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SENATE DRS35172-MC-73 (03/04)

Short Title: Providing Access To Entrepreneurs/Sm Business. **(Public)**

(Public)

Sponsors: Senators Barringer, Hise, and Gunn (Primary Sponsors).

Referred to:

A BILL TO BE ENTITLED
AN ACT TO ENACT THE NORTH CAROLINA PROVIDING ACCESS TO CAPITAL FOR
ENTREPRENEURS AND SMALL BUSINESS ACT.

Whereas, start-up companies and small businesses play a critical role in creating new jobs and sources of revenue within our State; and

Whereas, crowdfunding, or raising money through small contributions from a large number of local investors, allows smaller enterprises in North Carolina to have access to the capital they need to initiate new business ventures or grow existing ventures; and

Whereas, by promoting local investment opportunities and local crowdfunding, the General Assembly can give new and existing businesses access to additional financing tools, can assist in democratizing access to capital, and can facilitate investment by North Carolina residents in North Carolina businesses; and

Whereas, by facilitating local investment with appropriate restrictions to protect the interests of North Carolina investors, the General Assembly can promote the formation and growth of smaller North Carolina enterprises, along with additional job formation, and can permit businesses to raise capital using crowdfunding unencumbered by excessive government regulation; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 78A-17 is amended by adding a new subdivision to read:

"(20) Any offer or sale of a security by an issuer if the offer or sale is conducted in accordance with G.S. 78A-17.1."

SECTION 2. Article 3 of Chapter 78A of the General Statutes is amended by adding a new section to read:

"§ 78A-17.1. Invest NC exemption.

(a) Exemption. – Except as otherwise provided in this Chapter, an offer or sale of a security by an issuer is exempt from G.S. 78A-24 and G.S. 78A-49(d) if the offer or sale is conducted in accordance with each of the following requirements:

- (1) The issuer of the security is a business entity formed under the laws of the State and registered with the Secretary of State.
 - (2) 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), and SEC rule 147, 17 C.F.R. § 230.147.
 - (3) The sum of all cash and other consideration to be received for all sales of the security in reliance upon this exemption does not exceed the cap provided in this subdivision.



- 1 a. One million dollars (\$1,000,000), less the aggregate amount received
2 for all sales of securities by the issuer made in reliance upon this
3 exemption within the 12 months before the first offer or sale made in
4 reliance upon this exemption, if the issuer has not undergone and
5 made available to each prospective investor and the Administrator
6 the documentation resulting from a financial audit or review with
7 respect to its most recently completed fiscal year and meeting
8 generally accepted accounting principles.
- 9 b. Two million dollars (\$2,000,000), less the aggregate amount received
10 for all sales of securities by the issuer made in reliance upon this
11 exemption within the 12 months before the first offer or sale made in
12 reliance upon this exemption, if the issuer has undergone and made
13 available to each prospective investor and the Administrator the
14 documentation resulting from a financial audit or review with respect
15 to its most recently completed fiscal year and meeting generally
16 accepted accounting principles.
- 17 (4) The issuer has not accepted more than five thousand dollars (\$5,000) from
18 any single purchaser in an offering made in reliance upon this exemption in
19 any 12-month period unless the purchaser is an accredited investor as
20 defined by rule 501 of SEC regulation D, 17 C.F.R. § 230.501.
- 21 (5) Not less than 10 days prior to the commencement of an offering of securities
22 in reliance on this exemption or the use of any publicly available Web site in
23 connection with any such offering, the issuer shall file a notice with the
24 Administrator, in writing or in electronic form as specified by the
25 Administrator, containing the following:
- 26 a. A notice of claim of exemption from registration, specifying that the
27 issuer will be conducting an offering in reliance upon this exemption,
28 accompanied by the filing fee as specified in this section.
- 29 b. A copy of the disclosure statement to be provided to prospective
30 investors in connection with the offering, containing the following:
- 31 1. A description of the company, its type of entity, the address
32 and telephone number of its principal office, its history, its
33 business plan, and the intended use of the offering proceeds,
34 including any amounts to be paid, as compensation or
35 otherwise, to any owner, executive officer, director,
36 managing member, or other person occupying a similar status
37 or performing similar functions on behalf of the issuer.
- 38 2. The identity of all persons owning more than ten percent
39 (10%) of the ownership interests of any class of securities of
40 the company.
- 41 3. The identity of the executive officers, directors, managing
42 members, and other persons occupying a similar status or
43 performing similar functions in the name of and on behalf of
44 the issuer, including their titles and their prior experience.
- 45 4. The terms and conditions of the securities being offered and
46 of any outstanding securities of the company, the minimum
47 and maximum amount of securities being offered, if any, and
48 either the percentage ownership of the company represented
49 by the offered securities or the valuation of the company
50 implied by the price of the offered securities.

