

DRAFT

FOR DISCUSSION ONLY

**PROPOSED REVISIONS OF
UNIFORM SECURITIES ACTS**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

DECEMBER, 2000

WITH PREFATORY NOTE AND REPORTER'S NOTES

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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REPORTER'S PREFACE

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

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

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

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

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

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

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

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

The attached draft is solely a new Uniform Securities Act. It does not codify or append related regulations or guidelines. This Act also authorizes State administrators to adopt further exemptions without statutory amendment (See, e.g., §203).

This draft of a new Uniform Securities Act should be read as a discussion draft. Comments or proposals for change in this draft can be forwarded to:

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Official Comments will be written later.

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1 **UNIFORM SECURITIES ACT (2001)**

2 **[PART A: DEFINITIONS]**

3 **SECTION 101 [DEFINITIONS] When used in this Act, unless the context otherwise requires:**

4 **REPORTER'S COMMENT**

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

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

8 **REPORTER'S COMMENT**

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

10 (b)(1) “Agent” means an individual, other than a broker-dealer, who represents a
11 broker-dealer in effecting or attempting to effect purchases or sales of securities or represents
12 an issuer in effecting or attempting to effect purchases or sales of the issuer’s own securities.
13 A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar
14 status or performing similar functions, is an agent only if the individual otherwise comes
15 within the definition. An individual shall not be an agent who represents a broker-dealer in
16 this State in effecting transactions limited to those described in §15(h)(2) of the Securities
17 Exchange Act of 1934. The [Administrator] by rule or order may designate any individual not
18 to be an agent.

19 (2) An individual so acting for an issuer with respect to an offering or purchase of the

1 issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries is not
2 an agent if (i) the individual primarily performs, or is intended primarily to perform upon
3 completion of the offering substantial duties for or on behalf of the issuer, the issuer's parent
4 or any of the issuer's subsidiaries otherwise than in connection with transactions in the issuer's
5 own securities and (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. No individual who represents
7 an issuer shall be an agent by reason of effecting transactions in a federal covered security to
8 qualified purchasers pursuant to §18(b)(3) of the Securities Act of 1933 or effecting
9 transactions in a federal covered security pursuant to §18(b)(4)(D) of the Securities Act of 1933
10 if no commission or other remuneration is paid or given directly or indirectly for soliciting any
11 person in this State.

12 REPORTER'S COMMENT

13 Source of Law: The 1956 Act §401(b); RUSA §101(14); Colo. Sec. Act §201(14); Ill. Sec.
14 Act §2.9.

15 1. The 1956 Act §101(b) uses the term "agent" rather than RUSA §101(14)'s term "sales
16 representative."

17 2. §101(b)(2) is based on Colorado Securities Act §201(14) and Illinois Securities Act §2.9
18 to clarify when an individual acting for an issuer will not be an agent.

19 3. The substance of the final sentence of §101(b)(2) appears in NASAA 1997 amendments.
20 Section 18(b)(3) will become operational only when the Securities and Exchange Commission (SEC)
21 by rule adopts a definition of "qualified purchaser."

22 4. Agents described in §101(b)(2) will not be exempt from specified civil liability provisions
23 in §509.

24 (c) **"Broker-dealer"** means a person engaged in the business of effecting transactions
25 in securities for the account of others or for the person's own account. The term does not
26 include:

1. an agent;
2. an issuer;
- [3. a depository institution;]
4. an international bank; or
5. any other person the [Administrator], by rule or order, designates.

REPORTER'S COMMENT

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

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

2. Section 15(h)(1) of the National Securities Markets Improvement Act of 1996 preempts State law from “[establishing] capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to the requirements in those areas established under [the Securities Exchange Act].” These preemptions are recognized in the substantive broker-dealer provisions, §§401-404.

3. The Gramm-Leach-Bliley Act, signed into law in November 1999, rescinded the exemption of banks from the definition of broker and dealer in §§3(a)(4) and (5) of the Securities Exchange Act.

[(d) “Depository institution” means a bank, savings institution, or trust company that is organized or chartered under the laws of a State or of the United States, is authorized to and receives deposits, and which is supervised and examined by an official or agency of a State or the United States if its deposits or share accounts are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law. The term also includes a credit union organized and supervised by the laws of this State. The term does not include an insurance company or other organization primarily engaged in the insurance business or a Morris Plan bank, industrial loan company, or a similar

1 **bank or company unless its deposits are insured by a federal agency.]**

2 **REPORTER’S COMMENT**

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

5 1. There is no definition of depository institution in the 1956 Act, although there is use of
6 such undefined terms as “banks,” “savings institutions,” and “trust companies.”

7 2. RUSA §101(3) also excepted from this definition “[a] trust company or other institution
8 that is authorized by federal or State law to exercise fiduciary powers of the type a national bank is
9 permitted to exercise under the authority of the Comptroller of the Currency and is supervised and
10 examined by an official or agency of a State or the United States.” The SEC has not to date opined
11 as to whether or not such nondepository trust companies are banks under the federal securities laws.

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

14 **REPORTER’S COMMENT**

15 Source of Law: NASAA 1997 Amendment.

16 1. This provision is necessitated by §203A of the Investment Advisers Act of 1940, added
17 by Title III of the National Securities Markets Improvement Act of 1996, which allocates to primary
18 State regulation most advisers with assets under management of less than \$25 million. SEC
19 registration is permitted, but not required, for investment advisers having between \$25 and \$30
20 million of assets under management and is required of investment advisers having at least \$30 million
21 of assets under management. Investment Advisers Act Rule 203A-1. Most advisers with assets
22 under management of \$25 million or more register solely under §203 of the Investment Advisers Act
23 and not State law. This division of labor is intended to eliminate duplicative regulation of investment
24 advisers.

25 **(f) “Federal covered security” means any security that is or upon completion of a**
26 **transaction will be a covered security under §18(b) of the Securities Act of 1933 or rules or**
27 **regulations adopted under §18(b).**

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REPORTER'S COMMENT

Source of Law: NASAA 1997 Amendment.

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

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

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

(2)(B) Any proxy statement, report to shareholders, or other disclosure document relating to a covered security or its issuer that is required to be filed with the SEC or any national securities association registered under §15A of the Securities Exchange Act [today, the NASD]; or

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

2. Section 18(b) applies to four types of “covered securities”:

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

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

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

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

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

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

(C) Securities Act exemptions in §3(a) with the exception of the charitable exemption in §3(a)(4), the exchange exemption in

§3(a)(10), the intrastate exemption in §3(a)(11), and the municipal securities exemption in §3(a)(2), but only with “respect to the offer or sale of such [municipal] security in the State in which the issuer of such security is located”; and

(D) Securities issued in compliance with Commission rules under §4(2) [private placement exemption].

