number of units to be offered to the public, (2) the option exercise period does not exceed five years, (3) further transfer of the options is restricted, (4) the exercise price is not below the public offering price, and (5) the options are not deliverable until the entire issue has been sold.

O. (§18.16) Licensing of Persons

2007 Supplement

The 2003 Legislature eliminated certain provisions from ORS chapter 59 concerning the licensing of salespersons who represent the issuer, owner, or licensed mortgage banker or broker in effecting sales of real estate paper registered for sale. See 2003 Or Laws ch 270. However, these changes were more form than substance. Rather than licensing the salesperson to a mortgage banker or mortgage broker licensed under the Mortgage Lending Law, these salespersons are now licensed as

issuer agents for the issuer registering the real estate paper. The term of the salesperson license ends on the date the registration expires, rather than one year from the date that he or she was licensed to the mortgage lending banker or broker, thus preventing possible violations of effecting sales after expiration of the salesperson license.

2001 Edition

Persons effecting securities sales must be licensed as broker-dealers or salespersons unless excluded from the definitions set forth in subsections (1) and (18) of ORS 59.015. ORS 59.165. The procedure for licensing is set forth in OAR 441-175-0010 to 441-175-0175. Although persons representing the issuer (e.g., officers, directors, and employees of the issuer) generally are excluded from the definition of *salesperson* in connection with both exempt securities (ORS 59.025) and exempt transactions (ORS 59.035), persons not affiliated with the issuer (i.e., broker-dealers) generally are exempt from licensing only in effecting sales involving exempt transactions. These persons must be licensed in connection with exempt securities sales. Exceptions to the general rule for licensing to sell exempt securities involve sales of commercial paper under ORS 59.025(7).

EXAMPLE: The Boring Electric Company is offering some of its own stock for sale. Its officers and directors are planning to solicit sales. Since the securities of local public utilities are exempt from registration by ORS 59.025(8), the utility's officers and directors are therefore exempt from being licensed as salespersons. However, if XYZ, an unaffiliated company, offers to assist in the sales, XYZ must first become licensed as a securities broker. This is true regardless of whether or not XYZ plans to receive a fee or commission for its services.

Licensed mortgage brokers and mortgage bankers are specifically excluded from the definition of *broker-dealer* when selling real estate paper registered for sale under ORS 59.065, but salespersons must still be licensed. ORS 59.015(1)(h); see OAR 441-175-0020, 441-175-0055.

Persons serving as issuer salespersons for "covered securities" are not required to be licensed. See OAR 441-049-1021(4).

The 2001 Legislature, at the request of the Governor and the Agency, amended ORS chapter 59 to authorize the Director to impose conditions or restrictions on licenses issued to broker-dealers, state investment advisers, investment adviser representatives, and salespersons. ORS 59.175(5)(b), 59.205, 59.215. Effective September 28, 2001, the director adopted permanent rules outlining the types of conditions or restrictions that may be imposed on a license, including subjecting the licensee to increased supervision, requiring the licensee to take additional

examinations, limiting securities activities to specified subject-matter areas or types of securities, and restricting a licensee from assuming supervisory responsibilities. The conditions may be imposed on a license to be issued or on a license already issued. The conditions are imposed by order and are subject to administrative adjudication as a contested case pursuant to ORS chapter 183. See OAR 441-225-0030.

P. (§18.17) Liability
2007 Supplement

In 2003, the Legislature adopted ORS 59.137, which imposes liability on persons who violate or materially aid in a violation of ORS 59.035 (the fraud provision of the securities law), as well as persons who control or who serve as partners and LLC managers of persons who violate ORS 59.035. Unlike ORS 59.115 and 59.127, which provide for recessionary damage, ORS 59.137 permits the recovery of actual damages. The statute of limitations under 59.137(6) is the longer of (1) three years from sale or (2) two years from discovery.

2001 Edition

Any person who sells a security in violation of the Oregon Securities Law is liable to the purchaser for the consideration paid for the security, plus interest from the date of purchase. ORS 59.115(2). Any person who purchases a security in violation of the Oregon Securities Law is liable to the seller for the value of the security on the date of sale, plus interest from the date of purchase. ORS 59.127. The court may award attorney fees to the prevailing party, except in class actions, in which neither party is entitled to an award of attorney fees. ORS 59.115(10), 59.127(10).

Since 1997, ORS 59.115(1)(a) and 59.127(1)(a) have excluded from their scope a “covered security” sold or purchased in violation of the registration requirements of the Oregon Securities Law. Sales of “covered securities” remain subject to the fraud provisions of ORS chapter 59.

Persons liable for violations of the Oregon Securities Law may include officers and directors of the seller, *State ex rel Healy v. Houston*, 42 Or App 287, 295–296, 600 P2d 886 (1979); persons who control the seller, *Castle v. Ritacco*, 142 Or App 89, 919 P2d 1196 (1996); *Computer Concepts, Inc. v. Brandt*, 137 Or App 572, 905 P2d 1177 (1995); persons who participate or materially aid in the sale, *Ainslie v. First Interstate Bank*, 148 Or App 162, 939 P2d 125 (1997); persons recommending the purchase, *Gonia v. E.I. Hagen Co.*, 251 Or 1, 443 P2d 634 (1968); and even lawyers who participate or materially aid in the sale, *Ainslie v. Spolyar*, 144 Or App 134, 926 P2d 822 (1996); *Towery v. Lucas*, 128 Or App 555, 876 P2d 814 (1994); *Prince v. Brydon*, 307 Or 146, 764 P2d 1370 (1988); *Adams v. American Western Securities*, 265 Or 514, 510 P2d 838 (1973); *Collins v. Fitzwater*, 277 Or 401, 560 P2d 1074 (1977).

Actions may be brought pursuant to ORS 59.115 for up to three years after the sale. This period may be extended to two years after discovery of fraud in cases brought against sellers pursuant to ORS 59.115(1)(b) or against any liable person in actions brought pursuant to ORS 59.135. ORS 59.115(6); see *Anderson v. Carden*, 146 Or App 675, 934 P2d 562 (1997). Actions brought pursuant to ORS 59.115(3) normally must be brought within three years of the sale. *Loewen v. Galligan*, 130 Or App 222, 882 P2d 104 (1994). Comparable provisions are contained in ORS 59.127.

A person whose sole function in connection with the purchase or sale of a security is to provide ministerial functions of escrow, custody, or deposit services in accordance with applicable law is liable only if the person participates or materially aids in the purchase or sale. An injured party has the burden of showing that the person knew or should have known of the facts on which liability is based. ORS 59.115(4), 59.127(4).

III. EXEMPT SECURITIES

A. (§18.18) Generally

Fourteen categories of securities instruments are exempt from registration. ORS 59.025. Transactions in these securities are not exempt from the antifraud provisions of the Oregon Securities Law. Exempt securities are themselves exempt regardless of the identity of the purchaser (with the exception of commercial paper). An exempt security stays exempt from transaction to transaction (unless the underlying basis for the exemption disappears). In contrast, an exempt sale (ORS 59.035) depends on certain aspects of the particular sales transaction, and the purchaser may find that no exemption is available in the resale of that security.

No filing requirement or fee is required to use any exemption from registration provided for in ORS 59.025. OAR 441-025-0005(1). Persons relying on these exemptions have the burden of proof in establishing the availability of the exemption. ORS 59.275; OAR 441-025-0005(2).

Certain provisions of NSMIA (see §18.1, *supra*) preempt most state securities regulatory authority over the sale of certain securities, including securities otherwise exempt under ORS 59.025. The preemptive provisions of NSMIA are in §18(b)(4) of the 1933 Securities Act and were effective October 11, 1996.

B. (§18.19) Government Securities

2007 Supplement

Subsection (8) of ORS 174.100 was renumbered subsection (9).

Regarding the caveat in the 2001 text, the rules describing the no-action letter procedure are now set forth in OAR 441-001-0040.

