Chapter 18

OREGON SECURITIES LAW

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The authors and the OSB Legal Publications Department thank the authors of all prior editions of this chapter for their contributions.

§ 18.1 INTRODUCTION

The Oregon Securities Law is set forth in ORS chapter 59. *See* ORS 59.005. Among other things, the Oregon Securities Law imposes the following requirements:

(1) A security must be registered with the Director of the Department of Consumer and Business Services (DCBS) before it is offered or sold (ORS 59.055(1)), unless the offer or sale is exempt from the registration requirements (ORS 59.055(2)), or the director is preempted under federal law from requiring its registration (ORS 59.055(3)).

(2) The person selling the security must be licensed by the Director of the DCBS as a broker-dealer or salesperson, unless that person is excluded from the definition of *broker-dealer* or *salesperson*. ORS 59.015(1), (18); OAR 441-175-0020; OAR 441-175-0040.

(3) No person may, directly or indirectly, in connection with the purchase or sale of any security, make "any untrue statement of a material

fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." ORS 59.135.

NOTE: ORS 59.015(13) defines the term *offer* expansively to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." It is not necessarily limited to situations that involve an express attempt to sell securities. The United States Securities and Exchange Commission (SEC) has stated that any publicity that may "contribute to conditioning the public mind or arousing public interest" in the offering can itself constitute an offer under the Securities Act of 1933 ("1933 Act") (Pub L 73-22, tit I, 48 Stat 74 (codified as amended 77 USC §§ 77a–77aa)). *See* SEC, *Statement of Commission Relating to Publication of Information Prior to or after Effective Date of Registration*, Securities Act Release No 33-3844, 22 Fed Reg 8359 (Oct 8, 1957). Issuers—especially unseasoned issuers that do not yet engage in a regular pattern of communication—should exercise great caution regarding communications in advance of a securities offering, even if that communication does not expressly offer the issuer's securities.

NOTE: ORS 59.345 sets forth the circumstances in which an offer to either sell or buy is made in Oregon and, accordingly, subject to the Oregon Securities Law.

NOTE: In addition to requirements under the Oregon Securities Law, readers must also consider the application of the federal securities law, as well as the securities law of other jurisdictions in which the securities will be offered or sold. *See* chapters 14 to 17.

This chapter briefly discusses the registration requirements and procedures and, in somewhat more detail, the exemptions and federal preemptions from registration available under the Oregon Securities Law.

Ten methods of registration are available in Oregon, with "registration by qualification" being the most widely used method and the one that provides the registrant with the greatest selling flexibility (*see* § 18.3-2). The other methods tend to be more specialized and allow for less

flexibility. For example, some methods of registration limit the scope of the selling campaign or to whom the securities can be sold. Because these methods limit the size and scope of the offering, the cost of preparing the application materials is usually lower and the length of the DCBS's review is shorter.

Two categories of exemptions are available under the Oregon Securities Law: exempt securities (ORS 59.025) and exempt transactions (ORS 59.035). *See* § 18.4-1 to § 18.4-9 (exempt securities); § 18.5-1 to § 18.5-16 (exempt transactions). Securities exemptions exempt the security itself. The security can be resold as long as the basis underlying the exemption continues to exist. Exempt transactions exempt only the transaction between the particular buyer and seller. Persons who purchase a security in an exempt transaction must register it before they resell it, unless the resale is exempt or the Director of the DCBS is preempted from requiring its registration.

In addition, section 18 of the 1933 Act, as amended, preempts state securities regulators from requiring the registration of certain federal "covered securities." *See* § 18.2 (federal covered securities). Congress determined that these securities were more national in nature and that requiring registration in each individual state would be overly burdensome. There are four broad categories of federal covered securities under section 18 of the 1933 Act (15 USC § 77r).

> NOTE: The exemptions and federal preemptions relate solely to whether a security is required to be registered with the DCBS. The antifraud provisions of the Oregon Securities Law apply regardless of whether the security is registered, exempted, or preempted. The fact that a security does not have to be registered in no way diminishes the need for compliance with the fraud and disclosure provisions of all applicable securities laws. *See* 15 USC § 77r(c)(1).

Likewise, certain security-type instruments have been excluded from the application of the Oregon Securities Law by the Oregon Securities Law and the Oregon Insurance Code. ORS 59.015(19)(b); ORS 731.046.

The Director of the DCBS has broad supervisory authority under the Oregon Securities Law over persons dealing in securities (ORS 59.235) and is authorized to investigate and enforce violations of the Oregon Securities Law (ORS 59.245). If the director concludes that a violation has occurred, the director can (1) take administrative action and order that the violator cease and desist from violating the Oregon Securities Law (ORS 59.245(4)), (2) deny the violator the ability to rely on the exemptions to the securities-registration requirements (ORS 59.045), and (3) assess a civil penalty up to $20,000 per violation or $100,000 for a continuing violation (ORS 59.995). In addition, most violations of the Oregon Securities Law are Class B felonies. *See* ORS 59.991.

Furthermore, the Attorney General is authorized 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. ORS 59.331. In most cases, the Attorney General must obtain the director's consent before undertaking an investigation or enforcement action. ORS 59.331(3). The remedies and sanctions that may be imposed in an action under ORS 59.331 include restitution, injunctive relief, attorney fees, and a fine of up to $20,000 for each violation. ORS 59.331(6).

§ 18.2 FEDERAL COVERED SECURITIES

In 1996, Congress passed and the President signed into law the National Securities Markets Improvement Act of 1996 (NSMIA) (Pub L 104-290, 110 Stat 3416). The NSMIA amended section 18 of the 1933 Act (15 USC § 77r) to preempt certain state registration requirements in connection with certain federal "covered securities" and significantly altered certain areas of state regulation of securities and the securities industry. In April 2012, section 18 was further amended by the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") (Pub L 106, 126 Stat 306) to add additional classifications of federal covered securities. 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 section 18.

Under section 18(b) of the 1933 Act, federal "covered securities" include:

(1) securities listed or approved for listing on the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), the National Market System of the Nasdaq Stock Market (Nasdaq-NMS), or any of their successor entities; securities listed or approved for listing on certain recognized exchanges maintaining listing requirements comparable to the NYSE, the AMEX, or the Nasdaq-NMS; and securities of the same issuer that are equal to or senior to the listed securities;

(2) securities of investment companies registered under the Investment Company Act of 1940 (15 USC §§ 80a-1 to 80a-64);

(3) securities sold to *qualified purchasers* as that term is defined by the SEC;

> NOTE: In March 2015, the SEC promulgated Tier 2 of Regulation A (17 CFR §§ 230.251–230.263) as mandated by Title IV of the JOBS Act. In doing so, it defined the term *qualified purchaser* for purposes of that provision to include any person who purchases securities in connection with an offering done in reliance on Tier 2 of Regulation A of the 1933 Act. *See* SEC Rule 256 (17 CFR § 230.256). The SEC may in the future define such term differently in connection with different securities and transactions.

(4) securities sold in reliance on section 4(a)(1) or 4(a)(3) of the 1933 Act (15 USC § 77d), if the issuer of the securities is filing reports pursuant to section 13 or 15 of the Securities Exchange Act of 1934 ("1934 Act"), as amended (Pub L 73–291, 48 Stat 881);

(5) securities sold in reliance on section 4(a)(4) of the 1933 Act;

(6) securities sold in reliance on section 4(a)(6) of the 1933 Act;

> NOTE: For purposes of this item, in October 2015, the SEC adopted Regulation Crowdfunding under section 4(a)(6) of the 1933 Act pursuant to a mandate under Title III of the JOBS Act. *See* 17 CFR pt 227.

(7) securities sold in a Tier 2 offering under Regulation A (*see* 17 CFR §§ 230.251–230.263);

NOTE: For purposes of this item, only securities sold in reliance on Tier 2 under Regulation A are deemed "covered securities." *See* 17 CFR § 230.251. Securities sold in reliance on Tier 1 under Regulation A are not "covered securities," and their offer and sale must comply with or be exempt from all applicable state registration requirements.

(8) securities sold in reliance on an exemption under section 3(a) of the 1933 Act (15 USC § 77c), 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;

(9) securities sold in reliance on rules promulgated by the SEC under section 4(a)(2) of the 1933 Act; and

NOTE: For purposes of this item, only securities sold pursuant to SEC Rule 506 (17 CFR § 230.506) are deemed "covered securities." Securities sold pursuant to SEC Rule 504 (17 CFR § 230.504) under Regulation D of the 1933 Act (17 CFR §§ 230.501–230.508), or pursuant to section 4(a)(2) of the 1933 Act are not "covered securities."

(10) securities sold in reliance on section 4(a)(7) of the 1933 Act.

15 USC § 77r(b).

Section 18(c) of the 1933 Act provides that the states retain antifraud jurisdiction over the purchase and sale of all federal covered securities. States also retain the authority to require the filing of notice and the payment of fees in connection with the offer and sale of certain covered securities in their state. States cannot require notice filings or fees for exchange-listed securities and securities sold in reliance on Regulation Crowdfunding (*see* 17 CFR pt 227), unless the issuer's principal place of business is located in that state or territory, or 50 percent or greater of the total securities issued are sold to residents of that state or territory.

The Oregon Securities Law defines the term *federal covered security* as "any security that is a covered security under section 18 of the [1933 Act], and for which such Act provides that the director [of the DCBS] 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 advisers.* ORS 59.015(4), (8)(a), (20)(a).

ORS 59.049 and OAR chapter 441, division 49, set forth procedures to be used for filing notice of a federal covered security. ORS 59.049(1) and OAR 441-049-1031 provide for "notice filing" and fees for investment companies (mutual funds, unit investment trusts); ORS 59.049(2) and OAR 441-049-1041 provide for notice filings for certain other covered securities that are subject to section 18(b)(3) or (4) of the 1933 Act, other than section 18(b)(4)(E); and ORS 59.049(3) and OAR 441-049-1051 provide for notice filings that are subject to section 18(b)(4)(E) of the 1933 Act. OAR 441-049-1001 contains the fees for notice filings for federal covered securities.

> PRACTICE TIP: The requirements under ORS 59.055 are to be read in the disjunctive. As such, a security may be a "federal covered security" and simultaneously be exempt under ORS 59.025 or ORS 59.035. In such cases, no notice filing under ORS 59.049 is required.

> PRACTICE TIP: Persons seeking to file notice of a Tier 2 Regulation A offering would need to comply with the requirements under OAR 441-049-1041 and file notice before the offer and sale of any securities in Oregon. The fee for such filing is $200. OAR 441-049-1001(3). Persons may file notice by using the Uniform Regulation A Tier 2 Notice Filing Form, which is available on the North American Securities Administrators Association's (NASAA) website at <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/08/Uniform-Reg-A-Tier-2-Notice-Filing-Form-FINAL-May 25.doc>.

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

Although ORS 59.075(2) provides that a notice filed under ORS 59.049 generally expires one year after the date that it is filed, the director has determined by rule that annual renewal of the notice filing is not required for specific types of covered securities. OAR 441-049-1021(5).

