

18 NCAC 06A .1209 NONPROFIT SECURITIES

(a) The exemption provided by G.S. 78A-16(9) from the registration requirements of G.S. 78A-24 for securities offered, or to be offered, and sold by any person operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association shall not be available where:

- (1) The issuer is disqualified by Rule .1207 of this Section. For the purposes of determining the availability of the exemption provided by G.S. 78A-16(9), the issuer also shall be disqualified under Rule .1207 of this Section where the trustee of a trust indenture under which the securities are to be issued is subject to the disqualifications of Subparagraphs (a)(1) through (6) of Rule .1207 of this Section.
- (2) The issuer, or any affiliate or predecessor has had any material default within five years prior to commencement of the offering in the payment of:
 - (A) principal, interest, dividend or sinking fund installment on any security or indebtedness for borrowed money; or
 - (B) rentals under material leases with terms of three years or more.
- (3) Any part of the net earnings of the nonprofit issuer inures to the benefit of any other person.
- (4) The issuer fails to comply with the requirements of Paragraph (b) of this Rule and, if applicable or appropriate, Paragraphs (c) and (d) of this Rule.

Provided, however, that the administrator may modify or waive, upon the showing of good cause in writing, any disqualification that results from Subparagraphs (a), (1), (2) or (3) of this Rule.

(b) No commission, discount, finder's fee or other similar remuneration or compensation shall be paid, directly or indirectly, to any person for soliciting any prospective purchaser of any security sold to a resident of this State in reliance upon this exemption unless such person is either registered pursuant to G.S. 78A-36 or exempt from registration thereunder or the issuer reasonably believes that such person is so registered or exempt therefrom.

(c) The nonprofit issuer should provide each offeree a written document providing full disclosure of all material facts. A prospectus, pamphlet, circular or similar literature providing the following minimum disclosures, if applicable, normally will suffice for this purpose; provided, however that nothing in this Paragraph shall be construed as in any manner relieving any person from the full disclosure requirements of G.S. 78A-8(2):

- (1) The Cover or First Page:
 - (A) The name of the issuer;
 - (B) Title of securities;
 - (C) In tabular form, the per unit and aggregate price to the public, underwriting or selling commissions and expenses, and net proceeds to the issuer;
 - (D) Name of dealer or financial adviser;
 - (E) Names of trustee and paying agent;
 - (F) If the offering is being made only to certain persons, a description of such offerees;
 - (G) The appropriate disclaimer and/or legend, pursuant to the provisions of Rule .1316 of this Chapter, shall appear in boldface type;
 - (H) If appropriate, the following statement shall appear in boldface: **THIS OFFERING IS SUBJECT TO CERTAIN RISKS.** (See "Risk Factors"); and
 - (I) The date of the disclosure document.
- (2) A Table of Contents.
- (3) The Issuer:
 - (A) The name, address, organization (state in which organized, date organized, statute under which organized, and form of organization) and purpose of the issuer;
 - (B) The history of the issuer;
 - (C) A description of the general area and location of the issuer;
 - (D) Accreditation and regulation of the issuer;
 - (E) The number of paid employees and a description of any employee benefit plans;
 - (F) Any affiliation between the issuer and the dealer, or any officers, directors or general partners or any person holding a similar position of either, with any building contractor or supplier who has an interest in or may receive any of the proceeds of the offering or with any trustee of a trust indenture under which the securities are to be issued.
- (4) Risk Factors: Where appropriate, risk factors in connection with the offering must be disclosed. Reference to risk factors should note the page number of the disclosure document at which they may

be found or further disclosure is made. Risk factors that should be considered include, but are not limited to, the following examples:

- (A) There is no market for the securities, and there is no assurance that a market will develop. Consequently, investors may not be able to resell any securities purchased should they need to or wish to do so for emergency purposes or otherwise.
 - (B) The issuer is primarily dependent upon contributions of the membership to meet expenses for operation of the issuer and payments of principal and interest of the securities. The issuer may not receive sufficient funds to meet these obligations.
 - (C) During the past . . . fiscal years, the issuer has operated at a loss, and is currently not earning sufficient income to pay the principal and interest on the securities offered hereby. There is no assurance the issuer will be able to meet debt service requirements in the future.
 - (D) These securities will mature and become payable on . . . and it is anticipated the issuer will attempt to refinance them at that time. There is no assurance that refinancing funds will be available at that time or that such funds will be available at terms acceptable to the issuer.
 - (E) These securities are not secured by land, buildings or equipment of the issuer. In the event of default, the investor has the status of an unsecured creditor.
 - (F) The issuer has defaulted on a previous issue of securities. This issue is for the purpose of refinancing.
 - (G) The trust indenture permits the issuer further to encumber the property securing these securities through the future issuance of additional securities.
- (5) Use of Proceeds:
- (A) An itemized statement as to the application of the proceeds of the offering. If additional funds are needed to accomplish the stated purposes, this should be disclosed, together with a statement showing how such funds will be obtained.
 - (B) If there is to be an escrow of funds, a description of the escrow arrangements.
- (6) Description of Property:
- (A) In addition to describing physical properties, a valuation of mortgaged property should be included as follows: Total valuation of existing land, buildings, improvements and equipment before the offering: \$____.; and total valuation of land, buildings, improvements and equipment after the offering and upon completion of construction: \$____.
 - (B) The person preparing any appraisals shall be identified, and his qualifications for serving as such shall be indicated.
- (7) Management and Control:
- (A) The name and principal occupation of each officer, trustee, director, general partners or other persons holding similar positions. In the case of religious organizations, a brief summary of the background of the minister(s) and any other important church officials should be included.
 - (B) A description of any material transactions or proposed transactions between the issuer and such persons or any affiliate of such persons.
- (8) Material Litigation and Transactions. Any pending or threatened litigation which may materially affect the issuer's income. Any contracts with the issuer which, if terminated, would materially affect the issuer's income.
- (9) Description of Securities:
- (A) Description of the indenture under which the securities are to be issued should include information as to:
 - (i) interest and interest payment dates,
 - (ii) default,
 - (iii) redemption,
 - (iv) subordination,
 - (v) sinking fund,
 - (vi) subsequent issues,
 - (vii) modification of the indenture,
 - (viii) insurance coverage on properties of the issuer, and
 - (ix) any other material facts regarding the rights of holders.
 - (B) A pay-back or maturity schedule.
 - (C) If guarantees of payment are made by any other person, information describing the ability of that person to guarantee, including financial statements, shall be included. Note: - A