2001 Edition

Securities issued or guaranteed by the United States government, a state or one of its agencies or political subdivisions, or certain foreign governments or their political subdivisions are exempt from registration. ORS 59.025(1)–(2). United States savings bonds, tax-exempt industrial revenue bonds, and New York Port Authority bonds are examples of such exempt securities. Most of these types of securities are also considered “covered securities,” except for locally issued municipal securities to be sold in the issuing state under §18(b)(4)(c) of the 1933 Securities Act and foreign securities exempt under ORS 59.025(2).

In addition, securities that are offered in connection with exempt securities (generally, guarantees of public securities by private entities) are also exempt if they cannot be sold separately. ORS 59.025(1)(b).

The Agency has issued “no-action” letters regarding securities issued by quasi-public organizations. This position has hinged on the degree to which some governmental entity, or the electorate itself, controls appointment to or removal from the entity’s governing board. On the other hand, the Agency has declined to issue no-action letters when a nonprofit organization, without governmental control of its board, plans to issue a security even though the proceeds are to be used to construct a facility whose ownership will later pass to the government.

The Agency has taken the position that securities guaranteed by the Federal Deposit Insurance Corporation (FDIC) generally fall within the scope of this exemption, at least to the extent of the guarantee. Likewise, it has taken the position that securities guaranteed by the Government National Mortgage Association (commonly referred to as “Ginnie Mae”) and by the Federal National Mortgage Association (commonly referred to as a “Fannie Mae”) generally fall within the scope of this exemption.

The Agency has generally taken a no-action position regarding the nonregistration of securities issued by the District of Columbia or by United States territories such as Puerto Rico and Guam. See ORS 174.100(8), which defines *United States* to include territories, outlying possessions, and the District of Columbia. These securities are “covered securities” pursuant to §3(a)(2) of the 1933 Securities Act.

CAVEAT: A no-action letter states that the Director will take no action to require the registration of the security in question. Although the Agency adds the caveat that it takes no position regarding the rights of third parties in the matter under discussion, securities lawyers generally rely on these letters and forgo registration. The procedure for obtaining a no-action letter is set forth in OAR 441-015-0010 and 441-015-0020.

C. (§18.20) Governmentally Regulated Institutions

Securities issued by certain heavily regulated institutions are exempt from registration, presumably because the institutions undergo strict scrutiny by other state or federal agencies.

A security that is issued or guaranteed by certain specified financial institutions (e.g., banks, savings and loan associations, and credit unions) and regulated by federal agencies is exempt from registration under ORS 59.025(3). This exemption includes a security issued by a federal bank, but not a security issued by a California state bank. Securities issued by banks are “covered securities” by virtue of §§18(b)(4)(C) and 3(a)(2) of the 1933 Securities Act.

NOTE: The Agency has issued no-action letters regarding U.S. branches of foreign banks, provided that the branch is subject to the same regulation as is a federal- or state-chartered bank.

A security “that represents an interest in or a direct obligation of” banks, trust companies, savings and loan associations, and credit unions regulated by the State of Oregon is exempt from registration. ORS 59.025(6). This exemption includes a security issued by an Oregon-chartered bank, but not a security issued by a California state bank. Securities issued by banks are “covered securities” by virtue of §§18(b)(4)(C) and 3(a)(2) of the 1933 Securities Act.

A security, “the issuance of which is under supervision, regulation or control” of the Oregon Public Utility Commission (PUC), is exempt from registration. ORS 59.025(8). This section does not exempt securities issued by non-Oregon public utilities.

NOTE: This exemption does not include securities issued by non-Oregon public utilities or even securities issued by a regulated industry, unless the “issuance” of the security is regulated by the Oregon PUC. Thus, the issuance of securities by Portland General Electric may well fall within this exemption because the PUC generally regulates securities sales by electric companies. But the issuance of securities by a long-haul trucking company would likely not qualify because the PUC generally does not regulate the issuance of securities by truckers even though the PUC might otherwise license or regulate trucking companies.

Unlike the Uniform Securities Act, the 1933 Securities Act, and some state securities laws, the Oregon Securities Law does not exempt securities issued by domestic insurance companies. To the extent that the securities of insurance companies and financial institutions chartered by other states are exempt from federal registration by virtue of §3(a) of the 1933 Securities Act (other than paragraphs (4), (10), and (11) of §3(a)), the securities issued by those financial institutions are exempt from registration in Oregon pursuant to the preemptive provisions of §18(b)(4)(C) of the

1933 Securities Act. Those securities may also fall within the scope of other exemptions. See ORS 59.025(4)–(5).

CAVEAT: In dealing with the exemptions for financial institutions and public utilities, care must be taken to assure that the securities are, in fact, issued by one of the specified entities and not by a holding company, parent, affiliate, or subsidiary whose securities are not exempt under these exemptions.

D. (§18.21) Exchanges; Nasdaq; Rating Services 2007 Supplement

The National Association of Securities Dealers Automated Quotation System is now an exchange, named NASDAQ Stock Market LLC. See www.nasdaq.com. Effective July 1, 2006, that electronic exchange reclassified its listings into three tiers. What was formerly its small-cap market is now NASDAQ Capital Market and what was formerly NMS is now NASDAQ Global Market. In addition, a new tier within the Global Market tier was created and named NASDAQ Global Select Market, with higher initial listing standards.

The exemption from registration in ORS 59.025(4)(b) for securities designated or approved for designation by Nasdaq-NMS would likely apply to securities listed or approved for listing on the NASDAQ Global Market and Global Select Market tiers, but not to securities listed or approved for listing on the NASDAQ Capital Market tier.

Section 18(b)(1)(A) of the Securities Act of 1933 includes securities listed or authorized for listing on the National Market System of the NASDAQ stock exchange (or any successor to such entity) as a covered security.

In March 2006, NASDAQ petitioned the SEC to adopt an amendment to Rule 146(b) to designate securities listed, or authorized for listing, on the NASDAQ Capital Market tier as covered securities and, in August 2006, filed a rule change to amend its quantitative listing standards for the Capital Market tier to make those standards substantially similar to those of the markets named in §18(b)(1)(A) of the Securities Act of 1933. On April 18, 2007, the SEC issued its final rule adopting the requested amendment to Rule 146(b). Thus, effective May 24, 2007, all securities listed or authorized for listing on NASDAQ Capital Market (formerly Nasdaq SmallCap Market) are covered securities under §18(b)(1)(B), preempted from registration or qualification requirements at the state level.

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Section 18(b)(1)(A) of the Securities Act of 1933 includes securities listed or authorized for listing on the National Market System of the NASDAQ stock exchange (or any successor to such entity) as a covered security.

In March 2006 NASDAQ petitioned the SEC to adopt an amendment to Rule 146(b) to designate securities listed, or authorized for listing, on the NASDAQ Capital Market tier as covered securities, and in August 2006 filed a rule change to amend its quantitative listing standards for the Capital Market tier to make those standards substantially similar to those of the markets named in Section 18(b)(1)(A) of the Securities Act of 1933. On April 18, 2007, the SEC issued its final rule adopting the requested amendment to Rule 146(b). Thus, effective May 24, 2007 all securities listed or authorized for listing on NASDAQ Capital Market (formerly Nasdaq SmallCap Market) are covered securities under Section 18(b)(1)(B), preempted from registration or qualification requirements at the state level.

Securities listed or approved for listing on the four stock exchanges set forth in ORS 59.025(4) (New York, American, Midwest, and Pacific), securities designated or approved for designation by the National Association of Securities Dealers Automated Quotation System—National Market System (Nasdaq-NMS), and securities described in OAR 441-025-0010 (the Chicago Board Options Exchange and the Philadelphia Stock Exchange, Inc., but only to the extent of issuers who qualify under Tier 1 listing and maintenance requirements of that exchange) are exempt from registration. In addition, securities of the issuer that are senior to or of substantially equal rank to the listed security are exempt. Thus, a note, bond, preferred stock, or guarantee of an issuer whose common stock was listed on one of the named exchanges would likely be exempt because the holder of the securities would have equal or greater rights on liquidation than would a holder of the listed common stock. Finally, warrants or rights to purchase any of these securities, and the securities issuable on exercise of the warrant or right, are also exempt.