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

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

(g) “File, Filed, or Filing” means the receipt of a document, application, or notice, by the [Administrator or designated depository] or designee of the [Administrator] or by the principal office of the [Administrator].

REPORTER’S COMMENT

Source of Law: RUSA §101(4).

1. The RUSA definition was revised to recognize that documents or applications may be filed in paper form or electronically with the Administrator, or when designated, depository institutions such as the Central Registration Depository or successor institutions or the Securities and Exchange Commission’s (SEC) Electronic Data Gathering and Retrieval (EDGAR) System or successor systems.

2. The essence of the definition focuses on the receipt of a document or application. The definition does not limit filing to any specific medium such as mail, certified mail, or a particular electronic system. The definition in this Section is intended to permit an Administrator to accept filings over the Internet or through a direct modem system, both of which are now used to transmit documents to EDGAR, or through new electronic systems as they evolve.

3. The use of the word “receipt” is meant to encompass the RUSA concept of actual delivery and recognize that delivery can be through electronic means.

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

REPORTER'S COMMENT

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

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

REPORTER'S COMMENT

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

1. This definition follows the 1956 Act.

2. Any method of guarantee that results in a guarantee of payment of all principal and interest will suffice including, for example, an irrevocable letter of credit.

(j) “Institutional Investor” means any of the following, whether acting by itself or for others in a fiduciary capacity:

(i) a depository institution or international bank;

(ii) an insurance company;

(iii) a separate account of an insurance company;

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

(v) any broker or dealer registered under the Securities Exchange Act of

1934;

1 (vi) an employee pension, profit-sharing, or benefit plan if the plan has
2 total assets in excess of \$25,000,000 or its investment decisions are made by a
3 named fiduciary, as defined in the Employee Retirement Income Security Act
4 of 1974, that is either a broker or dealer registered under the Securities
5 Exchange Act of 1934, an investment adviser registered or exempt from
6 registration under the Investment Advisers Act of 1940, an investment adviser
7 registered under this Act, a depository institution, or an insurance company;

8 (vii) a plan established and maintained by a State, any of its political
9 subdivisions, or any agency or instrumentality of a State or any political
10 subdivisions if the plan has total assets in excess of \$25,000,000, for the benefit
11 of its employees, investment decisions are made by a named fiduciary, as
12 defined in the Employee Retirement Income Security Act of 1974, that is either
13 a broker or dealer registered under the Securities Exchange Act of 1934, an
14 investment adviser registered or exempt from registration under the Investment
15 Advisers Act of 1940, an investment adviser registered under this Act, a
16 depository institution, or an insurance company;

17 (viii) a trust if it has total assets in excess of \$25,000,000, and its trustee
18 is a depository institution and whose participants are exclusively plans of the
19 types identified in paragraph (vi) or (vii) of this Section, regardless of size of
20 assets, except trust funds that include as participants self-directed individual
21 retirement accounts or similar self-directed plans;

22 (ix) an organization described in §501(c)(3) of the Internal Revenue

Code, or a corporation, Massachusetts or similar business trust, limited liability company, limited liability partnership, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$25,000,000;

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

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

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

(xiii) any “qualified institutional buyer” as is defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(H), of the Securities Act of 1933;

(xiv) any “major U.S. institutional investor” as that term is defined in Rule 15a-6(b)(4)(i) of the Securities Exchange Act of 1934;

(xv) any other institutional buyer; or

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

REPORTER'S COMMENT

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

1. Section 101(j)(viii) concludes with an except clause meant to exclude self-directed plans for individuals from this definition.

2. Section 101(j)(xv) is meant to reach institutional buyers similar to those listed in §§101(j)(i)-(xiv), but not otherwise listed.

(k) “Insurance Company” means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the re-insuring of risks underwritten by insurance companies, and which is subject to supervision by the [insurance commissioner, or a similar official or agency] of a State.

REPORTER'S COMMENT

Source of Law: Securities Act §2(a)(13).

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

REPORTER'S COMMENT

Source of Law: RUSA §401(a)(2).

1. RUSA §401(a)(2) also reached “substantially all” principal and interest in dividends, without defining substantially all.

(m) “International Bank” means any international banking institution of which the United States is a member and whose securities are exempt from the Securities Act of 1933.

REPORTER'S COMMENT

Source of Law: New.

1 1. Securities issued or guaranteed by the International Bank for Reconstruction and
2 Development, 22 U.S.C. §286k-1(a); the Inter-American Development Bank, 22 U.S.C. §283h(a);
3 the Asian Development Bank, 22 U.S.C. §285h(a); the African Development Bank, 22 U.S.C.
4 §290i-9; and the International Finance Corporation, see 22 U.S.C. §282k; are treated as exempted
5 securities within the meaning of §3(a)(2) of the Securities Act of 1933. See 3 L. Loss & J. Seligman,
6 Securities Regulation 1191-1194 (3d ed. rev. 1999).

7 **(n) “Investment adviser” means a person who, for compensation, engages in the**
8 **business of advising others as to the value of securities or as to the advisability of investing in,**
9 **purchasing, or selling securities or who, for compensation and as a part of a business, issues**
10 **or promulgates analyses or reports concerning securities. “Investment adviser” also includes**
11 **financial planners and other persons who, as an integral component of other financially related**
12 **services, provide investment advisory services to others for compensation and as part of a**
13 **business or who hold themselves out as providing investment advisory services to others for**
14 **compensation. The term does not include:**

15 **(1) an investment adviser representative;**

16 **(2) a lawyer, accountant, engineer, or teacher whose performance of investment**
17 **advisory services is solely incidental to the practice of the person’s profession;**

18 **(3) a broker-dealer or its agents whose performance of investment advisory services is**
19 **solely incidental to the conduct of business as a broker-dealer and who receives no special**
20 **compensation for the investment advisory services;**

21 **(4) a publisher, employee, or columnist of a bona fide newspaper, news magazine,**
22 **business or financial publication or electronic medium, or an owner, operator, producer, or**
23 **employee of a bona fide cable, radio, television or electronic network, station, or production**
24 **facility if, in either case, the financial or business news published or disseminated is made**

1 available to the general public and the content does not consist of rendering advice on the basis
2 of the specific investment situation of each client;

3 (5) a federal covered investment adviser; or

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

5 REPORTER'S COMMENT

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

7 1. This provision follows the 1956 Act except (a) it adds §101(n)(5) to incorporate the new
8 concept of a federal covered investment adviser; (b) broadens the publication exception in §101(n)(4)
9 following RUSA.

