

HOUSE BILL NO. 90

INTRODUCED BY S. GUNDERSON

BY REQUEST OF THE STATE AUDITOR

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING SECURITIES REGULATORY LAWS; CLARIFYING EXEMPT TRANSACTIONS; REVISING THE DEFINITION OF "PYRAMID PROMOTIONAL SCHEME" TO INCLUDE PAYMENT OF ANYTHING OF VALUE; ~~REMOVING FILING AND NOTICE BY MULTILEVEL MARKETERS;~~ AMENDING SECTIONS 30-10-105, ~~30-10-303,~~ AND 30-10-324, MCA; ~~REPEALING SECTION 30-10-327, MCA;~~ AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, in Redding v. McCarter, 2012 MT 144, 365 Mont. 316, the Montana Supreme Court stated that the Securities Act of Montana was drafted broadly to be in harmony with federal securities law, which recognizes the virtually limitless scope of human ingenuity, especially in the creation of the countless and variable schemes devised by those who seek the use of money of others on the promise of profits; and

WHEREAS, recent enforcement actions by the Montana State Auditor have encountered securities schemes promising investors with profits through payment of items of no value but of purported value.

THEREFORE, this act seeks to definitively clarify that the Montana Securities Act applies to the virtually limitless scope of securities schemes, including those not involving strictly the payment of money.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 30-10-105, MCA, is amended to read:

"30-10-105. Exempt transactions -- rulemaking. Except as expressly provided in this section, 30-10-201 through 30-10-207 and 30-10-211 do not apply to the following transactions:

(1) a nonissuer isolated transaction, whether effected through a broker-dealer or not. A transaction is presumed to be isolated if it is one of not more than three transactions during the prior 12-month period.

(2) (a) a nonissuer distribution of an outstanding security by a broker-dealer registered pursuant to 30-10-201 if:

(i) quotations for the securities to be offered or sold or the securities issuable upon exercise of any warrant or right to purchase or subscribe to the securities are reported by the automated quotations system

1 operated by the national association of securities dealers, inc., or by any other quotation system approved by the
2 commissioner by rule; or

3 (ii) the security has a fixed maturity or a fixed interest or dividend provision and there has not been a
4 default during the current fiscal year or within the 3 preceding fiscal years or if the issuer and any predecessors
5 have been in existence for less than 3 years and there has not been a default in the payment of principal, interest,
6 or dividends on the security.

7 (b) The commissioner may by order deny or revoke the exemption specified in subsection (2)(a) with
8 respect to a specific security. Upon the entry of an order, the commissioner shall promptly notify all registered
9 broker-dealers that it has been entered and give the reasons for the order and shall notify them that within 15
10 days of the receipt of a written request, the matter will be set for hearing. If a hearing is not requested and is not
11 ordered by the commissioner, the order remains in effect until it is modified or vacated by the commissioner. If
12 a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to all interested
13 persons, may modify or vacate the order or extend it until final determination. An order under this subsection may
14 not operate retroactively. A person may not be considered to have violated parts 1 through 3 of this chapter by
15 reason of any offer or sale effected after the entry of an order under this subsection if the person sustains the
16 burden of proof that the person did not know and in the exercise of reasonable care could not have known of the
17 order.

18 (3) a nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited
19 order or offer to buy, but the commissioner may require that the customer acknowledge upon a specified form
20 that the sale was unsolicited and that a signed copy of each form be preserved by the broker-dealer for a
21 specified period;

22 (4) a transaction between the issuer or other person on whose behalf the offering is made and an
23 underwriter or between underwriters;

24 (5) a transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian,
25 or conservator in the performance of official duties;

26 (6) a transaction executed by a bona fide pledgee without any purpose of evading parts 1 through 3 of
27 this chapter;

28 (7) an offer or sale to a bank, savings institution, trust company, insurance company, investment
29 company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial
30 institution or institutional buyer or to a broker-dealer, whether the purchaser is acting for itself or in a fiduciary

1 capacity;

2 (8) (a) a transaction pursuant to an offer made in this state directed by the offeror to not more than 10
3 persons, other than those designated in subsection (7), during any period of 12 consecutive months, if:

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

5 (ii) a commission or other remuneration is not paid or given directly or indirectly for soliciting a prospective
6 buyer. However, a commission may be paid to a registered broker-dealer if the securities involved are registered
7 with the United States securities and exchange commission under the federal Securities Act of 1933, as
8 amended.

