

DRAFT
FOR DISCUSSION ONLY

UNIFORM SECURITIES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 2001

WITH PREFATORY NOTE AND REPORTER'S NOTES

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM SECURITIES ACT

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UNIFORM SECURITIES ACT

PREFATORY NOTE

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 increasingly interstate and international aspects of securities trading.

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

The attached draft has been reorganized to follow the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) Procedural and Drafting Manual 15-41 (1997).

This is a new Uniform Securities Act. Amendment of the earlier 1956 Act or RUSA would not be wise given the different versions of the 1956 Act enacted by the States and the determination to seek enactment in all state jurisdictions of the new Uniform Securities Act after it is adopted by the National Conference.

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.*, Section 203).

The Drafting Committee reviewed several drafts in meetings between 1998 and 2002. The Committee had the assistance of advisors and observers from several interested groups, including, alphabetically, the American Bar Association, the Certified Financial Planners, the Financial Planning Board of Standards, the Investment Company Institute, the Investment Counsel Association of America, the National Association of Securities Dealers, Inc., the North American Securities Administrators Association, the Securities and Exchange Commission, and the Securities Industry Association. In addition, the Reporter and the Chair met on several occasions with committees or representatives of these and other groups.

UNIFORM SECURITIES ACT

PART 1

TITLE AND DEFINITIONS

SECTION 101. SHORT TITLE. This [Act] may be cited as the Uniform Securities Act.

Reporter's Notes

Prior Provision: 1956 Act Section 416; RUSA Section 804.

SECTION 102. DEFINITIONS. In this [Act], unless the context otherwise requires:

(1) “Administrator” means the [insert ~~name~~ title of administrative agency or official].

(2) “Agent” means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer’s own securities, except that a partner, officer, or director of a broker-dealer or issuer, or an individual occupying a similar status or performing similar functions, is an agent only if the individual otherwise comes within the term. The term does not include:

(A) an individual who represents a broker-dealer in effecting transactions in this State limited to those described in Section 15(h)(2) of the Securities Exchange Act of 1934;

(B) an individual acting for an issuer with respect to an offering or purchase of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries if:

1 (i) the individual primarily performs, or is intended primarily to perform
2 upon completion of the offering, substantial duties for or on behalf of the issuer, the issuer's
3 parent, or any of the issuer's subsidiaries otherwise than in connection with transactions in the
4 issuer's own securities; and

5 (ii) the individual's compensation is not based, in whole or in part, upon
6 the amount of purchases or sales of the issuer's own securities; or

7 (C) an individual the administrator, by rule or order, specifies.

8 (3) "Bank" means:

9 (A) a banking institution organized under the laws of the United States;

10 (B) a member bank of the Federal Reserve System;

11 (C) any other banking institution, whether incorporated or not, doing business
12 under laws of a State or of the United States, a substantial portion of the business of which
13 consists of receiving deposits or exercising fiduciary powers similar to those permitted to
14 national banks under the authority of the Comptroller of the Currency pursuant to the first section
15 of Public Law 87-722 (12 U.S.C. 92a), and which is supervised and examined by a state or
16 federal agency having supervision over banks, and which is not operated for the purpose of
17 evading this [Act], and

18 (D) a receiver, conservator, or other liquidating agent of any institution or firm
19 included in subparagraphs (A), (B), or (C).

20 (4) "Broker-dealer" means a person engaged in the business of effecting transactions in
21 securities for the account of others or for the person's own account. The term does not include:

22 (A) an agent [acting on behalf of the broker-dealer];

1 (B) an issuer;

2 (C) an international bank; or

3 (D) a person the administrator, by rule or order, specifies.

4 [(5) “Depository institution” means a bank, or a savings institution, or trust company that
5 is organized or chartered under the laws of a State or of the United States, authorized to receive
6 deposits, and supervised and examined by an official or agency of a State or the United States if
7 its deposits or share accounts are insured by the Federal Deposit Insurance Corporation, the
8 National Credit Union Share Insurance Fund, or a successor authorized by federal law. The term
9 also includes a credit union organized and supervised under the laws of this State, whose deposits
10 and share accounts are insured. The term does not include:

11 (A) an insurance company or other organization primarily engaged in the
12 insurance business;

13 (B) a Morris Plan bank;

14 (C) an industrial loan company; or

15 (D) a similar bank or company unless its deposits are insured by a federal
16 agency.]

17 (6) “Federal covered investment adviser” means a person registered under the Investment
18 Advisers Act of 1940.

19 (7) “Federal covered security” means a security that is or upon completion of a
20 transaction will be a covered security under Section 18(b) of the Securities Act of 1933 or rules
21 or regulations adopted under Section 18(b).

22 (8) “Filing” means the receipt of a record by the administrator or a designee of the

1 administrator.

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

3 (10) “Guaranteed” means guaranteed as to payment of all principal and all interest.

4 (11) “Institutional investor” means any of the following, whether acting for itself or for
5 others in a fiduciary capacity:

6 (A) a depository institution or international bank;

7 (B) an insurance company;

8 (C) a separate account of an insurance company;

9 (D) an investment company as defined in the Investment Company Act of 1940;

10 (E) a broker-dealer registered under the Securities Exchange Act of 1934;

11 (F) an employee pension, profit-sharing, or benefit plan if the plan has total assets
12 in excess of \$25,000,000 or its investment decisions are made by a named fiduciary, as defined in
13 the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under
14 the Securities Exchange Act of 1934, an investment adviser registered or exempt from
15 registration under the Investment Advisers Act of 1940, an investment adviser registered under
16 this [Act], a depository institution, or an insurance company;

17 (G) a plan established and maintained by a State, a political subdivision of a State,
18 or an agency or instrumentality of a State or a political subdivision of a State for the benefit of its
19 employees, if the plan has total assets in excess of \$25,000,000 or its investment decisions are
20 made by a [duly designated public official] or by a named fiduciary, as defined in the Employee
21 Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities
22 Exchange Act of 1934, an investment adviser registered or exempt from registration under the

1 Investment Advisers Act of 1940, an investment adviser registered under this [Act], a depository
2 institution, or an insurance company;

3 (H) a trust, if it has total assets in excess of \$25,000,000, its trustee is a depository
4 institution, its participants are exclusively plans of the types identified in subparagraph (F) or
5 (G), regardless of size of assets, except a trust that includes as participants self-directed
6 individual retirement accounts or similar self-directed plans;

7 (I) an organization described in Section 501(c)(3) of the Internal Revenue Code,
8 or a corporation, Massachusetts or similar business trust, limited liability company, limited
9 liability partnership, or partnership, not formed for the specific purpose of acquiring the
10 securities offered, with total assets in excess of \$25,000,000;

11 (J) a small business investment company licensed by the Small Business
12 Administration under Section 301(c) or (d) of the Small Business Investment Act of 1958 with
13 total assets in excess of \$25,000,000;

14 (K) a private business development company as defined in Section 202(a)(22) of
15 the Investment Advisers Act of 1940 with total assets in excess of \$25,000,000;

16 [(L) an investment adviser registered under the Investment Advisers Act of 1940
17 with investments under management in excess of \$100 million, whether acting for its own
18 account or for the account of others on a discretionary basis;]

19 (M) a “qualified institutional buyer” as defined in Rule 144A(a)(1), other than
20 Rule 144A(a)(1)(H), under the Securities Act of 1933;

21 (N) a “major U.S. institutional investor” as defined in Rule 15a-6(b)(4)(i) under
22 the Securities Exchange Act of 1934;

(O) any other institutional buyer; or

(P) any other person the administrator, by rule or order, specifies.

Reporters Notes

Source of Law: RUSA Section 101(5); Securities Act Rules 144A and 501(a).

1. Section 102(10)(H) concludes with an except clause meant to exclude self-directed plans for individuals from this definition.

2. Section 102(10)(P) is meant to reach institutional buyers similar to those listed in Sections 102(10)(A)-(N), but not otherwise listed.

(12) “Insurance company” means a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and subject to supervision by the insurance commissioner or a similar official or agency of a State.

(13) “Insured” means insured as to payment of all principal and all interest.

(14) “International bank” means an international banking institution of which the United States is a member and whose securities are exempt from registration under the Securities Act of 1933.

(15) “Investment adviser” means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities.

The term includes a financial planner or other person that, as an integral component of other

1 financially related services, provides investment advisory services to others for compensation as
2 part of a business or that holds itself out as providing investment advisory services to others for
3 compensation. The term does not include:

4 (A) an investment adviser representative;

5 (B) a lawyer, accountant, engineer, or teacher whose performance of investment
6 advisory services is solely incidental to the practice of the person's profession;

7 (C) a broker-dealer or its agents whose performance of investment advisory
8 services is solely incidental to the conduct of business as a broker-dealer and who receives no
9 special compensation for the investment advisory services;

10 (D) a publisher of a bona fide newspaper, news magazine, or business or financial
11 publication of general, regular, and paid circulation;

12 (E) a federal covered investment adviser;

13 (F) any other person that is excepted from the definition of investment adviser
14 under Section 202(a)(11) of the Investment Advisers Act of 1940; or

15 (G) any other person the administrator, by rule or order, specifies.

16 (16) "Investment adviser representative" means an individual employed by or associated
17 with [or who represents] an investment adviser or federal covered investment adviser and who
18 makes any recommendations or otherwise renders investment advice regarding securities,
19 manages accounts or portfolios of clients, determines which recommendation or advice regarding
20 securities should be given [,provides investment services or holds out as providing investment
21 advisory services,] receives compensation to solicit, offering to negotiate for the sale of or selling
22 investment advisory services, or supervising employees who perform any of the foregoing. The

term does not include an individual:

(A) whose functions are clerical or ministerial;

(B) who is an agent whose performance of investment advisory services is solely incidental to the individual's conduct as an agent and who receives no special compensation for investment advisory services;

(C) who is employed by or associated with a federal covered investment adviser, unless the individual:

(i) has a "place of business" in this State as that term is defined by rule under Section 203A of the Investment Advisers Act of 1940 and is "investment adviser representative" as that term is defined by rule under Section 203A of the Investment Advisers Act of 1940 or

(ii) has a "place of business" in this State that as that term is defined by rule under Section 203A of the Investment Advisers Act of 1940 and is not a "supervised person" as that term is defined in Section 202(a)(25) of the Investment Advisers Act of 1940; or

(D) who, the administrator, by rule or order, specifies.

Reporter's Notes

Source of Law: New

1. Investment adviser representatives were not required to register under the federal Investment Advisers Act, before or after the National Securities Markets Improvement Act.

2. Investment adviser representative is defined under Section 203A of the Investment Advisers Act of 1940 in Rule 203A-3(a).

3. This definition of investment adviser representative includes third party solicitors with a place of business in a state who receives compensation to solicit on behalf of federal covered

1 investment advisers, but are not supervised persons of the federal covered investment advisers.

2
3 ~~(17) “Issuer” means a person or group of persons that issues or proposes to issue its own~~
4 ~~securities, subject to the following:~~

5 ~~————— (A) The issuer of a collateral trust certificate, voting trust certificate, certificate of~~
6 ~~deposit for a security, or share in an investment company without a board of directors or persons~~
7 ~~performing similar functions, is the person performing the acts and assuming the duties of~~
8 ~~depositor or manager under the trust or other agreement or instrument under which the security is~~
9 ~~issued.~~

10 ~~————— (B) The issuer of an equipment trust certificate, including a conditional sales~~
11 ~~contract or similar security serving the same purpose, is the person or the person’s parent to~~
12 ~~whom the equipment or property is or is to be leased or conditionally sold.~~

13 ~~————— (C) The issuer of a fractional undivided interest in oil, gas, or other mineral rights~~
14 ~~is the owner of an interest in the lease or in payments out of production under a lease, right, or~~
15 ~~royalty, whether whole or fractional, who creates fractional interests for the purpose of sale.~~

16 (17) “Issuer” means a person that issues or proposes to issue a security, [including a
17 guarantor in whole or in part of payment of the security,] subject to the following rules:

18 ————— (A) The issuer of a voting trust certificate, certificate of deposit for a
19 security, or share in an investment company without a board of directors or individuals
20 performing similar functions, is the person performing the acts and assuming the duties of
21 depositor or manager pursuant to the trust or other agreement or instrument under which the
22 security is issued.

23 ————— (B) The issuer of a collateral trust certificate or an equipment trust

1 certificate or similar security serving the same purpose is the person by whom the property is or
2 is to be used, or to whom the property or equipment is or is to be leased or conditionally sold, or
3 who is otherwise contractually responsible for assuring payment of the certificate.

4 _____ (C) The issuer of a fractional undivided interest in oil, gas or other mineral
5 rights is the owner of an interest in a lease, right or royalty, or in payments out of production
6 under a lease, right or royalty, whether whole or fractional, that creates fractional interests for the
7 purpose of public offering.

8 **Reporter's Notes**

9
10 **Source of Law:** 1956 Act Section 401(g); RUSA Section 101(8).

11
12 In the suggested revision the term “collateral trust certificate” is inserted in paragraph (B)
13 on equipment trust certificates to which it seems to better relate. The language of the rest of
14 paragraph (A) does not seem to apply to a collateral trust certificate. Indeed, while collateral
15 trust certificates are referred to in the definition of “security” in Section 102(29), equipment trust
16 certificates are not (the same is true in the federal act), one would think because an equipment
17 trust certificate is a variation of a collateral trust certificate.

18
19 It should be pointed out that this would be different from the definitional treatment of
20 “issuer” in the federal Securities Act, which is the same as in our current inclusion of collateral
21 trust certificates in paragraph (A).

22
23 2. With respect to deletion of the phrase “including a conditional sales contract,” a
24 conditional sales contract is not a security and when a conditional sales contract is the basis of an
25 equipment trust certificate, it runs only to the trustee. It does not appear in the federal act’s
26 treatment of equipment trust certificates. That the conditional sale purchaser is the issuer is
27 picked up in the rest of paragraph (B).

28
29 3. In paragraph (B), deletion of “or the person’s parent”: This does not appear in the
30 federal statute. The parent may or may not be an issuer. It would depend upon the deal. Where
31 the issuer railroad, for example, is not creditworthy, the parent holding company may have to
32 guarantee the certificates or the lease or conditional sale contract to the trustee, in which case the
33 parent would or should also become an issuer. It is not either/or. And that would be consistent
34 with federal law which treats a guarantor of a security or the means of payment of a security as an
35 issuer.

4. In paragraph (B), insertion of “or who is otherwise contractually responsible for assuring payment of the certificate.” This is to take care of other forms of payment than leases or conditional sales contracts. It would also reach guarantors.

5. Insertion of “[, including a guarantor in whole or in part of payment of the security”]: In order to pick up a guarantor, which relates to the whole definition of issuer, and because a guarantor may be a subsidiary or a sibling company as well as a parent, or even an unrelated party, there is inserted in the lead-in to the definition of these bracketed materials.

a. “In whole or in part” is added after “guaranteed”, because the definition of “guaranteed” in Section 102(10) provides that it means “guaranteed as to payment of all principal and all interest”. That definition was drafted with its usage in the exemption provisions in mind. A guarantor of part of an obligation that is being publicly sold, however, can and should be treated as an issuer with an issuer’s responsibility. That also would be consistent with federal law. The differentiation of the use of “guaranteed” is in the bracketed language in Section 102(17).

b. Guaranteeing “payment of the security” is used rather than simply guaranteeing the security in order to include, for example, a guarantee of payment of the lease or conditional sale obligation underlying an equipment trust certificate that is the means of payment of the certificate.

c. The insertion is bracketed, because it may be unnecessary. It does not appear in the definition of issuer in the federal act. The treatment of guarantors has developed as a matter of SEC practice.

6. In paragraph (C), “an oil, gas, or other mineral lease or in payments out of production under a lease, right, or royalty” is deleted and “oil, gas, or other mineral rights” is substituted: the latter phrasing is used in the definition of “security” in Section 102(29). It is also the phrasing used in the federal act’s definition of security and issuer. The reference to lease, production payment, right or royalty is picked up in the balance of paragraph (C).

(18) “Nonissuer transaction” or “nonissuer distribution” means a transaction or distribution not directly or indirectly for the benefit of the issuer.

Reporter's Notes

1
2 The Pennsylvania Securities Commission has suggested adding to the end of this
3 definition “or an affiliate of the issuer.”
4

5
6 (19) “Offer to purchase” includes every attempt to obtain or solicit an offer to sell a
7 security or interest in a security for value, but the term does not include a tender offer that is
8 subject to subsection 14(d) of the Securities Exchange Act of 1934.
9

10 **Reporter’s Notes**
11

12 A rescission offer under Section 510 would be an offer to purchase.
13

14 (20) “Person” means an individual, corporation, business trust, estate, trust, partnership,
15 limited liability company, association, joint venture, government; governmental subdivision,
16 agency, or instrumentality, public corporation; or any other legal or commercial entity.

17 (21) “Place of business” of a broker-dealer or an investment adviser means:

18 (A) an office at which the broker-dealer or investment adviser regularly provides
19 brokerage or investment advisory services or solicits, meets with, or otherwise communicates
20 with clients; or

21 (B) any other location that is held out to the general public as a location at which
22 the broker-dealer or investment adviser provides brokerage or investment advisory services or
23 solicits, meets with, or otherwise communicates with clients.
24

25 **Reporter’s Notes**

Source of Law: Rules 203A-3(b) and 222-1 of the Investment Advisers Act of 1940.

(22) “Predecessor act” means the Act repealed ~~under~~ by Section 702.

(23) “Price amendment” means the amendment to a registration statement filed under the Securities Act of 1933 or, if no amendment is filed, the prospectus or prospectus supplement filed under the Securities Act of 1933 that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price.

(24) “Principal place of business” of a broker-dealer or an investment adviser means the executive office of the broker-dealer or investment adviser from which the officers, partners, or managers of the broker-dealer or investment adviser direct, control, and coordinate the activities of the broker-dealer or investment adviser.

Reporter's Notes

Source of Law: Rule 222-1(b) of the Investment Advisers Act of 1940.

(25) “Record,” except in “of record,” “official record,” and “public record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. ~~including, but not be limited to, a registration statement, report, application, book, publication, account, paper, correspondence, memorandum, agreement, document, computer file, microfilm, photograph, audio or visual tape, and any other writing.~~

1 **Reporter's Notes**

2 **Source of Law:** Uniform Electronic Transactions Act Section 2(13).

3 1. This subsection would include, but not be limited to, a registration statement, report,
4 application, book, publication, account, paper, correspondence, memorandum, agreement,
5 document, computer file, microfilm, photograph, audio or visual tape, and any other writing.
6

7 2. The Uniform Electronic Transactions Act §2(13) defines record in substantively
8 identical terms.

9 The Official Comment explains:

10 This is a standard definition designed to embrace all means of communicating or
11 storing information except human memory. It includes any method for storing or
12 communicating information, including "writings." A record need not be
13 indestructible or permanent, but the term does not include oral or other
14 communications which are not stored or preserved by some means.
15

16 3. This term is intended to embrace new forms of records that are created or popularized
17 in the future.
18

19 (26) "Sale" includes every contract of sale, contract to sell, or disposition of, a security or
20 interest in a security for value, and "offer to sell" includes every attempt or offer to dispose of, or
21 solicitation of an offer to buy, a security or interest in a security for value. Both terms:

22 (A) include:

23 (i) security given or delivered with, or as a bonus on account of, any
24 purchase of securities or any other thing constitutes part of the subject of the purchase and to
25 have been offered and sold for value;

26 (ii) a gift of assessable stock involves an offer and sale; and

27 (iii) a sale or offer of a warrant or right to purchase or subscribe to another
28 security of the same or another issuer, and every sale or offer of a security that gives the holder a
29 present or future right or privilege to convert into another security of the same or another issuer,
30 includes an offer of the other security.

1 (B) do not include:

2 (i) the creation of a security interest in conjunction with a loan;

3 (ii) a stock dividend, whether the corporation distributing the dividend is
4 the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other
5 than the surrender of a right to a cash or property dividend if each stockholder may elect to take
6 the dividend in cash, property, or stock;

7 (iii) an act incident to a judicially approved reorganization in which a
8 security is issued in exchange for one or more outstanding securities, claims, or property
9 interests, or partly in such exchange and partly for cash; and

10 (iv) the solicitation of tenders of securities by an offeror in a tender offer
11 in compliance with Rule 162 issued under the Securities Act of 1933.

12 13 **Reporter's Notes**

14
15 **Source of Law:** 1956 Act Section 401(j); RUSA Section 101(13).

16
17 1. Both the 1956 Act and RUSA definition of “sale” are modeled on Section 2(a)(3) of
18 the Securities Act of 1933.

19
20 2. Language in Section 401(j) of the 1956 Act also addressed the now rescinded SEC “no
21 sale” doctrine and has been eliminated. Merger transactions are usually sales under Section
22 102(26), but may be exempted from the securities registration requirements by Section 202(16).

23
24 3. Securities Act Rule 162 allows the offeror in a stock exchange offer to solicit tenders
25 of securities before a registration statement is effective as long as no securities are purchased
26 until the registration statement is effective and the tender offer has expired.

27
28 4. Should Section 102(26)(B)(i) be clarified to refer to bona fide commercial loans given
29 the Reves case holding that some notes are securities. Similarly should Section 102(26)(B)(ii)
30 refer to bona fide stock dividends to address spinoff transactions?

31
32 (27) “Securities Act of 1933” (15 U.S.C.A. Section 77a et seq.), “Securities Exchange

1 Act of 1934” (15 U.S.C. Section 78a et seq.), “Public Utility Holding Company Act of 1935,”(15
2 U.S.C. Section 79 et seq.), “Investment Company Act of 1940” (15 U.S.C. Section 80a-1 et seq.),
3 “Investment Advisers Act of 1940” (15 U.S.C. Section 80b-1 et seq.), “Employee Retirement
4 Income Security Act of 1974,” (29 U.S.C. Section 1001 et seq.) “National Housing Act,” (12
5 U.S.C. Section 1701 et seq.), “Commodity Exchange Act” (7 U.S.C. Section 1 et seq.), “Internal
6 Revenue Code” (26 U.S.C. Section 1 et seq.); “Small Business Investment Act of 1958” (15
7 U.S.C. Section 66 et seq.) and “Electronic Signatures in Global and National Commerce Act,”
8 (15 U.S.C. Section 7001), mean the federal statutes of those names, and the rules and regulations
9 under these statutes, as in effect on the effective date of this [Act], [or as later amended].
10

11 **Reporter’s Notes**

12 **Source of Law:** 1956 Act Section 401(k); RUSA Section 101(15).

13 1. There are a large number of references to other laws in this Act, particularly to the
14 federal securities laws identified in Section 102(27) and to rules adopted by the Securities and
15 Exchange Commission under those laws. This is because one of the main objectives of this
16 revision of a uniform state regulatory statute is to take account of those provisions in the federal
17 laws that are preemptive, and to coordinate with other, nonpreemptive provisions of the federal
18 laws where coordination between federal and state securities regulators is the public interest.
19

20 2. Section 12(d) of the Uniform Statute and Rule Construction Act, adopted by NCCUSL
21 in 1995 and enacted in one State, provides: “A statute or rule that incorporates by reference a
22 statute or rule of another jurisdiction does not incorporate a later enactment or adoption or
23 amendment of the other statute or rule.” Nevertheless, some States permit later amendments to
24 statutes and rules referenced in enacted legislation to become automatically effective.
25

26 3. After enactment amendments to a preemptive federal statute, to an amendment of such
27 a statute that maintains the preemption, to rules adopted by a federal agency under a preemptive
28 provision of a federal statute or to amendments to such rules should be enforced in all states
29 under the Supremacy Clause of the United States Constitution. A number of such references are
30 in this Act.
31

32 QUERY: Should the reference to rules in this subsection be limited to rules
33 “appropriately adopted?”

1
2 (28) “Securities and Exchange Commission” means the United States Securities and
3 Exchange Commission.

4 (29) “Security” means a note; stock; treasury stock; security future; bond; debenture;
5 evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement;
6 collateral trust certificate; preorganization certificate or subscription; transferable share;
7 investment contract; voting trust certificate; certificate of deposit for a security; fractional
8 undivided interest in oil, gas, or other mineral rights; put, call, straddle, option or privilege on a
9 security, certificate of deposit, or group or index of securities (including an interest therein or
10 based on the value thereof); put, call, straddle, option or privilege entered into on a national
11 securities exchange relating to foreign currency; or, in general, an interest or instrument
12 commonly known as a “security”; or a certificate of interest or participation in, temporary or
13 interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase,
14 any of the foregoing. The term includes both a certificated and uncertificated security. The term
15 does not include:

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

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

21 (30) “Self-regulatory organization” means a national securities exchange registered under
22 the Securities Exchange Act of 1934, a national securities association of broker-dealers registered

1 under the Securities Exchange Act of 1934, a clearing agency registered under the Securities
2 Exchange Act of 1934, or the Municipal Securities Rulemaking Board established under the
3 Securities Exchange Act of 1934.

4 (31) “State” means a State of the United States, the District of Columbia, Puerto Rico, the
5 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
6 the United States.

7 (32) “Underwriter” means a person that has purchased from an issuer with a view to, or
8 offers or sells for an issuer in connection with, the distribution of ~~any~~ a security; participates or
9 has a direct or indirect participation in an undertaking; or participates or has a participation in the
10 direct or indirect underwriting of an undertaking. The term does not include a person whose
11 interest is limited to a commission from an underwriter or dealer not in excess of the usual and
12 customary distributors’ or sellers’ commission. As used in this paragraph the term “issuer”
13 shall include, in addition to an issuer, any person directly or indirectly controlling or controlled
14 by the issuer, or any person under direct or indirect common control with the issuer.
15

16 **Reporter’s Notes**

17
18 **Prior Provisions:** 1956 Act Section 401; RUSA 101.
19

20 1. Under Section 606(a) the administrator has the power to define by rule any term,
21 whether or not used in this Act, as long as the definitions are not inconsistent with the Act.
22

23 2. All definitions include corresponding meanings. For example, “filing” would include
24 “file” or “filed”; “sale” would include “sell.”
25

26 3. Prefatory Phrase: “When used in this Act, unless the context otherwise requires”:
27 Prior Provisions: 1956 Act Section 401 Preface; RUSA Section 101 Preface. This prefatory
28 phrase which begins the counterpart provisions of the federal securities statutes, see, e.g.,
29 Securities Act of 1933 Section 2(a), provides the basis for the courts to take into account the

1 statutory and factual context of each definition, see, e.g., *Reves v. Ernst & Young*, 494 U.S. 56
2 (1990); 2 L. Loss & J. Seligman, *Securities Regulation* 927-929 (3d ed. rev. 1999), and will
3 allow the courts to harmonize these definitions with the counterpart federal securities definitions
4 to the extent appropriate. Cf. *Akin v. Q-L Inv., Inc.*, 959 F.2d 521, 532 (5th Cir. 1992) (“Texas
5 courts generally look to decisions of the federal courts to interpret the Texas Securities Act
6 because of obvious similarities between the state and federal laws”); *Koch v Koch Indus., Inc.*
7 203 F.3d 1202, 1235 (10th Cir. 2000) (following federal definition of materiality); *Biales v.*
8 *Young*, 432 S.E.2d 482, 484 (S.C. 1993) (“Section 35-1-1490(2) is substantially similar to
9 Section 12(1) of the Federal Securities Act”).

10
11 4. Section 102(1): Administrator: Prior Provisions: 1956 Act Section 401(a); RUSA
12 Section 101(1).

13
14 5. Section 102(2): Agent: Prior Provisions: 1956 Act Section 401(b); RUSA Section
15 101(14).

16
17 Section 102(2), in part, follows the 1956 Act definitions. The 1956 Act used the term
18 “agent” while the RUSA Section 101(14) used the term “sales representative.” Given the
19 broader enactment of the 1956 Act, this Act also uses the term “agent.”

20
21 Whether a particular individual who represents a broker-dealer or issuer is an “agent”
22 depends upon the same factors that create an agency relationship at common law. See, e.g.,
23 *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176, 179 (Minn. Ct. App. 1986) (following
24 Official Comment that establishing agency under the Uniform Securities Act “depends upon
25 much the same factors which create an agency relationship at common law”) *Shaughnessy &*
26 *Co., Inc. v. Commissioner of Sec.*, 1971-1978 Blue Sky L. Rep. (CCH) ¶71,348 (Wis. Cir. Ct.
27 1977) (unlicensed person who took information relevant to securities transaction and turned it
28 over to securities agents was himself an agent).

29
30 An individual can be an agent for a broker-dealer or issuer for a purpose other than
31 effecting or attempting to effect purchases or sales of securities and not be a statutory agent under
32 this Act. See, e.g., *Baker, Watts & Co. v. Miles & Stockridge*, 620 A.2d 356, 367 (Md. Ct. App.
33 1993) (attorney-client relationship is generally one of agency, but that alone does not bring
34 attorneys within securities act definition of agent).

35
36 Section 102(2) is intended to include any individual who acts as an agent, whether or not
37 the individual is an employee or independent contractor.

38
39 The term “individual” is limited to human beings and does not include a juridical
40 “person” such as a corporation. Cf. definition of “person” in Section 102(20). The 1956 Act
41 Section 401(b) similarly was limited to individuals and did not include juridical persons. See,
42 e.g., *Connecticut Nat’l Bank v. Giacomi*, 699 A.2d 101, 111-112 (Conn. 1997) (“agent” only
43 includes natural persons when it used the term individual); *Schpok v. Fodale*, 236 N.W.2d 97, 99
44 (Mich. Ct. App. 1975) (agent defined to be individual which did not under the statute include a

1 corporation).

2
3 An individual will not be considered to be an agent under Section 102(2) merely because
4 of the person's status as a partner, officer, or director of a broker-dealer or issuer if such an
5 individual does not effect or attempt to effect purchases or sales of securities. See, e.g., *Abell v.*
6 *Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988). See also *Norwest Bank Hastings v. Clapp*, 394
7 N.W.2d 176, 178-179 (Minn. Ct. App. 1986) (lender was not an agent). Cf. *Quick v. Woody*,
8 747 S.W.2d 108 (Ark. 1988).

9
10 Section 102(2)(B) provides with respect to individuals acting for an issuer, a parent of the
11 issuer, or subsidiary of the issuer, including a partner, officer, or director, that such individual
12 will not be an "agent" when such an individual acts for an issuer with respect to an offering or
13 sale of the issuer's securities, a parent, or subsidiary when (1) such an individual primarily
14 performs duties other than in connection with transactions in the issuer's own securities and (2)
15 the individual does not receive compensation based, in whole or in part, upon sales of the issuer's
16 own securities. Similar provisions exist in some states today. See, e.g., Colorado Section
17 201(14); Illinois Securities Act Section 2.9.

18
19 An individual acting for an issuer subject to Section 102(2)(B) will not be exempted from
20 relevant fraud and liability provisions in Part 5.

21
22 6. Section 102(3): Bank: This Subsection is substantively identical to Subsection 3(a)(6)
23 of the Securities Exchange Act of 1934.

24
25 7. Section 102(4): Broker-Dealer: Prior Provisions: 1956 Act Section 401(c); RUSA
26 Section 101(2). This definition generally follows the definition of broker-dealer in the 1956 Act
27 and RUSA.

28
29 The use of the compound term is meant to include either a broker or a dealer. The
30 recognized distinction is that a broker acts for the benefit of another while a dealer acts for itself
31 (e.g., in buying for or selling from its own inventory).

32
33 The distinction between "a person engaged in the business of effecting transactions in
34 securities" and an investor, who may buy and sell with some frequency and is outside the scope
35 of this term, has been well developed in the case law. See 6 L. Loss & J. Seligman, *Securities*
36 *Regulation* 2980-2984 (3d ed. 1990).

37
38 The 1956 Act Section 401(c) excluded from the definition of broker-dealer a person who
39 during any 12 consecutive months did not direct more than 15 offers to buy or sell in this State.
40 In this Act exemptions from broker-dealer registration are provided in Section 401(b).