10 2. When the broadened language in the equivalent to §101(n)(4) was included in RUSA, an
11 Official Code Comment was adopted that read:

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

19 3. The exclusion in §101(n)(4) is intended to reach publishers, employees, or columnists of
20 Internet or electronic media, but only if the Internet or electronic media publication or "website"
21 satisfies the "bona fide" and "dissemination is made available to the general public and the content
22 does not consist of rendering advice" requirements. See e.g., *SEC v. Park*, 99 F. Supp. 2d 889, 895-
23 896 (N.D. Ill. 2000) (court declined to dismiss complaint against an Internet web site when there
24 were allegations that the site was not "bona fide" or of "general and regular" circulation).

25 4. In Sec. Ex. Act Rel. 42,099, 70 SEC Dock. 2486 (1999), the SEC proposed a different
26 approach to the equivalent to the §101(n)(3) exemption which would except broker-dealers offering
27 fee based programs, which are forms of special compensation, because the Commission does not
28 believe that Congress intended these broker-dealers to be subject to the Investment Advisers Act.
29 Id. at 2489. If Rule 202(a)(11)-1 is adopted, parallel language will be added to §101(n)(3).

30 5. Section 101(n) expressly refers to financial planners. This reference is not intended to
31 preclude persons who hold some form of formally recognized financially planning or consulting
32 designation or certification from using this designation. Nor does the use by a person of the
33 designation or certification as a financial planner alone require registration of the financial planner as
34 an investment adviser.

1 **(o)(1) “Investment adviser representative” means any partner, officer, director of (or**
2 **an individual occupying a similar status or performing similar functions) or any other**
3 **individual employed by or associated with an investment adviser, except an individual whose**
4 **functions are clerical or ministerial, who does any of the following: (A) makes any**
5 **recommendations or otherwise renders advice regarding securities, (B) manages securities**
6 **accounts or portfolios of clients, (C) determines which recommendation or advice regarding**
7 **securities should be given, [(D) solicits, offers or negotiates for the sale of or sells investment**
8 **advisory services,] or (E) supervises employees who perform any of the foregoing.**

9 **(2) “Investment adviser representative of a federal covered investment adviser” means**
10 **an individual with a place of business in this State as “place of business” is defined by the**
11 **United States Securities and Exchange Commission under Rule 203A-3(b) of the Investment**
12 **Advisers Act of 1940 and who –**

13 **(i) is an investment adviser representative as defined in Rule 203A-3(a) under the**
14 **Investment Advisers Act of 1940; or**

15 **(ii) [solicits, offers, or negotiates for the sale of or sells investment advisory service] on**
16 **behalf of a federal covered investment adviser, but is not a supervised person of the federal**
17 **covered investment adviser, as “supervised person” is defined in §202(a)(25) of the Investment**
18 **Advisers Act of 1940.**

19 **(3) “Investment adviser representative” does not include any person the**
20 **[Administrator], by rule or order, designates.**

1 REPORTER'S COMMENT

2 Source of Law: NASAA 1997 Amendment.

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

5 2. Section 402(d) excepts an individual who has no place of business within a State from
6 being an investment adviser representative within that State.
7

8 (p) **“Issuer” means a person or group of persons that issues or proposes to issue its own**
9 **securities, except:**

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

15 (2) **The “issuer” of an equipment trust certificate, including a conditional sales contract**
16 **or similar security serving the same purpose, is the person or such person’s parent to whom**
17 **the equipment or property is or is to be leased or conditionally sold.**

18 (3) **The “issuer” of a fractional undivided interest in an oil, gas, or other mineral lease**
19 **or in payments out of production under a lease, right, or royalty is the owner of an interest in**
20 **the lease or in payments out of production under a lease, right, or royalty, whether whole or**
21 **fractional, who creates fractional interests for the purpose of sale.**

1 REPORTER'S COMMENT

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

3 1. The definition in §101(p) includes §101(p)(2) that did not appear in the 1956 Act but was
4 added by RUSA.

5 **(q) “Nonissuer” means not directly or indirectly for the benefit of the issuer.**

6 REPORTER'S COMMENT

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

8 1. In *TechnoMedical Labs, Inc. v. Utah Sec. Div.*, 744 P.2d 320 (Utah Ct. App. 1987), the
9 court declines to limit the term “benefit” to monetary benefit and instead held a spinoff transaction
10 could provide direct or indirect benefits to an issuer. *Id.* at 323-324 following *SEC v. Datronics*
11 *Engineers, Inc.* 490 F.2d 250 (4th Cir. 1973), cert. denied, 416 U.S. 937; *SEC v. Harwin Indus.*
12 *Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971).

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

16 REPORTER'S COMMENT

17 Source of Law: 1956 Act §401(i); RUSA §101(10). National Conference of Commissioners
18 for Uniform State Laws 21 (1997).

19 1. Section 101(r) uses the broader RUSA definition of “person” and adds to the substance
20 of the 1956 Act the terms “limited liability company, limited liability partnership”, and the concluding
21 phrase “or any other legal or commercial entity.”

22 2. The use of the concluding phrase “or any other legal or commercial entity” is intended to
23 be broad enough to include other forms of business entities that may be created or popularized in the
24 future.

(s) “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, which 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.

REPORTER'S COMMENT

Source of Law: RUSA §101(11).

(t)(1) “Sale” or “sell” includes every contract of sale, contract to sell, or disposition of, a security or interest in a security for value.

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

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

(4) A gift of assessable stock involves an offer and sale.

(5) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, includes an offer of the other security.

(6) The terms defined in this Subsection do not include (A) the creation of a security interest in conjunction with a loan; (B) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; or (C) any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash; or (D) the solicitation of tenders of securities by an offeror in a stock tender offer in compliance with Securities Act Rule 162.

REPORTER'S COMMENT

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

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

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

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

3. Language in §401(j) of the 1956 Act also addressed the now rescinded SEC “no sale” doctrine and has been eliminated. Merger transactions are intended generally to be viewed as sales under this definition but may be exempted from the securities registration requirements by §202(o).

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

(u) “Securities Act of 1933,” “Securities Exchange Act of 1934,” “Public Utility Holding Company Act of 1935,” “Investment Company Act of 1940,” “Investment Advisers Act of 1940,” “Employee Retirement Income Security Act of 1974,” “National Housing Act,”

“Commodity Exchange Act,” and “Securities Litigation Uniform Standards Act of 1998” mean the federal statutes of those names, their rules and regulations, as amended. “Securities and Exchange Commission” means the United States Securities and Exchange Commission.

OFFICIAL COMMENT

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

1. This Subsection is intended at least to refer to specified federal statutes, their rules and regulations and amendments adopted before the effective date of this Act in this State, but not to amendments of these statutes, rules and regulations adopted after the effective date. Cf. National Conference of Commissioners on Uniform State Laws, Uniform Statute and Rule Construction Act §12(d) (1995), which provides:

A statute or rule that incorporates by reference a statute or rule of another jurisdiction does not incorporate a later enactment or adoption or amendment of the other statute or rule.

