

DRAFT

FOR DISCUSSION ONLY

**PROPOSED REVISIONS OF  
UNIFORM SECURITIES ACTS**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**OCTOBER, 1999**

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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## **REPORTER'S PREFACE**

There are two versions of the Uniform Securities Act currently in force.

The Uniform Securities Act of 1956 ("1956 Act") has been adopted at one time or another, in whole or in part, by 37 jurisdictions.

The Revised Uniform Securities Act of 1985 ("RUSA") has been adopted in only a few states.

Both Acts have been preempted in part by the National Securities Markets Improvement Act of 1996 ("NSMIA") and the Securities Litigation Uniform Standards Act of 1998.

The need to modernize the Uniform Securities Act is a consequence of a combination of the new federal preemptive legislation, significant recent changes in the technology of securities trading and regulation, and the increasing internationalization of securities trading.

The approach of this first draft is to use the substance and vocabulary of the more widely adopted 1956 Act, when appropriate. The attached draft also takes into account, when appropriate, RUSA, the recent federal preemptive legislation, and the other developments described in the comments.

The attached draft has been reorganized to follow the current National Conference of Commissioners on Uniform State Laws ("NCCUSL") Procedural and Printing Manual 26-27 (1997).

This is a new Uniform Securities Act. Amendment of the earlier 1956 Act or RUSA would not be wise given the several different versions of the 1956 Act adopted by the states and the Drafting Committee's determination to seek adoption of the new Uniform Securities Act in all state jurisdictions.

The attached draft is solely a new Uniform Securities Act. It does not codify or append related regulations or guidelines. This Act also authorizes state administrators to adopt further exemptions without statutory amendment (See, e.g., §5).

This initial draft of a new Uniform Securities Act should be read as a discussion draft. Comments or proposals for change in this draft can be forwarded before [to be encouraged] or after [reflecting the discussions] the October 22-24, 1999 Drafting Committee meeting at the Arlington Heights Hotel, Arlington, Virginia to:

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Official Comments will be written later.

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1 **UNIFORM SECURITIES ACT (2001)**

2 **SECTION 1 [SHORT TITLE; STATUTORY POLICY].**

3 (a) This Act may be cited as the Uniform Securities Act (2001).

4 (b) This [Act] shall be applied and construed to effectuate its general purpose to make  
5 uniform the law with respect to the subject of this [Act] among states and to coordinate the  
6 interpretation and administration of this [Act] with the related federal laws and regulations.

7 **REPORTER'S COMMENT**

8 Source of Law: 1956 Act §§415-416; RUSA §§803-804.

9 1. The goals of uniformity among the states and coordination with related federal  
10 regulation may be enhanced by greater use of such information technology systems as the Central  
11 Registration Depository (CRD), or the Securities and Exchange Commission (SEC) Electronic  
12 Data Gathering and Retrieval (EDGAR) System. These types of techniques are consistent with a  
13 potential system of “one stop filing” of all federal and state forms that is encouraged by this Act.

14 2. Recent NASAA sponsored efforts to achieve a voluntary Coordinated Equity Review  
15 (CER) System for certain securities also suggest the potential feasibility of “one stop review” of  
16 issuer, broker-dealer, or investment adviser filings. This type of coordination is encouraged, but  
17 not required, by this Act.

18 3. This Act is intended to be revenue neutral in its impact on existing state laws.

1 **[PART A: DEFINITIONS]**

2 **SECTION 2 [DEFINITIONS]** When used in this Act, unless the context otherwise requires:

3 **REPORTER'S COMMENT**

4 Source of Law: 1956 Act §401; RUSA §101; Sec. Act §2(a).

5 (a) "[Administrator]" [substitute any other appropriate term, such as "Commission,"  
6 "Commissioner," "Secretary"] means the [insert name of administrative agency or official].

7 **REPORTER'S COMMENT**

8 Source of Law: 1956 Act §401(a); RUSA §101(1).

9 (b) "Agent" means an individual other than a broker-dealer authorized to act or acting for a  
10 broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. A  
11 partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or  
12 performing similar functions, is an agent only if he or she otherwise comes within this definition.

13 **REPORTER'S COMMENT**

14 Source of Law: The 1956 Act §401(b) includes the substance of this definition and uses the  
15 term "agent" rather than RUSA §101(14)'s term "sales representative."

16 1. In the first sentence the 1956 Act's phrase "who represents a broker-dealer or issuer . .  
17 ." has been replaced by RUSA's more precise "authorized to act and acting for . . ."

18 2. The 1956 Act also included a middle sentence exempting several types of issuer's  
19 agents. The substance of these exemptions has been relocated to the definition of a "security" in  
20 §2(r), and the broker-dealer exemptions in §14.

21 3. NASAA added reference in 1997 amendments to new exceptions found in §§18(b)(3)  
22 and 18(b)(4) of the Securities Act of 1933. These are included in a new final clause in the first  
23 sentence.

1 (c) “Broker-dealer” means a person engaged in the business of effecting transactions in  
2 securities for the account of others or for the person’s own account. The term does not include:

- 3 1. an agent;
- 4 2. an issuer, except when effecting transactions other than with respect to its own  
5 securities;
- 6 3. a depository institution or international bank; or
- 7 4. any other person the [Administrator], by rule or order, designates.

#### 8 **REPORTER’S COMMENT**

9 Source of Law: RUSA §101(2); 1956 Act §401(c).

10 1. This definition follows the phrasing of RUSA §101(2), but substitutes the term “agent”  
11 for “sales representative” in §2(c)(1).

12 2. The 1956 Act had an alternative equivalent to §2(c)(4) which read:

13 a person who has no place of business in this state if (A) he effects  
14 transactions in this state exclusively with or through (i) the issuers of  
15 the securities involved in the transactions, (ii) other broker-dealers, or  
16 (iii) banks, savings institutions, trust companies, insurance companies,  
17 investment companies as defined in the Investment Company Act of  
18 1940, pension or profit-sharing trusts, or other financial institutions or  
19 institutional buyers, whether acting for themselves or as trustees, or (B)  
20 during any period of twelve consecutive months he does not direct  
21 more than fifteen offers to sell or buy into this state in any manner to  
22 persons other than those specified in clause (A), whether or not the  
23 offeror or any of the offerees is then present in this state.

24 3. In 1997 NASAA amended the equivalent to §§2(c)(3) & (4) to read:

25 (3) a bank, savings institution, or trust company, or (4) a person who  
26 has no place of business in this state if (A) he effects transactions in this  
27 state exclusively with or through (i) the issuers of the securities  
28 involved in the transactions, (ii) other broker-dealers, or (iii) banks,  
29 savings institutions, trust companies, insurance companies, investment  
30 companies as defined in the Investment Company Act of 1940, pension

1 or profit-sharing trusts, or other financial institutions or institutional  
2 buyers, whether acting for themselves or as trustees, or (B) the person  
3 is licensed under the securities act of a state in which the person  
4 maintains a place of business and the person offers and sells in this state  
5 to a person who is an existing customer of the person and whose  
6 residence is not in this state.

7 4. Section 15(h)(1) of the National Securities Markets Improvement Act of 1996 preempts  
8 state law from “[establishing] capital, custody, margin, financial responsibility, making and keeping  
9 records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal  
10 securities dealers, government securities brokers, or government securities dealers that differ from,  
11 or are in addition to the requirements in those areas established under [the Securities Exchange Act].”  
12 These preemptions are recognized in the substantive broker-dealer provisions, §§13-17.

13 (d) “Depository institution” means:

14 (1) a person that is organized, chartered, or holding an authorization certificate  
15 under the laws of a state or of the United States which authorizes the person to receive deposits,  
16 including a savings, share, certificate, or deposit account, and which is supervised and examined  
17 for the protection of depositors by an official or agency of a state or the United States; and

18 (2) a trust company or other institution that is authorized by federal or state law to  
19 exercise fiduciary powers of the type a national bank is permitted to exercise under the authority of  
20 the Comptroller of the Currency and is supervised and examined by an official or agency of a state  
21 or the United States. The term does not include an insurance company or other organization  
22 primarily engaged in the insurance business or a Morris Plan bank, industrial loan company, or a  
23 similar bank or company unless its deposits are insured by a federal agency.

#### 24 **REPORTER’S COMMENT**

25 Source of Law: RUSA §101(3); cf. Securities Exchange Act §§3(a)(6) (“bank”), 3(a)(46)  
26 (“financial institution”).

27 1. There is no definition of depository institution in the 1956 Act, although there is use of

1 such undefined terms as “banks,” “savings institutions,” and “trust companies.”

2 (e) “Federal covered investment adviser” means a person who is registered under §203 of  
3 the Investment Advisers Act of 1940.

#### 4 **REPORTER’S COMMENT**

5 Source of Law: NASAA 1997 Amendment.

6 1. This provision is necessitated by Title III of the National Securities Markets  
7 Improvement Act of 1996 which allocates to exclusive state regulation advisers with assets under  
8 management of \$25 million or less unless they were advisers to a federally registered investment  
9 company. Any adviser with assets under management of \$25 million or more will register solely  
10 under §203 of the Investment Advisers Act and not state law. This division of labor is intended to  
11 eliminate duplicative regulation of investment advisers.

12 2. The NASAA definition also included the now unnecessary clause “except that, until  
13 October 10, 1999, a federal covered investment adviser for which a nonpayment or underpayment  
14 of a fee has not been promptly remedied following written notification to the adviser of such  
15 nonpayment or underpayment shall not be a federal covered investment adviser.”

16 (f) “Federal covered security” means any security that is a covered security under §18(b) of  
17 the Securities Act of 1933 or rules or regulations adopted under §18(b).

#### 18 **REPORTER’S COMMENT**

19 Source of Law: NASAA 1997 Amendment.

20 1. The National Securities Markets Improvement Act of 1996 was most significant for its  
21 partial preemption of state law in the securities offering and shareholder report areas. Under  
22 amended §18(a) of the federal Securities Act of 1933, no state statute, rule, order, or other  
23 administrative action may apply to

24 (1) The registration of a “covered” security or a security that will be a  
25 covered security upon completion of the transaction;

26 (2)(A) Any offering document prepared by or on behalf of the issuer of a  
27 covered security;

28 (2)(B) Any proxy statement, report to shareholders, or other disclosure  
29 document relating to a covered security or its issuer that is required to be filed with  
30 the SEC or any national securities association registered under §15A of the

1 Securities Exchange Act [today, the NASD]; or

2 (3) The merits of a covered security or a security that will be a covered  
3 security upon completion of the transaction.

4 Section 18 applies to four types of “covered securities”:

5 (1) Securities listed or authorized for listing on the New York Stock  
6 Exchange (NYSE), the American Stock Exchange (Amex); the National Market  
7 System of the NASDAQ stock market; or securities exchanges registered with the  
8 SEC (or any tier or segment of their trading) if the SEC determines by rule that  
9 their listing standards are substantially similar to those of the NYSE, Amex, or  
10 NASDAQ National Market System, which the Commission has now done through  
11 Rule 146; and any security of the same issuer that is equal in seniority or senior to  
12 any security listed on the NYSE, Amex, NASDAQ National Market System list, or  
13 other applicable securities exchange;

14 (2) Securities issued by a registered investment company (or one that has  
15 filed a registration statement under the federal Investment Company Act of 1940);

16 (3) Securities offered or sold to “qualified purchasers.” This category of  
17 covered securities will become operational only when the SEC defines the term  
18 “qualified purchaser” by rule, which to date it has not done; and

19 (4) Securities issued under the following specified exemptions of the  
20 Securities Act:

21 (A) Sections 4(1) [transactions by persons other than an  
22 issuer, underwriter or dealer], and 4(3) [dealers after specified  
23 periods of time], but only if the issuer files reports with the  
24 Commission under §13 or 15(d) of the Securities Exchange Act;

25 (B) Section 4(4) [brokers];

26 (C) Securities Act exemptions in §3(a) with the exception of  
27 the charitable exemption in §3(a)(4), the intrastate exemption in  
28 §3(a)(11), and the municipal securities exemption in §3(a)(2), but  
29 only with “respect to the offer or sale of such security in the state in  
30 which the issuer of such security is located”; and

31 (D) Section 4(2) [private placement exemption].

32 Section 18(c)(1) preserves state authority “to investigate and bring enforcement actions  
33 with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with  
34 securities or securities transactions.” NSMIA, in essence, preempts aspects of the securities  
35 registration and reporting processes for specified covered securities. The Act does not diminish  
36 state authority to investigate and bring enforcement actions generally with respect to securities  
37 transactions.

38 The states are also authorized to require filings of any document filed with the SEC for  
39 notice purposes “together with annual or periodic reports of the value of securities sold or offered  
40 to be sold to persons located in the state (if such sales data is not included in documents filed with  
41 the Commission), solely for notice purposes and the assessment of any fee, together with a consent  
42 to service of process and any required fee.” §18(c)(2). However no filing or fee may be required  
43 with respect to any listed security that is a covered security under §18(b)(1) [traded on specified



1 stock markets].

2 2. The 1997 NASAA Amendment also included the now unnecessary clause “except, up  
3 through October 10, 1999 or such other date as may be legally permissible, a federal covered  
4 security for which a fee has not been paid and promptly remedied following written notification  
5 from the [Administrator] to the issuer of the nonpayment or underpayment of such fees, as  
6 required by this Act, shall not be a federal covered security.”

7 (g) “Filed” means the actual [or electronic] delivery of a document or application to the  
8 [Administrator or designated depository] or designee of the [Administrator] or to the principal  
9 office of the [Administrator].

#### 10 **REPORTER’S COMMENT**

11 Source of Law: RUSA §101(4).

12 1. The RUSA definition has been revised to recognize that documents or applications may  
13 be filed electronically with the [Administrator], or when designated, depository institutions such as  
14 the Central Registration Depository or successor institutions or the Securities and Exchange  
15 Commission’s (SEC) Electronic Data Gathering and Retrieval (EDGAR) System.

16 2. The definition in this Section also is intended to permit an Administrator to accept  
17 filings over the Internet or through a direct modem system such as that used with EDGAR.

18 (h) “Fraud,” “deceit,” and “defraud” are not limited to common law deceit.

#### 19 **REPORTER’S COMMENT**

20 Source of Law: 1956 Act §401(d); RUSA §101(6).

21 (i) “Guaranteed” means guaranteed as to payment of principal, interest, or dividends.

#### 22 **REPORTER’S COMMENT**

23 Source of Law: 1956 Act §401(e); RUSA §401(a)(1).

24 1. This definition follows the 1956 Act.

1           2. RUSA uses an alternative and broader definition:

2                   “Guaranteed” means guaranteed as to payment of all or substantially  
3                   all of principal and interest or dividends.

4           (j) “Investment adviser” means a person who, for compensation, engages in the business of  
5   advising others as to the value of securities or as to the advisability of investing in, purchasing, or  
6   selling securities or who, for compensation and as a part of a business, issues or promulgates  
7   analyses or reports concerning securities. The term does not include:

8                   (1) an investment adviser representative;

9                   (2) a depository institution or international bank;

10                  (3) a lawyer, accountant, engineer, or teacher whose performance of investment  
11   advisory services is solely incidental to the practice of the person’s profession;

12                  (4) a broker-dealer whose performance of investment advisory services is solely  
13   incidental to the conduct of business as a broker-dealer and who receives no special compensation  
14   for the investment advisory services;

15                  (5) a publisher, employee, or columnist of a newspaper, news magazine, or business  
16   or financial publication, or an owner, operator, producer, or employee of a cable, radio, or  
17   television network, station, or production facility if, in either case, the financial or business news  
18   published or disseminated is made available to the general public and the content does not consist  
19   of rendering advice on the basis of the specific investment situation of each client;

20                  (6) a person whose advice, analyses, or reports relate only to securities exempt  
21   under §3(a);

22                  (7) any other person the [Administrator], by rule or order, designates.

## REPORTER'S COMMENT

Source of Law: 1956 Act §401(f); RUSA §101(7); and NASAA 1997 Amendment.

1. This provision follows the 1956 Act except (a) it adds §2(j)(1) to incorporate the new concept of an investment adviser representative; (b) substitutes in §2(j)(2) the term “depository institution” for the terms “a bank, savings institution, or trust company”; (c) broadens the publication exception in §2(j)(5) following RUSA; and (d) eliminates the exception for “a person who has no place of business in this state if (A) his only clients in this state are other investment advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940; pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (B) during any period of twelve consecutive months he does not direct business communications into this state in any manner to more than five clients other than those specified in clause (A), whether or not he or any of the persons to whom the communications are directed is then present in this state”.

2. When the broadened language in the equivalent to §2(j)(5) was included in RUSA, an Official Code Comment was adopted that read:

Subparagraph (v) has been revised to make it clear that newsletters, radio, or TV broadcasts and other financial publications do not constitute giving investment advice if the information is made available to the general public and the content is not based upon the specific investment situations of the publisher's clients. This provision is consistent with the United States Supreme Court's construction in *Lowe v. SEC*, [472 U.S. 181] (1985), of the counterpart provision in the Investment Advisers Act of 1940.

3. The definition in §2(j) does not include the sentence added by the NASAA Amendment in 1997:

“Investment adviser” also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation.

Instead the definition follows its federal counterpart and will reach financial planners who otherwise satisfy the definition of investment adviser. Query: Is this sufficient?

(k) “Investment adviser representative” means any partner, officer, director of (or a person

occupying a similar status or performing similar functions) or other individual employed by or associated with an investment adviser, and does any of the following, except clerical or ministerial personnel, who (1) makes any recommendations or otherwise renders advice regarding securities, (2) manages accounts or portfolios of clients, (3) determines which recommendation or advice regarding securities should be given, (4) solicits, offers or negotiates for the sale of or sells investment advisory services, or (5) supervises employees who perform any of the foregoing.

### **REPORTER'S COMMENT**

Source of Law: NASAA 1997 Amendment.

1. Investment adviser representatives are not required to register under the federal Investment Advisers Act, before or after NSMIA.

2. Section 14(d) provides that an individual who has no place of business within a state is not an investment adviser representative within that state.

(l) "Issuer" means a person who issues or proposes to issue a security, except:

(1) The "issuer" of a collateral trust certificate, voting trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or persons performing similar functions, is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued.

(2) The "issuer" of an equipment trust certificate, including a conditional sales contract or similar security serving the same purpose, is the person to whom the equipment or property is or is to be leased or conditionally sold.

(3) The "issuer" of a fractional undivided interest in an oil, gas, or other mineral

1 lease or in payments out of production under a lease, right, or royalty is the owner of an interest in  
2 the lease or in payments out of production under a lease, right, or royalty, whether whole or  
3 fractional, who creates fractional interests for the purpose of sale.

#### 4 **REPORTER'S COMMENT**

5 Source of Law: 1956 Act §401(g); RUSA §101(8).

6 1. The definition in §2(l) includes §2(l)(2) that did not appear in the 1956 Act but was  
7 added by RUSA.

8 (m) “Nonissuer transaction” means a transaction not directly or indirectly for the benefit of  
9 the issuer.

#### 10 **REPORTER'S COMMENT**

11 Source of Law: 1956 Act §401(h); RUSA §101(9).

12 (n) “Person” means an individual, corporation, business trust, estate, trust, partnership,  
13 association, joint venture, government, governmental subdivision or agency, or any other legal or  
14 commercial entity.

#### 15 **REPORTER'S COMMENT**

16 Source of Law: 1956 Act §401(i); RUSA §101(10).

17 1. Section 2(n) uses the slightly broader RUSA definition of “person” and adds to the  
18 substance of the 1956 Act the concluding phrase “or any other legal or commercial entity.”

19 (o) “Price amendment” means the amendment to a registration statement filed under the  
20 Securities Act of 1933 or, if no amendment is filed, the prospectus or prospectus supplement filed  
21 under the Securities Act of 1933, which includes a statement of the offering price, underwriting

1 and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other  
2 matters dependent upon the offering price.

### 3 **REPORTER'S COMMENT**

4 Source of Law: RUSA §101(11).

5 (p) (1) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition  
6 of, a security or interest in a security for value.

7 (2) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or  
8 solicitation of an offer to buy, a security or interest in a security for value.

9 (3) Any security given or delivered with, or as a bonus on account of, any purchase of  
10 securities or any other thing is considered to constitute part of the subject of the purchase and to have  
11 been offered and sold for value.

12 (4) A purported gift of assessable stock is considered to involve an offer and sale.

13 (5) Every sale or offer of a warrant or right to purchase or subscribe to another security  
14 of the same or another issuer, as well as every sale or offer of a security which gives the holder a  
15 present or future right or privilege to convert into another security of the same or another issuer, is  
16 considered to include an offer of the other security.

17 (6) The terms defined in this Subsection do not include (A) the creation of a security  
18 interest or a loan; (B) any stock dividend, whether the corporation distributing the dividend is the  
19 issuer of the stock or not, if nothing of value is given by stockholders for the dividend [other than the  
20 surrender of a right to a cash or property dividend when each stockholder may elect to take the  
21 dividend in cash or property or in stock]; or (C) any act incident to a judicially approved  
22 reorganization in which a security is issued in exchange for one or more outstanding securities, claims,

1 or property interests, or partly in such exchange and partly for cash.

## 2 **REPORTER'S COMMENT**

3 Source of Law: 1956 Act §401(j); RUSA §101(13).

4 1. Both the 1956 Act and RUSA definition of “sale” or “sell” are modeled on §2(a)(3) of  
5 the Securities Act of 1933.