41
42 The Gramm-Leach-Bliley Act, signed into law in November 1999, rescinded the
43 exemption of banks from the definition of broker and dealer in Sections 3(a)(4) and (5) of the
44 Securities Exchange Act of 1934. Under Section 102(4)(D), a securities administrator can

1 exclude banks and other depository institutions, in whole or in part. There is also an exemption
2 in Section 401(b)(2) for bank registration as a broker-dealer for specified activities.
3

4 Section 15(h)(1) of the Securities Exchange Act of 1934, as amended by the National
5 Securities Markets Improvement Act of 1996 preempts state law from “[establishing] capital,
6 custody, margin, financial responsibility, making and keeping records, bonding, or financial or
7 operational reporting requirements for brokers, dealers, municipal securities dealers, government
8 securities brokers, or government securities dealers that differ from, or are in addition to the
9 requirements in those areas established under [the Securities Exchange Act].” These
10 preemptions are recognized in the substantive broker-dealer provisions in Part 4.
11

12 8. Section 102(6): Federal covered investment adviser: No Prior Provision. This
13 provision is necessitated by Section 203A of the Investment Advisers Act of 1940, added by Title
14 III of the National Securities Markets Improvement Act of 1996, which allocates to primary state
15 regulation most advisers with assets under management of less than \$25 million. SEC
16 registration is permitted, but not required, for investment advisers having between \$25 and \$30
17 million of assets under management and is required of investment advisers having at least \$30
18 million of assets under management. Investment Advisers Act of 1940 Rule 203A-1. Most
19 advisers with assets under management of \$25 million or more register solely under Section 203
20 of the Investment Advisers Act of 1940 and not state law. This division of labor is intended to
21 eliminate duplicative regulation of investment advisers.
22

23 9. Section 102(7): Federal covered security: No Prior Provision. The National
24 Securities Markets Improvement Act of 1996, as subsequently amended, partially preempted
25 state law in the securities offering and shareholder reporting areas. Under Section 18(a) of the
26 Securities Act of 1933, no state statute, rule, order, or other administrative action may apply to:
27

28 (1) The registration of a “covered” security or a security that will be a covered security
29 upon completion of the transaction;
30

31 (2)(A) Any offering document prepared by or on behalf of the issuer of a covered
32 security;
33

34 (2)(B) Any proxy statement, report to shareholders, or other disclosure document relating
35 to a covered security or its issuer that is required to be filed with the SEC or any national
36 securities association registered under Section 15A of the Securities Exchange Act such as the
37 National Association of Securities Dealers (NASD); or
38

39 (3) The merits of a covered security or a security that will be a covered security upon
40 completion of the transaction.
41

42 2. Section 18(b) of the Securities Act of 1933 applies to four types of “covered
43 securities”:
44

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

10 (2) Securities issued by an investment company registered with the SEC (or one that has
11 filed a registration statement under the federal Investment Company Act of 1940);
12

13 (3) Securities offered or sold to “qualified purchasers.” This category of covered
14 securities will become operational only when the SEC defines the term “qualified purchaser” as
15 used in Section 18(b)(3) of the Securities Act of 1933, by rule, which to date it has not done; and
16

17 (4) Securities issued under the following specified exemptions of the Securities Act of
18 1933:
19

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

24 (B) Section 4(4) (brokers);
25

26 (C) Securities Act exemptions in Section 3(a) with the exception of the charitable
27 exemption in Section 3(a)(4), the exchange exemption in Section 3(a)(10), the intrastate
28 exemption in Section 3(a)(11), and the municipal securities exemption in Section 3(a)(2), but
29 only with “respect to the offer or sale of such [municipal] security in the State in which the issuer
30 of such security is located”; and
31

32 (D) Securities issued in compliance with SEC rules under Section 4(2) (private placement
33 exemption).
34

35 Section 18(c)(1) preserves state authority “to investigate and bring enforcement actions
36 with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with
37 securities or securities transactions.”
38

39 The National Securities Markets Improvement Act, in essence, preempts aspects of the
40 securities registration and reporting processes for specified covered securities. The Act does not
41 diminish state authority to investigate and bring enforcement actions generally with respect to
42 securities transactions.
43

44 The states are also authorized to require filings of any document filed with the SEC for

1 notice purposes “together with annual or periodic reports of the value of securities sold or offered
2 to be sold to persons located in the State (if such sales data is not included in documents filed
3 with the Commission), solely for notice purposes and the assessment of any fee, together with a
4 consent to service of process and any required fee.” Section 18(c)(2). However, no filing or fee
5 may be required with respect to any listed security that is a covered security under Section
6 18(b)(1) (traded on specified stock markets). Section 302 of this Act addresses notice filings and
7 fees applicable to federal covered securities.
8

9 9. Section 102(8): Filing: Prior Provision: RUSA Section 101(4). The RUSA
10 definition was revised to recognize that records may be filed in paper form or electronically with
11 the administrator, or designees such as the Web-CRD (Central Registration Depository) or
12 Investor Advisor Registration Depository (IARD) or successor institutions or the Securities and
13 Exchange Commission’s Electronic Data Gathering, Analysis and Retrieval System (EDGAR) or
14 successor systems.
15

16 In the RUSA definition, the term “filed” referred to “actual delivery of a document or
17 application.” This Act substitutes the term “record” which is defined in Section 102(25) to refer
18 broadly to “information that is inscribed on a tangible medium or that is stored in an electronic or
19 other medium and is retrievable in perishable form”. This definition requires the receipt of a
20 record. The definition does not limit filing to any specific medium such as mail, certified mail,
21 or a particular electronic system. The definition is intended to permit an administrator to accept
22 filings over the Internet or through a direct modem system, both of which are now used to
23 transmit documents to EDGAR, or through new electronic systems as they evolve.
24

25 “Receipt” refers to the actual delivery of a record to the administrator or a designee and
26 does not refer to a subsequent review of the record by the administrator. See, e.g., *Fehrman v.*
27 *Blunt*, 825 S.W.2d 658 (Mo. Ct. App. 1992).
28

29 10. Section 102(9): Fraud, Deceit and Defraud: Prior Provisions: 1956 Act Section
30 401(d); RUSA Section 101(6). This definition, which is identical to the 1956 Act and RUSA,
31 codifies the holdings that “fraud” as used in the federal and state securities statutes is not limited
32 to common law deceit. See generally 7 L. Loss & J. Seligman, *Securities Regulation* 3421-3448
33 (3d ed. 1991).
34

35 11. Section 102(10): Guaranteed: Prior Provisions: 1956 Act Section 401(e); RUSA
36 Section 401(a)(1). The 1956 Act definition of “guaranteed” applied generally to payment of
37 “principal, interest, or dividends.” The RUSA definition of “guaranteed,” which was solely
38 applicable to exempt securities, applied to the guarantee of “all or substantially all of principal
39 and interest or dividends.”
40

41 Section 102(10) follows the 1956 Act approach and applies generally to the guarantee of
42 “all principal and all interest.” Any method of guarantee that results in a guarantee of payment of
43 all principal and all interest will suffice including, for example, an irrevocable letter of credit.
44

1 This definition does not address whether or not a guarantee, whether whole or partial, is
2 itself a security. That issue is addressed by the definition of “security” in Section 102(29).
3

4 12. Section 102(12): Insurance company: No Prior Provision. This definition is based
5 on Securities Act of 1933 Section 2(a)(13).
6

7 13. Section 102(13): Insured: Prior Provision: RUSA Section 401(a)(2). The RUSA
8 definition of “insured,” which was solely applicable to exempt securities, applied to the insurance
9 of “all or substantially all of principal, interest, or dividends.” Section 102(13) is applicable
10 generally but is limited to “payment of all principal and all interest.”
11

12 14. Section 102(14): International bank: No Prior Provision. Securities issued or
13 guaranteed by the Internal Bank for Reconstruction and Development, 22 U.S.C. Section 286k-
14 1(a); the Inter-American Development Bank, 22 U.S.C. Section 283h(a); the Asian Development
15 Bank, 22 U.S.C. Section 285h(a); the African Development Bank, 22 U.S.C. Section 290i-9; and
16 the International Finance Corporation, see 22 U.S.C. Section 282k; are treated as exempted
17 securities within the meaning of Section 3(a)(2) of the Securities Act of 1933, see generally 3 L.
18 Loss & J. Seligman, Securities Regulation 1191-1194 (3d ed. rev. 1999), and are within this
19 term.
20

21 15. Section 102(15): Investment adviser: Prior Provisions: 1956 Act Section 401(f);
22 RUSA Section 101(7). This term generally follows the definition in the 1956 Act and RUSA,
23 both of which, in turn, generally followed the definition in Section 202(a)(11) of the Investment
24 Advisers Act of 1940.
25

26 The first sentence in Section 102(15) is identical to the first sentence in the 1956 Act
27 Section 401(f) and the counterpart language in Section 202(a)(11). The RUSA definition deleted
28 the phrases “either directly or through publications or writings” and “regular” before business.
29 These terms have been returned to Section 102(15) because of the intention that this definition be
30 construed uniformly with the definition in the Investment Advisers Act of 1940. See Section
31 613.
32

33 The second sentence in the term addressing financial planners is new. The purpose of
34 this sentence is to achieve functional regulation of those financial planners who, in fact, satisfy
35 the definition of investment adviser. Cf. Investment Advisers Act Release 1092, 39 SEC Dock.
36 494 (1987) (similar approach in Securities and Exchange Commission interpretative Release).
37 This reference is not intended to preclude persons who hold some form of formally recognized
38 financial planning or consulting designation or certification from using this designation. The use
39 by a person of the designation or certification as a financial planner alone does not require
40 registration of the financial planner as an investment adviser.
41

42 Sections 102(15)(A)-(G) are exclusions from the term “investment adviser.” An
43 excluded person can be held liable for fraud in providing investment advice, see Section 502, but
44 would not be subject to the registration and regulatory provisions in Part 4.

1 Sections 102(15)(A) and (E) are new and recognize that investment adviser
2 representatives and federal covered investment advisers are separately treated in this Act. See
3 definitions in Sections 102(6) and 102(16); registration and exemptions in Sections 404-405.
4

5 Sections 102(15)(B), (C), and (G) are substantively identical to the 1956 Act, RUSA, and
6 the Investment Advisers Act of 1940. The Official Comment to 1956 Act Section 401(f) quoted
7 an opinion of the Securities and Exchange Commission General Counsel in Investment Advisers
8 Act Release 2 on the meaning of “special compensation” included in Section 102(15)(C):
9

10 [This clause] amounts to a recognition that brokers and dealers commonly
11 give a certain amount of advice to their customers in the course of their regular
12 business, and that it would be inappropriate to bring them within the scope of the
13 Investment Advisers Act merely because of this aspect of their business. On the
14 other hand, that portion of clause [(3)] which refers to ‘special compensation’
15 amounts to an equally clear recognition that a broker or dealer who is specially
16 compensated for the rendition of advice should be considered an investment
17 adviser and not be excluded from the purview of the Act merely because he is also
18 engaged in effecting market transactions in securities. . . . The essential
19 distinction to be borne in mind in considering borderline cases . . . is the
20 distinction between compensation for advice itself and compensation for services
21 of another character to which advice is merely incidental.
22

23 Section 102(15)(D) is identical to the 1956 Act definition but adds the word “paid” to the
24 counterpart exclusion in Section 202(a)(11) of the Investment Advisers Act “to emphasize,” as
25 the Official Comment explained, “that a person who periodically distributes a ‘tipster sheet’ free
26 as a way to get paying clients is not excluded from the definition as a ‘publisher.’” After the
27 1956 Act was published, the United States Supreme Court construed the definition of investment
28 adviser in *Lowe v. SEC*, 472 U.S. 181 (1985), and concluded:
29

30 Congress did not intend to exclude publications that are distributed by investment
31 advisers as a normal part of the business of servicing their clients. The legislative
32 history plainly demonstrates that Congress was primarily interested in regulating
33 the business of rendering personalized investment advice, including publishing
34 activities that are a normal incident thereto. On the other hand, Congress, plainly
35 sensitive to First Amendment concerns, wanted to make clear that it did not seek
36 to regulate the press through the licensing of nonpersonalized publishing
37 activities.
38

39 *Id.* at 185.
40

41 Responsive to this language RUSA rewrote this exclusion to provide:
42 a publisher, employee, or columnist of a newspaper, news magazine, or business
43 or financial publication, or an owner, operator, or employee of a cable, radio, or
44 television network, station, or production facility, if, in either case, the financial or

1 business news published or disseminated is made available to the general public
2 and the content does not consist of rendering advice on the basis of the specific
3 investment situation of each client.
4

5 Recent experience at the federal and state levels suggest that the RUSA approach may be
6 too broad. The retention of the 1956 Act and Investment Advisers Act approach provides a
7 better balance between First Amendment concerns and protection of investors from non-“bona
8 fide” publicizing of investment advice. The exclusion in Section 102(15)(D) is intended to
9 exclude publishers of Internet or electronic media, but only if the Internet or electronic media
10 publication or website satisfies the “bona fide” and “publication of general, regular, and paid
11 circulation” requirements. Cf. SEC v. Park, 99 F. Supp. 2d 889, 895-896 (N.D. Ill. 2000) (court
12 declined to dismiss complaint against an Internet website when there were allegations that the
13 website was not “bona fide” or of “general and regular circulation”).
14

15 The exclusion in Section 102(15)(F) is required by the National Securities Markets
16 Improvement Act of 1996. This exclusion will reach banks and bank holding companies as
17 described in Investment Advisers Act Section 202(a)(11)(A) and persons whose advice solely
18 concerns United States government securities as described in Section 202(a)(11)(E).
19

20 16. Section 102(18): Nonissuer transaction or nonissuer distribution: Prior Provisions:
21 1956 Act Section 401(h); RUSA Section 101(9). This definition is relevant to several exempt
22 transactions in Section 202. See, e.g., Sections 202(1)-(7).
23

24 In *TechnoMedical Labs, Inc. v. Utah Sec. Div.*, 744 P.2d 320 (Utah Ct. App. 1987), the
25 court declined to limit the term benefit to monetary benefit and instead held a spinoff transaction
26 could provide direct or indirect benefits to an issuer. *Id.* at 323-324, *following* SEC v. Datronics
27 Eng’r, Inc., 490 F.2d 250 (4th Cir. 1973), *cert. denied*, 416 U.S. 937; SEC v. Harwin Indus.
28 Corp., 326 F. Supp. 943 (S.D.N.Y. 1971).
29

30 17. Section 102(20): Person: Prior Provisions: 1956 Act Section 401(i); RUSA Section
31 101(10). This is the standard definition used by the National Conference of Commissioners for
32 Uniform State Laws. The use of the concluding phrase “or any other legal or commercial entity”
33 is intended to be broad enough to include other forms of business entities that may be created or
34 popularized in the future.
35

36 18. Section 102(23): Price amendment: Prior Provision: RUSA Section 101(11). This
37 concept concerns the registration by coordination with the Securities and Exchange Commission
38 procedure in Section 303(d). See also Section 304(d). In the case of noncash offerings, required
39 information concerning such matters as the offering price and underwriting arrangements is
40 normally filed in a “price” amendment after the rest of the registration statement has been
41 reviewed by the Securities and Exchange Commission staff. See generally 1 L. Loss & J.
42 Seligman, *Securities Regulation* 542-550 (3d ed. rev. 1998).
43

44 19. Section 102(29): Security: Prior Provisions: 1956 Act Section 401(1); RUSA

1 Section 101(16). Much of the definition in Section 102(29), like the definitions in the 1956 Act
2 Section 401(l) and RUSA Section 101(16), is identical to the definition in Section 2(a)(1) of the
3 Securities Act. State courts interpreting the Uniform Securities Act definition of security have
4 often looked to interpretations of the federal definition of security. See generally 2 L. Loss & J.
5 Seligman, *Security Regulation* 923-1138.19 (3d ed. rev. 1999).

6
7 The most recent amendments to Section 2(a)(1) of the Securities Act of 1933 were added
8 by the Commodities Futures Modernization Act of 2000 which added or revised language
9 addressing securities futures and securities puts, calls, straddles, options, or privileges to the
10 federal act. Identical language has been included in Section 102(29) of this Act to harmonize
11 interpretation of the federal and state definition of a “security.” See Section 613.

12
13 Section 102(29) includes the exception from RUSA to the 1956 definition for “an
14 interest in a contributory or noncontributory pension or welfare plan subject to the Employee
15 Retirement Income Security Act of 1974.” Section 102(29) also uses RUSA’s “fractional
16 undivided interest in oil, gas or other mineral rights” formulation, which originated in Section
17 2(a)(1) of the Securities Act of 1933, rather than the 1956 Act formulation, “certificate of
18 interest or participation in an oil, gas or mining title.” In recent years, courts interpreting Section
19 2(a)(1) of the Securities Act of 1933 have found certain oil, gas or mineral rights to be
20 investment contracts (that is, securities). 2 L. Loss & J. Seligman, *Securities Regulation* 979-982
21 (3d ed. rev. 1999).

22
23 Preorganization certificates or subscriptions are included in this term, obviating the need
24 for a separate definition as in RUSA Section 402(13).

25
26 A new sentence was added referring to certificated or uncertificated securities to indicate
27 that the term is intended to apply whether or not a security is evidenced by a writing.

28
29 Under federal securities law certain limited liability companies and limited partnerships
30 have been held to be investment contracts and accordingly “securities” within the meaning of
31 Section 2(a)(1) of the Securities Act of 1933. See 2 L. Loss & J. Seligman, *Securities Regulation*
32 1028-1031 (3d ed. rev. 1999). In addition, when consistent with the court decisions interpreting
33 the investment contract concept, see, e.g., *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), such
34 instruments as limited liability partnerships or viatical settlements could also be statutory
35 securities. This term is intended to reject the holding that a viatical contract would never be a
36 security. See *SEC v. Life Partners Inc.*, 87 F.3d 536 (D.C. Cir. 1996), *reh’g denied*, 102 F. 3d
37 587 (D.C. Cir. 1996).

38
39 Insurance or endowment policies or endowments or annuity contracts, other than those on
40 which an insurance company promises to make variable payments are excluded from this term.
41 Variable insurance products are exempted from securities registration under Section 201(4). This
42 will allow state securities administrators to bring enforcement actions concerning variable
43 insurance sales practices. As of July 2001, 12 states, by statute, had taken a different approach
44 and excluded variable insurance products from the definition of a security. Alaska § 45.55.990

(32); Ark. §23-42-102(15)(B); California §25,019; Georgia §10-5-2(a)(26)(C); Louisiana §51:702(15)(b)(i); Mississippi §75-71-105(n); New Jersey §49:3-49(m); North Carolina §78A-2(11); Oregon §59.015(19)(b)(A); Pennsylvania §102(t); Virginia §13.1-501; Wisconsin §551.22(13)(b). Four states exclude from the definition of security any annuity contract issued by an insurance company that is subject to regulation by the insurance commissioner. Ala. §8-6-2(10); Conn. §36b-3(17); Neb. §8-1101; Tex. §4A[581-4]. In those states variable insurance product sales practices would not be subject to the securities fraud provisions.

20. Section 102(30): Self-regulatory organization: Prior Provision: RUSA Section 101(17). This definition was added by RUSA and is based on a counterpart provision in the Federal Securities Code. At the current time national securities exchanges are required under Section 6 of the Securities Exchange Act; national securities associations under Section 15A; clearing agencies are registered under Section 17A; and the Municipal Securities Rulemaking Board under Section 15B.

21. Section 102(31): State: Prior Provisions: 1956 Act Section 401(m); RUSA Section 101(18). This is the standard definition used by the National Conference of Commissioners on Uniform State Laws. It does include territories and possessions of the United States, as well as the District of Columbia and Puerto Rico, but does not include foreign governments, their territories, or their possessions.

22. Section 102(32): Underwriter: No Prior Provision. The definition in Section 102(32) is intended to be construed consistently with the definition of underwriter in Section 2(a)(11) of the Securities Act of 1933.

[SECTION 103 ELECTRONIC RECORDS AND SIGNATURES. The provisions of this [Act] governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.]

Reporter's Notes

Prior Provision: Uniform Electronic Transactions Act (1999).

1. The Uniform Electronic Transactions Act, Section 4 “applies to any electronic record

1 or electronic signature created, generated, sent, communicated, received, or stored on or after the
2 effective date of [that Act].” The Act “applies only to transactions between parties each of which
3 has agreed to transactions by electronic means,” section 5(b), but in those cases is intended “to
4 facilitate electronic transactions consistent with other applicable law.” Section 6(1). Specifically
5 Section 7 provides:

6
7 (a) A record or signature may not be denied legal effect or enforceability
8 solely because it is in electronic form.

9
10 (b) A contract may not be denied legal effect or enforceability solely
11 because an electronic record was used in its formation.

12
13 (c) If a law requires a record to be in writing, an electronic record satisfies
14 the law.

15
16 (d) If a law requires a signature, an electronic signature satisfies the law.

17
18 2. Section 102 of the Electronic Signatures in Global and National Commerce Act,
19 expressly allows a state statute, regulation, or other rule of law to permit electronic transactions
20 “only if such statute, regulation, or other rule of law . . . constitutes an enactment or adoption of
21 the Uniform Electronic Transactions Act.
22

1 **PART 2**

2 **EXEMPTION FROM REGISTRATION OF SECURITIES**

3
4 **Reporter's Notes**

5 Section 201 includes exempt securities and Section 202 includes exempt transactions.
6 Both exempt securities and exempt transactions are exempt from the securities registration and
7 the filing of sales literature sections of this Act. Neither Section 201 nor Section 202 provide an
8 exemption from the Act's antifraud provisions in Part 5, nor the broker-dealer, agent, investment
9 adviser, or investment adviser registration requirements in Part 4.

10
11 A Section 201 exempt security retains its exemption when initially issued and in
12 subsequent trading.

13
14 A Section 202 transaction exemption must be established before each transaction.

15
16 Neither the exempt security nor the transaction exemptions are meant to be mutually
17 exclusive. A security or transaction may qualify for two or more of these exemptions.

18
19
20 **SECTION 201. EXEMPT SECURITIES.** The following securities are exempt from
21 Sections 301, 303 through 306 and 504:

22 (1) [United States government and municipal.] a security, including a revenue obligation
23 or a separate security as defined in a rule under the Securities Act of 1933, issued, insured, or
24 guaranteed by the United States; by a State; by a political subdivision of a State; by a public
25 authority, agency, instrumentality of one or more States; by a political subdivision of one or
26 more States; by a person controlled or supervised by and acting as an instrumentality of the
27 United States under authority granted by the Congress; or a certificate of deposit for any of the
28 foregoing;

29 (2) [Foreign government.] a security issued, insured, or guaranteed by a foreign
30 government with which the United States maintains diplomatic relations, or any of its political

1 subdivisions, if the security is recognized as a valid obligation by the issuer, insurer, or
2 guarantor;

3 (3) [Depository institution and international bank.] a security issued by and representing
4 or that will represent an interest in or a direct obligation of, or be guaranteed by, a depository
5 institution or by an international bank;

6
7 **Reporter's Notes**
8

9 **Source of Law:** RUSA Section 401(b)(3).
10

11 1. Section 402(a)(3) of the 1956 Act exempts specified bank and similar depository
12 institutions; Section 402(a)(4) exempts specified savings and loan and similar thrift institution
13 securities; and Section 402(a)(6) exempts specified credit union securities. RUSA Section
14 401(b)(3) combines the three types of depository institutions into a common definition (see
15 RUSA Section 101(13) which is adopted here as Section 102(5)) and a common exemption (see
16 RUSA Section 401(b)(3) which is adopted in this Section).
17

18 2. Banks specified in Section 3(a)(2) of the Securities Act of 1933 issue federal covered
19 securities under Section 18(b)(4)(C) of the Securities Act of 1933.
20

21 (4) [Insurance company.] a security issued by and representing an interest in or a debt of,
22 or insured or guaranteed by, an insurance company authorized to do business in this State;

23 (5) [Public utility.] a security issued or guaranteed by a railroad, other common carrier,
24 public utility, or holding company that is:

25 (A) a holding company registered under the Public Utility Holding Company Act
26 of 1935 or a subsidiary of a registered holding company within the meaning of that act;

27 (B) regulated in respect to its rates and charges by the United States or a State; or

28 (C) regulated in respect to the issuance or guarantee of the security by the United
29 States, a State, Canada, or a Canadian province or territory;

1 (6) [Certain options and rights.] a put or call option contract, warrant, or subscription
2 right on or with respect to a federal covered security specified in Section 18(b)(1) of the
3 Securities Act of 1933 or by rule under that provision or a security listed or approved for listing
4 on another appropriate securities market specified by rule by the administrator; or an option on a
5 security or an index of securities or foreign currencies issued by a clearing agency registered
6 under the Securities Exchange Act of 1934 and listed or designated for trading on a national
7 securities exchange, a facility of a national securities exchange, or a facility of a national
8 securities association registered under the Securities Exchange Act of 1934 [or an offer or sale of
9 the underlying security in connection with the offer, sale or exercise of an option or other security
10 that was exempt under this section at the time such option or other security was written or issued.
11 For purposes of this paragraph, a derivative security is similar to an option if it has been
12 designated in Rule 9b-1 under the Securities Exchange Act of 1934];

13 (7) [Nonprofit organization.] a security issued by a person organized and operated
14 exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic, or
15 reformatory purposes or as a chamber of commerce and not for pecuniary profit, no part of the
16 net earnings of which inures to the benefit of a private stockholder or person, or a security of a
17 company that is excluded from the definition of an investment company under Section
18 3(c)(10)(B) of the Investment Company Act of 1940, but not including a note, bond, debenture,
19 or evidence of indebtedness unless the administrator, by rule or order, so specifies under Section
20 203;

Reporter's Notes

Source of Law: Sec. Act Section 3(a)(4).

1. Section 402(a)(9) of the 1956 Act and Section 401(b)(10) of RUSA exempt specified nonprofit securities. Both are modeled on Section 3(a)(4) of the Securities Act, which was subsequently amended.

2. Section 3(a)(4) is not treated as a federal covered security in Section 18(b)(4)(C), although a separate Section 3(a)(13) exemption which addresses certain church plan securities is a federal covered security under Section 18(b)(4)(C).

3. RUSA also included an optional notice and review requirement for nonprofit securities in Section 401(b)(10) "if at least ten days before a sale of the security the person has filed with the administrator a notice setting forth the material terms of the proposed sale and copies of any sales and advertising literature to be used and the administrator by order does not disallow the exemption within the next five full business days." As of June 2001, 49 jurisdictions included a nonprofit organization exemption. Of these 13 included a statutory notice filing requirements. See Ala. §8-6-10(8); District of Columbia §2-2664.1(8); Iowa §502.202(9); Kansas §17-1261(h); Md. §11-601(9)(ii); Mich. §451.8031(a)(8)(A); Mo. §409.402(a)(9); Mont. §30-10-104(8); Nev. §90.520(j); N.M. §58-13B-26H; N.D. §10-04-05.5; Okla. §401(a)(6); Tenn. §48-2-103(a)(7); Wash. §21.20.310 (11). In addition North Carolina authorizes its administrator "by rule or order [to] impose conditions, upon this exemption either generally or in relation to specific securities or transactions."

4. This exemption is of particular concern to state securities administrators. See, e.g., State Regulators Announce Dramatic Rise in Religious Scams; Tens of Thousands Lured, 33 Sec. Reg. & L. Rep. (BNA) 1189 (2001). Robert M. Lam, Chairman of the Pennsylvania Securities Commission, wrote the Reporter on November 30, 1999:

Of all the changes that have occurred at the State level, the rise of the market of debt securities of non-profit organizations has been the most significant and troublesome. . . .

5. The Denominational Investment and Loan Administrators on April 20, 2001, proposed adding to subsection 201(7):

[except that this exemption does not include a note, bond, debenture or evidence of indebtedness unless at least ten days before a sale of the security the person has filed with the administrator a notice setting forth the material terms of the proposed sale and copies of any sales and advertising literature to be used and the administrator by order does not disallow the exemption within the next five full business days]

The Denominational Investment and Loan Administrators explained:

1 a. Except for the optional text, this exemption parallels the 1933 Act
2 nonprofit exemption, which creates uniformity in treatment at the state and federal
3 levels.
4

5 b. The optional text recognizes that some states have expressed concern
6 with nonprofit debt offerings and provides these states the option of requiring an
7 exemption filing. The optional text is based upon the nonprofit exemption in
8 RUSA §401(b)(10).
9

10 c. This exemption is consistent with current state treatment of nonprofit
11 securities offerings. The vast majority of states today provide either an exemption
12 or an exemption with filing for some or all nonprofit offerings. Only about eight
13 states require registration of all nonprofit offerings.
14

15 6. With respect to the exclusion of an investment company under subsection 3(c)(10)(B)
16 of the Investment Company Act, the Pennsylvania Securities Commission further states:
17

18 Funds excluded from the definition of investment company under Section
19 3(c)(10) of the 1940 Act include pooled income funds, collective trust funds and
20 collective investment funds maintained for collective investment assets of general
21 endowment funds, assets of pooled income funds, assets exchanged for issuance
22 of charitable gift annuities, assets of charitable remainder trusts, assets of a
23 charitable lead trust and assets of trusts with remainder interests dedicated to
24 charitable organizations (“Charitable Funds”).
25

26 Under Section 6 of the federal Philanthropy Protection Act, Congress
27 preempted application of the registration provisions of state securities laws to
28 issuance of securities of Charitable Funds unless states acted within three years of
29 enactment (December 1998) to pass special state legislation cancelling federal
30 preemption. Ten states passed such legislation (AR, CT, FL, MD, MS, NE, PA,
31 TN, VT, VA).
32

33 To the extent that any security issued by Charitable Funds would not
34 constitute an evidence of indebtedness and be excluded from the exemption, [this]
35 Draft presents a major issue of 20% of the states whose legislatures, as permitted
36 by Congress, enacted specific legislation to retain jurisdiction over these
37 securities.
38

39 The minority of states that did adopt legislation to cancel federal preemption may delete
40 the phrase “or a security of a company that is excluded from the definition of an investment
41 company under Section 3(c)(10) of the Investment Company Act of 1940.”
42
43

1 (8) [Cooperative.] a member's or owner's interest in, or a retention certificate or like
2 security given in lieu of a cash patronage dividend issued by, a cooperative organized and
3 operated as a nonprofit membership cooperative under the cooperative laws of a State, but not a
4 member's or owner's interest, retention certificate, or like security sold to persons other than
5 bona fide members of the cooperative unless the administrator adopts a rule or issues an order
6 under Section 203;

7 (9) [Employee benefit plan.] a security issued in connection with an employees' stock
8 purchase, savings, option, profit-sharing, pension or similar employees' benefit plan, including
9 any securities, plan interests, and guarantees issued under a compensatory benefit plan or
10 compensation contract, contained in a record, established by the issuer, its parents, its majority
11 owned subsidiaries, or the majority owned subsidiaries of the issuer's parent for the participation
12 of their employees; directors; general partners; and trustees if the issuer is a business trust;
13 officers; consultants and advisors; and their family members who acquire the securities from
14 such persons by gift or pursuant to a domestic relations order; and securities issued in connection
15 with the employee benefit plans to former employees, directors, general partners, trustees,
16 officers, consultants, and advisors, but only if these persons were employed by or providing
17 services to the issuer at the time the securities were offered; in this paragraph, "employee"
18 includes an insurance agent who is the exclusive agent of the issuer, its subsidiaries or parents, or
19 who derives more than 50 percent of the agent's annual income from those entities; and

20 **Reporter's Notes**

21 The Pennsylvania Securities Commission has expressed concerns that this exemption,
22 unlike Rule 701 of the Securities Act of 1933, does not provide for (1) resale restrictions; (2)
23 limits on the amounts that may be sold; and (3) mandatory delivery of a disclosure document by
24
25

1 the issuer. Pennsylvania proposes as an alternative the exemption of any security exempt under
2 Securities Act of 1933 Rule 701.
3

4 (10) [Equipment trust certificate.] an equipment trust certificate in respect to equipment
5 leased or conditionally sold to a person, if securities issued by the person would be exempt under
6 this Section or would be federal covered securities under Section 18(b)(1) of the Securities Act of
7 1933.
8

9 **Reporter's Notes**

10
11 1. Section 201(1): United States government and municipal: Prior Provisions: 1956 Act
12 Section 402(a)(1); RUSA Section 401(b)(1). This exemption generally follows the 1956 Act
13 except that it adds securities "insured" by a relevant government to those "issued" or
14 "guaranteed." RUSA, in contrast, also addressed foreign governments, which in this Act are
15 treated separately in Section 201(2). Rule 131 issued under the Securities Act of 1933 defines
16 securities issued under governmental obligations and is referenced by the phrase, "[a] security,
17 including a revenue obligation or a separate security as that form is defined in a rule under the
18 Securities Act of 1933."
19

20 2. Section 201(2): Foreign government: Prior Provisions: 1956 Act Section 402(a)(2);
21 RUSA Section 401(b)(2). The 1956 Act, as amended, and RUSA both reached foreign
22 governments as specified in Section 201(2) and separately treated "a security issued, insured, or
23 guaranteed by Canada, a Canadian province or territory, a political subdivision of Canada or a
24 Canadian province or territory, an agency or corporate or other instrumentality of one or more of
25 the foregoing." The separate treatment of Canadian securities is largely redundant and has been
26 eliminated from this Section.
27

28 3. Section 201(4): Insurance company: Prior Provisions: 1956 Act Section 402(a)(5);
29 RUSA Section 401(b)(4). The issuance, insurance, or guarantee of securities by an insurance
30 company is extensively regulated by state insurance commissions or other state agencies.
31

32 Under this Act insurance or endowment policies or annuity contracts under which an
33 insurance company promises to pay fixed sums are excluded from the definition of a security in
34 Section 102(29).
35

36 A variable annuity or other variable insurance product would be considered a security
37 under this Act and under federal securities law. See SEC v. Variable Annuity Life Ins. Co. of
38 Am., 359 U.S. 65 (1959); SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967).

1 A variable annuity or other variable insurance product issued by an investment company
2 registered with the Securities and Exchange Commission under the Investment Company Act of
3 1940 would be a “federal covered security,” see Section 102(7), and subject to the notice filing
4 requirements of Section 302.

5
6 A variable annuity or other variable insurance product not issued by a registered
7 investment company would be exempted by Section 201(4), but would be subject to the antifraud
8 provisions in Part 5.

9
10 4. Section 201(5): Public utility: Prior Provisions: 1956 Act Section 401(a)(7); RUSA
11 Section 401(b)(5). Both the 1956 Act and RUSA include references, omitted here, to the
12 Interstate Commerce Commission, whose enabling legislation subsequently was repealed. Public
13 utilities covered by this exemption are subject both to the federal Public Utility Holding
14 Company Act and to state utility regulation.

15
16 5. Section 201(6): Certain options and rights: No Prior Provision. The 1956 Act
17 Section 402(a)(8) provided an exemption for securities listed on the New York, American,
18 Midwest (now Chicago), or other stock exchanges, senior or substantially equal securities of the
19 same issuer, and any security called for by listed or approved subscription rights or warrants, or
20 any warrant or right to purchase or subscribe to any security exempted by Section 402(a)(8).

21
22 RUSA essentially retained this exemption in Section 401(b)(7) and added securities
23 designated for inclusion in the National Market System by the National Association of Securities
24 Dealers in Section 401(b)(8) and specified options issued by a clearing agency registered under
25 the Securities Exchange Act of 1934 in Section 401(b)(9).

26
27 In 1996 Congress enacted the National Securities Markets Improvement Act and provided
28 in Section 18(b)(1) that securities listed on the New York, American or Nasdaq Stock Exchange,
29 or designated by rule of the Securities and Exchange Commission, as well as any security of the
30 same issuer that is equal in seniority or senior to any of these securities will be a federal covered
31 security. Under Rule 146 the SEC has designated as federal covered securities under Section
32 18(b)(1) Tier I of the Pacific Exchange; Tier I of the Philadelphia Stock Exchange; and The
33 Chicago Board Options Exchange on condition that the relevant listing standards continue to be
34 substantially similar to those of the New York, American, or Nasdaq stock exchanges. See
35 Reporter’s Note to Section 102(7).

36
37 A federal covered security subject to Section 18(b)(1) of the Securities Act of 1933 will
38 not be subject to the securities registration requirements of Sections 301 and 303 through 306.

39
40 The exemption in Section 201(6) addresses specified options, warrants, and rights that are
41 not federal covered securities under Section 18(b)(1) of the Securities Act of 1933, but generally
42 would have been exempted under RUSA. The 1956 Act, which was narrower, was drafted
43 before the computerized Nasdaq Stock Exchange began trading the National Market List and the
44 development of standardized options markets.

1 The bracketed language in Section 201(6) was proposed by the Options Clearing
2 Corporation after our last Drafting Committee meeting. The final clause of the exemption makes
3 clear that any offer or sale of the underlying security that occurs as a result of the offer or sale of
4 an option or other derivative security exempted under this provision or as the result of the
5 exercise of the option or other derivative security, is covered by the exemption if the option met
6 the terms of the exemption at the time such derivative security was written (sold) or issued. The
7 sale of the underlying security when an option is exercised would be exempt even if the
8 underlying security is not at that time subject to any exemption under the Act. This is consistent
9 with existing precedent under federal law suggesting that the legality of the sale of an underlying
10 security when exercised an option should be determined by the status of the security at the time
11 the option was written rather than at the time of exercise. See, e.g., *H. Kook & Co., Inc. v.*
12 *Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93 (2d Cir. 1969). Any transaction in an
13 underlying security that results from the offer, sale or exercise of any derivative security issued
14 by a registered clearing agency and traded on a national securities exchange or association is
15 exempt if the derivative security when written was exempt under Section 201(6).

16
17 6. Section 201(8): Cooperative: Prior Provision: RUSA Section 401(b)(13). Section
18 201(8) is derived from RUSA Section 401(b)(13) which was included in that Act after a number
19 of states had adopted exemptions for securities issued by cooperatives. Section 201(8) is not
20 intended to be available if securities are traded to the public generally.