These include securities that are subject to section 18(b)(3) or (4) of the 1933 Act, SEC Rule 506 (17 CFR § 230.506), and Tier 2 Regulation A offerings. *See* 15 USC §§ 77a–77aa. Notices for covered securities under section 18(b)(2) of the 1933 Act expire one year after their effective date. These include unit investment trusts and mutual funds.

§ 18.3 REGISTRATION

§ 18.3-1 Generally

Generally, there are two philosophies related to the regulatory review of securities-registration applications: (1) disclosure review and (2) merit review. Disclosure review requires that the offering document provide full and complete information regarding the issuer and the offered securities to prospective investors. Rules generally exist regarding the nature and scope of the disclosures that need to be included in the offering document. See, for example, Regulation S-K under the 1933 Act (17 CFR pt 229). Investors are left to determine the merits of the offering on their own. Federal review by the SEC is disclosure review.

Merit review focuses more on the "merits" of an offering and whether the offering is "fair, just and equitable" to Oregon residents and whether the issuer is solvent and in sound financial condition. *See, e.g.*, ORS 59.085; ORS 59.105. The disclosures are a secondary consideration. Joseph C. Long, Michael J. Kaufman & John M. Wunderlich, 12 *Securities Law Series: Blue Sky Law* § 1:46 (2017) (updated periodically). The reviewing agency, in effect, looks to the overall fairness of the offering. Dilution, promoter compensation, selling expenses, investor rights, and the feasibility of the proposed activity are examples of terms of the offering that the reviewing agency may evaluate. Merit review does not mean that the reviewing agency has passed on the truthfulness, completeness, or worth of the registered security or that it has recommended the investment. *See* ORS 59.145.

Oregon is a merit-review state (ORS 59.105), and the DCBS has broad discretion in determining the fairness of a proposed offering. *Standard Ins. Co. v. Olin*, 81 Or App 405, 725 P2d 934 (1986), *rev allowed and rem'd*, 303 Or 136 (1987); 25 Op Att'y Gen 85 (Or 1950).

For many years, the DCBS informally applied certain merit standards to various types of registered securities offerings under authority set forth in ORS 59.105. In February 1992, the Director of the DCBS 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 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 securities may be denied if the selling expenses of the offering exceed 15 percent of the aggregate offering price. OAR 441-085-0010. Anything in excess of that amount is presumed unreasonable and the Director of the DCBS may deny the application.

Options granted to underwriters or other persons as compensation for the sale of securities must also 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 percent 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. *See* OAR 441-085-0020(2).

> NOTE: The DCBS has not formally adopted, but continues to informally follow, the other NASAA guidelines. A copy of those guidelines can be found on the NASAA's website at <www.nasaa.org/regulatory-activity/statements-of-policy>.

To apply for an order of registration from the DCBS, offerors generally must submit the materials required under the rule—typically the disclosure document and a Form U-1, current audited financial statements (OAR 441-011-0040), and a salesperson-licensing application on Form U-

4 (*see, e.g.*, § 18.3-2)—and pay the applicable fee. *See* OAR 441-065-0030.

> PRACTICE TIP: Audited financial statements are not required for (1) any registered securities offering in which the aggregate offering price is less than $500,000; or (2) any offering of bonds, notes, evidence of indebtedness, preferred stock, or other securities requiring fixed or contingent periodic payments or amortization when the aggregate offering price is less than $100,000. OAR 441-011-0040(3). Form U-1 is the Uniform Application to Register Securities published by the NASAA. Form U-1 requires certain information regarding the issuer of the securities, a description of the securities to be registered and their proposed offering price, a list of the states in which the issuer intends to offer the securities, and the submission of certain documents relating to the issuer and the offering. Form U-4 is the Uniform Application for Securities Industry Registration or Transfer, published by the Financial Industry Regulatory Authority (FINRA). Form U-4 requires detailed biographical, professional, and financial information about the salesperson filing the application, as well as any firms with which such person is affiliated. These forms are available on the NASAA's website, at <www.nasaa.org/industry-resources/uniform-forms>.

ORS 59.065 and ORS 59.175 direct the Director of the DCBS 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); ORS 59.175(9)–(10)(a). The director "may" adjust the amount of a fee every two years to reflect changes in the national midpoint for a similar fee. ORS 59.065(3)(b); ORS 59.175(10)(b). See OAR 441-065-0001 for registration fees and OAR 441-175-0002 for fees for licensing of issuer salespersons.

On receipt of the required documents and fees, the DCBS reviews the submitted documents to determine whether it should approve or deny the application under ORS 59.105. The DCBS's staff attempts to conduct its initial review of an application to register securities and issue comments within 90 days after it receives the application. The DCBS's staff will

complete its review of an application to renew an order of registration within 30 days of receipt of the application.

The registrant must amend the registration application when "there are material changes in the terms and conditions of the original registration." ORS 59.070. There is an additional fee if the issuer is seeking to increase the aggregate amount that was approved to be sold in Oregon. ORS 59.070(2).

§ 18.3-2 Registration by Qualification

Registration by qualification is the most burdensome of the registration procedures, but one that provides the registrant with the greatest selling flexibility. Under OAR 441-065-0020, an issuer that is seeking to register securities by qualification must submit a Form U-1, audited financial statements under OAR 441-011-0040, the disclosure document that the issuer intends to use in connection with the offer and sale of securities, various supporting exhibits (articles and bylaws, title reports, etc.), and a fee computed in accordance with OAR 441-065-0001. In addition, any person who is selling the security must be licensed, unless they are excluded from the licensing requirements, and can apply for that license by submitting a Form U-4 and paying the applicable fee. These forms are available on the NASAA's website, at <www.nasaa.org/industry-resources/uniform-forms>. *See* § 18.3-13 (licensing of persons).

> PRACTICE TIP: All securities eligible for any of the specialized registrations described in § 18.3-3 to § 18.3-9 also may be registered by qualification.

After the DCBS has reviewed the application, it will tender comments to the issuer. Changes are almost always required to the initial application. After all of the comments have been cleared, the DCBS will issue an order of registration that expires after one year from the date on which it is issued, except that if the offering is required to be effective with the SEC, the DCBS will not issue an order of registration until it has been notified by the applicant that the offering has received notification of effectiveness from the SEC. *See* ORS 59.075(2).

> PRACTICE TIP: The states, under the auspices of the NASAA, have created coordinated review protocols for federally registered

equity offerings, Small Company Offering Registrations (commonly known as SCOR, *see* § 18.3-9), direct participation programs (such as real estate investment trusts), and Tier 1 Regulation A offerings (*see* 17 CFR § 230.251). This coordinated review process is meant to streamline the process for issuers seeking to register their securities in multiple states. It is also meant to establish uniform review standards and expedite the registration process. A person can learn more about the coordinated review process on the NASAA's coordinated review website at <www.coordinatedreview.org>.

§ 18.3-3 Private Placements

Some offerings—including offerings under SEC Rule 504 (17 CFR § 230.504) under Regulation D and Tier 1 offerings under Regulation A—are exempt from registration under the 1933 Act, but must be registered in Oregon. These are commonly referred to as private placements. See chapter 17 for an in-depth discussion of the private placement of securities, involving an abbreviated form of registration.

§ 18.3-4 Registration by Filing

OAR 441-065-0030 provides an expedited registration procedure 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 36 consecutive calendar months;

(3) have at least 500 shareholders;

(4) have either a total net worth of at least $4 million or a total net worth of $2 million and "net pretax income from operations before allowances for extraordinary items, for at least two of the three preceding fiscal years";

(5) have a public float of at least 400,000 units;

(6) do not have "outstanding warrants and options held by the underwriters and executive officers and directors of the issuer in an amount exceeding ten percent of the total number of shares to be outstanding after completion of the offering of the securities being registered";

(7) have been subject to SEC reporting requirements for at least 36 consecutive calendar months and have timely complied with applicable reporting requirements under the 1934 Act;

(8) have had at least "four market makers for the class of equity securities registered" under the 1934 Act for at least 30 days during the three months preceding the offering of the securities registered; and

(9) have not, nor have had any subsidiaries, since the end of the preceding fiscal year, (a) failed to pay a dividend or sinking fund installment on preferred stock; (b) defaulted on indebtedness for borrowed money; or (c) defaulted on "the rental on one or more long-term leases which defaults in the aggregate are material to the financial position of the issuer and its subsidiaries, taken as a whole."

OAR 441-065-0030.

In addition, each of the underwriters participating in the offering of the security and each broker-dealer who will offer the security in Oregon must be a member of or be subject to "the rules of fair practice of a national association of securities dealers with respect to the offering and the underwriters must have contracted to purchase the securities offered in a principal capacity." OAR 441-065-0030(1)(g). Furthermore, the person or persons on whose behalf the securities are offered "must receive proceeds equal to 90 percent or more of the aggregate public offering price;" and, in "the case of an equity security, the price at which the security will be offered to the public" cannot be "less than five dollars per share." OAR 441-065-0030(1)(h), (j).

An applicant must submit to the DCBS a Form U-1 and certain disclosure materials filed with the SEC, and pay the applicable fee. Form U-1 is available on the NASAA's website, at <www.nasaa.org/industry-resources/uniform-forms>. Unlike other forms of registration, this registration becomes effective automatically, unless the DCBS raises objections.

NOTE: Issuers who are qualified to use this type of registration might also be qualified as issuers of "covered securities" preempted from registration under section 18 of the 1933 Act (15 USC § 77r).

§ 18.3-5 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 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 an application form and certain documents described in the regulation (including the disclosure material to be given prospective purchasers), and pay the applicable fee.

§ 18.3-6 Registration for Resale, or Dealing and Trading

ORS 59.035(9) generally exempts from the securities-registration requirements the offer or sale by a licensed broker-dealer of "any security acquired in the ordinary and usual course of business, when such security is a part of an issue which has been registered in whole or in part." OAR 441-065-0040 allows licensed broker-dealers wishing to avail themselves of that exemption to register securities for purposes of relying on that exemption.

Under that rule, the securities must be outstanding in the hands of the public and

(1) the issuer must be organized under the laws of the United States or any state, or the issuer must have at least 300 beneficial owners domiciled in the United States;

(2) the issuer must not have had an offering of the same class of securities in the previous six months, except for offerings to employees;

(3) prices and commissions must be related to the market; and

(4) the issuer must agree to provide, or otherwise be required to provide, audited financial statements annually to holders of the class of security registered, and the issuer must be solvent, not be subject to administrative sanction, and not have engaged in certain activities.

OAR 441-065-0040(1).

To use this registration procedure, the broker-dealer must file with the DCBS on a form approved by the Director of the DCBS detailed information regarding the issuer specified in OAR 441-065-0040(4), and pay the applicable fee. The information contained on the form must also be made available to purchasers. OAR 441-065-0040(5).

> PRACTICE TIP: The form to be used in connection with this registration can be found on the DCBS's website, at <http://dfr .oregon.gov/business/financial-industry/Documents/2203.pdf>.