6 2. RUSA added a new §101(13)(ii) that provides:

7 “Offer to purchase” includes every attempt or offer to obtain, or solicitation  
8 of an offer to sell, a security or interest in a security for value, but the term  
9 does not include a transaction that is subject to Section 14(d) of the  
10 Securities Exchange Act of 1934.

11 3. Language in the 1956 Act in what would be now §2(p)(6) also addressed the now  
12 rescinded SEC “no sale” doctrine and has been eliminated.

13 4. The RUSA version of what is now §2(p)(6)(A) has been adopted rather than the 1956  
14 Act phrase “any bona fide pledge or loan.”

15 (q) “Securities Act of 1933,” “Securities Exchange Act of 1934,” “Public Utility Holding  
16 Company Act of 1935,” “Investment Company Act of 1940,” “Investment Advisers Act of 1940,”  
17 “Employee Retirement Income Security Act of 1974,” “National Housing Act,” and “Commodity  
18 Exchange Act” mean the federal statutes of those names, as amended before or after this Act.

## 19 **REPORTER'S COMMENT**

20 Source of Law: 1956 Act §401(k); RUSA §101(15).

21 (r) “Security” means: a note; stock; treasury stock; bond; debenture; evidence of  
22 indebtedness; certificate of interest or participation in a profit-sharing agreement; a limited  
23 partnership interest; collateral-trust certificate; preorganization certificate or subscription;

transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; fractional undivided interest in an oil, gas, or other mineral lease or in payments out of production under a lease, right, or royalty; a put, call, straddle, or option entered into on a national securities exchange relating to foreign currency; a put, call, straddle, or option on a security, certificate of deposit, or group or index of securities, including an interest in or based on the value of any of the foregoing; or, in general, an interest or instrument commonly known as a “security,” or a certificate of interest or participation in, temporary or interim certificate for, receipt for, whole or partial guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. The term does not include:

(i) an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some other specified period; or

(ii) an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974.

#### **REPORTER’S COMMENT**

Source of Law: 1956 Act §401(l); RUSA §101(16).

1. Section 2(r) adds three provisions from RUSA to the 1956 definition: (a) “a limited partnership interest”; (b) “a put, call, straddle, or option entered into on a national securities exchange relating to foreign currency; a put, call, straddle or option on a security, certificate of deposit, or group or index of securities, including an interest in or based on the value of any of the foregoing”; and (c) the exception for “an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974.”

2. Section 2(r) also uses RUSA’s “fractional undivided interest in oil, gas or other mineral rights” formulation, which originated in §2(a)(1) of the Securities Act rather than the 1956 Act’s formulation, “certificate of interest or participation in an oil, gas or mining title.” The Official Comment to the 1956 Act Section explained:



The phrase in this statute is modeled on the language in §25008(a) of the California act—“certificate of interest in an oil, gas, or mining title or lease”—which may be slightly broader than the federal phrase and in any event is by far the most commonly found phrase in the state statutes. The words which have been added to the California language are intended to make it clear that so-called “oil payments” are securities whether or not they may be regarded as interests in a title or lease. Very few states go so far as to include entire leasehold interests. However, it is clear that even entire leasehold interests may be offered under such circumstances that a security is involved in the nature of an “investment contract.” SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943).

In recent years, the courts interpreting §2(a)(1) of the federal Securities Act have often interpreted oil, gas or mineral interests as investment contracts when they were not fractional undivided interests. 2 L. Loss & J. Seligman, *Securities Regulation* 979-982 (3d ed. rev. 1999).

3. Much of the language in §2(r), like the language in the 1956 Act §401(l) and RUSA §101(16), is identical or virtually identical to §2(a)(1) of the Securities Act. State courts interpreting the Uniform Securities Act definition of security have often looked to interpretations of the federal definition of security. See generally 2 L. Loss & J. Seligman, *Security Regulation* 923-1138.19 (3d ed. rev.1999).

4. Preorganization certificates or subscriptions are included in this definition, obviating the need for a separate definition as in RUSA §402(13).

(s) “Self-regulatory organization” means a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, a national securities association of brokers and dealers registered under Section 15A of the Securities Exchange Act of 1934, a clearing agency registered under Section 17A of the Securities Exchange Act of 1934, or the Municipal Securities Rulemaking Board established under Section 15B(b)(1) of the Securities Exchange Act of 1934.

## REPORTER'S COMMENT

Source of Law: RUSA §101(17).

1. RUSA §101(17) also includes a reference to §21 of the Commodity Exchange Act, which is omitted here.

1 (t) “State” means a state, commonwealth, territory, or possession of the United States, the  
2 District of Columbia, or the Commonwealth of Puerto Rico.

3 **REPORTER’S COMMENT**

4 Source of Law: 1956 Act §401(m); RUSA §101(18).

1 **[PART B: EXEMPTIONS]**

2 **SECTION 3 [EXEMPT SECURITIES].** The following securities are exempt from §§7 and 21:

3 (a) [United States and Municipal Governments and Agencies]. Any security (including a  
4 revenue obligation) issued or guaranteed by the United States or any Territory thereof, or by the  
5 District of Columbia, or by any State of the United States, or by any political subdivision of a State  
6 or Territory or by any public instrumentality of one or more States or Territories, or by any person  
7 controlled or supervised by and acting as an instrumentality of the Government of the United  
8 States pursuant to authority granted by the Congress of the United States; any certificate of  
9 deposit for any of the foregoing; or any security which is an industrial development bond (as  
10 defined in Section 103(c)(2) of the Internal Revenue Code of 1954) the interest on which is  
11 excludable from gross income under Section 103(a)(1) of such Code [if, by reason of the  
12 application of paragraph (4) or (6) of Section 103(c) of such Code (determined as if paragraphs  
13 (4)(A), (5), and (7) were not included in such Section 103(c)), paragraph (1) of such Section  
14 103(c) does not apply to such security] [except to the extent that it is preempted by §18(b)(4)(C)  
15 [specified §3(a) exemptions] of the Securities Act of 1933].

16 **REPORTER'S COMMENT**

17 Source of Law: Sec. Act §3(a)(2); 1956 Act §402(a)(1); RUSA §401(b)(1).

18 1. Section 3 includes exempt securities and Section 4 includes exempt transactions. Both  
19 exempt securities and exempt transactions are exempt from the securities registration and the filing  
20 of sales literature Sections of the Act. Neither §3 nor §4 provide an exemption from the Act's  
21 antifraud provisions, §§18 and 22 .

22 A §3 exempt security retains its exemption when initially issued and in subsequent trading.

23 A §4 transaction exemption must be demonstrated before each transaction.

24 2. Section 3(a) is identical to §3(a)(2) of the Securities Act of 1933 except for the final  
25 "except" clause and is intended to provide certainty to issuers that a security exempt from the

1 federal Securities Act will also be exempt from the Uniform Securities Act.

2 3. Section 3(a) has substantive differences from RUSA: (a) The exemption does not  
3 include “insured” securities, only guaranteed securities; (b) the exemption does not include  
4 international agencies of which the United States is a member, which are exempted in §3(c) of this  
5 Draft as international banks; and (c) the exemption substitutes a clause concerning industrial  
6 revenue bonds for somewhat similar phraseology in RUSA.

7 4. NSMIA, in effect, preempts state regulation of municipal offerings but not “with respect  
8 to the offer or sale of such security in the state in which the issuer of such security is located.”  
9 SEC Act §18(b)(4)(C). The final “except” clause aligns §3(a) with §18(b)(4)(C).

10 (b) [Foreign Governments]. Any security issued or guaranteed by Canada, any Canadian  
11 province, any political subdivision of any such province, any agency or corporate or other  
12 instrumentality of one or more of the foregoing, or any other foreign government with which the  
13 United States currently maintains diplomatic relations, or any political subdivision thereof, if the  
14 security is recognized as a valid obligation by the issuer or guarantor.

#### 15 **REPORTER’S COMMENT**

16 Source of Law: 1956 Act §402(a)(2); RUSA §401(b)(2).

17 1. The language of §3(b) is taken verbatim from the 1956 Act.

18 2. Unlike RUSA, it does not include “insured” securities.

19 (c) [Depository Institutions and International Banks]. A security issued by and  
20 representing or that will represent an interest in or a direct obligation of, or guaranteed by, a  
21 depository institution if the deposit or share accounts of the depository institution are insured by  
22 the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation,  
23 the National Credit Union Share Insurance Fund, or a successor to an applicable agency authorized

1 by federal law; or by any international bank of which the United States is a member and whose  
2 securities are exempted from the Securities Act of 1933.

### 3 **REPORTER'S COMMENT**

4 Source of Law: RUSA §401(b)(3).

5 1. Section 402(a)(3) of the 1956 Act exempts specified bank and similar depository  
6 institutions; §402(a)(4) exempts specified savings and loan and similar thrift institution securities;  
7 and §402(a)(6) exempts specified credit union securities. The approach in RUSA is preferable.  
8 RUSA combines the three types of depository institutions into a common definition (see RUSA  
9 §101(13) which is adopted here as §2(d)) and a common exemption (see RUSA §401(a)(3) which  
10 is adopted in this Section).

11 2. Securities issued or guaranteed by the International Bank for Reconstruction and  
12 Development, 22 U.S.C. §286k-1(a); the Inter-American Development Bank, 22 U.S.C. §283h(a);  
13 the Asian Development Bank, 22 U.S.C. §285h(a); the African Development Bank, 22 U.S.C.  
14 §290i-9; the International Finance Corporation, see 22 U.S.C. §282k; and the European Bank for  
15 Reconstruction and Development, see 22 U.S.C. §290l-9(a); are treated as exempted securities  
16 within the meaning of §3(a)(2) of the Securities Act of 1933. See 3 L. Loss & J. Seligman,  
17 Securities Regulation 1191-1194 (3d ed. rev. 1999).

18 (d) [Insurance Companies]. Any security issued by and representing an interest in or a  
19 debt of, or guaranteed by, any insurance company organized under the laws of any state and  
20 authorized to do business in this state.

### 21 **REPORTER'S COMMENT**

22 Source of Law: 1956 Act §402(a)(5); RUSA §401(b)(4).

23 1. In 1958 the Conference amended the 1956 Act §402(a)(5) to add the clause “but this  
24 exemption does not apply to an annuity contract, investment contract, or similar security under  
25 which the promised payments are not fixed in dollars but are substantially dependent upon the  
26 investment results of a segregated fund or account invested in securities.” The Supreme Court  
27 adopted a similar approach to the definition of securities in 1959. SEC v. Variable Annuity Life  
28 Ins. Co. of Am., 359 U.S. 65 (1959); see also SEC v. United Benefit Life Ins. Co., 387 U.S. 202  
29 (1967).

2. This Act adopted a similar approach in its definition of securities in §2(r) and this exemptive provision. Section 2(r) excepts from the definition of security “an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some other specified period.” This exception implicitly recognizes that insurance companies are extensively regulated by state insurance commissioners or other state agencies. Ordinary insurance policies or annuities, without variable returns, are not treated as securities.

In contrast, variable annuities and insurance products as well as other securities issued by insurance companies are securities under §2(r), but are exempted from securities registration under this Section. These securities are subject to the Act's antifraud provision, §18.

3. RUSA §401(b)(4) is similar to the approach taken in this Act but would also exempt securities “insured by” an insurance company.

(e) [Public Utilities]. Any security issued or guaranteed by any public utility or holding company which is a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that Act.

## REPORTER'S COMMENT

Source of Law: 1956 Act §402(a)(7); RUSA §401(b)(5).

1. The 1956 Act and RUSA used substantively similar terms in this exemption.

2. Both the 1956 Act and RUSA include references, omitted here, to railroads and common carriers, and to the Interstate Commerce Commission, whose enabling legislation subsequently was repealed. Query: Do state railroad or common carrier commissions deserve an exemption when they regulate the issuance, or guarantee the issuance of securities?

(f) [Regulated Securities Markets]. A security listed or approved for listing upon notice of issuance on the New York Stock Exchange, the American Stock Exchange, [or such additional national securities exchange or segment or tier as are designated by rule of the Securities and Exchange Commission under §18(c)(1) of the Securities Exchange Act] [, or listed on the (insert names of other appropriate regional stock exchange)]; or a security designated or approved for

1 designation upon issuance for inclusion in the National Market System by the National Association  
2 of Securities Dealers, Inc., [if quotations have been available and public trading has taken place for  
3 the class of security designated before the offer or sale of a security in reliance upon this  
4 exemption]; any other security of the same issuer which is of senior or substantially equal rank; a  
5 security called for by subscription right or warrant so designated; or a warrant or right to purchase  
6 or subscribe to any of the foregoing.

#### 7 **REPORTER'S COMMENT**

8 Source of Law: 1956 Act §402(a)(8); RUSA §401(b)(7)-(8).

9 1. Section 402(a)(8) of the 1956 Act exempts securities listed for trading upon the New York,  
10 American, Midwest (now called the Chicago Stock Exchange), and other (to be inserted) stock  
11 exchanges. Section 401(b)(7) of the 1985 Act employs identical language for stock exchanges and  
12 §401(b)(8) adopts a similar exemption for securities traded in the National Market System list of the  
13 NASDAQ computerized over-the-counter securities market.

14 2. Under Rule 146 the SEC has designated (i) Tier I of the Pacific Stock Exchange; (ii) Tier  
15 I of the Philadelphia Stock Exchange; and (iii) The Chicago Board Options Exchange on condition  
16 that the relevant listing standards continue to be substantially similar to those of the NYSE, AMEX,  
17 or NASDAQ/NMS.

18 (g) [Not-for-Profit Institutions]. Any security issued by a person organized and operated  
19 exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes  
20 and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any  
21 person, private stockholder, individual, or any security of a fund that is excluded from the  
22 definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act of  
23 1940; or any security issued by or any interest or participation in any church plan, company or  
24 account that is excluded from the definition of an investment company under Section 3(c)(14) of  
25 the Investment Company Act of 1940; or a membership or equity interest in, or a retention

1 certificate or like security given in lieu of a cash patronage dividend issued by, a cooperative  
2 organized and operated as a nonprofit membership cooperative under the cooperative laws of any  
3 state if not traded to the public.

#### 4 **REPORTER'S COMMENT**

5 Source of Law: Sec. Act §§3(a)(4), 3(a)(13); RUSA §401(b)(13).

6 1. Section 402(a)(9) of the 1956 Act and §401(b)(10) of RUSA exempt specified not-for-  
7 profit securities. Both are modeled on §3(a)(4) of the Securities Act, which was subsequently  
8 amended. There is also a new §3(a)(13) in the Securities Act that addresses securities issued by  
9 church plans. Section 3(g) combines §§3(a)(4) and 3(a)(13) of the Securities Act of 1933.

10 2. RUSA also included an optional notice and review requirement for not-for-profit  
11 securities in §401(b)(10) “if at least ten days before a sale of the security the person has filed with  
12 the [Administrator] a notice setting forth the material terms of the proposed sale and copies of any  
13 sales and advertising literature to be used and the [Administrator] by order does not disallow the  
14 exemption within the next five full business days.” This Act instead relies exclusively on the  
15 antifraud provisions to address whatever abuses might occur with these securities.

16 3. The final clause of this Section is derived from RUSA §401(b)(13) which was included  
17 in that Act after a number of states had adopted exemptions for securities issued by cooperatives.  
18 The 1956 Act §402(a)(12) had instead merely provided: “insert any desired exemption for  
19 cooperatives.” The drafter of the 1956 Act had found such sharp variation among the 18 states  
20 that then adopted this exemption that “no common pattern can be found.” L. Loss, Commentary  
21 on the Uniform Security Act 118 (1976).

22 In contrast §3(a)(5)(B) of the Securities Act provides:

23 (5) Any security issued . . . (B) by (i) a farmer's  
24 cooperative organization exempt from tax under Section 521 of the  
25 Internal Revenue Code of 1954, (ii) a corporation described in  
26 Section 501(c)(16) of such Code and exempt from tax under Section  
27 501(a) of such Code, or (iii) a corporation described in Section  
28 501(c)(2) of such Code which is exempt from tax under Section  
29 501(a) of such Code and is organized for the exclusive purpose of  
30 holding title to property, collecting income therefrom, and turning  
31 over the entire amount thereof, less expenses, to an organization or  
32 corporation described in clause (i) or (ii).



(h) [Commercial Paper]. A promissory note, draft, bill of exchange, or banker's acceptance that evidences an obligation to pay cash within nine months after the date of issuance, exclusive of days of grace, is issued in denominations of at least \$50,000, and receives a rating in one of the three highest rating categories from a nationally recognized statistical rating organization; or a renewal of such an obligation that is likewise limited, or a guarantee of such an obligation or of a renewal.

#### REPORTER'S COMMENT

Source of Law: RUSA §401(b)(11); Sec. Act §3(a)(3).

1. The 1956 Act §402(a)(10) used a similar approach when it provides:

any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal.

2. RUSA, like the 1956 Act, expressly relied on §3(a)(3) of the Securities Act. RUSA also had the advantage of close to three decades of subsequent administrative and case experience. See 3 L. Loss & J. Seligman, *Securities Regulation* 1205-1219 (3d ed. rev.1999). The Securities and Exchange Commission had emphasized that the Securities Act §3(a)(3) exemption only applies to "prime quality negotiable commercial paper," Sec. Act Rel. 4412 (1961), quoted in 3 L. Loss & J. Seligman, *supra*, at 1210. RUSA §401(b)(11) references to "a rating in one of the three highest rating categories from a nationally recognized statistical rating organization" and "denominations of at least \$50,000" are similar in effect to the less precise "prime quality" language in the SEC interpretation.

3. In 1987 NASAA proposed amendments to the 1956 Act to conform to RUSA §401(b)(11).

4. Regarding SEC treatment of nationally recognized statistical rating organizations, see Securities Exchange Act Rule 15c3-1(c)(2)(vi)(F), which refers without definition to securities "rated in one of the four highest rating categories by at least two of the nationally recognized statistical rating organizations". To date the Commission has used no action letters to recognize which organizations qualify for this designation.

1 (i) [Employee Benefit Plans]. A security issued in connection with an employees' stock  
2 purchase, savings, option, profit-sharing, pension or similar employees' benefit plan.

3 **REPORTER'S COMMENT**

4 Source of Law: RUSA §401(b)(12).

5 1. The definition of security in this Act in §2(r) excludes "an interest in a contributory or  
6 noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act  
7 of 1974."

8 2. The 1956 Act §402(a)(11) did not include this exclusion from the definition of security  
9 but did exempt

10 any investment contract issued in connection with an employees'  
11 stock purchase, savings, pension, profit-sharing, or similar benefit  
12 plan if the [Administrator] is notified in writing thirty days before the  
13 inception of the plan or, with respect to plans which are in effect on  
14 the effective date of this Act, within sixty days thereafter (or within  
15 thirty days before they are reopened if they are closed on the  
16 effective date of this Act).

17 For employee plans not excepted from the definition of a security plan, this is an  
18 underinclusive exemption in that many employee benefit plan securities would not be in the form of  
19 investment contracts. On the other hand, to single out employee plan investment contracts for a  
20 special notice requirement seems unnecessary. Securities relying on this exemption are subject to  
21 the Act's antifraud provisions.

22 (j) [Traded Options]. An option on a security or an index of securities issued by a clearing  
23 agency and traded on a national securities exchange registered under the Securities Exchange Act  
24 of 1934.

25 **REPORTER'S COMMENT**

26 Source of Law: RUSA §401(b)(9).

27 1. The 1956 Act §402(a)(8) as part of the Securities Exchange exemption had exempted  
28 warrants or rights to purchase securities exempt under that Section, but did not otherwise address

options.

2. RUSA §401(b)(9) was drafted after the development of options trading markets. The Official RUSA Code Comment explained:

As with other Subsections, the premise is that the option security will be exempt from registration if the underlying security to which the option relates is either registered under this Act, exempt from registration under this [Section], or not required to be registered under this Act. A common example of the latter category would be nonissuer transactions in the underlying security, currency, commodity, or other interest . . .

(k) [Equipment Trust Certificates]. Equipment trust certificates in respect to equipment leased or conditionally sold to a person, if securities issued by the person would be exempt under this Section.

#### **REPORTER'S COMMENT**

Source of Law: RUSA §401(b)(6).

1. There was no equipment trust certificate exemption in the 1956 Act.
2. The Securities Act §3(a)(6) includes a narrower exemption for railroad equipment trusts.
3. The Official Comment to RUSA §401(b)(6) explains:

The new paragraph (b)(6) reflects the extensive development of equipment lease financing through leveraged leases, conditional sales, and other devices. The underlying premise is that if the securities of the person using such a financing device would be exempt under some other paragraph of Section 401, the equipment trust certificate or other security issued to acquire the property in question also is exempt.

1     **SECTION 4 [EXEMPT TRANSACTIONS].** The following transactions are exempt from §§7  
2     and 21:

3             (a) [Isolated Nonissuer Transactions]. An isolated nonissuer transaction, whether effected  
4     through a broker-dealer or not.

5   **REPORTER'S COMMENT**

6             Source of Law: 1956 Act §402(b)(1); RUSA §402(1).

7             (b) [Secondary Trading Exemption]. A nonissuer transaction in a security of a class  
8     outstanding in the hands of the public for not less than 90 days preceding the transaction if a  
9     publication of a nationally recognized securities rating organization by the [Administrator] by rule  
10    or order or a document filed with the Securities and Exchange Commission (SEC) which is  
11    publicly available through the SEC's Electronic Data Gathering and Retrieval System (EDGAR) or  
12    a successor system contains:

13                 (i) the names of the issuer's officers and directors, or in the case of a non-U.S.  
14    issuer, the corporate equivalents of such persons in the issuer's country of domicile;

15                 (ii) a statement of [audited] financial condition of the issuer as of a date within the  
16    last 18 months; and

17                 (iii) an [audited] statement of income or operations (a) for each of the two years  
18    next preceding the date of the statement of condition or (b) for the period as of the date of the  
19    statement of financial condition if the period of existence is less than two years.