21
22 The 1956 Act Section 402(a)(12) had instead provided: “insert any desired exemption for
23 cooperatives.” The reporter of the 1956 Act had found such sharp variation among the 18 states
24 that then had adopted a cooperative exemption that “no common pattern can be found.” L. Loss,
25 *Commentary on the Uniform Securities Act* 118 (1976).

26
27 7. Section 201(9): Employee benefit plan: Prior Provision: RUSA Section 401(b)(12).
28 The 1956 Act Section 402(a)(11) was limited to investment contracts issued in connection with
29 specified employee benefit plans if the administrator was given 30 days written notice.

30
31 In 1979, the United States Supreme Court in *International Bhd. of Teamsters v. Daniel*,
32 439 U.S. 551 (1979), held that a noncontributory, mandatory pension plan subject to the
33 Employee Retirement Income Security Act of 1974 was not a security within the meaning of the
34 Securities Act of 1933 or the Securities Exchange Act of 1934. The Securities and Exchange
35 Commission staff subsequently took the position that the interests of employees in involuntary,
36 contributory plans are not securities. Sec. Ex. Act Rel. 6188, 19 SEC Dock. 465, 473 (1980).
37 Both contributory and noncontributory pension or welfare plans subject to the Employee
38 Retirement Income Security Act of 1974 are excluded from the definition of security in Section
39 102(29).

40
41 In this definition, the term “advisors” does not mean “investment advisers,” as defined in
42 Section 102(15).

43
44 With respect to employee benefit plans that are securities, Section 201(9) provides an

1 exemption, but follows RUSA in not limiting the exemption to investment contracts and not
2 requiring 30 days notice to the administrator. The administrator, however, does retain the power
3 under Section 204, if necessary or appropriate, to deny, condition, limit, or revoke this and other
4 specified exemptions.

5
6 The conclusion of Section 201(9) is derived from Rule 701(c) issued under the Securities
7 Act of 1933. Compliance with Rule 701 is intended to provide compliance with this exemption.
8

9 8. Section 201(10): Equipment trust certificate: Prior Provision: RUSA Section
10 401(b)(6). The Securities Act of 1933 Section 3(a)(6) includes a narrower exemption for railroad
11 equipment trusts.
12

13 The Official Comment to RUSA Section 401(b)(6) explained:
14

15 The new paragraph (b)(6) reflects the extensive development of
16 equipment lease financing through leveraged leases, conditional
17 sales, and other devices. The underlying premise is that if the
18 securities of the person using such a financing device would be
19 exempt under some other paragraph of Section 401, the equipment
20 trust certificate or other security issued to acquire the property in
21 question also is exempt.
22

23 **SECTION 202. EXEMPT TRANSACTIONS.** The following transactions are exempt
24 from Sections 301, 303 through 306, and 504:

25 (1) [Isolated nonissuer transaction.] an isolated nonissuer transaction, whether effected
26 through a broker-dealer or not;

27 (2) [Nonissuer transaction in specified outstanding securities.] a nonissuer transaction by
28 a registered agent of a registered broker-dealer, and a resale transaction by a sponsor of a unit
29 investment trust registered under the Investment Company Act of 1940, in a security of a class
30 that has been outstanding in the hands of the public for at least 90 days; if, at the time of the
31 transaction:

32 (A) the issuer of the security is engaged in business, is not in the organization
33 stage or in bankruptcy or receivership, and is not a blank check, blind pool, or shell company

1 whose primary plan of business is to engage in a merger or combination of the business with, or
2 an acquisition of, an unidentified person or persons;

3 (B) the security is sold at a price reasonably related to the current market price of
4 the security;

5 (C) the security does not constitute the whole or part of an unsold allotment to or a
6 subscription or participation by, the broker-dealer as an underwriter of the security or a
7 redistribution; and

8 (D) a nationally recognized securities manual or its electronic equivalent
9 designated by rule or order of the administrator under this [Act] or a record filed with the
10 Securities and Exchange Commission which is publicly available contains:

11 (i) a description of the business and operations of the issuer;

12 (ii) the names of the issuer's executive officers and the names of the
13 issuer's directors, if any;

14 (iii) an audited balance sheet of the issuer as of a date within 18 months or,
15 in the case of a reorganization or merger where the parties to the reorganization or merger had the
16 audited balance sheet, a pro forma balance sheet;

17 (iv) an audited income statement for each of the issuer's immediately
18 preceding two fiscal years or for the period of existence of the issuer, whichever is shorter, or, in
19 the case of a reorganization or merger where the parties to the reorganization or merger had the
20 audited income statement, a pro forma income statement; and

21 (v) the issuer of the security has a class of equity securities listed on a
22 national securities exchange registered under the Securities Exchange Act of 1934, or designated

1 for trading on the National Association of Securities Dealers Automated Quotation System,
2 unless the issuer of the security is a unit investment trust registered under the Investment
3 Company Act of 1940; the issuer of the security, including its predecessors, have been engaged
4 in continuous business for at least three years; or the issuer of the security has total assets of at
5 least \$2,000,000 based on an audited balance sheet as of a date within 18 months or, in the case
6 of a reorganization or merger where the parties to the reorganization or merger had the audited
7 balance sheet, a pro forma balance sheet;

8
9
10 **Reporter's Notes**

11 **QUERY:** The SIA has proposed adding an exemption for: "Any security rated by a nationally
12 recognized statistical rating organization in one of its four highest generic rating categories."
13 The Pennsylvania Securities Commission does not object to the SIA proposal as a nonissuer
14 exemption, but would object if it were an issuer exemption.
15

16
17 (3) [Nonissuer transaction in specified foreign securities.] a nonissuer transaction [in an
18 equity security] [a security] of a foreign issuer that is a margin security defined in regulations or
19 rules adopted by the Board of Governors of the Federal Reserve System;

20 (4) [Nonissuer transaction in securities subject to Securities Exchange Act reporting.] a
21 nonissuer transaction in an outstanding security if the issuer or the guarantor of the security files
22 reports with the Securities and Exchange Commission under the reporting requirements of
23 Section 13 or 15(d) of the Securities Exchange Act of 1934 [and any nonissuer transaction in an
24 outstanding security of a consolidated subsidiary of the reporting issuer];
25

1 **Reporter's Notes**

2 **QUERY:** Given Securities Act Subsection 18(b)(4)(A), is this exemption necessary?

3
4 Pennsylvania urges yes, "it should be kept so that states under the guise of NSMIA cannot
5 require any filing enumerated in Section 504."
6

7
8 (5) [Nonissuer transaction in specified fixed income securities.] a nonissuer transaction in
9 a security that has a fixed maturity or a fixed interest or dividend, if:

10 (A) there has not been a default during the current fiscal year or within the three
11 next preceding years or during the existence of the issuer and any predecessor if less than three
12 years, in the payment of principal, interest, or dividends on the security; and

13 (B) the issuer is engaged in business, is not in the organization stage or in
14 bankruptcy or receivership, and is not or has not been within the past 12 months a blank check,
15 blind pool, or shell company whose primary plan of business is to engage in a merger or
16 combination of the business with, or an acquisition of, an unidentified person or persons;

17 (6) [Unsolicited brokerage transaction.] a nonissuer transaction by or through a broker-
18 dealer registered under this [Act] effecting an unsolicited order or offer to purchase;

19 (7) [Nonissuer transaction by pledgees.] a nonissuer transaction executed by a bona fide
20 pledgee without any purpose of evading this [Act];

21 (8) [Underwriter transaction.] a transaction between the issuer or other person on whose
22 behalf the offering is made and an underwriter, or among underwriters;

23 (9) [Unit secured transaction.] a transaction in a note, bond, debenture, or other evidence
24 of indebtedness secured by a real or chattel mortgage or deed of trust or by an agreement for the
25 sale of real estate or chattels, if each mortgage, deed of trust, or agreement, together with all the

1 notes, bonds, debentures, or other evidences of indebtedness secured thereby, is offered and sold
2 as a unit, and there is no general solicitation or general advertisement of the transaction, and a
3 commission or other remuneration is not paid to a person not registered under this [Act] as a
4 broker-dealer or as an agent;

5 (10) [Bankruptcy, guardian, or conservator transaction.] a transaction by an executor,
6 administrator of an estate, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or
7 conservator;

8 (11) [Transaction with institutional investors.] an offer or sale to one or more of the
9 following:

10 (A) an institutional investor;

11 [(B) a federal covered investment adviser acting for its own account]; or

12 (C) any other person the administrator, by rule or order, specifies;

14 **Reporter's Notes**

15 **Source of Law:** New.

16
17 1. The 1956 Act contains similar but less inclusive language in Section 402(b)(8).

18
19 2. If the SEC adopts a rule defining “qualified purchaser” as used in Section 18(b)(3) of
20 the Securities Act to specify certain purchasers of federal covered securities, part or all of this
21 exemption may prove redundant.
22

23
24 (12) [Limited offering transaction.] a transaction under an offer to sell securities of an
25 issuer, if the transaction is part of an issue in which:

26 (A) there are no more than 10 purchasers in this State during any 12 consecutive
27 months, other than those designated in Rule 501(a) under the Securities Act of 1933 and in

1 paragraph (11);

2 (B) general solicitation or general advertising is not used in connection with the
3 offer to sell or sale of the securities;

4 (C) a commission or other remuneration is not paid or given to a person, other
5 than a broker-dealer or agent registered under this [Act], for soliciting a prospective purchaser in
6 this State; and

7 (D) either the seller reasonably believes that all the purchasers in this State other
8 than those designated in Rule 501(a) of the Securities Act of 1933 and in paragraph (11) are
9 purchasing for investment or, immediately before and immediately after the transaction, the
10 issuer reasonably believes that the equity securities of the issuer are held by a total of 50 or fewer
11 beneficial owners, wherever located, other than those designated in Rule 501(a) under the
12 Securities Act of 1933 and in paragraph (11) and the transaction is part of an aggregate offering
13 that does not exceed [\$1,000,000] during any 12 consecutive months;

15 Reporter's Notes

16
17 **Source of Law:** RUSA Section 402(11); 1956 Act Section 402(b)(9).
18

19 1. Section 402(b)(9) of the 1956 Act and Section 402(11) of the 1985 Act provide
20 alternative limited offering transaction exemptions. The 1956 Act was limited to offers to no
21 more than ten persons (other than institutional investors specified in Section 402(b)(8)); all
22 buyers in the State had to purchase for investment; and no remuneration was given for soliciting
23 prospective buyers in the State. The 1985 Act, in contrast, was limited to no more than 25
24 purchasers (other than financial or institutional investors); no general solicitation or advertising;
25 and no remuneration was paid to a person other than a broker-dealer for soliciting a prospective
26 purchaser.
27

28 2. This Section would apply to preorganization limited offerings as well as operating
29 company limited offerings. The Securities Act of 1933 Sections 3(b) and 4(2) also apply to both.
30 In contrast, the 1956 Act Section 402(b)(10) and RUSA Section 402(12) use similar concepts in

1 separate Sections to apply to preorganization limited offerings.
2

3 3. Section 18(b)(4)(D) of the Securities Act of 1933 defines as federal covered securities
4 those issued under Securities and Exchange Commission rules under Section 4(2) of the
5 Securities Act. This would include Rule 506, which uses the “accredited investor” definition in
6 Rule 501(a). When a transaction involves Rule 506, Section 18(b)(4)(D) further provides “that
7 this paragraph does not prohibit a state from imposing notice filing requirements that are
8 substantially similar to those required by rule or regulation under Section 4(2) that are in effect
9 on September 1, 1996.” These notice requirements are found in Section 302(c) of this Act.
10

11 4. A majority of states have adopted a Uniform Limited Offering Exemption, coordinate
12 to varying degrees with Regulation D. The authority to adopt this and other exemptive rules is
13 provided in Section 203.
14
15

16 (13) [Transaction with existing security holders.] a transaction under an offer to existing
17 security holders of the issuer, including persons who at the time of the transaction are holders of
18 convertible securities, options, or warrants, if a commission or other remuneration, other than a
19 standby commission, is not paid or given directly or indirectly for soliciting a security holder in
20 this State;

21 (14) [Offering when registered under this [Act] and the Securities Act of 1933.] an offer
22 to sell, but not a sale, of a security not exempt from registration under the Securities Act of 1933
23 if:

24 (A) a registration or offering statement or similar record as required under the
25 Securities Act of 1933 has been filed but is not effective or the offer is made in compliance with
26 Rule 165 under the Securities Act of 1933; and

27 (B) no stop order of which the offeror is aware has been entered against the
28 offeror by the administrator or the Securities and Exchange Commission, and no examination or
29 proceeding that is public and may culminate in a stop order is known by the offeror to be

1 pending;

2 (15) [Offering when registered under this [Act] and exempt from the Securities Act of
3 1933.] an offer to sell, but not a sale, of a security exempt from registration under the Securities
4 Act of 1933 if:

5 (A) a registration statement has been filed under this [Act], but is not effective;

6 (B) a solicitation of interest is provided in a record to offerees in compliance with
7 a rule adopted by the administrator under this [Act]; and

8 (C) no stop order of which the offeror is aware has been entered by the
9 administrator, and no examination or proceeding that may culminate in that kind of order is
10 known by the offeror to be pending; and

11 12 **Reporter's Notes**

13
14 **Source of Law:** RUSA Section 402(16).

15
16 1. A solicitation of interest document must accompany a registration by qualification as
17 specified in Section 304(b)(13).

18
19 2. Oral offers may be made after a registration statement has been filed, both before and
20 after a registration statement is effective.
21

22
23 (16) [Control transaction.] a transaction involving the distribution of the securities of an
24 issuer to the security holders of another person in connection with a merger, consolidation,
25 exchange of securities, sale of assets, or other reorganization to which the issuer, or its parent or
26 subsidiary, and the other person, or its parent or subsidiary, are parties;

27 (17) [Rescission Offer.] a rescission offer under ~~subsection 509(k)~~ Section 510 and

1 [(18) [Out-of-state offer or sale.] an offer or sale of a security to a person not a resident
2 of this State and not present in this State.]
3

4 **Reporter's Notes**

5
6 1. Sections 202(1)-(7) are available only for nonissuer transactions. An issuer selling
7 securities in an initial public offering or other offering may not rely on Sections 202(1)-(7). A
8 nonissuer, however, can rely on an applicable issuer transaction exemption such as Section
9 202(11). The term "nonissuer transaction or nonissuer distribution" is defined in Section
10 102(18); the term "issuer" is defined in Section 102(17).
11

12 2. Section 202(1): Isolated nonissuer transaction: Prior Provisions: 1956 Act Section
13 402(b)(1); RUSA Section 402(1). The term "isolated transaction" is not defined in this Act, but
14 left to the states to develop. Historically under state law there has been somewhat varied case
15 law development of the term "isolated transactions." See e.g., *Blinder, Robinson & Co., Inc. v.*
16 *Goettsch*, 403 N.W.2d 772 (Iowa 1987) (isolated nonissuer transaction exemption is not
17 unconstitutionally vague); *Allen v. Schauf*, 449 P.2d 1010 (Kan. 1969) (regulation defined
18 isolated transactions to not exceed four persons solicited in a 12 month period); *Nelson v. State*,
19 355 P.2d 413, 420 (Okla. Ct. Crim. App. 1960) ("[a]n isolated sale means one standing alone,
20 disconnected from any other"); see generally 1 L. Loss & J. Seligman, *Securities Regulation* 125-
21 130 (3d ed. rev. 1998).
22

23 In general this subsection is intended to cover the occasional sale by a person. It would
24 not exempt multiple or successive transactions by a person or group, whether those be sufficient
25 to constitute a "distribution" as that term is used for purposes of the federal securities laws, see 2
26 L. Loss & J. Seligman, *Securities Regulation* 1138.50-1138.52 (3d ed. rev. 1999), or merely too
27 frequent to be considered "isolated" under the relevant state law.
28

29 Limited issuer offering transactions are separately addressed in Section 202(12).
30

31 3. Section 202(2): Nonissuer transaction in specified outstanding securities: Prior
32 Provisions: 1956 Act Section 402(b)(2); RUSA Sections 402(3)-(4).
33

34 This Section represents a modernization of the securities manual exemption which was
35 included in both the 1956 Act and RUSA. NASAA adopted an amendment to the 1956 Act
36 Section 402(b) after discussions with the Securities Industry Association and others in the
37 securities industry. This Section generally follows the NASAA amendment.
38

39 Rule 419 issued under the Securities Act of 1933 defines a "blank check company" to be
40 a company that "is a development state company that has no specific business plan or purpose or
41 has indicated that its business plan is to engage in a merger or acquisition with an unidentified

1 company or companies, or other entity or person. A “blind pool” is similar and would involve an
2 investment in a blank check or other entity with no identified business plan or purpose. A “shell
3 company” is also similar and would involve an entity which, to date, has no specific business
4 assets, plan, or purpose.

5
6 4. Section 202(3): Nonissuer transaction in specified foreign transactions: No Prior
7 Provision. The NASAA amendment that was the basis of Section 202(2) also included specified
8 foreign nonissuer transactions subject to a manual exemption when there was disclosure of the
9 issuer’s officers and directors in the issuer’s country of domicile. This subsection uses margin
10 securities as an alternative approach to identify sufficiently seasoned foreign securities. Margin
11 securities are required to be in compliance with Regulation T which was adopted by the Board of
12 Governors of the Federal Reserve System.

13
14 5. Section 202(4): Nonissuer transaction in securities subject to Securities Exchange Act
15 reporting: Prior Provision: RUSA Section 402(2). RUSA added this exemption to authorize
16 nonissuer secondary trading in the securities of issuers that were subject to the periodic reporting
17 requirements of the Securities Exchange Act of 1934. To bar immediate secondary trading in
18 nonregistered initial public offerings, there was a further requirement that these securities be
19 subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of
20 1934 for not less than 90 days.

21
22 Section 18(b)(4)(A) of the National Securities Markets Improvement Act of 1996 defines
23 nonissuer transactions under Section 4(1) of the Securities Act of 1933 (“transactions by persons
24 other than an issuer, underwriter, or dealer”) as “federal covered securities,” see Section 102(7),
25 if the issuer files reports with the Securities and Exchange Commission under Sections 13 or
26 15(d) of the Securities Exchange Act of 1934. Under Section 18(a) of the Securities Act of 1933
27 no state statute, rule, order, or other administrative action with respect to registration of securities
28 or reporting requirements may apply to a federal covered security. To harmonize Section 202(4)
29 with Sections 18(a) and 18(b)(4)(A) of the Securities Act of 1933, the 90 day reporting period in
30 RUSA Section 402(2) has been removed.

31
32 6. Section 202(5): Nonissuer transaction in specified fixed income securities: Prior
33 Provisions: 1956 Act Section 402(b)(2)(B); RUSA Section 402(4). The substance of this
34 exemption follows the 1956 Act and RUSA, but also addresses blank check and similar
35 offerings, which became major concerns at the state and federal levels during the past two
36 decades. Cf. Securities Act of 1933 Rule 419. See Reporter’s Note to Section 202(2).

37
38 This subsection includes both debt securities with fixed maturity or a fixed interest rate
39 and preferred stock with fixed dividend provisions.

40
41 7. Section 202(6): Unsolicited brokerage transaction: Prior Provisions: 1956 Act
42 Section 402(b)(3); RUSA Section 402(5). Section 18(b)(4)(B) of the Securities Act of 1933
43 defines transactions as federal covered securities when they are subject to Section 4(4) of the
44 Securities Act of 1933 “brokerage transactions executed upon customers’ orders on any exchange

1 or in the over-the-counter market but not the solicitation of such orders.” Section 202(6) is
2 intended to provide further exemption for nonagency transactions by dealers not within the scope
3 of Section 4(4).
4

5 The 1956 Act Section 402(b)(3) had provided that the administrator “may by rule require
6 that the customer acknowledge upon a specified form that the same was unsolicited, and that a
7 signed copy of each such form be preserved by the broker-dealer for a specified period.” This
8 type of requirement is generally preempted by Section 18(a) of the Securities Act of 1933 and is
9 viewed as unnecessary for the limited class of dealer nonagency transactions that will be
10 exempted by Section 202(6).
11

12 8. Section 202(7): Nonissuer Transaction by Pledges: Prior Provisions: 1956 Act
13 Section 402(b)(7); RUSA Section 402(9). This subsection is identical to the 1956 Act and
14 substantively identical to RUSA.
15

16 9. Section 202(8): Underwriter transaction: Prior Provisions: 1956 Act Section
17 402(b)(4); RUSA Section 402(6). This subsection is substantively identical to the 1956 Act and
18 RUSA.
19

20 10. Section 202(9): Unit secured transaction: Prior Provisions: 1956 Act Section
21 402(b)(5); RUSA Section 402(7). In recent years this exemption has been one of concern to state
22 securities administrators. The conditions that conclude this exemption are new and are intended
23 to address these concerns. Otherwise this exemption is substantively identical to the 1956 Act
24 and RUSA.
25

26 11. Section 202(10): Bankruptcy, guardian, or conservator transaction: Prior Provisions:
27 1956 Act Section 402(b)(6); RUSA Section 402(8). This subsection is identical to that in the
28 1956 Act and RUSA.
29

30 12. Section 202(13): Transaction with existing security holders: Prior Provisions: 1956
31 Act Section 402(b)(11); RUSA Section 402(14). Section 3(a)(9) of the Securities Act of 1933
32 exempts exchange offerings with existing security holders. Under Section 18(b)(4)(C)
33 transactions subject to Section 3(a)(9) are federal covered securities. See Section 102(7).
34 Notice requirements in the earlier 1956 Act and RUSA accordingly would be preempted by the
35 Securities Act of 1933. See Section 18(a) of the Securities Act of 1933. Otherwise this
36 exemption is substantively identical to the 1956 Act and RUSA.
37

38 13. Section 202(14): Offering when registered under this [Act] and the Securities Act of
39 1933: Prior Provisions: 1956 Act Section 402(b)(12); RUSA Section 402(15). This exemption
40 generally follows the 1956 Act and RUSA. Rule 165 of the Securities Act of 1933, which was
41 adopted in 1999, allows the offeror of securities in a business combination to make written
42 communications that offer securities for sale before a registration statement is filed as long as
43 specified conditions are satisfied.
44

1 RUSA Section 402(15) also had the requirement that a registration statement be filed
2 under this Act, but not yet be effective. By eliminating this requirement this exemption will
3 reach the offer (but not the sale) of a security that is anticipated to be a federal covered security
4 by applying for listing on the New York Stock Exchange or other exchange specified in Section
5 18(b)(1) of the Securities Act of 1933, but the listing and federal covered security status has not
6 yet become effective.
7

8 14. Section 202(16): Control transaction: Prior Provision: RUSA Section 402(17).
9 Until 1972 mergers and similar transactions were not considered to involve sales and did not
10 have to register under the Securities Act of 1933. In 1972 the Securities and Exchange
11 Commission adopted Rule 145 defining many mergers and similar transactions to be sales and
12 formally abandoned its earlier “no sale” doctrine. See 3 L. Loss & J. Seligman, Securities
13 Regulation 1262-1280 (3d ed. rev. 1999).
14

15 Because most merger and similar transactions require shareholder approval and
16 shareholders often have appraisal rights if they choose to dissent, the potential for abuse is less
17 than in an offering of securities for cash. When appropriate the administrator can deny,
18 condition, limit or revoke this exemption under Section 204. Section 202(16) does not follow
19 the requirement in RUSA Section 402(17) that written notice of the transactions and a copy of
20 the solicitation materials be given to the administrator 10 days before the consummation of the
21 transaction and, that the administrator is empowered to disallow the exemption within the next
22 10 days.
23

24 15. Section 202(18): Out-of-state offer or sale: no prior provision. This exemption is
25 inconsistent with A.S. Goldmen & Co., Inc. v. New Jersey Bur. of Sec., 163 F.3d 780 (3d Cir.
26 1999), which held that under the United States Constitution’s Commerce Clause a State could
27 authorize a securities administrator to prevent a broker-dealer from selling securities from a
28 resident State to buyers in other States where purchase of the securities was authorized.
29
30

31 **SECTION 203. ADDITIONAL EXEMPTIONS AND WAIVERS.** The
32 administrator, by rule or order, may exempt a security, transaction, or offer, or class of securities,
33 transactions, or offers from Sections 301 through 306 and 504, and waive a requirement for a
34 security, transaction, or offer or class of securities, transactions, or offers under Sections 201 and
35 202.

36
37 **Reporter’s Notes**
38

39 **Prior Provision:** RUSA Section 403.

1 1. Under this type of authority, at least 49 of 53 jurisdictions through July 2001 had
2 adopted the Uniform Limited Offering Exemption (ULOE) or a Regulation D exemption, and 31
3 jurisdictions had adopted a Rule 144A exemption. The Drafting Committee did not attempt to
4 incorporate ULOE or a Rule 144A exemption as part of this Act because of their complexity and
5 the likelihood of periodic updating of its provisions. The Drafting Committee believes that Rule
6 144A, and similar exemptions in ULOE, can be most effectively implemented by rule rather than
7 statute.

8
9 2. Under Section 203 the states would also be authorized to adopt by rule or order new
10 exemptions as circumstances warrant for new technologies such as the Internet. Cf. NASAA
11 Resolution Regarding Securities Offered on Internet, NASAA Rep. ¶7040 (Jan. 7, 1996).

12
13 3. It is the intent of this provision that ULOE, Rule 144A, and additional exemptions or
14 waivers be adopted uniformly by states, to the extent this is practicable. Cf. Sections 609 and
15 613.

16
17
18 **SECTION 204. DENIAL, CONDITION, LIMITATION, OR REVOCATION OF**
19 **EXEMPTIONS.** Except to the extent that a security or transaction involves a federal covered
20 security, the administrator, by order, may deny, condition, limit, or revoke an exemption created
21 under Section 201(7), 202, or 203 with respect to a specific security, transaction, or offer. The
22 order must be issued in accordance with Sections 604 or 605. An order issued under this section
23 is not retroactive. A person does not violate Section 301, 303 through 306, ~~and~~ or 504 by reason
24 of an offer to sell or sale effected after the entry of an order issued under this section if the person
25 did not know and, in the exercise of reasonable care could not have known, of the order.

26
27
28
29
30 **Reporter's Notes**

31
32 **Prior Provisions:** 1956 Act Section 402(c); RUSA Section 404.

33
34 1. Section 204 is potentially far reaching. The ability to deny, condition, limit, or revoke
35 the exemptions specified in Sections 201(7), 202, or 203 is adopted concomitant with the breadth

1 of these exemptions. One or more than one security, transaction, or offer can be covered by a
2 Section 204 order.
3

4 2. No order under Section 204 may be entered except in accordance with the
5 requirements of Sections 604 or 605. The courts have given a securities administrator decision to
6 deny or revoke an exemption substantial deference when there was compliance with applicable
7 due process and statutory requirements. See, e.g., *Johnson-Bowles Co., Inc. v. Div. of Sec.*, 829
8 P.2d 101 (Utah Ct. App. 1992).

1 **PART 3**

2 **REGISTRATION OF SECURITIES AND**

3 **NOTICE FILINGS OF FEDERAL COVERED SECURITIES**

4
5 **SECTION 301. SECURITIES REGISTRATION REQUIREMENT.** It is unlawful
6 for a person to offer or sell a security in this State unless:

- 7 (1) the security is a federal covered security;
- 8 (2) the security, transaction, or offer is exempted under Sections 201 through 203; or
- 9 (3) the security is registered under this [Act].
- 10

11 **Reporter's Notes**

12
13 **Prior Provisions:** 1956 Act Section 301; RUSA Section 301.

14
15 1. This Section is substantively identical to the 1956 Act and RUSA except for the
16 addition of Section 301(1), which is necessitated by the National Securities Markets
17 Improvement Act of 1996. See Section 102(7).

18
19 2. Unless a federal covered security or exempt, no sale of a security may be made in this
20 State before the security is registered. "Sale" is defined in Section 102(26); "in this State" is
21 addressed in Section 611; securities registration is addressed in Sections 303 through 306.

22
23 3. The Securities Act of 1933 permits certain types of offers during the "waiting period"
24 between the filing and effectiveness of a registration statement. The exemptive provisions of
25 Sections 202(14)-(15) operate to permit similar offers for securities that are in the process of
26 registration under federal or state statutes or both.

27
28 4. Notice filings and fees applicable to federal covered securities, see Section 102(7), are
29 addressed in Section 302.

30
31
32 **SECTION 302. NOTICE FILINGS AND FEES APPLICABLE TO CERTAIN**
33 **FEDERAL COVERED SECURITIES.** (a) The administrator, by rule or order, may require the

filing of any or all of the following records with respect to a federal covered security, that is defined in Section 18(b)(2) of the Securities Act of 1933:

(1) before the initial offer of the federal covered security in this State, all records that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933 and a consent to service of process signed by the issuer [together with a fee of \$_____];

(2) after the initial offer of the federal covered security in this State, all records that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933; and

(3) to the extent necessary or appropriate to compute fees, a report of the value of the federal covered securities sold or offered to persons located in this State, if the sales data are not included in records filed with the Securities and Exchange Commission, [together with a fee of \$_____].

(b) A notice filing is effective for one year commencing upon the later of the notice filing or the effectiveness of the offering with the Securities and Exchange Commission. Upon expiration, a notice filing may be renewed by the issuer filing a copy of those records filed by the issuer with the Securities and Exchange Commission that the administrator, by rule or order, specifies [together with the renewal fee of \$ ____]. A previously filed consent to service of process may be incorporated by reference in a renewal. A renewed notice filing is effective upon the expiration of the filing being renewed.

(c) With respect to any security that is a federal covered security under Section 18(b)(4)(D) of the Securities Act of 1933, the administrator, by rule, may require the notice filing

1 by or on behalf of an issuer to include a copy of Form D, including the Appendix, as promulgated
2 by the Securities and Exchange Commission and in effect on September 1, 1996 and a consent to
3 service of process signed by the issuer no later than 15 days after the first sale of the federal
4 covered security in this State, [together with a fee of \$_____].

5 (d) The administrator may issue a stop order suspending the offer and sale of a federal
6 covered security within this State, except a federal covered security under Section 18(b)(1) of the
7 Securities Act of 1933, if the administrator finds that there is a failure to comply with a notice
8 filing or fee requirement of this section. If the deficiency is corrected, the stop order is void as of
9 the time of its entry.

10 (e) The administrator, by rule or order, may waive any or all of the requirements of this
11 section.

13 **Reporter's Notes**

14 **Prior Provision:** None.

15
16
17 1. The little used "registration by notification" in the 1956 Act Section 302 or
18 "registration by filing" in RUSA Section 302 are omitted from this Act because of the notice
19 filing approach required by Section 18(b)(2) of the Securities Act of 1933 for federal covered
20 securities.

21
22 2. For Rule 506 offerings which are denoted in Section 18(d)(4)(D) of the Securities Act
23 of 1933, the Securities and Exchange Commission requires the filing of Form D. See Rule 503.
24 When an issuer proceeds under Rule 506, Section 302(c) is intended to limit required state filings
25 to no more than a requirement of filing a copy of Form D, as in effect on September 1, 1996,
26 including the Appendix, a consent to service of process, and a fee.

27
28 3. The definition of "filing" in Section 102(8) will permit states to receive electronic
29 filing of records under this Section. The term will also permit states to receive records through a
30 designee such as a central depository or to electronically receive notice filings simultaneously
31 with the Securities and Exchange Commission or subsequent to those filings with the Securities
32 and Exchange Commission.

1 4. An administrator may accept under this and other sections a signed consent
2 electronically filed with a designee of the administrator.
3

4
5 **SECTION 303. SECURITIES REGISTRATION BY COORDINATION.**

6 (a) A security for which a registration statement has been filed under the Securities Act of
7 1933 in connection with the same offering may be registered by coordination under this section.

8 (b) A registration statement and accompanying records under this section must contain or
9 be accompanied by the following records in addition to the information specified in Section 305
10 and a consent to service of process complying with Section 612:

11 (1) a copy of the latest form of prospectus filed under the Securities Act of 1933;

12 (2) if the administrator, by rule or order, requires, a copy of the articles of
13 incorporation and bylaws or their substantial equivalents currently in effect; a copy of any
14 agreement with or among underwriters; a copy of any indenture or other instrument governing
15 the issuance of the security to be registered; and a specimen, copy, or description of the security;

16 (3) if the administrator requests, copies of any other information, or any other
17 records filed by the issuer under the Securities Act of 1933; and

18 (4) an undertaking to forward each amendment to the federal prospectus, other
19 than an amendment that merely delays the effective date of the registration statement, promptly
20 after it is filed with the Securities and Exchange Commission.

21 (c) A registration statement under this section becomes effective simultaneously with or
22 subsequent to the federal registration statement when all the following conditions are satisfied:

23 (1) no stop order under subsection (d) or Section 306 or issued by the Securities
24 and Exchange Commission is in effect and no proceeding is pending against the issuer under

1 Section ~~408~~ 412; and

2 (2) the registration statement has been on file for at least 20 days or such shorter
3 period as the administrator, by rule or order, specifies.

4 (d) The registrant shall promptly notify the administrator or a designee of the
5 administrator in a record of the date and time when the federal registration statement became
6 effective and the content of a price amendment, if any, and shall promptly file a record
7 containing the information in the price amendment. If the notice is not timely received, the
8 administrator may enter a stop order, without notice or hearing, retroactively denying
9 effectiveness to the registration statement or suspending its effectiveness until compliance with
10 this subsection.

11 The administrator shall promptly notify the registrant of the issuance of the order by
12 electronic means, telegram, or telephone and promptly confirm this notice by a record. If the
13 registrant then complies with the notice requirements of this subsection, the stop order is void as
14 of the time of its entry.

15 (e) If the federal registration statement becomes effective before all the conditions in this
16 subsection are satisfied and they are not waived by the administrator, the registration statement
17 automatically becomes effective under this [Act] when all the conditions are satisfied. If the
18 registrant notifies the administrator of the date when the federal registration statement is expected
19 to become effective, the administrator shall promptly notify the registrant by electronic means,
20 telegram or telephone and promptly confirm this notice by a record, indicating whether all the
21 conditions are satisfied and whether the administrator contemplates the institution of a
22 proceeding under Section 306. The notice by the administrator does not preclude the institution

1 of such a proceeding.

2 (f) The administrator, by rule or order, may waive or modify the application of a
3 requirement of this section.

5 **Reporter's Notes**

6
7 Prior Provisions: 1956 Act Section 303; RUSA Section 303.

8
9 1. Registration by coordination was one of the key innovations of the 1956 Act. As in
10 the 1956 Act, Section 303 streamlines the content of the registration statement and the procedure
11 by which a registration statement becomes effective, but not the substantive standards governing
12 the effectiveness of a registration statement.

13
14 2. The phrase “in connection with the same offering” does not require that the federal
15 and state registration statements be filed simultaneously or become effective simultaneously. A
16 registration by coordination can be filed in a state after the effectiveness of the federal
17 registration statement as long as the administrator does not conclude that the interval was too
18 long to consider the state registration statement “the same offering.”