9 (b) a transaction pursuant to an offer made in this state directed by the offeror to not more than 25
10 persons, other than those designated in subsection (7), during any period of 12 consecutive months if:

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

12 (ii) a commission or other remuneration is not paid or given directly or indirectly for soliciting a prospective
13 buyer; however, a commission may be paid to a registered broker-dealer if the securities involved are registered
14 with the United States securities and exchange commission under the federal Securities Act of 1933, as
15 amended; and

16 (iii) the offeror applies for and obtains the written approval of the commissioner prior to making any offers
17 in this state and pays a filing fee that must accompany the application for approval. The commissioner may deny
18 an application.

19 (c) a transaction pursuant to an offer made in this state by an offeror that is used in conjunction with the
20 exemption found in subsection (8)(a) and the offeror has applied to the commissioner to use the exemption found
21 in subsection (8)(b) in conjunction with or in addition to the exemption in subsection (8)(a), which the
22 commissioner may allow if:

23 (i) the offeror has its corporate headquarters or principal place of business in this state;

24 (ii) the seller reasonably believes that all the buyers are purchasing for investment;

25 (iii) a commission or other remuneration is not paid or given directly or indirectly for soliciting a
26 prospective buyer; however, a commission may be paid to a registered broker-dealer if the securities involved
27 are registered with the United States securities and exchange commission under the federal Securities Act of
28 1933, as amended; and

29 (iv) the offeror applies for and obtains the written approval of the commissioner prior to making any offers
30 in addition to the offers made pursuant to subsection (8)(a) and pays a filing fee that must accompany the

1 application for approval. The commissioner may deny the application.

2 (d) For the purpose of the exemptions provided for in this subsection (8), an offer to sell is made in this
3 state, whether or not the offeror or any of the offerees are then present in this state, if the offer either originates
4 from this state or is directed by the offeror to this state and received at the place to which it is directed or at any
5 post office in this state in the case of a mailed offer.

6 (9) an offer or sale of a preorganization certificate or subscription if:

7 (a) a commission or other remuneration is not paid or given directly or indirectly for soliciting a
8 prospective subscriber;

9 (b) the number of subscribers does not exceed 25; and

10 (c) a payment is not made by a subscriber;

11 (10) a transaction pursuant to an offer to existing security holders of the issuer, including persons who
12 at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable
13 warrants exercisable within not more than 90 days of their issuance, if:

14 (a) a commission or other remuneration, other than a standby commission, is not paid or given directly
15 or indirectly for soliciting any security holder in this state; or

16 (b) the issuer first files a notice specifying the terms of the offer and the commissioner does not by order
17 disallow either subsection (10)(a) or the notice specifying the terms of the offer;

18 (11) an offer, but not a sale, of a security for which registration statements have been filed under both
19 parts 1 through 3 of this chapter and the Securities Act of 1933 if a stop, refusal, denial, suspension, or revocation
20 order is not in effect and a public proceeding or examination looking toward an order is not pending under either
21 law;

22 (12) an offer, but not a sale, of a security for which a registration statement has been filed under parts
23 1 through 3 of this chapter and the commissioner does not disallow the offer in writing within 10 days of the filing;

24 (13) the issuance of a security dividend, whether the corporation distributing the dividend is the issuer
25 of the security or not, if nothing of value is given by security holders for the distribution other than the surrender
26 of a right to a cash dividend when the security holder can elect to take a dividend in cash or in securities;

27 (14) a transaction incident to a right of conversion, a statutory or judicially approved reclassification, or
28 a recapitalization, reorganization, quasi-reorganization, stock split, reverse stock split, merger, consolidation, or
29 sale of assets;

30 (15) a transaction in compliance with rules that the commissioner may adopt to serve the purposes of

1 30-10-102. The commissioner may require that 30-10-201 through 30-10-207 and 30-10-211 apply to any
2 transactional exemptions adopted by rule.