20   **REPORTER'S COMMENT**

21             Source of Law: RUSA §402(3).

1. This is a revision of the Manual Exemption.
2. The 1956 Act §402(b)(2) provides:

Any nonissuer distribution of an outstanding security if (A) a recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or (B) the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security.

3. In 1996 NASAA proposed an amendment to §402(b)(2) that provides:

Any nonissuer transaction by a registered agent of a registered broker-dealer, and any resale transaction by a sponsor of a unit investment trust registered under the Investment Company Act of 1940, in a security of a class that has been outstanding in the hands of the public for at least 90 days provided, at the time of the transaction:

(1) The issuer of the security is actually engaged in business and not in the organization stage or in bankruptcy or receivership and is not a blank check, blind pool or shell company whose primary plan of business is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person or persons;

(2) The security is sold at a price reasonably related to the current market price of the security;

(3) The security does not constitute the whole or part of an unsold allotment to, or a subscription or participation by, the broker-dealer as an underwriter of the security;

(4) A nationally recognized securities manual designated by rule or order of the [Administrator] or a document filed with the U.S. Securities & Exchange Commission (SEC) which is publicly available through the SEC's Electronic Data Gathering and Retrieval System (EDGAR) contains:

(a) A description of the business and operations of the issuer,  
(b) The names of the issuer's officers and the names of the issuer's directors, if any, or, in the case of a non-U.S. issuer, the corporate equivalents of such persons in the issuer's country of domicile,

1 (c) An audited balance sheet of the issuer as of a date within  
2 18 months or, in the case of a reorganization or merger where  
3 parties to the reorganization or merger had such audited balance  
4 sheet, a pro forma balance sheet, and

5 (d) An audited income statement for each of the issuer's  
6 immediately preceding two fiscal years, or for the period of  
7 existence of the issuer, if in existence for less than two years or, in  
8 the case of a reorganization or merger where the parties to the  
9 reorganization or merger had such audited income statement, a pro  
10 forma income statement, and

11 (e) The issuer of the security has a class of equity securities  
12 listed on a national securities exchange registered under the  
13 Securities Exchange Act of 1934, or designated for trading on the  
14 National Association of Securities Dealers Automated Quotation  
15 System (NASDAQ), unless:

16 (i) The issuer of the security is a unit investment trust  
17 registered under the Investment Company Act of 1940, or

18 (ii) The issuer of the security has been engaged in continuous  
19 business (including predecessors) for at least three years, or

20 (iii) The issuer of the security has total assets of at least \$2,000,000  
21 based on an audited balance sheet as of a date within 18 months or, in the  
22 case of a reorganization or merger where parties to the reorganization or  
23 merger had such audited balance sheet, a pro forma balance sheet.

24 (2.1) Any nonissuer transaction in a security by a registered agent of  
25 a registered broker-dealer if:

26 (A) The issuer of the security is actually engaged in business and not  
27 in the organization stage or in bankruptcy or receivership and is not a blank  
28 check, blind pool or shell company whose primary plan of business is to  
29 engage in a merger or combination of the business with, or an acquisition of,  
30 an unidentified person or persons; and

31 (B) The security is senior in rank to the common stock of the issuer  
32 both as to payment of dividends or interest and upon dissolution or  
33 liquidation of the issuer and such security has been outstanding at least three  
34 years and the issuer or any predecessors has not defaulted within the current  
35 fiscal year or the three immediately preceding fiscal years in the payment of  
36 any dividend, interest, principal, or sinking fund installment on the security  
37 when due and payable.

38 4. The NASAA amendment broadens the exemption to add the phrase "or a document  
39 filed with the U.S. Securities & Exchange Commission (SEC) which is publicly available through  
40 the SEC's Electronic Data Gathering and Retrieval System (EDGAR)." That concept has been  
41 added to this Section.

5. The NASAA amendment also recognizes that non-U.S. issuers can be subject to the manual exemption when there is disclosed the corporate equivalent to the issuer's officers and directors in the issuer's country of domicile. This concept also has been added to this Section.

In 1997 the Report of the Task Force on the Future of Shared State and Federal Securities Regulation 13 (1997) proposed that state authorities adopt uniform exemptions to facilitate secondary trading of foreign issuer securities that meet minimum asset or market capitalization tests or that are traded on a recognized foreign stock exchange. This is a different approach to achieve the same result.

6. This Draft eliminates the reference to securities manuals and uses instead a nationally recognized statistical rating organization approach.

7. Query: Do we need the 90 day test?

(c) [Nonissuer Transactions in Securities Subject to Securities Exchange Act Reporting].

A nonissuer transaction in an outstanding security if the issuer of the security has a class of securities subject to registration under §12 of the Securities Exchange Act of 1934 and has been subject to the reporting requirements of §§13 or 15(d) of the Securities Exchange Act of 1934 for not less than 90 days next preceding the transaction; or has filed and maintained with the [Administrator] for not less than 90 days preceding the transaction information, in such form as the [Administrator], by rule, specifies, substantially comparable to the information the issuer would be required to file under §12(b) or §12(g) of the Securities Exchange Act were the issuer to have a class of its securities registered under §12 of the Securities Exchange Act of 1934, and paid a fee with the filing of [\$\_\_\_\_\_].

## REPORTER'S COMMENT

Source of Law: RUSA §402(2).

1. There is no counterpart in the 1956 Act.

2. The Official Comment to RUSA §402(2) provided:

1 New Paragraph (2) is intended to authorize secondary trading for  
2 the securities of issuers who have become subject to the reporting  
3 requirements under the Securities Exchange Act of 1934. The 90-day  
4 period has been inserted to bar immediate secondary trading in  
5 nonregistered initial public offering (IPO) securities. If securities have been  
6 registered under Part III, Section 305(m) operates to authorize secondary  
7 trading in all the securities of that class for a period of at least a year. At  
8 that time, reliance then would have to be placed upon either this paragraph,  
9 the following paragraph, or some other exemptive provision.

10 A company not subject to the reporting requirements of the 1934  
11 Act can voluntarily make its securities eligible for secondary trading by filing  
12 comparable information, together with the appropriate fee, with the  
13 [Administrator].

14 3. In 1996 NASAA proposed an amendment adding the equivalent to RUSA §402(2) but  
15 substituting 180 days for RUSA's use of 90 days in this Section.

16 (d) [Specified Fixed Maturity, Interest or Dividend]. A nonissuer transaction in a security  
17 that has a fixed maturity or a fixed interest or dividend provision and there has been no default  
18 during the current fiscal year or within the three next preceding years, or during the existence of  
19 the issuer, and any predecessors if less than three years, in the payment of principal, interest, or  
20 dividends on the security.

## 21 **REPORTER'S COMMENT**

22 Source of Law: RUSA §402(4); 1956 Act §402(b)(2)(B).

23 1. RUSA divided the substance of the 1956 Act §402(b)(2) into separate manual and fixed  
24 maturity exemptions. This Act also uses that division.

25 2. The substance of this exemption is identical to the 1956 Act §402(b)(2)(B) and RUSA  
26 §402(4).

27 (e) [Brokerage Transactions]. A nonissuer transaction by or through a broker-dealer  
28 registered or exempt under this Act effecting an unsolicited order or offer to purchase.



1 **REPORTER'S COMMENT**

2 Source of Law: 1956 Act §402(b)(3); RUSA §402(5).

3 1. The 1956 Act §402(b)(3) also included the phrase “but the [Administrator] may by rule  
4 require that the customer acknowledge upon a specified form that the sale was unsolicited, and  
5 that a signed copy of each such form be preserved by the broker-dealer for a specified period.”  
6 This is an SEC requirement.

7 (f) [Underwriter Transactions]. Any transaction between the issuer or other person on  
8 whose behalf the offering is made and an underwriter, or among underwriters.

9 **REPORTER'S COMMENT**

10 Source of Law: 1956 Act §402(b)(4); RUSA §402(6).

11 (g) [Unit Real Estate Transactions]. Any transaction in a bond or other evidence of  
12 indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale  
13 of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the  
14 bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit.

15 **REPORTER'S COMMENT**

16 Source of Law: 1956 Act §402(b)(5); RUSA §402(7).

17 (h) [Bankruptcy Transactions]. Any transaction by an executor, administrator, sheriff,  
18 marshal, receiver, trustee in bankruptcy, guardian, or conservator.

19 **REPORTER'S COMMENT**

20 Source of Law: 1956 Act §402(b)(6); RUSA §402(8).

21 1. Section 402(b)(6) of the 1956 Act and §402(8) of the 1985 Act use identical language  
22 to provide an exemption for transactions by an executor, administrator, sheriff, marshal, receiver,

1 trustee in bankruptcy, guardian or conservator. There is a somewhat similar securities exemption  
2 in §3(a)(7) of the Securities Act of 1933 limited to certificates issued by a receiver or by a trustee  
3 or debtor in possession under chapter 11 with the approval of the court.

4 (i) [Bona Fide Pledges]. Any transaction executed by a bona fide pledgee without any  
5 purpose of evading this Act.

#### 6 **REPORTER'S COMMENT**

7 Source of Law: 1956 Act §402(b)(7); RUSA §402(9).

8 (j) [Accredited Investors]. Any sale solely to accredited investors, which includes:

9 (1) Any depository institution; any broker or dealer registered pursuant to §15 of the  
10 Securities Exchange Act of 1934; any insurance company; any investment company registered under  
11 the Investment Company Act of 1940 or a business development company as defined in §2(a)(48) of  
12 that Act; any Small Business Investment Company licensed by the Small Business Administration  
13 under §301(c) or (d) of the Small Business Investment Act of 1958; any plan established and  
14 maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its  
15 political subdivisions, for the benefit of its employees, if such plan has total assets in excess of  
16 \$5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income  
17 Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in §3(21) of  
18 such Act, which is either a bank, savings and loan association, insurance company, or registered  
19 investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-  
20 directed plan, with investment decisions made solely by persons that are accredited investors;

21 (2) Any private business development company as defined in §202(a)(22) of the

Investment Advisers Act of 1940;

(3) Any organization described in §501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000;

(4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds \$1,000,000;

(6) Any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(7) Any trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in Rule 506(b)(2)(ii) of the Securities Act of 1933; and

(8) Any entity in which all of the equity owners are accredited investors.

#### **REPORTER'S COMMENT**

Source of Law: Sec. Act Rule 501(a).

1. This exemption harmonizes state law with its federal counterpart. At the current time, sales to accredited investors under Securities Act Rules 505 and 506 represent the most significant exemption from federal securities registration. In 1997 and 1998 a substantial number of exempt offerings were filed with the SEC on Rules 504, 505, or 506 of the Securities Act of 1933:

	<b>RULE 504</b>	<b>RULE 505</b>	<b>RULE 506</b>
<b>1997</b>	2918	1407	8324
<b>1998</b>	2988	1056	9656

Letter to Joel Seligman from Richard K. Wulff, Chief, SEC Office of Small Business, March 23, 1999.

2. The 1956 Act contains similar but less inclusive language in §402(b)(8) which provides:

any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity.

3. RUSA defined financial or institutional investors in §101(5) and then exempted transactions with financial or institutional investors or broker-dealers in §402(10). RUSA §101(5) provides:

“Financial or institutional investor” means any of the following, whether acting for itself or others in a fiduciary capacity:

- (i) a depository institution;
- (ii) an insurance company;
- (iii) a separate account of an insurance company;
- (iv) an investment company as defined in the Investment Company Act of 1940;
- (v) an employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$5,000,000 or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is either a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, a depository institution, or an insurance company; and
- (vi) any other institutional buyer.

4. Section 4(j) includes all accredited investors delineated in Securities Act Rule 501(a), including natural persons with a net worth of more than \$1 million or income in excess of specified amounts.

5. When the SEC adopts a rule defining “qualified purchasers” as purchasers of federal

1 covered securities, part or all of this exemption may prove redundant.  
2

3 (k) [Limited Offering Transactions]. A transaction pursuant to an offer to sell securities of  
4 an issuer, if the transaction is part of an issue in which

5 (i) there are no more than 25 purchasers in this State, other than those designated in  
6 §4(j), during any 12 consecutive months;

7 (ii) no general solicitation or general advertising is used in connection with the offer  
8 to sell or sale of the securities;

9 (iii) no commission or other similar compensation is paid or given, directly or  
10 indirectly, to a person, other than a broker-dealer registered or not required to be registered under  
11 this [Act], for soliciting a prospective purchaser in this State; and

12 (iv) either (I) the seller reasonably believes that all the purchasers in this State  
13 [other than those designated in §4(j)] are purchasing for investment; or (II) immediately before and  
14 immediately after the transaction, the issuer reasonably believes that the securities of the issuer are  
15 held by a total of 50 or fewer beneficial owners, other than those designated in §4(j) and the  
16 transaction is part of an aggregate offering that does not exceed [\$500,000] during any 12  
17 consecutive months; but the [Administrator] by rule or order as to a security or transaction or a  
18 type of security or transaction, may withdraw or further condition this exemption or waive one or  
19 more of the conditions in this paragraph.

## 20 **REPORTER'S COMMENT**

21 Source of Law: RUSA §402(11).

22 1. The 1956 Act §402(b)(9) is similar and provides:

1 any transaction pursuant to an offer directed by the offeror to not more than  
2 ten persons (other than those designated in paragraph (8)) in this state  
3 during any period of twelve consecutive months, whether or not the offeror  
4 or any of the offerees is then present in this state, if (A) the seller reasonably  
5 believes that all the buyers in this state (other than those designated in  
6 paragraph (8)) are purchasing for investment, and (B) no commission or  
7 other remuneration is paid or given directly or indirectly for soliciting any  
8 prospective buyer in this state (other than those designated in paragraph  
9 (8)); but the [Administrator] may rule or order, as to any security or  
10 transaction or any type of security or transaction, withdraw or further  
11 condition this exemption, or increase or decrease the number of offerees  
12 permitted, or waive the conditions in Clauses (A) and (B) with or without  
13 the substitution of a limitation on remuneration.

14 2. Section 402(b)(9) of the 1956 Act and §402(11) of the 1985 Act provide alternative  
15 limited offering transaction exemptions. The 1956 Act is limited to offers to no more than ten  
16 persons (other than institutional investors specified in §402(b)(8)); all buyers in the state must  
17 purchase for investment; and no remuneration is given for soliciting prospective buyers in the state.  
18 The 1985 Act, in contrast, is limited to no more than 25 purchasers (other than financial or  
19 institutional investors); no general solicitation or advertising; and no remuneration is paid to a  
20 person other than a broker-dealer for soliciting a prospective purchaser. The 1985 Act also  
21 requires that all nonfinancial or institutional investors be reasonably believed to be intrastate  
22 immediately before and after the transaction or the securities of the issuer be held by fewer than 50  
23 persons and that the aggregate offering not exceed \$500,000.

24 3. This Section would apply to preorganization limited offerings as well as operating  
25 company limited offerings. The Securities Act §§3(b) and 4(2) equally apply to both. In contrast,  
26 both the 1956 Act §402(b)(10) and RUSA §402(12) use similar concepts in separate Sections to  
27 apply to preorganization limited offerings.

28 The 1956 Act §402(b)(10) provides:

29 any offer or sale of a preorganization certificate or subscription if (A) no  
30 commission or other remuneration is paid or given directly or indirectly for  
31 soliciting any prospective subscriber, (B) the number of subscribers does not  
32 exceed ten, and (C) no payment is made by any subscriber;

33 Similarly, RUSA §402(12) provides:

34 an offer to sell or sale of a preorganization certificate or subscription if no  
35 commission or other similar compensation is paid or given, directly or  
36 indirectly, for soliciting a prospective subscriber; no public advertising or  
37 general solicitation is used in connection with the offer to sell or sale; the

1 number of subscribers does not exceed ten; and no payment is made by a  
2 subscriber.

3 (l) [Exchange Transactions]. Any transaction pursuant to an offer to existing security  
4 holders of the issuer, including persons who at the time of the transaction are holders of  
5 convertible securities, non-transferable warrants, or transferable warrants exercisable within not  
6 more than 90 days of their issuance, if (A) no commission or other remuneration (other than a  
7 standby commission) is paid or given directly or indirectly for soliciting any security holder in this  
8 state, or (B) the issuer first files a notice specifying the terms of the offer and the [Administrator]  
9 does not by order disallow the exemption within the next five full business days.

10 **REPORTER'S COMMENT**

11 Source of Law: 1956 Act §402(b)(11); RUSA §402(14).

12 Query: Is the 90 day requirement necessary?

13 (m) [Offerings When Registered Under this Act and the Securities Act of 1933]. A  
14 transaction involving an offer to sell, but not a sale, or a security not exempt from registration  
15 under the Securities Act of 1933 if:

16 (i) a registration or offering statement or similar document as required under the  
17 Securities Act of 1933 has been filed, but is not effective;

18 (ii) a registration statement, if required, has been filed under this [Act], but is not  
19 effective; and

20 (iii) no stop order of which the offeror is aware has been entered by the  
21 [Administrator] or the Securities and Exchange Commission, and no examination or public

1 proceeding that may culminate in that kind of order is known by the offeror to be pending.

2 **REPORTER'S COMMENT**

3 Source of Law: RUSA §402(15).

4 1. The 1956 Act §402(b)(12) is substantively similar.

5 (n) [Offerings When Registered Under this Act and Exempt from the Securities Act of  
6 1933]. A transaction involving an offer to sell, but not a sale, of a security exempt from  
7 registration under the Securities Act of 1933 if:

8 (1) a registration statement has been filed under this [Act], but is not effective; and

9 (2) no stop order of which the offeror is aware has been entered by the  
10 [Administrator] and no examination or public proceeding that may culminate in that kind of order  
11 is known by the offeror to be pending.

12 **REPORTER'S COMMENT**

13 Source of Law: RUSA §402(16).

14 1. There is no counterpart in the 1956 Act.

15 **REPORTER'S GENERAL COMMENT**  
16 **TO §4**

17 There are two other exemptions in RUSA, not found in the 1956 Act, omitted from this Act.

18 First, RUSA §402(17) exempts:

19 A transaction involving the distribution of the securities of an issuer  
20 to the security holders of another person in connection with a merger,  
21 consolidation, exchange of securities, sale of assets, or other reorganization to  
22 which the issuer, or its parent or subsidiary, and the other person, or its parent  
23 or subsidiary, are parties, if:

24 (i) the securities to be distributed are registered under the Securities  
25 Act of 1933 before the consummation of the transaction; or



1 (ii) the securities to be distributed are not required to be  
2 registered under the Securities Act of 1933, written notice of the  
3 transaction and a copy of the materials, if any, by which approval of the  
4 transaction will be solicited is given to the [Administrator] at least ten  
5 days before the consummation of the transaction and the  
6 [Administrator] does not, by order, disallow the exemption within the  
7 next ten days.

8 These securities often would be federal covered securities and not subject to state regulation.  
9 If they are not federal covered securities and otherwise exempt, the case for exemption is less  
10 persuasive.

11 Second, an optional RUSA §402(18) which provides:

12 (i) a transaction involving the offer to sell or sale of one or more  
13 promissory notes each of which is directly secured by a first lien on a single  
14 parcel of real estate, or a transaction involving the offer to sell or sale of  
15 participation interests in the notes if the notes and participation interests are  
16 originated by a depository institution and are offered and sold subject to the  
17 following conditions:

18 (A) the minimum aggregate sales price paid by each purchaser may not  
19 be less than \$250,000;

20 (B) each purchaser must pay cash either at the time of the sale or within  
21 60 days after the sale; and

22 (C) each purchaser may buy for that person's own account only;

23 (ii) a transaction involving the offer to sell or sale of one or more  
24 promissory notes directly secured by a first lien on a single parcel of real estate  
25 or participation interests in the notes, if the notes and participation interests are  
26 originated by a mortgagee approved by the Secretary of Housing and Urban  
27 Development under Sections 203 and 211 of the National Housing Act and are  
28 offered or sold, subject to the conditions specified in paragraph (i), to a  
29 depository institution or insurance company, the Federal Home Loan Mortgage  
30 Corporation, the Federal National Mortgage Association, or the Government  
31 National Mortgage Association; and

32 (iii) a transaction between any of the persons described in paragraph (ii)  
33 involving a nonassignable contract to buy or sell the securities described in  
34 paragraph (i) which contract is to be completed within two years, if:

35 (A) the seller of the securities pursuant to the contract is one of the  
36 parties described in paragraph (i) or (ii) who may originate securities;

37 (B) the purchaser of securities pursuant to a contract is any other  
38 person described in paragraph (ii); and

39 (C) the conditions described in paragraph (i) are fulfilled.

1           RUSA added this new exemption for those states that chose to not be preempted by §4(5) of  
2 the federal Securities Act, the mortgage-backed securities transaction exemption. These securities  
3 almost invariably will be exempt under another Section such as the limited offering or sale to  
4 accredited investor transaction exemption.

1     **SECTION 5 [ADDITIONAL EXEMPTIONS].**

2             (a) The [Administrator] by rule may exempt any other security or transaction or class of  
3 securities or transactions from §§7 and 21 .