19
20 3. Sections 303(a)-(e) are similar to the 1956 Act except that these provisions have been
21 modernized to include electronic filing and electronic notification. Cf. Sections 102(8), 102(25).
22 It is anticipated that this will facilitate simultaneous filing with the Securities and Exchange
23 Commission and the states which is consistent with the uniformity intended by this Act. See
24 Section 613. Simultaneous or sequential filing could be administered through a designee similar
25 to the current Web-CRD or in conjunction with the Securities and Exchange Commission’s
26 Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system or otherwise.

27
28 4. Section 303(b) limits the administrator to requiring only the information and records
29 filed with the Securities and Exchange Commission.

30
31 5. Sections 303(c)-(e) describe the conditions to be satisfied to achieve effectiveness of a
32 coordinated filing. “Price amendment” is defined in Section 102(23). The administrator retains
33 the right to test the registration statement by the substantive standards of Section 306(a) and may
34 issue a stop or denial order if the administrator believes any of those provisions are applicable.

35
36 6. Section 303(f) follows RUSA Section 303(h) and empowers the administrator to
37 waive or modify any of the requirements of this Section when it is appropriate to do so. An
38 example would be the expedited procedures several states have adopted to coordinate with shelf
39 registrations under Rule 415 adopted under the Securities Act of 1933. In waiving or modifying
40 requirements, the administrator must make a finding satisfying the requirements of Section

1 606(b).
2
3

4 **SECTION 304. SECURITIES REGISTRATION BY QUALIFICATION.**

5 (a) A security may be registered by qualification under this section.

6 (b) A registration statement under this section shall contain the following information and
7 be accompanied by the following records in addition to the information specified in Section 305,
8 and a consent to service of process complying with Section 612:

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

14 (2) with respect to a director and officer of the issuer, or other person occupying a
15 similar status or performing similar functions, the person's name, address, and principal
16 occupation for the past five years; the amount of securities of the issuer held by the person as of a
17 specified date 30 days before the filing of the registration statement; the amount of the securities
18 covered by the registration statement to which the person has indicated an intention to subscribe;
19 and a description of a material interest in a material transaction with the issuer or a significant
20 subsidiary effected within the past three years or proposed to be effected;

21 (3) with respect to persons covered by paragraph (2), the remuneration paid during
22 the past 12 months and estimated to be paid during the next 12 months, directly or indirectly by
23 the issuer, together with all predecessors, parents, subsidiaries, and affiliates, to all those persons
24 in the aggregate;

1 (4) with respect to a person owning of record, or beneficially if known, 10 percent
2 or more of the outstanding shares of any class of equity security of the issuer, the information
3 specified in paragraph (2) other than the person's occupation;

4 (5) with respect to a promoter if the issuer was organized within the past three
5 years, the information specified in paragraph (2), any amount paid to the promoter within that
6 period or intended to be paid to the promoter, and the consideration for the payment;

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

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

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

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

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

20 (10) a description of any stock options or other security options outstanding, or to
21 be created in connection with the offering, together with the amount of any such options held or
22 to be held by each person required to be named in paragraph (2), (4), (5), (6), or (8), and by any

1 person that holds or will hold 10 percent or more in the aggregate of any such options;

2 (11) the dates of, parties to, and general effect concisely stated of each
3 management or other material contract made or to be made otherwise than in the ordinary course
4 of business to be performed in whole or in part at or after the filing of the registration statement
5 or was made within the past two years, together with a copy of the contract;

6 (12) a description of any pending litigation or proceeding to which the issuer is a
7 party and which materially affects its business or assets, including litigation or a proceeding
8 known to be contemplated by governmental authorities;

9 (13) 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 and any solicitation of interest used in compliance with Section 202(15)(B);

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

16 (15) a signed or conformed copy of an opinion of counsel concerning the legality
17 of the security being registered, with an English translation if it is in a language other than
18 English, which states whether the security when sold will be validly issued, fully paid, and
19 nonassessable and, if a debt security, a binding obligation of the issuer;

20 (16) the consent in a record of any accountant, engineer, appraiser, or other person
21 whose profession gives authority to a statement made by the person, if the person is named as
22 having prepared or certified a report or valuation, other than a public and official record, which is

1 used in connection with the registration statement;

2 (17) a balance sheet of the issuer as of a date within four months before the filing
3 of the registration statement; a statement of income and changes in financial position for each of
4 the three fiscal years preceding the date of the balance sheet and for any period between the close
5 of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any
6 predecessors' existence if less than three years; and, if any part of the proceeds of the offering is
7 to be applied to the purchase of a business, the financial statements that would be required if that
8 business were the registrant; and

9 (18) the additional information the administrator, by rule or order, specifies.

10 (c) The administrator, by rule or order, may waive any of the requirements of subsection
11 (b).

12 (d) A registration statement under this section becomes effective 30 days, or any shorter
13 period as the administrator, by rule or order, specifies, after the date the registration statement or
14 the last amendment other than a price amendment is filed, if:

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

16 (2) the administrator has not issued an order under Section 306(c) that
17 effectiveness be delayed; and

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

19 (e) The administrator may delay effectiveness for a single period of not more than 90 days
20 if the administrator determines the registration statement is not complete in all material respects
21 and promptly notifies the registrant of that determination. The administrator may also delay
22 effectiveness for a further period of not more than 30 days if the administrator determines that the

1 delay is necessary or appropriate.

2 (f) The administrator, by rule or order, may require as a condition of registration under
3 this section that a prospectus containing a specified part of the information specified in
4 subsection (b) be sent or given to each person to whom an offer is made, before or concurrently
5 with whichever first occurs of:

6 (1) the first offer made in a record to the person otherwise than by means of a
7 public advertisement, by or for the account of the issuer or another person on whose behalf the
8 offering is being made, or by an underwriter or broker-dealer who is offering part of an unsold
9 allotment or subscription taken by the person as a participant in the distribution;

10 (2) the confirmation of any sale made by or for the account of the person;

11 (3) payment pursuant to such a sale; or

12 (4) delivery of the security pursuant to such a sale.

14 **Reporter's Notes**

15
16 **Prior Provisions:** 1956 Act Section 304; RUSA Section 304.

17
18 1. This Section generally follows the 1956 Act and RUSA. Any security may be
19 registered by qualification, whether or not another procedure is available. Ordinarily, however,
20 registration by qualification will only be used by an issuer when no other procedure is available.

21
22 2. Section 304(b) originally was modeled on Schedule A of the Securities Act of 1933.
23 Section 304(b)(17) uses the same terminology as is used currently in Regulation S-X of the
24 Securities and Exchange Commission. Under Sections 606(a), (c), and (d) the administrator is
25 authorized to specify the form and content of rules and forms governing registration statements
26 and the form and content of financial statements required under this Act.

27
28 3. Under Section 304(b)(18) and 304(c) the administrator may require additional
29 information or may waive in whole or in part or conditionally any of the requirements of Section
30 304(b). Section 304(b)(18), for example, authorizes the administrator to require that a report by
31 an accountant, engineer, appraiser or other professional person be filed. Section 304(b)(18)

1 would also authorize that securities of designated classes under a trust indenture contain
2 additional specified information.

3
4 4. The Pennsylvania Securities Commission urges that Section 304(d) should be
5 predicated also on “all information required by the Commission has been furnished” before a
6 person can request effectiveness.

7
8 5. Pennsylvania further raises the question whether “in all material respects” in Section
9 304(e) includes compliance with a request to escrow promotional shares or gross proceeds as
10 permitted by Section 305(g). I do not believe that this Section, unlike Section 306, should be so
11 interpreted. “In all material respects” is intended solely to modify “the registration statement.”
12

13 6. Pennsylvania also urges that the time limits in Sections 304(d) and (e) could harm
14 small business. “State regulators remain extremely flexible with small business issuers, often
15 keeping files open for over a year. While this provision may be well-intentioned as a
16 counterweight to bureaucratic intransigence in practice it very well may work to the detriment of
17 those who need the help most – small businesses and entrepreneurs.”
18
19

20 **SECTION 305. SECURITIES REGISTRATION FILINGS.**

21 (a) [~~Registration requirements.~~ Persons who may file.] A registration statement may be
22 filed by the issuer, or a person on whose behalf the offering is to be made, ~~or~~ a registered broker-
23 dealer.

24 (b) [Filing fee.] A person filing a registration statement shall pay a filing fee of [\$ ____].
25 When a registration statement is withdrawn before the effective date or a preeffective stop order
26 is entered under Section 306, the administrator shall retain [\$ ____] of the fee.

27 (c) [Status of registration statement.] A registration statement filed under Section 303 or
28 304 ~~must~~ shall specify:

- 29 (1) the amount of securities to be offered in this State;
30 (2) the states in which a registration statement or similar record in connection with
31 the offering has been or is to be filed; and
32 (3) any adverse order, judgment, or decree entered in connection with the offering

1 by ~~the regulatory agency in a State, by a court, or a state's securities regulator~~ by the Securities
2 and Exchange Commission, or by a court.

3 (d) [Incorporation by reference.] A record filed under this [Act] or the predecessor act,
4 within five years preceding the filing of a registration statement, may be incorporated by
5 reference in the registration statement to the extent that the record is currently accurate.

6 (e) [Waiver of requirements.] The administrator, by rule or order, may waive the
7 requirement for inclusion of any information or record in a registration statement.

8 (f) [Nonissuer distribution.] In the case of a nonissuer distribution, information may not
9 be required under subsection (j) or Section 304, unless it is known to the person filing the
10 registration statement or to the person on whose behalf the distribution is to be made, or can be
11 furnished by these persons without unreasonable effort or expense.

12 (g) [Escrow and impoundment.] The administrator, by rule or order, may require as a
13 condition of registration that a security issued within the past five years or to be issued to a
14 promoter for a consideration substantially different from the public offering price, or to a person
15 for a consideration other than cash, be deposited in escrow; and that the proceeds from the sale of
16 the registered security in this State be impounded until the issuer receives a specified amount
17 from the sale of the security either in this State or elsewhere. The administrator, by rule or
18 order, may specify the conditions of any escrow or impoundment required under this subsection,
19 but the administrator may not reject a depository institution solely because of its location in
20 another State.

21 (h) [Form of subscription.] The administrator, by rule or order, may require as a
22 condition of registration that a registered security be sold only on a specified form of subscription

1 or sale contract and that a signed or conformed copy of each contract be filed under this [Act] or
2 preserved for a period of not more than three years specified in the rule or order.

3 (i) [Effective period.] Except during the time a stop order is in effect under Section 306,
4 a registration statement is effective for one year after its effective date, or for a longer period
5 designated in an order of the administrator during which the security is being offered or
6 distributed in a nonexempted transaction by or for the account of the issuer or other person on
7 whose behalf the offering is being made or by an underwriter or broker-dealer who is still
8 offering part of an unsold allotment or subscription taken as a participant in the distribution. For
9 the purpose of a nonissuer transaction, all outstanding securities of the same class identified in
10 the registration statement as a registered security are considered to be registered while the
11 registration statement is effective. A registration statement may not be withdrawn until one year
12 after its effective date if any securities of the same class are outstanding. A registration statement
13 may be withdrawn only with the approval of the administrator.

14 (j) [Periodic reports.] While a registration statement is effective, the administrator, by
15 rule or order, may require the person that filed the registration statement to file reports, not more
16 often than quarterly, to keep reasonably current the information contained in the registration
17 statement and to disclose the progress of the offering.

18 (k) [Posteffective amendments.] A registration statement may be amended after its
19 effective date. The posteffective amendment becomes effective when the administrator so
20 orders. If a posteffective amendment is made to increase the number of securities specified to be
21 offered or sold, the person filing the amendment shall pay a registration fee of [\$__]. A
22 posteffective amendment relates back to the date of the offering of the additional securities being

1 registered, if within six months after the date of the sale, the amendment is filed and the
2 additional registration fee is paid.

3 4 **Reporter's Notes**

5
6 **Prior Provisions:** 1956 Act Section 305; RUSA Section 305.

7
8 QUERY: Should Section 305(f) be reallocated to Section 304 and 305(j)?

9 1. Section 305 generally follows the 1956 Act and RUSA except that earlier provisions
10 in both Acts referring to Investment Company Act of 1940 securities, which are federal covered
11 securities, see Section 102(7), have been deleted.

12
13 2. Section 305 is applicable both to registration by coordination, see Section 303, and
14 registration by qualification, see Section 304.

15
16 3. Section 305(a) expressly authorizes registration by “a person on whose behalf the
17 offering is to be made.” This would permit a nonissuer, cf. Section 102(18), or a broker-dealer to
18 file a registration statement independent of the issuer.

19
20 4. This Act is intended to be revenue neutral, see Comment 2 to Section 613.
21 Accordingly, Section 305(b) does not specify what fees states should provide.

22
23 5. Section 305(c), which generally follows the 1956 Act and RUSA, does not require in
24 Section 305(c)(3) disclosure of an order permitting the withdrawal of a registration statement.
25 The administrator may, however, require disclosure of this information in a registration by
26 qualification under Section 304(b)(18).

27
28 6. Section 305(c), like every other provision concerned with the content of the
29 registration statement, must be read with Section 306(a)(1) which judges the accuracy and
30 completeness of the registration statement as of its effective date unless an order denying
31 effectiveness had been entered before the effective date. A registration statement must be kept
32 current with changing developments until the effectiveness date, but a registration statement is
33 not required to be amended after the effective date except to correct inaccuracies or deficiencies
34 which existed as of the effective date. An administrator, however, separately may require under
35 Section 305(j) periodic reports to keep reasonably current the information contained in the
36 registration statement.

37
38 7. Under Section 305(d) incorporation by reference is permitted as a matter of
39 administrative practice.

40
41 8. Section 305(e) is the substantive equivalent to provisions in the 1956 Act and RUSA.

1 9. Section 305(f) is the substantive equivalent to provisions in the 1956 Act and RUSA.
2 This subsection is designed to address nonissuer offerings where the seller cannot obtain certified
3 financial statements and other normally required records. The phrase “without unreasonable
4 effort or expense” comes from Section 10(a)(3) of the Securities Act of 1933. It is not meant to
5 apply to expenses incidental to supplying required information required for registration in the
6 case of a nonissuer distribution by a person in a control relationship with the issuer or otherwise
7 having access to or contractual rights to obtain the required information. Section 305(f) only
8 applies to registration by qualification under Section 304 and periodic reports for either
9 registration by coordination or registration by qualification under Section 305(j).

10
11 10. Section 305(g), follows the 1956 Act and RUSA, and authorizes the administrator to
12 require the escrow and impoundment of funds until the issuer receives a specified amount from
13 the sale of the security in this State or elsewhere. This section is limited to a security issued
14 within the past five years or to be issued to a promoter for a consideration substantially different
15 from the public offering price or to a person for a consideration other than cash. The typical
16 distribution subject to Section 305(g) will be a relatively new promotional or speculative
17 offering.

18
19 Under Section 305(g) the administrator would also be authorized to order the release of
20 impounded funds back to prospective purchasers. See, e.g., *State ex rel. Ariz. Corp. Comm’n v.*
21 *Bionomics Int’l, Ltd.*, 543 P.2d 802 (Ariz. Ct. App. 1975). However, before release of funds
22 held in impoundment back to prospective purchasers, the administrator must afford the registrant
23 an opportunity to be heard.

24
25 Unlike the statute in *Schwaemmle Const. Co. v. Michigan Dep’t of Commerce*, 360
26 N.W.2d 141 (Mich. 1984), Section 305(g) broadly provides that the administrator “may
27 determine the conditions of any escrow or impoundment under this subsection.” As in
28 *Schwaemmle*, this power only will operate until the impounded or escrowed funds are released.

29
30 Section 305(g) follows the 1956 Act and RUSA and provides that the administrator may
31 not reject a depository solely because of its location in another state.

32
33 11. Section 305(h) follows the 1956 Act in authorizing the administrator to specify the
34 form of a subscription or sale contract.

35
36 12. Section 305(i) generally follows the 1956 Act and RUSA. The term “nonissuer
37 transaction” or “nonissuer distribution” is defined in Section 102(18). A sale by a nonissuer
38 would have to be registered under Section 301 unless it is exempted or involves a federal covered
39 security.

40
41 Section 202(1) exempts “isolated nonissuer transactions.” When a nonissuer transaction
42 is not exempt under Section 202(1), it may still be exempted under other transaction exemptions,
43 including Sections 202(2) through (8), (11), or (12).

1 If no exemption is available for a nonissuer distribution, and it does not involve a federal
2 covered security, the security must be registered under Part 3. Under the first sentence of Section
3 305(i) each registration statement remains effective for at least one year and for any longer period
4 the administrator may determine. However, no registration statement is effective while a stop
5 order with respect to it is in effect under Section 306.
6

7 For the purposes of a nonissuer transaction, all outstanding securities of the same class as
8 a registered security are considered to be registered as long as the registration statement remains
9 effective. This means that during the effective period of a registration statement under this Act
10 all securities of the same class can be traded by anyone, including nonissuers, as if they were
11 registered.
12

13 Section 305(i) also provides that, unless the administrator determines otherwise, a
14 registration statement cannot be withdrawn until one year after its effective date if any securities
15 of the same class are outstanding. This is designed to protect sellers who would be unaware of a
16 withdrawal from being subject to civil liability.
17

18 13. Section 305(k) follows RUSA and a procedure limited to investment companies in
19 the 1956 Act in allowing posteffective date amendments. Under Section 305(k), when a
20 posteffective amendment increases the number of securities to be offered or sold, an additional
21 registration fee is required.
22
23

24 **SECTION 306. DENIAL, SUSPENSION, AND REVOCATION OF SECURITIES**

25 **REGISTRATION.**

26 (a) [Stop orders.] The administrator may issue a stop order denying effectiveness to, or
27 suspending or revoking the effectiveness of, a registration statement if the administrator finds
28 that the order is in the public interest and that:

29 (1) the registration statement as of its effective date or before the effective date in
30 the case of an order denying effectiveness, an amendment under Section 305(k) as of its effective
31 date, or a report under Section 305(j), is incomplete in a material respect or contains a statement
32 that, in the light of the circumstances under which it was made, was false or misleading with
33 respect to a material fact;

34 (2) this [Act] or a rule adopted, order issued, or condition lawfully imposed under

1 this [Act] has been willfully violated, in connection with the offering, by the person filing the
2 registration statement; by the issuer, a partner, officer, or director of the issuer or a person
3 occupying a similar status or performing a similar function; a promoter of the issuer; or a person
4 directly or indirectly controlling or controlled by the issuer; but only if the person filing the
5 registration statement is directly or indirectly controlled by or acting for the issuer; or by an
6 underwriter;

7 (3) the security registered or sought to be registered is the subject of a permanent
8 or temporary injunction of a court of competent jurisdiction or an administrative stop order or
9 similar order entered under any other federal or state law applicable to the offering, but the
10 administrator may not institute a proceeding against an effective registration statement under this
11 paragraph more than one year after the date of the order or injunction relied on, and the
12 administrator may not enter an order under this paragraph on the basis of an order or injunction
13 entered under the securities act of another State unless the order or injunction was based on facts
14 that would constitute, as of the date of the order, a ground for a stop order under this section;

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

17 (5) with respect to a security sought to be registered under Section 303, there has
18 been a failure to comply with the undertaking required by Section 303(b)(4);

19 (6) the applicant or registrant has failed to pay the proper filing fee, but the
20 administrator may enter only a stop order under this paragraph and shall void the order if the
21 deficiency is corrected; [or

22 (7) the applicant or registration statement violates a rule adopted or order issued

1 by the administrator under this [Act] that:

2 (A) the offering has worked or tended to work a fraud upon purchasers or
3 would so operate;

4 (B) the offering has been or would be made with unreasonable amounts of
5 underwriters' and sellers' discounts, commissions, or other compensation, or promoters profits or
6 participations, or unreasonable amounts or kinds of options; or

7 (C) the offering is being made on terms that are unfair, unjust, or
8 inequitable].

9 (b) [Institution of stop order.] The administrator may not institute a stop order proceeding
10 against an effective registration statement on the basis of a fact or transaction known to the
11 administrator when the registration statement became effective unless the proceeding is instituted
12 within 30 days after the registration statement became effective.

13 (c) [Summary Process.] The administrator may summarily revoke, deny, postpone, or
14 suspend the effectiveness of a registration statement pending final determination of an
15 administrative proceeding. Upon the entry of the order, the administrator shall promptly notify
16 each person specified in subsection (d) that the order has been entered, the reasons for the
17 postponement or suspension, and that within 15 days after the receipt of a request in a record
18 from the person the matter will be scheduled for a hearing. If a hearing is not requested and none
19 is ordered by the administrator, the order remains in effect until it is modified or vacated by the
20 administrator. If a hearing is requested or ordered, the administrator, after notice of and
21 opportunity for hearing to each person specified in subsection (d), may modify or vacate the
22 order or extend it until final determination.

1 (d) [Procedural requirements.] A stop order may not be entered under subsection (a) or
2 (b) without:
3 (1) appropriate notice to the applicant or registrant, the issuer, and the person on
4 whose behalf the securities are to be or have been offered;
5 (2) opportunity for hearing; and
6 (3) findings of fact and conclusions of law in a record [in accordance with the
7 state administrative procedure act].
8 (e) [Modification or vacation.] The administrator may modify or vacate a stop order
9 entered under this section if the administrator finds that the conditions that caused its entry have
10 changed or that it is otherwise in the public interest.
11

12 **Reporter's Notes**

13
14 **QUERY:** In Section 306(a)(3), should we include foreign states?
15

16 **Prior Provisions:** 1956 Act Section 306; RUSA Section 306.
17

18 1. This Section generally follows the 1956 Act and RUSA and applies to both
19 registration by coordination under Section 303 and registration by qualification under Section
20 304.
21

22 2. Section 306(a)(1) follows the 1956 Act and RUSA in testing in a suspension or
23 revocation proceeding the completeness and accuracy of a registration statement as of the
24 registration statement's effective date. A registration statement that becomes misleading because
25 of a development that occurs after its effective date is not a ground for the issuance of a stop
26 order under Section 306(a)(1). Posteffective amendments are not required except to correct
27 inaccuracies as of the effective date. An administrator, however, may require periodic reports
28 under Section 305(j). With respect to periodic reports under Section 305(j), a misleading report
29 would be the basis of a stop order under Section 306(a)(1) if it is materially inaccurate as of the
30 date it was filed.
31

32 3. On the meaning of "willfully," see Comment 2 under Section 508.
33

1 4. A violation by an issuer has the same consequences whether the issuer has filed a
2 registration statement or has had a local broker-dealer file it. This is not the case when the
3 registration statement is filed by a local broker-dealer acting independently.
4

5 5. The verb “is” at the beginning of Section 306(a)(3) means that a stop order or
6 injunction that has expired or been vacated is not the ground for action under this paragraph.
7

8 6. Section 306(a)(4) applies to activity that is conducted in a state where that activity is
9 illegal. It does not apply if the activity is not illegal under that state’s law. This paragraph is not
10 meant to apply to activity which is lawful where conducted but would be illegal if conducted in
11 the state where the registration statement is filed.
12

13 7. Sections 306(a)(5)-(6) follow the 1956 Act and RUSA.
14

15 8. Section 306(a)(7) addresses merit regulation. Sections 306(E)-(F) of the 1956 Act
16 addressed merit regulation by authorizing a stop order when an “offering has worked or tended to
17 work a fraud upon purchasers or would so operate” or “the offering has been or would be made
18 with unreasonable amounts of underwriters’ and sellers’ discounts, commissions, or other
19 compensation, or promoters’ profits or participation, or unreasonable amounts or kinds of
20 options.”
21

22 By 1985 a majority of states which had adopted the 1956 Act had adopted this approach
23 to merit regulation rather than the earlier and broader “unfair, unjust or inequitable” standard that
24 then applied in a minority of states.
25

26 RUSA Sections 306(a)(5)-(6) adopted provisions substantively identical to the 1956 Act
27 and included in brackets an “unfair, unjust, or inequitable” alternative.
28

29 As of July 2001 46 jurisdictions had adopted a form of Section 306(a)(7)(A) (“tended to
30 work a fraud or would so operate”); 35 jurisdictions had adopted a form of §306(a)(7)(B)
31 (“unreasonable amounts of underwriters’ and sellers’ discounts, commissions, or other
32 compensation, or promoter profits or participations, or unreasonable amounts or kinds of
33 options”); and 16 jurisdictions had adopted a form of §306(a)(7)(C) (“terms that are unfair,
34 unjust, or inequitable”).
35
36

37 **Sect. 306(a)(7) - Denial, Suspension and Revocation**

38		Sect.A-	Sect. B -	Sect. C -
39		Has worked or	Unreasonable	Unfair, un-
40		tended to work	amounts	just or
41		fraud		Inequitable
42	Jurisdiction			terms
43				

		X	X	X
1	Alabama Sec. 8-6-9(a)			
2	Alaska Sec. 45.55.120(a)	X	X	
3	Arizona Sec. 44-1921	X		X ¹
4	Arkansas Sec. 23-42-405(a)	X	X	X
5	California Sec. 25410(a)	X	X	X
6	Colorado Sec. 11-51-306			
7	Connecticut 36b-20(a)	X	X	
8	Delaware Sec. 7308(a)	X	X	
9	District of Columbia Sec. 260	X	X	
10	Florida Sec. 517.111(1)			X
11	Georgia Sec. 10-5-7(a)	X		
12	Guam Sec. 46306(a)	X	X	
13				
14	jurisdiction	Section A	Section B	Section C
15				
16	Hawaii Sec. 485-13(a)	X	X	
17	Idaho Sec. 30-1413	X	X	
18	Illinois Sec. 11 [5/11]	X		
19	Indiana Sec. 23-2-1-7(a)	X	X	
20	Iowa Sec. 502.209	X	X	
21	Kansas Sec. 17-1260(a)		X	X
22	Kentucky Sec. 292.390(1)	X	X	
23	Louisiana Sec. 51:707(A)	X		
24	Maine 10406(1)	X	X	X
25	Maryland 11-511(a)	X		
26	Massachusetts Sec. 305(A)	X	X	
27	Michigan Sec. 451.706(a)	X	X	
28	Minnesota Sec. 80A.13 Subd.1	X		X ²
29	Mississippi Sec. 75-71-425	X	X	

¹ Arizona Sec. 44-1921(3) “. . . or would be unfair or inequitable to the purchasers.”

² Minnesota Sec. 80A. 13(6) - "except with respect to securities which are being registered by notification, the terms of the securities are unfair and inequitable; provided, however, that the commissioner may not determine that an offering is unfair and inequitable solely on the grounds that the securities are to be sold at an excessive price where the offering price has been determined by arms length negotiation between nonaffiliated parties. The selling price of any security being sold by a broker-dealer licensed in this state shall be presumed to have been determined by arms length negotiation;"

1	Missouri Sec. 409.306(a)	X	X	X ³
2	Montana Sec. 30-10-207(1)	X	X	
3	Nebraska Sec. 8-1109.01	X	X	X
4	Nevada Sec. 90.510(1)	X	X	
5	New Hampshire Sec. 421-B:16(b)	X	X	X ⁴
6	New Jersey Sec. 49:3-64			
7	New Mexico Sec. 58-13B-25(A)	X	X	
8	New York Sec. 352(1)			
9	North Carolina Sec. 78A-29(a)(2)	X	X	
10				
11	jurisdiction	Section A	Section B	Section C
12				
13	North Dakota Sec. 10-04-09	X		X
14	Ohio Sec. 1707.13	X		X ⁵
15	Oklahoma Sec. 306(a)(2)	X	X	
16	Oregon Sec. 59.105(1)		X	X
17	Pennsylvania Sec. 208(a)	X	X	
18	Puerto Rico Sec. 876(a)(2)	X	X	
19	Rhode Island Sec. 7-1 I-306(a)			
20	South Carolina Sec. 35-I-1010(b)	X	X	
21	South Dakota Sec. 47-3 IA-306(a)(2)	X	X	X
22	Tennessee Sec. 48-2-112(a)	X		
23	Texas Sec. 32[581-32]	X		
24	Utah Sec. 61-1-12(1)	X	X	
25	Vermont Sec. 4211	X		X ⁶
26	Virginia Sec. 13.1-513(a)			
27	Washington Sec. 21.20.280			
28	West Virginia Sec. 32-3-306(a)(2)			
29	Wisconsin Sec. 551.28(1)			
30	Wyoming Sec. 17-4-112(a)			

³ Missouri Sec. 409.306(a)(E)(ii) – “any aspect of the offering is substantially unfair, unjust, inequitable or oppressive”

⁴ New Hampshire Sec. 421-B: 16(b)(7), “. . .except with respect to securities which are being registered by notification the terms of the securities are unfair and inequitable; provided, however, that the secretary of state may not determine that an offering is unfair and inequitable solely on the grounds that the securities are to be sold at an excessive price where the offering price has been determined by arms length negotiation between nonaffiliated parties. The selling price of any security being sold by a broker-dealer licensed in this state shall be presumed to have been determined by arms length negotiation;”

⁵ Ohio Sec. 1707.13. “. . . that such security is being disposed of or purchased on grossly unfair terms. . .”

⁶ Vermont Sec. 4211(5), “Is of bad business repute;”

TOTALS:

The National Securities Markets Improvement Act of 1996 subsequently preempted merit regulation of federal covered securities. See Section 102(7).

Section 306(a)(7) takes a different approach. Subject to the National Securities Markets Improvement Act of 1996, each of the merit standards in RUSA is retained but on the condition that they are adopted by the administrator by rule or order. This will provide notice to issuers of a state's merit standards. Notice will address one criticism of merit regulation. See generally 1 L. Loss & J. Seligman, Securities Regulation 111-124 (3d ed. rev. 1998).

Statements of Policy of the North American Securities Administrator Association that have been adopted by a state would provide notice in compliance with Section 306(a)(7). Similarly other state rules or orders could be adopted in the future to address new types of securities as they occur.

Under Section 306(a)(7) an administrator, by rule or order, for example, could adopt a standard that would provide the basis for a stop order denying effectiveness to a development state company that has no specific business purpose or plan and has indicated that its business purpose or plan is to engage in a merger or acquisition with an unidentified company, entity, or person. "Blank check offerings" are subject to Rule 419 adopted under the Securities Act of 1933.

9. Section 306(b) follows the 1956 Act and RUSA and allows an administrator up to 30 days after a registration statement becomes effective to institute a stop order proceeding on the basis of a fact or transaction known when the registration statement became effective. This will avoid the necessity of an administrator issuing a stop order prematurely.

10. Sections 306(c)-(d) assure each person subject to a stop order notice, opportunity for a hearing, and written findings of fact and conclusions of law contained in a record.

11. An administrator must consider the public interest when issuing a stop order and may under Section 306(e) consider the public interest when modifying or vacating a stop order. See, e.g., *TechnoMedical Lab., Inc. v. Utah Sec. Div.*, 744 P.2d 320, 324-325 (Utah Ct. App. 1987) (a state has a valid public interest in stopping the issuance of hundreds of thousands of public shares that did not comply with the disclosure requirements of securities registration); cf. stop orders under the Securities Act of 1933, see 1 L. Loss & J. Seligman, Securities Regulation 576-589 (3d ed. rev. 1998).

1 **PART 4**

2 **BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS, INVESTMENT ADVISER**
3 **REPRESENTATIVES, FEDERAL COVERED INVESTMENT ADVISERS, AND**
4 **INVESTMENT ADVISER REPRESENTATIVES OF FEDERAL COVERED**
5 **INVESTMENT ADVISERS**

6
7 **SECTION 401. BROKER-DEALER REGISTRATION REQUIREMENT AND**
8 **EXEMPTIONS.**

9 (a) [Registration requirement.] It is unlawful for a person to transact business in this State
10 as a broker-dealer, unless the person is registered under this [Act] as a broker-dealer or is exempt
11 from registration as provided in subsection (b).

12 (b) [Exemptions from registration.] The following broker-dealers are exempt from the
13 registration requirement of subsection (a):

14 (1) except as otherwise provided in subsection (c), a broker-dealer without a place
15 of business in this State if its only transactions effected in this State are with:

16 (A) the issuer of the securities involved in the transactions;
17 (B) a broker-dealer registered or not required to be registered under this
18 [Act];

19 (C) an institutional investor;
20 (D) a preexisting customer whose principal place of residence is not in this
21 State if the broker-dealer is both registered or not required to be registered under the Securities
22 Act of 1934 and registered under the securities act of the State in which the customer maintains

1 a principal place of residence;

2 [(E) a preexisting customer whose principal place of residence was not in
3 this State when the customer relationship was established, but who moved into this State, if:

4 (i) the broker-dealer is both registered or not required to be
5 registered under the Securities Exchange Act of 1934 and registered under the securities laws of
6 the State from which the customer moved into this State and where the customer had maintained
7 a principal place of residence; and

8 (ii) within 45 days after the customer's first transaction in this
9 State, the broker-dealer files an application for registration in this State and no further transaction
10 is effected more than 60 days after the date on which the application is filed, or, if earlier, the
11 date on which this State notifies the broker-dealer that it has denied the application for
12 registration or has stayed the pendency of the application for cause;]

13 (F) no more than three persons in this State during the previous 12 months
14 period, in addition to those specified in subparagraphs (A) through (E), if the broker-dealer is
15 both registered or not required to be registered under the Securities Exchange Act of 1934 and
16 registered under the securities act in the State in which the broker-dealer has its principal place of
17 business; and

18 (G) any other person the administrator, by rule or order, specifies.

19 [(2) a bank if its broker-dealer activities are limited to those specified in
20 subsections 3(a)(4)(B)(i) through (vi) and (viii) through (ix), 3(a)(5)(B), and 3(a)(5)(C) of the
21 Securities Exchange Act of 1934 and sales under subsection 3(a)(5)(C) are solely to institutional
22 investors;] and

1 (3) any other broker-dealer the administrator, by rule or order, exempts.

2 (c) [Separate requirement for government securities dealer exemption.] The exemptions
3 provided in subsection (b) are not available to a broker-dealer that deals solely in United States
4 government securities and is not registered under the Securities Exchange Act of 1934 unless the
5 broker-dealer is subject to supervision as a dealer in government securities by the Board of
6 Governors of the Federal Reserve System.

7 (d) [No suspended or barred personnel.] It is unlawful for a broker-dealer or for an issuer
8 engaged in offering securities in this State, directly or indirectly, to employ or associate with an
9 individual to engage in any activity [involving the offer of sale of securities] in this State if the
10 individual is suspended or barred from employment or association with a broker-dealer or issuer
11 [or investment adviser] by an order of the administrator under this [Act]. A broker-dealer or
12 issuer does not violate this subsection if the broker-dealer or issuer [or investment adviser] did
13 not know or in the exercise of reasonable care could not have known, of the suspension or bar.
14 Upon request from a broker-dealer and for good cause shown, the administrator, by order, may
15 modify or vacate the prohibition of this subsection with respect to an individual suspended or
16 barred.

17 (e) [Agent for only one principal.] ~~Except as otherwise provided in subsection (b).~~ It is
18 unlawful for a broker-dealer or an issuer to employ or associate with an agent who transacts
19 business in this State on behalf of the broker-dealer or issuer unless the agent is registered under
20 Section 402(a) or exempt from registration under Section 402(b). ~~under this [Act] as an agent.~~

21
22 **Reporter's Notes**
23

1 **Prior Provisions:** 1956 Act Section 201; RUSA Sections 201-202.