§ 18.3-7 Mortgage/Real Estate Paper Registration

Offerings of real estate paper by mortgage brokers are often significantly different from other types of securities offerings because the specific terms and conditions of the real estate paper to be sold are often not established at the time that the application to register securities is submitted. As a consequence, the DCBS created a special registration procedure for real-estate-paper offerings, also known as "mortgage broker offerings," that addresses the unique aspects of these types of offerings. *See* OAR 441-065-0250; OAR 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, as well as the proposed form to be used in connection with a specific transaction. Under this registration, it is not necessary for the issuer to file a completed specific disclosure document with the DCBS each time a mortgage-broker transaction is actually made. In addition, the issuer must file an application form and pay the appropriate fee.

NOTE: The DCBS has not prepared a specific application form for mortgage broker offerings; rather, applicants will typically submit a Form U-1.

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

(1) offerings involving construction loans and loans exceeding 90 percent 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 reserve 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).

Under ORS 59.015(1)(h), licensed mortgage brokers who sell real estate paper that is registered under ORS 59.065 are excluded from the definition of *broker-dealer*. Similarly, employees of the mortgage broker who sell real estate paper are excluded from the definition of *salesperson*. OAR 441-175-0040(1). Those employees must, however, still be licensed as salespersons. OAR 441-175-0055(2). The term of the salesperson license ends on the date on which the registration expires, rather than one year from the date on which the salesperson was licensed to the mortgage banker or broker. OAR 441-175-0120(14)(a).

In addition, the mortgage broker is responsible for (1) supervising its licensed securities salespersons, including reviewing and authorizing all securities activities of the licensed salespersons; (2) segregating investor funds from its own funds; and (3) maintaining books and records required in OAR chapter 441, division 865. OAR 441-175-0055(4)–(6). Under OAR 441-865-0010 and OAR 441-865-0020(5), the mortgage broker is required to maintain financial statements that are prepared in accordance

with generally accepted accounting principles, and those financial statements are subject to examination by the DCBS's Mortgage Lending section.

Neither the mortgage broker nor its licensed salesperson can recommend a securities transaction to an investor unless the broker or salesperson has reviewed the terms of the transaction and, after reasonable inquiry by the broker or salesperson, the licensee has reasonable grounds to believe that the recommendation is suitable for the investor on the basis of (1) information furnished by the investor (including the investor's investment objectives and financial situation), and (2) any other relevant information known to the licensee. OAR 441-175-0055(7).

PRACTICE TIP: This form of registration is optional. Registration by qualification pursuant to OAR 441-065-0020 (*see* § 18.3-2), although perhaps more demanding in terms of disclosure and merit standards, is also available and is quite useful when dealing with the limitations of a generic offering, such as no construction loans, rights of subordination, and limits on participants in a single loan. In addition, if the client has a large loan that needs to be fractionalized, the lawyer should consider an SEC Rule 506(b) private offering, which permits sales to 35 sophisticated investors and an unlimited number of accredited investors, and is preempted from registration by the state. *See* 17 CFR § 230.506.

CAVEAT: If the client has a current registration, the lawyer should be alert to integration issues involving an SEC Rule 506 offering. *See* 17 CFR § 230.502(a).

§ 18.3-8 Registration by Multijurisdictional Coordination

A type of registration that is extremely limited in application is set forth in OAR 441-065-0035 (registration by multijurisdictional coordination). It is currently available only to certain Canadian "blue chip" companies that have filed registration statements with the SEC on Form F-7, Form F-8, or Form 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 and the current prospectus, and pay the appropriate registration fee. OAR 441-065-0035. Form U-1 is available on the NASAA's website, at <www.nasaa.org/industry-resources/uniform-forms>.

§ 18.3-9 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 offerings under SEC Rule 504 under Regulation D under the 1933 Act and is meant for offerings of less than $1 million and sold in reliance on SEC Rule 504. *See* 17 CFR § 230.504.

SCOR is available to any issuer that is organized as a corporation or a limited liability company (LLC) under the laws of any state or territory of the United States. 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. OAR 441-065-0225(2). *See* OAR 441-065-0080(3). See § 18.5-14 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. OAR 441-065-0225(2)(f). If the offering includes debt securities, the application for registration must include information demonstrating the issuer's ability to service its debt. OAR 441-065-0225(2)(d). The offering price for any common stock must be not less than $1 per share. OAR 441-065-0225(2)(e).

An applicant for this type of registration must file a Form U-7 (available on the NASAA's website at <www.nasaa.org/industry-resources/corporation-finance/scor-overview/scor-forms>), file the issuer's audited financial statements, and pay the applicable fee. OAR 441-065-0170(2). The 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.

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

> NOTE: Form U-4 and Form U-7 are available on the NASAA's website, at <www.nasaa.org/industry-resources/uniform-forms>.

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); OAR 441-085-0010 (discussed in § 18.3-1).

> CAVEAT: Rules regarding the registration of private placements and small corporate offerings are contained in a series of provisions located at OAR 441-065-0060 to 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 the participating 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 state securities administrators implemented a regional review procedure for multistate offerings filed under SCOR. In addition to Oregon, states participating in regional review in this area include Alaska, Washington, Idaho, Arizona, Colorado, Utah, Montana, Nevada, New Mexico, and Wyoming.

Although an application must be submitted and a fee must be paid in each state, comments are coordinated by a lead merit state and a lead

disclosure state and a single comment letter is issued. All states issue an order of registration that is effective as of the date that all comments are cleared. *See* NASAA, *SCOR Statement of Policy* (Apr 28, 1996), *available at* <www.nasaa.org/industry-resources/corporation-finance/scor-overview/scor-statement-of-policy>.

The participating states have prepared a SCOR manual to assist issuers in preparing Form U-7. That manual can be found on the NASAA's website at <www.nasaa.org/wp-content/uploads/2011/08/2-SCORIM-92899.doc>.

§ 18.3-10 Fairness Hearings

Section 3(a)(10) of the 1933 Act (15 USC § 77c) provides an exemption to the securities-registration requirements under the 1933 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 legal authority to conduct such a hearing. The hearing must be held to determine the fairness of the exchange, and the persons to whom the securities are proposed to be issued must have the right to appear at the hearing.

> NOTE: The exemption under section 3(a)(10) is not available for exchanges in connection with a Chapter 11 bankruptcy proceeding.

Oregon is one of a few states that has expressly authorized the Director of the DCBS by law to conduct a fairness hearing that would satisfy the requirements under section 3(a)(10). ORS 59.095.

Under ORS 59.095 and OAR 441-095-0030 thereunder, the proponent 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 issuer salesperson licensing application on Form U-4. The filing fee for each salesperson is $50. There are no examination or bonding requirements for the issuer salesperson. *See* OAR 441-175-0120(4)(b); OAR 441-175-0110.

NOTE: Form U-1 and Form U-4 are available on the NASAA's website, at <www.nasaa.org/industry-resources/uniform-forms>.

The DCBS will also require 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 DCBS 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 SEC Form 10-Ks and SEC Form 10-Qs, which are used to satisfy the financial-reporting requirements under the 1934 Act, will satisfy the financial-statement requirements. Those forms are published on the SEC's website at <www .sec.gov/about/forms/form10-k.pdf> and <www.sec.gov/about/forms/form10-q .pdf>. *See* § 16.9-1(a) (Form 10-K), § 16.9-1(b) (Form 10-Q). In addition, the proponent must file material contracts and agreements of the proponent and a fairness opinion, if it exists. Finally, proponents may expedite the review process by preparing a draft notice of hearing, which will accompany the materials to be distributed to all interested parties.

NOTE: There must be a nexus to Oregon for the DCBS to grant a hearing. This nexus can be demonstrated by showing that the proponent of the plan or the company to be acquired is headquartered in Oregon, or that at least 50 percent of the target company's shareholders are located in Oregon. OAR 441-095-0030(1).

After receiving the application, the DCBS will conduct a preliminary review to determine whether the requirements under OAR 441-095-0030(3) are satisfied and whether the exchange is "fair" from both a procedural and a substantive perspective. This includes not only whether the disclosures relating to the exchange are adequate, but also whether interested parties were given adequate notice and whether the hearing will be conducted in a convenient and accessible location.

After completing its preliminary review, the DCBS will deliver comments to the proponents. When all fairness issues have been resolved, the proponent of the plan must deliver the hearing notice to every person whose securities it proposes to exchange. The hearing notice 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 date of the hearing must be 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. OAR 441-095-0030(3).

The hearing itself will be conducted as an "other than contested case" by a hearings officer appointed by the Director of the DCBS pursuant to the provisions of ORS chapter 183 (Oregon's Administrative Procedures Act). OAR 441-095-0030(4). At the hearing, the proponent will formally present the plan and summarize its material provisions. This typically includes testimony from the chief executive officer of the proponent, the chairperson of the target's board, and the financial advisor to the target that analyzed the fairness of the plan from a financial perspective. The hearings officer may ask additional questions. At the conclusion of the testimony, the hearings officer will give any interested party the opportunity to pose questions to the proponent or to testify and comment on the plan itself for the record.

> NOTE: Generally, interested parties will be allowed to submit written comments to the hearings officer up to two business days before the hearing date.

After the hearing, the hearings officer will issue an order that includes findings of fact and conclusions of law and that either approves or denies the exchange. OAR 441-095-0030(6). If the exchange is approved, the Director of the DCBS will also issue an order of registration, which registers the shares to be issued in the exchange and the salesperson licenses. The final order is generally produced within several days after a hearing, save for very complex matters. The findings and orders are dated as of the hearing date, unless issues were raised at the hearing that were not resolved. OAR 441-095-0030(5). The DCBS tries to work with the proponents of the plan in identifying any potential issues before the hearing.

PRACTICE TIP: Proponents of a plan can draft findings and recommendations for review and modification by the hearings officer.

NOTE: If the fairness hearing is uncontested and the hearings officer finds that the plan is "fair, just and equitable and free from fraud," then the DCBS, with the proponent's consent, will, upon stipulation of the parties, issue an order of registration and order approving the plan in lieu of making specific findings required by OAR 441-095-0030(6).

Typically, the exchange will require approval by both the shareholders of the proponent and the shareholders of the target, and the proxy statement is usually sent to target shareholders at the same time as the hearing notice, and the vote is usually held immediately after the hearing in anticipation of receiving an order approving the terms of the plan. The shareholder votes may, in very rare circumstances, be postponed if evidence presented at the hearing necessitates that modifications be made to the plan.

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

§ 18.3-11 Renewal of Registration

Securities registered under ORS 59.065 expire after one year and must be renewed if the issuer wishes to continue to offer and sell securities in Oregon. ORS 59.075.

OAR 441-075-0020 sets forth the specific procedures to renew an order of registration. Generally, the same information that was provided in connection with the initial application must be included with the renewal application, except that the audited financial statements need only be current within 135 days of filing the application. OAR 441-075-0020(3), (7). If an applicant is seeking to renew the application of the same issuer-salesperson, then that application can be submitted on Form 440-2118a (which is available on the DCBS's website at <http://dfr.oregon.gov/

business/financial-industry/Pages/apps-forms.aspx>) instead of the Form U-4. OAR 441-075-0020(9). Registration fees are calculated in the same manner as they are for initial registrations. OAR 441-075-0020(5). An updated and current prospectus must be filed. OAR 441-075-0020(6). An order of renewal, when issued, is effective for 12 months. OAR 441-075-0020(10).