4             (b) The [Administrator] by rule may adopt or modify limited offering transaction  
5 exemptions that will further the objectives of compatibility with the exemptions from securities  
6 registration authorized by the Securities Act of 1933 and uniformity among the states.

7                             **REPORTER'S COMMENT**

8             Source of Law: RUSA §403; NASAA Uniform Limited Offerings Exemption (ULOE)  
9 statutory Section.

10            1. There is no counterpart in the 1956 Act.

11            2. Under this type of authority, at least 49 (of 53) jurisdictions through 1999 had adopted  
12 the ULOE or a Regulation D exemption, and 30 jurisdictions had adopted a Rule 144A exemption.  
13 The accredited investor exemption in §4(j) represents a different approach to the ULOE.

14            3. Section 5(b) will also provide the basis for NASAA proposals to harmonize state law  
15 with subsequent amendments to the SEC definition of accredited investor which is the basis of the  
16 §4(j) exemption in this Act.

17            4. The alternative of statutory enactment of the ULOE, Rule 144A, or accredited investor  
18 exemptions would be less desirable given the frequency of SEC amendments of the relevant federal  
19 rules which provide the basis of these exemptions.

1     **SECTION 6 [REVOCATION OF EXEMPTIONS].**

2             (a) The [Administrator] by order may deny or revoke an exemption specified in §§3(f), (g),  
3     or (i), or §4, with respect to a specific security or transaction.

4             (b) An order issued under this Section is not retroactive. A person does not violate §7 or  
5     21 by reason of an offer to sell or sale effected after the entry of an order under this Section if the  
6     person did not know, and in the exercise of reasonable care could not have known, of the order.

7                             **REPORTER'S COMMENT**

8             Source of Law: RUSA §404.

9             1. The 1956 Act §402(c) is broader and provides:

10                     (c) The [Administrator] may by order deny or revoke any exemption  
11                     specified in clause (9) or (11) of Subsection (a) or in Subsection (b) with  
12                     respect to a specific security or transaction. No such order may be entered  
13                     without appropriate prior notice to all interested parties, opportunity for  
14                     hearing, and written findings of fact and conclusions of law, except that the  
15                     [Administrator] may by order summarily deny or revoke any of the specified  
16                     exemptions pending final determination of any proceeding under this  
17                     Subsection. Upon the entry of a summary order, the [Administrator] shall  
18                     promptly notify all interested parties that it has been entered and of the  
19                     reasons therefor and that within fifteen days of the receipt of a written  
20                     request the matter will be set down for hearing. If no hearing is requested  
21                     and none is ordered by the [Administrator], the order will remain in effect  
22                     until it is modified or vacated by the [Administrator]. If a hearing is  
23                     requested or ordered, the [Administrator], after notice of and opportunity  
24                     for hearing to all interested persons, may modify or vacate the order or  
25                     extend it until final determination. No order under this Subsection may  
26                     operate retroactively. No person may be considered to have violated  
27                     Section 301 or 403 by reason of any offer or sale effected after the entry of  
28                     an order under this Subsection if he sustains the burden of proof that he did  
29                     not know, and in the exercise of reasonable care could not have known, of  
30                     the order.

31             2. Any order issued by the Administrator is intended to be in compliance with the State's  
32     Administrative Procedure Act.

1 **[PART C: REGISTRATION OF SECURITIES]**

2 **SECTION 7 [SECURITIES REGISTRATION REQUIREMENT].** It is unlawful for any person  
3 to offer or sell any security in this state unless (a) it is registered under this Act; (b) the security or  
4 transaction is exempted under §§3-4; or (c) it is a federal covered security, in compliance with §8.

5 **REPORTER'S COMMENT**

6 Source of Law: NASAA amendment to 1956 Act §301.

7 1. The 1956 Act §301 and RUSA §301 were substantively identical except for §7(c),  
8 which is necessitated by NSMIA.

1     **SECTION 8 [FEDERAL COVERED SECURITIES].**

2             (a) The [Administrator] by rule or order, may require the filing of any or all of the  
3     following documents with respect to a covered security under Section 18(b)(2) [investment  
4     companies] of the Securities Act of 1933:

5             (1) Before the initial offer of such federal covered security in this state, all  
6     documents that are part of a federal registration statement filed with the Securities and Exchange  
7     Commission under the Securities Act of 1933, together with a consent to service of process signed  
8     by the issuer and with [Insert language here to provide for the fee to be paid specifically for these  
9     types of filings].

10            (2) After the initial offer of such federal covered security in this state, all documents  
11    that are part of an amendment to a federal registration statement filed with the Securities and  
12    Exchange Commission under the Securities Act of 1933, which shall be filed concurrently with the  
13    [Administrator].

14            (3) A report of the number of units and the total value of such federal covered  
15    securities offered or sold in this state, together with [Insert language here to provide for any  
16    additional fee to be paid].

17            (b) With respect to any security that is a covered security under §18(b)(4)(D) [private  
18    placement] of the Securities Act of 1933, the [Administrator], by rule or order, may require the  
19    issuer to file a copy of SEC Form D and a consent to service of process signed by the issuer no  
20    later than 15 days after the first sale of such covered security in this state, together with [the fee to  
21    be paid].

22            (c) The [Administrator] by rule may require the filing of any document filed with the

1 Securities and Exchange Commission under the Securities Act of 1933, with respect to a covered  
2 security under §18(b)(3) [qualified purchasers] or (4) [exempt offerings] of the Securities Act of  
3 1933, together with [the fee to be paid].

4 (d) The [Administrator] may issue a stop order suspending the offer and sale of a covered  
5 security, except a covered security under §18(b)(1) of the Securities Act of 1933, if it finds that (1)  
6 the order is in the public interest, and (2) there is a failure to comply with any material condition  
7 established under this Section.

8 (e) The [Administrator], by rule or order, may waive any or all of the provisions of this  
9 Section.

#### 10 **REPORTER'S COMMENT**

11 Source of Law: NASAA 1997 amendment.

12 1. There is no counterpart in the 1956 Act or RUSA, both of which were adopted before  
13 NSMIA.

14 2. The little used “registration by notification” in the 1956 Act §302 or “registration by  
15 filing” in RUSA §302 are omitted from this Act because of the notice filing approach required by  
16 §18(b)(2) of the Securities Act of 1933 for federal covered securities.

17 3. When an issuer proceeds under the Securities Act Regulation D, §8(b) is intended to  
18 limit required state filings to no more than a requirement of filing a copy of Form D, consent to  
19 service of process, and a fee.

1     **SECTION 9 [SECURITIES REGISTRATION BY COORDINATION].**

2             (a) Any security, other than a federal covered security, for which a registration statement  
3     has been filed under the Securities Act of 1933 in connection with the same offering may be  
4     registered by coordination.

5             (b) A registration statement and accompanying documents may be filed electronically with  
6     [appropriate depository] and shall contain the following information and be accompanied by the  
7     following documents in addition to the information specified in §11 of the consent to service of  
8     process required by §32:

9                 (1) A copy of the latest form of prospectus filed under the Securities Act of 1933;

10                (2) if the [Administrator] by rule or otherwise requires, a copy of the articles of  
11     incorporation and bylaws (or their substantial equivalents) currently in effect, a copy of any  
12     agreements with or among underwriters, a copy of any indenture or other instrument governing the  
13     issuance of the security to be registered, and a specimen or copy of the security;

14                (3) if the [Administrator] requests, any other information, or copies of any other  
15     documents, filed under the Securities Act of 1933; and

16                (4) an undertaking to forward all amendments to the federal prospectus, other than  
17     an amendment which merely delays the effective date of the registration statement, promptly and in  
18     any event not later than the first business day after the day they are forwarded to or filed with the  
19     Securities and Exchange Commission, whichever first occurs.

20             (c) A registration statement under this Section automatically becomes effective at the  
21     moment the federal registration statement becomes effective if all the following conditions are  
22     satisfied:



1                   (1) no stop order is in effect and no proceeding is pending under §17;  
2                   (2) the initial registration statement has been on file with the [Administrator] for at  
3   least ten days; and  
4                   (3) a statement of the maximum and minimum proposed offering prices and the  
5   maximum underwriting discounts and commissions has been on file for two full business days or  
6   such shorter period as the [Administrator] permits by rule or otherwise and the offering is made  
7   within those limitations.

8           The registrant shall promptly notify the [Administrator] by electronic means, telephone, or  
9   telegram of the date and time when the federal registration statement became effective and the  
10   content of the price amendment, if any, and shall promptly file a posteffective amendment  
11   containing the information and documents in the price amendment. Upon failure to receive the  
12   required notification and posteffective amendment with respect to any price amendment, the  
13   [Administrator] may enter a stop order, without notice or hearing, retroactively denying  
14   effectiveness to the registration statement or suspending its effectiveness until compliance with this  
15   Subsection; provided that the [Administrator] promptly notifies the registrant by electronic means,  
16   telephone, or telegram (and promptly confirms by electronic means, letter, or telegram when the  
17   [Administrator] notifies by telephone) of the issuance of the order. If the registrant proves  
18   compliance with the requirements of this Subsection as to notice and posteffective amendment, the  
19   stop order is void as of the time of its entry. The [Administrator] may by rule or otherwise waive  
20   either or both of the conditions specified in clauses (2) and (3). If the federal registration  
21   statement becomes effective before all the conditions in this Subsection are satisfied and they are  
22   not waived, the registration statement automatically becomes effective as soon as all the conditions

1 are satisfied. If the registrant advises the [Administrator] of the date when the federal registration  
2 statement is expected to become effective, the [Administrator] shall promptly advise the registrant  
3 by electronic means, telephone, or telegram, at the registrant's expense, whether all the conditions  
4 are satisfied and whether the [Administrator] then contemplates the institution of a proceeding  
5 under §17; but this advice by the [Administrator] does not preclude the institution of such a  
6 proceeding at any time.

7 (d) The [Administrator] by rule or order may waive or modify the application of a  
8 requirement of this Section if a provision or an amendment, repeal, or other alteration of the  
9 securities registration provisions of the Securities Act of 1933, or the regulations adopted under  
10 that act, render the waiver or modification appropriate for further coordination of state and federal  
11 registration.

## 12 **REPORTER'S COMMENT**

13 Source of Law: 1956 Act §303; RUSA §303.

14 1. Sections 9(a)-(c) are identical to the 1956 Act §303 except that they integrate the  
15 possibility of electronic filing, whether through a central registration depository that could be  
16 administered similar to the current Central Registration Depository (CRD) or in conjunction with  
17 the SEC's EDGAR System, or otherwise. Sections 9(a)-(c) also permit required notification to be  
18 made by electronic means, which includes computer technology.

19 2. Section 9(d) is derived from RUSA §303(h).

1     **SECTION 10 [SECURITIES REGISTRATION BY QUALIFICATION].**

2             (a) Any security, other than a federal covered security, may be registered by qualification.

3             (b) A registration statement under this Section shall contain the following information and  
4     be accompanied by the following documents in addition to the information specified in §11, and  
5     the consent to service of process required by §32:

6             (1) with respect to the issuer and any significant subsidiary: its name, address, and  
7     form of organization; the state or foreign jurisdiction and date of its organization; the general  
8     character and location of its business; a description of its physical properties and equipment; and a  
9     statement of the general competitive conditions in the industry or business in which it is or will be  
10    engaged;

11            (2) with respect to every director and officer of the issuer, or person occupying a  
12    similar status or performing similar functions: her or his name, address, and principal occupation  
13    for the past five years; the amount of securities of the issuer held by her or him as of a specified  
14    date within 30 days of the filing of the registration statement; the amount of the securities covered  
15    by the registration statement to which he or she has indicated an intention to subscribe; and a  
16    description of any material interest in any material transaction with the issuer or any significant  
17    subsidiary effected within the past three years or proposed to be effected;

18            (3) with respect to persons covered by §10(a)(2): the remuneration paid during the  
19    past twelve months and estimated to be paid during the next twelve months, directly or indirectly  
20    by the issuer (together with all predecessors, parents, subsidiaries, and affiliates) to all those  
21    persons in the aggregate;

22            (4) with respect to any person owning of record, or beneficially if known, ten

1 percent or more of the outstanding shares of any class of equity security of the issuer: the  
2 information specified in §10(a)(2) other than his occupation;

3 (5) with respect to every promoter if the issuer was organized within the past three  
4 years: the information specified in §10(a)(2), any amount paid to her or him within that period or  
5 intended to be paid to her or him, and the consideration for any such payment;

6 (6) with respect to any person on whose behalf any part of the offering is to be  
7 made in a nonissuer distribution: her or his name and address; the amount of securities of the issuer  
8 held by her or him as of the date of the filing of the registration statement; a description of any  
9 material interest in any material transaction with the issuer or any significant subsidiary effected  
10 within the past three years or proposed to be effected; and a statement of the reasons for making  
11 the offering;

12 (7) the capitalization and long term debt (on both a current and pro forma basis) of  
13 the issuer and any significant subsidiary, including a description of each security outstanding or  
14 being registered or otherwise offered, and a statement of the amount and kind of consideration  
15 (whether in the form of cash, physical assets, services, patents, goodwill, or anything else) for  
16 which the issuer or any subsidiary has issued any of its securities within the past two years or is  
17 obligated to issue any of its securities;

18 (8) the kind and amount of securities to be offered; the proposed offering price or  
19 the method by which it is to be computed; any variation at which any proportion of the offering is  
20 to be made to any person or class of persons other than the underwriters, with a specification of  
21 any such person or class; the basis upon which the offering is to be made if otherwise than for cash;  
22 the estimated aggregate underwriting and selling discounts or commissions and finders' fees

(including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering) or, if the selling discounts or commissions are variable; the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of every underwriter and every recipient of a finder's fee; a copy of any underwriting or selling group agreement under which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter;

(9) the estimated cash proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of any such funds; and, if any part of the proceeds is to be used to acquire any property (including goodwill) otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection with the acquisition, and the amounts of any such commissions and any other expense in connection with the acquisition (including the cost of borrowing money to finance the acquisition);

(10) a description of any stock options or other security options outstanding, or to be created in connection with the offering, together with the amount of any such options held or to be held by every person required to be named in §§10(a)(2), (4)-(6) or (8), and by any person who

1 holds or will hold ten percent or more in the aggregate of any such options;

2 (11) the dates of, parties to, and general effect concisely stated of, every  
3 management or other material contract made or to be made otherwise than in the ordinary course  
4 of business if it is to be performed in whole or in part at or after the filing of the registration  
5 statement or was made within the past two years, together with a copy of every such contract; and  
6 a description of any pending litigation or proceeding to which the issuer is a party and which  
7 materially affects its business or assets (including any such litigation or proceeding known to be  
8 contemplated by governmental authorities);

9 (12) a copy of any prospectus, pamphlet, circular, form letter, advertisement, or  
10 other sales literature intended as of the effective date to be used in connection with the offering;

11 (13) a specimen or copy of the security being registered; a copy of the issuer's  
12 articles of incorporation and bylaws, or their substantial equivalents, as currently in effect; and a  
13 copy of any indenture or other instrument covering the security to be registered;

14 (14) a signed or conformed copy of an opinion of counsel as to the legality of the  
15 security being registered (with an English translation if it is in a foreign language), which shall state  
16 whether the security when sold will be legally issued, fully paid, and nonassessable, and, if a debt  
17 security, a binding obligation of the issuer;

18 (15) the written consent of any accountant, engineer, appraiser, or other person  
19 whose profession gives authority to a statement made by her or him, if any such person is named as  
20 having prepared or certified a report or valuation (other than a public and official document or  
21 statement) which is used in connection with the registration statement;

22 (16) [an audited] balance sheet of the issuer as of a date within four months before

1 the filing of the registration statement; [an audited] profit and loss statement and analysis of  
2 surplus for each of the three fiscal years preceding the date of the balance sheet and for any period  
3 between the close of the last fiscal year and the date of the balance sheet, or for the period of the  
4 issuer's and any predecessors' existence if less than three years; and, if any part of the proceeds of  
5 the offering is to be applied to the purchase of any business, the same financial statements which  
6 would be required if that business were the registrant; and

7 (17) such additional information as the [Administrator] requires by rule or order.

8 (c) A registration statement under this Section becomes effective when the [Administrator]  
9 so orders.

#### 10 **REPORTER'S COMMENT**

11 Source of Law: 1956 Act §304; RUSA §304.

12 1. The 1956 Act also contains §304(d) which the NASAA proposed deleting in 1987:

13 The [Administrator] may by rule or order require as a condition of  
14 registration under this Section that a prospectus containing any designated  
15 part of the information specified in Subsection (b) be sent or given to each  
16 person to whom an offer is made before or concurrently with (1) the first  
17 written offer made to him (otherwise than by means of a public  
18 advertisement) by or for the account of the issuer or any other person on  
19 whose behalf the offering is being made, or by any underwriter or broker-  
20 dealer who is offering part of an unsold allotment of subscription taken by  
21 him as a participant in the distribution, (2) the confirmation of any sale made  
22 by or for the account of any such person, (3) payment pursuant to any such  
23 sale, or (4) delivery of the security pursuant to any such sale, whichever first  
24 occurs.

25 2. RUSA §§304(c)-(d) also requires:

26 (c) A registration statement under this Section becomes effective 30  
27 calendar days, or any shorter period the [Administrator] by rule or order  
28 specifies, after the date the registration statement or the last amendment  
29 other than a price amendment is filed, if:

1 (1) no stop order is in effect and no proceeding is pending under  
2 Section 306;

3 (2) the [Administrator] has not ordered under Subsection (d) that  
4 effectiveness be delayed; and

5 (3) the registrant has not requested that effectiveness be delayed.

6 (d) The [Administrator] may delay effectiveness for a single  
7 period of not more than 90 days if the [Administrator] determines  
8 the registration statement is not complete in all material respects and  
9 promptly notifies the registrant of that determination. The  
10 [Administrator] may delay effectiveness for a single period of not  
11 more than 30 days if the [Administrator] determines that the delay is  
12 necessary, whether or not the [Administrator] previously delayed  
13 effectiveness under this Subsection.

14 The Official Comment explains:

15 Under the 1956 Act, there was no time limit within which an  
16 [Administrator] had to act on an application for registration by qualification.  
17 Subsection (c) now requires automatic effectiveness 30 days after the last  
18 filing, but with adequate provisions for delay of effectiveness at either the  
19 [Administrator's] or the applicant's request.



1     **SECTION 11 [GENERAL SECURITIES REGISTRATION PROVISIONS].**

2             (a) [Registration Requirements] A registration statement may be filed by the issuer, other  
3     than the issuer of a federally covered security, any other person on whose behalf the offering is to  
4     be made, or a registered broker-dealer.

5             [(b) [Filing Fee] Every person filing a registration statement shall pay a filing fee of [\_\_\_\_]  
6     percent of the maximum aggregate offering price at which the registered securities are to be  
7     offered in this state, but the fee shall in no case be less than [\$\_\_\_\_] or more than[\$ \_\_\_\_]. When  
8     a registration statement is withdrawn before the effective date or a preeffective stop order is  
9     entered under §12, the [Administrator] shall retain [\$ \_\_\_\_] of the fee.]

10            (c) [Status of Registration Statement] Every registration statement shall specify (1) the  
11     amount of securities to be offered in this state; (2) the states in which a registration statement or  
12     similar document in connection with the offering has been or is to be filed; and (3) any adverse  
13     order, judgment, or decree entered in connection with the offering by the regulatory authorities in  
14     each state or by any court or the Securities and Exchange Commission.

15            (d) [Incorporation by Reference] Any document filed under this Act or a predecessor Act  
16     (within five years preceding the filing of a registration statement) may be incorporated by reference  
17     in the registration statement to the extent that the document is currently accurate.

18            (e) [Waiver of Requirements] The [Administrator] may by rule or otherwise permit the  
19     omission of any item of information or document from any registration statement.

20            (f) [Nonissuer Distribution] In the case of a nonissuer distribution, information may not be  
21     required under §§10 or 11(j), unless it is known to the person filing the registration statement or to  
22     the persons on whose behalf the distribution is to be made, or can be furnished by them without

1 unreasonable effort or expense.

2 (g) [Escrow and Impoundment] The [Administrator] may by rule or order require as a  
3 condition of registration by qualification or coordination (1) that any security issued within the past  
4 three years or to be issued to a promoter for a consideration substantially different from the public  
5 offering price, or to any person for a consideration other than cash, be deposited in escrow; and (2)  
6 that the proceeds from the sale of the registered security in this state be impounded until the issuer  
7 receives a specified amount from the sale of the security either in this state or elsewhere. The  
8 [Administrator] may by rule or order determine the conditions of any escrow or impounding  
9 required hereunder, but he may not reject a depository solely because of location in another state.

10 (h) [Form of Subscription] The [Administrator] may by rule or order require as a condition  
11 of registration that any security registered by qualification or coordination be sold only on a  
12 specified form of subscription or sale contract, and that a signed or conformed copy of each  
13 contract be filed with the [Administrator] or preserved for any period up to three years specified in  
14 the rule or order.