2
3 1. “Broker-dealer” is defined in Section 102(4). The scope of the Section 401(a)
4 reference “to transact business in this State” is specified in Section 611.

5
6 2. Under Section 401(a) a person can be required to register as a securities broker-dealer
7 only if the person transacts business in securities. See, e.g., AMR Realty Co. v. State, 373 A.2d
8 1002 (N.J. Supr. Ct. App. Div. 1977) (requirement that the transactions involve securities).

9
10 3. Comments on Section 401(b) will be written.

11
12 4. Section 401(d) prohibits a broker-dealer or issuer from employing an individual in a
13 capacity from which that person has been suspended by the administrator. Violation of this
14 provision does not result in strict liability. In order for a broker-dealer or issuer to be liable, the
15 broker-dealer or issuer must have known or should have known of the administrator’s order to
16 the individual suspended or barred.

17
18 5. The SIA has proposed alternative versions of a cross-border transaction provision.

19
20 **Cross-Border Transactions Alternative A**

21
22 PROPOSED LANGUAGE (Original NASAA proposal):

23
24 [LIMITED REGISTRATION OF CANADIAN BROKER-DEALERS, AGENTS.]

25
26 (a) A broker-dealer that is resident in Canada and has no office or physical presence in
27 this State may, provided the broker-dealer is registered in accordance with this Section, effect
28 transactions in securities with or for, or induce or attempt to induce the purchase or sale of any
29 security by:

30
31 (1) a person from Canada who is temporarily resident in this State, with whom the
32 Canadian broker-dealer had a bona fide broker-dealer client relationship before the person
33 entered the United States; or

34
35 (2) a person from Canada who is resident in this State, whose transactions are in
36 self-directed tax advantaged retirement plan in Canada of which the person is the holder or
37 contributor.

38
39 (b) An agent who will be representing a Canadian broker-dealer registered under this
40 Section may, provided the agent is registered in accordance with this Section, effect transactions
41 in securities in this State as permitted for the broker-dealer in Subsection (a).

42
43 (c) A Canadian broker-dealer may register under this Section provided that it
44

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

3
4 (2) files a consent to service of process;

5
6 (3) is registered as a broker- dealer in good standing in the jurisdiction from which
7 it is effecting transactions into this State and files evidence thereof; and

8
9 (4) is a member of a self-regulatory organization or stock exchange in Canada.

10
11 (d) An agent who will be representing a Canadian broker-dealer registered under this
12 Section in effecting transactions in securities in this State may register under this Section
13 provided that the agent

14
15 (1) files an application in the form required by the jurisdiction in which the
16 broker-dealer has its head office;

17
18 (2) files a consent to service of process; and

19
20 (3) is registered in good standing in the jurisdiction from which the agent is
21 effecting transactions into this State and files evidence thereof.

22
23 (e) If no denial order is in effect and no proceeding is pending under Section (204),
24 registration becomes effective on the 30th day after an application is filed, unless earlier made
25 effective.

26
27 (f) A Canadian broker-dealer registered under this Section shall

28
29 (1) maintain its registration and its membership in a self-regulatory organization
30 or stock exchange in good standing;

31
32 (2) provide the administrator upon request with its books and records relating to
33 its business in the State as a broker-dealer;

34
35 (3) inform the administrator of any criminal action taken against the broker-dealer
36 or of any finding or sanction imposed on the broker-dealer as a result of any self-regulatory or
37 regulatory action involving fraud, theft, deceit, misrepresentation or similar conduct; and

38
39 (4) disclose to its clients in the State that the broker-dealer and its agents are not
40 subject to the full regulatory requirements of the Act.

41
42 (g) An agent of a Canadian broker-dealer registered under this Section shall

43
44 (1) maintain provincial or territorial registration in good standing;

(2) inform the administrator of any criminal action, taken against the agent, or of any finding or sanction imposed on the agent as a result of any self-regulatory or regulatory action involving fraud, theft, deceit, misrepresentation or similar conduct.

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

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

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

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

(2) with or through (a) the issuers of the securities involved in the transactions, (b) other broker dealers, and (c) 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; and

(3) as otherwise permitted by this Act.

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

Cross-border Transactions Alternative B

PROPOSED LANGUAGE (Adding exemption for all jurisdictions and including IAs and IARs):

[LIMITED REGISTRATION OF FOREIGN BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES.]

(a) A broker-dealer or investment adviser that is resident in a foreign jurisdiction and has no office or physical presence in this State may, provided the broker-dealer or investment adviser is registered in accordance with this Section, effect transactions in securities with or for, or induce or attempt to induce the purchase or sale of any security by,

1 (1) a person from who is temporarily resident in this State, with whom the
2 broker-dealer or investment adviser had a bona fide broker-dealer or investment adviser client
3 relationship before the person entered the United States; or
4

5 (2) a person from that foreign jurisdiction who is resident in this State, whose
6 transactions are in a self-directed tax advantaged retirement plan in that foreign jurisdiction of
7 which the person is the holder or contributor.
8

9 (b) an agent or investment adviser representative who will be representing a broker-
10 dealer or investment adviser registered under this Section may, provided the agent or investment
11 adviser representative is registered in accordance with this Section, effect transactions in
12 securities in this State as permitted for the broker-dealer or investment adviser in Subsection (a).
13

14 (c) A broker-dealer or investment adviser may register under this Section provided that it
15

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

18 (2) files a consent to service of process;
19

20 (3) is registered as a broker or dealer or investment adviser in good standing in the
21 jurisdiction from which it is effecting transactions into this State and files evidence thereof; and
22

23 (4) is a member of a self-regulatory organization or stock exchange in the foreign
24 jurisdiction in which it is resident.
25

26 (d) An agent or investment adviser representative who will be representing a broker-
27 dealer or investment adviser registered under this Section in effecting transactions in securities in
28 this State may register under this Section provided that the agent or investment adviser
29

30 (1) files an application in the form required by the jurisdiction in which the
31 broker-dealer or investment adviser has its head office;
32

33 (2) files a consent to service of process; and
34

35 (3) is registered in good standing in the jurisdiction from which the agent or
36 investment adviser is effecting transactions into this State and files evidence thereof.
37

38 (e) If no denial order is in effect and no proceeding is pending under Section (204),
39 registration becomes effective on the 30th day after an application is filed, unless earlier made
40 effective.
41

42 (f) A broker-dealer or investment adviser registered under this Section shall
43

44 (1) maintain its registration and its membership in any required self-regulatory

1 organization or stock exchange in that foreign jurisdiction in good standing;

2
3 (2) provide the administrator upon request with its books and records relating to
4 its business in the State as a broker-dealer;

5
6 (3) inform the administrator of any criminal action taken against it or of any
7 finding or sanction imposed on the broker-dealer or investment adviser as a result of any self-
8 regulatory or regulatory action involving fraud, theft, deceit, misrepresentation or similar
9 conduct; and

10
11 (4) disclose to its clients in the State that the broker-dealer or investment adviser
12 and its agents or investment adviser representatives are not subject to the full regulatory
13 requirements in the Act.

14
15 (g) An agent or investment adviser representative of a broker-dealer or investment adviser
16 registered under this Section shall

17
18 (1) maintain registration in that foreign jurisdiction in good standing;

19
20 (2) inform the administrator of any criminal action taken against the agent or
21 investment adviser or of any finding or sanction imposed on the agent or investment adviser as a
22 result of any self-regulatory or regulatory action involving fraud, theft, deceit, misrepresentation
23 or similar conduct.

24
25 (h) Renewal applications for broker-dealers, investment advisers agents and investment
26 adviser representatives under this Section must be filed before December 1 each year and may be
27 made by filing the most recent renewal application, if any, filed in the jurisdiction in which the
28 broker-dealer or investment adviser has its head office, or if no such renewal application is
29 required, the most recent application under Subsection (c)(1) or Subsection (d)(1), as the case
30 may be.

31
32 (i) Every applicant for registration or renewal registration under this Section shall pay the
33 fee for broker-dealers, investment advisers, agents and investment adviser representatives as
34 required under this Act.

35
36 (j) A broker-dealer, investment adviser, agent or investment adviser representative
37 registered under this Section may only effect transactions in this State.

38
39 (1) as permitted in Subsection (a) or (b);

40
41 (2) with or through (a) the issuers of the securities involved in the transactions, (b) other
42 broker dealers, and (c) banks, savings institutions, trust companies, insurance companies,
43 investment companies as defined in the Investment Company Act of 1940, pension or profit-
44 sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves

1 or as trustees; and

2
3 (3) as otherwise permitted by this Act.

4
5 (k) A broker-dealer, investment adviser, agent or investment adviser
6 representative registered under this Section and acting in accordance with the limitations set out
7 in Subsection (j) is exempt from all the requirements of this Act, except the antifraud provisions
8 and the requirements set out in this Section. Such broker-dealer, investment adviser, agent or
9 investment adviser representative may only have its registration under this Section denied,
10 suspended or revoked for a breach of the antifraud provisions or the requirements in this section.

11
12 As of July 2001 five jurisdictions had a statutory and 30 jurisdictions had a regulatory
13 provision similar to Alternative A. None had a statutory or regulatory provision similar to
14 Alternative B.

15
16
17 **SECTION 402. AGENT REGISTRATION REQUIREMENT AND**

18 **EXEMPTIONS.** (a) [Registration requirement.] It is unlawful for an individual to transact
19 business in this State as an agent unless the individual is registered under this [Act] as an agent or
20 exempt from registration as provided in subsection (b).

21 (b) [Exemptions.] The following agents are exempt from the registration requirement of
22 subsection (a):

23 (1) an agent acting for a broker-dealer exempt under Section 401(b);

24 (2) an agent acting for an issuer [when the agent's compensation is based in whole
25 or in part upon the amount of purchases or sales of the issuer's own securities,] who:

26 (A) effects transactions in a security of the issuer exempted by Section
27 201; or

28 (B) effects transactions in the issuer's securities exempted by Section 202
29 [other than Section 202(9) and 202(12)];

30 [(3) an agent acting for an issuer who effects transactions solely in federal covered

1 securities of the issuer, except that an agent who effects transactions in a federal covered security
2 to qualified purchasers under Section 18(b)(3) or 18(b)(4)(D) of the Securities Act of 1933 is not
3 exempt if any commission or other remuneration is paid or given directly or indirectly for
4 effecting transactions to a person in this State;]

5 [(4) an agent acting for a broker-dealer registered in this State under Section
6 401(a) or exempt under Section 401(b) or (c) in the offer and sale of securities for any account
7 directed by an investment adviser registered in this State or a federal covered investment
8 adviser;] or

9 (5) any other agent the administrator, by rule or order, exempts.

10 (c) [Registration required for employment.] The registration of an agent is not effective
11 while the agent is not employed by or associated with a broker-dealer registered or exempt from
12 registration under this [Act] or an issuer that offers its securities in this State.

13 (d) [Agent for only one principal.] An individual may not act as an agent for more than
14 one broker-dealer or more than one issuer at a time, unless the broker-dealer or issuer for whom
15 the agent acts is affiliated by direct or indirect common control or the administrator, by rule or
16 order, so authorizes.

18 **Reporter's Notes**

19
20 **Prior Provisions:** 1956 Act Section 201; RUSA Sections 201-202.

21
22 1. "Agent" is defined in Section 102(2). The scope of the Section 402(a) reference to
23 "transact business in this State" is specified in Section 611.

24
25 2. An independent contractor must either be a broker-dealer or an agent if the individual
26 transacts business as a broker-dealer or agent. There is no other category of activity permitted
27 under this Act for securities broker-dealer or agent activities.

1
2 **SECTION 403. INVESTMENT ADVISER REGISTRATION REQUIREMENT**
3 **AND EXEMPTIONS.**

4 (a) [Registration requirement.] It is unlawful for a person to transact business in this
5 State as an investment adviser unless registered under this [Act] as an investment adviser or
6 exempt from registration as provided in subsection (b).

7 (b) [Exemptions from registration.] The following investment advisers are exempt from
8 the registration requirement of subsection (a):

9 (1) an investment adviser without a place of business in this State that is
10 registered under the securities act of the State in which the investment adviser has its principal
11 place of business if its only clients in this State are:

12 (A) federal covered investment advisers, registered investment advisers, or
13 registered broker-dealers;

14 (B) institutional investors;

15 (C) preexisting clients whose principal place of residence is not in this
16 State if the investment adviser is registered under the securities act of the State in which the
17 client maintains a principal place of residence; or

18 (D) any other client the administrator, by rule or order, specifies;

19 (2) an investment adviser without a place of business in this State if it has had,
20 during the preceding 12 months, not more than five clients who are residents of this State in
21 addition to those specified under paragraph (1); and

22 (3) any other investment adviser the administrator, by rule or order, exempts.

23 (c) [No suspended or barred personnel.] It is unlawful for an investment adviser, directly

1 or indirectly, to employ or associate with an individual ~~to engage in any activity~~ who engages in
2 any activity involving investment advice in this State if the individual is suspended or barred
3 from employment or association with an investment adviser [or a broker-dealer] by an order of
4 the administrator unless the investment adviser [or broker-dealer] did not know, or in the
5 exercise of reasonable care could not have known, of the suspension or bar. Upon request from
6 the investment adviser and for good cause shown, the administrator, by order, may waive the
7 prohibition of this subsection with respect to the individual suspended or barred.

8 (d) [Registration contingent upon employment.] It is unlawful for any investment adviser
9 to employ or associate with an investment adviser representative who transact business in this
10 State on behalf of the investment adviser unless the investment adviser representative is
11 registered under Section 404(a) or exempt from registration as ~~[provided subsection (b) under~~
12 ~~this [Act] as an investment adviser representative.~~ under Section 404(b).

14 Reporter's Notes

15
16 **Prior Provisions:** 1956 Act Section 201; RUSA Sections 203-204.

17
18 1. "Investment adviser" is defined in Section 102(15). The scope of the Section 403(a)
19 reference to "transact business in this State" is specified in Section 611.

20
21 2. Excluded from the definition of investment adviser in Section 102(15)(C) is a broker-
22 dealer who receives no special compensation for investment advisory services. Such a broker-
23 dealer would not have to register in two different capacities in this State. A broker-dealer who
24 does receive special compensation, on the other hand, would also meet the statutory definition of
25 investment adviser and would be required to register in both capacities.

26
27 3. Section 403(b)(2) is required by the National Securities Markets Improvement Act of
28 1996 which prohibits a state from regulating an investment adviser that does not have a place of
29 business in this State and had fewer than six clients who are state residents during the preceding
30 12 months.

1 4. Section 403(c) prohibits an investment adviser from employing an individual who is
2 prohibited from such employment or association by the administrator. Violation of this provision
3 does not result in strict liability. To be liable the investment adviser must have known or should
4 have known of the administrator's order to the individual suspended or barred.
5
6

7 **SECTION 404. INVESTMENT ADVISER REPRESENTATIVE REGISTRATION**
8 **REQUIREMENT AND EXEMPTIONS.**

9 (a) [Registration requirement.] It is unlawful for an individual to transact business in this
10 State as an investment adviser representative unless the individual is registered under this [Act]
11 as an investment adviser representative or is exempt from registration under subsection (b).

12 (b) [Exemptions.] The following investment adviser representatives are exempt from the
13 registration requirement of subsection (a):

14 (1) an investment adviser representative who is employed by or associated with an
15 investment adviser that is exempt from registration under Section 403(b) or a federal covered
16 investment adviser that is exempt from the notice filing requirements of Section 405; and

17 (2) any other investment adviser representative who the administrator, by rule or
18 order, exempts.

19 ~~(d)~~(c) [Registration contingent upon employment.] The registration of an investment
20 adviser representative is not effective while the investment adviser representative is not
21 employed by or associated with an investment adviser registered under this [Act] or a federal
22 covered investment adviser that has made or is required to make a notice filing under Section
23 405.

24 ~~(c)~~(d) [Representative for only one principal] An individual may not act as an investment
25 adviser representative for more than one investment adviser at a time unless the administrator, by

1 rule or order, so authorizes.

2 ~~[(f)(e) [Responsibility of suspended or barred representative.]~~ It is unlawful for an
3 investment adviser representative, directly or indirectly, to conduct business on behalf of a
4 federal covered investment adviser in this State, if the investment adviser representative is barred
5 or suspended from employment or association with an investment adviser by an order of the
6 administrator under this [Act]. Upon request from the federal covered investment adviser and for
7 good cause shown, the administrator, by order, may waive the prohibition of this subsection with
8 respect to the person barred or suspended.]

10 **Reporter's Notes**

11
12 No Prior Provision.

13
14 1. "Investment adviser representative" is defined in Section 102(16). The scope of the
15 Section 404(a) reference to "transacts business in this State" is specified in Section 611.

16
17 2. Neither the 1956 Act nor RUSA provided for the registration of investment adviser
18 representatives. In recent years, however, the states increasingly have done so.

19
20 3. Under this Act a sole proprietor investment adviser may register both as an investment
21 adviser and as an investment adviser representative.

22
23 4. Pennsylvania urges adding "an investment adviser representative with a place of
24 business in this state that is employed by or associated with a federal covered investment
25 adviser" in Section 404.

26
27 5. Section 404(c) prohibits an investment adviser representative from association with a
28 federal covered investment adviser when such association is prohibited by an order of the
29 administrator. Unlike similar provisions in Sections 401 and 403, there is no culpability
30 requirement that the investment adviser representative "knows or in the exercise of reasonable
31 care should have known" of a suspension or bar because the order should be received by the
32 investment adviser representative. As with Sections 401 and 403, the administrator may waive
33 this prohibition.

34
35 6. The FPA strongly supports permitting at least two IA affiliations under Section

1 404(e). As a lesser alternative to expressly allowing dual registration, the FPA requests that the
2 draft not include Section 404(e).
3
4
5

6 **SECTION 405. FEDERAL COVERED INVESTMENT ADVISER NOTICE**
7 **FILING REQUIREMENT.**

8 (a) [Notice Filing Requirement.] Except with respect to a federal covered investment
9 adviser whose only clients are those described in Section 403(b)(1)(A), (B), and (D), it is
10 unlawful for a federal covered investment adviser to transact business in this State unless the
11 federal covered investment adviser complies with subsections (b) and (c).

12 (b) [Notice Filing Procedure.] A federal covered investment adviser shall file a notice
13 before acting in this State as a ~~nonexempt~~ federal covered investment adviser ~~in this State~~ that is
14 not excepted under subsection (a), by filing such records as have been filed with the Securities
15 and Exchange Commission under the Investment Advisers Act of 1940, including a consent to
16 service of process, as the administrator, by rule or order, requires, and an annual notice fee of
17 [\$___].

18 (c) [Filing of additional records.] The administrator may require a federal covered
19 investment adviser that is not excepted under subsection (a) to provide a copy of any additional
20 record regarding the federal covered investment adviser that has been filed with the Securities
21 and Exchange Commission under the Investment Advisers Act of 1940.

22 (d) [Effectiveness of filing.] The notice filing is effective upon its filing.
23

24 **QUERY:** Given Section 405(b), do we need Section 405(c)?
25

26 **Reporter's Notes**

1 No Prior Provision.

2
3 1. "Federal covered investment adviser" is defined in Section 102(6). The scope of the
4 Section 405(a) reference to "transacts business in this State" is specified in Section 611.

5
6 2. This provision is necessitated by the National Securities Markets Improvement Act of
7 1996 and is intended to coordinate this Act with the Investment Advisers Act of 1940.

8
9
10 **SECTION 406. REGISTRATION BY BROKER-DEALERS, AGENTS,**
11 **INVESTMENT ADVISERS, AND INVESTMENT ADVISER REPRESENTATIVES.**

12 (a) [Initial registration.] A broker-dealer, agent, investment adviser, or investment
13 adviser representative shall register by filing an application including a consent to service of
14 process complying with Section 612, and paying the fee specified in ~~subsection (d)~~ Section 410
15 and any reasonable costs charged by the designee of the administrator for processing the filing.
16 The following rules shall apply:

17 (1) Each application must contain the information required for the filing of a
18 uniform application.

19 (2) Each application shall also contain any other financial or other information
20 requested by the administrator that is material to an understanding of information in the uniform
21 application and whatever other information, to the extent not contained in the uniform
22 application, the administrator, by rule or order, requires, including any of the following:

- 23 (A) the applicant's form and place of organization;
- 24 (B) the applicant's proposed method of doing business;
- 25 (C) the qualifications and business history of the applicant, and in the case
26 of the broker-dealers or investment adviser, the qualifications and business history of each
27 partner, officer, or director, or any person occupying a similar status or performing similar

1 functions, and any person directly or indirectly controlling the broker-dealer or investment
2 adviser;

3 (D) any injunction or administrative order or conviction of a misdemeanor
4 involving securities or commodities or an aspect of the securities or commodities business or a
5 felony of the applicant or a person specified in subparagraph (C);

6 (E) the applicant's financial condition and history;

7 (F) if the applicant is an investment adviser, any information concerning
8 the investment adviser to be furnished or disseminated to a client or prospective client; and

9 (G) any other information that the administrator determines is material to
10 the application.

11 ~~(3)~~(b) [Effectiveness of registration.] If an order is not in effect and no proceeding is
12 pending under Section ~~408~~ 412, registration is effective at noon on the 45th day after a completed
13 application is filed. The administrator, by rule or order, may specify an earlier effective date and
14 may by order defer the effective date until noon on the 45th day after the filing of any
15 amendment completing the application.

16 ~~(4)~~(c) [Registration renewal.] Each registration is effective until midnight on December
17 31 of the year for which the application for registration is filed. A registration may be
18 automatically renewed each year unless an order is in effect under Section ~~408~~ 412, by filing
19 such records as the administrator, by rule or order, specifies and paying the fee specified in
20 ~~subsection (d)~~ Section 410, and paying costs charged by the designee of the administrator for
21 processing such filings.

1 **Reporter's Notes**

2
3 **Prior Provisions:** 1956 Act Section 202; RUSA Section 205(b).

4
5 1. Under Section 406(a), the administrator is authorized to accept standardized forms
6 such as Form B-D for broker-dealers; Form U-4 for agents and investment adviser
7 representatives; and Form ADV for investment advisers, which are filed today through such
8 designees as the Web-CRD or the Investment Adviser Registration Depository.

9
10 2. Under this Act a single person may act both as an agent and investment adviser
11 representative if the person satisfies applicable requirements to be both an agent and investment
12 adviser representative.

13
14
15
16 **SECTION 407. SUCCESSION AND CHANGE IN REGISTRATION.**

17 ~~(5)~~(a) [Succession to registration.] A broker-dealer or investment adviser may succeed to
18 the current registration of another broker-dealer or investment adviser, and a federal covered
19 investment adviser may succeed to the current notice filing of another federal covered investment
20 adviser, by filing as a successor an application for registration as required by Section 401 or 403,
21 or a notice filing as required by Section 405, for the unexpired portion of the year of the current
22 registration or notice filing. There is no fee for filing under this paragraph.

23 ~~(h)~~(b) [Organizational change.] A broker-dealer or investment adviser may change its
24 form of organization, date or state of incorporation or formation or composition of membership
25 in a partnership or limited liability company by amendments to its registration if the change does
26 not involve any material change in its financial condition or management. The amendment will
27 become effective when filed or upon a date designated by the registrant in its filing. The new
28 entity is a successor to the original registrant. A material change in financial condition or
29 management shall require a new application for registration as a broker-dealer or investment
30 adviser. Any registered predecessor shall discontinue conducting its securities business other

1 than winding down transactions and shall file for withdrawal of broker-dealer or investment
2 adviser registration within 45 days after filing its amendment to effect succession.

3 ~~(i)(c)~~ [Name and control change.] A broker-dealer or investment adviser may change its
4 name by amendment to its registration. The amendment becomes effective when filed or upon a
5 date designated by the registrant.

6 (d) [Change of control.] A change of control of a broker-dealer or investment adviser is
7 effective upon the filing of an amendment to its registration identifying the new controlling
8 person and a letter explaining the background of the transaction and certifying that the new
9 control person has complied with applicable filing requirements of the National Association of
10 Securities Dealers to effect a change of control. The amendment will become effective when the
11 amendment and letter have been filed with the administrator or upon a subsequent date
12 designated by the registrant in its amendment.

13
14
15 **SECTION 408. TERMINATION OF EMPLOYMENT OF AGENTS AND**
16 **INVESTMENT ADVISER REPRESENTATIVES.**

17 ~~(b)(a) [Termination of employment]~~ If a registered agent terminates employment by or
18 association with a broker-dealer or issuer, or if a registered investment adviser representative
19 terminates employment by or association with an investment adviser or federal covered
20 investment adviser, or if either registrant terminates activities that require registration as an agent
21 or investment adviser representative, the agent or investment adviser representative shall
22 promptly file a notice. The notice shall be filed by the relevant broker-dealer, investment

adviser, or federal covered investment adviser if the registrant fails to do so. The following rules shall apply:

[(1) When an agent terminates employment by or association with a registered broker-dealer or an issuer, and within 30 days begins employment by or association with another registered broker-dealer or an issuer, the registration of the agent is immediately effective upon payment of the filing fee specified in ~~subsection (d)~~ Section 410.]

[(2) When an investment adviser representative terminates employment by or association with a registered investment adviser, and within 30 days begins employment with or association with another registered investment adviser, the registration of the investment adviser representative is immediately effective upon payment of the filing fee specified in ~~subsection (d)~~ Section 410.]

Reporter's Notes

To better harmonize this Act with current practice under the WebCRD, NASAA proposes an alternative approach to what is now Section 408:

When an agent registered under Section 402 terminates employment by or association with a broker-dealer registered under Section 401, and begins employment by or association with another broker-dealer registered under Section 401, and submits application for registration within 30 days complying with the requirements of 406(a) and payment of the filing fee in Section 410, the registration of the agent:

- (i) is immediately effective if the agent's CRD record contains no new or amended disclosure since the agent was last registered under Section 402.
- (ii) will be temporarily effective if the agent's CRD record contains a new or amended disclosure since the last time the agent received a registration under Section 402. The administrator may withdraw the temporary registration so long as the administrator does so within 30 days of the filing of the application. If the administrator does not withdraw, the temporary registration will become automatically effective on the 31st day.

(iii) notwithstanding, the administrator may require an applicant, whether or not the applicant is registered to undergo full registration under section 402.

**SECTION 409. TERMINATION AND WITHDRAWAL OF REGISTRATION OF
BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS, AND INVESTMENT
ADVISER REPRESENTATIVES.**

~~(c)(b) [Termination of registration]~~ The following rules apply for the termination of registration:

(a) [Termination of Registration.] ~~(1)~~ If the administrator determines that a registrant or applicant for registration is no longer in existence or has ceased to do business as a broker-dealer, agent, investment adviser or investment adviser representative, or is the subject of an adjudication of mental incompetence or is subject to the control of a committee, conservator, or guardian, or cannot reasonably be located, the administrator, by rule or order, may cancel or suspend the registration or cancel or deny the application. The administrator may reinstate a canceled or revoked registration, with or without hearing, and may make such registration retroactive.

(b) [Withdrawal from registration.] (2) Withdrawal from registration ~~as~~ by a broker-dealer, agent, investment adviser, or investment adviser representative becomes effective 30 days after filing of an application to withdraw or within such shorter time as the administrator, by rule or order, specifies, unless a revocation or suspension proceeding is pending when the application is filed. If a proceeding is pending, withdrawal becomes effective when and upon such conditions as the administrator, by rule or order, specifies. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the administrator may nevertheless

1 institute a revocation or suspension proceeding under Section ~~408~~ 412 within one year after
2 withdrawal became automatically effective and enter a revocation or suspension order as of the
3 last date on which registration was effective.
4

5 **SECTION 410. FILING FEES.**

6 ~~(1)~~ (a) [Broker-Dealers.] A broker-dealer shall pay a fee of [\$____] when initially filing an
7 application for registration, and a fee of [\$____] when filing a renewal of registration. If the
8 application or renewal is denied or withdrawn, the administrator shall retain [\$____] of the fee.

9 ~~(2)~~ (b) [Agents.] An agent shall pay a fee of [\$____] when filing an application for
10 registration, a fee of [\$____] when filing a renewal of registration, and a fee of [\$____] when filing
11 for a transfer of registration. If the application, renewal or transfer is denied or withdrawn, the
12 administrator shall retain [\$____] of the fee.

13 ~~(3)~~ (c) [Investment Advisers.] An investment adviser shall pay a fee of [\$____] when filing
14 an application for registration, and a fee of [\$____] when filing a renewal of registration. If the
15 application or renewal is denied or withdrawn, the administrator shall retain [\$____] of the fee.

16 ~~(4)~~ (d) [Investment Adviser Representatives.] An investment adviser representative shall
17 pay a fee of [\$____] when filing an application for registration, a fee of [\$____] when filing a
18 renewal of registration, and a fee of [\$____] when filing a transfer of registration. If the
19 application, renewal or transfer is denied or withdrawn, the administrator shall retain [\$____] of the
20 fee.

21 ~~(6)~~ (e) [Payment.] A person required to pay a [filing or notice] fee under this section may
22 transmit the fee through or to a designee that the administrator, by rule or order, specifies.

1
2 **SECTION ~~409. SUBSTANTIVE REQUISITIONS.~~ 411. ONGOING**
3 **REQUIREMENTS.**

4 ~~(c)~~(a) [Financial standard.] Except as limited by Section 15(h) of the Securities Exchange
5 Act of 1934 or Section 222 of the Investment Advisers Act of 1940, the administrator, by rule or
6 order, may establish minimum financial requirements for registered broker-dealers ~~subject to~~
7 ~~Section 15(h) of the Securities Exchange Act of 1934, and establish minimum financial~~
8 ~~requirements for~~ and registered investment advisers;. ~~limited to Section 222 of the Investment~~
9 ~~Advisers Act of 1940.~~

10 ~~(d)~~(b) [Financial reports.] Except as limited by Section 15(h) of the Securities Exchange
11 Act of 1934 or Section 222(b) of the Investment Advisers Act of 1940 a registered broker-dealer
12 and a registered investment adviser shall file such financial reports as the administrator, by rule or
13 order, prescribes.

14 ~~(a)~~(c) [Recordkeeping.](+) Except as limited by Section 15(h) of the Securities Exchange
15 Act of 1934 ~~and~~ or Section 222 of the Investment Advisers Act of 1940:

16 (1) a registered broker-dealer and a registered investment adviser shall make and
17 keep the accounts, correspondence, memoranda, papers, books, and other records the
18 administrator, by rule or order, specifies; and

19 (2) required records may be maintained in any form of data storage acceptable
20 under Section 17(a) of the Securities Exchange Act of 1934 if they are readily accessible to the
21 administrator.

22 ~~(b)~~(d) [~~Examinations~~ Inspections.] The records of a registered broker-dealer and a

1 registered investment adviser are subject to such reasonable periodic, special, or other
2 ~~examinations~~ inspections by a representative of the administrator within or without this State as
3 the administrator considers necessary or appropriate in the public interest and for the protection of
4 investors. An ~~examination~~ inspection may be made at any time and without prior notice. The
5 administrator may copy, and remove for examination, ~~purposes~~, copies of all records the
6 administrator reasonably considers necessary or appropriate to conduct the ~~examination~~
7 inspection. The administrator may impose a reasonable fee for conducting an ~~examination~~
8 inspection under this subsection.

9 (f) ~~(e)~~ [Custody and discretionary authority bond.] The administrator, by rule or order, may
10 require each broker-dealer and investment adviser that has custody of or discretionary authority
11 over funds or securities of a client to post a bond or other satisfactory form of security in an
12 amount not to exceed [\$ ____], as the administrator, by rule or order, specifies, ~~subject to~~ except
13 as limited by Section 15(h) of the Securities Exchange Act of 1934 ~~and or~~ Section 222 of the
14 Investment Advisers Act of 1940. The administrator may determine the conditions of the bond or
15 other satisfactory form of security. A bond or other satisfactory form of security may not be
16 required of a registrant whose net capital, or, in the case of an investment adviser whose minimum
17 financial requirements, which the administrator, by rule or order, may specify exceeds the amount
18 required by the administrator. Each bond or other satisfactory form of security must permit an
19 action by a person who has a claim under Section 509, to enforce any liability on the bond, and
20 must provide that an action may not be maintained to enforce any liability on the bond unless
21 commenced within the time limitations of Section 509~~(f)~~(j).

22 ~~(g)~~ (f) [Custody rules.] An agent may not have custody over funds or securities of a

1 customer except under the supervision of a broker-dealer, and an investment adviser
2 representative may not have custody over funds or securities of a client except under the
3 supervision of an investment adviser or federal covered investment adviser. The administrator, by
4 rule or order, may prohibit, limit, or impose conditions on an agent from having custody of funds
5 or securities of a customer and on an investment adviser from having custody of securities of
6 securities or funds of a client.

7 ~~(f)~~(g) [Investment advisers brochure rule.] With respect to a registered investment adviser,
8 the administrator, by rule or order, may require that information be furnished or disseminated to
9 clients or prospective clients in this State as necessary or appropriate in the public interest ~~or~~ and
10 for the protection of investors and advisory clients.

12 **Reporter's Notes**

13
14 **Prior Provisions:** NASAA 1986, 1997; and 2000 Amendments to 1956 Act Section 203;
15 RUSA Section 205(b).

16
17 1. In Section 411(a) minimum financial requirements refers, as delineated in Section
18 15(h) of the Securities Exchange Act, to "capital, custody, margin, financial responsibility,
19 making and keeping records, bonding, or financial or operational reporting requirements."

20
21 2. Minimum financial requirements must be maintained during the entire time a person is
22 registered and not merely at the time of the registration. See, e.g., National Grange Mut. Ins. Co.
23 v. Prioleau, 236 S.E.2d 808 (S.C. 1977) (continuing bond requirement); Ridgeway, McLeod &
24 Assoc., 281 A.2d 390 (N.J. Super. Ct. App. Div. 1971) (continuing minimum capital
25 requirement).

26
27 3. Section 613 encourages uniformity of application and construction of this Act among
28 States and with related federal laws and regulations.