Although a renewal application is subject to the DCBS's merit review under ORS 59.105, the renewal 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 since the offering was last reviewed by the DCBS.

Applications to renew an order of registration should be submitted at least 30 days before the expiration of the current order of registration to assure completion of the review and renewal process before expiration. OAR 441-075-0020(1). Incomplete applications will not be processed. OAR 441-075-0020(2).

§ 18.3-12 Conditions of Registration

The Director of the DCBS may impose on a registered offering "such conditions, limitations and restrictions as the director deems appropriate to make the issue fair, just and equitable," including the following:

> (1) That a prospectus containing any designated part of the information submitted in connection with registration be sent or given to each person to whom a security is offered or sold.
>
> (2) That the security be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed with the director or preserved for a period up to three years specified in the rule or order.
>
> (3) That any of the following be deposited in escrow on terms approved by the director:
>
> (a) Any security issued or to be issued for consideration substantially different from the public offering price or for a consideration substantially different from the public offering price or for a consideration other than cash.

(b) The proceeds from the sale of the security until the issuer receives an amount specified by the director.

ORS 59.085.

§ 18.3-13 Licensing of Broker-Dealers and Salespersons

Generally, any person who effects transactions in securities must be licensed as a broker-dealer, a broker-dealer salesperson, or an issuer salesperson, unless such person is excluded from the definitions of the relevant terms under subsections (1) and (18) of ORS 59.015, OAR 441-175-0020, or OAR 441-175-0040. *See* ORS 59.165. This includes officers, directors, and other employees of an issuer that receive no special compensation for that selling activity (an "issuer salesperson"). OAR 441-175-0020(2); OAR 441-175-0040(3). The procedure for licensing is set forth in OAR 441-175-0010 to 441-175-0175. Issuer salespersons are not subject to any examination or surety-bond requirements. *See* OAR 441-175-0120(4)(b); OAR 441-175-0110.

NOTE: Although persons performing activities that are solely clerical or ministerial would ordinarily fall under Oregon's broad definition of *broker-dealer* or *salesperson* and, therefore, be subject to licensure, the DCBS has stated in "no-action" letters that persons performing such duties are not subject to licensure.

CAVEAT: A "no-action" letter states that the Director of the DCBS will take no-action to require the registration of the security in question based solely on the facts and the legal analysis provided in the request for no-action. Although the DCBS 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 441-001-0040.

OAR 441-225-0030 outlines 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.

Issuer-salespersons are not required to be licensed to sell securities that are exempt under ORS 59.025 and ORS 59.035. *See* ORS 59.015(18)(b). Issuer-salespersons are also not required to be licensed to sell "covered securities," unless they are variable annuities. OAR 441-049-1021(4).

Except for securities sold in reliance on ORS 59.035(8) to (10), broker-dealers and broker-dealer salespersons are not required to be licensed to sell securities that are exempt under ORS 59.035. ORS 59.015(1)(d). They are, however, required to be licensed to sell securities that are exempt under ORS 59.025, unless they are excluded from the licensing requirements. *See* ORS 59.015(1)(g).

Exceptions to the general rule requiring broker-dealers to be licensed to sell exempt securities include, but are not limited to, sales of commercial paper under ORS 59.025(7) (*see* ORS 59.015(1)(g)), and charitable securities that are exempt under ORS 59.025(14) and OAR 441-025-0040. *See* OAR 441-175-0020(1).

> EXAMPLE: The Boring Electric Company is offering some of its own stock for sale. Its officers and directors are planning to solicit sales. Because 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(7). ORS 59.015(1)(h). Employees of the mortgage broker that offer and sell real estate paper must, however, be licensed as salespersons under OAR 441-175-0120. OAR 441-175-0055(2).

PRACTICE TIP: Although a licensed mortgage broker may be exempt from the broker-dealer licensing requirements under Oregon law, they may be required to register under federal law. Persons acting as broker-dealers or salespersons must always comply with both state and federal registration requirements.

§ 18.3-14 Liability

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(1)–(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)–(11); ORS 59.127(10).

Since 1997, ORS 59.115(1)(a) and ORS 59.127(1)(a) have excluded from their scope a "federal 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 By & Through Healy v. Houston*, 42 Or App 287, 295–96, 600 P2d 886 (1979), *rev den*, 288 Or 493 (1980)); 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), *rev den*, 323 Or 153 (1996)); persons who participate or materially aid in the sale (*Ainslie v. First Interstate Bank of Oregon, N.A.*, 148 Or App 162, 939 P2d 125 (1997), *rev dismissed*, 326 Or 627 (1998)); 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, 564, 876 P2d 814 (1994) ("no privilege for statements of attorneys who participate or materially aid in an unlawful sale of securities has been recognized by the courts"); *Prince v.*

Brydon, 307 Or 146, 764 P2d 1370 (1988); *Adams v. Am. W. Sec., Inc.*, 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).

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, *rev den*, 320 Or 493 (1994)), unless such actions are also brought pursuant to ORS 59.135, in which case the two-year discovery rule applies (*Anderson v. Carden*, 146 Or App 675, 934 P2d 562, *rev den*, 326 Or 68 (1997)).

ORS 59.127 contains comparable provisions related to the purchase of a security.

The 2003 Legislature adopted ORS 59.137, which imposes liability on persons who violate or materially aid in a violation of ORS 59.135(1), (2), or (3) (the fraud provisions of the securities laws), as well as persons who control or who serve as partners or LLC managers of persons who violate ORS 59.135. Unlike ORS 59.115 and ORS 59.127, which provide for rescissionary damages, ORS 59.137 permits the recovery of actual damages.

Under ORS 59.137, the plaintiff "must prove the element of *scienter* in the same way that plaintiffs must under the corresponding federal laws, section 10(b) and Rule 10b-5." *State ex rel. Oregon State Treasurer v. Marsh & McLennan Companies*, 269 Or App 31, 50, 346 P3d 504, *rev den*, 357 Or 299 (2015) (footnote omitted).

The statute of limitations under ORS 59.137(6) is the longer of (1) three years from sale or (2) two years from discovery. Under some circumstances, the parties to a securities transaction may contractually shorten the applicable limitations period. *Ristau v. Wescold, Inc.*, 318 Or 383, 868 P2d 1331 (1994); *Garrison v. Bally Total Fitness Holding Corp.*, No Civ.04 1331 PK, 2006 WL 3354475 (D Or Nov 15, 2006).

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); ORS 59.127(4).

Under ORS 59.125, no action or suit may be commenced under ORS 59.115 if the purchaser has received before suit an offer to repay the amount specified under ORS 59.115(2)(a) and, if that offer is accepted within 30 days of receipt of the offer, the amount of the rescission offer is repaid in full. Under ORS 59.125(4), the rescission offer must be registered under ORS 59.065, unless the offer is exempt or is a federal covered security. ORS 59.095(4).

§ 18.4 EXEMPT SECURITIES

§ 18.4-1 Generally

Sixteen categories of securities instruments are exempt from registration under Oregon law. *See* ORS 59.025; OAR 441-025-0050; OAR 441-025-0060. The purchase or sale of an exempt security is, however, not exempt from the antifraud provisions of the Oregon Securities Law (ORS 59.135(1)–(3)). *Chester v. McDaniel*, 264 Or 303, 308–09, 504 P2d 726 (1972).

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 transaction (ORS 59.035) depends on certain aspects of the particular sales transaction, and the purchaser may find that no exemption is available upon the resale of that security (*see, e.g.*, § 18.5-1).

No filing or fee is required to be made or paid to the DCBS in connection with a seller's reliance on the exemptions under ORS 59.025. OAR 441-025-0005(1). Persons relying on such an exemption have the burden

of proof in establishing the availability of the exemption. ORS 59.275; OAR 441-025-0005(2).

Certain provisions of section 18 of the 1933 Act (15 USC § 77r) preempt most state securities regulatory authority over the sale of certain securities, including securities otherwise exempt under ORS 59.025. Those preemptive provisions are contained in section 18(b) of the 1933 Act. *See* § 18.1 to § 18.2 (federal covered securities).

§ 18.4-2 Government Securities

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 federal "covered securities," except for locally issued municipal securities to be sold in the issuing state under section 18(b)(4)(E) of the 1933 Act (15 USC § 77r) 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 DCBS has issued "no-action" letters regarding securities issued by quasi-public organizations. *See* § 18.3-13 (discussing no-action letters). 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.

The DCBS 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(10), which defines *United States* to include territories, outlying possessions, and the District of Columbia. These securities are "covered securities" pursuant to section 3(a)(2) and section 18(b)(4)(E) of the 1933 Act (15 USC § 77r; 15 USC § 77c).

§ 18.4-3 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 federally chartered bank, but not a security issued by any state-chartered bank.

> NOTE: The DCBS has issued no-action letters regarding U.S. branches of foreign banks when the branch is subject to the same regulations as is a federal- or state-chartered bank. *See* § 18.3-13 (discussing no-action letters).

A security "that represents an interest in or a direct obligation of" a bank, trust company, savings and loan association, or credit union 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 any other state bank. Securities issued by banks are "covered securities" by virtue of sections 18(b)(4)(E) and 3(a)(2) of the 1933 Act (15 USC § 77r; 15 USC § 77c) .

A security, the issuance of which is under the supervision, regulation, or control of the Oregon Public Utility Commission (PUC), is exempt from registration. ORS 59.025(8).

> 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 section 402(a)(5) the Uniform Securities Act of 1956, the 1933 Act, and some state securities laws, the Oregon Securities Law does not exempt securities issued by domestic insurance companies. *See* ORS 732.125.

NOTE: In 1956, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association promulgated a Uniform Securities Act (the "1956 Uniform Act"). Oregon adopted the Uniform Act in 1967 subject to modifications. The DCBS will frequently look to the annotations to the Uniform Act for guidance, unless there is a contrary Oregon case or policy that is on point. In 2002, the NCCUSL promulgated an amended version of the Uniform Securities Act, which was amended in 2005. Oregon has not adopted the 2002 Uniform Securities Act.

To the extent that the securities of insurance companies and financial institutions chartered by other states are exempt from federal registration by virtue of section 3(a) of the 1933 Act (other than paragraphs (4), (10), and (11) of section 3(a)), the securities issued by those insurance companies and financial institutions are exempt from registration in Oregon pursuant to the preemptive provisions of section 18(b)(4)(E) of the 1933 Act. Those securities may also fall within the scope of other exemptions. *See* ORS 59.025(4)–(5).

NOTE: Any insurance policy, other than a variable annuity policy, whose form has been filed with and approved by the Director of the DCBS, is exempt from the application of the Oregon Securities Law. The marketing of that policy is also exempt. ORS 731.046.

CAVEAT: In dealing with the exemptions for financial institutions and public utilities, the lawyer must ensure 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 do not qualify under these exemptions.