2. In those States which permit after adopted amendments to become automatically effective, the phrase “as amended” would permit these States to automatically adopt after effective amendments.

(v) “Security” means: a note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; fractional undivided interest in an oil, gas, or other mineral lease or in payments out of production under a lease, right, or royalty; a put, call, straddle, or option entered into on a national securities exchange relating to foreign currency; a put, call, straddle, or option on a security, certificate of deposit, or group or index of securities, including an interest in or based on the value of any of the foregoing; or, in general, an interest or instrument commonly known as a “security,” or a certificate of interest or participation in, temporary or interim certificate for, receipt for, whole

1 or partial guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

2 **The term does not include:**

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

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

8 **REPORTER’S COMMENT**

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

10 1. Section 101(w) adds two provisions from RUSA to the 1956 definition: (a) “a put, call,
11 straddle, or option entered into on a national securities exchange relating to foreign currency; a put,
12 call, straddle or option on a security, certificate of deposit, or group or index of securities, including
13 an interest in or based on the value of any of the foregoing”; and (b) the exception for “an interest
14 in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement
15 Income Security Act of 1974.”

16 2. Section 101(w) also uses RUSA’s “fractional undivided interest in oil, gas or other mineral
17 rights” formulation, which originated in §2(a)(1) of the Securities Act rather than the 1956 Act’s
18 formulation, “certificate of interest or participation in an oil, gas or mining title.” In recent years, the
19 courts interpreting §2(a)(1) of the federal Securities Act have often interpreted oil, gas or mineral
20 interests as investment contracts. 2 L. Loss & J. Seligman, Securities Regulation 979-982 (3d ed.
21 rev. 1999).

22 3. Much of the language in §101(w), like the language in the 1956 Act §401(l) and RUSA
23 §101(16), is identical or virtually identical to §2(a)(1) of the Securities Act. State courts interpreting
24 the Uniform Securities Act definition of security have often looked to interpretations of the federal
25 definition of security. See generally 2 L. Loss & J. Seligman, Security Regulation 923-1138.19 (3d
26 ed. rev.1999).

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

29 5. Under federal securities law limited liability companies and limited partnerships have been
30 held to be investment contracts and accordingly “securities” within the meaning of §2(a)(1) of the
31 Securities Act of 1933. See 2 L. Loss & J. Seligman, Securities Regulation 1028-1031 (3d ed. rev.

1 1999). In addition, when consistent with the court decisions interpreting the investment contract
2 concept, see, e.g., SEC v. W.J. Howey Co., 328 U.S. 293 (1946), such instruments as limited liability
3 partnerships or viatical settlements could also be statutory securities. But cf. SEC v. Life Partners
4 Inc., 87 F.3d 536 (D.C. Cir. 1996), reh’g denied, 102 F. 3d 587 (D.C. Cir. 1996).

5 6. Insurance or endowment policies or endowments or annuity contracts, other than those
6 on which an insurance company promises to make variable payments are excluded from this
7 definition. Variable insurance products are exempted from securities registration under §201(d).
8 This will allow State securities administrators to bring enforcement actions concerning variable
9 insurance sales practices. Some States have taken a different approach and excluded variable
10 insurance products from the definition of a security. In those States variable insurance product sales
11 practices would not be subject to the securities fraud provisions.

12 7. This definition is intended to apply whether or not a security is evidenced by a writing.

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

19 REPORTER’S COMMENT

20 Source of Law: RUSA §101(17).

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

23 (x) “State” means a State of the United States, the District of Columbia, Puerto Rico,
24 the United States Virgin Islands, or any territory or insular possession subject to the
25 jurisdiction of the United States.

26 REPORTER’S COMMENT

1 Source of Law: National Conference of Commissioners on Uniform State Laws, Procedural
2 and Drafting Manual 21 (1997); 1956 Act §401(m); RUSA §101(18).

3 (y) “Underwriter” means any person who has purchased from an issuer with a view to,
4 or offers or sells for an issuer in connection with, the distribution of any security, or
5 participates or has a direct or indirect participation in any such undertaking, or participates
6 or has a participation in the direct or indirect underwriting of any such undertaking; but such
7 term shall not include a person whose interest is limited to a commission from an underwriter
8 or dealer not in excess of the usual and customary distributors’ or sellers’ commission.

9 REPORTER’S COMMENT

10 Source of Law: Securities Act §2(a)(11).

11 1. The meaning of §101(y) is intended to be consistent with the definition of underwriter in
12 §2(a)(11) of the Securities Act of 1933.

1 **[PART B: EXEMPTIONS]**

2 **OFFICIAL COMMENT**

3 1. Section 201 includes exempt securities and Section 202 includes exempt transactions.
4 Both exempt securities and exempt transactions are exempt from the securities registration and the
5 filing of sales literature Sections of the Act. Neither §201 nor §202 provide an exemption from the
6 Act's antifraud provisions, §§501 and 505 .

7 A §201 exempt security retains its exemption when initially issued and in subsequent trading.

8 A §202 transaction exemption must be established before each transaction.

9 2. Neither the exempt security nor the transaction exemptions are meant to be mutually
10 exclusive. A security or transaction may qualify for two or more of these exemptions.

11 **SECTION 201 [EXEMPT SECURITIES]. The following securities are exempt from §§301-306**
12 **and 504:**

13 **(a) [United States Governments and Municipals]. Any security (including a revenue**
14 **obligation or a separate security as that term is defined in Rule 131 of the Securities Act of**
15 **1933) issued, insured, or guaranteed by the United States or by any State, or by any political**
16 **subdivision of a State or by any public authority, agency or instrumentality of one or more**
17 **States or political subdivisions of States, or by any person controlled or supervised by and**
18 **acting as an instrumentality of the Government of the United States pursuant to authority**
19 **granted by the Congress of the United States; or any certificate of deposit for any of the**
20 **foregoing.**

21 **REPORTER'S COMMENT**

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

23 1. Rule 131 provides in relevant part:

24 (a) Any part of an obligation evidenced by any bond, note, debenture, or other
25 evidence of indebtedness issued by any governmental unit specified in section 3(a)(2)

1 of the Act which is payable from payments to be made in respect of property or
2 money which is or will be used, under a lease, sale, or loan arrangement, by or for
3 industrial or commercial enterprise, shall be deemed to be a separate “security” within
4 the meaning of section 2(1) of the Act, issued by the lessee or obligor under the lease,
5 sale or loan arrangement.

6 (b) An obligation shall not be deemed a separate “security” as defined in
7 paragraph (a) hereof if, (1) the obligation is payable from the general revenues of a
8 governmental unit, specified in section 3(a)(2) of the Act, having other resources
9 which may be used for the payment of the obligation, or (2) the obligation relates to
10 a public project or facility owned and operated by or on behalf of and under the
11 control of a governmental unit specified in such section, or (3) the obligation relates
12 to a facility which is leased to and under the control of an industrial or commercial
13 enterprise but is a part of a public project which, as a whole, is owned by and under
14 the general control of a governmental unit specified in such section, or an
15 instrumentality thereof.