1 5. The identity of any person who has been or will be retained
2 by the issuer to assist the issuer in conducting the offering
3 and sale of the securities, including any Web sites, but
4 excluding persons acting solely as accountants or attorneys
5 and employees whose primary job responsibilities involve the
6 operating business of the issuer rather than assisting the issuer
7 in raising capital, and for each person identified in response
8 to this paragraph, a description of the consideration being
9 paid to such person for such assistance.

10 6. A description of any litigation or legal proceedings involving
11 the company or its management.
12 7. The names and addresses, including URL, of any Web sites
13 that will be used in connection with the offering.

14 c. An escrow agreement with a bank or other depository institution
15 located within this State in which the investor funds will be
16 deposited, providing that all offering proceeds will be released to the
17 issuer only when the aggregate capital raised from all investors is
18 equal to or greater than the minimum target offering amount
19 specified in the disclosure document provided to the Administrator
20 pursuant to sub-subdivision (a)(5)b. of this section and that all
21 investors may cancel their commitments to invest if that target
22 offering amount is not raised by the time stated in the disclosure
23 document.

24 (6) The issuer is not, either before or as a result of the offering, an investment
25 company, as defined in section 3 of the Investment Company Act of 1940,
26 15 U.S.C. § 8a-3, or an entity that would be an investment company but for
27 the exclusions provided in section 3(c) of the act, or subject to the reporting
28 requirements of section 13 or 15(d) of the Securities Exchange Act of 1934,
29 15 U.S.C. § 78m and 78o(d).

30 (7) The issuer shall inform all prospective purchasers under this section that the
31 securities have not been registered under federal or State securities law and
32 that the securities are subject to limitations on resale. The issuer shall display
33 the following legend conspicuously on the cover page of the disclosure
34 document:

35 "IN MAKING AN INVESTMENT DECISION, INVESTORS
36 MUST RELY ON THEIR OWN EXAMINATION OF THE
37 ISSUER AND THE TERMS OF THE OFFERING, INCLUDING
38 THE MERITS AND RISKS INVOLVED. THESE SECURITIES
39 HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR
40 STATE SECURITIES COMMISSION OR REGULATORY
41 AUTHORITY. FURTHERMORE, THE FOREGOING
42 AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR
43 DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY
44 REPRESENTATION TO THE CONTRARY IS A CRIMINAL
45 OFFENSE. THESE SECURITIES ARE SUBJECT TO
46 RESTRICTIONS ON TRANSFERABILITY AND RESALE AND
47 MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS
48 PERMITTED BY SUBSECTION (E) OF SEC RULE 147, 17 C.F.R.
49 § 230.147(E) AS PROMULGATED UNDER THE SECURITIES
50 ACT OF 1933, AS AMENDED, AND THE APPLICABLE STATE
51 SECURITIES LAWS, PURSUANT TO REGISTRATION OR

1 EXEMPTION THEREFROM. INVESTORS SHOULD BE AWARE
2 THAT THEY WILL BE REQUIRED TO BEAR THE FINANCIAL
3 RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD
4 OF TIME."