3 (16) the sale of a commodity investment contract traded on a commodities exchange recognized by the
4 commissioner at the time of sale;

5 (17) a transaction within the exclusive jurisdiction of the commodity futures trading commission as granted
6 under the Commodity Exchange Act;

7 (18) a transaction that:

8 (a) involves the purchase of one or more precious metals;

9 (b) requires, and under which the purchaser receives within 7 calendar days after payment in good funds
10 of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased. For the
11 purposes of this subsection, physical delivery is considered to have occurred if, within the 7-day period, the
12 quantity of precious metals, whether in specifically segregated or fungible bulk, purchased by the payment is
13 delivered into the possession of a depository, other than the seller, that:

14 (i) (A) is a financial institution, meaning a bank, savings institution, or trust company organized under
15 or supervised pursuant to the laws of the United States or of this state;

16 (B) is a depository the warehouse receipts of which are recognized for delivery purposes for any
17 commodity on a contract market designated by the commodity futures trading commission; or

18 (C) is a storage facility licensed by the United States or any agency of the United States; and

19 (ii) issues, and the purchaser receives, a certificate, document of title, confirmation, or other instrument
20 evidencing that the quantity of precious metals has been delivered to the depository and is being and will continue
21 to be held on the purchaser's behalf, free and clear of all liens and encumbrances other than:

22 (A) liens of the purchaser;

23 (B) tax liens;

24 (C) liens agreed to by the purchaser; or

25 (D) liens of the depository for fees and expenses that previously have been disclosed to the purchaser.

26 (c) requires the quantity of precious metals purchased and delivered into the possession of a depository,
27 as provided in subsection (18)(b), to be physically located within Montana at all times after the 7-day delivery
28 period provided in subsection (18)(b), and the precious metals are in fact physically located within Montana at
29 all times after that delivery period;

30 (19) a transaction involving a commodity investment contract solely between persons engaged in

1 producing, processing, using commercially, or handling as merchants each commodity subject to the contract
2 or any byproduct of the commodity;

3 (20) an offer or sale of a security to an employee of the issuer, pursuant to an employee stock ownership
4 plan qualified under section 401 of the Internal Revenue Code or 17 CFR 230.701;

5 (21) (a) an offer or sale of securities by a cooperative association organized under the provisions of Title
6 35, chapter 15 or 17, or under the laws of another state that are substantially the same as the provisions of Title
7 35, chapter 15 or 17, if the offer and sale are only to members of the cooperative association or the purchase of
8 the securities is necessary or incidental to establishing membership in the cooperative association;

9 (b) a cooperative organized under the laws of another state may not take advantage of the exemption
10 created by this subsection (21) unless, not less than 10 days before the issuance or delivery of the securities,
11 the cooperative has furnished the commissioner with a general written description of the transaction and any
12 other information the commissioner may require by rule or otherwise. The commissioner shall promulgate rules
13 establishing a list of states whose laws are considered substantially the same as Title 35, chapter 15 or 17, for
14 the purposes of this subsection (21).

15 (22) an offer or sale of securities in which:

16 (a) the offer or sale meets the following residency requirements:

17 (i) it is made in this state to residents of this state;

18 (ii) the issuer is a business entity formed under the laws of this state and registered with the Montana
19 secretary of state;

20 (iii) prior to the offer or sale, the issuer has documentary evidence to establish a reasonable basis to
21 believe the buyer is a resident of this state; and

22 (iv) the offer or sale meets the intrastate exemption requirements in section 3(a)(11) of the Securities Act
23 of 1933, 15 U.S.C. 77c(a)(11), and 17 CFR 230.147;

24 (b) the offer or sale meets the following payment requirements:

25 (i) cash and other consideration received by the issuer for all securities transactions does not exceed
26 \$1 million, less the aggregate amount received for all sales of securities by the issuer within the 12 months before
27 the first offer or sale made in reliance on this exemption;

28 (ii) the issuer does not accept more than \$10,000 from a buyer unless the buyer is an accredited investor
29 under Rule 501 SEC Regulation D, 17 CFR 230.501;

30 (iii) the issuer reasonably believes that all buyers are purchasing for investment and not for sale in

1 connection with a distribution of the security;

2 (iv) a commission or remuneration is not paid or given, directly or indirectly, for any person's participation
3 in the offer or sale of securities for the issuer unless the person is a registered broker-dealer or agent under this
4 chapter; and

5 (v) all funds received from buyers are deposited into a bank or depository institution authorized to do
6 business in this state and used in accordance with representations made to investors;

7 (c) the issuer, within 10 days of any solicitation or within 15 days after the first sale of the security
8 pursuant to this exemption, whichever occurs first, provides to the commissioner in a form prescribed by the
9 commissioner notice that:

10 (i) specifies that the issuer is conducting an offering in reliance upon this exemption;

11 (ii) identifies the issuer;

12 (iii) lists all persons involved in the offer and sale of securities on behalf of the issuer;

13 (iv) identifies the bank or other depository institution where investor funds will be deposited; and

14 (v) includes payment of a filing fee;

15 (d) the issuer does not constitute any of the following:

16 (i) before or after the offer or sale, an investment company as defined in section 3 of the Investment
17 Company Act of 1940, 15 U.S.C. 80a-3, or subject to the reporting requirements of section 13 or 15(d) of the
18 Securities Exchange Act of 1934, 15 U.S.C. 78m and 78o(d);

19 (ii) before or after the offer or sale, an investment adviser as defined in this chapter or a person who
20 otherwise provides investment advice as a service or for a fee;

21 (iii) before the offer or sale, an individual who has been convicted within 10 years before the sale, or 5
22 years in the case of issuers, their predecessors, and affiliated issuers, of a felony or misdemeanor;

23 (iv) before or after the offer or sale, a person subject to a final order that bars the person from the
24 business of securities, insurance, or banking, issued by any of the following:

25 (A) a state or federal securities regulator or similar entity;

26 (B) a state or federal banking authority or similar entity;

27 (C) a state insurance commission or similar entity;

28 (e) the offer or sale:

29 (i) can be used in conjunction with any other exemption under this chapter except the exemptions for
30 institutional investors under subsection (8) and for controlling persons of the issuer. Sales toward controlling

1 persons do not count toward the limitation in subsection (22)(b).

2 (ii) is not available if the issuer or any of its officers, controlling persons, or promoters is disqualified under
3 any part of this chapter;

4 (f) prior to the sale, the issuer informed all purchasers that the securities have not been registered under
5 this chapter and cannot be resold unless the securities are registered or qualify for an exemption from
6 registration; and

7 (g) the offer or sale is not:

8 (i) an offering proposing to issue stock or other equity interest in a development stage company without
9 a specific business plan or purpose;

10 (ii) an offering in which the issuer has indicated that its business is to enlarge in a merger or acquisition
11 with an unidentified company or companies or other unidentified entities or persons; or

12 (iii) an offering without an allocation of proceeds to sufficiently identifiable properties or objectives."
13

14 ~~SECTION 2. SECTION 30-10-303, MCA, IS AMENDED TO READ:~~

15 ~~"30-10-303. Unlawful representation concerning registration or exemption. (1) The fact that an
16 application for registration under 30-10-201(6), a notice filing under 30-10-211 or 30-10-327, or a registration
17 statement under 30-10-203, 30-10-204, or 30-10-205 has been filed or the fact that a person or security is
18 effectively registered or a complete notice filing has been made does not constitute a finding by the commissioner
19 that any document filed under parts 1 through 3 of this chapter is true, complete, and not misleading.~~

20 ~~(2) The fact that an application for registration or a notice filing has been filed or a person or security is
21 effectively registered or a complete notice filing has been made as provided in subsection (1) or the fact that an
22 exemption or exception is available for a person, security, or transaction does not mean that the commissioner
23 has passed in any way upon the merits of, qualifications of, or recommended or given approval to, any person,
24 security, or transaction. It is unlawful to make or cause to be made to any prospective purchaser, customer, or
25 client any representation inconsistent with this section."~~

26

27 **Section 2.** Section 30-10-324, MCA, is amended to read:

28 **"30-10-324. Definitions.** As used in 30-10-301, 30-10-324, ~~AND~~ 30-10-325, ~~and 30-10-327;~~ AND
29 30-10-327, the following definitions apply:

30 (1) (a) "Compensation" means the receipt of money, a thing of value or purported value, or a financial

1 benefit.

2 (b) Compensation does not include:

3 (i) payments to a participant based on the sale of goods or services by the participant to third persons
4 when the goods or services are purchased for actual use or consumption; or

5 (ii) payments to a participant based on the sale of goods or services to the participant that are used or
6 consumed by the participant.

7 (2) (a) "Consideration" means the payment of money, the purchase of goods or services, or the purchase
8 of intangible property.