16 (b) **[Foreign Governments]. Any security issued, insured, or guaranteed by any foreign**
17 **government with which the United States currently maintains diplomatic relations, or any of**
18 **its political subdivisions, if the security is recognized as a valid obligation by the issuer, insurer,**
19 **or guarantor.**

20 REPORTER’S COMMENT

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

22 (c) **[Depository Institutions and International Banks]. A security issued by and**
23 **representing or that will represent an interest in or a direct obligation of, or guaranteed by,**
24 **a depository institution or by any international bank.**

25 REPORTER’S COMMENT

26 Source of Law: RUSA §401(b)(3).

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

2. Depository institutions specified in §3(a)(2) of the Securities Act of 1933 are also federal covered securities under §18(b)(4)(C) of the Securities Act of 1933.

(d) [Insurance Companies]. Any security issued by and representing an interest in or a debt of, or insured or guaranteed by, any insurance company authorized to do business in this State.

REPORTER'S COMMENT

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

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

2. This Act adopts a similar approach in its definition of securities in §101(w) and this exemptive provision. Section 101(w) excepts from the definition of security “an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some other specified period.” This exception implicitly recognizes that insurance companies are extensively regulated by State insurance commissioners or other State agencies.

3. Variable annuities and variable life insurance products that are issued by registered investment companies are “covered securities” under NSMIA and are subject to the notice filing requirements of §302.

4. The 1956 Act §402(a)(5), unlike RUSA §401(b)(4), did not exempt securities “insured by” an insurance company.

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

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

(ii) regulated in respect to its rates and charges by a governmental authority of the United States or a State; or

(iii) regulated in respect to the issuance or guarantee of the security by a governmental authority of the United States, a State, Canada, or a Canadian province or territory.

REPORTER'S COMMENT

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

1. The 1956 Act and RUSA used substantively similar terms in this exemption.
2. Both the 1956 Act and RUSA include references, omitted here, to the Interstate Commerce Commission, whose enabling legislation subsequently was repealed.
3. Public utilities covered by this exemption are subject both to the federal Public Utility Holding Company Act and to State utility regulation.

(f) [Certain Options and Rights]. A put or call option contract, warrant or subscription right on or with respect to any federal covered security specified in §18(b)(1) of the Securities Act of 1933 or by rule issued under that Subsection or any security listed or approved for listing on the (insert names of other appropriate securities markets designated by rule by [the Administrator] consistent with §604(b)); or any option on a security or an index of securities or foreign currencies issued by a clearing agency registered under the Securities Exchange Act of 1934 and listed or designated for trading on a national securities exchange, a facility of a national securities exchange, or a facility of a national securities association registered under

the Securities Exchange Act of 1934.

REPORTER'S COMMENT

Source of Law: New; RUSA §401(b)(9).

1. Section 18(b)(1) of the Securities Act of 1933 provides:

A security is a covered security if such security is –

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed or authorized for listing on the National Market System of the Nasdaq Stock Market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) is a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

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

3. A federal covered security subject to §18(b)(1) of the Securities Act of 1933 will not be subject to the securities registration requirements of §§301 and 303-306.

4. This Subsection provides exemptions for related options, warrants, and for other securities listed or approved for listing on other appropriate securities markets that the Administrator so designates.

5. The reference to options is derived from RUSA §401(b)(9). The 1956 Act §402(a)(8) as part of the Securities Exchange exemption had exempted warrants or rights to purchase securities exempt under that Section, but did not otherwise address options. RUSA §401(b)(9) was drafted after the development of options trading markets.

(g) [Not-for-Profit Organizations]. Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic, or reformatory purposes or as a chamber of commerce and not for pecuniary profit, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or any security of a fund that is excluded from the definition of an investment company under

Section 3(c)(10) of the Investment Company Act of 1940. This exemption does not include a note, bond, debenture, or evidence of indebtedness, unless the [Administrator] so designates, by rule or order under §203.

REPORTER'S COMMENT

Source of Law: Sec. Act §§3(a)(4).

1. Section 402(a)(9) of the 1956 Act and §401(b)(10) of RUSA exempt specified not-for-profit securities. Both are modeled on §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 §18(b)(4)(C), although a separate §3(a)(13) exemption which addresses certain church plan securities in the Securities Act is a federal covered security in §18(b)(4)(C).

3. RUSA also included an optional notice and review requirement for not-for-profit securities in §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.” This Act instead relies exclusively on the antifraud provisions to address whatever abuses might occur with these securities.

4. This exemption is of particular concern to State securities administrators. 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. . . .

(h) [Cooperatives]. A membership or equity interest in, or a retention certificate or like security given in lieu of a cash patronage dividend issued by a cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of any State. This exemption does not include a membership or equity interest, retention certificate or like

1 security sold to persons other than bona fide members of the cooperative unless the
2 [Administrator] adopts an exemptive rule or order under §203.

3 REPORTER'S COMMENT

4 Source of Law: RUSA §401(b)(13)

5 1. This Subsection is derived from RUSA §401(b)(13) which was included in that Act after
6 a number of States had adopted exemptions for securities issued by cooperatives. The 1956 Act
7 §402(a)(12) had instead merely provided: "insert any desired exemption for cooperatives." The
8 drafter of the 1956 Act had found such sharp variation among the 18 States that then adopted this
9 exemption that "no common pattern can be found." L. Loss, Commentary on the Uniform Security
10 Act 118 (1976).
11

12 (i) [Employee Benefit Plans]. Any security issued in connection with an employees'
13 stock purchase, savings, option, profit-sharing, pension or similar employees' benefit plan,
14 including any securities (including plan interests and guarantees) issued under a written
15 compensatory benefit plan or compensation contract, established by the issuer, its parents, its
16 majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the
17 participation of their employees, directors, general partners, trustees (where the issuer is a
18 business trust), officers, or consultants and advisors, and their family members who acquire
19 such securities from such persons through gifts or domestic relations orders. Securities issued
20 in connection with such employee benefit plans to former employees, directors, general
21 partners, trustees, officers, consultants and advisors are also exempt, but only if such persons
22 were employed by or providing services to the issuer at the time the securities were offered.
23 The term "employee" includes insurance agents who are exclusive agents of the issuer, its
24 subsidiaries or parents, or who derive more than 50 percent of their annual income from those

entities.

REPORTER'S COMMENT

Source of Law: RUSA §401(b)(12); Sec. Act Rule 701.

1. The definition of security in this Act in §101(w) excludes “an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974.”