PRACTICE TIP: Not all securities listed for trading on Nasdaq are exempt.

Only securities listed on its National Market System (i.e., “blue chip” Nasdaq securities) are exempt from registration by ORS 59.025(4).

Most of the securities discussed above are also “covered securities.” Securities listed (or quoted) or approved for listing (or quotation) on the NYSE, AMEX, and Nasdaq-NMS are “covered,” as well as securities equal to or senior to those “covered securities.” Securities on the Chicago Board Options Exchange are “covered” as well as those on Tier 1 of PHLX and Tier 1 of the Pacific Stock Exchange as long as those listing requirements remain at least as restrictive as those listing requirements for the NYSE, AMEX, and Nasdaq-NMS.

A “security maintaining a rating approved by the director in a recognized securities manual” is exempt from registration. ORS 59.025(5). See OAR 441-025-0020 for the ratings necessary for bonds and commercial paper, but not preferred stock, as assigned by Fitch Investors Service, Inc., Moody’s, Inc., and Standard and Poor’s Corporation.

CAVEAT: Given the complexities of modern corporate life, care should be taken to determine whether the issuer of the security in question is, in fact, the company qualifying under ORS 59.025(4)–(5) and is not a holding company, parent, affiliate, or subsidiary whose securities are not exempt under these exemptions.

E. (§18.22) Employee Benefit Plans; Nonprofit Groups; Cooperatives

Certain employee benefit plans are exempt from registration but only when “the terms of the plan are fair, just and equitable to employees under rules” of the Director. ORS 59.025(12)(b). The Director has deemed fair, just, and equitable only employee benefit plans of employee-owned enterprises. OAR 441-025-0030. The term *employee-owned enterprise* was formerly defined in ORS 285.263(1), renumbered ORS 285A.535, but this definition was repealed in 1999. The Agency’s amended rule reflects the statutory change by deleting the reference to ORS 285A.535, but it does not give lawyers any guidance on what is now meant by the term *employee-owned enterprise*. The Agency has indicated that until the rule is further amended, lawyers should rely on the definition found in *former* ORS 285A.535.

In addition, pursuant to the exemption-creating powers granted the Securities Section by ORS 59.025(14), an exemption from registration has been created by OAR 441-025-0050 for additional types of employee benefit plans that:

- (1) Comply with Title 1 of the Employee Retirement Income Security Act of 1974, as amended; or
- (2) Meet the requirements of IRC §403(b); or
- (3) Do not permit employee contributions.

The two exemptions apply to securities issued by certain employee benefit plans to covered employees. See §18.29, *infra*, for a discussion of ORS 59.035(4), which exempts securities sold to pension plans.

CAVEAT: Unlike the Oregon definition of *security* in ORS 59.015(19)(a), the definition of *security* in the federal securities acts does not include the term *employee pension plan*. In *Teamsters v. Daniel*, 439 US 551, 569–570, 99 S Ct 790, 58 L Ed2d 808 (1979), the Supreme Court held that a noncontributory pension plan was not an investment contract security. In *Black v. Payne*, 591 F2d 83, 86–87 (9th Cir 1979), the Ninth Circuit held that a contributory plan for state employees also fell outside the scope of federal securities law. See *Carter v. Signode Industries, Inc.*, 694 F Supp 493, 496 n 3 (ND Ill 1988).

Under federal law, the SEC promulgated Rule 701, which exempts from federal registration certain securities sold to employees and certain other persons in compensatory circumstances, not involving efforts by the issuer to raise capital. 17 CFR §230.701. Oregon does not have a similar exemption from registration, but it has

adopted a simplified registration procedure for securities that qualify for SEC Rule 701. See OAR 441-065-0270, which is discussed in §18.12, *supra*.

Securities issued by certain nonprofit corporations are exempt under ORS 59.025(13). In *Rajneesh Found. Inter. v. Corp. Comm.*, 65 Or App 356, 361, 671 P2d 1203 (1983), the court held that this exemption must be read in conjunction with OAR 815-30-040 (*now* OAR 441-025-0040), which narrows the exemption to include only certain charitable remainder annuity trusts, charitable remainder unitrusts, and pooled income funds.

PRACTICE TIP: Bonds or notes issued by nonprofit groups such as churches, fraternal organizations, and social clubs generally are not exempt and therefore must be registered. When the offering amount to be raised is relatively small, the offering is limited to members of the issuing organization, and the interest rate paid is significantly less than the prevailing interest rate, the Agency's standard of review generally has been less stringent than that applied to more traditional offerings. The public files of the Agency contain many examples of offering documents previously used by nonprofit groups.

Stock or membership certificates issued by certain agricultural, fishing, and grocery cooperatives or associations are exempt. ORS 59.025(9)–(11). These exemptions do not apply to cooperatives that are involved in forest products or other activities that are not specifically set forth in these exemptions.

F. (§18.23) Commercial Paper 2007 Supplement

Trust certificates have been held to be securities under Oregon law. *Battig v. Simon*, 237 F Supp2d 1139 (D Or 2001), *later proceeding*, 2001 US Dist LEXIS 22318 (D Or 2001). Corporate “debentures” have also been held to be securities under Oregon law. *Mann v. Laurent*, 229 F Supp2d 1133 (D Or 2002).

2001 Edition

Commercial paper securities are exempt from registration if these securities are not the subject of a public offering. ORS 59.025(7). Subsection (7) of ORS 59.025 differs markedly from the other subsections of the statute in that commercial paper is the only exempt security that may require registration if sold in a public offering. It is also the only section that provides that the exempt security may be sold by a person unaffiliated with the issuer without that person being licensed as a broker-dealer. ORS 59.015(1)(g).

The term *commercial paper* is not defined in the Oregon Securities Law. Two early Attorney General opinions indicate that commercial paper arises out of transactions involving the sale or exchange of commodities, merchandise, or personal

paper of some sort in a commercial transaction and does not include notes executed by consumers in a consumer transaction such as the purchase of an automobile. 12 Op Att’y Gen 633, 634 (Or 1926); 11 Op Att’y Gen 372, 374 (Or 1923). In *Securities Industry Assn. v. Board of Governors*, 468 US 137, 104 S Ct 2979, 82 L Ed2d 107 (1984), the U.S. Supreme Court discusses at length the term *commercial paper* as that term is used in the federal securities laws.

The Agency has long taken the view that “commercial paper” encompasses only high-grade negotiable paper of the type rated in the investor services such as Fitch Investors Service, Inc., Moody’s Investors Service, Inc., and Standard and Poor’s Corporation. This position was affirmed in *State v. Crooks*, 84 Or App 440, 444–445, 734 P2d 374 (1987). In *Crooks, supra*, a mortgage broker was convicted of selling unregistered percentage participations in notes and other security instruments. On appeal, the court rejected the broker’s argument that the exemption for commercial paper encompassed all *negotiable instruments* as that term is defined in the UCC. The court held that the securities laws should be construed to provide the greatest possible protection to the public and therefore that the commercial paper exemption should be construed narrowly to include “only unsecured short term negotiable debt instruments issued by commercial entities.” *Crooks, supra*. The unregistered security sold by the broker fell outside the commercial paper exemption.

