

State of Arkansas
91st General Assembly
Regular Session, 2017

A Bill

HOUSE BILL 1890

By: Representative Tucker

For An Act To Be Entitled

AN ACT TO ESTABLISH AN ARKANSAS CROWDFUNDING OPTION;
TO REGULATE EXEMPTIONS UNDER SECURITIES LAWS; AND FOR
OTHER PURPOSES.

Subtitle

TO ESTABLISH AN ARKANSAS CROWDFUNDING
OPTION; AND TO REGULATE EXEMPTIONS UNDER
SECURITIES LAWS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. DO NOT CODIFY. Legislative findings and intent.

(a) The General Assembly finds that:

(1) Start-up companies play a critical role in expanding economic opportunities, creating new jobs, and generating revenues;

(2) The lack of access to capital is an obstacle to starting and expanding small business, inhibits job growth, and has negatively affected this state's economy;

(3) The costs and complexities of state securities registration can outweigh the benefits to Arkansas businesses seeking to raise capital by small securities offerings;

(4) The use of crowdfunding, that is, raising money online through small contributions from a large number of investors, is presently restricted by Arkansas state securities laws; and

(5) Crowdfunding allows small companies to access the capital they need to start or expand businesses.

(b) It is the intent of the General Assembly that:



(1) In compliance with exemptions from federal law, the exemption provided by this subchapter shall apply only if:

(A) The investor is an Arkansas resident or is an entity formed under Arkansas laws;

(B) The issuer of the securities is an entity formed under Arkansas laws and doing business in Arkansas; and

(C) The issuer intends to use and does use at least eighty percent (80%) of the proceeds of the sale of securities in Arkansas; and

(2) By creating an Arkansas crowdfunding option, with limitations to protect investors, this act will enable Arkansas businesses to obtain capital, democratize venture capital formation, and facilitate investment by Arkansas residents in Arkansas start-up companies, thereby promoting the formation and growth of local companies and the accompanying job creation in this state.

SECTION 2. Arkansas Code § 23-42-102(1)(B), concerning the definition of an "agent" under the Arkansas Securities Act, is amended to add an additional subdivision to read as follows:

(iii) A person who is a registered broker-dealer in a state other than Arkansas who does not:

(a) Have a place of business in this state;

and

(b) Effect securities transactions with more than three (3) persons in this state during any period of twelve (12) consecutive months as described in subdivision (3)(B)(iv) of this section.

SECTION 3. Arkansas Code § 23-42-102, concerning the definitions under the Arkansas Securities Act, is amended to add an additional subdivision to read as follows:

(19) "Online intermediary" means a person:

(A) Who is acting under § 23-42-504 as an intermediary in a transaction involving an offer of securities for the account of an issuer through a website; and

(B) Who does not:

(i) Offer investment advice or recommendations;

(ii) Solicit purchases, sales, or offers to buy the

securities offered or displayed on its website;

(iii) Compensate employees, agents, or other persons for the solicitation or based on the sale of securities displayed or referenced on its website;

(iv) Hold, manage, possess, or otherwise handle purchaser funds or securities;

(v) Act as an exchange or listing or quotation service for the offer or sale of securities by a third party; or

(vi) Engage in any other activities as the Securities Commissioner, by rule, determines is appropriate.

SECTION 4. Arkansas Code § 23-42-504(a), concerning exempt transactions, is amended to read as follows:

(a) The following transactions are exempted from §§ 23-42-501 and 23-42-502:

(1) Any isolated nonissuer transactions, whether effected through a broker-dealer or not, provided that repeated or successive transactions shall be prima facie evidence that the transactions are not isolated nonissuer transactions;

(2) Any nonissuer transaction by a registered agent of a registered broker-dealer, and any resale transaction by a sponsor of a unit investment trust registered under the Investment Company Act of 1940, in a security of a class that has been outstanding in the hands of the public for at least ninety (90) days, provided at the time of the transaction:

(A) The issuer of the security is actually engaged in business and not in the organization stage or in bankruptcy or receivership and is not a blank check, blind pool, or shell company whose primary plan of business is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person or persons;

(B) The security is sold at a price reasonably related to the current market price of the security;

(C) The security does not constitute the whole or part of an unsold allotment to, or a subscription or participation by, the broker-dealer as an underwriter of the security;