2. The final three sentences of this Subsection are derived from Securities Act Rule 701(c). Compliance with Rule 701 is intended also to be compliance with this exemption.

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

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

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

(j) [Equipment Trust Certificates]. Equipment trust certificates in respect to equipment leased or conditionally sold to a person, if securities issued by the person would be exempt under this Section or would be federal covered securities under §18(b)(1) of the Securities Act of 1933.

REPORTER'S COMMENT

Source of Law: RUSA §401(b)(6).

1. There was no equipment trust certificate exemption in the 1956 Act.

- 1 2. The Securities Act §3(a)(6) includes a narrower exemption for railroad equipment trusts.
2 3. The Official Comment to RUSA §401(b)(6) explains:

3 The new paragraph (b)(6) reflects the extensive development of equipment
4 lease financing through leveraged leases, conditional sales, and other devices.
5 The underlying premise is that if the securities of the person using such a
6 financing device would be exempt under some other paragraph of Section
7 401, the equipment trust certificate or other security issued to acquire the
8 property in question also is exempt.

9 **SECTION 202 [EXEMPT TRANSACTIONS]. The following transactions are exempt from**
10 **§§301-306, and 504:**

11 **[(1) NONISSUER TRANSACTIONS]**

12 **(a) [Isolated Nonissuer Transactions]. Any isolated nonissuer transaction, whether**
13 **effected through a broker-dealer or not.**

14 REPORTER'S COMMENT

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

- 16 1. The phrase "isolated" nonissuer transactions has had considerable case law development
17 under State law. Cf. 1 L. Loss & J. Seligman, Securities Regulation 125-129 (3d ed. rev. 1998).
18 2. Limited issuer offerings are addressed in §202(k).

19 **(b) [Certain Nonissuer Transactions]. Any nonissuer transaction by a registered agent**
20 **of a registered broker-dealer, and any resale transaction by a sponsor of a unit investment**
21 **trust registered under the Investment Company Act of 1940, in a security of a class that has**
22 **been outstanding in the hands of the public for at least 90 days; provided, at the time of the**

1 **transaction:**

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

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

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

14 **(4) A nationally recognized securities manual or its**
15 **electronic equivalent designated by rule or order of the**
16 **[Administrator] or a document filed with the Securities and**
17 **Exchange Commission which is publicly available through the**
18 **Commission's Electronic Data Gathering and Retrieval System**
19 **(EDGAR) contains:**

20 **(a) A description of the business and operations of the**
21 **issuer,**

22 **(b) The names of the issuer's executive officers and the**

1 names of the issuer's directors, if any, or, in the case of a non-
2 United States issuer, the corporate equivalents of such persons in
3 the issuer's country of domicile,

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

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

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

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

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

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

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7 REPORTER'S COMMENT

8 QUERY: The SIA has proposed adding an exemption for: "Any security rated by a
9 nationally recognized statistical rating organization in one of its four highest generic rating
10 categories."

11 Source of Law: NASAA Amendment to 1956 Act §402(b).

12 1. The 1956 Act §402(b)(2) provides:

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

23 2. The NASAA amendment broadens the exemption to add the phrase "or a document filed
24 with the U.S. Securities & Exchange Commission (SEC) which is publicly available through the
25 SEC's Electronic Data Gathering and Retrieval System (EDGAR)." The NASAA amendment also
26 recognizes that non-U.S. issuers can be subject to the manual exemption when there is disclosed the
27 corporate equivalent to the issuer's officers and directors in the issuer's country of domicile.

28 3. Section 202(b)(4) is intended to be broad enough to include all commonly recognized
29 formats of a nationally recognized securities manual including CD-Rom or electronic dissemination
30 over the Internet.

31 (c) [Foreign Nonissuer Transactions] A nonissuer transaction involving a foreign
32 equity security that is a margin security as that term (or any successor term) is defined in rules

or regulations prescribed by the Board of Governors of the Federal Reserve System.

REPORTER'S COMMENT

1. Margin securities are required to be in compliance with Regulation T adopted by the Board of Governors of the Federal Reserve System.

(d) [Nonissuer Transactions in Securities Subject to Securities Exchange Act Reporting]. A nonissuer transaction in an outstanding security if the issuer of the security or the guarantor of the security files reports with the Securities and Exchange Commission pursuant to the reporting requirements of §§13 or 15(d) of the Securities Exchange Act of 1934.

REPORTER'S COMMENT

Source of Law: RUSA §402(2); Securities Act §18(b)(4)(A)-(B).

1. There is no counterpart in the 1956 Act.

2. To harmonize this Subsection with Securities Act §18(b)(4)(A)-(B), an earlier 90 day reporting period in RUSA §402(2) has been removed.

3. The term consolidated here is intended to have the same meaning as in Regulation S-X adopted by the Securities and Exchange Commission.

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

1 and not in the organization stage or in bankruptcy or receivership and is not a blank check,
2 blind pool, or shell company whose primary plan of business is to engage in a merger or
3 combination of the business with, or an acquisition of, an unidentified person or persons.

4 REPORTER'S COMMENT

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

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

8 2. The substance of this exemption is identical to the 1956 Act §402(b)(2)(B) and RUSA
9 §402(4), but adds concluding clauses which address blank check and similar offerings, which became
10 major concerns at the State and federal levels during the past two decades. Cf. Securities Act of 1933
11 Rule 419.

12 3. This Subsection includes preferred stock with fixed dividend provisions.

13 (f) [Unsolicited Brokerage Transactions]. A nonissuer transaction by or through a
14 broker-dealer registered under this Act effecting an unsolicited order or offer to purchase.

15 REPORTER'S COMMENT

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

17 1. Securities Act §18(b)(4)(B) defines transactions as federal covered securities when they
18 are §4(4) "brokerage transactions executed upon customers' orders on any exchange or in the over-
19 the-counter market but not the solicitation of such orders." This transaction exemption is intended
20 to provide further exemption for nonagency transactions by dealers not within the scope of Securities
21 Act §4(4).

22 2. The 1956 Act §402(b)(3) also included the phrase "but the [Administrator] may by rule
23 require that the customer acknowledge upon a specified form that the sale was unsolicited, and that
24 a signed copy of each such form be preserved by the broker-dealer for a specified period." This
25 would be inconsistent with §18(b)(4)(B).

26 3. This exemption is solely an exemption from the securities registration requirements of
27 §§301-306, and 504.

(g) [Pledges]. Any nonissuer transaction executed by a bona fide pledgee without any purpose of evading this Act.

REPORTER'S COMMENT

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

[(2) ISSUER TRANSACTIONS]

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

REPORTER'S COMMENT

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

(i) [Unit Secured Transactions]. Any transaction in a note, bond, debenture, or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if each mortgage, deed of trust, or agreement, together with all the notes, bonds, debentures, or other evidences of indebtedness secured thereby, is offered and sold as a unit, and (1) there is no general solicitation or general advertisement of the transaction and (2) no sales compensation is paid to any person not registered under this Act as a broker-dealer or as an agent.

