**Nancy Fallon-Houle, P.C.**

Attorney At Law

5449 bending oaks place

downers grove, Illinois 60515-4456

nfallon@nfhlaw.com 630-963-0439 x 22 www.nfhlaw.com

© Nancy Fallon-Houle, 1998-2012

***Private Offering Chart***

***Comparison of Private, Exempt Offering Types: 4(2), Regulation D 506, and Regulation D 504 (SCOR)***

|  | **Section 4(2)****Private Placement** | **Regulation D, Rule 506****Private Placement** | **Regulation D, Rule 504 (SCOR)****Small Public Offering (Exempt)** |
| --- | --- | --- | --- |
| Offering Type | Private: Very Small, Family & Very Small Group of Close Friends; VC/PE deal with only VC/PE or institutional investors. | Private: Extended Family and Friends, acquaintances, business associates, VCs, PE Funds, institutional investors. | Small Public, although Exempt.Any Offerees, no restrictions on sophistication or numbers, nonaccrediteds permitted. |
| **Dollar Limit** | No Limit | No Limit | $1,000,000 [[1]](#footnote-1) |
| **Investor Limit and****Characteristics** | Only a few to 10 Investors, generally. (# subject to attorney’s judgment, and based on Issuer’s relationship with each investor and the nature of the investors. Generally no nonaccrediteds other than close family.  | 35 Nonaccredited Investor Limit, and an unlimited number of Accredited [[2]](#footnote-2) Investors. Nonaccrediteds must be financially sophisticated investors, requiring an “Investor Questionnaire”. Disclosure doc to Nonaccrediteds required. | No limit on Number of Investors. No required investor characteristics. Some registration states may impose suitability standards on investors in their state, depending on risk level of offering: Development stage, financial condition, management experience). |
| **Internet Advertising or General Solicitation Permitted?** | No. Investors must have pre-existing relationship with Issuer or principals. | No. Investors must have pre-existing relationship with Issuer or principals. ACE.Net, IPO.Net, etc., permissible only in very limited states, and only if < $1,000,000 sold to all accrediteds. New law 4/2012: Solicitation allowed if only sell to confirmed accredited investors. | Yes. Prior relationship with investors not required. Permitted: Internet, Website, radio, TV, seminars, cold calls, and ads, if restricted to states in which offering is registered. ACE.Net & IPO.Net offers permitted in states where notice filings made.  |
| **Audited Financials Required** | None. However, significant credibility given to Issuer with audited or reviewed financials; some VC’s insist upon. | None, if all accredited investors.Required for federal exemption if any nonaccredited investors. However, significant credibility given to Issuer with audited or reviewed financials; some investors insist upon audits. Audited financials becoming “market” for all private offerings. | Yes. None for federal, but because SEC requires registration in at least one merit review state, and GAAP audited (or reviewed) financials are generally required for state merit review, then GAAP audited (or reviewed) financials are required. Some states require 1 year, some 2 years, TX = 3 years.) No audit required for IL. “Reviewed” required for some U-7 / SCOR states. Significant credibility given to issuers with audited financials. No merit review, and no audited financials, required if all investors are accredited, and all offerees reasonably believed to be accredited (“MAI Exemption”) |
| **SEC Filing Type** | None at federal level (but states are a landmine of myriad inconsistent filings). § 4(2) Exemption. | Notice Filing on SEC Form D 15 days after 1st sale; 10-page Form D Filed electronically on EDGAR after 4-5 day process of EDGAR application. No PPM filing, review or comment by SEC. | Notice Filing on SEC Form D 15 days after 1st sale; 10-page Form D Filed electronically on EDGAR after 4-5 day process of EDGAR application. No PPM filing, review or comment by SEC. |
| **SEC Filing Fee** | None | None | None |
| **NASD Filing Type** | N/A. | None | None required for issuer. Broker may use 15c2-11 (Form 211). (Not recommended) |