- 5 (8) The issuer shall require each purchaser to certify in writing "I understand
6 and acknowledge that:
- 7 a. I am investing in a high-risk, speculative business venture. I may lose
8 all of my investment, and I can afford the loss of my investment.
- 9 b. This offering has not been reviewed or approved by any state or
10 federal securities commission or other regulatory authority and that
11 no such person or authority has confirmed the accuracy or
12 determined the adequacy of any disclosure made to me relating to
13 this offering.
- 14 c. The securities I am acquiring in this offering are illiquid, that there is
15 no ready market for the sale of such securities, that it may be difficult
16 or impossible for me to sell or otherwise dispose of this investment,
17 and that, accordingly, I may be required to hold this investment
18 indefinitely.
- 19 d. I may be subject to tax on my share of the taxable income and losses
20 of the company, whether or not I have sold or otherwise disposed of
21 my investment or received any dividends or other distributions from
22 the company."
- 23 (9) If the offer or sale of securities is made through an Internet Web site, the
24 following requirements apply:
- 25 a. Prior to the offer of an investment opportunity to residents of this
26 State through a Web site, the issuer shall provide to the Web site and
27 to the Administrator evidence that the issuer is organized under
28 North Carolina law and that it is authorized to do business within the
29 State.
- 30 b. The issuer shall obtain from each purchaser of a security under this
31 section evidence that the purchaser is a resident of North Carolina
32 and, if applicable, an accredited investor.
- 33 c. The Web site operator shall register with the Administrator by filing
34 a statement that it is a business entity that is organized under North
35 Carolina law and that it is authorized to do business within the State
36 and that it is being utilized to offer and sell securities pursuant to this
37 exemption. As part of the registration, the Web site shall notify the
38 Administrator of its and the issuer's identity, location, and contact
39 information.
- 40 d. The issuer and the Web site must keep and maintain records of the
41 offers and sales of securities effected through the Web site and must
42 provide ready access to the records to the Administrator, upon
43 request. The Administrator may access, inspect, and review any Web
44 site and its records.
- 45 (10) All payments for purchase of securities must be directed to and held by the
46 bank or depository institution subject to the provisions of sub-subdivision
47 (a)(5)c. of this section. The bank or depository institution shall notify the
48 Administrator of the receipt of payments for securities and the identity and
49 residence of the investors. The information shall be confidential and
50 considered trade secrets within the scope of G.S. 132-1.2 while in the
51 possession of the Administrator.

- 1 (11) No offers or sales of a security shall be made through an Internet Web site
2 unless the Web site is registered with the Administrator pursuant to
3 sub-subdivision (a)(9)c. of this section. The Web site shall not be subject to
4 the registration provisions of G.S. 78A-36 provided that all of the following
5 apply:
6 a. It does not offer investment advice or recommendations.
7 b. It does not solicit purchases, sales, or offers to buy the securities
8 offered or displayed on the Web site.
9 c. It does not compensate employees, agents, or other persons for the
10 solicitation or based on the sale of securities displayed or referenced
11 on the Web site.
12 d. It is not compensated based on the amount of securities sold, and it
13 does not hold, manage, possess, or otherwise handle investor funds
14 or securities.
15 e. It does not engage in such other activities as the Administrator, by
16 rule, determines appropriate.
- 17 (12) An executive officer, director, managing member, or person occupying a
18 similar status or performing similar functions in the name of and on behalf
19 of the issuer shall be exempt from the registration provisions of
20 G.S. 78A-36, provided that the person does not receive, directly or
21 indirectly, any commission or remuneration for offering and selling
22 securities of the issuer pursuant to this exemption.
- 23 (13) The issuer must provide a copy of the disclosure document provided to the
24 Administrator pursuant to sub-subdivision (a)(5)b. of this section to each
25 prospective investor at the time the offer of securities is made to the
26 prospective investor. In addition to the information described in
27 sub-subdivision (a)(5)b. of this section, the disclosure document provided to
28 the Administrator and to prospective investors should include additional
29 information material to the offering, including, where appropriate, a
30 discussion of significant factors that make the offering speculative or risky.
31 This discussion must be concise and organized logically and should not
32 present risks that could apply to any issuer or any offering.
- 33 (b) Indexing. – The dollar limitations provided in subdivision (a)(3) of this section shall
34 be cumulatively adjusted every fifth year by the Administrator to reflect the change in the
35 Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics,
36 setting each dollar limitation to the nearest fifty thousand dollars (\$50,000).
- 37 (c) Report. – An issuer of a security, the offer and sale of which is exempt under this
38 section, shall provide a quarterly report to the issuer's investors until no securities issued under
39 this section are outstanding. The report required by this subsection shall be free of charge. An
40 issuer may satisfy the reporting requirement of this subsection by making the information
41 available on an Internet Web site if the information is made available within 45 days of the end
42 of each fiscal quarter and remains available until the succeeding quarterly report is issued. An
43 issuer shall file each such quarterly report with the Administrator and must provide a written
44 copy of the report to any investor upon request. The report must contain each of the following:
- 45 (1) Compensation received by each director and executive officer, including
46 cash compensation earned since the previous report and on an annual basis
47 and any bonuses, stock options, other rights to receive securities of the issuer
48 or any affiliate of the issuer, or other compensation received.
49 (2) An analysis by management of the issuer of the business operations and
50 financial condition of the issuer.