15 (i) [Effective Period] Every registration statement is effective for one year from its effective  
16 date, or any longer period during which the security is being offered or distributed in a  
17 nonexempted transaction by or for the account of the issuer or other person on whose behalf the  
18 offering is being made or by any underwriter or broker-dealer who is still offering part of an unsold  
19 allotment or subscription taken as a participant in the distribution, except during the time a stop  
20 order is in effect under §12. All outstanding securities of the same class as a registered security are  
21 considered to be registered for the purpose of any nonissuer transaction (1) so long as the  
22 registration statement is effective and (2) between the 30<sup>th</sup> day after the entry of any stop order

1 suspending or revoking the effectiveness of the registration statement under §12 (if the registration  
2 statement did not relate in whole or in part to a nonissuer distribution) and one year from the  
3 effective date of the registration statement. A registration statement may not be withdrawn for one  
4 year from its effective date if any securities of the same class are outstanding. A registration  
5 statement may be withdrawn otherwise only in the discretion of the [Administrator].

6 (j) [Periodic Reports] So long as a registration statement is effective, the [Administrator]  
7 may by rule or order require the person who filed the registration statement to file reports, not  
8 more often than quarterly, to keep reasonably current the information contained in the registration  
9 statement and to disclose the progress of the offering.

10 (k) [Changes in Amount Offered] A registration statement may be amended after its  
11 effective date so as to increase the securities specified to be offered and sold, if the public offering  
12 price and underwriters' discounts and commissions are not changed from the respective amounts  
13 of which the [Administrator] was informed. The amendment becomes effective when the  
14 [Administrator] so orders. The person filing such an amendment shall pay a late registration fee of  
15 [\$\_\_] and a filing fee, calculated in the manner specified in Subsection(b), with respect to the  
16 additional securities proposed to be offered or sold. The amendment relates back to the date of the  
17 offering of the additional securities being registered, provided that within six months of the date of  
18 such sale the amendment is filed and the additional filing fee and late registration fee are paid.

19 (l) [Delivery of Prospectus] The [Administrator] may by rule or order require as a  
20 condition of registration under §9 or 10, that a prospectus or any part of the information contained  
21 in §10(b) be sent or given to each person to whom an offer is made before the sale of the security  
22 in accordance with the prospectus delivery requirements of the Securities Act of 1933.

1 **REPORTER'S COMMENT**

2 Source of Law: 1956 Act §306; NASAA 1987 Amendment; RUSA §306.

3 1. Sections 11(a)-(j) are derived from the 1956 Act; §§11(k)-(l) are derived from 1987  
4 NASAA proposed amendments which, in turn, were derived from RUSA.

5 2. Provisions in both the 1956 Act and RUSA referring to Investment Company Act  
6 securities, which are federal covered securities, have been deleted.

1     **SECTION 12 [DENIAL, SUSPENSION, AND REVOCATION OF SECURITIES**  
2     **REGISTRATION].**

3             (a) The [Administrator] may issue a stop order denying effectiveness to, or suspending or  
4     revoking the effectiveness of, a registration statement if the [Administrator] finds that the order is  
5     in the public interest and that:

6                 (1) The registration statement as of its effective date or as of the proposed effective  
7     date in the case of an order denying effectiveness, an amendment under §11(k) as of its effective  
8     date, or a report under §11(j) is incomplete in a material respect or contains a statement that, in the  
9     light of the circumstances under which it was made, was false or misleading with respect to a  
10    material fact;

11                (2) this [Act] or a rule, order, or condition lawfully imposed under this [Act] has  
12    been willfully violated, in connection with the offering, by the person filing the registration  
13    statement; by the issuer, a partner, officer, or director of the issuer, a person occupying a similar  
14    status or performing a similar function, or a person directly or indirectly controlling or controlled  
15    by the issuer, but only if the person filing the registration statement is directly or indirectly  
16    controlled by or acting for the issuer; or by an underwriter;

17                (3) the security registered or sought to be registered is the subject of a permanent  
18    or temporary injunction of a court of competent jurisdiction or an administrative stop order or  
19    similar order entered under any other federal or state law applicable to the offering; but the  
20    [Administrator] may not institute a proceeding against an effective registration statement under this  
21    paragraph more than one year after the date of the order or injunction relied on, and the  
22    [Administrator] may not enter an order under this paragraph on the basis of an order or injunction

1 entered under the securities act of another state unless the order or injunction was based on facts  
2 that currently would constitute a ground for a stop order under this Section;

3 (4) the issuer's enterprise or method of business includes or would include activities  
4 that are illegal where performed;

5 (5) the offering has worked or tended to work a fraud upon purchasers or would so  
6 operate;

7 [alternative subparagraph (5): the offering is being made on terms that are unfair, unjust, or  
8 inequitable;]

9 (6) the offering has been or would be made with unreasonable amounts of  
10 underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or  
11 participation, or unreasonable amounts or kinds of options;

12 (7) with respect to a security sought to be registered under §9, there has been a  
13 failure to comply with the undertaking required by §9(b)(4); or

14 (8) the applicant or registrant has failed to pay the proper filing fee; but the  
15 [Administrator] may enter only a stop order under this paragraph and shall vacate the order if the  
16 deficiency is corrected.

17 (b) The [Administrator] may not institute a stop order proceeding against an effective  
18 registration statement on the basis of a fact or transaction known to the [Administrator] when the  
19 registration statement became effective unless the proceeding is begun within 30 days after the  
20 registration statement became effective.

21 (c) The [Administrator] may summarily postpone or suspend the effectiveness of a  
22 registration statement pending final determination of an administrative proceeding. Upon the entry

1 of the order, the [Administrator] shall promptly notify each person specified in Subsection(d) that  
2 the order has been entered, the reasons for the postponement or suspension, and that within 15  
3 days after the receipt of a written request from the person the matter will be set down for hearing.  
4 If no hearing is requested and none is ordered by the [Administrator], the order remains in effect  
5 until it is modified or vacated by the [Administrator]. If a hearing is requested or ordered, the  
6 [Administrator], after notice of and opportunity for hearing to each person specified in  
7 Subsection(d), may modify or vacate the order or extend it until final determination.

8 (d) A stop order may not be entered under Subsection(a) or (b) without (i) appropriate  
9 notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to  
10 be or have been offered, (ii) opportunity for hearing, and (iii) written findings of fact and  
11 conclusions of law [in accordance with the state Administrative Procedures Act].

12 (e) The [Administrator] may modify or vacate a stop order entered under this Section if the  
13 [Administrator] finds that the conditions that caused its entry have changed or that it is otherwise  
14 in the public interest.

## 15 **REPORTER'S COMMENT**

16 Source of Law: RUSA §306.

17 1. The 1956 Act §306 is similar.

18 Sections 306(E)-(F) of the 1956 Act address “merit regulation” in a limited sense and are  
19 distinguishable from the earlier and broader “fair, just and equitable” standards that still exist in a  
20 minority of states. Sections 306(a)(5)-(6) of the 1985 are substantively identical, but retain an  
21 “unfair, unjust or inequitable” alternative. Both forms of merit regulation have been partially  
22 preempted by NSMIA.

23 2. Paragraphs in the RUSA §305 that refer to registration by filing have been eliminated.

24 3. With respect to the term “willfully” in §12(a)(2)(B), the state courts have often looked

1 to cases defining this term under the federal securities cases. See 6 L. Loss & J. Seligman,  
2 Securities Regulation 3034-3039 (3d ed. 1990).



1                   **[PART D: REGISTRATION OF BROKER-DEALERS, AGENTS,**  
2                   **INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES]**

3                   **SECTION 13 [REGISTRATION REQUIREMENTS FOR BROKER-DEALERS, AGENTS,**  
4                   **INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES].**

5                   (a) Except as provided in §14, it is unlawful for any person to transact business in this state  
6                   as a broker-dealer, and for any individual to transact business in this state as an agent on behalf of a  
7                   broker-dealer or issuer, unless such person is registered under this Act as a broker dealer, and such  
8                   individual is registered under this Act as an agent.

9                   (b) Except as provided in §14, it is unlawful for any broker-dealer or issuer to employ or  
10                  undertake an association with an agent who transacts business in this state on behalf of such broker-  
11                  dealer or issuer unless the agent is registered under this Act. The registration of an agent is not  
12                  effective during any period when the agent is not employed by or associated with a particular broker-  
13                  dealer registered or exempt under this Act or a particular issuer, an offering of whose securities is  
14                  being made in this state. When an agent begins or terminates employment by or association with a  
15                  broker-dealer or issuer, or begins or terminates those activities which make him or her an agent, the  
16                  broker-dealer or issuer or the agent shall promptly notify the [Administrator].

17                  (c) Except as provided in §14, it is unlawful for any person to transact business in this state  
18                  as an investment adviser, and for any individual to transact business in this state as an investment  
19                  adviser representative, unless registered under this Act.

20                  (d) Except as provided in §14, it is unlawful for any investment adviser to employ or undertake  
21                  an association with an investment adviser representative who [conducts advisory business in this state

1 on behalf of such investment adviser] [has a place of business located in this state] unless the  
2 investment adviser representative is registered under this Act. The registration of an investment  
3 adviser representative is not effective during any period when the investment adviser representative  
4 is not employed by or associated with a particular investment adviser registered or exempt under this  
5 Act. When an investment adviser representative begins or terminates employment by or association  
6 with an investment adviser, or begins or terminates activities which make him or her an investment  
7 adviser representative, the investment adviser or the investment adviser representative shall promptly  
8 notify the [Administrator].

9 [e] Every registration or notice filing under this Section expires December 31<sup>st</sup> unless renewed.]

10 (f) Except with respect to investment advisers whose only clients are those described in §14(c)  
11 of this Act, it is unlawful for any federal covered investment adviser to transact business in this state  
12 unless such person complies with the provisions of §15(c) of this Act.

13 (g) A broker-dealer or investment adviser may not directly or indirectly employ, or undertake  
14 an association with an individual to engage in any activity in this State contrary to a suspension or bar  
15 from association with a broker-dealer or investment adviser imposed against that individual by the  
16 [Administrator]. A broker-dealer or investment adviser does not violate this Subsection unless the  
17 broker-dealer or investment adviser knows or in the exercise of reasonable care should know of the  
18 suspension or bar. Upon request from a broker-dealer or investment adviser and for good cause  
19 shown, the [Administrator], by order, may waive the prohibition of this Subsection with respect to a  
20 person suspended or barred.

## 21 **REPORTER'S COMMENT**

1 Source of Law: 1956 Act §201(a)-(b); 1997 NASAA Amendment (for §§13(c)-(f)); RUSA  
2 §203(b) (for §13(g)).

3 1. RUSA §§201, 203 are similar to the 1956 Act §201, but separately address broker-  
4 dealers and investment advisers.

5 2. Query: Should we define place of business in §13(c)?

6 3. In 1995 NASAA also proposed as an amendment §201-A which provides:

7 Sec. 201-A [LIMITED REGISTRATION OF CANADIAN

8 BROKER-DEALERS AND AGENTS.] (a) A broker-dealer that is  
9 resident in Canada and has no office or physical presence in this state  
10 may, provided the broker-dealer is registered in accordance with this  
11 Section, effect transactions in securities with or for, or induce or  
12 attempt to induce the purchase or sale of any security by,

13 (1) a person from Canada who is temporarily resident in this state,  
14 with whom the Canadian broker-dealer had a bona fide broker-dealer-client relationship  
15 before the person entered the United States; or

16 (2) a person from Canada who is resident in this state, whose  
17 transactions are in a self-directed tax advantaged retirement plan in Canada of which the  
18 person is the holder or contributor.

19 (b) An agent who will be representing a Canadian broker-dealer registered under  
20 this  
21 Section may, provided the agent is registered in accordance with this Section, effect  
22 transactions in securities in this state as permitted for the broker-dealer in Subsection (a).

23 (c) A Canadian broker-dealer may register under this Section provided that  
24 it

25 (1) files an application in the form required by the jurisdiction in which it has  
26 its head office;

27 (2) files a consent to service of process;

28 (3) is registered as a broker or dealer in good standing in the jurisdiction  
29 from which it is effecting transactions into this state and files evidence thereof; and

30 (4) is a member of a self-regulatory organization or stock exchange in  
31 Canada.

32 (d) An agent who will be representing a Canadian broker-dealer registered  
33 under this Section in effecting transactions in securities in this state may register  
34 under this Section provided that he or she

35 (1) files an application in the form required by the jurisdiction in which the broker-  
36 dealer has its head office;

37 (2) files a consent to service of process; and

38 (3) is registered in good standing in the jurisdiction from which he or she is  
39 effecting transactions into this state and files evidence thereof.

40 (e) If no denial order is in effect and no proceeding is pending under Section

1 (204), registration becomes effective on the 30<sup>th</sup> day after an application is filed,  
2 unless earlier made effective.

3 (f) A Canadian broker-dealer registered under this Section shall

4 (1) maintain its provincial or territorial registration and its membership in a self-  
5 regulatory organization or stock exchange in good standing;

6 (2) provide the [Administrator] upon request with its books and records  
7 relating to its business in the state as a broker-dealer;

8 (3) inform the [Administrator] forthwith of any criminal action taken against  
9 it (him or her) or of any finding or sanction imposed on the broker-dealer as a result  
10 of any self-regulatory or regulatory action involving fraud, theft, deceit,  
11 misrepresentation or similar conduct; and

12 (4) disclose to its clients in the state that the broker-dealer and its agents are  
13 not subject to the full regulatory requirements in the Act.

14 (g) An agent of a Canadian broker-dealer registered under this Section shall

15 (1) maintain his or her provincial or territorial registration in good standing;

16 (2) inform the [Administrator] forthwith of any criminal action, taken  
17 against him or her, or of any finding or sanction imposed on the agent as a result of  
18 any self-regulatory or regulatory action involving fraud, theft, deceit,  
19 misrepresentation or similar conduct.

20 (h) Renewal applications for Canadian broker-dealers and agents under this  
21 Section must be filed before December 1 each year and may be made by filing the  
22 most recent renewal application, if any, filed in the jurisdiction in which the broker-  
23 dealer has its head office, or if no such renewal application is required, the most  
24 recent application filed pursuant to clause (1) of Subsection (c) or clause (1) of  
25 Subsection (d), as the case may be.

26 (i) Every applicant for registration or renewal registration under this Section  
27 shall pay the fee for broker-dealers and agents as required under this Act.

28 (j) A Canadian broker-dealer or agent registered under this Section may  
29 only effect transactions in this state

30 (1) as permitted in Subsection (a) or (b);

31 (2) with or through (a) the issuers of the securities involved in the  
32 transactions, (b) other broker dealers, and (c) banks, savings institutions, trust  
33 companies, insurance companies, investment companies as defined in the  
34 Investment Company Act of 1940, pension or profit-sharing trusts, or other  
35 financial institutions or institutional buyers, whether acting for themselves or as  
36 trustees; and

37 (3) as otherwise permitted by this Act.

38 (k) A Canadian broker-dealer or agent registered under this Section and  
39 acting in accordance with the limitations set out in Subsection (j) is exempt from all  
40 the requirements of this Act, except the antifraud provisions and the requirements  
41 set out in this Section. Such Canadian broker-dealer or agent may only have its  
42 registration under this Section denied, suspended or revoked for a breach of the  
43 antifraud provisions or the requirements in this Section.

1 The NASAA Comment to §201-A explains:

2 The policy permits a limited registration for two distinct types of cross  
3 border trading. The first category covers trading by Canadian persons who are  
4 temporarily resident within the United States. The term “temporarily” is borrowed  
5 from SEC Rule 15a-6 which exempts certain foreign broker-dealers from  
6 registering under the Exchange Act. The scope of coverage is extended to be co-  
7 extensive with that rule. The SEC does not define the term in its rule . . .

8 The second category of activity covered by the policy is trading in self-  
9 directed tax advantaged retirement plan accounts. These accounts, which are called  
10 Registered Retirement Savings Plans (“RRSP’s”), have two features which make it  
11 impossible and impracticable to transfer them to a U.S. broker-dealer. First, the  
12 account must be sited in Canada with a Canadian trustee. The account cannot be  
13 run through the books of a non-Canadian broker. Second, the securities held in the  
14 account must be predominantly Canadian. Few U.S. brokers have sufficient trading  
15 activity in Canadian securities to justify the expense of following Canadian  
16 companies. These two factors counsel permitting Canadian persons to continue  
17 account activity with a Canadian broker-dealer. Collapsing the account results in  
18 draconian tax consequences for Canadian persons.

1     **SECTION 14 [EXEMPT BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS**  
2     **AND INVESTMENT ADVISER REPRESENTATIVES].**

3             (a) The following broker-dealers are exempt from the registration requirements of §13:

4                 (1) a broker-dealer who either is registered or, except as provided in §14(a)(3), is  
5     not required to be registered under the Securities Exchange Act of 1934 and who has no place of  
6     business in this State if:

7                     (i) transactions effected in this State by the broker-dealer with the issuer of  
8     the securities involved in the transactions or other broker-dealers registered or exempt under this  
9     [Act];

10                    (ii) the broker-dealer is registered under the securities act of a state in which  
11     the broker-dealer maintains a place of business and the broker-dealer offers and sells in this State  
12     to a person who is an existing customer of the broker-dealer and whose principal place of  
13     residence is not in this State; or

14                    (iii) the broker-dealer is registered under the securities act of a state in  
15     which the broker-dealer maintains a place of business and the broker-dealer during any 12  
16     consecutive months does not effect transactions with more than six persons in this State in addition  
17     to transactions specified in subparagraphs (i) and (ii);

18             (2) any other broker-dealer the [Administrator], by rule or order, exempts.

19             (3) The exemption provided in Subsection (a)(1)(i) is not available to a broker-  
20     dealer who deals solely in government securities and is not registered under the Securities  
21     Exchange Act of 1934 unless the broker-dealer is subject to supervision as a dealer in government  
22     securities by the Federal Reserve Board.

1 (b) The following agents are exempt from the registration requirements of §13:

2 (1) an agent acting for a broker-dealer exempt under Subsection (a);

3 [(2) an agent acting for an issuer in effecting transactions in a security exempted by  
4 §§3(a)-(d), (g)-(i)];

5 (3) an agent acting for an issuer effecting offers or sales of securities in transactions  
6 exempted by §4;

7 (4) an agent acting for an issuer effecting transactions in this state with [employees,  
8 partners, officers, or directors of the issuer, a parent or a wholly-owned subsidiary of the issuer]  
9 [any person], if no commission or other similar compensation is paid or given directly or indirectly  
10 to the agent for soliciting such [employee, partner, officer, or director] [person]; and

11 (5) any other agent the [Administrator], by rule or order, exempts.

12 (c) The following investment advisers are exempt from the registration requirements of  
13 §13:

14 (1) a federal covered investment adviser;

15 (2) any other investment adviser without a place of business in this State [and that is  
16 registered in another State] if:

17 (i) its only clients in this State are [registered or exempt] investment  
18 advisers, [registered or exempt] broker-dealers, or institutional investors (investment companies  
19 registered or exempt under the Investment Company Act of 1940, depository institutions,  
20 international banks, insurance companies, employee benefit plans with assets of not less than  
21 \$1,000,000, governmental agencies or instrumentalities and such other institutional investors as are  
22 designated by rule or order of the [Administrator]);

(ii) it directs business communications to and transacts advisory business with a person in this State who is an existing client of the investment adviser and whose principal place of residence is not in this State; and

(iii) during the preceding 12 month period it directs business communications to and transacts advisory business with not more than six clients in addition to those specified in subparagraphs (2)(i) and (2)(ii);and

(3) any other investment adviser the [Administrator], by rule or order, exempts.

(d) The following investment adviser representatives are exempt from the registration requirements of §13:

(1) an investment adviser representative acting for an investment adviser which solely provides advisory services with respect to securities exempted by §3;

(2) an investment adviser representative with no place of business in this State; or

(3) any other investment adviser representative that the [Administrator], by rule or order, exempts.

#### **REPORTER'S COMMENT**

Source of Law: RUSA §§202, 204.

1. The 1956 Act §§401(b)-(c) and (f) were similar but did not address vacationing clients.

2. While NSMIA preempts state regulation of federal covered investment advisers, it does not similarly preempt federal regulation of investment adviser representatives which were intended to be subject to state regulation.

3. NSMIA currently establishes a national set minimum standard prohibiting a state from regulating investment advisers that do not have a place of business in a state and have had fewer than six clients who are state residents during the past 12 months.



1     **SECTION 15 [REGISTRATION PROCEDURE FOR BROKER-DEALERS, AGENTS,**  
2     **INVESTMENT ADVISERS, AND INVESTMENT ADVISER REPRESENTATIVES].**

3             (a) A broker-dealer, agent, investment adviser, or investment adviser representative may  
4     obtain an [initial or renewal] registration by filing with the [Administrator] or his designee an  
5     application together with a consent to service of process complying with §32. The application  
6     shall contain whatever information the [Administrator] by rule requires concerning such matters as

7                 (1) the applicant's form and place of organization;

8                 (2) the applicant's proposed method of doing business;

9                 (3) the qualifications and business history of the applicant; in the case of the broker-  
10    dealer or investment adviser, the qualifications and business history of each partner, officer, or  
11    director, any person occupying a similar status or performing similar functions, or any person  
12    directly or indirectly controlling the broker-dealer or investment adviser; and, in the case of an  
13    investment adviser, the qualifications and business history of [each employee];

14                (4) any injunction or administrative order or conviction of a felony of the applicant  
15    or any person specified in §15(a)(3);

16                (5) the applicant's financial condition and history; and

17                (6) any information to be furnished or disseminated to any client or prospective  
18    client, if the applicant is an investment adviser.