| **State Filing Type** | Notice Filing required in many states, some before offer or sale; myriad of inconsistent filing, legend and exemption requirements among states. Some states require legends in PPM and Subscription Agreement, and minimum net worth or income in that state.Some states have no filing. No commissions or finders’ fees, even if to registered broker. | Notice Filing required 15 days after first sale in each of 49 states. (However, notice required before offers in NY).  | 1. Registrations required in at least one merit review state in order to comply with federal Rule 504 exemption, unless offers and sales made only to accredited investors. Registrations required in most states before conducting general public solicitation in those states, (including offers on internet or posting book on Website).Use either SCOR Format (Form U-7) or narrative offering memo format.2. If offering and selling only to confirmed accredited investors, a notice filing, rather than a registration, is permitted in about 25 states, under the Model Accredited Investor Exemption. [[3]](#footnote-3) |
| **Legal Fees: Offering Document Cost [[4]](#footnote-4) (Approximate)** | $ 15,000 to $25,000(Depends on number of investors, their sophistication; how close their relationships are to the Issuer, and their states of residence. If the relationship is close enough, then is it possible to use NO disclosure book, and save several thousand in legal fees; though these sophisticated investors often negotiate the investor agreements, which trigger higher legal fees in the Shareholder Agreement. | $45,000 - $85,000 if all accrediteds. $55 - $95,000 if any nonaccrediteds. (For nonaccrediteds, offering document must be full statutory disclosure on Form SB-1, Form 1-A, or Form S-1, audited financials are required; investor sophistication questionnaire required; tax section in O.M. may be required. Legal fee cost for either accredited or nonaccredited will increase if finder involved and substantially if broker involved. Pre-written business plan and biographies will keep costs down. | $45-$85-$100,000 for offering doc and one merit state registration, plus $2,500 for SEC Form D preparation and filing.Pre-written business plan is critical to keeping costs down, and issuer drafting SCOR Form U-7 causes issuer to focus on necessary issues, keeping costs down. Legal fee costs increase substantially if broker, finder or stock exchange involved. Excludes State Filing Fees. Excludes State Legal Fees for any states other than 1. Excludes post-offering sale reporting. Excludes forming or reorganizing issuer. |
| **Legal Fees: SEC Filing Cost** | N/A | $2,500 to $3,000 for SEC Form D preparation and filing with SEC.Excludes State Filing Fees & State Registration Legal Fees. Excludes post-offering sale reporting. |
| **State Filing Fees** | Notice Filing Fees average $300 per state. | Notice Filing Fees average $300 per state, and range between: $100 and $1485; NY = $1485; MA = $750; IL, MI, KY and NV=$100; CA, FL, IN=$0. | Registration Fees: Average is $600 per state. In addition, Issuer/Agent registration fees average $400 per state for states requiring it. |
| **Legal Fees: State Filings** | Special Notice Forms, legend conditions and state representations vary in each state; average $600 per state. | $600 flat fee per state. | Hourly. Average total per state is $600 for initial filing, plus fees for U-1 and U-2, plus hourly for amendments, & negotiating and responding to comments. Additional fees for Issuer/Agent Registration. |
| **How to Sell the Shares** | Personal Contacts of Officers/Directors; No Internet or Public Contacts. | Personal Contacts of Officers/Directors; No Internet or Public Contacts | Officers of the Company market the Shares in any states in which shares are registered or filed; Website or Internet prospectus may be used (however, only in states where shares are registered); May sell on Ace.Net, IPO.Net, et. al. if shares are registered in state of local operator and if make notice filings or registrations in state of residence of any investors, local paper ads permitted only if shares registered in that state and if mailing only into that state; No national newspaper ads. Cold calls permitted.  |
| **Resale Restrictions** | 1-year resale restriction under Rule 144A: shares cannot be resold during that time. | No Resale restrictions; however the SEC has proposed a 1 year resale restriction similar to Rule 144. Resale may be restricted in states where MAIE exemptions used. |