CAVEAT: Oregon courts have indicated that the securities laws do not encompass ordinary commercial transactions. *Bergquist v. International Realty*, 272 Or 416, 423–427, 537 P2d 553 (1975); *Sperry & Hutchinson Co. v. Hudson*, 190 Or 458, 466–469, 226 P2d 501 (1951). Thus, certain commercial paper given as part of an ordinary commercial transaction may not be a security at all, although even “ordinary” commercial paper may become a security if it is resold in a noncommercial context. For example, in *State v. Walker*, No 171937 (Marion Cty Cir Ct 1983), the defendant pleaded guilty to securities violations arising out of the resale to individual investors of notes originally created in consumer purchases of used cars. On the other hand, in *Columbia Pacific Bank & Trust Co. v. Columbia Pacific Resources, Inc.*, No 80-524-RE (D Or Oct 29, 1981), the court held that the securities laws did not apply to the sale of mortgage participations between financial institutions.

G. (§18.24) Exemptions by Rule

Several of the statutory exemptions contain language empowering the Director to define or expand the scope of the exemption. Pursuant to these statutory grants, the Director has adopted regulations dealing with the exchange exemption, OAR 441-025-0010, the manual exemption, OAR 441-025-0020, exempt employee benefit plans, OAR 441-025-0030, and exempt charitable securities, OAR 441-025-0030. Each of

these regulations is discussed in §§18.18–18.23, *supra*, in connection with the statutory exemption.

In addition to these grants of authority, the Director has the power to create additional classes of exempt securities by rule. ORS 59.025(14). To date, the only exemption created through this power relates to employee benefit plans, OAR 441-025-0050. See §18.22, *supra*, for a description of this exemption.

IV. EXEMPT TRANSACTIONS

A. (§18.25) Generally

Oregon law exempts certain securities transactions from the registration provisions of the Oregon Securities Law, but these transactions are not exempt from the fraud/disclosure requirements of the law. ORS 59.035. Unlike security instruments exempted from registration by ORS 59.025, exempt sales under ORS 59.035 are exempt only for that particular transaction. Even if a person purchases a security that ORS 59.035 exempts from registration, that purchaser will not be able to resell the security without registration unless he or she can also find an exemption that covers the resale.

Except for a mortgage broker selling a security that is exempt pursuant to ORS 59.035(7), a person selling a security through an exempt sale need not be licensed as a securities broker, ORS 59.015(1)(d), or as a securities salesperson, ORS 59.015(18)(b)(B). However, three of these exemptions are available only to licensed broker-dealers. ORS 59.035(8)–(10).

The Director is statutorily empowered to exempt transactions by rule. ORS 59.035(15). *See, e.g.,* §18.27, *infra*.

Except for the exemptions created by ORS 59.035(11) and OAR 441-035-0045, no filing requirements or fees are required to use any exemption from registration provided for in ORS 59.035. OAR 441-035-0005(1). Persons relying on these exemptions have the burden of proof in establishing the availability of the exemption. ORS 59.275; OAR 441-035-0005.

Certain provisions of NSMIA (*see* §18.1, *supra*) preempt most state securities regulatory authority over certain securities transactions. The preemptive provisions of NSMIA are in §18(b)(4) of the 1933 Securities Act. *See* §18.3, *supra*.

B. (§18.26) Judicially Supervised Sales

Certain judicially approved sales, such as sheriff's sales, are exempt from registration. ORS 59.035(1). This exemption should be read in conjunction with the exclusion from "sale" set forth in ORS 59.015(17)(c)(C) of certain judicial reorganizations. In addition, the federal Bankruptcy Code provides that state and

federal securities registration laws are inapplicable to certain bankruptcy-related transactions. 11 USC §1145.

C. (§18.27) Isolated Transactions

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COMMENT: The 2001 text points out that ORS 59.350(1) currently provides that a transaction with a husband and wife is treated as a transaction with one person. The 2007 Legislature enacted new provisions giving legal status to domestic partnerships. 2007 Or Laws ch 99. It is not clear whether issuers may or must count domestic partners as one person, or whether the new provisions would apply to securities transactions. The ability of domestic partners to file joint tax returns, which appears to be the main reason that a married couple is one person, was not addressed in the new provision.

A treaties cited in the 2001 text has been updated. See LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* (5th ed 2004) (supplemented periodically).

2001 Edition

“An isolated nonissuer transaction in this state, whether effected through a broker-dealer or not,” is exempt from registration in Oregon. ORS 59.035(2). This language was adopted in 1985 and represents a significant departure from the language under prior Oregon law, but it is much closer to language in the Uniform Securities Act and the laws of many other states. The most significant change is that, like the Uniform Securities Act, this exemption is limited to nonissuers. A nonissuer is a person other than the entity that is issuing the security. Prior case law hints that the term *issuer* might include an affiliate of an issuer when the affiliate is essentially selling on behalf of, or for the direct benefit of, the issuer. See *Thorson v. Richmond*, 267 Or 586, 590–591, 518 P2d 642 (1974).

Although isolated-transaction exemptions appear in many state securities statutes, there is no consensus on the number of sales that can be made in an “isolated” transaction. Although certain state courts and state administrative agencies have interpreted this language to exempt as many as 35 sales, Oregon courts interpreted the language of the pre-1985 exemption quite narrowly, limiting its availability to one, or possibly two, sales.

Although one of the intentions of the proponents of the 1985 change was to avoid the narrower constraints placed on this exemption by prior case law, and to expand the number of sales permitted under this exemption, it is unclear whether or not the courts will interpret the language in such a way as to permit a greater number of sales.

NOTE: Section 18(b)(4)(A) creates a “covered security” preemption for any transaction exempted under §4(1) of the 1933 Securities Act, provided that the securities subject to the transaction are those of an issuer that is a reporting company under §13 or §15 of the 1934 Securities Exchange Act.

“Isolated-issuer” transactions made to three or fewer persons during any 24-month period are exempt from registration pursuant to OAR 441-035-0050, adopted under ORS 59.035(15). The rule includes within its scope “any isolated issuer transaction not involving a public offering” and provides that an “isolated issuer transaction shall include sales by or on behalf of an issuer.” OAR 441-035-0050.

NOTE: The rule (OAR 441-035-0050) exempts from registration three or fewer “issuer” transactions made within a 24-month-period; the statute (ORS 59.035(2)) exempts isolated-“nonissuer” transactions but does not specify the number of sales or time period needed to qualify. Pre-1985 case law interpreting ORS 59.035(2) may no longer be helpful given the significant wording change in 1985. There are no reported cases interpreting the current language of ORS 59.035(2).

Several cases interpret the pre-1985 isolated-transaction exemption. In *Tarsia v. Nick’s Laundry Co.*, 239 Or 562, 399 P2d 28 (1965), an employer offered to sell its stock to three of its employees. Two employees accepted the offer of the unregistered stock. In interpreting the prior isolated-transaction exemption, the court noted that two, but not three, sales qualified as exempt. However, a strong dissent argued that the transaction was not exempt. In subsequent cases interpreting the pre-1985 isolated-transaction exemption, the courts seem to take the position advanced in the favorably quoted *Tarsia* dissent. *Creager v. Berger*, 97 Or App 338, 775 P2d 918 (1989); *Redhouse v. Preferred Properties*, 87 Or App 673, 743 P2d 1125 (1987); *Marshall v. Harris*, 276 Or 447, 459, 555 P2d 756 (1976); *Thorson, supra*, 267 Or at 590.

NOTE: The 1985 revisions to the Oregon Securities Law eliminated “offers” from the definition of *sale*. Thus it appears that unlimited offers could occur (e.g., a newspaper advertisement) as long as the number of actual purchasers were few enough for the transaction to qualify as isolated.

Another issue arising from this exemption is how separate in time the transactions need to be in order to qualify as exempt. In *Marshall, supra*, the court created a test:

We have held that sales of stock to three, and perhaps even as few as two, different individuals may be “repeated and successive transactions,” so as not to qualify within this exemption. We believe that the proper test to be applied in such a case is whether the sales in question are made “within a period of such reasonable time as to indicate that one general purpose actuates the vendor and that the sales are not so detached and separate as to form no part of a single plan.” [Footnotes omitted.]