(D) A nationally recognized securities manual designated by rule or order of the ~~commissioner~~ Securities Commissioner or a document

filed with the United States Securities and Exchange Commission that is publicly available through the United States Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval System and contains:

(i) A description of the business and operations of the issuer;

(ii) The names of the issuer's officers and directors, if any, or, in the case of an issuer not domiciled in the United States, the corporate equivalents of such persons in the issuer's country of domicile;

(iii) An audited balance sheet of the issuer as of a date within eighteen (18) months or, in the case of a reorganization or merger when the parties to the reorganization or merger had such audited balance sheets, a pro forma balance sheet; and

(iv) An audited income statement for each of the issuer's immediately preceding two (2) fiscal years, or for the period of existence of the issuer, if in existence for less than two (2) years, or, in the case of a reorganization or merger when the parties to the reorganization or merger had such audited income statements, a pro forma income statement; and

(E) The issuer of the security has a class of equity securities listed on a national securities exchange registered under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., as it existed on January 1, 2011, unless:

(i) The issuer of the security is a unit investment trust registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq., as it existed on January 1, 2011;

(ii) The issuer and predecessors of the issuer of the security have been engaged in continuous business for at least three (3) years; or

(iii) The issuer of the security has total assets of at least two million dollars (\$2,000,000) based on:

(a) An audited balance sheet dated within the past eighteen (18) months; or

(b) In the case of a reorganization or merger of parties with audited balance sheets dated within the past eighteen (18)

months showing total assets of at least two million dollars (\$2,000,000), a pro forma balance sheet;

(3) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

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

(5) Any transactions by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(6) Any transaction executed by a bona fide pledgee without any purpose of evading this chapter;

(7) A transaction by a person exempted from registration under § 23-42-102(3)(B)(v) if the transaction would be lawful in the place of residence of the offeree or purchaser had it occurred there instead of in this state;

(8) Any offer or sale:

(A) By an issuer to a person in a state other than this state if that offer or sale would be lawful if made in the other state; or

(B) To a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, 15 U.S.C. § 80a-1 26 et seq., as it existed on January 1, 2017, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity. ~~The Securities Commissioner~~ commissioner may by order, upon petition by any person, determine if the petitioner may be deemed, upon the basis of knowledge, experience, volume, and number of transactions, and other securities background, an “institutional buyer” for purposes of this subdivision (a)(8);

(9)(A) Any transaction pursuant to an offer and sale to not more than thirty-five (35) purchasers other than those designated in subdivision (a)(8) of this section during any period of twelve (12) consecutive months, if:

(i) The seller reasonably believes that all the buyers are purchasing for investment; and

(ii) ~~No~~ A commission or other remuneration shall not be paid or given directly or indirectly for soliciting any prospective buyer in this state unless the person receiving any such commission or remuneration is registered ~~pursuant to~~ under § 23-42-301.

(B) However, the commissioner may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption, or increase or decrease the number of purchasers permitted, or waive the conditions in subdivisions (a)(9)(A)(i) and (ii) of this section with or without the substitution of a limitation on remuneration;

(10) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities or warrants, if no commission or other remuneration, other than a standby commission, is paid or given directly or indirectly for soliciting any security holder in this state, unless the commissioner shall, upon written application, permit the payment of a commission or other remuneration with or without the substitution of a limitation on remuneration;

(11) Any offer, but not a sale, of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933, 15 U.S.C. § 77a et seq., as it existed on January 1, 2017, if no order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either act; ~~and~~

(12) An offer or sale of a security by an issuer if:

(A) Either of the following applies:

(i) The issuer of the security is a corporation or other business entity organized and operating under the laws of this state with its principal place of business in Arkansas, and the transaction meets the requirements of the federal exemption for intrastate offerings in section 3(a)(11) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(11), as it existed on January 1, 2017, and Rule 147 of the United States Securities Exchange Commission, as it existed on January 1, 2017, and as such, the securities shall be offered to and sold only to persons who are residents of this state at the time of purchase; or

(ii) The issuer of the security is a corporation or other business entity with its principal place of business in Arkansas, and

the transaction meets the requirements of the federal exemption for intrastate offerings in section 28 of the Securities Exchange Act of 1933, 15 U.S.C. § 77z-3, as it existed on January 1, 2017, and Rule 147A of the United States Securities and Exchange Commission, as it existed on January 1, 2017, and as such, the securities shall be sold only to persons who are residents of this state at the time of purchase;