| **Exit Strategies [[5]](#footnote-5) for Secondary Trading by Investors who Buy Initial Shares** | Subsequent merger with larger, listed company. Subsequent NASDAQ NM-Listed public offering. | List on OTC Bulletin Board or regional or Chicago Stock Exchange, Post on Ace.Net, IPO.Net, or internet stock trading vehicle; Post for sale on Issuer’s website, Subsequent merger with larger, listed company. Subsequent NASDAQ NM-Listed public offering.5 |
| **Other Restrictions:** | Federal: No Disqualifications apply; States: Some state laws contain disqualification provisions that prevent certain principals from being involved in an offering. | No Disqualifications apply because of federal pre-emptions under the National Securities Markets Improvement Act of 1996. | Disqualified from using exemption if issuer is a “blind pool”, or a developmental stage company with no specific business plan or purpose, or if plan or purpose is to merge with or acquire an unidentified company.OK for seed stage or developmental stage issuer with business plan.Use of Form U-7 triggers same disqualifiers as under Reg A.Must register in at least one merit review state to qualify for federal 504 exemption. |
| **Estimated Time To Complete Company Review and Document Preparation.** | 20+ days due diligence, plus 10 additional days offering document preparation time. Allow 4 to 6 weeks, if no unusual issues arise. More time if finders or brokers involved, or any unregistered securities sold prior to this offering. | 20-30 days' due diligence, plus30 additional days offering document preparation. Allow 6 to 8 weeks, if no unusual issues arise. More time if finders or brokers involved, or if any previously unregistered securities or any legal clean up or due diligence problems. | 20-30 days' due diligence, plus30 additional days offering document preparation. + 20-60 days additional review and comment time for tough states. State review time can range from 0 to 60 days; states take from 6 weeks to 6 months to clear. Allow 6-8 weeks to sell in NY if no unusual issues arise, other states 2-3 months. |
| **When Can Offers and Sales Be Made?** | Federal: Anytime.States: Some states have pre-offer filing requirements; but generally offers and sales can be made in most states before filings. Check blue sky law of state of residence of investor before mailing offering document. | Federal: Anytime.States: Offers and Sales permitted in 49 states after distribution of offering document and prior to filings. However, filings required in all states, within 15 days after 1st sale. | Federal: Offers and sales permitted at any time after distribution of offering book.States: Offers and sales permitted in “disclosure states” or “exempt” states at any time after distribution of offering book.Offers and sales not permitted in tough states or Registration States until registration is pending, or in some cases, complete. |
| **Type of Offering to be Used For:** | Issuer-Sold: Very Small Private Placement with VC or angel investors, or family and very close friends who would never sue you if the offering lost money. | Issuer-Sold: Unlimited number of wealthy investors + 35 average/small investors, all with pre-existing relationship with Issuer; or,Broker-Sold: Unlimited number of wealthy investors + 35 average/small investors, all with pre-existing relationship with Broker. Both: All states. | Issuer-Sold DPO only (broker-sold is not usually cost-effective for a 504); Limited to the few states which will exempt Rule 504 Offerings NY, CA (only with super- suitability), IL, TN (15 only, need pre-existing relationship), AZ ($100,000 to 10 only, need pre-existing relationship); Small Offering Amount; Medium Number of Investors from Customers, Subscribers, Vendors, Internet Contacts, Newspaper or TV Ads. Works well for Issuers with affinity groups. |
| **Disclosure Required if Broker Or Finder To Sell Or Take a % of Offering or of Company Stock** | Must Disclose All Broker and Finder Compensation of every type (including shares) in Offering Memo | Must Disclose All Broker and Finder Compensation of every type (including shares) in Offering Memo and on SEC Form D. Finders run risk of SEC exposure to unregistered activity. | Must Disclose All Broker and Finder Compensation of every type (including shares) in Offering Memo and on SEC Form D. Finders run risk of SEC exposure to unregistered activity. |
|  |  |  |