29
30 4. Section 411(b)(1) authorizes the administrator to require all records to be preserved for
31 the period the administrator prescribes by rule or order.
32

1 5. The duty in Section 411(b)(2) to correct or update information is limited to information
2 which a reasonable investor would continue to consider important in deciding whether to purchase
3 or sell securities. Cf. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 444-450 (1970);
4 Securities Act Release No. 6084, 17 SEC Dock. 1048, 1054 (1979) (“persons are continuing to
5 rely on all or any material portion of the statements”).
6

7 6. Rule 17a-4 is the current Rule under Section 17(a) of the Securities Exchange Act
8 referred to in Section 411(b)(2) that addresses acceptable forms of data storage.
9

10 7. The administrator’s power to copy and examine records in Section 411(c) is subject to
11 all applicable privileges. See, e.g., 10 L. Loss & J. Seligman, Securities Regulation 4921-4925
12 n.69 (3d ed. rev. 1996).
13
14

15 **SECTION ~~408~~ 412. DENIAL, REVOCATION, SUSPENSION, CANCELLATION,**
16 **WITHDRAWAL, RESTRICTION, CONDITION, OR LIMITATION OF**
17 **REGISTRATION.**

18 (a) [Disciplinary Standards.] The administrator, by order, may deny, revoke, suspend,
19 restrict, condition, or limit an application or registration of a broker-dealer, agent, investment
20 adviser, or investment adviser representative [or censure, bar, or impose a civil penalty upon a
21 registered broker-dealer, agent, investment adviser, or investment adviser representative] if the
22 administrator finds:

23 (1) that the order is in the public interest; and

24 (2) that the applicant or registrant:

25 (A) within the past 10 years has filed an application for registration under
26 this [Act] or the predecessor act in this State which, as of its effective date or as of any date after
27 filing in the case of an order denying effectiveness, was incomplete in any material respect or
28 contained a statement that, in light of the circumstances under which it was made, was false or
29 misleading with respect to a material fact;

1 (B) within the past 10 years has willfully violated or willfully failed to
2 comply with this [Act] or the predecessor act or a rule adopted or order issued under this [Act] or
3 the predecessor act;

4 (C) has been convicted of a felony or within the past 10 years has been
5 convicted of a misdemeanor involving a security, a commodity futures or option contract, or ~~an~~
6 any aspect of a business involving the securities, ~~or commodities, or other business involving~~
7 investments, franchises, insurance, banking, or finance;

8 (D) is enjoined or restrained by a court of competent jurisdiction in an
9 action commenced by the administrator, a State, the Securities and Exchange Commission, or the
10 United States from engaging in or continuing an act or practice involving an aspect of the
11 securities or commodities business, or other business investments, franchises, insurance, banking,
12 or finance;

13 (E) is the subject of an order, entered after notice and opportunity for
14 hearing:

15 (i) by the securities regulator of a State or by the Securities and
16 Exchange Commission denying, revoking, or suspending registration as a broker-dealer, agent,
17 investment adviser, or investment adviser representative;

18 (ii) by the securities regulator of a State or by the Securities and
19 Exchange Commission against a broker-dealer or an investment adviser;

20 (iii) by the Securities and Exchange Commission suspending or
21 expelling the registrant from membership in a self-regulatory organization; or

22 (iv) by a court as a United States Postal Service fraud;

1 (F) is the subject of an adjudication or determination, after notice and
2 opportunity for hearing, by the Securities and Exchange Commission, the Commodities Futures
3 Trading Commission, the Federal Trade Commission, or securities regulator of another State that
4 the person has willfully violated the Securities Act of 1933, the Securities Exchange Act of 1934,
5 the Investment Advisers Act of 1940, the Investment Company Act of 1940, or the Commodity
6 Exchange Act, the securities or commodities law of another State, or a federal or state law under
7 which a business involving investments, franchises, insurance, banking, or finance is regulated;

8 (G) is insolvent, either in the sense that the person's liabilities exceed the
9 person's assets or in the sense that the person cannot meet the person's obligations as they mature,
10 but the administrator may not enter an order against an applicant or registrant under this
11 subparagraph without a finding of insolvency as to the applicant or registrant;

12 (H) is not qualified on the basis of factors such as training, experience, and
13 knowledge of the securities business, except as otherwise provided in subsection (c);

14 (I) within the past 10 years has failed to supervise reasonably an agent,
15 investment adviser representative, or employee, if the agent, investment adviser representative, or
16 employee was subject to the person's supervision and committed a violation of this [Act] or the
17 predecessor act or a rule adopted or order issued under this [Act] or the predecessor act;

18 (J) after notice, failed to pay the proper filing fee within 30 days after being
19 notified by the administrator of a deficiency, but the administrator shall vacate an order under this
20 subparagraph when the deficiency is corrected;

21 (K) within the past 10 years has been found, after notice and opportunity
22 for a hearing: ~~to have:~~

1 (i) found by a court of competent jurisdiction to have willfully
2 violated the law of a foreign jurisdiction under which the business of securities, commodities,
3 insurance, or banking is regulated;

4 (ii) to have been the subject of an order of a securities regulator of a
5 foreign jurisdiction denying, revoking, or suspending the right to engage in the business of
6 securities as a broker-dealer, agent, investment adviser, or investment adviser representative; or

7 (iii) to have been suspended or expelled from membership by a
8 securities exchange or securities association operating under the authority of the securities
9 regulator of a foreign jurisdiction;

10 (L) is the subject of a cease and desist order issued by the Securities and
11 Exchange Commission or issued under the securities or commodities laws of a State; ~~or~~

12 (M) within the past 10 years has engaged in dishonest or unethical practices
13 in the securities or commodities business; or

14 (N) refuses to allow or otherwise impedes the administrator from
15 conducting an audit, examination or inspection, or refuses access to any registrant's office to
16 conduct an audit, examination or inspection.

17 (b) [Statute of Limitation.] Under subsections (a)(2)(E)(i) through (iv) the administrator
18 may not commence a revocation or suspension proceeding more than one year after the date of the
19 order relied on. The administrator may not enter an order on the basis of an order under the state
20 securities act of another state unless the other order was based on facts that would constitute a
21 ground for an order under this section.

22 (c) [Examination.] The administrator, by rule or order, may require that an examination,

1 including an examination developed or approved by an organization of securities administrators,
2 be taken by any class of or all applicants. The administrator, by rule or order, may waive the
3 examination as to a person or class of persons if the administrator determines that the examination
4 is not necessary or appropriate in the public interest or for the protection of investors.

5 (d) [Summary Process.] The administrator, by order, may summarily condition, postpone,
6 suspend, or limit registration pending final determination of a proceeding under this section.

7 (e) [Due Process.] An order may not be issued under this section except under subsection
8 (d) without:

9 (1) appropriate notice to the applicant or registrant, and, if the applicant or
10 registrant is an agent or investment adviser representative, the employer or prospective employer;

11 (2) opportunity for hearing; and

12 (3) findings of fact and conclusions of law in a record [in accordance with the state
13 administrative procedure act].

14 (f) [Control Person Liability.] The administrator, by order, may deny, revoke, suspend,
15 restrict, or limit the application or registration of a person that, directly or indirectly, controls a
16 person not in compliance with a provision of this section to the same extent as the noncomplying
17 person, unless the controlling person acted in good faith and did not directly or indirectly induce
18 the act, practice, or course of business constituting the violation.

19 **Reporter's Notes**

20
21 **Prior Provisions:** 1956 Act Section 204, NASAA 1981, 1986, 1987, 1992, and 1994
22 proposed Amendments; RUSA Sections 212-214.

- 23
24 1. Under Sections 603-605 the administrator may seek other remedies.
25

1 2. Section 412 authorizes the administrator to seek a sanction based on the seriousness of
2 the misconduct.

3
4 3. The term“foreign” means a jurisdiction outside of the United States, not a different
5 state within the United States.

6
7 4. There is no time limit or statute of limitations on felony violations in Section
8 412(a)(2)(C).

9
10 5. Under Section 412(a) the administrator must prove that the denial, revocation,
11 suspension, withdrawal, cancellation, restriction, condition, or limitation both is (1) in the public
12 interest and (2) in one of the enumerated categories in Section 412(a)(2). See, e.g., Mayflower
13 Sec. Co., Inc. v. Bureau of Sec., 312 A.2d 497 (N.J. 1973).

14
15 6. The “public interest” is a much litigated concept that has come to have settled
16 meanings. See generally 6 L. Loss & J. Seligman, Securities Regulation 3056-3057 (3d ed. 1990)
17 (under federal securities laws).

18
19 7. The term “dishonest and unethical practices” in Section 412(a)(2)(M) has been held not
20 to be unconstitutionally vague. See, e.g., Brewster v. Maryland Sec. Comm’n, 548 A.2d 157, 160
21 (M.D. Ct. Spec. App. 1988) (“a broad statutory standard is not vague if it has a meaningful
22 referent in business practice, custom or usage”); Johnson-Bowles Co. v. Division of Sec., 829
23 P.2d 101, 114 (Utah Ct. App. 1992) (such legislative language bespeaks a legislative intent to
24 delegate the interpretation of what constitutes “dishonest and unethical practices” in the securities
25 industry to the administrator).

26
27 8. Section 412(a)(2)(N) can be violated by a refusal to cooperate with an administrator’s
28 reasonable audit, examination, inspection, or investigation, including by withholding or
29 concealing records, refusing to furnish required records, or refusing the administrator reasonable
30 access to any office or location within an office to conduct an audit, examination, inspection or
31 investigation under this Act. However, a request by a person subject to an audit, examination,
32 inspection, or investigation for a reasonable delay to obtain assistance of counsel does not
33 constitute a violation of Section 412(a)(2)(N).

1 **PART 5**

2 **FRAUD AND LIABILITIES**

3
4 **SECTION 501. GENERAL FRAUD.** It is unlawful for any person, in connection with
5 the offer, sale or purchase of any security, directly or indirectly:

- 6 (1) to employ any device, scheme, or artifice to defraud;
- 7 (2) to make any untrue statement of a material fact or to omit to state a material fact
8 necessary in order to make the statement made, in the light of the circumstances under which it is
9 made, not misleading; or
- 10 (3) to engage in any act, practice, or course of business that operates or would operate as a
11 fraud or deceit upon a person.
- 12

13 **Reporter's Notes**

14
15 **Source of Law:** 1956 Act Section 101; RUSA Section 501.

16
17 1. Section 501, which was Section 101 in the 1956 Act, was originally substantially
18 similar to the Rule 10b-5 adopted under the Securities Exchange Act of 1934, which in turn was
19 modeled on Section 17(a) of the Securities Act of 1933, except that Rule 10b-5 was expanded to
20 cover the purchase as well as the sale of any security. There has been significant later federal and
21 state case development.

22
23 2. There are no exemptions from Section 501.

24
25 3. Section 501 applies to any securities transaction. This would include registered,
26 exempt, or federal covered securities. It would also include a rescission offer under Section 510.

27
28 4. Because Rule 10b-5 reaches market manipulation, see 8 L. Loss & J. Seligman,
29 Securities Regulation Ch.10.D (3d ed. 1991), this Act does not include the RUSA market
30 manipulation Section 502, which had no counterpart in the 1956 Act.

31

1 5. The culpability required to be pled or proved under Section 501 is addressed in the
2 relevant enforcement context. See, e.g., Section 508, criminal penalties, where “willfulness” must
3 be proven; Section 509, civil liabilities, which includes a reasonable care defense.
4

5 6. There is no private cause of action, express or implied, under Section 501. Section
6 509(m) expressly provides that only Section 509 provides for a private cause of action.
7

8 7. NASAA urges Official Comments to clarify what requirements are necessary to state a
9 cause of action under Section 501.
10

11 **SECTION 502. PROHIBITED CONDUCT IN PROVIDING INVESTMENT** 12

13 **ADVICE.**

14 (a) [Fraud in Providing Investment Advice.] It is unlawful for a person who advises
15 others, for compensation, either directly or through publications or writings, as to the value of
16 securities or the advisability of investing in, purchasing or selling securities, or who, for
17 compensation and part of a regular business, issues or promulgates analyses or reports concerning
18 securities:

19 (1) to employ any device, scheme, or artifice to defraud ~~the other~~ another person;
20 or

21 (2) to engage in any act, practice, or course of business which operates or would
22 operate as a fraud or deceit upon ~~the other~~ another person.

23 (b) [Rulemaking.] The administrator may, by rule, define an act, practice or course of
24 business of an investment adviser or an investment adviser representative other than a supervised
25 person of a federal covered investment adviser as fraudulent, deceptive or manipulative, and
26 prescribe means reasonably designed to prevent investment advisers and investment adviser
27 representative representatives other than supervised persons of a federal covered investment

1 adviser from engaging in such defined fraudulent, deceptive, or manipulative acts, practices and
2 courses of business.]

3 (c) [Investment Adviser Contracts.] It is unlawful for an investment adviser directly or
4 indirectly to enter into, perform, extend, or renew any investment advisory contract if the contract:

5 (1) provides for compensation to the investment adviser on the basis of a share of
6 capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

7 (2) fails to provide, in substance, that no assignment of such contract will be made
8 by the investment adviser without the consent of the other party to the contract; or

9 (3) fails to provide, in substance, that the investment adviser, if a [general]
10 partnership, will notify the other party to the contract of any change in the membership of the
11 partnership within a reasonable time after the change.

12 (d) [Conflict of Interest Disclosure Requirement.] It is unlawful for an investment adviser,
13 acting as principal for the investment adviser's own account, knowingly to sell a security to or
14 purchase a security from a client, or acting as broker-dealer for a person other than the client,
15 knowingly to effect any sale or purchase of a security for the account of the client, without
16 disclosing to the client in ~~writing~~ a record before completion of the transaction the capacity in
17 which the investment adviser is acting and obtaining the consent of the client to the transaction.

18 The prohibitions of this paragraph do not apply to a transaction with a customer of a broker-dealer
19 if the broker-dealer is not acting as an investment adviser in relation to the transaction.

20
21 **Reporter's Notes**

22 **Source of Law:** 1956 Act Section 102(a); RUSA Section 503; Inv. Adv. Act Section 206.

1 1. Subsection 502(c) or (d) permit an investment adviser to engage in conduct in which a
2 federal covered adviser may lawfully engage under the Investment Advisers Act of 1940 or the
3 rules adopted under that Act.

4
5 2. Under Section 203A(b)(2) of the Investment Advisers Act states retain their authority
6 to investigate and bring enforcement actions against a federal covered investment adviser or a
7 person associated with a federal covered investment adviser. Under Section 502, which applies to
8 any person, a state could bring an enforcement action against a federal covered investment
9 adviser, including a federal covered investment adviser excluded from the definition of
10 investment adviser in Section 102(15)(E).

11
12 3. There is no private cause of action, express or implied, under Section 502. Cf. Section
13 509(m).

14
15 4. As of July 2001 51 state jurisdictions by statute have adopted the substance of Section
16 502(a); none have adopted the substance of Section 502(b); 34 have adopted the substance of
17 Section 502(c); and 24 have adopted the substance of Section 502(d).

18
19
20 **Section 502 Prohibited Conduct in Providing Investment Advice**

21

	Jurisdiction and Citation	Section (a)	Section (b)	Section (c)	Section (d)
22					
23	1 Alabama Sec. 8-6-17	X		X	X
24	2 Alaska Sec. 45.55.020	X		X	
25	3 Arizona Sec. 44-3241	X			
26	4 Arkansas Sec. 23-42-307	X		X	
27	5 California 25235	X			X
28	6 Colorado Sec. 11-51-501	X			X
29	7 Connecticut Sec. 36b-5	X		X	
30	8 Delaware Sec. 7317	X		X	
31	9 District of Columbia Sec. 2665.2.[502]	X		X	X
32	10 Florida Sec. 517.301.	X			
33	11 Georgia Sec. 10-5-12.	X		X	
34	12 Guam Sec. 46102	X		X	
35	13 Hawaii Sec. 485-25	X		X	X
36	14 Idaho Sec. 30-1404	X		X	
37	15 Illinois Sec. 12[5/121	X			
38	16 Indiana Sec. 23-2-1-12.1	X		X	X
39	17 Iowa Sec. 502.408	X		X	
40	18 Kansas 17-1253	X		X	X

		Jurisdiction and Citation	Section (a)	Section (b)	Section (c)	Section (d)
1	19	Kentucky Sec. 292.320	X		X	
2	20	Louisiana Sec. 51:712	X			
3	21	Maine Sec. 10203	X			
4	22	Maryland Sec. 11-302	X		X	X
5	23	Massachusetts Sec. 102	X			
6	24	Michigan Sec. 451.502	X		X	X
7	25	Minnesota Sec. 80A.02	X			X
8	26	Mississippi Sec. 75-71-503	X		X	X
9	27	Missouri Sec. 409.102	X		X	X
10	28	Montana Sec. 30-10-301	X		X	X
11	29	Nebraska Sec. 8-1102	X		X	X
12	30	Nevada Sec. 90.590	X			
13	31	New Hampshire Sec. 421-B:4	X			
14	32	New Jersey Sec. 49:3-53	X		X	
15	33	New Mexico Sec. 58-13B-33	X		X	
16	34	New York				
17	35	North Carolina Sec. 78A-8	X		X	X
18	36	North Dakota Sec. 10-04-10.1	X		X	X
19	37	Ohio Sec. 1707.44	X			X
20	38	Oklahoma Sec. 102	X		X	
21	39	Oregon Sec. 59.135	X			
22	40	Pennsylvania Sec. 404	X			X
23	41	Puerto Rico Sec. 852. [102]	X		X	
24	42	Rhode Island Sec. 7-11-503	X			X
25	43	South Carolina Sec. 35-1-1220	X		X	X
26	44	South Dakota Sec. 47-3 IA-102	X		X	X
27	45	Tennessee Sec. 48-2-121	X			
28	46	Texas				
29	47	Utah Sec. 61-1-2	X		X	
30	48	Vermont Sec. 4224	X		X	X
31	49	Virginia Sec. 13.1-503	X		X	X
32	50	Washington Sec. 21.20.020	X		X	X
33	51	West Virginia Sec. 32-4-102	X		X	
34	52	Wisconsin Sec. 551.44	X			
35	53	Wyoming Sec. 17-4-102	X			

Jurisdiction and Citation	Section (a)	Section (b)	Section (c)	Section (d)
TOTALS:	51	-0-	33	24

5. The SIA opposes Sections 502(b)-(d) in this draft and would instead include new Sections 502(b)-(c):

(b) Subsection (a) of this section shall not apply to a broker-dealer or it's agents whose actions are solely incidental to the conduct of the business of the broker-dealer and who receive no special compensation for their services.

(c) The administrator may not by rule interpret this section nor adopt any rule, nor by rule define any act, practice or course of business of a federal covered investment adviser to be a violation of subparagraph (a) if such act, practice or course of business would not continue a fraudulent act under the Investment Advisers Act of 1940 or the rules promulgated thereunder.

6. Pennsylvania instead proposes new language: "The prohibitions of this Section shall apply to federal covered advisers only to the extent that the prohibited conduct involves fraud."

SECTION 503. EVIDENTIARY BURDEN.

(a) [Civil.] In a civil action or administrative proceeding under this [Act], a person claiming an exemption, exception, preemption, or exclusion has the burden of proving persuasion to prove the applicability of the exemption, exception, preemption, or exclusion.

(b) [Criminal.] In a criminal proceeding under this [Act], a person claiming an exemption, exception, preemption, or exclusion has the burden of going forward with evidence of the claim.

Reporter's Notes

Source of Law: 1956 Act Section 402(d); RUSA Section 608.

1. The Official Comment 2 to RUSA Section 608 explained:

Section (b) has been added to clarify the parties' respective obligations in a criminal proceeding. While the standard of proof that the prosecuting attorney is

1 required to meet to obtain a conviction is establishing the requisite elements of the
2 criminal offense “beyond a reasonable doubt,” a defendant claiming an exemption
3 or exception as a defense has the burden of offering evidence to establish that
4 defense.
5

6 2. The burden of proving an exemption or exception is upon the party claiming it. See,
7 e.g., *United States ex. rel. Schott v. Tehan*, 365 F.2d 191, 195 (6th Cir. 1966) (Ohio blue sky law
8 constitutionally shifts burden of proof to defendant); *Commonwealth v. David*, 309 N.E.2d 484,
9 488 (Mass. 1974) (exemption is an affirmative defense); *State v. Frost*, 387 N.E.2d 235, 238-239
10 (Ohio 1979) (it is not unconstitutional to require the burden of proof as an affirmative defense to
11 prove a securities law exemption).
12
13

14 **SECTION 504. FILING OF SALES AND ADVERTISING LITERATURE.**

15 (a) [Filing Requirement.] Except as otherwise provided in subsection (b), the
16 administrator, by rule or order, may require the filing of any prospectus, pamphlet, circular, form
17 letter, advertisement, sales literature, or advertising communication addressed or intended for
18 distribution to prospective investors, including clients or prospective clients of an investment
19 adviser registered or required to be registered in this State, in connection with a security or
20 investment advice.

21 (b) [Scope Limitations.] This section does not apply to any such communication relating
22 to a federal covered security, a federal covered adviser, or any security or transaction exempted by
23 Sections 201 and 202.
24

25 **Reporter’s Notes**

26 **Source of Law:** 1956 Act Section 403; RUSA Section 405.
27
28

29 1. The prospectuses, pamphlets, circulars, form letters, advertisements, sales literature or
30 advertising communications, or other records includes material disseminated electronically or
31 available on a web site.
32

2. The administrator may bring civil enforcement in a court under Section 603 or institute administrative enforcement under Section 604 or 605 to prevent publication, circulation or use of any materials required by the administrator to be filed under Section 504 that have not been filed.

3. Pennsylvania opposes extending Section 504(b) to Section 203, noting that under ULOE an administrator currently can require a filing.

SECTION 505. MISLEADING FILINGS. It is unlawful for a person to make or cause to be made, in a record that is used in a proceeding or filed under this [Act], a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with such statement, to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading.

Reporter's Notes

Source of Law: 1956 Act Section 404; RUSA Section 504. The definition of “materiality” in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (U.S. 1976) (“an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote”) has generally been followed in both federal and state securities law. See 4 L. Loss & J. Seligman, *Securities Regulation* 2071-2105 (3d ed. rev. 2000).

SECTION 506. MISREPRESENTATIONS CONCERNING REGISTRATION OR EXEMPTION.—(a) The filing of an application for registration, a registration statement, or a notice filing under this [Act], or the registration of a person, the notice filing by a person, or the registration of a security under this [Act] does not constitute a finding by the administrator that a record filed under this [Act] is true, complete, and not misleading. The filing or registration or the availability of an exemption, exception, preemption, or exclusion for a security or a

1 transaction does not mean that the administrator has passed upon the merits or qualifications of, or
2 recommended or given approval to, a person, security, or transaction. ~~(b)~~ It is unlawful to make,
3 or cause to be made, to a purchaser, customer, client, or prospective customer or client, a
4 representation inconsistent with ~~subsection (a)~~ this section.

6 **Reporter's Notes**

7
8 **Source of Law:** RUSA Section 505; 1956 Act Section 405. This Section follows the
9 1956 Act and RUSA, as well as state securities statutes generally, in providing that a
10 misrepresentation concerning registration or an exemption is unlawful.
11

12 **[SECTION 507. QUALIFIED IMMUNITY.]**

13
14 (a) [Truthful statements required.] A broker-dealer, agent, investment adviser, or
15 investment adviser representative shall make truthful and accurate statements in any record
16 required by the administrator, the Securities and Exchange Commission, or a self-regulatory
17 organization.

18 (b) [Qualified immunity.] A broker-dealer, agent, investment adviser, or investment
19 adviser representative is not liable to another broker-dealer, agent, investment adviser, or
20 investment adviser representative for defamation relating to an alleged untrue statement that is
21 contained in a record required by the administrator, the Securities and Exchange Commission, or a
22 self-regulatory organization unless it is shown by clear and convincing evidence that the person
23 knew, or should have known at the time that the statement was made, that it was false in any
24 material respect or the person acted in reckless disregard of the statement's truth or falsity.]
25

1 **Reporter's Notes**

2
3 **Source of Law:** National Association of Securities Dealers, Inc. Proposal Relating to
4 Qualified Immunity in Arbitration Proceedings for Statements Made in Forms U-4 and U-5.
5

6 1. The National Association of Securities Dealers proposal was reprinted in Securities
7 Exchange Release 39,892, 66 SEC Dock. 2473 (1998). It has not been approved by the Securities
8 and Exchange Commission.
9

10 2. The National Association of Securities Dealers proposal is limited to arbitration
11 proceedings.
12

13 3. An alternative approach would be a standard providing for absolute immunity. See
14 generally Wright, Form U-5 Defamation, 52 Wash. & Lee L. Rev. 1299 (1995).
15

16 4. Securities administrators or self-regulatory organizations generally are subject to
17 absolute or qualified immunity for actions of their employees within the course of their official
18 duties. See 10 L. Loss & J. Seligman, Securities Regulation 4818-4821 (3d ed. rev. 1996).
19

20 5. As is generally the law "truth is a complete defense to a defamation action." Andrews
21 v. Prudential Sec., Inc., 160 F.3d 304, 308 (6th Cir. 1998).
22

23 6. Through June 2001 no state had adopted in its securities statute a qualified immunity
24 provision.
25

26 **SECTION 508. CRIMINAL PENALTIES.**
27

28 (a) [Criminal penalties.] A person that willfully violates this [Act], or a rule adopted or
29 order issued under this [Act], except Section 504 or the notice filing requirements of Section 302
30 or 405, or who willfully violates Section 505 knowing the statement made to be false or
31 misleading in a material respect, upon conviction, shall be fined not more than [\$___] or
32 imprisoned not more than [___] years, or both. ~~but~~ A person convicted of violating a rule or order
33 under this [Act] may be sued, fined, but may not be imprisoned for the violation of a rule adopted
34 or order issued if the person proves ~~that the person did not have~~ lack of knowledge of the rule or
35 order.

(b) [Statute of limitations.] An indictment or information may not be returned under this [Act] more than [____ years] after the commission of the offense.

(b)(c) [Criminal reference not required.] The [Attorney General or the proper prosecuting attorney] with or without a reference from the administrator, may commence appropriate criminal proceedings under this [Act].

(c)(d) ~~[No limitation on other criminal enforcement.]~~ This [Act] does not limit the power of this State to punish a person for conduct that otherwise constitutes a crime under the laws of this State's law.

Reporter's Notes

Source of Law: 1956 Act Section 409.

1. This Section follows the 1956 Act and the federal securities laws in awarding criminal penalties for any willful violation of the Act. RUSA Section 604 distinguished between felonies and misdemeanors, limiting willful violations of cease and desist orders to a misdemeanor.

2. The term “willfully” has the same meaning in Section 508 as it did in the 1956 Act. All that is required is proof that a person acted intentionally in the sense that the person was aware of what he or she was doing. Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required. This definition has been followed by most subsequent courts. See, e.g., *State v. Hodge*, 460 P.2d 596, 604 (Kan. 1969) (“No specific intent is necessary to constitute the offense where one violates the securities act except the intent to do the act denounced by the statute”); *State v. Nagel*, 279 N.W.2d 911, 915 (S.D. 1979) (“[I]t is widely understood that the legislature may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer”); *State v. Fries*, 337 N.W.2d 398, 405 (Neb. 1983) (proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under a state’s blue sky law); *People v. Riley*, 708 P.2d 1359, 1362 (Colo. 1985) (“A person acts ‘knowingly’ or ‘willfully’ with respect to conduct . . . when he is aware that his conduct . . . exists”); *State v. Larsen*, 865 P.2d 1355, 1358 (Utah 1993) (willful implies a willingness to commit the act, not an intent to violate the law or to injure another or acquire any advantage); *State v. Montgomery*, 17 P.3d 292, 294 (Idaho 2001) (Docket No. 24670) (bad faith is not required for a violation of a state securities act; willful implies “simply a purpose or willingness to commit the act or make the omission referred to”); *State v.*

1 Dumke, 901 S.W.2d 100, 102 (Mo. Ct. App. 1995) (*mens rea* not required); State v. Mueller, 549
2 N.W.2d 455, 460 (Wis. Ct. App. 1996) (willfulness does not require proof that the defendant
3 acted with intent to defraud or knowledge that the law was violated).

4
5 “Willfully” would not include negligent or inadvertent conduct.
6

7 3. The appropriate state prosecutor under Section 508(c) may decide whether to bring a
8 criminal action under this statute, another statute, or, when applicable, common law.
9

10 4. This Section does not specify maximum dollar amounts for criminal fines, maximum
11 terms for imprisonment, nor the years of limitation, but does provide for each state including
12 appropriate numbers for these matters.
13

14 5. In certain states the administrator has full or limited criminal enforcement powers.
15
16
17

18 **~~SECTION 509. CIVIL LIABILITY.~~**
19

20 ~~—— (a) The application of this section is limited by the Securities Litigation Uniform~~
21 ~~Standards Act of 1998.~~

22 ~~—— (b) A person who:~~

23 ~~—— (1) sells a security in violation of Section 301; or~~

24 ~~—— (2) sells a security by means of any untrue statement of a material fact or an~~
25 ~~omission to state a material fact necessary in order to make the statement made, in the light of the~~
26 ~~circumstances under which they are made, not misleading, the buyer not knowing of the untruth or~~
27 ~~omission, and the seller does not sustain the burden of proof that the seller did not know and in~~
28 ~~the exercise of reasonable care could not have known of the untruth or omission is liable to the~~
29 ~~buyer. The buyer may maintain an action at law or in equity to recover the consideration paid for~~
30 ~~the security, [together with interest at x percent per year from the date of payment,] costs, and~~
31 ~~reasonable attorneys’ fees determined by the court, less the amount of any income received on the~~

1 ~~security, upon the tender of the security, or for damages provided in paragraph (j)(1).~~

2 ~~—— (c) A person who sells a security in violation of Section 401(a), 402(a), or 506(b) is liable~~
3 ~~to the buyer. The buyer may sue at law or in equity to recover the commissions paid to purchase~~
4 ~~the security [together with interest at X percent per year from the date of payment,] costs, or~~
5 ~~reasonable attorneys' fees determined by the court.~~

6 ~~(d) A person who buys a security by means of an untrue statement of a material fact or an~~
7 ~~omission to state a material fact necessary in order to make the statement made, in light of the~~
8 ~~circumstances under which it is made, not misleading, the seller not knowing of the untruth or~~
9 ~~omission, and the buyer does not sustain the burden of proof that the buyer did not know and in~~
10 ~~the exercise of reasonable care could not have known of the untruth or omission is liable to the~~
11 ~~seller. The seller may maintain an action at law or in equity to recover the security, costs, or~~
12 ~~reasonable attorneys' fees determined by the court, plus the amount of any income received on the~~
13 ~~security or for damages provided in paragraph (j)(2).~~

14 ~~—— (e) An investment adviser or investment adviser representative who violates Section~~
15 ~~403(a), 404(a), or 506(b), whether through the issuance of analyses, reports, or otherwise, is liable~~
16 ~~to a person who provides directly or indirectly any consideration for advice as to the value of~~
17 ~~securities or their purchase or sale. That person may maintain an action at law or in equity to~~
18 ~~recover the consideration paid for the advice [together with interest at [x] percent from the date of~~
19 ~~payment], plus costs and reasonable attorneys' fees determined by the court.~~

20 ~~—— (f) A person who receives directly or indirectly any consideration from another person for~~
21 ~~advice as to the value of securities or their purchase or sale, whether through the issuance of~~
22 ~~analyses, reports, or otherwise and employs a device, scheme, or artifice to defraud other person~~

1 ~~or engages in any act, practice, or course of business that operates or would operate as a fraud or~~
2 ~~deceit on the other person, is liable to the other person. The other person may maintain an action~~
3 ~~at law or in equity to recover the consideration paid for the advice and any loss due to the advice,~~
4 ~~[together with interest at [x] percent from the date of payment of the consideration,] costs, and~~
5 ~~reasonable attorney's fees determined by the court, less the amount of any income received from~~
6 ~~the advice.~~

7 ~~—— (g) The following persons are liable jointly and severally with and to the same extent as a~~
8 ~~violation under subsections (b) through (f):~~

9 ~~———— (1) a person who directly or indirectly controls a person liable under subsections~~
10 ~~(b) through (f);~~

11 ~~———— (2) a person who is a managing partner, executive officer, or director of a person~~
12 ~~liable under subsections (b) through (d) including each person occupying a similar status or~~
13 ~~performing similar functions;~~

14 ~~———— (3) a person who is an employee of a person liable under subsections (b) through~~
15 ~~(f) who materially aids and abets conduct giving rise to the liability; and~~

16 ~~———— (4) a person who is a broker-dealer or agent or an investment adviser or investment~~
17 ~~adviser representative who materially aids and abets the conduct giving rise to the liability in~~
18 ~~subsections (b) through (f).~~

19 ~~—— There is contribution as in cases of contract among the several persons liable under this~~
20 ~~Section.~~

21 ~~—— (h) A person specified in subsections (g)(1) and (2) will not be liable if the person sustains~~
22 ~~the burden of proof that the person did not know, and in exercise of reasonable care could not~~

1 ~~have known, of the existence of the facts by reason of which the liability is alleged to exist.~~

2 ~~—— (i) The tender specified in this subsection (b) may be made at any time before entry of~~
3 ~~judgment. Tender requires only notice in a record of willingness to exchange the security for the~~
4 ~~amount specified. A purchaser who no longer owns the security may recover damages.~~

5 ~~—— (j) Damages in an action arising:~~

6 ~~(1) under subsection (b) are the amount that would be recoverable upon a tender~~
7 ~~less the value of the security when the purchaser disposed of it, together with interest [at x percent~~
8 ~~per year from the date of disposition of the security,] costs, and reasonable attorneys' fees~~
9 ~~determined by the court;~~

10 ~~—— (2) under subsection (d) are the difference between the price at which the securities~~
11 ~~were purchased and the market value the securities would have had at the time of the purchase in~~
12 ~~the absence of the defendant's action, omission, or transaction causing liability, together with~~
13 ~~interest [at x percent per year from the date of purchase of the security], costs, and reasonable~~
14 ~~attorneys' fees determined by the court.~~

15 ~~—— (k) A cause of action under this section survives the death of an individual who might~~
16 ~~have been a plaintiff or defendant.~~

17 ~~—— (l) A person may not obtain relief:~~

18 ~~—— (1) under paragraph (b)(1) or subsection (e) unless an action is commenced within~~
19 ~~one year after the act, omission, or transaction constituting the violation;~~

20 ~~—— (2) under paragraph (b)(2) or subsection (d) or (f) unless an action is commenced~~
21 ~~within one year after discovery, and one [three] year[s] after discovery should have been made by~~
22 ~~the exercise of reasonable care, or three [five] years after the act, omission, or transaction~~

1 ~~constituting the violation.~~

2 ~~—— (m) A purchaser may not commence an action under this section if:~~

3 ~~—— (1) the purchaser received in a record, before an action is commenced, an offer to~~
4 ~~purchase:~~

5 ~~—— (A) stating the respect in which liability under this section may have arisen~~
6 ~~and fairly advising the purchaser of the purchaser's rights in connection with the offer to~~
7 ~~repurchase;~~

8 ~~—— (B) if the basis for relief under this subsection may have been a violation of~~
9 ~~subsection (e) or (f), including financial and other information necessary to correct all material~~
10 ~~misstatements or omissions in the information that was required by this [Act] to be furnished to~~
11 ~~the purchaser as of the time of the sale of the security to the purchaser;~~

12 ~~—— (C) offering to repurchase the security for cash, payable on delivery of the~~
13 ~~security, equal to the consideration paid, [together with interest at x percent per year] from the~~
14 ~~date of payment, less income received thereon, or, if the purchaser no longer owns the security,~~
15 ~~offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages~~
16 ~~computed in the manner provided in subparagraph (j)(1); and~~

17 ~~—— (D) stating that the offer may be accepted by the purchaser within 30 days~~
18 ~~after the date of its receipt by the purchaser or any shorter period, not less than three days that the~~
19 ~~administrator by order prescribes;~~

20 ~~—— (2) the offer under paragraph (1) [is filed with administrator before the offering~~
21 ~~and] conforms in form and content with any rule prescribed by the administrator;~~

22 ~~—— (3) the offeror has the present ability to pay the amount offered under paragraph~~

1 ~~(1);~~

2 ~~————— (4) the offer under paragraph (i) is received by the purchaser; and~~

3 ~~————— (5) the purchaser accepts the offer in a record within the period specified under~~
4 ~~paragraph (1)(D) and is paid in accordance with the terms of the offer.~~

5 ~~———— (n) A person who has made or engaged in the performance of a contract in violation of this~~
6 ~~[Act] or a rule adopted or order issued under this [Act], or who has acquired a purported right~~
7 ~~under the contract with knowledge of the facts by reason of which its making or performance was~~
8 ~~in violation, may not base an action on the contract.~~

9 ~~(o) A condition, stipulation, or provision binding a person purchasing or selling a security~~
10 ~~or receiving investment advice or waiving compliance with this [Act] or a rule adopted or order~~
11 ~~issued under this [Act] is void.~~

12 ~~———— (p) The rights and remedies provided by this [Act] are in addition to any other rights or~~
13 ~~remedies that may exist at law or in equity, but this [Act] does not create a cause of action not~~
14 ~~specified in this section or Section 406(n).~~

15
16 ~~————~~ **SECTION 509. CIVIL LIABILITY.**

17 ~~———— (a) [Securities Litigation Uniform Standards Act.] Enforcement of civil liability under this~~
18 ~~Section is subject to the Securities Litigation Uniform Standards Act of 1998.~~

19 ~~(b) [Liability of seller to buyer.] A person who sells a security in violation of Section 301,~~
20 ~~or by means of an untrue statement of a material fact or an omission to state a material fact~~
21 ~~necessary in order to make the statement made, in light of the circumstances under which it is~~
22 ~~made, not misleading, the buyer not knowing the untruth or omission, and the seller not sustaining~~

1 the burden of proof that the seller did not know and in the exercise of reasonable care could not
2 have known of the untruth or omission, is liable to the buyer. An action under this subsection is
3 governed by the following rules:

4 (1) The buyer may commence an action at law or in equity to recover the
5 consideration paid for the security, less the amount of any income received on the security,
6 together with interest at [] percent per year from the date of the purchase, costs, and reasonable
7 attorneys' fees determined by the court, upon the tender of the security, or for damages as
8 provided in paragraph (3).