19             The [Administrator] may by rule or order require an applicant for initial registration to  
20    publish an announcement of the application in one or more specified newspapers published in this  
21    state. If no denial order is in effect and no proceeding is pending under §17, registration becomes  
22    effective at noon of the 30<sup>th</sup> day after an application is filed. The [Administrator] may by rule or

1 order specify an earlier effective date, and may by order defer the effective date until noon of the  
2 30<sup>th</sup> day after the filing of any amendment. Registration of a broker-dealer automatically  
3 constitutes registration of any agent who is a partner, officer, or director, or a person occupying a  
4 similar status or performing similar functions. Registration of an investment adviser automatically  
5 constitutes registration of any investment adviser representative who is a partner, officer, or  
6 director, or a person occupying a similar status or performing similar functions.

7 (b) The requirements of Subsection (a) are satisfied by an applicant who has filed and  
8 maintains a completed and current registration with the Securities and Exchange Commission or  
9 [designated self-regulatory organization] by filing with the [Administrator] notice of the  
10 registration in the form and content determined by the [Administrator], by rule, and a consent to  
11 service of process complying with §32, or causing to be sent to the Administrator such notice and  
12 consent by a central registration depository system. The registration information filed with the  
13 Securities and Exchange Commission or [designated self-regulatory organization] may be available  
14 to the [Administrator] through a central registration depository system approved by the  
15 [Administrator].

16 (c) Except with respect to federal covered investment advisers whose only clients in this  
17 state are those described in §14(c) of this Act, a federal covered investment adviser shall file with  
18 the [Administrator], before acting as a federal covered investment adviser in this state, such  
19 documents as have been filed with the Securities and Exchange Commission as the  
20 [Administrator], by rule or order, may require.

21 (d) (1) Every applicant for [initial or renewal] broker-dealer or agent registration shall  
22 pay a registration filing fee of [\$\_\_] as required by the [Administrator] in the case of a broker-

1 dealer, [\$\_\_] in the case of an agent. When an application is denied or withdrawn, the  
2 [Administrator] shall retain [\$\_\_] of the fee;

3 (2) Every applicant for [initial or renewal] registration as an investment adviser or  
4 an investment adviser representative shall pay a registration fee as required by the [Administrator],  
5 [\$\_\_] in the case of an investment adviser, and [\$\_\_] in the case of an investment adviser  
6 representative. When an application is denied or withdrawn, the [Administrator] shall retain  
7 [\$\_\_] of the fee;

8 (3) Every person acting as a federal covered investment adviser in this state shall  
9 pay an [initial and renewal] notice filing fee as required by the [Administrator].

10 (e) A registered broker-dealer, federal covered investment adviser, or investment adviser  
11 may file an application for registration of a successor, whether or not the successor is then in  
12 existence, for the unexpired portion of the year. There shall be no filing fee.

13 (f) The [Administrator] may, by rule or order, require a minimum capital for registered  
14 broker-dealers, limited by the provisions of §15(h) of the Securities Exchange Act of 1934, and  
15 establish minimum financial requirements for investment advisers, limited by the provisions of §222  
16 of the Investment Advisers Act of 1940, which may include different requirements for those  
17 investment advisers who maintain custody of clients' funds or securities or who have discretionary  
18 authority over same and those investment advisers who do not.

19 (g) The [Administrator] may, by rule or order, require registered broker-dealers, agents,  
20 and investment advisers who have custody of or discretionary authority over client funds or  
21 securities to post surety bonds in amounts up to [\$\_\_] as the [Administrator] may prescribe,  
22 subject to the limitations of §15 of the Securities Exchange Act of 1934 (for broker-dealers) and

§222 of the Investment Advisers Act of 1940 (for investment advisers) and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of any registrant whose net capital, or, in the case of an investment adviser whose minimum financial requirements, which may be defined by rule exceeds [\$\_\_] the amounts required by the [Administrator]. Every bond shall provide for suit by any person who has a cause of action under §28. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within the time limitations of §28(f).

#### REPORTER'S COMMENT

Source of Law: NASAA 1986 and 1997 Amendments to 1956 Act §202; RUSA §205(b).

1. Section 15(b) was originally RUSA §205(b). The Official Comment to that Section explains:

Subsection (b) recognizes the substantial steps at coordination already undertaken by those agencies. The Subsection provides that licensing may be accomplished through a central registration depository system such as the CRD system of the National Association of Securities Dealers, Inc. Unless the [Administrator] requires additional information in a particular case, the information filed by the applicant with the Securities and Exchange Commission or a self-regulatory organization is sufficient for licensing purposes. The definition of "filed" includes the filing of information with an approved designee of the [Administrator].

2. RUSA §208 takes a different approach to the licensing of broker-dealers, agents (here called sales representatives) and investment advisers when it provides:

Licensing, general provisions. (a) Unless a proceeding under §212 is instituted or the applicant is notified that the application is incomplete, the license of a broker-dealer, sales representative, or investment adviser becomes effective 30 days after the later of the date an application for licensing is filed and is complete or the date an amendment to an application is filed and is complete, in either case only if all requirements imposed under §207 are satisfied. An application is complete when the applicant has furnished information responsive to each applicable item of the application. The [Administrator] by order may authorize an earlier effective date of licensing.

(b) The license of a broker-dealer, sales representative, or investment adviser is effective until terminated by expiration, revocation, or withdrawal.

1 (c) The license of a sales representative is effective only with respect to  
2 transactions effected on behalf of the broker-dealer or issuer for whom the sales  
3 representative is licensed.

4 (d) A person may not act at any one time as a sales representative for more  
5 than one broker-dealer or for more than one issuer, unless the broker-dealers or  
6 issuers for whom the sales representative acts are affiliated by direct or indirect  
7 common control or the [Administrator], by rule or order, authorizes multiple  
8 licenses.

9 (e) If a person licensed as a sales representative terminates association with  
10 a broker-dealer or issuer or ceases to be a sales representative, the sales  
11 representative and the broker-dealer or issuer on whose behalf the sales  
12 representative was acting shall promptly notify the [Administrator].

13 (f) The [Administrator] by rule may authorize one or more special  
14 classifications of licenses as a broker-dealer, sales representative, or investment  
15 adviser to be issued to applicants subject to limitations and conditions on the nature  
16 of the activities that may be conducted by persons so licensed.

17 Official Code Comment 3 to RUSA §208 explains:

18 The federal pattern of continuing registration has been adopted in lieu of the  
19 1956 Act provisions requiring annual renewals. Under Subsection (b), expiration,  
20 revocation, or withdrawal are the events now which generally terminate the  
21 effectiveness of a license.

1     **SECTION 16 [POSTREGISTRATION PROVISIONS].**

2             (a) Every broker-dealer and investment adviser shall make and keep such accounts,  
3     correspondence, memoranda, papers, books, and other records as the [Administrator] by rule  
4     prescribes by rule or order, except as provided by §15 of the Securities Exchange Act of 1934 (in  
5     the case of a broker-dealer), and §222 of the Investment Advisers Act of 1940 (in the case of an  
6     investment adviser).

7             (b) With respect to investment advisers, the [Administrator] may require that information  
8     be furnished or disseminated to clients in this state as necessary or appropriate in the public interest  
9     or for the protection of investors and advisory clients, except as provided by §222 of the  
10    Investment Advisers Act of 1940.

11            (c) Every registered broker-dealer shall file such financial reports as the [Administrator]  
12    may by rule prescribe by rule or order, except as provided by §15 of the Securities Exchange Act  
13    of 1934.

14            (d) If the information contained in any document filed with the [Administrator] is or  
15    becomes inaccurate or incomplete in any material respect, the registrant or federal covered  
16    investment adviser shall promptly file a correcting amendment promptly if the document is filed  
17    with respect to a registrant, or when such amendment is required to be filed with the Securities and  
18    Exchange Commission if the document is filed with respect to a federal covered investment  
19    adviser, unless notification of the correction has been given under §15(c).

20            (e) All the records referred to in Subsection (a) are subject at any time or from time to time  
21    to such reasonable periodic, special, or other examinations by representatives of the  
22    [Administrator], within or without this state, as the [Administrator] deems necessary or

1 appropriate in the public interest or for the protection of investors. For the purpose of avoiding  
2 unnecessary duplication of examinations, the [Administrator], shall cooperate with the securities  
3 administrators of other states, the Securities and Exchange Commission, and any national securities  
4 exchange or national securities association registered under the Securities Exchange Act of 1934.

5 (f) Required records may be maintained in any form of data storage if they are readily  
6 accessible to the [Administrator]. Required records must be preserved for [five] years unless the  
7 [Administrator] by rule specifies a lesser period for a particular type or class of records.

8 (g) Unless prohibited by rule or order of the [Administrator], an investment adviser may  
9 take or retain custody of securities or funds of a client.

#### 10 **REPORTER'S COMMENT**

11 Source of Law: 1956 Act §§203 & 102(c) and 1997 NASAA Amendment to §203; RUSA  
12 §§209(f), 215.

13 1. RUSA §211 is similar to §16(e), but provides:

14 Power of inspection. (a) The [Administrator], without notice, may examine  
15 in a manner reasonable under the circumstances the records, within or without this  
16 state, of a licensed broker-dealer, sales representative, or investment adviser in  
17 order to determine compliance with this [Act]. Broker-dealers, sales  
18 representatives, and investment advisers shall make their records available to the  
19 [Administrator] in legible form.

20 (b) The [Administrator] may copy records or require a licensed person to  
21 copy records and provide the copies to the [Administrator] to the extent and in a  
22 manner reasonable under the circumstances.

23 (c) The [Administrator] may impose a reasonable fee for the expense of  
24 conducting an examination under this Section.

1     **SECTION 17 [DENIAL, REVOCATION, SUSPENSION, CANCELLATION, AND**  
2     **WITHDRAWAL OF REGISTRATION].**

3             (a) The [Administrator] may by order deny, suspend or revoke any registration, or bar or  
4     censure any registrant or any officer, director, partner or person occupying a similar status or  
5     performing similar functions for a registrant, from employment by or association with a registered  
6     broker-dealer or investment adviser, or restrict or limit a registrant as to any function or activity of  
7     the business for which registration is required in this state, if the [Administrator] finds (1) that the  
8     order is in the public interest and (2) that the applicant or registrant

9             (A) has filed an application for registration which as of its effective date, or as of  
10    any date after filing in the case of an order denying effectiveness, was incomplete in any material  
11    respect or contained any statement which was, in light of the circumstances under which it was  
12    made, false or misleading with respect to any material fact;

13            (B) has willfully violated or willfully failed to comply with any provision of this Act  
14    or a predecessor act or any rule or order under this Act or a predecessor act, or any provision of  
15    the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of  
16    1940, or the Commodity Exchange Act within the past ten years;

17            (C) has been convicted, within the past ten years, of any misdemeanor involving a  
18    security or any aspect of the securities business, or any felony;

19            (D) is permanently or temporarily enjoined, within the past ten years, by any court  
20    of competent jurisdiction from engaging in or continuing any conduct or practice involving any  
21    aspect of the securities business;

22            (E) is the subject of an order entered within the past five years by the securities



1 administrator of any other state or by the Securities and Exchange Commission denying or  
2 revoking registration as a broker-dealer, agent, investment adviser, or investment adviser  
3 representative, or the substantial equivalent of those terms as defined in this Act, or is the subject  
4 of an order of the Securities and Exchange Commission suspending or expelling him from a  
5 national securities exchange or national securities association registered under the Securities  
6 Exchange Act of 1934, or is the subject of a United States Post Office fraud order; but (i) the  
7 [Administrator] may not institute a revocation or suspension proceeding under this paragraph more  
8 than one year from the date of the order relied on, and (ii) [the Administrator] may not enter an  
9 order under this paragraph on the basis of an order under another state act unless that order was  
10 based on facts which would currently constitute a ground for an order under this Subsection.

11 (F) is the subject of an adjudication or determination, after notice and opportunity  
12 for hearing, within the past ten years by a securities or commodities agency or administrator of  
13 another state or a court of competent jurisdiction that the person has willfully violated the  
14 Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of  
15 1940, the Investment Company Act of 1940, or the Commodity Exchange Act, or the securities or  
16 commodities law of any other state.

17 (G) has engaged within the past five years in dishonest or unethical practices in the  
18 securities business;

19 (H) is insolvent, either in the sense that the person's liabilities exceed the person's  
20 assets or in the sense that the person cannot meet the person's obligations as they mature; but the  
21 [Administrator] may not enter an order against a broker-dealer or investment adviser under this  
22 paragraph without a finding of insolvency as to the broker-dealer or investment adviser;

1 (I) is not qualified on the basis of such factors as training, experience, and  
2 knowledge of the securities business, except as otherwise provided in §17(b);

3 (J) has failed reasonably to supervise the person's agents or employees if the person  
4 is a broker-dealer, the person's investment adviser representatives or employees if the person is an  
5 investment adviser, to assure their compliance with this Act;

6 (K) has failed to pay the proper filing fee;

7 (L) has willfully violated the law of a foreign jurisdiction governing or regulating  
8 any aspect of the business of securities or banking or, within the past five years, has been the  
9 subject of an action of a securities regulator of a foreign jurisdiction denying, revoking or  
10 suspending the right to engage in the business of securities as a broker-dealer, agent, investment  
11 adviser or investment adviser representative, or is the subject of an action of any securities  
12 exchange or self-regulatory organization operating under the authority of the securities regulator  
13 of a foreign jurisdiction suspending or expelling such person from membership in such exchange or  
14 self-regulatory organization; or

15 (M) The [Administrator] may not institute a suspension or revocation proceeding  
16 solely on the basis of a final judicial or administrative order made known to her or him by the  
17 applicant before the effective date of the registration unless the proceeding is instituted within the  
18 next 90 days following registration. For the purpose of this provision, a "final judicial or  
19 administrative order" shall not include an order that is stayed or subject to further review or  
20 appeal. [This provision shall not apply to renewal registrations].

21 (b) The following provisions govern the application of §17(a)(2)(I):

22 (1) The [Administrator] may not enter an order against a broker-dealer on the basis

1 of the lack of qualification of any person other than (A) the investment adviser if the person is an  
2 individual or (B) an agent of the broker-dealer.

3 (2) The [Administrator] may not enter an order against any investment adviser on  
4 the basis of the lack of qualification of any person other than (A) the investment adviser if he or  
5 she is an individual or (B) an investment adviser representative.

6 (3) The [Administrator] may not enter an order solely on the basis of lack of  
7 experience if the applicant or registrant is qualified by training or knowledge or both.

8 (4) The [Administrator] shall consider that an agent representative who will work  
9 under the supervision of a registered broker-dealer need not have the same qualifications as a  
10 broker-dealer and that an investment adviser who will work under the supervision of a registered  
11 investment adviser need not have the same qualifications as an investment adviser.

12 (5) The [Administrator] shall consider that an investment adviser is not necessarily  
13 qualified solely on the basis of experience as a broker-dealer or agent. When the [Administrator]  
14 finds that an applicant for [initial or renewal] registration as a broker-dealer is not qualified as an  
15 investment adviser, the [Administrator] may by order condition the applicant's registrant as a  
16 broker-dealer upon her or his not transacting business in this state as an investment adviser.

17 (6) The [Administrator] may by rule provide for an examination, including an  
18 examination developed or approved by an organization of securities administrators, which  
19 examination may be written or oral or both, to be taken by any class of or all applicants. The  
20 [Administrator] may by rule or order waive the examination requirement as to a person or class of  
21 persons if the [Administrator] determines that the examination is not necessary for the protection  
22 of advisory clients.

1 (c) The [Administrator] may by order summarily postpone or suspend registration, or in the  
2 case of an investment adviser representative or of an individual applying to become an agent or an  
3 investment adviser representative, summarily suspend or bar any such person from acting in that  
4 capacity, pending final determination of any proceeding under this Section. Upon entry of the  
5 order, the [Administrator] shall promptly notify the applicant or registrant, as well as the employer  
6 or prospective employer if the applicant or registrant is an agent or investment adviser  
7 representative, that it has been entered and of the reasons for its entry and that within 15 days  
8 after the receipt of a written request the matter will be set down for hearing. If no hearing is  
9 requested and none is ordered by the [Administrator], the order will remain in effect until it is  
10 modified or vacated by the [Administrator]. If a hearing is requested or ordered, the  
11 [Administrator], after notice of and opportunity for hearing, may modify or vacate the order or  
12 extend it until final determination.

13 (d) If the [Administrator] finds that any registrant or applicant for registration is no longer  
14 in existence or has ceased to do business as a broker-dealer, agent, investment adviser or  
15 investment adviser representative, or is subject to an adjudication of mental incompetence or to the  
16 control of a committee, conservator, or guardian, or cannot be located after reasonable search, the  
17 [Administrator] may by order cancel or revoke the registration or cancel or deny the application.

18 (e) Withdrawal from registration as a broker-dealer, agent, investment adviser or  
19 investment adviser representative becomes effective 30 days after receipt of an application to  
20 withdraw or within such shorter period of time as the [Administrator] may determine, unless a  
21 revocation or suspension proceeding is pending when the application is filed or a proceeding to  
22 revoke or suspend or to impose conditions upon the withdrawal is instituted within 30 days after

1 the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at  
2 such time and upon such conditions as the [Administrator] by order determines. If no proceeding  
3 is pending or instituted and withdrawal automatically becomes effective, the [Administrator] may  
4 nevertheless institute a revocation or suspension proceeding under §17(a)(2)(B) within one year  
5 after withdrawal became effective and enter a revocation or suspension order as of the last date on  
6 which registration was effective.

7 (f) No order may be entered under any part of this Section except the first sentence of  
8 Subsection (c) without (1) appropriate prior notice to the applicant or registrant (as well as the  
9 employer or prospective employer if the applicant or registrant is an agent or investment adviser  
10 representative), (2) opportunity for hearing, and (3) written findings of fact and conclusions of law.

#### 11 **REPORTER'S COMMENT**

12 Source of Law: 1956 Act §204, NASAA 1981, 1986, 1987, 1992, and 1994 proposed  
13 Amendments; RUSA §§212-214.

1                                   **[PART E: ADMINISTRATION AND ENFORCEMENT]**

2       **SECTION 18 [GENERAL FRAUD PROVISION].** It is unlawful for any person, in connection  
3       with the offer, sale or purchase of any security, directly or indirectly

4               (a) to employ any device, scheme, or artifice to defraud,

5               (b) to make any untrue statement of a material fact or to omit to state a material fact  
6       necessary in order to make the statements made, in the light of the circumstances under which they  
7       are made, not misleading, or

8               (c) to engage in any act, practice, or course of business which operates or would operate as  
9       a fraud or deceit upon any person.

10                                   **REPORTER'S COMMENT**

11               Source of Law: 1956 Act §101; RUSA §501.

12               1. Section 13 is modeled on Rule 10b-5 of the Securities Exchange Act.

13               2. Because Rule 10b-5 reaches market manipulation, see 8 L. Loss & J. Seligman,  
14       Securities Regulation ch.10.D (3d ed. 1991), this Act does not include RUSA §502, which has no  
15       counterpart in the 1956 Act. Section 502 provides:

16                       [Manipulation of market]. (a) Without limiting the general applicability of  
17       Section 501, a person may not:

18                       (1) quote a fictitious price with respect to a security;

19                       (2) effect a transaction in a security which involves no change in the  
20       beneficial ownership of the security for the purpose of creating a false or misleading  
21       appearance of active trading in a security or with respect to the market for the  
22       security;

23                       (3) enter an order for the purchase of a security with the knowledge that an  
24       order of substantially the same size and at substantially the same time and price for  
25       the sale of the security has been, or will be, entered by or for the same, or affiliated,

1 person for the purpose of creating a false or misleading appearance of active trading  
2 in a security or with respect to the market for the security;

3 (4) enter an order for the sale of a security with knowledge that an order of  
4 substantially the same size and at substantially the same time and price for the  
5 purchase of the security has been, or will be, entered by or for the same, or  
6 affiliated, person for the purpose of creating a false or misleading appearance of  
7 active trading in a security or with respect to the market for the security; or;

8 (5) employ any other deceptive or fraudulent device, scheme, or artifice to  
9 manipulate the market in a security.

10 (b) A transaction effected in compliance with, or conduct that does not  
11 violate, the applicable provisions of the Securities Exchange Act of 1934 and the  
12 rules and regulations of the Securities and Exchange Commission thereunder is not  
13 a violation of Subsection (a).

14 The Official Comment 1 to RUSA §502 explained in part:

15 Although the coverage of the preceding Section is comprehensive, Section  
16 502 has been added to the Act to specifically delineate the elements of market  
17 manipulation.

1     **SECTION 19 [FRAUD BY INVESTMENT ADVISERS].** It is unlawful for any person who  
2     receives any consideration from another person primarily for advising the other person as to the  
3     value of securities or their purchase or sale, whether through the issuance of analyses or reports or  
4     otherwise,

5             (a) to employ any device, scheme, or artifice to defraud the other person, or

6             (b) to engage in any transaction, practice, or course of business which operates or would  
7     operate as a fraud or deceit upon the other person.

#### 8                                     **REPORTER'S COMMENT**

9             Source of Law: 1956 Act §102(a); RUSA §503; Inv. Adv. Act §206.

10            1. This Act omits 1956 §102(b) and amendments as unnecessary in light of the  
11     Administrator's rulemaking authority in §31. Section 102(b) provides:

12                     (b) It is unlawful for any investment adviser to enter into, extend, or renew  
13     any investment advisory contract unless it provides in writing

14                     (1) that the investment adviser shall not be compensated on the basis of a  
15     share of capital gains upon or capital appreciation of the funds or any portion of the  
16     funds of the client;

17                     (2) that no assignment of the contract may be made by the investment  
18     adviser without the consent of the other party to the contract; and  
19

20                     (3) that the investment adviser, if a partnership, shall notify the other party  
21     to the contract of any change in the membership of the partnership within a  
22     reasonable time after the change.