(B) The sum of all cash and other consideration to be received for all sales of the security in reliance upon the exemption described in this subdivision (a)(12) shall not exceed one million dollars (\$1,000,000), less the aggregate amount received for all sales of securities by the issuer within six (6) months after the completion of the offering. If before offering and selling the securities, the issuer submits audited financial statements regarding the issuer to the commissioner, then the sum of all cash and other consideration to be received for all sales of the security in reliance upon the exemption described in this subdivision (a)(12) shall not exceed two million dollars (\$2,000,000), less the aggregate amount received for all sales of securities by the issuer within six (6) months after the completion of the offering;

(C) The issuer shall not accept more than five thousand dollars (\$5,000) from any single purchaser unless the purchaser is an accredited investor as defined by Rule 501 of United States Securities Exchange Commission Regulation D, 17 C.F.R. 230.501, as it existed on January 1, 2017;

(D) The issuer should reasonably believe that all purchasers of securities are purchasing for investment and not for sale in connection with a distribution of the security;

(E) A commission or remuneration shall not be paid or given, directly or indirectly, for a person's participation in the offer or sale of securities for the issuer unless the person is registered as a broker-dealer or agent under this chapter;

(F) The commissioner may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition the exemption under this subdivision (a)(12);

(G)(i) The issuer should provide the commissioner with a copy of an escrow agreement with a bank, regulated trust company or corporate fiduciary, savings bank, savings and loan association, or credit union

authorized to do business in Arkansas where the issuer will deposit the buyer's funds or cause the buyer's funds to be deposited and where only the issuer may access the buyer's deposited funds.

(ii) The bank, regulated trust company or corporate fiduciary, savings bank, savings and loan association, or credit union where the buyer's funds are deposited shall act only at the direction of the party establishing the escrow agreement and does not have any duty or liability, contractual or otherwise, to any buyer or other person.

(iii) A buyer may cancel the buyer's commitment to invest if the minimum amount is not raised before the time stated in the escrow agreement;

(H) The issuer should maintain all records with respect to any offering conducted under the exemption under this subdivision (a)(12) as the commissioner may by rule or order require;

(I)(i) The issuer should establish both a minimum and a maximum offering amount and deposit all funds raised from buyers under the exemption under this subdivision (a)(12) into an escrow account described in subdivision (a)(12)(G) of this section.

(ii) The minimum amount established shall not be less than one-half (1/2) of the maximum offering amount.

(iii) The maximum amount established shall not exceed the limitations stated in subdivision (a)(12)(B) of this section.

(iv) The issuer shall not access the escrow funds until the aggregate funds raised from all buyers equals or exceeds the minimum amount.

(v) The issuer shall use all funds according to the representations made to buyers;

(J) The issuer shall pay a filing fee of one hundred dollars (\$100) to the commissioner for every proof of exemption filed with the commissioner under this subdivision (a)(12);

(K) The issuer shall not be, either before or as a result of the offering, an investment company, as defined in section 3 of the Investment Company Act of 1940, 15 U.S.C. § 80a-3, as it existed on January 1, 2017, an entity that would be an investment company but for the exclusions provided in section 3(c) of the Investment Company Act of 1940, 15. U.S.C. § 80a-3(c), as it existed on January 1, 2017, or subject to the reporting

requirements of section 13 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m or 78o(d), as it existed on January 1, 2017;

(L) The issuer of securities offered under the exemption provided by this subdivision (a)(12) shall provide a disclosure document to each prospective buyer at the time the offer of securities is made to the prospective buyer that contains the information that the commissioner requires by rule;

(M)(i) The issuer shall inform all prospective purchasers of securities offered under the exemption provided by this subdivision (a)(12), in plain, nontechnical language using words with common and everyday meaning that are understandable to the average reader, that the securities have not been registered pursuant to federal or state securities law and are subject to limitations on resale.