A transaction with a husband and a wife, or with an entity not formed to purchase the security, is deemed to be a transaction with a single person. ORS 59.350.

The language “in this state” appearing in the statutory exemption indicates that an out-of-state offeror could link a single Oregon sale with many sales throughout the rest of the world and still qualify for this exemption. However, an Oregon offeror probably could not. ORS 59.335 and 59.345 indicate that a sale originating in Oregon is considered to be made in Oregon. Therefore, any sales made to out-of-state residents would likely be considered to have been made in Oregon, thus eliminating reliance on this exemption if more than one sale is made. See *State v. Swain*, 147 Or 207, 31 P2d 745 (1934).

Under the statutory exemption available only to nonissuers, most transactions made in reliance on this exemption will be resales by individual shareholders selling shares in either closely held companies or smaller public companies not falling within the exchange exemptions. In most cases, the individual seller is likely selling to only a single purchaser or, at most, to a small number of purchasers. Other exemptions that might apply to such resales include ORS 59.035(12) if a broker is not involved, or ORS 59.035(8)–(10) if a broker is involved. If an individual seller is using a broker, both the seller and the broker must be concerned about the availability of an exemption.

As a general rule, the isolated sale of a security falls within the scope of the Oregon Securities Law even though an exemption from registration might apply. *Pratt v. Kross*, 276 Or 483, 555 P2d 765 (1976). Thus, the fraud provisions of the securities law would apply to all Oregon securities sales, even isolated sales. *Creager, supra*; *Chester v. McDaniel*, 264 Or 303, 307–309, 504 P2d 726 (1973).

Note that the 1933 Securities Act, which applies to all transactions in Oregon, does not have an isolated-transaction exemption. However, it does exempt the following transactions from registration:

- (1) Transactions by any person, other than an issuer, underwriter, or dealer (15 USC §77d(1)), which, if the securities involved are those of an issuer who is a reporting company under §13 or 15 of the 1934 Securities Exchange Act, create a “covered security” transaction that is preempted from state securities law;
- (2) Transactions by an issuer not involving any public offering (15 USC §77d(2)); and
- (3) Certain intrastate issuer transactions and subsequent resales more than nine months after these securities have come to rest (15 USC §77c(a)(11); 17 CFR §230.147).

The terms in these three exemptions are terms of art and their language should not be read literally. For a more detailed discussion of these exemptions, see LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* (3d ed 1995 & Ann

Supps); *The Section "4(½)" Phenomenon: Private Resale of "Restricted" Securities*, 34 BUS LAW 1961 (1979).

D. (§18.28) Pro Rata Offerings to Existing Security Holders

A pro rata offering is exempt from registration when an issuer makes an offer to its existing security holders. ORS 59.035(3). To qualify, no commission or remuneration, other than a standby fee, may be paid and the issuer must not have had an effective Oregon registration nor used this exemption within the prior year.

The term *standby commission* also appears in the comparable Uniform Securities Act exemption, §402(b)(11). The official comment to this exemption states: "The reference to a standby commission in [this exemption] is designed to permit payment to an underwriter for his risk and services in connection with his commitment to take down any portion of the offering which is not taken down by the security holders."

The Uniform Securities Act, as well as many state securities laws, permits state securities agencies to waive the prohibition against commissions. But the Oregon Securities Law contains no such waiver provision. Issuers located in Oregon should note that ORS 59.335 and 59.345 together indicate that a sale originating from Oregon is considered to have been made in Oregon.

When its opinion has been sought, the Agency has strictly construed this exemption. It takes the position that the term *pro rata* relates to the total outstanding shares of a class, not to the individual security holders of that class. It takes the position that identical offers must be made to all security holders of a class regardless of their state of residence.

On the other hand, the Agency takes the position that a pro rata offering can be made to a single class of an issuer's securities even though the issuer has more than one class of securities outstanding. It takes the position that this exemption covers transactions despite the inclusion of a rounding off or cashing out procedure used regarding fractional shares resulting from the pro rata offering.

EXAMPLE: If, without paying commissions, *ABC*, Inc., offers all its shareholders the right to purchase one additional share of stock for each 10 shares owned, the offer apparently would qualify. If *ABC*, Inc., offers each shareholder (assuming that shareholders own differing amounts of stock) the right to purchase one share each or if it offers the shares to all shareholders except for those living in state *B* (due to some onerous requirement imposed by the laws of state *B*), the transaction would not qualify.

E. (§18.29) Institutional Purchasers

Oregon law exempts from registration the sale of a security to “a bank, savings institution, trust company, insurance company, investment company, pension or profit-sharing trust or other financial institution or institutional buyer . . . , or to a broker-dealer, mortgage broker or mortgage banker.” ORS 59.035(4). The exemption further provides that the sale to an institutional investor is exempt whether the purchaser “is acting for itself or in a fiduciary capacity when the purchaser has discretionary authority to make investment decisions.” ORS 59.035(4). Neither a self-directed individual retirement account (IRA) nor a Keogh plan appears to qualify for this exemption even though the trustee is an “institution” because the institution does not have discretionary authority. In interpreting a similarly worded Iowa exemption, the court in *Briggs v. Sterner*, 529 F Supp 1155 (SD Iowa 1981), held that a self-administered retirement vehicle was not exempt from registration.

The term *institutional buyer* has not yet been defined by an Oregon court or administrative rule. ORS 59.035(4) lists five quasi-governmental entities as examples. The official comment to §402(b)(8) of the Uniform Securities Act, on which this Oregon exemption is modeled, indicates that the term “is broad enough to cover, for example, a college purchasing for its endowment fund or perhaps a labor union investing its surplus funds on a substantial scale.” LOUIS LOSS, COMMENTARY ON THE UNIFORM SECURITIES ACT 123 (1976).

This exemption refers to a “savings institution” but not to a savings and loan association or a credit union. The term *savings institution* appears in the Uniform Securities Act (§402(b)(8)) and a leading commentator cites support for his belief that the term refers to a particular type of institution found in only a handful of states, and does not encompass savings and loan associations. JOSEPH L. LONG, 12A BLUE SKY LAW: SECURITIES LAW SERIES §§4.07[2], 5.04[2] (2001). However, large savings and loan associations most likely fall within the scope of the term *other financial institution or institutional buyer* appearing in this exemption.

NOTE: The institutional exemption (see §18.29, *infra*) and the accredited-investor exemption (see §18.30, *infra*) overlap in many respects, but are not synonymous. Some investors may fall within one, but not both, of these exemptions. For instance, a venture capital fund with less than \$5 million in assets is likely an institutional investor, but it generally is not an accredited investor. On the other hand, an individual with a net worth of slightly over \$1 million is likely an accredited investor but would not be considered an institutional investor. For a more detailed discussion, see LONG, *supra*, §5.04.

NOTE: Section 18(b)(3) of the 1933 Securities Act creates a “covered security” category for sales of securities to *qualified purchasers* as that term is defined by SEC rule. As of October 2001, the SEC has not defined the term for

purposes of a covered security, but when so defined, it may very well overlap (and to the extent of the overlap, preempt) this exemption.

F. (§18.30) Accredited Investors

Oregon law exempts from registration “any transaction by an offeror with an accredited investor.” ORS 59.035(5). Although the statute does not limit the number of such accredited investors, it does prohibit public advertising or general solicitation to attract those investors.

The statute incorporates by reference §2(15)(i) or (ii) of the 1933 Securities Act, sections which define the term *accredited investor*. ORS 59.035(5). In addition, OAR 441-035-0010 closely follows the SEC’s definition of *accredited investor* set out in 17 CFR §230.215. Therefore, the definition of the term is essentially the same under both state and federal law.

The term *accredited investor* identifies various persons or entities who, because of their financial strength or their relationship to the issuer, are deemed not to need the protections accorded by registration.