9 (2) The tender referred to in paragraph (1) may be made any time before entry of
10 judgment. Tender requires only notice in a record of [ownership of the security and] willingness
11 to exchange the security for the amount specified. A buyer who no longer owns the security may
12 recover damages.

13 (3) Damages in an action arising under this subsection are the amount that would
14 be recoverable upon a tender less the value of the security when the buyer ~~purchaser~~ disposed of
15 it, together with interest at [] percent per year from the date of ~~disposition of the security~~
16 purchase, costs, and reasonable attorneys' fees determined by the court.

17 (c) [Liability of buyer to seller.] A person who buys a security by means of an untrue
18 statement of a material fact or omission to state a material fact necessary in order to make the
19 statement made, in light of the circumstances under which it is made, not misleading, the seller
20 not knowing of the untruth or omission, and the buyer not sustaining the burden of proof that the
21 buyer did not know and in the exercise of reasonable care could not have known of the untruth or
22 omission, is liable to the seller. An action under this subsection is governed by the following

1 rules:

2 (1) The seller may commence an action at law or in equity to recover the security,
3 together with any income received on the security, costs, and reasonable attorneys' fees
4 determined by the court, upon the tender of the purchase price, or for damages as provided in
5 paragraph (3).

6 (2) The tender referred to in paragraph (1) may be made any time before entry of
7 judgment. Tender requires only notice in a record of the present ability to pay the amount
8 tendered and willingness to take delivery of the security for the amount specified. If the buyer no
9 longer owns the security, the seller may recover damages.

10 (3) Damages in an action arising under this subsection are the difference between
11 the price at which the security was sold and the value the security would have had at the time of
12 the sale in the absence of the seller's conduct causing liability, together with interest at []
13 percent per year from the date of sale of the security, costs and reasonable attorneys' fees
14 determined by the court.

15 (d) [Liability of unregistered broker-dealer and agent.] A broker-dealer or agent who sells
16 or buys a security in violation of Section 401(a), 402(a), or 506 is liable to the customer. The
17 customer may commence an action at law or in equity to recover the commissions paid to
18 purchase or to sell the security, together with interest at [] percent per year from date of
19 payment, costs, and reasonable attorneys' fees determined by the court.

20 (e) [Liability of unregistered investment adviser and investment adviser representative.]
21 An investment adviser or investment adviser representative who provides investment advice for a
22 fee in violation of Section 403(a), 404(a), or 506(b) is liable to the client. The client may

1 commence an action at law or in equity to recover the consideration paid for the advice, together
2 with interest at [] percent from the date of payment, costs and reasonable attorneys' fees
3 determined by the court.

4 (f) [Liability for investment advice]. A person who receives directly or indirectly any
5 consideration from another person for advice as to the value of securities or their purchase or sale,
6 whether through the issuance of analyses, reports, or otherwise and employs a device, scheme, or
7 artifice to defraud such other person or engages in any act, practice, or course of business that
8 operates or would operate as a fraud or deceit on the other person, is liable to the other person.
9 That person may commence an action at law or in equity to recover the consideration paid for the
10 advice and the amount of any loss due to the advice, together with interest at [] percent from the
11 date of the transaction causing the loss, plus costs and reasonable attorney's fees determined by
12 the court, less the amount of any income received as a result of the transaction causing the loss.

13 (g) [Joint and several liability.] The following persons are liable jointly and severally with
14 and to the same extent as persons liable under subsections (b) through (f):

15 (1) a person who directly or indirectly controls a person liable under subsections
16 (b) through (f), unless the person sustains the burden of proof that the person did not know, and in
17 the exercise of reasonable care could not have known, of the existence of the facts by reason of
18 which the liability is alleged to exist;

19 (2) an individual who is a managing partner, executive officer, or director of a
20 person liable under subsections (b) through (f), including each individual occupying a similar
21 status or performing similar functions, unless the person sustains the burden of proof that the
22 individual did not know, and in the exercise of reasonable care could not have known, of the

1 existence of the facts by reason of which the liability is alleged to exist;

2 _____ (3) an individual who is an employee of a person liable under subsections (b)

3 through (f) who materially aids and abets the conduct giving rise to the liability, and

4 _____ (4) a person who is a broker-dealer, agent, investment adviser or investment

5 adviser representative who materially aids and abets the conduct giving rise to the liability under

6 subsections (b) through (f).

7 _____ (h) [Right of Contribution.] A person liable under this section has a right of contribution

8 as in cases of contract against any other person liable under this section for the same conduct.

9 _____ (i) [Survival of cause of action.] A cause of action under this section survives the death of

10 a person who might have been a plaintiff or defendant.

11 _____ (j) [Statute of limitations.] A person may not obtain relief:

12 _____ (1) under subsection (b) for violation of Section 301, or under subsection (d) or (e),

13 unless the action is commenced within one year after the violation occurred.

14 _____ (2) under subsection (b) other than for violation of Section 301, or under

15 subsection (c) or (f), unless the action is commenced within [the earlier of] one year after

16 discovery of the violation, one year [two, three years] after discovery of the violation should have

17 been made by the exercise of reasonable care, and three [four, five] years after the violation

18 occurred.

19 _____ (k) [No enforcement of violative contract.] A person who has made or engaged in the

20 performance of a contract in violation of this [Act] or a rule adopted or order issued under this

21 [Act], or who has acquired a purported right under the contract with knowledge of the facts by

22 reason of which its making or performance was in violation, may not base an action on the

contract.

(l) [No contractual waiver.] A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advise to waive compliance with this [Act] or a rule adopted or order issued under this [Act] is void.

(m) [Survival of other rights or remedies.] The rights and remedies provided by this [Act] are in addition to any other rights or remedies that may exist at law or in equity, bu this [Act] does not create a cause of action not specified in this section or Section 409(f).

Reporter's Notes

Source of Law: 1956 Act Section 410; RUSA Sections 605-607, 609, 802.

1. Section 509(a) referencing the Securities Litigation Uniform Standards Act of 1998 modifies the entire Section 509.

2. In Section 509(g)(2) partner is intended to be limited to partners with management responsibilities rather than a partner with a passive investment.

Some 42 or more jurisdictions have adopted each provision of Section 509(g).

Section 509(g) – Joint and Several Liability

Jurisdiction and Citation	Section A –	Section B–	Section C–	Section D--
	Directly of indirectly controls person liable	Managing partner, executive officer, etc.	Employee of person liable who materially aids and abets	Broker-dealer or investment adviser who materially aids and abets
1 Alabama Sec. 8-6-19(c)	X	X	X	
2 Alaska Sec. 45.55.930(c)	X	X	X	X

	Jurisdiction and Citation	Section A –	Section B–	Section C–	Section D--
		Directly of indirectly	Managing partner,	Employee of	Broker-dealer
		controls person liable	executive officer, etc.	person liable	or
					investm
					ent
				who materially	adviser
					who
				aids and abets	materially aids
					and abets
3	Arizona Sec. 44-2003.			X	X
4	Arkansas Sec. 23-42-106(c)	X	X	X	X
5	California (See Notes)	X	X ¹	X ²	³
6	Colorado Sec. 11-51-604(5) ⁴	X	X	X	X
7	Connecticut Sec. 36b-29(c)	X	X	X	X
8	Delaware Sec. 7323(b)	X	X	X	X
9	District of Columbia Sec.				
10	2666.5[605](c)	X	X	X	X
11	Florida Sec. 517.211.				
12	Georgia Sec. 10-5-14(c)	X	X	X	X
13	Guam Sec. 46410(b)	X	X	X	X
14	Hawaii Sec. 485-20(a)		X	X ⁵	
15	Idaho Sec. 30-1446(2)	X	X	X	X
16	Illinois Sec. 13[5/13].A		X		X
17	Indiana Sec. 23-2-1-19(d)	X	X	X	X
18	Iowa Sec. 502.503.1	X	X	X	X
19	Kansas 17-1268(b)	X	X	X	X
20	Kentucky Sec. 292.480	X	X	X	X
21	Louisiana Sec. 51:714(B)	X	X	⁶	X ⁷
22	Maine Sec. 10605(3)	X	X	X	X
23	Maryland Sec. 11-703(c)	X	X	X	X
24	Massachusetts Sec. 410(b)	X	X	X	X
25	Michigan Sec. 451.810(b)	X	X	X	X
26	Minnesota Sec. 80A.23.				
27	Subd.3	X	X	X	X
28	Mississippi Sec. 75-71-719	X	X	X	X

¹ California Sec. 25504. Controlling person – Joint and several liability

² California Sec. 25504.1. Person materially assisting in violation – Joint and several liability

³ Id. – “Any person who materially assists in any violation...”

⁴ Colorado – “...any person”

⁵ Hawaii – “... if the...agent has personally participated or aided in any way...”

⁶ Louisiana – “... every person occupying a similar status or performing similar functions...”

⁷ Louisiana – “...who participates in a material way”

1	27 Missouri Sec. 409.411(c)	X	X	X	X
2	28 Montana Sec. 30-10-307(2)	X	X	X	X
3	29 Nebraska Sec. 8-1118(3)	X	X	X	X
4	30 Nevada Sec. 90.660.4	X	X	X	X
5	31 New Hampshire Sec.				
6	421-B:25(III)	X	X	X	X
7	32 New Jersey Sec. 49:3-71(d)	X	X	X	X
8					
9	Jurisdiction and Citation	Section A –	Section B–	Section C–	Section
10					D--
11		Directly of indirectly	Managing partner,	Employee of	Broker-dealer
12		controls person liable	executive officer, etc.	person liable	or
13					investm
14					ent
15				who materially	adviser
16					who
17				aids and abets	materially aids
18					and abets
19	33 New Mexico Sec.				
20	58-13B-40(F)	X	X	X	X
21	34 New York Sec. 359-g				
22	35 North Carolina				
23	Sec.78A-56(c)	X	X	X	X
24	36 North Dakota Sec. 10-04-17 ⁸				
25	37 Ohio Sec. 1707.41		X		
26	38 Oklahoma Sec. 408(b) ⁹	X	X		
27	39 Oregon Sec. 59.995	X	X	X	X
28	40 Pennsylvania Sec. 501(c) ¹⁰				
29	41 Puerto Rico Sec. 890(b)	X	X	X	X
30	42 Rhode Island				
31	Sec. 7-11-605(d)	X	X	X	X
32	43 South Carolina				
33	Sec. 35-1-1490				
34	44 South Dakota Sec. 47-31A				
35	-410(c)	X	X	X	X

⁸ North Dakota – “The person making such sale or contract for sale, and every director, officer, or agent of or for such seller who shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser who may sue wither at law or in equity to recover...”

⁹ Oklahoma – “Every person who materially participates or aids in a sale or purchase made by any person liable...or how directly or indirectly controls any person so liable, shall also be liable jointly and severally...”

¹⁰ Pennsylvania – “Any person who willfully participates in any act or transactions in violation of section 402 shall be liable to any other person who purchased or sells any security at a price which was affected by the act or transaction for the damages sustained as a result of such act or transaction.”

1	45 Tennessee Sec. 48-2-122(g)	X	X	X	X
2	46 Texas Sec. 33[581-33](F)	X			
3	47 Utah Sec. 61-1-22(4)(a)	X	X	X	X
4	48 Vermont Sec. 4240(f)	X	X	X	X
5	49 Virginia Sec. 13.1-522(C)	X	X	X	X
6	50 Washington				
7	Sec. 21.20.430(3)	X	X	X	X
8	51 West Virginia				
9	Sec.32-4-410(b)	X	X	X	X
10	52 Wisconsin Sec. 551.59(4)	X	X	X	X
11	53 Wyoming Sec. 17-4-122(b)	X	X	X	X
12					
13	TOTALS:	<u>44</u>	<u>46</u>	<u>43</u>	<u>42</u>
14					
15					

16 3. The SIA proposes an additional defense under Section 509(g) that would provide: “It is
17 also a defense that the controlling person acted in good faith and did not, directly or indirectly,
18 induce the act, omission or transaction constituting a violation.”

19
20 4. There were several other proposals to revise Section 509, including:

21
22 a. Adding an inadvertent violation defense such as that in Rule 508 under the Securities
23 Act of 1933; limiting the scope of awards; or adding State power to compel restitution.

24
25 b. NASAA urges that there be a private right of action for secondary market fraud in
26 Section 509.

27
28 c. In contrast the SIA proposes limiting derivative liability under Section 509(g) to control
29 persons and proposes eliminating from Section 509(m) liability for violations under Section
30 411(e).

31
32 d. At the NCCUSL annual meeting, it was suggested that a plaintiff also be allowed to
33 recover reasonable litigation expenses.

34
35 5. In Section 509(g), the phrase “the buyer not knowing of the untruth or omission” has
36 been read as requiring proof that the plaintiff exercised reasonable care under the circumstances.
37 S & F Supply Co. v. Hunter, 527 P.2d 217, 221 (Utah 1974); Darling & Co. v. Clouman, 87
38 F.R.D. 756 (N.D. Ill. 1980). Neither causation nor reliance has been held to be an element of a
39 private cause of action under the precursor to Section 509(b). See Gerhard W. Gohler, IRA v.
40 Wood, 919 P.2d 561 (Utah 1996); Ritch v. Robinson-Humphrey Co., 748 So. 2d 861 (Ala. 1999).

41
42 In Kaufman v. i-Stat Corp., 754 A.2d 1188 (N.J. 2000), the New Jersey Supreme Court
43 interpreted the New Jersey Uniform Securities law to require privity and misrepresentations but

1 not reliance.

2
3 6. Section 509 is subject to a privity requirement articulated by the phrase “liable to the
4 buyer”. Cf., *Hoover v. E. F. Hutton & Co., Inc.*, 1980 Fed. Sec. L. Rep. (CCH) ¶97,654 (E.D. Pa.
5 1980).

6
7 In *Zack Co. v. Sims*, 438 N.E. 2d 663 (Ill. App. Ct. 1982), the court held that a party who
8 provides financing for the purchase of stock without becoming involved in the actual contract
9 negotiations is not a “purchaser” and not entitled to invoke the statutory remedies. However a
10 financing party may assume a variety of legal roles such as donor, lender, or beneficiary of a
11 resulting trust, with regard to the benefitted party, that have no relationship whatsoever to the
12 agreement between the contracting parties. A purchaser’s wife providing financing to the
13 purchaser without participating in the purchase transaction would not be entitled to relief as a
14 “purchaser” and is not entitled to relief, but she could be recognized as the beneficiary of a
15 resulting trust with a one half interest in designated stock. See also *Space v. E. F. Hutton Co.,*
16 *Inc.*, 544 N.E.2d 67 (Ill. App. 1989), appeal denied, 548 N.E.2d 1078 (Ill. 1989) (the remedies
17 under the Illinois blue sky law §13(A) are available only to purchasers of securities).

18
19 7. The “reasonable attorneys’ fees” specified in Section 509 are permissive, not
20 mandatory. See, e.g., *Andrews v. Blue*, 489 F.2d 367, 377 (10th Cir. 1973), (Colorado Statute). A
21 request for attorney’s fees may be made by motion a reasonable time after the final judgment
22 under the Florida statute. *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 767 F.2d
23 1498, 1503-1504 (11th Cir. 1985).

24
25 8. In providing for damages as an alternative to rescission, Section 509(b)(3) follows the
26 1956 Act and is an improvement upon many earlier state provisions, which conditioned the
27 plaintiff’s right of recovery on his or her being in a position to make a good tender. A plaintiff is
28 not given the right under this type of statutory formula to retain stock and also seek damages. See
29 *Windswept Corp. v. Fisher*, 683 F. Supp. 233, 239 (W.D. Wash. 1988) (Washington).

30
31 9. The measure of damages in Section 509(b)(3) is that contemplated by Section 12 of the
32 Securities of 1933. See 9 L. Loss and J. Seligman, *Securities Regulations* 4242-4246 (3d ed.
33 1992). The measure of damages in Section 509(c)(3), however, is suggested by Rule 10b-5. Sec.
34 9 id. 4408-4427.

35
36 10. Section 509(e)-(f) is based on a 1981 NASAA amendment to the Uniform Securities
37 Act adopted in order “to establish civil liability for individuals who willfully violate section 102
38 dealing with fraudulent practices pertaining to advisory activities.”

39
40 11. The control liability provision in Section 509(g)(1) is modeled on Section 15 of the
41 Securities Act of 1933 and Section 20(a) of the Securities Exchange Act of 1934. See 9 L. Loss &
42 J. Seligman, *Securities Regulations* 4457-4475 (3d ed. 1992). State court decisions typically
43 follow analogous federal law in deciding whether a person may be deemed a control person. See,

1 e.g., *Hines v. Data Line Sys., Inc.*, 787 P.2d 8, 13-16 (Wash. 1990). On the meaning of “control,”
2 see 4 L. Loss & J. Seligman, *Securities Regulations* 1703-1727 (3d ed. rev. 2000).

3
4 12. Under Section 509(g)(2), an outside director may be held liable without actively
5 participating in any of the illegal transactions. See *Hines v. Data Line Sys., Inc.* 787 P.2d 8, 16-18
6 (Wash. 1990). The Michigan precursor to Section 509(g)(2) imposes liability on directors of
7 corporations offering securities who know or reasonably should have known of the presence of
8 information that was false and misleading. There was no requirement that the plaintiff prove a
9 specific intent to defraud. *Molecular Technology Corp. v. Valentine*, 925 F.2d 910, 920 & n.7
10 (6th Cir. 1991).

11
12 Under Section 509(g)(2) partners, officers, and directors are liable, subject to the special
13 defense afforded by that subsection, without proof that they aided in the sale.

14
15 13. On the interpretation of the “material aids” in Section 509(g)(3)-(4), see *Quick v.*
16 *Woody*, 747 S.W.2d 108 (Ark. 1988); *Connecticut Nat’l Bank v. Giacomi*, 699 A.2d 101 (Conn.
17 1997); *State v. Diacide Distrib., Inc.*, 596 N.W.2d 532 (Iowa 1991).

18
19 In *Metal Tech Corp. v. Metal Techniques Co., Inc.* 703 P.2d 237, 245-246 (Or. App Ct.
20 1985) the court observed that merely acting as a scrivener or otherwise merely preparing and
21 executing documents would not involve material aid. See generally *Heilbron v. ARC Energy*
22 *Corp.* 757 S.W.2d 294 (Mo. App. 1988) (president of a corporation that was the general partner of
23 a limited partnership in which interest were sold without registration was jointly and severally
24 liable under Missouri Uniform Securities Act to same extent as the limited partnership).

25
26 This provision of the Uniform Act may be broader than Section 12(a)(1) of the Securities
27 Act of 1933. See *Pinter v. Dahl*, 485 U.S. 622, 641-655 (1988). Cf. *Foster v. Jesup & Lamont*
28 *Sec. Co., Inc.* 482 So. 2d 1201 (Ala. 1986) (holding that the “materially aids” standard of the
29 Uniform Act is broader than the counterpart language in §12(a)(2)).

30
31 The statutory language covers an employer. *Todaro v. E.F. Hutton & Co. Inc.*, 1982-1984
32 *Blue Sky L. Rep. (CCH) ¶71,957* at 70,413 (E.D. Va. 1982). But an auditor is not an agent per se.
33 *Jenson v. Touche, Ross & Co.*, 355 N.W.2d 720, 729 (Minn. 1983). With respect to the activities
34 that might bring a lawyer within this kind of language, see Annot., *Attorney’s Preparation of*
35 *Legal Document Incident to Sale of Securities as Rendering Him Liable under State Securities*
36 *Regulation Statutes*, 62 ALR3d 252. A lawyer may be liable without proof of knowledge of
37 illegality, since a nonseller who “materially aids in the sale” is liable under Section 509(g) unless
38 he or she proves “that he did not know, and in the exercise of reasonable care could not have
39 known, of the existence of the facts by reason of which the liability is alleged to exist.” See
40 *Heilbron v. ARC Energy Corp.*, 757 S.W.2d at 296; *Prince v. Brydon*, 307 Or. 146, 764 P.2d 1370
41 (1988).

42
43 14. The defense of lack of knowledge in Section 509(g) is modeled on Section 15 of the

1 Securities Act of 1933 or Section 20(a) of the Securities Exchange Act of 1934. See generally 9
2 L. Loss & J. Seligman, Securities Regulation 4467-4475 (3d.1992). Washington's Supreme Court
3 contrasts this defense with the corporate law business judgment rule and "requires affirmative
4 action on the part of a director who wished to avail himself of this defense." *Hines v. Data Line*
5 *Sys., Inc.*, 787 P.2d 8, 17-19 (Wash. 1990). Several jurisdictions have interpreted the provision
6 to Section 509(g) to impose strict liability on partners, officers, and directors unless the statutory
7 defense of lack of knowledge is proven. See, e.g., *Taylor v. Perdition Minerals Group, Ltd.*, 766
8 P.2d 805, 809 (Kan. 1988), citing cases; *Hines v. Data Line Sys., Inc.*, 787 P.2d at 17. The
9 plaintiff obviously does not have to allege a defendant's scienter to deprive the defendant of the
10 reasonable care defense. See *Currie v. Cayman Resources Corp.*, 595 F. Supp. 1364, 1374 (N.D.
11 Ga. 1984) (Texas statute).

12
13 15. The contribution provision in Section 509(h) is a safeguard to avoid the common law
14 rule that prohibited contribution among joint tortfeasors. In *Black & Co., Inc. v. Nova-Tech, Inc.*,
15 333 F. Supp. 468, 471 (D. Or. 1971), the court held under the Oregon provision that, since
16 indemnification was a traditional remedy for one who paid a loss caused by another, the
17 legislature did not intend by including a right of contribution to exclude the right of indemnity. In
18 *Hainbuchner v. Miner*, 509 N.E. 2d 424, 426 (Ohio 1987), the court held under the Ohio provision
19 that the liability of a director in contribution is coextensive with his liability for securities fraud in
20 the underlying action.

21
22 16. The statute of limitations in Section 509(j) follows RUSA on the type of statutes of
23 limitations available under the federal securities laws rather than the 1956 Act.

24
25 The 1956 Act Section 410(p) provided that: "No person may sue under this section more
26 than two years after the contract of sale." Under this provision, the state courts generally declined
27 to extend a statute of limitations period on grounds of fraudulent concealment or equitable tolling.
28 See, e.g., *Martin v. Pacific Ins. Co. of N.Y.*, 431 S.W.2d 239,240 (Ark. 1968); *Norden v.*
29 *Friedman*, 756 S.W.2d 158, 163 (Mo 1988); *Weisz v. Spindletop Oil & Gas Co.* 664 S.W.2d
30 423, 425-426 (Tex. Ct. App. 1983); *McCullough v. Leede Oil & Gas, Inc.*, 617 F. Supp. 384, 390-
31 391 (W.D. Okla. 1985) (Alabama statute); *Reshal Assoc., Inc. v. Long Grove Trading Co.*, 754 F.
32 Supp. 1226, 1242-1243 (N.D. Ill. 1990). But some state statutes expressly provided or have been
33 construed to provide for tolling. See, e.g., *Platsis v. E. F. Hutton & Co., Inc.* 642 F. Supp. 1277,
34 1305 (W.D. Mich. 1986), *aff'd per curiam*, 829 F.2d 13 (6th Cir. 1987), *cert denied*, 485 U.S. 962
35 (Michigan statute); *Barton v. Peterson*, 733 F. Supp. 1482, 1492-1493 (N.D. Ga. 1990) (Georgia).

36
37 Section 509(j) is similar to the statute of limitations that the United States Supreme Court
38 construed in *Lampf, Pleva, Lipkind, Preps & Petigrew v. Gilbertson*, 501 U.S. 350 (1991) in
39 which it has held that there was no equitable tolling under the federal one year after discovery and
40 three years after the act formula. See generally 10 L. Loss & J. Seligman, Securities Regulation
41 4505-4525 (3d. ed. rev. 1996).

42
43 17. Section 509(k) is similar to Section 29(b) of the Securities Exchange Act and is

intended only to apply to actions to enforce illegal contracts. See L. Loss, Commentary on the Uniform Securities Act 150 (1976). Nevertheless at least one court has read the provision as barring an action for rescission by a buyer with knowledge, allegedly, of the failure to register the securities. *Hayden v. McDonald*, 742 F.2d 423, 435-436 (8th Cir. 1984) (Unif. Sec. Act); cf. *Dunn v. Bemor Petroleum, Inc.*, 680 S.W.2d 304, 306 (Mo Ct. App. 1984) (recognition of defenses of estoppel and in part delicto “would defeat the purpose of our blue sky laws”). See also *Brannan v. Eisenstein*, 804 F.2d 1041-1045 (8th Cir. 1986).

18. Section 509(n) follows the 1956 Act. Cf. *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304 (Ariz. 1983) (securities violations may be basis of Consumer Fraud Act complaint); *Knoell v. Huff*, 395 N.W.2d 749, 754 (Neb. 1986) (Nebraska blue sky law is not exclusive remedy under state law for cases involving the sale of securities); *Campbell v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 1984-1985 Fed. Sec. L. Rep. (CCH) ¶92,082 at 91,416-91,417 (N.D. Ill. 1985) (Illinois blue sky law does not preempt application of the state’s Consumer Fraud Act to securities transactions).

Nonetheless Section 509 and Section 411(e) are intended to be the exclusive private causes of action under this Act.

19. The ICI recommends adding the following Official Comment:

Under the National Securities Markets Improvement Act of 1996 there is no private right of action for the failure of an issuer of federal covered securities to make a notice filing or pay a notice filing fee under this Act.

SECTION 510. RESCISSION OFFERS. A buyer may not commence an action under Section 509 if:

(a) the buyer received in a record, before the action is commenced, an offer to repurchase:

(1) stating the respect in which liability under Section 509 may have arisen and fairly advising the buyer of the buyer’s rights in connection with the offer to repurchase;

(2) [if the basis for relief under this subsection may have been a violation of Section 509(b) [or (f)],] offering to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, [together with interest at [] percent per year from the

1 date of purchase,] less the amount of any income received on the security, or, if the buyer no
2 longer owns the security, offering to pay the buyer upon acceptance of the offer an amount in cash
3 equal to the damages computed in the manner provided in subsection (b); and
4 _____ (3) if the basis for relief under this subsection may have been a violation of Section
5 509(f), with respect to a purchase transaction, including financial and other information necessary
6 to correct all material misstatements or omissions in the information which was required by this
7 [Act] to be furnished to the buyer as of the time of the purchase of the security by the buyer;
8 _____ (4) stating that the offer may be accepted by the buyer within 30 days after the date
9 of its receipt by the buyer or any shorter period, not less than three days, that the administrator by
10 order prescribes;
11 _____ (b) the offer under paragraph (a) [is filed with the administrator before the offering; and]
12 conforms in form and content to any rule adopted by the administrator under this [Act];
13 _____ (c) the offeror has the present ability to pay the amount offered under paragraph (a);
14 _____ (d) the offer under paragraph (a) is delivered to the buyer or sent in a manner that assures
15 actual receipt by the buyer; and
16 _____ (e) the buyer accepts the offer in a record within the period specified under subparagraph
17 (a)(4) and is paid in accordance with the terms of the offer.

Reporter's Notes

1. Query should the voluntary offer mechanism in Section 510(b) be available to a buyer with possible liability under Section 509(c) [or (f)]? If so, the provision might be put in a separate subparagraph and read:

if the basis for relief under this subsection may have been a violation of Section 509(c) [or

1 (f)], offering to redeliver the security, on payment of an amount equal to the purchase price paid,
2 less interest [at X percent per year] from the date of purchase and income received on the security,
3 or if the buyer no longer owns the security, offering to pay the seller upon acceptance of the offer
4 an amount in cash equal to the damages computed in the manner provided in subsection (c)
5

6 Correlative changes would be needed in other parts of Section 510.
7

8 2. A rescission offer must meet the specific requirements of Section 510. Cf. *Binder v.*
9 *Gordian Sec., Inc.*, 742 F. Supp. 663, 666 (N.D. Ga. 1990). A buyer who accepts a statutory offer
10 of rescission may not later sue for attorneys' fees incurred in seeking the rescission, although the
11 court noted that fees would have been awarded if the plaintiff had prevailed in an action for
12 rescission. *Brockman Indus., Inc., v. Carolina Sec. Corp.* 861 F.2d 798, 800-801 (4th Cir. 1988)
13 (South Carolina statute). But see *Dixon v. Oppenheimer & Co., Inc.*, 739 F.2d 165 (4th Cir. 1984)
14 (Virginia version precursor to Section 510 is limited to the securities sold in violation that the
15 purchaser seeks to have rescinded). See generally Rowe, *Rescission Offers under Federal and*
16 *State Securities Law*, 12 J. Corp. L. 383 (1987). In *Mashburn v. First Investors Corp.*, 432 S.E.2d
17 869 (N.C. App. 1993), *cert. denied*, 439 S.E.2d 18, the court relied on Brockmann and the Rowe
18 article to dismiss a claim after a rescission offer had been accepted.
19
20

1 **PART 6**

2 **ADMINISTRATION AND JUDICIAL REVIEW**

3
4 **SECTION 601. ADMINISTRATION OF [ACT].**

5 (a) This [Act] shall be administered by the [insert title of ~~administration~~ administrator and
6 any related provisions on such matters as method of selection, salary, term of office, selection and
7 remuneration of personnel, annual reports to the legislature or governor which are appropriate to
8 the particular State].

9 (b) It is unlawful for the administrator or any of the administrator's officers, employees [or
10 designees] to use for personal benefit or the benefit of others information that is obtained by the
11 administrator or is filed that is not public. This [Act] does not authorize the administrator or any
12 of the administrator's officers, employees [or designees] to disclose the information, except
13 among themselves, or when necessary or appropriate in a proceeding or investigation under this
14 [Act], or in cooperation with other agencies in accordance with Section 609(a).

15 (c) This [Act] does not create or derogate from any privilege or exemption that exists at
16 common law or otherwise when records or other evidence is sought under a subpoena.

17
18 **Reporter's Notes**

19
20 **Prior Provisions:** 1956 Act Section 406; RUSA Sections 701-702.

21
22 1. Each State, the District of Columbia, Guam, and Puerto Rico today have enacted an
23 administrative procedure act. Part 6 has been drafted on the assumption that each state adopting
24 this Act has a comprehensive administrative procedure act. It is the assumption of this Act that a
25 person against whom an order may be issued or a sanction imposed generally is entitled to an
26 administrative proceeding that affords procedural due process including notice and an opportunity

1 for a hearing. It is similarly the assumption of this Act that rules adopted on orders issued under
2 this Act are subject to judicial review. The specific provisions of this part are intended to
3 augment the state administrative procedure act.
4

5 2. Section 601(b) should be read with Section 608. Section 601(b) prohibits the
6 administrator or the administrator's officers and employees from using for personal benefit
7 records or information that Section 608(c) specifies as not constituting public records. Section
8 601(b) is not intended to limit in any way the operation of Section 608(a). Neither subsection
9 601(b) nor 608(c) is intended to impede the ability of the agencies specified in subsection 609(a)
10 to share records or other information in connection with an examination or an investigation. Cf.
11 *Griffin v. S.W. Devanney & Co., Inc.*, 775 P.2d 555 (Colo. 1989) (Colorado equivalent to
12 subsection 601(b) does not prohibit the administrator from disclosing to other regulators and law
13 enforcement agencies information regarding possible law enforcement violations obtained by the
14 administrator during an examination of a broker-dealer's books and records).
15

16 3. Section 601(c) makes clear that nothing in this Act alters the availability of evidentiary
17 privileges. That question is left to the general law of the particular state.
18
19

20 **SECTION 602. INVESTIGATIONS AND SUBPOENAS.**

21 (a) The administrator:

22 (1) may make public or private investigations within or outside of this State that
23 the administrator considers necessary or appropriate to determine whether any person has
24 violated, is violating, or is about to violate this [Act] or a rule adopted or order issued under this
25 [Act], or to aid in the enforcement of this [Act] or in the adoption of rules and forms under this
26 [Act];

27 (2) may require or permit a person to testify, file a statement, or produce a record,
28 under oath or otherwise as the administrator determines, as to all the facts and circumstances
29 concerning the matter to be investigated; and

30 (3) may publish information concerning a proceeding, or an investigation under, or
31 a violation of, this [Act] or a rule adopted or order issued under this [Act] if the administrator

1 determines it is necessary or appropriate in the public interest or for the protection of investors.