§ 18.4-4 Exchanges; NASDAQ; Rating Services

Securities listed or approved for listing on the four stock exchanges set forth in ORS 59.025(4) (NYSE, AMEX, Midwest Stock Exchange, and Pacific Stock Exchange), and securities designated or approved for

designation by the Nasdaq Stock Market, the Nasdaq Options Market, or the Nasdaq OMX Futures Exchange are exempt from registration. In addition, a security of the issuer that is senior to or of substantially equal rank to the listed security is exempt. ORS 59.025(4)(c). 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, as well as the securities issuable on exercise of the warrant or right, are also exempt. ORS 59.025(4)(d)–(e).

Most of the securities discussed above are also federal "covered securities." Securities listed (or quoted) or approved for listing (or quotation) on the NYSE, AMEX, and Nasdaq-NMS (or any of their successor entities) are "covered," as well as securities equal to or senior to those "covered securities." In addition, the SEC by rule has determined that securities that are listed or authorized for listing on the following national securities exchanges, or segments or tiers thereof, are "covered securities," as long as those exchanges maintain listing standards (or segments or tiers thereof) that are "substantially similar to those of the NYSE, NYSE Amex, or Nasdaq/NGM":

(i) Tier I of the NYSE Arca, Inc.;

(ii) Tier I of the NASDAQ PHLX LLC;

(iii) The Chicago Board Options Exchange, Incorporated;

(iv) Options listed on Nasdaq ISE, LLC;

(v) The Nasdaq Capital Market;

(vi) Tier I and Tier II of Bats BZX Exchange, Inc.; and

(vii) Investors Exchange LLC.

17 CFR § 230.146(b), *as amended by* 82 Fed Reg 50,059 (Oct 30, 2017).

A debt security maintaining a rating approved by the Director of the DCBS 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. and Moody's Investors Service.

NOTE: See ORS 59.035(10)(c) for an exemption for stocks that are listed in certain manuals and sold by a broker-dealer. *See* § 18.5-9 (broker-dealer sales).

§ 18.4-5 Employee Benefit Plans

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 of the DCBS. ORS 59.025(13)(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 previously defined in *former* ORS 285.263(1), renumbered ORS 285A.535, but this definition was repealed in 1999. The DCBS'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 DCBS has indicated in "no-action" letters that until the rule is further amended, lawyers should rely on the definition found in *former* ORS 285A.535. *See* § 18.3-13 (discussing no-action letters).

Former ORS 285A.535 (repealed by Or Laws 1999, ch 509, § 61) defined the term *employee-owned enterprise* as a business enterprise that met the following conditions:

> (a) Is organized as a cooperative corporation formed pursuant to ORS chapter 62 or a stock ownership plan formed pursuant to section 4975(e)(7) of the Internal Revenue Code of 1986, as amended (26 U.S.C.S. §4975(e)(7));
>
> (b) At least a majority of the employees is vested with stock in the enterprise and all employees who are vested with stock in the enterprise are entitled to vote;
>
> (c) A majority of the employees owns a majority of the shares and shares are voted in such a manner that the vote of the majority of the employees controls the vote of a majority of shares;
>
> (d) Voting rights on corporate matters for shares held in trust for the employees shall pass through to those employees at least to the extent required by the pass through voting requirements of section 409A(e) of the Internal Revenue Code of 1986, as amended;

(e) Voting rights of vested employees on corporate matters shall include merger, consolidation, recapitalization, reclassification, liquidation, dissolution or sale; and

(f) At least a majority of the members of the board of directors is elected by the employees of the enterprise.

In addition, pursuant to the exemption-creating powers that ORS 59.025(15) grants to the Director of the DCBS, an exemption from registration has been created by OAR 441-025-0050 for additional types of employee benefit plans that

(1) comply with "Title I of the Employee Retirement Income Security Act of 1974, as amended"; or

(2) meet the requirements of section 403(b) of the Internal Revenue Code; or

(3) do not permit employee contributions.

NOTE: The DCBS has taken the positon in "no-action" letters that stock-option plans are contributory if the holder of the option must pay an exercise price upon the exercise of the option even if the options are granted for no monetary consideration.

Two of the exemptions apply to securities issued by certain employee benefit plans to covered employees. See § 18.5-5 for a discussion of ORS 59.035(4), which exempts securities sold to pension plans.

CAVEAT: Unlike the Oregon Securities Law's definition of *security* in ORS 59.015(19)(a), the definition of *security* in the federal securities acts does not include the term *pension plan. See* 15 USC § 77b(a)(1). In *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 US 551, 569–70, 99 S Ct 790, 58 L Ed 2d 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), *cert den*, 444 US 867, *reh'g den*, 444 US 985 (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 Indus., Inc.*, 694 F Supp 493, 496 n 3 (ND Ill 1988). Whether an employee's interest in a

pension plan constitutes a security under federal securities law depends on whether the plan is "voluntary or involuntary, and contributory or noncontributory." *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F Supp 2d 511, 639 (SD Tex 2003). Employees' interests in such plans "are securities only when the employees voluntarily participate in the plan and individually contribute thereto." *In re Enron Corp. Sec., Derivative & ERISA Litig.,* 284 F Supp 2d at 640. *See also Goldenberg v. Indel, Inc.*, 741 F Supp 2d 618, 643–44 (DNJ 2010).

Under the 1933 Act, the SEC promulgated Rule 701 (17 CFR § 230.701), which exempts from federal registration the offering and sale of certain securities sold to employees and certain other persons in compensatory circumstances, not involving efforts by the issuer to raise capital. In 2017, Oregon promulgated an exemption under ORS 59.035 for securities that are offered and sold in reliance on SEC Rule 701. That exemption is discussed in § 18.5-15 (exemption for certain compensatory benefit plans).

§ 18.4-6 Nonprofit Corporations

Securities issued by certain nonprofit corporations are exempt from registration under ORS 59.025(14). In *Rajneesh Found. Int'l v. Corp. Comm'r*, 65 Or App 356, 361, 671 P2d 1203 (1983), the court held that this exemption must be read in conjunction with *former* OAR 815-030-0040 (*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. The DCBS's public files contain many examples of offering documents previously used by nonprofit groups. A person may obtain copies of those documents by contacting the DCBS.

§ 18.4-7 Certain Cooperatives or Associations

§ 18.4-7(a) Agricultural, Fishing, and Grocery Cooperatives

Stock or membership certificates issued by certain agricultural, fishing, and grocery cooperatives or associations are exempt from registration. 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.

§ 18.4-7(b) Manufactured-Dwelling Park Nonprofit Cooperative

Pursuant to the authority of the Director of the DCBS to grant exemptions by rule under ORS 59.025(15), certificates evidencing membership in a manufactured-dwelling park nonprofit cooperative are exempt if the cooperative owns or leases land in Oregon on which manufactured homes are or will be located. OAR 441-025-0060. The cooperative must set the cost of membership certificates at a reasonable price (not to exceed $1,000) to natural persons (not entities) who own or occupy a manufactured home on the property, and it may issue only one certificate per space, regardless of the number of occupants in the home. OAR 441-025-0060(3)–(5). The member must return the certificate to the cooperative when his or her membership terminates, in exchange for no more than the original purchase price of the certificate. OAR 441-025-0060(6).

§ 18.4-7(c) Renewable-Energy Cooperative Corporations

In 2014, the Oregon Legislature enacted ORS 59.025(12), exempting from registration stock or membership certificates in renewable-energy cooperative corporations organized for the purpose of developing and operating facilities to generate electricity from renewable-energy resources. This exemption is intended to allow people within the same community to invest in clean energy projects without incurring the costs of registration.

To rely on the exemption, the issuer must be a cooperative corporation in good standing under ORS chapter 62. Other restrictions include the following: (1) only natural persons (not entities) may purchase the securities, (2) the cooperative is limited to raising $1,500,000 per project from

nonaccredited investors, (3) only nonaccredited investors who are part of a "well-defined community" may purchase the securities, and (4) no nonaccredited investor may invest more than 10 percent of his or her liquid net worth. OAR 441-025-0122.

The term *well-defined community* is defined as "(a) [o]ne or more adjacent precincts, districts, cities, counties or other boundaries defined by the state or a unit of local government or by a state or local government agency; or (b) [i]ndividuals with a common bond of occupation or association, including family members." OAR 441-025-0120(6).

A well-defined community "based upon a common bond or association" may seek the approval of the Director of the DCBS to include individuals who reside or work in the city or county where the renewable-energy facility will be located or where the cooperative is headquartered, which approval must be granted before any offers may be made to a member of the proposed "enhanced community." OAR 441-025-0120(6)(b)(A)–(B).

A cooperative relying on this exemption may engage in limited advertising to prospective members, which may include information about the purpose and operating history of the cooperative and a brief description of its current and proposed projects. Information about proposed projects is limited to "identification of the project's proposed location, type of renewable technology, generation capacity, estimated timeline, and estimate of project cost." OAR 441-025-0122(10)(a). Advertising may not include the "offering of investments in specific projects," the "sale of capital stock to the public," or "any indication of possible returns on investment to the general public." OAR 441-025-0122(10)(b). All advertising materials must contain disclaimer language set forth in OAR 441-025-0122(10)(c) and information on how to obtain certain required disclosures.

OAR 441-025-0123 and OAR 441-025-0124 describe the disclosures that are required in connection with the sale of membership shares in a renewable-energy cooperative, as well as the disclosures that are required before the cooperative initiates a project to be funded through investments in securities issued pursuant to this exemption. All disclosure materials must contain the legend set forth in OAR 441-025-0126(2).

At least 14 days before a cooperative engages in any advertising, it must file its proposed disclosure materials and any request to use an "enhanced community" standard with the Director of the DCBS. OAR 441-025-0125(1). Each investor must sign and date the disclosure materials, and the cooperative must retain a copy of the signed documents for at least four years after the termination of the offering or after any notes issued as part of the offering mature. OAR 441-025-0125(2).

> PRACTICE TIP: Renewable-energy cooperatives may rely on any other applicable exemption under ORS 59.025 or ORS 59.035. OAR 441-025-0121(1)(d). Due to the disclosure and filing requirements, as well as limitations on nonaccredited investors regarding the total amount raised per project, residence in a well-defined community, and net worth of individual investors, readers should consider the availability of any less-restrictive exemptions.

§ 18.4-8 Commercial Paper

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. Commercial paper that is exempt under ORS 59.025(7) is also the only exempt security that may be sold by a person unaffiliated with the issuer without that person's 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 *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 US 137, 104 S Ct 2979, 82 L Ed 2d 107 (1984), the United States Supreme Court discusses at length the term *commercial paper* as that term is used in the federal securities laws.

The DCBS 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, and Standard and Poor's Corporation. This position was affirmed in *State v. Crooks*, 84 Or App 440, 444–45, 734 P2d 374 (1987). In *Crooks*, 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 Uniform Commercial Code. 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*, 84 Or App at 444–45. In that case, 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. Int'l Realty, Ltd.*, 272 Or 416, 423–27, 537 P2d 553 (1975); *Sperry & Hutchinson Co. v. Hudson*, 190 Or 458, 466–69, 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. Trust certificates have been held to be securities under Oregon law. *Battig v. Simon*, 237 F Supp 2d 1139 (D Or 2001), *later proceeding*, 2001 WL 34110367 (D Or Dec 14, 2001). Corporate "debentures" have also been held to be securities under Oregon law. *Mann v. St. Laurent*, 229 F Supp 2d 1133 (D Or 2002).

