**Section 130.212 Definition of Acts Not Constituting an "Offer" Under Section 2.5a of the Act (Testing the Waters)**

a) The solicitation of indications of interest to purchase a security made by or on behalf of an issuer for the sole purpose of soliciting an indication of interest in receiving a prospectus (or its equivalent) for such security does not constitute an offer under Section 5 of the Act provided that all of the following conditions are satisfied:

1) The issuer is, or will be, a business entity organized under the laws of one of the states or possessions of the United States or one of the provinces or territories of Canada, is engaged in or proposes to engage in a business other than petroleum exploration or production or mining or other extractive industries and is not a blind pool offering or other offering for which the specific business or properties cannot now be described. For purposes of this Section, the term "blind pool" means, without limitation, a development stage company that has generally disclosed its business plan or purpose, but such business plan or purpose has not identified specific properties or products to be purchased, constructed or developed;

2) The solicitor intends to register the security under Section 5 of the Act;

3) At least ten business days prior to the initial solicitation of interest under this Section, the solicitor files with the Securities Department a Solicitation of Interest Form together with any other materials or communications which are to be utilized in the solicitation of interest, including, without limitation, the script of any broadcast to be made, the text of any electronic dissemination through such media as the Internet or other data networks, and any similar documents together with a copy of any notice or materials to be published or circulated;

4) At least five business days prior to its usage, the solicitor files with the Securities Department any amendments or supplements to the foregoing materials or additional materials to be utilized in the solicitation of interest, except for materials provided to a particular solicitee pursuant to a request by that person;

5) No Solicitation of Interest Form, script, advertisement or other material which the solicitor has been notified by the Securities Department not to distribute is utilized to solicit indications of interest;

6) Except for scripted broadcasts and published notices, the solicitor does not communicate with any solicitee about the contemplated offering unless the solicitee is provided with the most current Solicitation of Interest Form at or before the time of the communication but no later than five days from the date of communication;

7) During the solicitation of interest period, the solicitor does not solicit or accept money or a commitment to purchase securities;

8) No sale is made until seven days after delivery to the purchaser of a final prospectus, offering circular or disclosure document as the case may be, or in those instances hereunder in which delivery of a preliminary prospectus is allowed, a preliminary prospectus; and

9) The solicitor does not know, and in the exercise of reasonable care, could not know that the issuer or any of the issuer's officers, directors, ten percent shareholders, partners, members or promoters (or any person performing a similar function):

A) Has filed a registration statement or an application for registration of securities which is the subject of a currently effective registration stop order entered pursuant to any federal or state securities law within five years prior to the filing of the Solicitation of Interest Form.

B) Has been convicted within five years prior to the filing of the Solicitation of Interest Form of any felony or misdemeanor in connection with the offer, purchase or sale of any security, or any felony involving fraud or deceit, including, without limitation, forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud.

C) Is currently subject to any federal or state administrative enforcement order or judgment entered by any state securities administrator or the Securities and Exchange Commission within five years prior to the filing of the Solicitation of Interest Form or is subject to any federal or state administrative enforcement order or judgment entered within five years prior to the filing of the Solicitation of Interest Form in which fraud or deceit, including, without limitation, making untrue statements of material facts or omitting to state material facts, was found.

D) Is subject to any federal or state administrative enforcement order or judgment which prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase or sale of securities.

E) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining such party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the State entered within five years prior to the filing of the Solicitation of Interest Form.

 The prohibitions listed above in subsections (a)(9)(A) through (E) of this Section shall not apply if the person subject to the disqualification is duly licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against such person or if the dealer employing such party is registered in this State and the Form BD filed with this State discloses the order, conviction, judgment or decree relating to such person. No person disqualified under this Section may act in a capacity other than that for which the person is registered. Any disqualification caused by this Section is automatically waived if the agency which created the basis for the disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

b) A failure to comply with any condition of subsection (a) of this Section will not result in the offer of a security provided that the solicitor demonstrates that:

1) the failure to comply did not pertain to a condition directly intended to protect that particular individual or entity;

2) the failure to comply was insignificant with respect to the offering as a whole; and

3) a good faith and reasonable attempt was made to comply with all applicable conditions of subsection (a) of this Section.

 Where a solicitation of interest is established only through reliance upon this subsection (b), the failure to comply shall nonetheless be actionable by the Securities Department as a violation of Section 12 of the Act.

c) The solicitor shall comply with the requirements set forth below:

1) Any published notice, script for broadcast or electronic dissemination through such media as the Internet or other data networks or similar means of communication shall contain at least the identity of the chief executive officer of the issuer, a brief and general description of its business and products, and the following legends:

A) THIS IS A SOLICITATION OF INTEREST ONLY. NO MONEY OR OTHER CONSIDERATION IS BEING SOLICITED AND NONE WILL BE ACCEPTED;

B) NO SALES OF THE SECURITIES WILL BE MADE OR COMMITMENT TO PURCHASE ACCEPTED UNTIL THE DELIVERY OF A FINAL OFFERING STATEMENT THAT INCLUDES COMPLETE INFORMATION ABOUT THE ISSUER AND THE OFFERING;

C) AN INDICATION OF INTEREST MADE BY A PROSPECTIVE INVESTOR INVOLVES NO OBLIGATION OR COMMITMENT OF ANY KIND;

D) THIS SOLICITATION OF INTEREST IS BEING MADE PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE FEDERAL AND STATE SECURITIES LAWS. NO SALE MAY BE MADE UNTIL THE OFFERING STATEMENT IS QUALIFIED BY THE SEC AND IS REGISTERED IN THIS STATE; AND

E) NEITHER THE FEDERAL NOR THE STATE AUTHORITIES HAVE CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT OR ANY OTHER DOCUMENT PRESENTED TO YOU IN CONNECTION WITH THIS SOLICITATION OF INTEREST.

2) All communications with prospective investors made in reliance on this Section must cease after an application for registration of securities is filed in this State, and no sale may be made until at least twenty days after the last communication made in reliance on this Section.

3) A preliminary prospectus (or its equivalent) may only be used in connection with an offering for which indications of interest have been solicited under this Section provided that the offering is conducted by a registered dealer in this State.

d) The Securities Director, or his or her designee, may waive in writing any provision of this Section, upon written application by the solicitor and due cause having been shown. Neither compliance nor attempted compliance with this Section, nor the absence of any objection or proceeding instituted or Order issued by the Secretary of State under Section 11 of the Act with respect to any solicitation of interest to purchase securities undertaken pursuant to this Section, shall be deemed to be a waiver of any provision of this Section or deemed to be a confirmation by the Securities Department of the availability of this Section.

e) Issuers on whose behalf indications of interest are solicited under this Section may not make offers or sales in reliance upon subsection D, G, H, R or S of Section 4 of the Act until twelve months after the last communication with a solicitee made pursuant to this Section.

(Source: Added at 21 Ill. Reg. 7523, effective May 23, 1997)