(ii) The issuer shall display the following legend conspicuously on the cover page of the disclosure documents required by subdivision (a)(12)(L) of this section:

"THESE SECURITIES HAVE NOT BEEN REGISTERED WITH, APPROVED BY, OR RECOMMENDED BY ANY FEDERAL OR STATE AGENCY. IN MAKING AN INVESTMENT DECISION, PURCHASERS MUST RELY ON THEIR OWN EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED. THESE SECURITIES HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR STATE SECURITIES COMMISSION OR DIVISION OR OTHER REGULATORY AUTHORITY. FURTHERMORE, THE FOREGOING AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE. THESE SECURITIES ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED BY SUBSECTION (e) OF SECURITIES AND EXCHANGE COMMISSION RULE 147, 17 CFR 230.147 (e), AS PROMULGATED PURSUANT TO THE SECURITIES ACT OF 1933, AS IT EXISTED ON JANUARY 1, 2017, AND THE APPLICABLE STATE SECURITIES LAWS, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM. INVESTORS SHOULD BE AWARE THAT THEY WILL BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME."

(iii) The issuer shall require each purchaser to certify in writing or electronically as follows:

"I UNDERSTAND AND ACKNOWLEDGE THAT I AM INVESTING IN A HIGH-RISK, SPECULATIVE BUSINESS VENTURE. I MAY LOSE ALL OF MY INVESTMENT, OR UNDER SOME CIRCUMSTANCES MORE THAN MY INVESTMENT, AND I CAN AFFORD THIS LOSS. THIS

OFFERING HAS NOT BEEN REVIEWED OR APPROVED BY ANY STATE OR FEDERAL SECURITIES COMMISSION OR DIVISION OR OTHER REGULATORY AUTHORITY AND NO SUCH PERSON OR AUTHORITY HAS CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF ANY DISCLOSURE MADE TO ME RELATING TO THIS OFFERING. THE SECURITIES I AM ACQUIRING IN THIS OFFERING CANNOT BE READILY SOLD, ARE ILLIQUID, THERE IS NO READY MARKET FOR THE SALE OF SUCH SECURITIES, IT MAY BE DIFFICULT OR IMPOSSIBLE FOR ME TO SELL OR OTHERWISE DISPOSE OF THIS INVESTMENT, AND, ACCORDINGLY, I MAY BE REQUIRED TO HOLD THIS INVESTMENT INDEFINITELY. I MAY BE SUBJECT TO TAX ON MY SHARE OF THE TAXABLE INCOME AND LOSSES OF THE COMPANY, WHETHER OR NOT I HAVE SOLD OR OTHERWISE DISPOSED OF MY INVESTMENT OR RECEIVED ANY DIVIDENDS OR OTHER DISTRIBUTIONS FROM THE COMPANY.";

(N)(i) All payments for purchase of securities offered under the exemption provided by this subchapter shall be directed to and held by the financial institutions described in subdivision (a)(12)(B) of this section.

(ii) The commissioner may request from the financial institution information necessary to ensure compliance with this section.

(iii) This information is not a public record under the Freedom of Information Act of 1967, § 25-19-101 et seq., and is not available for public inspection;

(O)(i) An issuer shall provide free of charge a quarterly report to the issuer's owners.

(ii) An issuer may satisfy the reporting requirement of this subdivision (a)(12) by making the information available on a website operated by an online intermediary if the information is made available within forty-five (45) days after the end of each fiscal quarter and remains available until the succeeding quarterly report is issued.

(iii) An issuer shall file each quarterly report required under this subdivision (a)(12)(O) with the State Securities Department and, if the quarterly report is made available on a website operated by an online intermediary, the issuer shall also provide a written copy of the report to any owner upon request.

(iv) The report shall contain:

(a) Compensation received by each director and executive officer, including cash compensation earned since the previous report and on an annual basis and any bonuses, stock options, other rights to

receive securities of the issuer or any affiliate of the issuer, or other compensation received; and

(b) An analysis by management of the issuer of the business operations and financial condition of the issuer;

(P) The issuer may distribute a notice within Arkansas that is limited to a statement that the issuer is conducting an offering and that includes:

(i) The name of the online intermediary, sales representative, or licensed broker-dealer through which the offering is being conducted; and

(ii) A link directing the potential investor to the website of the online intermediary or the website of the broker-dealer;

(Q) An issuer may make an offering under the exemption provided by this subdivision (a)(12) through:

(i) A broker-dealer that is licensed under this chapter with its principal place of business in Arkansas;