§ 18.4-9 Exemptions by Rule

Several of the statutory exemptions contain language empowering the Director of the DCBS to define or expand the scope of the exemption. Pursuant to these statutory grants, the director has adopted regulations dealing with the manual exemption (OAR 441-025-0020, *see* § 18.5-9), exempt employee benefit plans (OAR 441-025-0030, *see* § 18.4-5),

exempt charitable securities (OAR 441-025-0040, *see* § 18.4-6), and renewable-energy cooperative corporations (OAR 441-025-0120 to 441-025-0126, *see* § 18.4-7(c)).

In addition to these grants of authority, the director has the power to create additional classes of exempt securities by rule. ORS 59.025(15). To date, the only exemptions created through this power relate to employee benefit plans (*see* § 18.4-5) and memberships in a manufactured-dwelling park nonprofit cooperative (*see* § 18.4-7(b)).

§ 18.5 EXEMPT TRANSACTIONS

§ 18.5-1 Generally

Eighteen categories of securities transactions are exempt from the securities-registration requirements. *See* ORS 59.035. As with exempt securities (*see* § 18.4-1), the purchase or sale of securities in an exempt transaction is not exempt from the antifraud provisions of the Oregon Securities Law. *See* ORS 59.135. Unlike securities that are exempt from registration under ORS 59.025, ORS 59.035 exempts only the particular transaction. The purchaser of the security will not be able to resell the security unless an exemption or preemption exits, or the seller registers the security.

> NOTE: A transaction with spouses married to each other, or with an entity not formed to purchase the security, is deemed to be a transaction with a single person. ORS 59.350.

> NOTE: The exemptions under ORS 59.035 are not available if they are part of an attempt to fraudulently evade any provision of the Oregon Securities Law. This generally means that the exemption would not be available for any transaction or chain of transactions that, although in technical compliance with ORS 59.035, are part of a plan or scheme to evade the registration provisions of the Oregon Securities Law. *See*, *e.g.*, SEC Rule 500(f) (17 CFR § 230.500).

Except for a mortgage broker who sells a security that is exempt under ORS 59.035(7), or a broker-dealer who sells securities that are exempt under ORS 59.035(8) to (10), the person selling a security in

reliance on ORS 59.035 is not required to be licensed as a broker-dealer or salesperson. ORS 59.015(1)(d), (18)(b)(B).

The Director of the DCBS is statutorily authorized to exempt transactions by rule. ORS 59.035(15). *See, e.g.*, § 18.4-9 (exemptions by rule).

Except for the exemptions created by ORS 59.035(11), OAR 441-035-0045, OAR 441-035-0300, and OAR 441-035-0070 to 441-035-0230, no filings 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(2).

> NOTE: Section 18 of the 1933 Act (15 USC § 77r) preempts states from requiring the registration of certain securities transactions that involve federal "covered securities." *See* § 18.1 to § 18.2 (federal covered securities).

§ 18.5-2 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 the definition of *sale* of certain judicial reorganizations set forth in ORS 59.015(17)(c)(C). In addition, the federal Bankruptcy Code provides that the securities registration and licensing requirements under the state and federal securities-registration laws are generally inapplicable to certain bankruptcy-related securities transactions. 11 USC § 1145.

§ 18.5-3 Isolated Transactions

"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, which exempted an "isolated transaction not in the course of repeated and successive transactions" (ORS 59.035 (1983)). The 1985 language, however, is much closer to language in section 402(b)(1) of the 1956 Uniform Act and the laws of many other states. The most significant change is that, like

section 402(b)(1) of the Uniform Act, this exemption is limited to non-issuers. A nonissuer is any 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, 590–91, 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. *See, e.g.*, *Thorson*, 267 Or at 590–91.

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 the courts will interpret the language in such a way as to permit a greater number of sales.

> NOTE: Section 18(b)(4)(A) of the 1933 Act (15 USC § 77r) creates a "covered security" preemption for any transaction exempted under section 4(a)(1) of the 1933 Act (15 USC § 77d), as long as the securities subject to the transaction are those of an issuer that is a reporting company under section 13 or 15 of the 1934 Act (15 USC § 78m or 78o).

"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 & Linen Supply 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. *Tarsia*, 239 Or at 566. However, a strong dissent argued that the transaction was not exempt. *Tarsia*, 239 Or at 566–67 (O'Connell, J., dissenting). In subsequent cases interpreting the pre-1985 isolated-transaction exemption, the courts seem to take the position advanced in the favorably quoted *Tarsia* dissent. *See Creager v. Berger*, 97 Or App 338, 341, 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, *reh'g den*, 276 Or 823 (1976); *Thorson*, 267 Or at 590.

NOTE: The 1985 revisions to the Oregon Securities Law eliminated "offers" from the definition of *sale* in ORS 59.015. *See* Or Laws 1985, ch 349, § 1. 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 to qualify as exempt. In *Marshall*, 276 Or at 459, 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 promote the same aim and are not so detached and separated as to form no part of a single plan." [Footnotes omitted.]

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 since the offer did not originate in Oregon. However, an Oregon offeror probably could not. ORS 59.335 and ORS 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, *reh'g den*, 32 P2d 773 (1934).

Most transactions made in reliance on ORS 59.035(2) 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) to (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). *See* ORS 59.035 (exempting transactions "if they are not part of an attempt to evade fraudulently any provision of the Oregon Securities Law"). Thus, the fraud provisions of the securities law would apply to all Oregon securities sales, even isolated sales. *Creager*, 97 Or App at 340–41; *Chester v. McDaniel*, 264 Or 303, 307–09, 504 P2d 726 (1972).

NOTE: The 1933 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(a)(1)), which, if the securities involved are those of an issuer who is a reporting company under section 13 or 15 of the 1934 Act (15 USC section 78m or 78o),

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(a)(2));

(3) private resales to accredited investors pursuant to 15 USC section 77d(a)(7); and

(4) certain intrastate issuer transactions and subsequent resales more than six months after the initial sale date (15 USC § 77c(a)(11); 17 CFR § 230.147; 17 CFR § 230.147A).

The terms in these 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 & Troy Paredes, *Fundamentals of Securities Regulation* (6th ed 2011) (supplemented periodically).

§ 18.5-4 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, if

(1) "[n]o commission or remuneration, other than a standby fee, is paid or given directly or indirectly in connection with the transaction"; and

(2) "[t]he issuer has not had an effective registration under the Oregon Securities Law nor has used this exemption within one year prior to the date of the offering or sale."

ORS 59.035(3).

The phrase *other than a standby commission* appears in the comparable provision in the exemption under section 402(b)(11) of the 1956 Uniform Act. 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 DCBS has strictly construed this exemption in "no-action" letters. *See* § 18.3-13 (discussing no-action letters). 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 DCBS 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.

§ 18.5-5 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). The DCBS has taken the positon through no-action letters that self-directed individual retirement accounts and Keogh plans do not qualify as purchasers under this exemption—even though the trustee would fall under the definition of *institution*—because the trustee does not have discretionary authority to make investment decisions. *See* § 18.3-13 (discussing no-action letters). In

interpreting a similarly worded Iowa exemption, the court, in *Briggs v. Sterner*, 529 F Supp 1155, 1174 (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 section 402(b)(8) of the 1956 Uniform 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 & Edward M. Cowett, *Blue Sky Law* 367 (1958).

This exemption refers to a "savings institution" but not to a savings and loan association or a credit union. The term *savings institution* appeared in section 402(b)(8) of the Uniform Act, and a leading commentator cites support for his belief that the term refers to mutual savings banks and similar institutions found mainly in the eastern states, and does not encompass savings and loan associations and credit unions. Joseph C. Long, Michael J. Kaufman & John M. Wunderlich, 12A *Securities Law Series: Blue Sky Law* § 7:15 (2017) (updated periodically). 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 under ORS 50.035(4). Long, Kaufman & Wunderlich, *Blue Sky Law* at § 7:18.

> NOTE: The DCBS has taken the position in "no-action" letters that *qualified institutional buyers* as that term is defined under SEC Rule 144A (17 CFR § 230.144A) would fall under the definition of *institutional investor* under ORS 59.035(4).
>
> NOTE: The institutional exemption and the accredited-investor exemption (*see* § 18.5-6) overlap in many respects, but are not synonymous. Some investors may fall within one, but not both, of these exemptions. For example, under OAR 441-035-0010(8), an entity is an accredited investor if all of the equity holders are accredited investors. A venture capital fund with less than $5 million in assets would likely be an institutional investor, but it likely would

not fall under the definition of *accredited investor*, unless all of its equity holders are accredited investors. 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, *Blue Sky Law* at § 7:15.

NOTE: Section 18(b)(3) of the 1933 Act (15 USC § 77r) creates a "covered security" category for sales of securities to *qualified purchasers* as that term is defined by SEC rule. The SEC has defined the term *qualified purchaser* for purposes of this provision only in connection with Tier 2 offerings under Regulation A of the 1933 Act (*see* 17 CFR § 230.256). It may in the future define such term differently in connection with different securities and transactions, which definition(s) may very well overlap (and to the extent of the overlap, preempt) this exemption.

§ 18.5-6 Accredited Investors

Oregon law exempts from registration "[a]ny 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.

OAR 441-035-0010 defines the term *accredited investor* for purposes of this exemption. In addition, ORS 59.035(5) itself incorporates by reference section 2(15)(i) or (ii) of the 1933 Act (15 USC § 77b), which define the term *accredited investor* under federal law. ORS 59.035(5). OAR 441-035-0010 closely follows the SEC's definition of *accredited investor* set out in 17 CFR section 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 that, 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 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) to expand the number of purchasers permitted without the need to register the offering. *See* ORS 59.035(12)(b)(A). The DCBS 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 and the most restrictive conditions apply.

NOTE: Section 18(b)(4)(F) of the 1933 Act (15 USC § 77r) creates a "covered security" category for sales of securities exempt pursuant to rules or regulations promulgated by the SEC under section 4(a)(2) of the 1933 Act (15 USC § 77d). At present, the only rule or regulation promulgated by the SEC pursuant to section 4(a)(2) is Rule 506 under Regulation D (17 CFR § 230.506). To the extent that the issuer relies on SEC Rule 506 to sell to accredited investors, the transaction would be preempted from registration under Oregon law, but would be subject to the notice-filing and fee requirements under ORS 59.049, OAR 441-049-1001, and OAR 441-049-1051. *See* § 18.2 (federal covered securities).

§ 18.5-7 Convertible Securities

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

(1) no additional consideration is required;

(2) the exchange is made pursuant to a right of conversion; and

(3) the original security "was, when issued, convertible and 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 exercise.