Examples of accredited investors set out in OAR 441-035-0010 include the following: banks; insurance companies; most entities with assets in excess of \$5 million; executive officers and directors of the issuer; and natural persons with a net worth in excess of \$1 million, historical and expected annual income in excess of \$200,000, or historical and expected annual income with the person’s spouse in excess of \$300,000.

CAVEAT: These examples are abbreviated and are not all-inclusive.

Lawyers should carefully read the relevant rules before relying on this exemption.

NOTE: The accredited-investor exemption may be used in conjunction with the exemption available under ORS 59.035(12) in order to expand the number of purchasers permitted without the need to register the offering. See ORS 59.035(12)(b)(A). The Agency takes the position that, although the number of purchasers may be expanded, the other conditions of these two exemptions (e.g., prohibitions on commissions) are integrated.

NOTE: Section 18(b)(4)(C) of the 1933 Securities Act creates a “covered security” category for sales of securities exempt pursuant to rules or regulations promulgated by the SEC under §4(2) of the 1933 Securities Act. At present, the only rule or regulation promulgated by the SEC pursuant to §4(2) is Rule 506 under Regulation D. To the extent that the issuer relies on Rule 506 to sell to accredited investors, the transaction would be preempted from registration under Oregon law, but would be subject to notice filing under ORS 59.049. See §18.3, *supra*.

G. (§18.31) Convertible Securities

A transaction in which one security is exchanged for another of the same issuer is exempt from registration pursuant to ORS 59.035(6), provided:

- (1) No additional consideration is required;
- (2) The exchange is made pursuant to a right of conversion; and
- (3) The original security was convertible and, when the security was issued, it was either registered or exempt from registration. ORS 59.035(6).

Examples of the application of this exemption include convertible debentures and convertible classes of stock. Generally, the exemption is unavailable in the exercise of an option or a warrant because both options and warrants require the payment of additional consideration at the time of conversion.

Likewise, this exemption is not available when the security is convertible into a security of another entity, such as a subsidiary or a parent of the issuer.

PRACTICE TIP: See ORS 59.035(13), which provides an exemption in instances in which securities are exchanged in a merger or reorganization.

NOTE: Section §18(b)(4)(C) of the 1933 Securities Act creates a “covered security” category for sales of securities exempt pursuant to §3(a) of the 1933 Securities Act. To the extent that the convertible transaction can qualify under §3(a)(9), it would be preempted from registration under the Oregon Securities Law.

H. (§18.32) Real Estate Paper

The term *real estate paper* is defined in ORS 59.015(15) as “any obligation secured or purportedly secured by an interest in real property.” The statute further provides that “[r]eal estate paper includes, but is not limited to, mortgage-backed securities, collateralized mortgage obligations and real estate mortgage investment conduits.”

However, not all *real estate paper*, as defined, is covered by the Oregon Securities Law. Subsection (19)(a) of ORS 59.015 defines *security* to include “real estate paper sold by a broker-dealer, mortgage banker, mortgage broker or a person described in subsection (1)(b) of this section [financial institutions] to persons other than persons enumerated in ORS 59.035(4) [institutional investors].”

It is not entirely clear whether these amendments expand or contract the traditional approach to determining whether notes and other evidences of indebtedness are securities, as discussed more fully in chapter 15, *supra*. The definition of *real estate paper* is broad, however, and the definition of *mortgage banker* or *mortgage broker* may include owners of real estate paper or persons who fund real estate loans from their own resources (“mortgage bankers”) as well as persons who “broker” transactions between borrowers and lender when real estate paper is created. See ORS 59.840(5)

for the definition of *mortgage banker* and ORS 59.840(7) for the definition of *mortgage broker*.

Regardless of whether all types of real estate paper constitute securities, an exemption from registration (but not, of course, from the fraud provisions) exists in ORS 59.035(7), which exempts

[a]ny transaction in a vendor's interest in a land sale contract, or a bond or note secured by a mortgage or trust deed upon real estate, so long as the entire vendor's interest or mortgage or trust deed, with all the bonds or notes secured thereby, are sold to a single purchaser, in a single sale.

The Director adopted OAR 441-035-0021, which expands and conditions the use of the statutory exemption. The rule, which applies to transactions involving a seller or a seller's agent, either of whom is a broker-dealer or financial institution, includes the following requirements:

- (1) Specific written disclosures must be provided to a purchaser of real estate paper before purchase;
- (2) The real estate paper must be delivered to the purchaser; and
- (3) The seller must record the purchaser's interest in the appropriate counties.

Sellers who are broker-dealers or financial institutions must retain a copy of a purchaser's interest in real estate paper after it has been recorded. The original recorded instrument must be delivered to the purchaser. Finally, the rule allows guarantees of real estate paper to be sold under the exemption if the guarantee was created as an integral part of the real estate paper and the guarantor is not a mortgage broker, broker-dealer, or financial institution.

Similar requirements for mortgage bankers and mortgage brokers exist under OAR 441-870-0050.

The use of the exemption is prohibited if a transaction in real estate paper also includes the sale of an investment contract. OAR 441-035-0020. See chapter 15, *supra*, for a discussion of what constitutes an investment contract. The rule sets out examples of certain types of investment contracts, including fractional interests in real estate paper, pools of real estate paper, and certain management services provided by the seller.

I. (§18.33) Broker-Dealer Sales

Subsections (8), (9), and (10) of ORS 59.035 each exempt from registration certain secondary-market transactions in which an Oregon licensed securities broker-dealer is involved.

Sales by a licensed broker-dealer are exempt when:

- (1) The order for the sale was unsolicited by the broker;
- (2) The transaction was executed on a customer's order;

- (3) The security is listed on an exchange (including an exchange not qualifying under ORS 59.025(4)) or on the over-the-counter market; and
- (4) No public offering is involved. ORS 59.035(8).

Brokers relying on this exemption must keep certain records for two years. ORS 59.035(8).

NOTE: To the extent that a transaction otherwise falling within this exemption qualifies as a “dealer” transaction under §4(3) of the 1933 Securities Act involving securities of a reporting company under §13 or 15 of the 1934 Securities Exchange Act or a “brokered” transaction under §4(4) of the 1933 Securities Act, the conditions of licensing and recordkeeping contained in ORS 59.035(8) are preempted pursuant to subsection (A) or (B) of §18(b)(4) of the 1933 Securities Act.

Courts that have interpreted the term *solicitation* in the context of similarly worded exemptions have required that more than an “offer” occur. *Schmid v. Langenberg*, 526 SW2d 940 (Mo App 1975); *Home Indemnity Company v. Reynolds & Co.*, 187 NE2d 274, 279 (Ill App 1962).

The second broker-dealer exemption, ORS 59.035(9), exempts from registration a sale by a licensed broker-dealer when:

- (1) The security was acquired in the ordinary course of the broker’s business;
- (2) At least part of the issue was previously registered in Oregon;
- (3) The sale has not been halted anywhere as a result of legal action; and
- (4) The sale is not made for the benefit of the issuer.

Traditionally, broker-dealers have relied on this exemption when reselling a security whose Oregon registration has expired or when reselling a security registered in a jurisdiction other than Oregon. A special-purpose registration procedure has been established to assist broker-dealers in qualifying for this exemption. See OAR 441-065-0040. For a discussion of the resale and trading registration procedures, see §18.8, *supra*.

NOTE: To the extent that a transaction otherwise falling within this exemption qualifies as a “dealer” transaction in securities of a reporting company under §13 or 15 of the 1934 Securities Exchange Act or a “brokered” transaction under §4(4) of the 1933 Securities Act, the conditions of licensing and recordkeeping contained in ORS 59.035(8) are preempted pursuant to subsection (A) or (B) of §18(b)(4) of the 1933 Securities Act.