(ii) A sales representative that is licensed under this chapter; or

(iii) An online intermediary that meets the requirements of subdivision (a)(12)(R) of this section;

(R) Before acting as an online intermediary for an offering under the exemption provided by this subdivision (a)(12), the online intermediary shall file a statement with the commissioner, accompanied by the filing fee established by the commissioner, that includes the following:

(i) That the online intermediary consents to service of process in Arkansas pursuant to § 23-42-509(c)(1)(B);

(ii) That the online intermediary will provide information with respect to the offer of securities in Arkansas only under the exemption provided by this subdivision (a)(12);

(iii) The identity and location of, and contact information for, the online intermediary, including the names and physical addresses of the officers, directors, managers, partners, and other persons who control the business decisions of the online intermediary;

(iv) A statement that lists any changes to the information contained in the original or any subsequently filed statement required by this subdivision (a)(12)(R); and

(v)(a) Notice of its intention to act as an online intermediary for an offering.

(b) The notice under subdivision (a)(12)(R)(v)(a) of this section shall be on such form as the commissioner requires;

(S)(i) An online intermediary shall maintain records of all offers of securities effected through its website and shall provide to the department upon request access to the records.

(ii) The records of an online intermediary required under this section are subject to the reasonable, periodic, special, or other examination or inspection by the department, in or outside Arkansas, as the commissioner considers necessary or appropriate in the public interest and for the protection of purchasers.

(iii) An examination or inspection may be made at any time and without prior notice.

(iv) The commissioner may:

(a) Copy and remove for examination or inspection copies of all records that the commissioner reasonably considers necessary or appropriate to conduct the examination or inspection; and

(b) Assess a reasonable charge for conducting an examination or inspection under this section;

(T) The commissioner may by rule require an online intermediary to:

(i) File with the commissioner specified financial and other information;

(ii) Make and maintain specific records and preserve such records for five (5) years or other period as may be specified by rule; and

(iii) Establish written supervisory procedures and a system for applying the procedures that is reasonably expected to prevent and detect violations of this chapter;

(U) An online intermediary shall:

(i) Limit its offer of securities under the exemption provided by this subchapter to only Arkansas residents as that term is defined in Rule 501 of United States Securities and Exchange Commission Regulation D, 17 C.F.R. 230.501, as it existed on January 1, 2017;

(ii) Not hold a financial interest in any issuer or be affiliated with or under common control with an issuer whose securities appear on any website maintained for the offer of securities by the online intermediary; and

(iii) Not be an owner of any issuer offering securities under the exemption provided by this subdivision (a)(12);

(V) An online intermediary shall not be compensated based on the amount of securities sold;

(W) An online intermediary shall not identify, promote, or otherwise refer to any individual security offered by the online intermediary in any advertising for or on behalf of the online intermediary;

(X) An online intermediary shall not engage in any other activities that the commissioner, by rule, determines are prohibited by the online intermediary; and

(Y) An online intermediary and a director, executive officer, general partner, managing member, or other person with management authority over the online intermediary, shall not have been subject to any conviction, order, judgment, decree, or other action that would disqualify an issuer from claiming an exemption under Rule 506(a)-(d) adopted by the Securities Exchange Commission under the Securities Act of 1933, 17. C.F.R. 230.506(a) - (d), as it existed on January 1, 2017; and

(13) Any other transaction which that the commissioner by rule or order exempts as not being necessary or appropriate in the public interest for the protection of investors.

SECTION 5. Arkansas Code § 23-42-509(e), concerning covered securities transactions, is amended to read as follows:

~~(e) In addition to a filing required by subsection (c) or subsection (d) of this section, the commissioner may by rule or order require~~ Except as provided under subsection (c) or subsection (d) of this section, with respect to a covered security under section 18(b)(3) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(3), as it existed on January 1, 2017, or section 18(b)(4) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(4), as it existed on January 1, 2017, the commissioner may by rule or order require the issuer to:

~~(1) The concurrent filing of any document filed with the Securities and Exchange Commission under the Securities Act of 1933~~

~~concerning a covered security under section 18(b)(3) or section 18(b)(4) of the Securities Act of 1933 as it existed on January 1, 2013~~ Concurrently file with the commissioner any document or information required to be filed with the United States Securities and Exchange Commission; and

(2) A Pay a fee of one hundred dollars (\$100) ~~for the filing.~~