| **If Issuer To Sell Shares Directly: How** | No Internet or Public Contacts. Generally Issuer-Dealer Exemptions in State Law. | Public Contacts Permitted only if entire deal is sold only to accredited investors. Otherwise, no public contacts permitted. | Public Contacts Permitted only in States where offering is filed.Generally Issuer-Dealer Exemptions available for issuer; however, a few Issuer-Dealer registrations required. |
| **Disclosure Only (Easy) States** | Some states conduct light merit review on 4(2) offerings. | ALL, because of NSMIA. However, filings are required in almost every state. Filing fees range from $100 to $1,385 per state. Average $200-300 per state in filing fees. Filing document package required in each state. | CA (only if investors meet suitability requirements of §25102(n) $250,000 net worth and $100,000 income, or $500,000 net worth (net worth excludes home, home furnishings and autos); no blind pools or roll ups permitted.) DC, IA (accrediteds only), MN (accrediteds only and <10 MN), NY, <15 TN (if pre-existing relationship) |
| **Moderate States Requiring Audited Financials & Escrow Offering Minimum** | N/A. | N/A | AZ ($100,000 and 10 person max, if qualify for §14-4-102 exemption – must know the AZ persons in advance) [[6]](#footnote-6), AR 6, CO, CT, NV, WA |
| **Difficult States** | Arkansas, New Mexico, a few others. | None. All states require notices only. | CA (for regular investors) and all other except those noted in the 2 rows above. AL[[7]](#footnote-7), FL 7, ME 7  |
| **States Where 504 is a Notice Filing, if no Disqualification of Principals or issuer, + offering is Registered in 1 other State**  | Not Applicable | Not Applicable | AK, AZ, AR, CA, CO, CT, GA, ID, IL, IN, IA, KS, KY, LA [[8]](#footnote-8), MD, MA, MI, MS, MO, MT, NV, NH, NJ, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY. (List provided by CCH and requires NFH verification and updating.) **(Issuer Agent Registration Required)** |
| **States In Which An Offering May Be Made, With No Filing, to a Limited Number of Investors, but No Public Advertising + No Fees to Unregistered Brokers.** | CO (10), FL, GA (15), IL (unlimited accrediteds), IA (unlimited accrediteds), IN (15 accrediteds), MI (15), MN (10 + unlimited accrediteds), MO (15 + unlimited accrediteds), NJ (10), NV (25), NC (5), OR (10 + unlimited accrediteds), PA (2 accrediteds), TX(15) + unlimited accrediteds, WV(10), WI(15), WY(15) | CO (10), FL, GA (15), IL (unlimited accrediteds), IA (unlimited accrediteds), IN (15 accrediteds), MI (15), MN (10 + unlimited accrediteds), MO (15 + unlimited accrediteds), NJ (10), NV (25), NC (5), OR (10 + unlimited accrediteds), PA (2 accrediteds), TX (15) + unlimited accrediteds, WV (10), WI (15), WY (15). | CO (10), GA (15), IL (unlimited accrediteds), IA (unlimited accrediteds), IN (15 accrediteds), MA (25), MI (15), MN (10 + unlimited accrediteds), MO (15 + unlimited accrediteds), NJ (10), NV (25), NC (5), OR (10 + unlimited accrediteds), PA (2 accrediteds), TN (15 pre-existing relationship), TX(15) + unlimited accrediteds, WV (10), WI (15), WY (15). |
| **Issuer Dealer Registration Required** | No | FL if multiple offerings and deemed to be “engaged in the business”.CT: Notice Filing required.ME, MT, NY, yes in any event. | AZ, AR, AL, CT, IL, ID, IA, IN, ME, MT, NV, NM, NY, UT, plus more states. |
| **Available to 1940 Act Investment Company?** | Yes | Yes. | No |
| **Available to Reporting Company Issuers?**  | No. | Yes. However, carefully examine integration issues. | No. Issuers subject to § 13 or 15(d) of 1934 Act cannot use. |
| **Available to Developmental Stage Issuer With No Specific Business Purpose?** | Yes. | Yes. | No. |
| **Non-US or non-Canadian Issuer?** | Yes. | Yes. | Yes. But Form U-7 is not. |
| **Unique Form U-7 Requirements May Apply in State** | N/A | N/A | Must be a U.S. corporation. No Oil, Gas or Mining. $5 Share minimum (IL $2, IN $2.50), no stock splits for 2 years after this offering. No selling security holder shares can be registered. |
| **Type of Security Permitted to be Issued** | Any | All types (Common, Preferred, Debt) | Generally Used for Common Stock Only. However, U-7, II.C contemplates issuing securities convertible into common stock. |
| **Adopted Under Which 1933 Act Section?** | § 4(2) of 1933 Act (Any transaction not involving a “public offering”.) | § 4(2) of 1933 Act (Any transaction not involving a “public offering”.) | § 3(b) of 1933 Act (Small Public offerings up to $5,000,000) |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