23                     Clause (1) does not prohibit an investment advisory contract which provides  
24     for compensation based upon the total value of a fund averaged over a definite  
25     period, or as of definite dates or taken as of a definite date. "Assignment," as used  
26     in clause (2), includes any direct or indirect transfer or hypothecation of an  
27     investment advisory contract by the assignor or of a controlling block of the  
28     assignor's outstanding voting securities by a security holder of the assignor; but, if  
29     the investment adviser is a partnership, no assignment of an investment advisory  
30     contract is considered to result from the death or withdrawal of a minority of the



1 members of the investment adviser having only a minority interest in the business of  
2 the investment adviser, or from the admission to the investment adviser of one or  
3 more members who, after admission, will be only a minority of the members and  
4 will have only a minority interest in the business.

1     **SECTION 20 [BURDEN OF PROOF].**

2             (a) In a civil action or administrative proceeding under this [Act], a person claiming an  
3 exemption or an exception from a definition has the burden of proving the exemption or exception.

4             (b) In a criminal proceeding, the burden of going forward with evidence of a claim of  
5 exemption or exception from a definition is on the person claiming it.

6                             **REPORTER’S COMMENT**

7             Source of Law: RUSA §608.

8             1. 1956 Act §402(d) is similar.

9             2. The Official Comment 2 to RUSA §608 explains:

10                    Subsection (b) has been added to clarify the parties’ respective obligations  
11 in a criminal proceeding. While the standard of proof that the prosecuting attorney  
12 is required to meet to obtain a conviction is establishing the requisite elements of  
13 the criminal offense “beyond a reasonable doubt,” a defendant claiming an  
14 exemption or exception as a defense has the burden of offering evidence to establish  
15 that defense.

1     **SECTION 21 [FILING OF SALES AND ADVERTISING LITERATURE].** The  
2     [Administrator] may by rule or order require the filing of any prospectus, pamphlet, circular, form  
3     letter, advertisement, or other sales literature or advertising communication addressed or intended  
4     for distribution to prospective investors, including clients or prospective clients of an investment  
5     adviser registered or required to be registered in this state, unless the security or transaction is  
6     exempted by §§3-4.

7                                     **REPORTER'S COMMENT**

8             Source of Law: 1956 Act §403; RUSA §405.

1     **SECTION 22 [MISLEADING FILINGS].** A person may not make or cause to be made, in a  
2     document filed with the [Administrator] or in a proceeding under this [Act], a statement that the  
3     person knows or has reasonable grounds to know is, at the time and in the light of the  
4     circumstances under which it is made, false or misleading in a material respect.

5                                     **REPORTER’S COMMENT**

6             Source of Law: RUSA §504.

7             1. The 1956 Act §404 was similar.

8             2. The RUSA Official Comment explains:

9                     This Section adds the language “the person knows or has reasonable  
10                    grounds to know” as a condition to liability. This modification thus removes the  
11                    strict liability standard that existed under the Section 404 in the 1956 Act.

1    **SECTION 23 [MISREPRESENTATIONS CONCERNING REGISTRATION OR**  
2    **EXEMPTION].**

3           (a) Neither the fact that an application for registration or a registration statement has been  
4    filed under this [Act] nor the fact that a person is registered or a security is registered under this  
5    [Act] constitutes a finding by the [Administrator] that a document filed under this [Act] is true,  
6    complete, and not misleading. Neither of those facts nor the fact that an exemption or exception is  
7    available for a security or a transaction means that the [Administrator] has passed upon the merits  
8    or qualifications of, or recommended or given approval to, a person, security, or transaction.

9           (b) A person may not make, or cause to be made, to a purchaser, customer, or client a  
10   representation inconsistent with §23(a).

11                           **REPORTER'S COMMENT**

12           Source of Law: RUSA §505; 1956 Act §405.

1     **SECTION 24 [ADMINISTRATION OF ACT].**

2             (a) This Act shall be administered by the [insert name of local administrative agency and  
3     any related provisions on method of selection, salary, term of office, budget, selection and  
4     remuneration of personnel, annual reports to the legislature or governor, etc., which are  
5     appropriate to the particular state].

6             (b) It is unlawful for the [Administrator] or any of his officers or employees to use for  
7     personal benefit any information which is filed with or obtained by the [Administrator] and which is  
8     not made public. No provision of this Act authorizes the [Administrator] or any of her or his  
9     officers or employees to disclose any such information except among themselves or when  
10    necessary or appropriate in a proceeding or investigation under this Act. No provision of this Act  
11    either creates or derogates from any privilege which exists at common law or otherwise when  
12    documentary or other evidence is sought under a subpoena directed to the [Administrator] or any  
13    of her or his officers or employees.

14                             **REPORTER'S COMMENT**

15             Source of Law: 1956 Act §406; RUSA §§701-702.

16             1. The 1956 Act also includes optional §406(c):

17                     [(c) Insert a provision, if desired, covering fees for examinations, filings under  
18     Section 403, and other miscellaneous filings for which no fees are specified elsewhere in  
19     this Act.]

1     **SECTION 25 [INVESTIGATIONS AND SUBPOENAS].**

2             (a) The [Administrator] (1) may make such public or private investigations within or  
3     outside of this state as he or she deems necessary to determine whether any person has violated or  
4     is about to violate any provision of this Act or any rule or order, or to aid in the enforcement of  
5     this Act or in the prescribing of rules and forms hereunder, (2) may require or permit any person to  
6     file a statement in writing, under oath or otherwise as the [Administrator] determines, as to all the  
7     facts and circumstances concerning the matter to be investigated, and (3) may publish information  
8     concerning any violation of this Act or any rule or order.

9             (b) For the purpose of any investigation or proceeding under this Act, the [Administrator]  
10    or any designated officer may administer oaths and affirmations, subpoena witnesses, compel their  
11    attendance, take evidence, and require the production of any books, papers, correspondence,  
12    memoranda, agreements, or other documents or records which the [Administrator] deems relevant  
13    or material to the inquiry.

14            (c) In case of contumacy by or refusal to obey a subpoena issued to, any person, the [insert  
15    name of appropriate court or a court of another state able to assert jurisdiction over the person  
16    refusing to testify or produce, if the person is not subject to service of process in this State] upon  
17    application by the [Administrator], or the designated officer, there to produce documentary  
18    evidence if so ordered or to give evidence touching the matter under investigation or in question.  
19    Failure to obey the order of the court may be punished by the court as a contempt of court.

20            (d) No person is excused from attending and testifying or from producing any document or  
21    record before the [Administrator], or in obedience to the subpoena of the [Administrator] or any  
22    designated officer, or in any proceeding instituted by the [Administrator], on the ground that the

1 required testimony or evidence (documentary or otherwise) may tend to incriminate her or him or  
2 subject her or him to a penalty or forfeiture; but no individual may be prosecuted or subjected to  
3 any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he  
4 or she is compelled, after claiming the privilege against self-incrimination, to testify or produce  
5 evidence (documentary or otherwise), except that the individual testifying is not exempt from  
6 prosecution and punishment for perjury or contempt committed in testifying.

7 (e) The [Administrator] may issue and apply to enforce subpoenas in this state at the  
8 request of a securities agency or administrator of another state if the activities constituting an  
9 alleged violation for which the information is sought would be a violation of this {Act} if the  
10 activities had occurred in this state.

#### 11 **REPORTER'S COMMENT**

12 Source of Law: 1956 Act §407 and 1987 NASAA Proposed Amendment [adding §25(e)].

13 1. The Securities Litigation Uniform Standard Act of 1998 in §102(e) provides:

14 The Securities and Exchange Commission, in consultation with State  
15 securities commissions (or any agencies or offices performing like functions), shall  
16 seek to encourage the adoption of State laws providing for reciprocal enforcement  
17 by State securities commissions of subpoenas issued by another State securities  
18 commission seeking to compel persons to attend, testify in, or produce documents  
19 or records in connection with an action or investigation by a State securities  
20 commission of an alleged violation of State securities laws.



1     **SECTION 26 [ADMINISTRATIVE ENFORCEMENT].** Whenever it appears to the  
2     [Administrator] that any person has engaged or is about to engage in any act or practice  
3     constituting a violation of any provision of this Act or any rule or order under this Act, the  
4     [Administrator] may bring one or more of the following remedies:

5             (a) issue a cease and desist order, with or without a prior hearing against the person or  
6     persons engaged in the prohibited activities, directing them to cease and desist from further illegal  
7     activity; or

8             (b) bring an action in the [insert the name of appropriate court] to enjoin the acts or  
9     practices to enforce compliance with this Act or any rule or order hereunder. Upon a proper  
10    showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be  
11    granted and a receiver or conservator may be appointed for the defendant or the defendant's  
12    assets. In addition, upon a proper showing by the [Administrator] the court may enter an order of  
13    recission, civil penalty up to a maximum of [\$2,500] for a single violation or of [\$25,000] for  
14    multiple violations in a single proceeding or a series of related proceedings, a declaratory  
15    judgment, restitution or disgorgement directed to any person who has engaged in any act  
16    constituting a violation of any provision of this Act or any rule or order issued under this Act or  
17    other relief the court deems just. The court may not require the [Administrator] to post a bond;

18            (c) censure the person, if the person is a registered broker-dealer, agent, investment  
19    adviser, or investment adviser representative; or

20            (d) bar or suspend the person from association with a registered broker-dealer or  
21    investment adviser in this State; or

(e) issue an order against an applicant, registered person, or other person who knowingly violates this [Act] or a rule or order of the [Administrator] under this [Act], imposing a civil penalty up to a maximum of [\$2,500] for a single violation or of [\$25,000] for multiple violations in a single proceeding or a series of related proceedings.

#### **REPORTER'S COMMENT**

Source of Law: 1956 Act §408; NASAA 1987 Proposed Amendments to §408; RUSA §§602-603.

1. A Note to the 1956 Act §408 provides:

Constitutional due process considerations should be addressed by rulemaking or incorporation of the applicable administrative procedure act provisions of each jurisdiction.

2. The RUSA Official Comments to §602 provides in part:

One of the major revisions from the 1956 Act has been to increase the administrative remedies available to the [Administrator] when he or she has reasonable grounds to believe that a violation has occurred.

While changed from the 1956 Act, most of the proposed provisions are not alien to current practice. A large number of state administrators currently have cease and desist authority, either by amendment of the 1956 Act or through their administrative procedure law. A lesser number have provisions for bar. On the other hand, most administrators have no present authority to levy civil penalties.

The purpose behind the broader range of sanctions is to give the [Administrator] greater flexibility in imposing sanctions. Under the 1956 Act, an Administrator often faced the difficult choice of whether or not to suspend the license of a broker-dealer who had violated the Act, irrespective of the severity of the violation—a very drastic remedy and consequence. This Section now permits the [Administrator] to impose a less drastic sanction, e.g., a civil penalty. In egregious cases, on the other hand, an [Administrator] could, if warranted, impose multiple sanctions.

3. RUSA §710 alternatively provides:

The [Administrator] may commence an administrative proceeding at any time with respect to a matter within the [Administrator's ] jurisdiction. The [Administrator] shall

1 commence an administrative proceeding upon the application of a person, unless:

2 (A) the [Administrator] lacks jurisdiction over the subject matter;

3  
4 (B) resolution of the matter requires the [Administrator] to exercise discretion to  
5 determine whether or not to issue an order;

6 (C) a statute vests the [Administrator] with discretion to conduct or not to conduct  
7 an administrative proceeding before issuing an order to resolve the matter and, in the  
8 exercise of discretion, the [Administrator] determines not to conduct an administrative  
9 proceeding;

10 (D) resolution of the matter does not require the [Administrator] to issue an order  
11 that determines the person's legal rights, duties, privileges, immunities, or other legal  
12 interests;

13 (E) the matter is not timely submitted to the [Administrator]; or

14 (F) the matter is not submitted in a form substantially complying with the rules of  
15 the [Administrator].

16 (4) RUSA §712 provides an additional procedure for emergency procedures:

17 (A) The [Administrator] may use emergency administrative proceedings in a  
18 situation involving an immediate danger to the public welfare requiring immediate action.

19 (B) The [Administrator] may take only such action as is necessary to prevent or  
20 avoid the immediate danger to the public welfare that justifies use of emergency  
21 administrative proceedings.

22 (C) The [Administrator] shall issue an order, including a brief statement of findings  
23 of fact, conclusions of law, and, if it is an exercise of the agency's discretion, policy reasons  
24 for the decision to justify the determination of an immediate danger and the  
25 [Administrator's] decision to take the specific action.

26 (D) The [Administrator] shall give such notice as is practicable to persons who are  
27 required to comply with the order. The order is effective when issued.

28 (E) After issuing an order under this Section, the [Administrator] shall proceed as  
29 quickly as feasible to complete proceedings that would be required [under the state  
30 administrative procedures act] if the matter did not involve an immediate danger.

31 (F) The record of the [Administrator] consists of the documents regarding the

1 matter that were considered or prepared by the [Administrator]. The [Administrator] shall  
2 maintain these documents as the official record.

3 (G) Unless otherwise required by law, the [Administrator's] record need not  
4 constitute the exclusive basis for the [Administrator's] action in emergency administrative  
5 proceedings or for judicial review of the action.

6 (H) An order issued under this Section is subject to judicial review [in accordance  
7 with the state administrative procedure act].

1     **SECTION 27 [CRIMINAL PENALTIES].**

2           (a) Any person who willfully violates any provision of this Act except §22, or who willfully  
3     violates any rule or order under this Act, or who willfully violates §22 knowing the statement made  
4     to be false or misleading in any material respect, shall upon conviction be fined not more than  
5     [\$5,000] or imprisoned not more than three years, or both; but no person may be imprisoned for  
6     the violation of any rule or order if the person proves that he or she had no knowledge of the rule  
7     or order. [No indictment or information may be returned under this Act more than five years after  
8     the alleged violation.]

9           (b) The [Administrator] may refer such evidence as is available concerning violations of this  
10    Act or of any rule or order issued under this Act to the [Attorney General or the proper district  
11    attorney], who may, with or without such a reference, institute the appropriate criminal  
12    proceedings under this Act.

13          (c) Nothing in this Act limits the power of the state to punish any person for any conduct  
14    which constitutes a crime by statute or at common law.

15                           **REPORTER'S COMMENT**

16          Source of Law: 1956 Act §409.

17           1. RUSA §604 distinguishes between felonies and misdemeanors, limiting willful violations  
18    of cease and desist orders to a misdemeanor.

19           2. The sentence in brackets in §28(a) is an optional provision for any state which does not  
20    have a general criminal statute of limitations.

21           3. On the meaning of “willfully”, see the Comment under §12(a)(2)(B)

1     **SECTION 28 [ CIVIL LIABILITIES].** Except to the extent prohibited by the Securities

2     Litigation Uniform Standards Act of 1998, (a) any person who

3             (1) offers or sells a security in violation of §§7, 13(a), or 23(b), or of any rule or order  
4     under §21 which requires the affirmative approval of sales literature before it is used, or of any  
5     condition imposed under §§1(g) or (h), or

6             (2) offers or sells a security by means of any untrue statement of a material fact or any  
7     omission to state a material fact necessary in order to make the statements made, in the light of the  
8     circumstances under which they are made, not misleading (the buyer not knowing of the untruth of  
9     omission), and who does not sustain the burden of proof that he or she did not know, and in the  
10    exercise of reasonable care could not have known, of the untruth of omission, is liable to the  
11    person buying the security from her or him, who may sue either at law or in equity to recover the  
12    consideration paid for the security, together with interest at [x] percent per year from the date of  
13    payment, costs, and reasonable attorneys' fees, less the amount of any income received on the  
14    security, upon the tender of the security and any income received on it, or for damages if he or she  
15    no longer owns the security. Damages are the amount that would be recoverable upon a tender  
16    less the value of the security when the buyer disposed of it and interest at [x] percent per year from  
17    the date of disposition.

18            (b) Any person who

19             (1) engages in the business of advising others, for compensation, either directly or  
20    through publications or writings, as to the value of securities or as to the advisability of investing  
21    in, purchasing, or selling securities, or who, for compensation and as a part of a regular business,  
22    issues or promulgates analyses or reports concerning securities in violation of §§13(c) or (d), (an

1 action pursuant to a violation of §13(d) may not be maintained except by those persons who  
2 directly received advice from the unregistered investment adviser representative), §23(b), or of any  
3 rule or order under §21, or

4 (2) receives directly or indirectly any consideration from another person for advice  
5 as to the value of securities or their purchase or sale, whether through the issuance of analyses,  
6 reports or otherwise and employs any device, scheme, or artifice to defraud such other person or  
7 engages in any act, practice or course of business which operates or would operate as a fraud or  
8 deceit on such other person, is liable to that person who may sue either at law or in equity to  
9 recover the consideration paid for such advice and any loss due to such advice, together with  
10 interest at [x] percent per year from the date of payment of the consideration plus costs and  
11 reasonable attorneys' fees, less the amount of any income received. An action based on a violation  
12 of §\_\_ may not prevail where the person accused of the violation sustains the burden of proof that  
13 he or she did not know, and in the exercise of reasonable care could not have known, of the  
14 existence of the facts by reason of which the liability is alleged to exist.

15 (c) Every person who directly or indirectly controls a person liable under Subsections (a)  
16 and (b), including every partner, officer, or director of such a person, every person occupying a  
17 similar status or performing similar functions, every employee of such a person who materially aids  
18 conduct giving rise to the liability, and every broker-dealer or agent who materially aids in such  
19 conduct is liable jointly and severally with and to the same extent as such person, unless he or she  
20 sustains the burden of proof that he or she did not know, and in exercise of reasonable care could  
21 not have known, of the existence of the facts by reason of which the liability is alleged to exist.  
22 There is contribution as in cases of contract among the several persons so liable.

1 (d) Any tender specified in this Section may be made at any time before entry of judgment.  
2 Tender requires only notice of willingness to exchange the security for the amount specified. A  
3 purchaser who no longer owns the security may recover damages. Damages are the amount that  
4 would be recoverable upon a tender less the value of the security when the purchaser disposed of  
5 it, plus interest at the legal rate of this State from the date of disposition of the security, costs, and  
6 reasonable attorneys' fees determined by the court.

7 (e) Every cause of action under this statute survives the death of any person who might  
8 have been a plaintiff or defendant.

9 (f) A person may not obtain relief under §28 unless suit is brought within the earliest of one  
10 year after the discovery of the violation, one year after discovery should have been made by the  
11 exercise of reasonable care, or three years after the act, omission, or transaction constituting the  
12 violation.

13 (g) No person may sue under this Section (1) if the buyer received a written offer, before  
14 suit and at a time when he owned the security, to refund the consideration paid together with  
15 interest at [x] percent per year form the date of payment, less the amount of any income received  
16 on the security, and he or she failed to accept the offer within 30 days of its receipt, or (2) if the  
17 buyer received such an offer before suit and at a time when he or she did not own the security,  
18 unless he rejected the offer in writing within 30 days of its receipt.

19 (h) No person who has made or engaged in the performance of any contract in violation of  
20 any provision of this Act or any rule or order issued under this Act, or who has acquired any  
21 purported right under any such contract with knowledge of the facts by reason of which its making  
22 or performance was in violation, may base any suit on the contract.



1 (i) Any condition, stipulation, or provision binding any person acquiring any security or  
2 receiving any investment advice to waive compliance with any provision of this Act or any rule or  
3 order issued under this Act is void.

4 (j) The rights and remedies provided by this Act are in addition to any other rights or  
5 remedies that may exist at law or in equity, but this Act does not create any cause of action not  
6 specified in this Section or §15(g).

#### 7 **REPORTER'S COMMENT**

8 Source of Law: 1956 Act §410 (for §28(a)(1)); NASAA 1986 Proposed Amendment to  
9 §410 (for §§28(a)(2)(j)); RUSA §§605(a), 606.

10 1. RUSA divided counterpart provisions into §§605-607, 609, 802.

11 2. The initial clause referencing the Securities Litigation Uniform Standards Act of 1998  
12 modifies the entire §28. In 1998 Congress enacted that Act to prevent state private securities class  
13 actions lawsuits “from being used to frustrate the objectives of the Private Securities Litigation  
14 Reform Act of 1995.” See §2 Findings. At the same time the Act took several steps to preserve  
15 state securities enforcement powers and not to interfere with individual federal securities or state  
16 derivative claims.

17 The Securities Litigation Uniform Standards Act of 1998 (“The 1998 Act”) makes  
18 substantively identical amendments to §16 of the Securities Act of 1933 and §28 of the Securities  
19 Exchange Act of 1934.

20 Both Sections retain their preservation of state law rights and remedies formulation, but  
21 with a new limitation on class actions.

22 The class action limitation is expressly limited to “covered class actions” which in language  
23 sometimes paralleling Federal Rule of Civil Procedure Rule 23 and sometimes not means

24 (i) any single lawsuit in which

25 (I) damages are sought on behalf of more than 50 persons or  
26 prospective class members, and questions of law or fact common to those  
27 persons or members of the prospective class, without reference to issues of  
28 individualized reliance on an alleged misstatement or omission, predominate  
29 over any questions affecting only individual persons or members; or

1 (II) one or more named parties seek to recover damages on a  
2 representative basis on behalf of themselves and other unnamed parties  
3 similarly situated, and questions of law or fact common to those persons or  
4 members of the prospective class predominate over any questions affecting  
5 only individual persons or members; or

6 (ii) any group of lawsuits filed in or pending in the same court and involving  
7 common questions of law or fact, in which

8 (I) damages are sought on behalf of more than 50 persons; and

9 (II) the lawsuits are joined, consolidated, or otherwise proceed as a  
10 single action for any purpose.