1 (d) Offers and Sales to Controlling Persons. – The exemption provided in this section
2 shall not be used in conjunction with any other exemption under this Chapter, except offers and
3 sales to controlling persons shall not count toward the limitations in subdivision (3) or (4) of
4 subsection (a) of this section. A controlling person is an officer, director, partner, trustee, or
5 individual occupying similar status or performing similar functions with respect to the issuer or
6 to a person owning ten percent (10%) or more of the outstanding shares of any class or classes
7 of securities of the issuer.

8 (e) Disqualification. – The exemption allowed by this section shall not apply if an
9 issuer or person affiliated with the issuer or offering is subject to any disqualification contained
10 in 18 NCAC 06A .1207(a)(1) through (a)(6) or contained in rule 262 as promulgated under the
11 Securities Act of 1933 (17 C.F.R. § 230.262). The provisions of this subsection shall not apply
12 if (i) upon a showing of good cause and without prejudice to any other action by the
13 Administrator, the Administrator determines that it is not necessary under the circumstances
14 that an exemption be denied and (ii) the issuer establishes that it made factual inquiry into
15 whether any disqualification existed under this subsection but did not know, and in the exercise
16 of reasonable care could not have known, that a disqualification existed under this subsection.
17 The nature and scope of the requisite inquiry will vary based on the circumstances of the issuer
18 and the other offering participants.

19 (f) Rules. – The Administrator may adopt rules to implement the provisions of this
20 section and to protect investors who purchase securities under this section.

21 (g) Fee. – The Administrator shall charge a nonrefundable filing fee of one hundred
22 fifty dollars (\$150.00) for filing an exemption notice required by subsection (a) of this section.
23 The fees paid to the Administrator pursuant to this subsection shall be used to pay the costs
24 incurred in administering and enforcing this Chapter. The revenue derived from the fee shall be
25 credited to a nonreverting agency revenue account."

26 **SECTION 3.** G.S. 78A-49(d) reads as rewritten:

27 "(d) The Administrator may by rule or order require the filing of any prospectus,
28 pamphlet, circular, form letter, advertisement, or other sales literature or advertising
29 communication addressed or intended for distribution to prospective investors, unless the
30 security or transaction is exempted by ~~G.S. 78A-16 or 78A-17 (except 78A-17(9), (17), and
31 (19))~~G.S. 78A-16 and G.S. 78A-17 (except G.S. 78A-17(9), (17), (19), and (20)) and such
32 exemption has not been denied or revoked under G.S. 78A-18 or the security is a security
33 covered under federal law or the transaction is with respect to a security covered under federal
34 law."

35 **SECTION 4.** Notwithstanding any provision of Article 2A of Chapter 150B of the
36 General Statutes, within 12 months of the effective date of this act, the Secretary of State shall
37 adopt rules to implement the provisions of this act in accordance with the following procedure:

- 38 (1) At least 15 business days prior to adopting a rule, submit the rule and a
39 notice of public hearing to the Codifier of Rules. The Codifier of Rules shall
40 publish the proposed rule and the notice of public hearing on the Internet
41 within five business days.
- 42 (2) At least 15 business days prior to adopting a rule, notify persons on the
43 mailing list maintained pursuant to G.S. 150B-21.2(d) and any other
44 interested parties of the Secretary's intent to adopt a rule and of the public
45 hearing.
- 46 (3) Accept written comments on the proposed rule for at least 15 business days
47 prior to adoption of the rule.
- 48 (4) Hold at least one public hearing on the proposed rule no less than five days
49 after the rule and notice have been published.

1 A rule adopted in accordance with this section becomes effective on the first day of
2 the month following the month the Secretary adopts the rule and submits the rule to the
3 Codifier of Rules for entry into the North Carolina Administrative Code.

4 **SECTION 5.** Any rule adopted more than 12 months after the effective date of this
5 act shall comply with the requirements of Article 2A of Chapter 150B of the General Statutes.

6 **SECTION 6.** Section 4 of this act is effective when the act becomes law and
7 expires 12 months after that date. Section 5 of this act becomes effective 12 months after the
8 effective date of this act. The remainder of this act is effective when the act becomes law.