guarantee in and of itself involves the offering of a separate security which may require registration.

- (10) Plan of Distribution:
 - (A) The name and address of the dealer and fund raising adviser.
 - (B) The aggregate underwriting or selling commissions or similar compensation or remuneration.
 - (C) A brief description of any underwriting arrangements or distribution plan, including whether best efforts or firm commitment, and whether exclusive or nonexclusive.
- (11) Financial Statement:
 - (A) Balance sheet, within four months prior to the date of the first offer in reliance upon this exemption, prepared in accordance with generally accepted accounting principles.
 - (B) Income and expense statements for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet or such shorter period as the issuer has been in existence prepared in accordance with generally accepted accounting principles.
 - (C) Any statements or information necessary to explain extraordinary or non-recurring fluctuations in the statements supplied.
 - (D) If applicable, the number of pledging units and the average annual contribution per pledging unit.

In lieu of the disclosure document as described in this Paragraph, the issuer may use a disclosure document prepared in accordance with the Church Bond Guidelines prepared by NASAA published at Par. 1001 of CCH NASAA Reports, as may be amended from time to time, where such guidelines are applicable.

(d) Not less than five business days prior to any sale of a security in reliance upon the exemption provided by G.S. 78A-16(9) which shall include but not be limited to the receipt by the issuer, or any person acting on the issuer's behalf of a signed subscription agreement of, or the receipt of consideration from, a purchaser, the issuer shall file with the administrator, or cause to be so filed, the following information unless the content or time of filing is modified or waived by the administrator; provided, however that the filing is not required, unless requested by the administrator, where the offering is to be made exclusively to members of the nonprofit issuer and occupants of such members' households:

- (1) A statement, signed by the issuer and acknowledged before a notary public or other similar officer:
 - (A) Identifying the issuer, including the name, form of organization, date and state of organization, the nonprofit purpose for which the issuer is organized, address, telephone number and the appropriate representative to respond to questions;
 - (B) Identifying who will be selling the securities in this state and whether commissions, remuneration or compensation will be paid and the terms thereof;
 - (C) Describing the securities to be sold, including the type, aggregate offering amount to be offered in this state and the issue of which they are a part;
 - (D) Representing that the issuer is not disqualified by Paragraph (a) of this Rule from reliance upon this exemption;
 - (E) Representing that a disclosure document as may be required by Paragraph (c) of this Rule will be delivered to each purchaser prior to consummation of a sale or execution of a subscription agreement, or a statement as to the reasons the issuer believes that the disclosure document is unnecessary or inappropriate;
 - (F) Representing that in the event of any material change in the security or offering or if the disclosure document becomes incomplete in any material respect or contains any statement which is in the light of the circumstances under which it is made, false or misleading with respect to any material fact, the sale or offer for sale pursuant to this exemption will immediately cease, and will not be resumed until corrective disclosures are prepared and all prior purchasers are provided rescission offers pursuant to G.S. 78A-56(g).
- (2) An opinion of counsel relating to the "not for private profit" status of the issuer, the formation and good standing of the issuer, legality of the securities to be issued, and the validity of the indenture under which the securities are to be issued, or a letter of determination of tax exempt status issued by the Internal Revenue Service.
- (3) A consent to service of process (Form U-2) signed by the issuer and verified by a notary public or similar officer, naming the Secretary of State as service agent and accompanied by a corporate resolution of the board of directors, (Form U-2A), if applicable, authorizing the consent.

(e) Nothing in this Rule .1209 is intended to or should be construed as in any way relieving the issuer or any person acting on behalf of the issuer from providing disclosure to prospective investors adequate to satisfy the antifraud provisions of the Act.

(f) Should for any reason, an offer and sale of securities made in reliance upon the exemption provided by G.S. 78A-16(9) fail to comply with all of the conditions hereof, the issuer may claim the availability of any other applicable exemption.

(g) Any offer or sale shall be deemed to have been made in compliance with the exemption provided by G.S. 78A-16(9) if the issuer has substantially complied in all material respects with this Rule and G.S. 78A-16(9) would otherwise be available.

(h) In view of the objective of this Rule and the purpose and policies underlying the Act, the exemption provided by G.S. 78A-16(9) is not available to any issuer with respect to any transaction which although in technical compliance with the exemption provided by G.S. 78A-16(9) and this Rule, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this Rule.

*History Note: Authority G.S. 78A-16(9); 78A-49(a);
Eff. January 1, 1984;
Amended Eff. October 1, 1988;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 6, 2016.*