1 REPORTER'S COMMENT

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

3 1. In recent years, this area has been one of concern to State securities administrators. The
4 two conditions of this exemption are intended to address these concerns.

5 **(j) [Bankruptcy, Guardian, or Conservator Transactions]. Any transaction by an**
6 **executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or**
7 **conservator.**

8 REPORTER'S COMMENT

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

10 1. Section 402(b)(6) of the 1956 Act and §402(8) of the 1985 Act use identical language to
11 provide an exemption for transactions by an executor, administrator, sheriff, marshal, receiver, trustee
12 in bankruptcy, guardian or conservator. There is a somewhat similar securities exemption in §3(a)(7)
13 of the Securities Act of 1933 limited to certificates issued by a receiver or by a trustee or debtor in
14 possession under Chapter 11 with the approval of the court.

15 **(k) [Institutional Investors]. Any offer or sale made to one or more of the following:**
16 **(1) any institutional investor;**
17 **[(2) any investment adviser registered under the Investment Advisers Act of 1940 acting**
18 **for its own account]; or**
19 **(3) any other person the [Administrator], by rule or order, designates.**

20 REPORTER'S COMMENT

21 Source of Law: New

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

1 any offer or sale to a bank, savings institution, trust company, insurance
2 company, investment company as defined in the Investment Company Act of
3 1940, pension or profit-sharing trust, or other financial institution or
4 institutional buyer, or to a broker-dealer, whether the purchaser is acting for
5 itself or in some fiduciary capacity.

6 2. When the SEC adopts a rule defining “qualified purchaser” as used in §18(b) of the
7 Securities Act as purchasers of federal covered securities, part or all of this exemption may prove
8 redundant.

9 **(l) [Limited Offering Transactions]. A transaction pursuant to an offer to sell securities**
10 **of an issuer, if the transaction is part of an issue in which**

11 **(i) there are no more than 10 purchasers in this State, other than those designated in**
12 **Rule 501(a) of the Securities Act of 1933 and in §202(k) of this Act, during any 12 consecutive**
13 **months;**

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

16 **(iii) no commission or other remuneration is paid or given, to a person, other than a**
17 **broker-dealer or agent registered under this Act, for soliciting a prospective purchaser in this**
18 **State; and**

19 **(iv) either (I) the seller reasonably believes that all the purchasers in this State other**
20 **than those designated in Rule 501(a) of the Securities Act of 1933 and in §202(k) of this Act**
21 **are purchasing for investment; or (II) immediately before and immediately after the**
22 **transaction, the issuer reasonably believes that the equity securities of the issuer are held by**
23 **a total of 50 or fewer beneficial owners, wherever located, other than those designated in Rule**
24 **501(a) of the Securities Act of 1933 and in §202(k) of this Act and the transaction is part of an**
25 **aggregate offering that does not exceed \$1,000,000 during any 12 consecutive months.**

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REPORTER'S COMMENT

Source of Law: RUSA §402(11); 1956 Act §402(b)(9).

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

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

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

4. By rule a majority of States have adopted a Uniform Limited Offering Exemption, coordinate to varying degrees with Regulation D. The authority to adopt this and other exemptive rules is retained in §203.

(m) [Transactions with Existing Security Holders]. Any transaction under an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, options, or warrants, if no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this State.

REPORTER'S COMMENT

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

1. This exemption will apply to offerings exempt from federal registration other than (i) Securities Act Rule 506; (ii) §4(2) private offerings that do not satisfy Rule 506; (iii) offerings under Rule 505; and (iv) offerings under §4(6).

2. Under §18(b)(4)(C), §3(a)(9) transactions are federal covered securities. Some of what is covered in this exemption will be preempted by §3(a)(9) which provides:

Except with respect to a security exchanged in a case under Title 11 of the United States Code, any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange.

The §18(b)(4)(C) revision of §3(a)(9) transaction will reach exchangeable debt securities.

(n) [Offerings When Registered Under this Act and the Securities Act of 1933]. An offer to sell, but not a sale, of a security not exempt from registration under the Securities Act of 1933 if:

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

(ii) no stop order of which the offeror is aware has been entered against the offeror by the [Administrator] or the Securities and Exchange Commission, and no examination or public proceeding that may culminate in a stop order is known by the offeror to be pending.

REPORTER'S COMMENT

Source of Law: RUSA §402(15).

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

2. Securities Act Rule 165 allows the offeror of securities in a business combination to make written communications that offer securities for sale before a registration statement is filed as long as specified conditions are satisfied.

3. Federal covered securities, see §101(f), will not need to avail themselves of this exemption.

1 See §301.

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

8 **(o) [Offerings When Registered Under this Act and Exempt from the Securities Act of**
9 **1933]. An offer to sell, but not a sale, of a security exempt from registration under the**
10 **Securities Act of 1933 if:**

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

12 **(ii) a solicitation of interest document is provided to offerees in compliance with a rule**
13 **adopted by the [Administrator]; and**

14 **(iii) no stop order of which the offeror is aware has been entered by the [Administrator]**
15 **and no examination or public proceeding that may culminate in that kind of order is known**
16 **by the offeror to be pending.**

17 **REPORTER'S COMMENT**

18 Source of Law: RUSA §402(16).

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

20 2. A solicitation of interest document must accompany a registration by qualification as
21 specified in §304(b)(13).

22 3. Oral offers may be made after a registration statement has been filed.

23 **(p) [Control Transactions]. A transaction involving the distribution of the securities**
24 **of an issuer to the security holders of another person in connection with a merger,**
25 **consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer,**

1 or its parent or subsidiary, and the other person, or its parent or subsidiary, are parties.

2 REPORTER'S COMMENT

3 Source of Law: RUSA §402(17).

4 **SECTION 203 [ADDITIONAL EXEMPTIONS AND WAIVERS].** The [Administrator], by
5 rule or order, may exempt any other security, transaction, or offer, or class of securities,
6 transactions, or offers from §§301-306 and 504, and waive any requirement for any security,
7 transaction, or offer, or class of securities, transactions, or offers under §§201 and 202.

8 REPORTER'S COMMENT

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

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

12 2. Under this type of authority, at least 49 (of 53) jurisdictions through 1999 had adopted the
13 ULOE or a Regulation D exemption, and 30 jurisdictions had adopted a Rule 144A exemption.

14 3. The alternative of statutory enactment of the ULOE or Rule 144A exemptions would be
15 less desirable given the frequency of SEC amendments of the relevant federal rules which provide the
16 basis of these exemptions.