This chart is the copyrighted work product of Nancy Fallon-Houle and is not authorized to be given to, or used by, any person other than those to whom it has been given by Ms. Fallon-Houle.

1. Includes all securities of the issuer sold within the last 12 months, before the start of, and during the current offering, including any securities sold under Rule 504, Reg A, §3(b), or unregistered. Includes securities sold for cash, or issued for any other consideration, including services, property, loans or other securities. Limit includes stock issued in connection with a merger or acquisition. Limit does not include stock issued under a valid §4(2) or Reg D 506 Offering. [↑](#footnote-ref-1)
2. Accredited Investor means an individual investor having $1,000,000 net worth (excluding residence) or $200,000 income or $300,000 joint income; or an entity with $5,000,000 in assets or all of its equity owners are accredited. [↑](#footnote-ref-2)
3. This chart does not include a summary of the new state Model Accredited Investor Exemptions which permit general solicitation (Internet or otherwise) to confirmed accredited investors through subscription services such as Ace.Net or IPO.Net, etc. al., with a notice filing and fee in the state. Such notice filings are due prior to Internet offers in some states, but in other states they are not due until 15 days after a sale has been made in that state. Because such exemptions are very new and are in a state of flux, such exemptions will be examined at the time relied upon for each individual client requesting the analysis, on state-by-state basis, considering the specific aspects of the client’s offering. [↑](#footnote-ref-3)
4. The legal fees are directly affected by: (1) The Issuer’s ability to promptly provide, in an organized manner: (a) thorough responses to due diligence questions and (b) thorough disclosure information (factual and financial) about the Issuer, its principals, and its business, its subs and affiliates and their principals, the current and prior business affiliations of all principals, regulatory action against any of the former, description of the business, the industry, competitors, suppliers, customers, risk factors and litigation disclosure.

The lower range of legal fee estimates assumes: (1) Simple corporate structure with no subs or affiliates, (2) No brokers, finders, electronic market, or other person or entity selling the Shares, (3) No unusual disclosure items regarding principals or issuer, or prior regulatory action, (4) No corporate clean up, (5) No significant prior unregistered sales of Shares other than to founders, officers and key employees, and that such sales were properly blue skied, (6) No issues with name, trademark or IP, (7) Financial statements are in order, (8) Issuer is attentive to offering process with attorney and is forthcoming with info. And (9) No significant negotiation of, or changes to the escrow agreement.

If the Issuer selects a point person to field attorney questions and to be responsible for turning around information requests, both time and money will be saved. In addition, if the issuer employs an outside accountant familiar with the financial statement requirements under Regulation S-X, to prepare the Issuer’s financials, then the attorney time being involved with the financial statements will be reduced significantly. These legal fees include attorney due diligence of the Issuer, D & O questionnaires, writing the offering document, subscription agreement, escrow agreement, and preparing securities opinion of counsel. These legal fees are estimates only; legal fees will be charged hourly and the total fees will depend on many factors that are not predictable before the start of due diligence. [↑](#footnote-ref-4)
5. Issuers, and investors, should be aware that, although Rule 504 and Reg A securities are freely tradable, the shares are not listable on most exchanges until the issuer produces audited financials, and files and clears them on a Form 10 with the SEC; and the shares must also meet certain financial requirements of such exchanges. Even the lowest level exchange, the OTC Bulletin Board requires, as a condition to listing, that the issuer first file and clear with the SEC, the issuer’s audited financial statements. Further, a condition to listing on the NASDAQ Small Cap is that the issuer’s net income-before-taxes reaches $750,000 or net worth reaches $4 million. The Chicago Stock Exchange (CHX) has certain financial requirements as well. NASDAQ Global Market listing requires that the issuer’s net income before taxes reach $1 million and its net tangible assets reach $6 million. Listing on any of these exchanges except CHX requires that the issuer secure at least 2 or 3 market makers. There are a very limited number of markets in which the shares can be sold until such financial requirements and filings are met, or until the shares are ultimately listed on NASDAQ Global Market. [↑](#footnote-ref-5)
6. Securities registration is streamlined, however “agent of issuer” registration is required before offers and sales can be made in this state. [↑](#footnote-ref-6)
7. Merit review state and “agent of issuer” registration is required. [↑](#footnote-ref-7)
8. Offering will not be cleared in Louisiana unless a Louisiana-registered broker is used in Louisiana. [↑](#footnote-ref-8)