The third broker-dealer exemption, ORS 59.035(10), exempts certain aftermarket broker-dealer sales involving securities that are either listed in any recognized securities manual approved by rule by the director or listed on specified automated quotation systems.

The 2001 Legislature, at the request of the Governor and the Agency, amended ORS chapter 59 to provide the Director with the authority to designate all approved securities manuals by rulemaking. 2001 Or Laws ch 32. The Director adopted permanent rules, effective September 28, 2001, designating Fitch's, Standard and Poor's, and Mergents' manuals as approved manuals for purposes of ORS 59.035(10). See OAR 441-035-0030, amendments proposed July 13, 2001, and published for hearing and comment by the Secretary of State, August 1, 2001.

Nasdaq is the only automated quotation system specified for use in connection with this exemption, but its OTC Bulletin Board is specifically excluded. OAR 441-035-0040. To qualify for this exemption, the securities must be "sold at prices reasonably related to the current market price thereof at the time of sale." ORS 59.035(10)(a); *Lewelling v. First California Co.*, 564 F2d 1277, 1281 (9th Cir 1977) (broker has burden of proving that price at which broker sold stock is price reasonably related to current market price).

NOTE: To the extent that a transaction otherwise falling within this exemption qualifies as a "dealer" transaction under §4(3) of the 1933 Securities Act in securities of a reporting company under §13 or 15 of the 1934 Securities Exchange Act or a "brokered" transaction under §4(4) of the 1933 Securities Act, the conditions of licensing and recordkeeping contained in ORS 59.035(8) are preempted pursuant to subsection (A) or (B) of §18(b)(4) of the 1933 Securities Act.

J. (§18.34) Red Herrings, Solicitations of Interest, and Internet Contacts 2007 Supplement

The fees discussed in the seventh paragraph of the 2001 text have increased substantially. To claim the exemption created by OAR 441-035-0005, the issuer or promoter must file Oregon Form 440-3008, pay a minimum fee of \$200 (the maximum fee is \$1,500), file a U-4 salesperson application, and pay a \$50 fee for each salesperson. OAR 441-035-0045(1)(c), 441-065-0001, 441-175-0002.

2001 Edition

Subsection (11) of ORS 59.035 exempts from registration the distribution of a preliminary prospectus before registration is granted. This preliminary prospectus is commonly referred to as a "red herring" because the legend required by the SEC is set out in red print.

The exemption from registration provided by ORS 59.035(11) is available in only two situations. In the first situation, a registration statement is filed with both the Director and the SEC and there are no adverse orders pending or issued involving the offering. In this first situation, the exemption applies automatically. In the second situation, a

registration is pending in Oregon (but not with the SEC) and the Agency allows the distribution of the red herring by specifically granting this exemption.

The statute applies only to offers. ORS 59.035(11). The red herring may be distributed and salespersons may talk to prospective purchasers. This exemption does not cover sales. No money may change hands. No subscription agreements may be signed. A prospective purchaser may review the offering but may not commit to an investment until after the registration process has been completed and an order of registration has been issued.

OAR 441-035-0045 permits the use of “solicitations of interest” by certain eligible persons who intend to register securities for sale in Oregon and conduct the offering pursuant to Regulation A of the 1933 Securities Act or pursuant to OAR 441-065-0225 (small corporate offering registration, or SCOR). See §18.11, *supra*, for a discussion of SCOR.

The purpose of the exemption created by OAR 441-035-0045 is to permit an issuer or a promoter of an issuer-to-be-formed to assess whether or not there might be investor interest in the issuer’s securities before incurring the expenses associated with formally making a public offering of securities. The exemption permits the offeror to provide minimal information (identity of the promoters, type of enterprise, proposed amounts, and uses of proceeds) in communicating with the public. The offeror is permitted to solicit indications of interest that do not constitute legally binding subscriptions. The offeror is not permitted to receive any money, even on a conditional basis. The promoter or issuer remains subject to the antifraud provisions of ORS chapter 59.

To be eligible to use the exemption created by OAR 441-035-0045, the issuer must be (or will be on formation) a business entity organized under the laws of one of the states or possessions of the United States or one of the Canadian provinces or territories. In addition, the issuer must not be engaged (nor intend to engage) in the business of petroleum exploration or production, mining, or other extractive industry. The issuer must not be a *blank-check company* as defined in OAR 441-045-0010(2). See §18.39, *infra*, for a discussion of blank-check companies. Finally, officers and directors of the issuer are subject to “bad boy” provisions similar to those under Regulation A of the 1933 Securities Act.

The exemption created by OAR 441-035-0045 is not self-executing. See OAR 441-035-0005. To claim the exemption, the issuer or promoter must file Oregon Form 440-3008, pay a \$25 fee (representing the minimum registration fee), file a U-4 salesperson application, and pay a \$15 salesperson fee. OAR 441-035-0045(1)(c).

The exemption created by OAR 441-035-0045 carries good-faith provisions for potential liability to any eventual purchaser for failure to perfect the exemption. Reliance on this exemption precludes the contemporaneous reliance on certain other exemptions for a period of six months after the last sale under this exemption.

An issuer who is offering or selling securities in a jurisdiction other than Oregon may solicit using the Internet. OAR 441-035-0060. An Internet solicitation will not be deemed to be an “offer” or “sale” in Oregon if the Web page prominently declares that the offer is not being made in Oregon, the offer is not specifically directed to an Oregon resident, and no actual consummated sales are made in Oregon.

If an Internet solicitation is made, the availability of transactional exemptions that limit public advertising or general solicitation is precluded for a period of six months from the last contact between the issuer and an Oregon resident. OAR 441-035-0060(3)(c).

K. (§18.35) Small Offerings

2007 Supplement

Correction: The citation to 17 CFR §231.6455(III)(c) should have been to 17 CFR part 231, Release No. 33-6455(III)(C), 48 Fed Reg 10,045 (1983).

2001 Edition

Oregon law exempts from registration the sale of securities to not more than 10 purchasers within Oregon during any 12-consecutive-month period. ORS 59.035(12). Although the statute does not limit the number of offers that can be made pursuant to this exemption, it prohibits public advertising or general solicitation.

Purchasers who are not residents of Oregon would apparently not be counted in computing the 10 purchasers, provided the offers and sales occur outside Oregon. See ORS 59.035(12)(b)(C); *but see* ORS 59.335, 59.345.

If the securities are offered by a nonissuer (e.g., a shareholder who wants to resell shares previously acquired), the securities must have been acquired and held for a period of at least 12 consecutive months before sale. ORS 59.035(12)(a)(B).

The exemption contains some significant prohibitions, including the following:

(1) No commission or other remuneration may be paid in connection with the offer or sale. ORS 59.035(12)(a)(C). This prohibition includes monetary gain to the promoters of an issuer that is paid from the proceeds of the securities sales. The Director has taken the position that the prohibition extends to commissions paid on sales outside Oregon. The prohibition does not include fees paid to unaffiliated third parties for bona fide services not related to securities sales. Examples of such allowable fees include legal and accounting fees or property appraisal expenses. The Official Commentary to the similarly worded §402(b)(9) of the Uniform Securities Act states that “[this clause] is not intended to preclude solicitation by directors or officers or employees of the issuer so long as it is only an incidental function of their regular duties and they receive no additional compensation.” But this exemption would apparently

prohibit hiring an employee or electing a compensated director for the specific purpose of soliciting investors. See *Parrish v. Ben-Jon Oil Co.*, 666 P2d 1308 (Okla App 1983).

(2) As mentioned above, there may be no public advertising or general solicitation. The Director has not taken a position on what constitutes “public advertising or general solicitation.” ORS 59.035(12)(a)(D). Similar language in Regulation D has been interpreted to permit communications with persons with whom the promoter has a preexisting business relationship, but not to permit newspaper advertising, even tombstone advertising. See 17 CFR §231.6455(III)(c).