2 (b) For the purpose of an investigation under this [Act], the administrator or a designated
3 officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of
4 attendance, take evidence, and require the production of any records that the administrator
5 considers relevant or material to the investigation.

6 (c) If a person fails or refuses to testify, to file a statement, to produce records, or to obey
7 a subpoena issued by the administrator under this [Act], the administrator [may refer the matter to
8 the Attorney General or the proper attorney, who] may apply to [insert name of appropriate court]
9 or a court of another state to enforce compliance. The court may order any or all of the following:

10 (1) order the person to appear before the administration or a designated officer;

11 (2) production of records;

12 (3) injunctive relief, restricting or prohibiting the offer or sale of securities or
13 providing investment advice;

14 (4) a civil penalty against the person not less than [\$__] and not greater than [\$__]
15 per violation;

16 (5) an order finding the person in contempt; or

17 (6) any other necessary or appropriate relief.

18 (d) An individual is not excused from attending in obedience to the subpoena of the
19 administrator or a designated officer [or in a proceeding instituted by the administrator] on the
20 ground that the required testimony, statement or record, or other evidence, directly or indirectly,
21 may tend to incriminate the individual or subject the individual to a penalty or forfeiture. If the
22 individual asserts a claim against self-incrimination, the administrator may apply [in the

1 appropriate court] to compel the testimony, the filing of the statement or the production of the
2 record. If the testimony, the filing of the statement or the production of the record is compelled,
3 the information, record, or other evidence, directly or indirectly, may not be used against the
4 individual so compelled in a criminal case, except that the individual testifying or providing the
5 statement is not exempt from prosecution and punishment for perjury or contempt committed in
6 testifying or in the statement.

7 (e) At the request of the securities regulator of another state or a foreign jurisdiction, the
8 administrator may provide assistance if the requesting regulator states that it is conducting an
9 investigation to determine whether a person has violated, is violating, or is about to violate a law
10 or rule of the other state or foreign jurisdiction relating to securities matters that the requesting
11 regulator administers or enforces. The administrator may, in its sole discretion, conduct the
12 investigation and use the powers conferred by this section as the administrator determines is
13 necessary to collect information, records, and evidence pertinent to the request for assistance. The
14 assistance information may be provided without regard to whether the facts stated in the request
15 would also constitute a violation of this Act or the laws of this State. In deciding whether to
16 provide the assistance, the administrator shall consider whether the requesting regulator is
17 permitted and has agreed to provide assistance reciprocally within its state or foreign jurisdiction
18 to the administrator on securities matters when required; whether compliance with the request
19 would violate or prejudice the public policy of this State; and the availability of resources and
20 staff of the administrator to carry out the request for assistance.

Reporter's Notes

Source of Law: 1956 Act Section 407.

1. Sections 602 (a)-(b) follow the 1956 Act, which was modeled generally on Sections 21(a)-(d) of the Securities Exchange Act of 1934 as it then read.

2. Sections 602(c) amplifies the last sentence of Section 407(c) of the 1956 Act which had provided in toto: "Failure to obey the order of the court may be punished by the court as a contempt of court." See *Feigin v. Colorado Nat'l Bank, N.A.*, 879 P.2d 814, 818-819 (Colo. 1995).

3. Section 602 is intended to apply generally to securities offers and sales under Part 3 and broker-dealer and investment adviser activity under Part 4, when there is noncompliance with the first sentence of Section 602(c). This subsection does not limit the powers of an administrator under other provisions of this Act.

4. Where appropriate under Section 602(d), an administrator could move to authorize admission of a requesting state's attorney under existing *pro hac vice* rules.

5. Section 602(e) is consistent with the Securities Litigation Uniform Standard Act of 1998 which provides in Section 102(e):

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

6. The scope of subpoena enforcement in each state is a general matter for judicial determination. Under Section 602, an individual subpoenaed to testify by the administrator is not compelled to testify within the meaning of these sections simply by service of a subpoena. Under Section 602(b) the individual can be subpoenaed and compelled to attend. Once in attendance an individual can assert an evidentiary privilege or exemption, see Section 601(c), including the Fifth Amendment privilege against self-incrimination. If an individual refuses to testify or give evidence, the administrator may apply (or have the appropriate state attorney apply) to the appropriate court for the relief specified in Section 602(c). If the individual invokes the privilege against self-incrimination, Section 602(d) allows the administrator to apply to the appropriate court to compel testimony under a "use immunity" provision barring the record compelled or other evidence obtained being used in a criminal case. See *People v. District Co. of Arapahoe County*, 894 P.2d 739 (Colo. 1995).

1 7. QUERY: Should the administrator have to satisfy a standard in Section 602?

2
3
4 **SECTION 603. CIVIL ENFORCEMENT.**

5 (a) In addition to administrative enforcement under Sections 604 and 605, whenever it
6 appears to the administrator that a person has engaged, is engaging, or is about to engage in an act
7 or practice constituting [, or that a person is aiding and abetting] a violation of this [Act] or a rule
8 adopted or order issued under this [Act], the administrator may maintain an action in the [insert
9 the name of appropriate court] to enjoin the acts or practices and to enforce compliance with this
10 [Act] or a rule adopted or order issued under this [Act]. In an action maintained under this Section
11 and upon a proper showing, the court may

12 (1) grant a permanent or temporary injunction, restraining order, asset freeze,
13 accounting, writ of attachment, writ of general or specific execution, or writ of mandamus and
14 appoint a receiver or conservator for the defendant or the defendant's assets;

15 (2) order the administrator to take charge and control of a party's property,
16 including investment accounts and accounts in a depository institution, rents and profits, to
17 collect debts, and to acquire and dispose of property;

18 (3) enter an order of rescission, civil penalty up to a maximum of [\$__] for a single
19 violation or of [\$__] for multiple violations in a single proceeding or a series of related
20 proceedings, a declaratory judgment, restitution, or disgorgement directed to a person who has
21 engaged in an act or practice constituting a violation of this [Act] or a predecessor act or a rule
22 adopted or order issued under this [Act] or the predecessor act;

23 (4) order the payment of prejudgment and postjudgment interest or other relief the

1 court considers just; and

2 (b) The court may not require the administrator to post a bond.

3 ~~~~~

4 **Reporter's Notes**

5
6 1. In Section 412, in brackets, the administrator may seek censure, a civil penalty, or
7 suspension or bar of registered broker-dealers, agents, investment advisers, investment adviser
8 representatives, or associated persons.

9
10 2. Constitutional due process considerations can also be addressed by rulemaking or
11 incorporation of the applicable administrative procedure act provisions of each jurisdiction.

12
13 3. Section 603-605 do not include a statute of limitations. State statutes of limitations
14 applicable to administrative enforcement actions, however, would be applicable here. The SIA
15 proposes a five year statute of limitations.

16
17 4. A primary purpose of a broad range of potential sanctions is to enable administrators to
18 better tailor appropriate sanctions to particular misconduct.

19 20 21 **SECTION 604. ADMINISTRATIVE ENFORCEMENT.**

22 (a) Whenever it appears to the administrator that a person has engaged, is engaging, or is
23 about to engage in an act or practice constituting a violation of this [Act], [or that a person is
24 aiding and abetting a violation of this [Act] or a rule adopted under or order issued under this
25 [Act],] the administrator may do one or more of the following:

26 (1) issue a summary order directing the person to cease and desist from engaging
27 in the act or practice or to take other action as it necessary or appropriate to comply with the
28 requirements of this [Act], [and effect service or the summary order on the person]. If a hearing is
29 not timely requested, the summary order becomes final by operation of law. The order shall
30 remain effective from the date of issuance until the date the order becomes final by operation of

1 law or is overturned by a [an administrative law judge or presiding officer] or court following a
2 request for hearing. A person against whom a summary order has been issued under this
3 subsection may contest the order by filing a request for a contested case proceeding as provided in
4 [the state Administrative Procedure Act] or in accordance with rules adopted by the administrator
5 under this [Act]. The person must file the request within 30 days from the date that the order is
6 served.

7 (2) After notice and opportunity for hearing [in accordance with the state
8 administrative procedure act], issue an order imposing a civil penalty in an amount not to exceed
9 [\$____] for each violation against a person that violates an order served under paragraph (1).

10 (3) If a petition for judicial review of an order under paragraph (2) is not timely
11 filed [in accordance with the state administrative procedure act], file a certified copy of the
12 administrator's order with the clerk of a court of competent jurisdiction, which shall be treated
13 and have the same effect as a judgment of the court and may be recorded, enforced or satisfied in
14 the same manner as a judgment of the court.

15 (4) If a person violates an order issued under paragraph (1) or (2) [without having
16 petitioned for judicial review], the administrator may petition a court of competent jurisdiction [,
17 with notice to the person,] to enforce the order as certified by the administrator. The court shall
18 not require the administrator to post a bond.

19 (b) If on petition by the administrator, the court finds after hearing that the person is not in
20 compliance with the order, the court shall adjudge the person in civil contempt of the order. The
21 court may assess a further civil penalty against the person for contempt in an amount not less than
22 [\$____] but not greater than [\$____] for each violation, and may issue such other rulings as it

determines are appropriate.

Reporter's Notes

The FPA has proposed a reasonable limit on civil fines for notice filings violations.

SECTION 605. EMERGENCY ADMINISTRATIVE PROCEEDINGS.

(a) The administrator may use emergency administrative proceedings if the proceedings are in the public interest or for the protection of investors. If the administrator initiates a proceeding under this subsection, the administrator shall issue an order, including a brief statement of findings of fact, conclusions of law, and, if it is an exercise of the agency's discretion, policy reasons for the decision to justify the determination that the proceedings are in the public interest or for the protection of investors and the administrator's decision to take the specific action. The administrator must give the notice as is practicable to persons who are required to comply with the order. The order is effective when issued.

(b) After issuing an order under subsection (a), the administrator shall proceed as expeditiously as feasible to provide the same right to request a hearing that is required under Section 604.

(c) The record of the administrator under subsection (a) consists of the official records regarding the matter which were considered, prepared, submitted to, or obtained by the administrator. The administrator shall maintain these records as the official record.

(d) Unless otherwise required by law, the administrator's official record under subsection (a) need not constitute the exclusive basis for the administrator's action in an emergency

1 administrative proceeding or for judicial review of the emergency action.

2
3 **Reporter's Notes**
4

5 **Source of Law:** 1956 Act Section 408; NASAA 1987 Proposed Amendments to Section
6 408; RUSA Sections 602-603; Iowa Unif. Sec. Act Section 502.603 for Section 603(a)(2).
7

8 NASAA objects to Section 605 and believes that Section 604(a)(1) alone is sufficient.
9

10 **SECTION 606. RULES, FORMS, ORDERS, AND HEARINGS.**

11 (a) The administrator may adopt, after notice and comment, amend and rescind the rules,
12 and issue the forms and orders that are necessary or appropriate to carry out this [Act], including
13 rules and forms governing registration statements, applications, notice filings, reports, and other
14 records, and define terms, whether or not used in this [Act], when these definitions are not
15 inconsistent with this [Act]. For the purposes of rules and forms, the administrator may classify
16 securities, persons, and transactions and adopt different requirements for different classes.

17 (b) A rule or form may not be adopted, amended, or repealed, or an order issued, amended,
18 or vacated, unless the administrator finds that the rule, form, or order is necessary or appropriate
19 in the public interest or for the protection of investors and consistent with the purposes fairly
20 intended by this [Act]. In adopting rules and forms, the administrator may cooperate under
21 Section 609 to effectuate the purposes of this [Act] and to achieve uniformity among the states in
22 the form and content of registration statements, applications, reports, and other records. The
23 administrator, by rule or order, may adopt a uniform form.

24 (c) A financial statement filed under this [Act] shall be prepared in accordance with
25 generally accepted accounting principles in the United States, unless the administrator, by rule or

1 order, waives this requirement.

2 (d) Except ~~to the extent~~ as limited by Section 15(h) of the Securities Exchange Act or
3 Section 222 of the Investment Advisers Act of 1940, the administrator, by rule or order, may
4 prescribe:

5 (1) the form and content of financial statements required under this [Act];

6 (2) the circumstances under which consolidated financial statements must be filed;

7 and

8 (3) whether required financial statements must be audited by an independent
9 certified public accountant.

10 (e) The administrator shall make all rules, forms and orders available to the public.

11 (f) No penalty or liability under this [Act] shall be imposed for conduct that is engaged in
12 or omitted in good faith conformity with a rule, form, or order of the administrator under this
13 [Act].

14 (g) A hearing in an administrative proceeding under this [Act] must be conducted publicly
15 unless the administrator [for good cause shown] grants a request [joined in by all the respondents]
16 that the hearing not be conducted publicly.

17
18 **Reporter's Notes**

19
20 Source of Law: 1956 Act Section 412; 1987 NASAA Proposed Amendment to Section
21 412(a); RUSA Sections 705, 707.

22
23 1. It is anticipated that the administrator will make amendments under Section 606(a) to
24 remain coordinate with relevant federal law, including the rules of the National Association of
25 Securities Dealers, and to achieve uniformity among the States. See Section 613.
26

1 2. Uniform forms such as Form B-D, U-4, and U-5 are today common in the securities
2 industry and would be authorized by section 606(b).

3
4 3. Section 606(d) refers to generally accepted accounting principles in the United States
5 which currently are promulgated by the Financial Accounting Standards Board and the Securities
6 and Exchange Commission.

7
8 4. It is anticipated that the states will employ e-mail or other electronic means to provide
9 notice of proposed rulemaking or adoption of new rules, rule amendments, forms or form
10 amendments, statements of policy or interpretations adopted by the administrator, and issuance of
11 orders to registrants and others who have provided a current e-mail or similar address and
12 expressed an interest in receiving such notice.

13
14 5. Section 606(f) does not apply to staff no action or interpretative opinions, but does
15 apply to rules, forms, orders, statements of policy or interpretations adopted by the administrator.

16
17 6. Pennsylvania urges that Section 606(a) also authorize an administrator to waive any
18 provision this statute or a rule, similar to the power in Section 203.

19
20
21 **SECTION 607. ADMINISTRATIVE FILES AND OPINIONS.**

22 (a) The administrator shall maintain, or have its designee maintain, a register of all
23 applications for registration of securities, registration statements, notice filings, all applications for
24 broker-dealers, agents, investment advisers, and investment adviser representatives registration,
25 all notice filings by a federal covered investment adviser which are or have been effective under
26 this [Act] and the predecessor act; all notices of claim of exemption from registration or notice
27 filing requirements contained in a record; all orders issued under this [Act] and the predecessor
28 act; and all interpretative opinions or no-action determinations issued under this [Act].

29 (b) Upon request, the administrator shall furnish to a person a copy of a record that is a
30 public record. The administrator, by rule or order, may prescribe reasonable charges for
31 furnishing the record. A copy certified by the administrator or its designee is prima facie
32 evidence of the record certified.

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Reporter's Notes

Prior Provisions: 1956 Act Section 413; RUSA Section 709.

1. "Record" is defined in Section 102(25).

2. Compliance with a state comprehensive records law will typically satisfy the requirements of Section 607(a).

SECTION 608. PUBLIC RECORDS; CONFIDENTIALITY.

(a) Except as otherwise provided in subsection (c), records obtained by the administrator or filed, including information contained in or filed with any registration statement, application, notice filing, or report, are public records and are available for public examination

(b) The administrator may on request provide interpretative opinions or may issue determinations that the administrator will not institute an enforcement proceeding or commence an action against a specified person for engaging in a specified act or practice if the determination is consistent with the purposes intended by this [Act]. The administrator, by rule or order, may assess a reasonable charge for interpretative opinions or determinations that it will not commence an action or initiate an enforcement proceeding.

(c) The following records and other information are not public records under subsection (a) and are not public records under subsection (b):

(1) a record and other information obtained by the administrator in connection with an examination under Section ~~409~~ 411(c) or an investigation under Section 602;

(2) a record filed in connection with a registration statement under Sections 301 and 303 through 305 or a report under Section ~~409~~ 411(d), to the extent it contains trade secrets or

1 confidential information and the person filing the registration statement or report has asserted a
2 claim of confidentiality or privilege that is authorized by law;

3 (3) records and other information that is not required or provided to the
4 administrator or filed under this [Act] and is provided to the administrator only on the condition
5 that the information will not be subject to public examination or disclosure;

6 (4) nonpublic records and other information received from a securities agency, law
7 enforcement agency or agency or administrator specified in section 609;

8 (5) any social security number, residence address, and residence telephone number
9 contained in a record that is filed; and

10 [(6) information or records obtained by the administrator through a designee which
11 have been deleted from the designee or designated as nonpublic or nondisclosable by the
12 designee].

13 (d) The [administrator] may disclose:

14 (1) information obtained in connection with an investigation under subsection
15 602(a) to the extent provided in subsection 602(c) and subject to the restrictions of paragraph
16 (d)(2); and

17 (2) information obtained in connection with an investigation under subsection
18 602(a), if disclosure is for the purpose of a civil, administrative, or criminal investigation or
19 administrative, or criminal investigation or proceeding by a regulator, commission, organization
20 or agency specified in subsection 609(a), and the receiving regulator, commission, organization,
21 or agency represents in writing that under applicable law protections exist to preserve the
22 integrity, confidentiality, and security of the information.

(e) This section does not create or diminish a privilege or exemption existing at common law, by statute, rule, or otherwise.

Reporter's Notes

Source of Law: RUSA Section 703; SEC Rule Section 200.80(b)(4); Securities Exchange Act of 1934 Sections 24(d)-(e).

1. Records and other information obtained by an administrator in connection with an examination under subsection 411(c) or an investigation under Section 602 may be made public in the enforcement action, even if records and other information would otherwise be subject to subsection 608(c)(1).

2. Section 608 may insulate from public disclosure records or other information that may be available under a state freedom of information or open records act. Unless the state freedom of information or open records act implements a constitutional provision, this Act as the later and more specific enactment should control as a matter of statutory construction. A state may amend its freedom of information or open records act to eliminate any inconsistency.

3. Pennsylvania opposes allowing issuers under Section 608(c)(2) to “self-certify” that information in a registration statement is confidential and prefers requiring the SEC approval approach under Rule 406 issued under the Securities Act of 1933.

SECTION 609. COOPERATION WITH OTHER AGENCIES.

(a) The administrator may cooperate with the securities regulators of one or more States, Canadian jurisdictions, or another country, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Securities Investor Protection Corporation, a self regulatory organization, a national or international organization of securities officials or agencies, banking and insurance agencies, and any governmental law enforcement or regulatory agency.

(b) The cooperation authorized by subsection (a) includes the following actions:

(1) establishing or employing a designee as a central depository for registration and notice filings under this [Act] and for records required or allowed to be maintained under this

[Act];

- (2) developing common forms;
- (3) making a joint examination or investigation;
- (4) holding a joint administrative hearing;
- (5) filing and prosecuting a joint civil or administrative proceeding;
- (6) sharing and exchanging personnel;
- (7) coordinating registration under Sections 301 and 401 through 404 with other state jurisdictions, the Securities and Exchange Commission, and self-regulatory organizations;
- (8) sharing and exchanging information and records;
- (9) formulating, in accordance with the [administrative procedure act] of this State, rules, statements of policy, guidelines, forms, and interpretative opinions and releases;
- (10) formulating common systems and procedures; and
- (11) public notification of proposed rules, forms, statements of policy, and guidelines.

Reporter's Notes

Prior Provision: RUSA Section 704.

1. Uniformity of regulation among the states and coordination with the Securities and Exchange Commission is a principal objective of this Act. See also Section 613. Section 609 is intended to encourage such cooperation to the maximum extent appropriate.

2. Section 609(b) lists some joint or coordinated efforts which might be undertaken. Other appropriate cooperative activities are also encouraged.

3. In cooperating with other agencies, an administrator must also comply with its own State's laws and rules, including those with respect to administrative procedure.

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[(b) Rules adopted under this [Act] are subject to judicial review in accordance with the state administrative procedure act.]

Source of Law: RUSA Section 711(b).

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

(a) Sections 301, 302, 401(a), 402(a), 403(a), 404(a), 501, 506, and 509 apply to a person who sells or offers to sell a security when an offer to sell is made in this State, or an offer to buy is made and accepted in this State.

(b) Sections 401(a), 402(a), 403(a), 404(a), 501, and 506 apply to a person who buys or offers to buy a security when an offer to buy is made in this State, or an offer to sell is made and accepted in this State.

(c) For the purpose of this section, an offer to sell or to buy a security is made in this State, whether or not either party is then present in this State, when the offer:

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1 (2) is directed by the offeror to this State and received at the place to which it is
2 directed [or at any post office in this State, in the case of a mailed offer].

3 (d) For the purpose of this section, an offer to buy or to sell is accepted in this State when
4 acceptance:

5 (1) is communicated to the offeror in this State; and

6 (2) has not previously been communicated to the offeror, orally or in a record,
7 outside this State and is communicated to the offeror in this State, whether or not either party is
8 then present in this State, when the offeree directs it to the offeror in this State reasonably
9 believing the offeror to be in this State and it is received at a place in this State to which it is
10 directed [or at any post office in this State, in the case of a mailed acceptance].

11 (e) An offer to sell or to buy is not made in this State when a publisher circulates or there
12 is circulated on the publisher's behalf in this State any bona fide newspaper or other publication of
13 general, regular, and paid circulation that is not published in this State, or that is published in this
14 State but has had more than two-thirds of its circulation outside this State during the previous 12
15 months, or a radio or television program or other electronic communication originating outside
16 this State is received in this State. A radio or television program or other electronic
17 communication is considered as having originated in this State if either the broadcast studio or the
18 originating source of transmission is located in this State, unless:

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

21 (2) the program or communication is supplied by a radio, television, or other
22 electronic network with the electronic signal originating from outside this State for redistribution

1 to the general public in this State;

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

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

7 (f) Sections 403(a), 404(a), 502, and 506 apply to a person when any act or conduct
8 instrumental in effecting prohibited conduct is engaged in this State, whether or not either party is
9 then present in this State.

11 **Reporter's Notes**

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

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16 1. Under subsection 202(18) out-of-state offers or sales are exempt from securities
17 registration.

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19 2. The phrase "other electronic means" is coextensive with computer or other information
20 technology permitted by subsections 102(8), 102(25).

21 3. The Internet raises new jurisdictional issues, as one commentator theorizes because
22 application of state blue sky laws to securities transactions has traditionally been based on
23 location, i.e., the laws of a given state seek to regulate transactions occurring within the state's
24 boundaries. For example, Section 414(a) of the 1956 Uniform Securities Act provided that its
25 jurisdiction reached all persons offering or selling securities when "(1) an offer to sell is made in
26 this State, or (2) an offer to buy is made and accepted in this State." The 1956 Act further
27 provided that an offer to sell or buy is made "in this State, whether or not either party is then
28 present in this State, when the offer (1) originates from this State or (2) is directed by the offeror
29 to this State and received at the place to which it is directed." Rice, The Regulatory Response to
30 the New World of Cybersecurities, 51 Admin. L. Rev. 901, 930-931 (1999). It is uncertain
31 whether the existing statutory approach will remain adequate. "Despite the additional

1 complexities, existing principles can be used to view e-mail over the Internet as similar to
2 traditional postal mail and phone calls in providing a basis for jurisdiction.” Id. at 933. See also
3 id. at 944-945.

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5 The ABA Global Cyberspace Jurisdiction Project, 55 Bus. Law. 1801, 1931-1937 (2000),
6 generally emphasized that “there is and should be less focus on the residence of either the seller or
7 purchaser and more focus on the marketplace where the transaction occurs,” but specifically
8 recognized that an investor’s residence takes on greater significance in public or private offerings
9 of new securities than in secondary trading. Id. at 1931-1932. The Project recognized that “the
10 prevailing trend in jurisdiction over securities transactions has been to focus on the place to which
11 information on securities is directed by the offeror.” Id. at 1934.

12
13 4. Courts have interpreted the precursor to Section 611(a) as applicable if there was a
14 physical nexus between the sale or offer to sell and a specific state. See, e.g. *Ah Moo v. A. G.*
15 *Becker Paribas, Inc.*, 857 F.2d 615, 620 (9th Cir. 1988).

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17 In *Shappley v. State*, 520 S.W.2d 766, 768 (Tex. Crim. App. 1974), the court held: “If the
18 offer was made within the state, it would be immaterial whether it was intended that the sale
19 would be finally consummated in another state.” Similarly it is immaterial that a solicitation
20 originated outside the forum state if the solicitation was received within the forum state. See, e.g.,
21 *DuPont v. Becker*, 375 F. Supp. 959, 962 n.2 (D. Mass. 1974) *aff’d without pub. op.*, 508 F.2d
22 834 (1st Cir. 1974). See also *Parvin v. Davis Oil Co.*, 524 F.2d 112, 117 (9th Cir. 1975); *Petrites*
23 *v. J.C. Brandford & Co.*, 646 F.2d 1033, 1036-1037 (5th Cir. 1981); *Stimmel v. Shearson,*
24 *Hammill & Co.*, 411 F. Supp. 345, 348-349 (D. Or. 1976); *Oil Resources, Inc. v. State of Fla.*
25 *Dep’t of Banking & Fin., Div. of Sec.*, 583 F. Supp. 1027, 1030 (S.D. Fla. 1984), *aff’d without*
26 *pub. op.* 746 F.2d 814 (11th Cir. 1984).

27
28 In *Booth v. Verity*, 124 F. Supp. 2d 452, 459 (W.D. Ky. 2000) (Kentucky law), the court
29 held that the mere ability to view a passive web page or mass media report was an insufficient
30 contact with a state to render an out-of-state defendant subject to that state’s jurisdiction.

31
32 5. Application of the Section 611(c)(2) formula has been held to afford due process of
33 law. *Green v. Weis, Voison, Cannon, Inc.* 479 F.2d 462 (7th Cir. 1973).

34
35 In *Newsome ex rel. Oklahoma Sec. Comm. v. Diamond Oil Producers, Inc.*, 1982-1984
36 *Blue Sky L. Rep. (CCH) ¶71,869* (Okla. Dist. Ct. 1983), the court applied the precursor to Section
37 611(c)(1) even though the offer in the state to which it was directed had been made in accordance
38 with the laws of that state. It would be incompatible with the purposes of the Act to exclude such
39 sales from regulation, the court said, because that would create a “safe harbor” from which a
40 promoter could operate with impunity so long as he or she never ventured into the states in which
41 the purchasers resided.

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43 In *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash. 2d 107, 134-136, 744

1 P.2d 1032, 1053-1054 (en banc 1987), appeal dismissed sub nom. American Express Related
2 Serv. Co. v. Washington Pub. Power Sys., 488 U.S. 805, which grew out of a bond issue by the
3 System to finance two nuclear power plants, the court applied the “most significant relationship”
4 standard to conclude that Washington was clearly the state with the most substantial contracts
5 with the subject matter of the case.
6

7 Cf. Singer v. Magnavox Co., 380 A.2d 969, 981 (Del. 1977), where the Delaware Supreme
8 Court refused to apply the Delaware Blue Sky Law “simply because the company is incorporated
9 here.” Cf. also State of Wis. v. Mattes, 175 Wis. 2d 572, 499 N.W.2d 711 (Wis. Ct. App. 1993)
10 (establishing venue in county in which defendant accepted and negotiated checks).
11

12 6. With respect to Section 611(d), see Cody v. Ward, 954 F. Supp. 43 (D. Conn. 1997),
13 where a federal district court concluded that Connecticut could extend its version of the Uniform
14 Securities Act to a non-resident who sent oral and written misrepresentations into the state.
15

16 7. With respect to Section 611(e), cf. Martin v. Steubner, 652 F.2d 652 (6th Cir. 1981),
17 where an advertisement of a Minnesota real estate limited partnership was placed in the Wall
18 Street Journal and read by the plaintiff in Ohio. This alone would not establish Ohio as a forum
19 state. But the plaintiff also wrote from and received a written reply in Ohio, in addition to causing
20 \$100,000 to be transferred from an Ohio broker to the defendant’s bank in Minnesota, and was
21 mailed a subscription agreement in Ohio which was signed in that state. On these latter bases the
22 court concluded that there were sufficient contacts with Ohio. Id. at 653.
23

24 8. Does Section 611 adequately cover investors advisers and investment adviser
25 representatives?
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28 **SECTION 612. SERVICE OF PROCESS.**

29 (a) A consent to service of process required by this [Act] shall be filed in the form the
30 administrator, by rule, specifies. An irrevocable consent appointing the administrator the person’s
31 agent for service of process in a noncriminal proceeding against the person, a successor, or
32 personal representative, which arises under this [Act] or a rule adopted or order issued by the
33 administrator under this [Act] after the consent is filed, has the same force and validity as if
34 served personally on the person filing the consent.

35 (b) A person that has filed a consent complying with subsection (a) in connection with a

1 previous application for registration or notice filing need not file an additional consent.

2 (c) If a person, including a nonresident of this State, engages in an act or practice
3 prohibited or made actionable by this [Act] or a rule adopted or order issued by the administrator
4 under this [Act] and the person has not filed a consent to service of process under subsection (a),
5 and subsequently engaged in an act or practice prohibited or made actionable by this [Act], the
6 conduct constitutes the appointment of the administrator as the person's agent for service of
7 process in a noncriminal proceeding against a person, successor, or personal representative.

8 (d) Service under subsection (c) may be made by leaving a copy of the process in the
9 office of the administrator, but it is not effective unless:

10 (1) the plaintiff, who may be the administrator, promptly sends notice of the
11 service and a copy of the process by registered or certified mail, return receipt requested, to the
12 defendant or respondent at the address set forth in the consent to service of process or, if a consent
13 to service of process has not been filed, at the last known address, and takes other steps reasonably
14 calculated to give notice; and

15 (2) the plaintiff files an affidavit of compliance with this subsection in the
16 proceeding on or before the return day of the process, if any, or within the time that the court, or
17 the administrator in a proceeding before the administrator, allows.

18 (e) Service as provided in subsection (d) may be used in a proceeding before the
19 administrator or by the administrator in a proceeding in which the administrator is the moving
20 party.

21 (f) If the process is served under subsection (d), the court, or the administrator in a
22 proceeding before the administrator, shall order continuances as are necessary or appropriate to

1 afford the defendant or respondent reasonable opportunity to defend.

3 **Reporter's Notes**

5 1. The required consent to service of process in Section 612(a) extends to process in any
6 proceeding “which arises under this act,” and substituted service under Section 612(c) applies to
7 any proceeding “which grows out of” conduct “prohibited or made actionable by this act.”

9 2. In *Piantes v. Hayden-Stone, Inc.*, 514 P.2d 529 (Utah 1973), the court held that
10 jurisdiction could be based either on a state blue sky provision like Section 612(c) or on a state’s
11 long m statute. Cf. *Paquinelli v. Wilson*, 365 S.E.2d 702 (N.C. App. 1988), where the defendants,
12 both directors of a North Carolina corporation though residents of other states, were held to be
13 subject to personal jurisdiction under a North Carolina statute applicable to nonresident directors
14 “in all actions. . . on behalf of, or against said corporation in which said director is a necessary or
15 party.” *Id.* at 730. See also *Illinois Nat’l Bank & Trust Co. of Rockford, Ill. v. Gulf States Energy*
16 *Corp.*, 429 N.E.2d 1301 (Ill. App. 1981) (Illinois long arm statue applied to securities
17 transactions). But see *Ek v. Nationwide Candy Div., Ltd.*, 403 So. 2d 780, 784 (La. App. 1981),
18 cert denied, 407 So.2d 732 La. (1981) (long arm statute did not make nonresident amenable to
19 jurisdiction when he was never physically present in the forum state and the only contacts with
20 that state were two telephone calls and a letter).

23 **SECTION 613. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

24 applying and construing this Uniform Act, consideration shall be given to the need to promote
25 uniformity of the law with respect to its subject matter among states that enact it and to the
26 coordination of the application, construction, and administration of this [Act] with the Securities
27 Act of 1933, Securities Exchange Act of 1934, Public Utility Holding Company Act of 1935,
28 Investment Company Act of 1940, Investment Advisers Act of 1940, and the regulations adopted
29 under those acts, all as in effect on the effective date of this [Act] [, or as later amended]. This
30 Act shall be applied and construed to protect investors and, to the extent consistent with this
31 purpose, to encourage capital formation.

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Reporter's Notes

Source of Law: 1956 Act Section 415, RUSA Section 803.

1. The goals of uniformity among the states and coordination with related federal regulation, including self regulatory organizations, may be enhanced by greater use of information technology systems such as the Web-CRD, the Investment Adviser Registration Depository, or the Securities and Exchange Commission Electronic Data Gathering, Analysis, and Retrieval System. These types of techniques are consistent with a potential system of “one stop filing” of all federal and state forms that is encouraged by this Act.

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

3. This Section is intended to be for the guidance of the administrator and any reviewing court.

SECTION 614. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of the [Act] are severable.

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Reporter's Notes

Prior Provisions: 1956 Act Section 417; RUSA Section 805.

Cf. Florida Realty, Inc. v. Kirkpatrick, 509 S.W.2d 114, 121 (Mo. 1974) (reading exemption in blue sky law in the light of the common law rule that “a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose . . . ‘and no conflict will be found unless the same is clear and inescapable’”).

1 **PART 7**

2 **TRANSITION**

3
4 **SECTION 701. EFFECTIVE DATE.** This [Act] takes effect on [insert date, which
5 should be at least 60 days after enactment].
6

7 **Reporter's Notes**

8 **Prior Provisions:** 1956 Act Section 419; RUSA Section 806.
9

10 **SECTION 702. REPEALS.** The following Act is repealed:

11 [Insert name of former State securities act].
12

13 **SECTION 703. APPLICATION TO EXISTING PROCEEDING.**

14 (a) The predecessor act exclusively governs all actions, prosecutions, or proceedings that
15 are pending or may be maintained or instituted on the basis of facts or circumstances occurring
16 before the effective date of this [Act], except that a civil action may be maintained to enforce any
17 liability under the predecessor act unless commenced within any period of limitation that applied
18 when the cause of action accrued or within two years after the effective date of this [Act],
19 whichever is earlier.

20 (b) All effective registrations under the predecessor act, all administrative orders relating
21 to the registrations, statements of policy, interpretive opinions, declaratory rulings, no action
22 determinations, and all conditions imposed upon the registrations remain in effect while they
23 would have remained in effect if this [Act] had not been enacted. They are considered to have

1 been filed, entered, or imposed under this [Act], but are governed by predecessor act.

2 (c) The predecessor act applies in respect of any offer or sale made within one year after
3 the effective date of this [Act] under an offering begun in good faith before the effective date of
4 this [Act] because of an exemption available under the predecessor act.

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6 **Reporter's Notes**
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8 **Source of Law:** 1956 Act Section 418; RUSA Section 807.
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10 1. Prior law governs all suits, actions, prosecutions, or proceedings which are pending or
11 may be initiated on the basis of facts or circumstances occurring before the effective date of a
12 State blue sky statute. See *Hilton v. Mumaw*, 522 F.2d 588, 600 (9th Cir. 1975).
13

14 2. Case law construing provisions of prior securities statutes that are identical or
15 substantively similar may be relevant to construction of this Act.