9 (b) Consideration does not include:

10 (i) the purchase of goods or services furnished at cost that are used in making sales and that are not
11 for resale; or

12 (ii) a participant's time and effort expended in the pursuit of sales or in recruiting activities.

13 (3) "Direct selling association" means the nonprofit entity incorporated in the state of Delaware and
14 recognized by the department as the direct selling association.

15 (4) "Multilevel marketing company" means a person that:

16 (a) sells, distributes, or supplies goods or services through independent agents, contractors, or
17 distributors:

18 (i) at different levels of distribution; or

19 (ii) pursuant to a formula for compensating participants in whole or in part based on purchases of sales
20 by or recruitment of other participants;

21 (b) permits participants to recruit other participants in the company; and

22 (c) provides for commissions, cross-commissions, override commissions, bonuses, refunds, dividends,
23 or other consideration that is or may be paid as a result of the sale of goods or services or the recruitment of or
24 the performance or actions of other participants.

25 (5) "Participant" means a person involved in a sales plan or operation.

26 (6) "Person" means an individual, corporation, partnership, limited liability company, or other business
27 entity.

28 (7) (a) "Pyramid promotional scheme" means a sales plan or operation in which a participant gives
29 consideration for the opportunity to receive compensation derived primarily from obtaining the participation of
30 other persons in the sales plan or operation rather than from the sale of goods or services by the participant or

1 the other persons induced to participate in the sales plan or operation by the participant.

2 (b) A pyramid promotional scheme includes a Ponzi scheme, in which a person makes payments to
3 investors from ~~money~~ anything of value, including anything of purported value, obtained from later investors,
4 rather than from any profits or other income of an underlying or purported underlying business venture.

5 (c) A pyramid promotional scheme does not include a sales plan or operation that:

6 (i) subject to the provisions of subsection (7)(c)(iv), provides compensation to a participant based
7 primarily on the sale of goods or services by the participant, including goods or services used or consumed by
8 the participant or other participants, and not primarily for obtaining the participation of other persons in the sales
9 plan or operation;

10 (ii) does not require a participant to purchase goods or services in an amount that unreasonably exceeds
11 an amount that can be expected to be resold or consumed within a reasonable period of time;

12 (iii) (A) provides each person joining the sales plan or operation with a written agreement containing or
13 a written statement describing the material terms of participating in the sales plan or operation;

14 (B) allows a person at least 15 days to cancel the person's participation in the sales plan or operation;
15 and

16 (C) provides that if the person cancels participation within the time provided and returns any items given
17 to the person to assist in marketing goods or services under the plan, the person is entitled to a refund of any
18 consideration given to participate in the sales plan or operation; and

19 (iv) (A) on the request of a participant deciding to terminate participation in the sales plan or operation,
20 provides for the repurchase, at not less than 90% of the amount paid by the participant, of any currently
21 marketable goods or services sold to the participant within 12 months of the request that have not been resold
22 or consumed by the participant; and

23 (B) if disclosed to the participant at the time of purchase, provides that goods or services are not
24 considered currently marketable if the goods have been consumed or the services rendered or if the goods or
25 services are seasonal, discontinued, or special promotional items. Sales plan or operation promotional materials,
26 sales aids, and sales kits are subject to the provisions of this subsection (7)(c)(v) if they are a required purchase
27 for the participant or if the participant has received or may receive a financial benefit from their purchase.

28 (8) "Transacting business" means to directly or indirectly:

29 (a) offer, sell, distribute, or supply goods or services through independent agents, contractors, or
30 distributors at different levels of distribution; or

1 (b) recruit or attempt to recruit participants in a multilevel ~~distribution~~ MARKETING company."

2

3 ~~NEW SECTION. SECTION 4. REPEALER. THE FOLLOWING SECTION OF THE MONTANA CODE ANNOTATED IS~~

4 REPEALED:

5 ~~30-10-327. MULTILEVEL MARKETING COMPANY -- NOTICE OF ACTIVITY -- CONSENT TO SERVICE.~~

6

7 NEW SECTION. Section 3. Saving clause. [This act] does not affect rights and duties that matured,
8 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

9

10 NEW SECTION. Section 4. Severability. If a part of [this act] is invalid, all valid parts that are severable
11 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part
12 remains in effect in all valid applications that are severable from the invalid applications.

13

14 NEW SECTION. Section 5. Effective date. [This act] is effective on passage and approval.

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