(3) Sales under this exemption may not take place at the same time that the offeror has pending an application or effective registration for securities that are part of the same offering. But purchasers of securities in an offering registered pursuant to ORS 59.065 are not counted as purchasers for purposes of this exemption. ORS 59.035(12)(a)(E), (12)(b)(A).

PRACTICE TIP: If an issuer has conducted a registered offering and then wishes to sell additional securities in reliance on this exemption, the issuer (or its counsel) should make sure that the order of registration has lapsed. (Orders of registration are effective for one year after the original date of registration or renewal. ORS 59.075(2).) If the issuer wishes to sell before the lapse of the one-year period, then a letter requesting cancellation should be delivered to the Director. On request, the Director will issue a letter canceling the order of registration.

The exemption contains three significant provisions that give the issuer a considerable amount of flexibility in the capital formation process. First, persons who have purchased securities pursuant to any other exemption are not counted as purchasers for purposes of the 10-purchaser limitation. ORS 59.035(12)(b)(A). Second, repeat sales to the same purchaser do not increase the number of purchasers. However, repeat sales extend the 12-consecutive-month period. ORS 59.035(12)(b)(B). Third, purchasers of securities for which notice has been filed under ORS 59.049 are not counted as purchasers under this exemption. ORS 59.035(12)(b)(A). See §18.3, *supra*.

PRACTICE TIP: It is important to remember that this exemption is self-executing. See OAR 441-035-0005. There is no requirement to file anything with the Director. Also, the exemption limits the number of purchasers, not the number of offerees, but be alert to the prohibition on public advertising or general solicitation. Finally, a husband and a wife count as a single purchaser. ORS 59.350(1).

L. (§18.36) Mergers and Consolidations

Oregon law exempts from registration the exchange of securities incident to a merger or consolidation, a partial or complete liquidation, a reclassification of securities, a plan of exchange, or a sale of assets. ORS 59.035(13).

The exemption applies to all security-holder transactions incident to the qualifying merger or consolidation (e.g., exchanges and reclassifications) and applies to each of the entities involved, which do not have to be of identical form (e.g., a partnership may reorganize as a corporation and a corporation may merge with a limited liability company). The Director generally has taken the position that this exemption is available in triangular and reverse triangular mergers, but not in situations in which cash changes hands along with the securities.

NOTE: In so-called prepackaged plans of reorganization, a debtor with a large number of outstanding bondholders will sometimes approach its bondholders before filing for protection under Chapter 11 of the Bankruptcy Code and seek their preapproval of a proposed plan of reorganization to be filed after the initiation of the bankruptcy. In those cases, the goal is to expedite the Chapter 11 reorganization process. In an opinion issued on April 15, 1991, in response to a “no-action” request by Trump Taj Mahal, the Agency took the position that such a prebankruptcy solicitation of bondholders was not exempt pursuant to ORS 59.035(13). Rather, the Agency took the position that Trump should file an application for registration pursuant to ORS 59.065, make the prebankruptcy solicitations pursuant to ORS 59.035(11) (the “red herring” exemption), and then file the bankruptcy after obtaining the indications of approval of the proposed plan of reorganization but before an actual order of registration would be issued by the Agency. The reorganization itself would either be excluded from the definition of a sale by ORS 59.015(17)(c)(C) or be exempt from registration pursuant to ORS 59.035(1), because the plan of reorganization would be subject to approval by the bankruptcy court.

Rather than relying on this exemption, some local entities instead request a fairness hearing pursuant to ORS 59.095. See §18.13, *supra*. Under this procedure, the Director determines whether the transaction is fair, just, and equitable and free from fraud. This determination may be the basis for a claim of exemption from registration pursuant to §3(a)(10) of the 1933 Securities Act.

M. (§18.37) Professional Corporations

The issuance of capital stock by a professional corporation organized under ORS chapter 58 is exempt from registration. ORS 59.035(14).

N. (§18.38) Exemptions by Rule

Several of the statutory exemptions contain language empowering the Director to define, expand, or restrict the scope of the exemption. Pursuant to these statutory grants, the Director has adopted regulations dealing with the definition of *accredited investor* (OAR 441-035-0010, see §18.30, *supra*), the “manual” exemption (OAR 441-035-0030, see §18.33, *supra*), and the Nasdaq exemption (OAR 441-035-0040, see §18.33, *supra*).

In addition, ORS 59.035(15) empowers the Director to promulgate rules that exempt other transactions from registration. Pursuant to this statute, the Director promulgated a rule exempting certain isolated-issuer transactions (OAR 441-035-0050, see §18.27, *supra*) and a rule exempting certain “offers,” but not sales, made in connection with SEC Regulation A offerings (OAR 441-035-0045, see §18.29, *supra*), and certain Internet offers not directed to Oregon residents (OAR 441-035-0060, see §18.34, *supra*).

O. (§18.39) Denial of Transactional Exemptions

The Director has authority to deny, withdraw, or condition any exemption allowed by ORS 59.025 or 59.035. ORS 59.045. Pursuant to this authority, the Director promulgated OAR 441-045-0010, which defines *blank-check companies* and denies the use of all transactional exemptions under ORS 59.035 to issuers, broker-dealers, and their affiliates in attempting to offer or sell securities of blank-check companies. The only exception to the prohibition is for unsolicited sales by licensed broker-dealers under ORS 59.035(8).

So-called blank-check companies are publicly held corporations with few or no assets and no business plan other than acquisition by a privately held corporation as part of a plan designed to evade regulatory oversight. Blank-check companies have frequently been used for purposes of market manipulation and other forms of securities fraud.

The prohibition does not extend to exchange-listed or Nasdaq-quoted securities or to securities of companies registered as investment companies under the Investment Company Act of 1940. Waivers from the prohibition must be requested in writing and the Director grants waivers only when the waiver would not be contrary to the public interest.

V. (§18.40) EXCLUSIONS

2007 Supplement

The 2007 Legislature amended the provision excluding certain insurance contracts from the definition of a *security*. 2007 Or Laws ch 393, §1. Effective January 1, 2008, ORS 59.015(19)(b)(A) is amended to provide that *security* does not include

“[a]n insurance or endowment policy or annuity contract, *other than a variable annuity contract*, under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or some other specified period.” (New language italicized.)

The Department of Consumer and Business Services has initiated rulemaking to be effective January 1, 2008, acknowledging that these securities are federal-covered securities but exempting the issuer from notice filing and fees if certain conditions are met, and requiring licensing of salespersons offering and selling these securities. See OAR 441-049-1021, 441-049-1041.

2001 Edition

In addition to exempting certain security instruments and security transactions from the registration requirements of the securities law, Oregon law excludes certain financial instruments and financial transactions that would otherwise fall within the definition of a security or sale. These “excluded” instruments and transactions completely fall outside the Oregon Securities Law, they are not required to be registered, and they are not subject to the fraud or full-disclosure requirements of the securities law.

The following are excluded from the definition of *sale* and *sell*:

- (1) A bona fide pledge or loan of a security;
- (2) A bona fide security dividend if no value is given by the recipients for the dividend; and
- (3) Certain acts incident to judicial reorganizations. ORS 59.015(17)(c).

CAVEAT: A pledge is not excluded from the coverage of the federal securities laws or from the coverage of their fraud provisions. *Rubin v. United States*, 449 US 424, 101 S Ct 698, 66 L Ed2d 633 (1981). Federal law covers all securities transactions occurring in Oregon.

The following are excluded from the definition of the term *security*:

- (1) Certain insurance contracts;
- (2) A beneficial interest in certain voluntary inter vivos trusts; and
- (3) A beneficial interest in a testamentary trust. ORS 59.015(19)(b).

CAVEAT: Once again, federal law does not necessarily parallel Oregon law. Certain insurance contracts excluded under Oregon law fall within the scope of federal securities law. See, e.g., §3(a)(8) of the 1933 Securities Act; Rule 151, 17 CFR §230.151.