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)(E) of the 1933 Act (15 USC § 77r) creates a "covered security" category for certain sales of securities that are exempt pursuant to section 3(a) of the 1933 Act (15 USC § 77c). To the extent that the convertible transaction can qualify under section 3(a)(9), it would be preempted from registration under the Oregon Securities Law, but the notice-filing and fee-payment requirements under OAR 441-049-1041(1) would still apply.

§ 18.5-8 Real Estate Paper

ORS 59.015(15) defines the term *real estate paper* 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. ORS 59.015(19)(a) defines *security* to include "real estate paper sold by a broker-dealer, mortgage banker, mortgage broker or a person described in [ORS 59.015(1)(b), relating to financial institutions] to persons other than persons enumerated in ORS 59.035(4) [institutional investors]."

It is not entirely clear whether these provisions expand or contract the traditional approach to determining whether notes and other evidences of indebtedness are securities, as discussed more fully in chapter 15. The

definition of *real estate paper* is broad, however, and the definition of *mortgage banker* or *mortgage broker* as those terms are used in ORS 59.015 (which refers to those definitions in ORS 86A.100) 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 lenders when real estate paper is created. See ORS 86A.100(3) for the definition of *mortgage banker* and ORS 86A.100(5) 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 of the DCBS 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.

(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. OAR 441-035-0021(6).

Finally, the rule allows guarantees of real estate paper to be sold under the exemption if (1) the guarantee was created as an integral part of the real estate paper; and (2) the guarantor is not a mortgage broker, broker-dealer, or financial institution. OAR 441-035-0021(7).

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 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.

§ 18.5-9 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 under ORS 59.035(8) 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 section 4(a)(3) of the 1933 Act (15 USC § 77d) involving securities of a reporting company under section 13 or 15 of the 1934 Act (15 USC § 78m or 15 USC § 78o) or a "brokered" transaction under section 4(a)(4) of the 1933 Act, the conditions of licensing and recordkeeping contained in ORS 59.035(8) are preempted pursuant to subsection (A) or (B) of section 18(b)(4) of the 1933 Act (15 USC § 77r).

Courts that have interpreted the term *solicitation* in the context of similarly worded exemptions have required that more than an "offer" occur. *See, e.g.*, *Schmid v. Langenberg*, 526 SW2d 940 (Mo Ct App 1975); *Home Indem. Co. v. Reynolds & Co.*, 38 Ill App 2d 358, 187 NE2d 274, 279 (Ill App Ct 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. The DCBS has established a special-purpose registration procedure to assist broker-dealers in qualifying for this exemption. *See* OAR 441-065-0040. *See* § 18.3-6 (registration for resale, or dealing and trading).

> NOTE: To the extent that a transaction otherwise falling within this exemption qualifies as a "dealer" transaction in securities of a reporting company under section 13 or 15 of the 1934 Act or a "brokered" transaction under section 4(a)(4) of the 1933 Act, the condition of licensing contained in ORS 59.035(9) is preempted pursuant to subsection (A) or (B) of section 18(b)(4) of the 1933 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 that the Director of the DCBS has approved by rule or listed on specified automated quotation systems.

OAR 441-035-0030 provides that the following are approved for purposes of the exemption under ORS 59.035(10): Fitch Investors Service securities manual, Mergent securities manual, and the "OTCQX and OTCQB markets."

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). *See Lewelling v. First California Co.*, 564 F2d 1277, 1281 (9th Cir 1977) (the broker has the burden of proving that the price at which the broker sold the stock is a price reasonably related to the current market price).

NOTE: To the extent that a transaction otherwise falling within this exemption qualifies as a "dealer" transaction under section 4(a)(3) of the 1933 Act in securities of a reporting company under section 13 or 15 of the 1934 Act or a "brokered" transaction under section 4(a)(4) of the 1933 Act, the condition of licensing contained in ORS 59.035(10) is preempted pursuant to subsection (A) or (B) of section 18(b)(4) of the 1933 Act.

§ 18.5-10 Red Herrings, Solicitations of Interest, and Internet Contacts

Subsection (11) of ORS 59.035 exempts from registration the distribution of a preliminary prospectus after an application has been submitted to the DCBS, but before an order of registration has been issued. This preliminary prospectus is commonly referred to as a "red herring" because the disclaimer required to be included by the SEC on the cover of the prospectus is usually in red print. *See* 17 CFR § 229.501(b)(10)(iv).

The exemption from registration provided by ORS 59.035(11) is available in only two situations. The first situation applies to an offer, but not the sale, of a security for which registration statements have been filed with both the Director of the DCBS and the SEC if no adverse orders are pending or issued involving the offering. ORS 59.035(11)(a). 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 DCBS allows the distribution of the red herring by specifically granting this exemption. ORS 59.035(11)(b).

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 eligible persons to solicit indications of interest in a potential Tier 1 Regulation A or similar securities offering before submitting a securities-registration application (*see* 17 CFR § 230.255).

> NOTE: The DCBS is preempted from requiring the filing of notice in connection with a solicitation of interest in connection with a Tier 2 Regulation A offering. *See* SEC Rule 255 (17 CFR § 230.255); SEC Rule 256 (17 CFR § 230.256).

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 sufficient investor interest in the issuer's securities before incurring the expenses associated with registering the 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). OAR 441-035-0045(1)(a). See § 18.5-16 for a discussion of blank-check companies.

Finally, officers and directors of the issuer are subject to "bad actor" disqualification provisions similar to those under Regulation A of the 1933

Act. OAR 441-035-0045(1)(i). Unlike the exemptions under ORS 59.035(11), an issuer seeking to rely on OAR 441-035-0045 is not required to first file an application to register the securities with the DCBS or the SEC as a condition of relying on the exemption.

The exemption created by OAR 441-035-0045 is not self-executing. OAR 441-035-0005. To claim the exemption, the issuer or promoter must file Oregon Form 440-3008 (solicitation of interest), pay a $200 fee (representing the minimum registration fee), file a U-4 salesperson application, and pay a $50 salesperson fee. OAR 441-035-0045(1)(c). Form 440-3008 is available on the DCBS's website, at <http://dfr.oregon .gov/business/financial-industry/Pages/apps-forms.aspx>.

The exemption created by OAR 441-035-0045 also provides for potential liability to any eventual purchaser for the failure to exercise good faith and reasonable efforts in perfecting the exemption. *See* OAR 441-035-0045(2)–(3). Reliance on this exemption precludes the contemporaneous reliance on certain other exemptions for a period of six months after the last communication with a prospective investor made under this exemption. OAR 441-035-0045(6).

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 a "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 as a direct or indirect result of the Internet offer. OAR 441-035-0060(2). *See* ORS 59.335(1)(b).

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 prospective Oregon investor. OAR 441-035-0060(3)(c).

§ 18.5-11 Small Offerings

Oregon law exempts from registration the sale of securities to not 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 (ORS

59.035(12)(b)(C)), it prohibits public advertising or general solicitation. ORS 59.035(12)(a)(D).

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

> COMMENT: This prohibition includes monetary gain to the promoters of an issuer that is paid from the proceeds of the securities sales. The DCBS 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 section 402(b)(9) of the 1956 Uniform 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 Civ App 1983).

(2) As mentioned above, there may be no public advertising or general solicitation. ORS 59.035(12)(a)(D).

> COMMENT: The DCBS has not taken a position on what constitutes "public advertising or general solicitation" under 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 pt 231; *Interpretive Release on Regulation D*, SEC Release No 33-6455, 48 Fed Reg 10,045, 1 Fed Sec L Rep (CCH) ¶ 2380 (Mar 3, 1983).

(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. ORS 59.035(12)(a)(E).

NOTE: 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)(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 of the DCBS. 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 federal covered 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* § 18.2 (federal covered securities).

PRACTICE TIP: It is important to remember that this exemption limits the number of purchasers, not the number of offerees, but the

lawyer should be alert to the prohibition on public advertising or general solicitation. In addition, married spouses and entities not formed to purchase the security count as a single purchaser. ORS 59.350.

§ 18.5-12 Mergers and Consolidations

Oregon law exempts from registration the exchange of securities incident to a "merger, consolidation, partial or complete liquidation, reclassification of securities, plan of exchange or sale of assets in consideration of the issuance of securities of another issuer" pursuant to a statutory vote. 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 an LLC). The DCBS 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: The SEC's staff has stated that a company that is structuring a prepackaged bankruptcy may rely on section 3(a)(9) of the 1933 Act (15 USC § 77c) for the solicitation of security holders before the bankruptcy filing and then complete the exchange following the bankruptcy filing pursuant to the registration exemption in section 1145 of the Bankruptcy Code, as long as the company files a Form T-3 before commencing the pre-bankruptcy filing solicitation. *See* SEC Compliance and Disclosure Interpretation 125.11, *available at* <www.sec.gov/divisions/corpfin/ guidance/sasinterp.htm>. Because securities that are offered in reliance on section 3(a)(9) are federal covered securities under section 18(b)(4)(D) of the 1933 Act (15 USC § 77r), the company would only need to comply with the notice and fee requirements under OAR 441-049-1041. The exchange itself would not fall under the definition of *sale* under ORS 59.015(17)(c)(C) because it is an act incident to a judicially approved reorganization and would not have to be registered.

Rather than relying on this exemption, some local entities instead request a fairness hearing pursuant to ORS 59.095. *See* § 18.3-10 (fairness hearings). Under this procedure, the Director of the DCBS determines whether the transaction is fair, just, and equitable and free from fraud after a fairness hearing. This determination may also be the basis for a claim of exemption from registration pursuant to section 3(a)(10) of the 1933 Act.

§ 18.5-13 Professional Corporations

The issuance of capital stock by a professional corporation organized under ORS chapter 58 is exempt from registration. ORS 59.035(14). *See generally* chapter 33 (professional corporations).

§ 18.5-14 Oregon Intrastate Offering Exemption

Citing the policy that "[c]rowdfunding, or raising money through small investments from a large number of investors can provide smaller enterprises access to capital for new or expanded business ventures," the Director of the DCBS exercised the rule-making authority granted by ORS 59.035(15) in adopting the Oregon Intrastate Offering Exemption (the "OIO exemption") found in OAR 441-035-0070 to 441-035-0230. OAR 441-035-0070.

> NOTE: Certain aspects of the OIO exemption described in this section are based on emergency rules that the DCBS promulgated under ORS 183.335(5) on July 12, 2017. Under ORS 183.335(5), those rules will expire on January 7, 2018, and the DCBS is in the process of promulgating permanent rules that are expected to take effect on or before January 7, 2018. Readers should be aware that any DCBS rules, particularly emergency rules, are subject to change after the publication date and the current text of the rules should always be consulted.

This exemption, which is available to the issuer only, requires that (1) the issuer be a business entity incorporated or organized in Oregon; (2) the offering be conducted in accordance with section 3(a)(11) of the 1933 Act (15 USC § 77c), which can be accomplished via compliance with SEC Rule 147 (17 CFR § 230.147) or SEC Rule 147A (17 CFR § 230.147A); and (3) securities may only be offered and sold to Oregon residents. OAR 441-035-0090(1)–(3).