11 Exception for derivative actions. Notwithstanding subparagraph (A), the term “covered  
12 class action” does not include an exclusively derivative action brought by one or more shareholders  
13 on behalf of a corporation.

14 No private party covered class action based upon the statutory or common law of any state  
15 may be maintained in any state or federal court if it alleges

16 (1) any untrue statement or omission of a material fact in connection with the purchase or  
17 sale of a covered security; or

18 (2) that the defendant used or employed any manipulative or deceptive device or  
19 contrivance in connection with the purchase or sale of a covered security.

20 Quoting §16(b) of the 1933 Act. This, in effect, is a total preemption of a state class actions based  
21 upon two categories of securities fraud. To give this preemption “teeth”, §§16(b) and 28 further  
22 provide for removal of any covered class action brought in any state court to the relevant Federal  
23 District Court when the claim involves a covered security (which has the same meaning as it does  
24 in the 1996 Act’s amendment to §18(b)(1)-(2) of the 1933 Act “except that such term shall not  
25 include any debt security that is exempt from registration under this title pursuant to rules issued  
26 by the Commission under §4(2)”).

27 The 1998 Act then provides three limits to the potential swath of this preemption.

28 First, the Act preserves certain private covered class actions brought under the relevant  
29 state law of incorporation or organization if it involves

30 (i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively  
31 from or to holders of equity securities of the issuer; or

1 (ii) any recommendation, position, or other communication with respect to the sale of  
2 securities of the issuer that

3 (I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of  
4 equity securities of the issuer; and

5 (II) concerns decisions of those equity holders with respect to voting their  
6 securities, acting in response to a tender or exchange offer, or exercising dissenters' or  
7 appraisal rights.

8 Quoting §16(b). Second, state actions are preserved in §§16(b) and 28 which provides  
9 “Notwithstanding any other provision of this Section, nothing in this Section may be construed to  
10 preclude a State or political subdivision thereof or a State pension plan from bringing an action  
11 involving a covered security on its own behalf, or as a member of a class comprised solely of other  
12 States, political subdivisions, or State pension plans that are named plaintiffs, and that have  
13 authorized participation, in such action.” Quoting §16(b). Sections 16(b) and 28 define state  
14 pension plans to mean “a pension plan established and maintained for its employees by the  
15 government of the State or political subdivision thereof, or by any agency or instrumentality  
16 thereof.”

17 Third, a contractual agreement between an issuer and an indenture trustee may be  
18 maintained in a State or Federal court by a party (or successor to the party) to the agreement.

19 If a Federal court determines that any of these three actions may be maintained, the Federal  
20 court “shall remand such action to ... State court.” Quoting §16(b).

21 Each state securities commission “shall retain jurisdiction under the laws of such State to  
22 investigate and bring enforcement actions.” Quoting §16(b).

23 At the same time, §27(b)(4) of the 1933 Act, its counterpart in the 1934 Act were amended  
24 by adding a new stay of discovery power: “Upon a proper showing a court may stay discovery  
25 proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to  
26 protect of effectuate its judgments, in an action subject to a stay of discovery pursuant to this  
27 Subsection.”

1     **SECTION 29 [JUDICIAL REVIEW OF ORDERS].** All rules and orders issued under this  
2     [Act] are subject to judicial review [in accordance with the state Administrative Procedure Act].

3                                     **REPORTER’S COMMENT**

4             Source of Law: RUSA §711(b).

5             1. The 1956 Act §411 instead specified procedures for judicial review of orders, in part  
6     modeled on §12 of the Model Administrative Procedure Act, 54 Handbook of National  
7     Conference of Commissioners or Uniform State Laws 334 (1944) and partly on §25 of the  
8     Securities Exchange Act.

9             2. The Official Comment 2 to RUSA §711 states:

10            The Section does not preclude persons from waiving their rights to an  
11     administrative proceeding if, with full knowledge of their rights, they choose to do  
12     so.

1     **SECTION 30 [RULES, FORMS, ORDERS, AND HEARINGS].**

2             (a) The [Administrator] may from time to time make, amend and rescind such rules, forms  
3     and orders as are necessary to carry out the provisions of this Act, including rules and forms  
4     governing registration statements, applications, and reports, and defining any terms, whether or not  
5     used in this Act, insofar as the definitions are not inconsistent with the provisions of this Act. For  
6     the purposes of rules and forms, the [Administrator] may by rule adopt exemptions from the  
7     registration requirements of §§7 and 13 where such exemptions are consistent with the public  
8     interest and with the purposes fairly intended by the policy and provisions of this Act.

9             (b) No rule, form, or order may be made, amended, or rescinded unless the [Administrator]  
10    finds that the action is necessary or appropriate in the public interest or for the protection of  
11    investors and consistent with the purposes fairly intended by the policy and provisions of this Act.  
12    In prescribing rules and forms the [Administrator] shall cooperate with the securities administrators  
13    of the other states and the Securities and Exchange Commission with a view to effectuating the  
14    policy of this statute to achieve maximum uniformity in the form and content of registration  
15    statements, applications, and reports.

16            (c) The [Administrator] may by rule or order prescribe (1) the form and content of financial  
17    statements required under this Act, (2) the circumstances under which consolidated financial  
18    statements shall be filed, and (3) whether any required financial statements shall be certified by  
19    independent certified public accountants. All financial statements shall be prepared in accordance  
20    with generally accepted accounting practices.

21            (d) All rules and forms of the [Administrator] shall be published.

22            (e) No provision of this Act imposing any liability applies to any act done or omitted in

1 good faith in conformity with any rule, form, or order of the [Administrator].

2 (f) Every hearing in an administrative proceeding shall be public unless the [Administrator]  
3 in his or her discretion grants a request joined in by all the respondents that the hearing be  
4 conducted privately.

5 **REPORTER'S COMMENT**

6 Source of Law: 1956 Act §412; 1987 NASAA Proposed Amendment to §412(a); RUSA  
7 §§705, 707.

1     **SECTION 31 [ADMINISTRATIVE FILES AND OPINIONS].**

2           (a) The [Administrator] shall keep a register of all applications for registration of securities  
3     and registration statements and all applications for broker-dealer, agent, investment adviser or  
4     investment adviser representative registration which are or have ever been effective under this Act;  
5     all written notices of claim of exemption from registration requirements; all orders entered under  
6     this Act; and all interpretative opinions or no-action determinations issued under this Act. All  
7     records may be maintained in computer or microfilm format or any other form of data storage.  
8     The register shall be available for public inspection.

9           (b) The information contained in or filed with any registration statement, application, or  
10    report may be made available to the public under such rules as the [Administrator] prescribes.

11          (c) Upon request and at such reasonable charges as he or she prescribes, the  
12    [Administrator] shall furnish to any person copies (certified under his or her seal of office if  
13    requested) of any entry in the register or any document which is a matter of public record. In any  
14    proceeding or prosecution under this Act, any copy so certified is prima facie evidence of the  
15    contents of the entry or document certified.

16          (d) The [Administrator] in his discretion may honor requests from interested persons for  
17    interpretative opinions or may issue determinations that the [Administrator] will not institute  
18    enforcement proceedings against certain specified persons for engaging in certain specified  
19    activities where the determination is consistent with the purposes fairly intended by the policy and  
20    provisions of this Act.

21                           **REPORTER'S COMMENT**

22           Source of Law: 1956 Act §413; NASAA Proposed Amendments to §§413(b), (e); RUSA

1 §§101(4), 709.

2 1. Section 2(g) of this Act includes a definition of “filed.”

3 2. RUSA §703(b) adds a confidentiality provision:

4 (b) The following information and documents do not constitute public  
5 information under Subsection (a):

6 (1) information or documents obtained by the [Administrator] in connection  
7 with an investigation under §601; and

8 (2) information or documents filed with the [Administrator] in connection  
9 with a registration statement under Part III or a report under §209 and constituting  
10 trade secrets or commercial or financial information of a person for which that  
11 person is entitled to, and has asserted, a claim of confidentiality or privilege  
12 authorized by law.

13 3. RUSA §706 adds a declaratory order provision:

14 (a) Any person may petition the [Administrator] for a declaratory order as  
15 to the applicability to specified circumstances of a statute, rule, or order under this  
16 [Act]. The [Administrator] may issue a declaratory order in response to a petition  
17 for that order unless the [Administrator] determines that the petition fails to comply  
18 with the [Administrator’s] rules or, if the order were issued, would substantially  
19 prejudice the rights of a person who would be a necessary party and who does not  
20 consent to the determination of the matter by a declaratory order.

21 (b) The [Administrator], upon application by an interested party, may  
22 conduct a hearing and issue a declaratory ruling as to the applicability of this [Act]  
23 or a rule or order of the [Administrator] under this [Act] to a person, security, or  
24 transaction, or as to the meaning of a term used in this [Act].



1     **SECTION 32 [JURISDICTION AND SERVICE OF PROCESS].**

2                                     **[Subject Matter Jurisdiction]**

3             (a) Sections 7-8, 13(a), 18, 23, and 28 apply to persons who sell or offer to sell a security  
4     when (1) an offer to sell is made in this State, or (2) an offer to buy is made and accepted in this  
5     State.

6             (b) Sections 13(a), 18, and 23 apply to persons who buy or offer to buy a security when (1)  
7     an offer to buy is made in this State, or (2) an offer to sell is made and accepted in this State.

8             (c) For the purpose of this Section, an offer to sell or to buy a security is made in this State,  
9     whether or not either party is then present in this State, when the offer (1) originates from this  
10    State or (2) is directed by the offeror to this State and received at the place to which it is directed  
11    [or at any post office in this State in the case of a mailed offer].

12            (d) For the purpose of this Section, an offer to buy or to sell is accepted in this State when  
13    acceptance (1) is communicated to the offeror in this State and (2) has not previously been  
14    communicated to the offeror, orally or in writing, outside this State; and acceptance is  
15    communicated to the offeror in this State, whether or not either party is then present in this State,  
16    when the offeree directs it to the offeror in this State reasonably believing the offeror to be in this  
17    State and it is received at a place in this State to which it is directed [or at any post office in this  
18    State in the case of a mailed acceptance].

19            (e) An offer to sell or to buy is not made in this State when the publisher circulates or there  
20    is circulated on his behalf in this State any bona fide newspaper or other publication of general,  
21    regular, and paid circulation which is not published in this State, or which is published in this State  
22    but has had more than two thirds of its circulation outside this State during the past twelve months,

1 or a radio or television program or other electronic means originating outside this State is received  
2 in this State. A radio or television program or other electronic communication is considered as  
3 having originated in this State if either the broadcast studio or the originating source of  
4 transmission is located in this State, unless:

5 (1) the program or communication is syndicated and distributed from outside this  
6 State for redistribution to the general public in this State;

7 (2) the program or communication is supplied by a radio, television, or other  
8 electronic network with the electronic signal originating from outside this State for redistribution  
9 to the general public in this State;

10 (3) the program or communication is an electronic signal that originates outside this  
11 State and is captured for redistribution to the general public in this State by a community antenna  
12 or cable, radio, cable television, or other electronic system; or

13 (4) the program or communication consists of an electronic signal that originates in  
14 this State, but which is not intended for redistribution to the general public in this State.

15 (f) Sections 13(c), 19, and 23 as far as investment advisers and investment adviser  
16 representatives are concerned, apply when any act instrumental in effecting prohibited conduct is  
17 done in this State, whether or not either party is then present in this State.

18 [Personal Jurisdiction]

19 [A. Consent]

20 (g) An applicant for licensing or registration under this [Act] or an issuer who proposes to  
21 offer a security in this State through an agent shall file with the [Administrator], in the form the  
22 [Administrator], by rule, prescribes, an irrevocable consent appointing the [Administrator] the person's

1 agent for service of process in a noncriminal proceeding against the person, a successor, or personal  
2 representative, which arises under this [Act] or a rule or order of the [Administrator] under this [Act]  
3 after the consent is filed, with the same force and validity as if served personally on the person filing  
4 the consent.

5 (h) A person who has filed a consent complying with §33(g) in connection with a previous  
6 application for licensing or registration need not file an additional consent.

7 (i) A consent to service filed on behalf of an issuer organized or domiciled under the laws of  
8 a foreign country whose securities are being offered in this State other than by or through  
9 underwriters, must be accompanied by an opinion of counsel stating that a judgment of a United States  
10 court will be recognized by the courts of the country in which the issuer is organized or domiciled.

11 [B. Conduct]

12 (j) If a person, including a nonresident of this State, engages in conduct prohibited or made  
13 actionable by this [Act] or a rule or order of the [Administrator] under this [Act] and the person has  
14 not filed a consent to service of process under §33(g), the engaging in the conduct constitutes the  
15 appointment of the [Administrator] as the person's agent for service of process in a noncriminal  
16 proceeding against the person, a successor, or personal representative which grows out of the conduct.

17 [C. Service of Process]

18 (k) Service under §§33(g) or(i) may be made by leaving a copy of the process in the office of  
19 the [Administrator], but it is not effective unless:

20 (1) the plaintiff, who may be the [Administrator], promptly sends notice of the service  
21 and a copy of the process by registered or certified mail, return receipt requested, to the defendant or  
22 respondent at the address set forth in the consent to service of process or, if no consent to service of

1 process has been filed, at the last known address, or takes other steps reasonably calculated to give  
2 actual notice; and

3 (2) the plaintiff files an affidavit of compliance with this Subsection in the proceeding  
4 on or before the return day of the process, if any, or within such further time as the court, or the  
5 [Administrator] in a proceeding before the [Administrator], allows.

6 (l) Service as provided in §33(k) may be used in a proceeding before the [Administrator] or  
7 by the [Administrator] in a proceeding in which the [Administrator] is the moving party.

8 (m) If the process is served under §33(k), the court, or the [Administrator] in a proceeding  
9 before the [Administrator], shall order continuances as may be necessary to afford the defendant or  
10 respondent reasonable opportunity to defend.

#### 11 **REPORTER'S COMMENT**

12 Source of Law: 1956 Act §414; NASAA Proposed 1986 and 1997 Amendments to §414;  
13 and RUSA §§708, 801.

14 1. The phrase “other electronic means” includes computer or other information  
15 technology.

16  
17 2. Query: Does this Section sufficiently reach Internet and other electronic  
18 communications?

1     **SECTION 33 [COOPERATION WITH OTHER AGENCIES].**

2             (a) To encourage uniform interpretation and administration of this Act and effective  
3 securities regulation and enforcement, the [Administrator] shall cooperate with the securities  
4 agencies or administrators of one or more states, Canadian provinces or territories, or another  
5 country, the Securities and Exchange Commission, the Commodity Futures Trading Commission,  
6 the Securities Investor Protection Corporation, any self regulatory organization, any national or  
7 international organization of securities officials or agencies, and any governmental law enforcement  
8 or regulatory agency.

9             (b) The cooperation authorized by Subsection (a) includes, but is not limited to, the  
10 following actions:

11                 (1) establishing a central depository for registration under this Act and for  
12 documents or records required or allowed to be maintained under this Act;

13                 (2) developing common forms;

14                 (3) making a joint registration examination or investigation;

15                 (4) holding a joint administrative hearing;

16                 (5) filing and prosecuting a joint civil or administrative proceeding;

17                 (6) sharing and exchanging personnel;

18                 (7) sharing and exchanging information and documents subject to the  
19 restrictions of [insert applicable state law]; and

20                 (8) formulating, in accordance with the [administrative procedure act] of  
21 this state, rules or proposed rules on matters such as statements of policy,  
22 guidelines, and interpretative opinions and releases.

**REPORTER'S COMMENT**

Source of Law: RUSA §704; 1987 NASAA Amendment.

1. There is no counterpart provision in the 1956 Act.

2. In 1987 NASAA proposed adopting RUSA §704.

1     **SECTION 34 [QUALIFIED IMMUNITY].**

2             (a) Every broker-dealer, agent, investment adviser or investment adviser representative is  
3     required to make truthful and accurate statements in any document required by the  
4     [Administrator], the Securities and Exchange Commission, or any self-regulatory organization.

5             (b) No broker-dealer, agent, investment adviser, or investment adviser representative shall  
6     be liable in any proceeding to another broker-dealer, agent, investment adviser or investment  
7     adviser representative for any defamation claim relating to an alleged untrue statement that is  
8     contained in any document required by the [Administrator], the Securities and Exchange  
9     Commission, or any self-regulatory organization unless it is shown that the defending party knew  
10    at the time that the statement was made that it was false in any material respect or the defending  
11    party acted in reckless disregard of the statement's truth or falsity.

12                             **REPORTER'S COMMENT**

13             Source of Law: National Association of Securities Dealers, Inc. Proposal Relating to  
14     Qualified Immunity in Arbitration Proceedings for Statements Made in Forms U-4 and U-5.

15             1. The NASD proposal was reprinted in Securities Exchange Release 39,892, 66 SEC  
16     Dock. 2473 (1998). To date it has not been approved by the SEC.

17             2. The NASD proposal is limited to arbitration proceedings and also requires proof by  
18     clear and convincing evidence. Section 37 applies the normal burden of proof and culpability  
19     standards of the federal securities laws.

20             3. The Proposal Release explained at 2474:

21  
22             Background. This issue arises primarily in the context of filings made on  
23     form U-5 following termination of employment of a registered person. The NASD  
24     By-Laws (Article V. Section 3) require that the member give notice of the  
25     termination to the NASD within 30 days after the termination, and that the member  
26     provide a copy simultaneously to the registered person. The By-Laws also require  
27     that the member notify the NASD, and send a copy to the registered person within  
28     30 days if the member learns of facts or circumstances causing any information in

1 the prior notice to become inaccurate or incomplete.

2 Form U-5, which is entitled the “Uniform Termination Notice for Securities  
3 Industry Registration,” is a form used throughout the securities industry at both the  
4 federal and state level. It requires that the member indicate the reason for the  
5 termination by checking one of the blocks labeled Voluntary, Deceased, Permitted  
6 to Resign, Discharged, or Other. If one of the last three blocks is checked, the  
7 member must provide an explanation. Regardless of the block checked, the  
8 member also must indicate whether the registered person, during the period of his  
9 or her association with the member, was involved in certain types of disciplinary  
10 actions, the subject of a customer complaint, convicted of certain crimes, or under  
11 investigation or internal review.

12 In recent years, registered persons have brought, primarily in arbitration, a  
13 number of defamation claims for allegedly untrue or misleading statements made on  
14 the Form U-5. Because of the financial interests at issue the potential for  
15 substantial damages may exist in a number of cases. The NASD believes that the  
16 potential for liability, or for inconsistent standards of liability, is a significant  
17 disincentive for firms to provide full and fair disclosure. Failure to make full  
18 disclosure of disciplinary problems has the potential to compromise the integrity of  
19 the Central Registration Depository, and hinders enforcement action by the NASD  
20 and other regulators. At the same time, the NASD believes it is important that any  
21 solution provide adequate protection to employees from statements designed to  
22 penalize unfairly a departing employee, or to prevent him or her from obtaining new  
23 employment or attracting existing customers to another member firm where the  
24 person has subsequently become employed.

25 4. An alternative approach would be a standard providing for absolute immunity.



1 **[PART F: MISCELLANEOUS]**

2 **SECTION 35 [SEVERABILITY].** If any provision of this [Act] or its application to any person  
3 or circumstances is held invalid, the invalidity does not affect other provisions or applications of  
4 this [Act] which can be given effect without the invalid provision or application, and to this end the  
5 provisions of the [Act] are severable.

6 **REPORTER'S COMMENT**

7 Source of Law: 1956 Act §417; RUSA §805.

1     **SECTION 36 [REPEAL AND SAVINGS PROVISIONS].**

2             (a) The [identify the existing act or acts] is [are] repealed except as saved in this Section.

3             (b) Prior law exclusively governs all suits, actions, prosecutions, or proceedings which are  
4     pending or may be initiated on the basis of facts or circumstances occurring before the effective  
5     date of this Act, except that no civil suit or action may be maintained to enforce any liability under  
6     prior law unless brought within any period of limitation which applied when the cause of action  
7     accrued and in any event within two years after the effective date of this Act.

8             (c) All effective registrations under prior law, all administrative orders relating to such  
9     registrations, and all conditions imposed upon such registrations remain in effect so long as they  
10    would have remained in effect if this Act had not been passed. They are considered to have been  
11    filed, entered, or imposed under this Act, but are governed by prior law.

12            (d) Prior law applies in respect of any offer or sale made within one year after the effective  
13    date of this Act pursuant to an offering begun in good faith before its effective date on the basis of  
14    an exemption available under prior law.

15            (e) Judicial review of all administrative orders as to which review proceedings have not  
16    been instituted by the effective date of this Act are governed by §30, except that no review  
17    proceeding may be instituted unless the petition is filed within any period of limitation which  
18    applied to a review proceeding when the order was entered and in any event within 60 days after  
19    the effective date of this Act.

20                             **REPORTER'S COMMENT**

21             Source of Law: 1956 Act §418; RUSA §807.

1     **SECTION 37 [EFFECTIVE DATE].** This [Act] takes effect on [insert date, which should be at  
2     least 60 days after enactment].

3                                     **REPORTER'S COMMENT**

4             Source of Law: 1956 Act §419; RUSA §806.