NOTE: Section 3(a)(11) of the 1933 Act provides an exemption to the federal securities-registration requirements for securities that are offered and sold by issuers that are resident and doing business within a given state to persons that are resident within the same state. SEC Rule 147 provides a safe harbor under section 3(a)(11). Under that rule, offers and sales made by a company incorporated in the same state in which it conducts at least 80 percent of its operations and holds its principal place of business of its securities to investors residing within that state will be exempt under section 3(a)(11). On October 26, 2016, the SEC adopted Rule 147A, which was meant to accommodate offers accessible to out-of-state residents and companies that are incorporated or organized out-of-state. The rule went into effect on April 20, 2017. In contrast to SEC Rule 147, SEC Rule 147A allows the issuer to be incorporated outside of Oregon and offers also may be made outside of Oregon. Any sales, however, must still be made to Oregon residents. Anyone relying on the OIO exemption should carefully review section 3(a)(11) of the 1933 Act, SEC Rule 147, and SEC Rule 147A to ensure that the requirements of both the state and the applicable federal exemption are satisfied.

The issuer may raise a maximum of $250,000, no more than $2,500 of which can come from any "natural person," and an Oregon intrastate offering cannot extend beyond 12 months' duration without the approval of the Director of the DCBS. OAR 441-035-0090(3)(a), (4). Investors may not resell the securities for a period of nine months immediately after purchase except to the issuer or pursuant to an order of registration under ORS 59.065, even if an exemption for the resale would otherwise exist under ORS 59.025 or ORS 59.035. OAR 441-035-0100(1). After the nine-month period has ended, investors may sell the securities in reliance on an exemption, if available, or if the security is registered. OAR 441-035-0100(2).

NOTE: SEC Rules 147 and 147A restrict resales for only six months after the initial purchase, whereas the OIO exemption restricts resales for nine months after the initial purchase. In general, issuers wishing to avail themselves of state and federal exemptions

with inconsistent terms should comply with the most restrictive requirements.

Before conducting an offering under the OIO exemption, the issuer must meet in person to review its business plan with a "business technical service provider," defined as a Small Business Development Center, Economic Development District, or a not-for-profit incubator, accelerator, or business resource provider approved by the Director of the DCBS. OAR 441-035-0080(1); OAR 441-035-0090(8). The issuer must provide certain disclosures to all offerees and purchasers as set forth in OAR 441-035-0120, and file a notice containing the information listed in OAR 441-035-0110(2) with the director and pay a $200 fee at least seven days before advertising the offering.

Issuers may advertise the offering through an online third-party platform that complies with OAR 441-035-0160. Advertisements are limited to the information set forth in OAR 441-035-0130(2), and third-party platform providers are subject to the requirements of OAR 441-035-0160, including that the platform does not effect transactions in securities unless it is a licensed broker-dealer under ORS 59.015(1)(a) and that the platform does not obtain any interest in the issuer in return for posting information on the platform.

The OIO exemption is not available to (1) blank-check companies (*see* § 18.6); (2) offerings involving any extractive industries; (3) offerings involving an investment company under the Investment Company Act of 1940 (15 USC §§ 80a-1 to 80a-64); and (4) offerings that involve the sale of securities other than notes, stocks, or debentures. OAR 441-035-0170.

"No person may receive a commission, fee, or other remuneration for offering, soliciting or selling any OIO security." OAR 441-035-0180. Additionally, certain "bad actor" events relating to the issuer or its affiliates occurring within five years before the offering will preclude the issuer from relying on the OIO exemption. OAR 441-035-0210.

Before selling a security, the seller must have a "reasonable documentary basis" to believe that the prospective purchaser is a resident of Oregon and must have obtained a signed acknowledgement from the investor. OAR 441-035-0090(3)(b). A reasonable documentary basis includes,

but is not limited to, (1) "[a] current Oregon Driver License or a current personal identification card issued by the State of Oregon"; or (2) "[a] document that indicates the prospective purchaser owns or occupies property in the state as his or her principal residence, such as a current voter registration, or official business mail from a state or federal agency." OAR 441-035-0090(3)(b).

An offering conducted using the OIO exemption will be integrated with other offerings if sufficient elements set forth in OAR 441-035-0190 are present, including that the sales are part of the same general plan of financing, the sales are made at or about the same time, and the sales are made for the same general purpose.

Issuers relying on the OIO exemption have ongoing reporting and recordkeeping obligations pursuant to OAR 441-035-0200 and OAR 441-035-0220. In any proceeding under the Oregon Securities Law, the issuer bears the burden of proving that it satisfied all conditions of the OIO exemption. OAR 441-035-0230.

> PRACTICE TIP: The term *crowdfunding* is used colloquially to describe a number of different capital-raising mechanisms. Non-equity crowdfunding in which backers contribute funds as a donation or in exchange for small nonmonetary awards is generally not regulated by federal or state securities laws. Some people may refer to offerings under SEC Rule 506(c) (17 CFR § 230.506(c)) promulgated under the 1933 Act as "crowdfunding," in that the exemption permits general advertising and solicitation, as long as only accredited investors actually purchase any securities in the offering. Crowdfunding may also include offerings that are conducted in reliance on Tier 1 or Tier 2 of Regulation A under the 1933 Act. *See* 17 CFR §§ 230.251–230.263. In addition, section 4(a)(6) of the 1933 Act and Regulation Crowdfunding (17 CFR pt 227) provide a federal exemption from registration for equity crowdfunding transactions. Each of these mechanisms and the OIO exemption has its own specific requirements. Any attorney providing advice in connection with a crowdfunding transaction should take care to ensure that the offering fully complies with the appropriate state and/or federal exemption.

§ 18.5-15 Exemption for Certain Compensatory Benefit Plans

SEC Rule 701 (17 CFR § 230.701) exempts from the federal securities-registration requirements offers and sales of securities to employees and certain consultants pursuant to a written compensatory benefit plan or contract. Before 2017, Oregon did not have a comparable exemption, but rather provided for a simplified registration procedure under *former* OAR 441-065-0270 (repealed effective February 1, 2017) for companies seeking to offer securities that were exempt under SEC Rule 701.

In 2017, the Director of the DCBS exercised the rulemaking authority granted by ORS 59.035(15) and adopted OAR 441-035-0300. That rule exempts from the securities-registration requirements the offer and sale of securities pursuant to a written compensatory benefit plan that is exempt under SEC Rule 701, as long as the issuer satisfies certain notice-filing requirements no more than 30-days after the offer and sale of securities subject to the exemption and pays a fee equal to 1/10 of 1 percent of the aggregate offering amount, with a minimum fee of $200 and a maximum fee of $1,500. OAR 441-035-0300(1). Issuers must pay the maximum fee if they file notice with the DCBS more than 30 days after the offer and sale of securities subject to the exemption. OAR 441-035-0300(4).

> NOTE: Securities issued pursuant to a compensatory benefit plan often take the form of options to purchase the employer's stock at a later date. OAR 441-035-0300(1)(c) provides that options to purchase securities become subject to the notice and fee requirements when the option grant is made, regardless of when the option becomes exercisable.

If an issuer currently has securities that are registered securities under *former* OAR 441-065-0270, it will not have to pay any additional fee in connection with those securities to rely on the new exemption, but the issuer will have to file notice with the DCBS. OAR 441-035-0300(4)(b).

Issuers are required to amend a notice filed under OAR 441-035-0300 when there are material changes in the terms of the original notice or plan, with *material change* defined as an increase in the aggregate amount of securities to be offered in Oregon, a change in the type of securities, or

a change in the identity of the issuer or owner. OAR 441-035-0300(7)(a). If an issuer amends its notice in connection with an increase in the aggregate amount of securities to be offered in Oregon, the issuer must pay a fee equal to 1/10 of 1 percent of the aggregate offering amount, up to $1,500, less amounts previously paid under the prior notice. The amendment fee may not be less than $100. OAR 441-035-0300(7)(b).

§ 18.5-16 Exemptions by Rule

Several of the statutory exemptions contain language empowering the Director of the DCBS 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* § 18.5-6) and the "manual" exemption (OAR 441-035-0030, *see* § 18.5-9).

In addition, ORS 59.035(15) empowers the director to promulgate rules that exempt other transactions from registration. Pursuant to this statute, the director has promulgated rules exempting certain isolated-issuer transactions (OAR 441-035-0050, *see* § 18.5-3); certain solicitations of interest made in connection with SEC Regulation A offerings or certain registered offerings (OAR 441-035-0045, *see* § 18.5-10); certain Internet offers not directed to Oregon residents (OAR 441-035-0060, *see* § 18.5-10); certain "crowdfunding" transactions (OAR 441-035-0070 to 441-035-0230, *see* § 18.5-14); and offers and sales pursuant to certain compensatory benefit plans (OAR 441-035-0300, *see* § 18.5-15).

§ 18.6 DENIAL OF EXEMPTIONS

The Director of the DCBS may, by rule or by order, deny, withdraw, or condition any exemption allowed by ORS 59.025 or ORS 59.035. ORS 59.045. Pursuant to this authority, the director promulgated OAR 441-045-0010, which defines the term *blank-check company* 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). OAR 441-045-0010(4).

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 (15 USC §§ 80a-1 to 80a-64). 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. OAR 441-045-0010(5).

§ 18.7 EXCLUSIONS

In addition to exempting certain security instruments and security transactions from the registration requirements of the Oregon Securities Law, Oregon law excludes certain financial instruments and financial transactions that would otherwise fall within the definition of the term *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 Oregon Securities Law.

The following are excluded from the definitions 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 Ed 2d 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.*, section 3(a)(8) of the 1933 Act (15 USC § 77c); SEC Rule 151 (17 CFR § 230.151).

ORS 59.015(19)(b)(A) specifies that a variable annuity contract is not excluded from the definition of security. However, OAR 441-049-1041(2) acknowledges that these securities are federal covered securities and exempts the issuer from notice filing and fees if certain conditions are met. OAR 441-049-1021(4)(c) requires that persons offering and selling these securities be licensed.

In addition, ORS 731.046 (under the Oregon Insurance Code) exempts any policy, other than a variable annuity policy, whose form has been filed with and approved by the director from the application of the Oregon Securities Law as well as the marketing of such policy.

Appendix 18A Glossary

1933 Act	Securities Act of 1933, Pub L 73-22, tit I, 48 Stat 74 (codified as amended at 15 USC §§ 77a–77aa)
1934 Act	Securities Exchange Act of 1934, Pub L 73–291, 48 Stat 881 (codified at 15 USC §§ 78a–78qq)
1956 Uniform Act	Uniform Securities Act of 1956, *available at* <www.uniformlaws.org/shared/docs/securities/securities_final_05.pdf>
AMEX	American Stock Exchange
DCBS	Department of Consumer and Business Services
LLC	limited liability company
Nasdaq-NMS	National Market System of the Nasdaq Stock Market
NASAA	North American Securities Administrators Association
NYSE	New York Stock Exchange
OIO exemption	Oregon Intrastate Offering Exemption (*see* OAR 441-035-0070 to 441-035-0230)
Regulation A	17 CFR §§ 230.251–230.263
Regulation D	17 CFR §§ 230.501–230.508
SEC	United States Securities and Exchange Commission