17 4. Under §203 the States would also be authorized to adopt by rule or order new exemptions
18 as circumstances warrant for new technologies such as the Internet. Cf. NASAA Resolution
19 Regarding Securities Offered on Internet, NASAA Rep. ¶7040 (Jan. 7, 1996).

20 5. It is the intent of this provision that additional exemptions or waivers be adopted uniformly
21 by States, to the extent this is practicable. Cf. §§607 and 609.
22

23 **SECTION 204 [DENIAL, CONDITION, LIMITATION OR REVOCATION OF**
24 **EXEMPTIONS].** Except to the extent that a security or transaction involves a federal covered
25 security, the [Administrator] by order may deny, condition, limit or revoke an exemption

created under §§201(g), 202 or 203, with respect to a specific security, transaction, or offer.

Each such order must be entered in accordance with the requirements of §603. An order

issued under this Section is not retroactive. A person does not violate §§301-306 or 504 by

reason of an offer to sell or sale effected after the entry of an order under this Section if the

person did not know, and in the exercise of reasonable care could not have known, of the

order.

REPORTER'S COMMENT

Source of Law: RUSA §404; 1956 Act §402(e).

1. Section 204 is intended to be potentially far reaching. The ability to deny, condition, limit, or revoke the exemptions specified in §§201(g), 202, or 203 is adopted concomitant with the breadth of these exemptions. One or more than one specific security, transaction, or offer can be covered by a §204 order.

[PART C: REGISTRATION OF SECURITIES AND NOTICE FILINGS OF FEDERAL COVERED SECURITIES]

SECTION 301 [SECURITIES REGISTRATION REQUIREMENT]. It is unlawful for any person to offer or sell any security in this State unless (a) the security is a federal covered security; (b) the security, transaction, or offer is exempted under §§201-203; or (c) the security is registered under this Act.

REPORTER'S COMMENT

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

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

SECTION 302 [NOTICE FILINGS AND FEES APPLICABLE TO FEDERAL COVERED SECURITIES]. (a) The [Administrator], by rule or order, may require the filing of any or all of the following documents with respect to a federal covered security as defined in §18(b)(2) of the Securities Act of 1933:

(1) Before the initial offer of such federal covered security in this State, all documents 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 such federal covered security in this State, all documents that are part of an amendment to a federal registration statement filed with the Securities and

1 Exchange Commission under the Securities Act of 1933.

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

5 (4) The notice filing shall be effective for a period of one year commencing upon the
6 later of the [Administrator's] receipt of the notice filing or the effectiveness of the offering with
7 the Securities and Exchange Commission. A notice filing may be renewed upon expiration by
8 the issuer filing with the [Administrator] a copy of those documents filed by the issuer with the
9 Securities and Exchange Commission that the [Administrator] specifies by rule or order
10 [together with the renewal fee of \$ ____]. A previously filed consent to service of process may
11 be incorporated by reference in a renewal. A renewed notice filing shall be effective upon the
12 expiration of the filing being renewed.

13 (b) With respect to any security that is a federal covered security under §18(b)(4)(D)
14 of the Securities Act of 1933, the [Administrator], by rule, may require the notice filing by or
15 on behalf of an issuer to file a copy of Form D, including the Appendix, as promulgated by the
16 Securities and Exchange Commission and a consent to service of process signed by the issuer
17 no later than 15 days after the first sale of such federal covered security in this State, [together
18 with a fee of \$_____].

19 (c) The [Administrator] may issue a stop order suspending the offer and sale of a
20 federal covered security within this State, except a covered security under §18(b)(1) of the
21 Securities Act of 1933, if it finds that there is a failure to comply with any notice filing or fee
22 requirement of this Section. If the deficiency is corrected, the stop order is void as of the time

1 of its entry.

2 (d) The [Administrator], by rule or order, may waive any or all of the requirements of
3 this Section.

4 REPORTER'S COMMENT

5 Source of Law: NASAA 1997 amendment.

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

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

11 3. For Rule 506 offerings which are currently implicitly referenced in §18(d)(4)(D) of the
12 Securities Act, the Securities and Exchange Commission requires the filing of Form D. See Rule 503.
13 When an issuer proceeds under Rule 506, §302(b) is intended to limit required State filings to no
14 more than a requirement of filing a copy of Form D, consent to service of process, and a fee.

15 4. The definition of "filed" in §101(g) will permit States to adopt electronic filing of
16 documents under this Section. The definition of filed would also permit States to receive documents
17 through a central depository or to electronically accept notice of filings with the Securities and
18 Exchange Commission.

19 **SECTION 303 [SECURITIES REGISTRATION BY COORDINATION]. (a) Any security**
20 **for which a registration statement has been filed under the Securities Act of 1933 in connection**
21 **with the same offering may be registered by coordination under this Section.**

22 (b) A registration statement and accompanying documents under this Section shall
23 contain or be accompanied by the following documents in addition to the information specified
24 in §305 and the consent to service of process complying with §510:

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

26 (2) if the [Administrator], by rule or order requires, a copy of the articles of
27 incorporation and bylaws or their substantial equivalents, currently in effect; a copy of any

1 agreement with or among underwriters; a copy of any indenture or other instrument
2 governing the issuance of the security to be registered; and a specimen, copy, or description
3 of the security;

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

6 (4) an undertaking to forward each amendment to the federal prospectus, other than
7 an amendment which merely delays the effective date of the registration statement, promptly
8 after the day it is filed with the Securities and Exchange Commission.

9 (c) A registration statement under this Section automatically becomes effective at the
10 moment the federal registration statement becomes effective if all the following conditions are
11 satisfied:

12 (1) no stop order under §§303(d) or 306 or issued by the Securities and Exchange
13 Commission is in effect and no proceeding is pending against the issuer under §405; and

14 (2) the registration statement has been on file with the [Administrator] for at least 20
15 days or such shorter period as the [Administrator] permits by rule or order; and

16 (d) The registrant shall promptly notify the [Administrator] in writing which may be
17 by electronic means or [telegram] of the date and time when the federal registration statement
18 became effective and the content of the price amendment, if any, and shall promptly file a
19 notice containing the information and documents in the price amendment. Upon failure to
20 receive the required notification with respect to any price amendment, the [Administrator]
21 may enter a stop order, without notice or hearing, retroactively denying effectiveness to the
22 registration statement or suspending its effectiveness until compliance with this Subsection;

1 provided that the [Administrator] promptly notifies the registrant by telephone or electronic
2 means or telegram (and promptly confirms by electronic means, letter, or telegram when the
3 [Administrator] notifies by telephone) of the issuance of the order. If the registrant complies
4 with the notice requirements of this Subsection, the stop order is void as of the time of its
5 entry. The [Administrator] may by rule or order waive either or both of the conditions
6 specified in this paragraph. If the federal registration statement becomes effective before all
7 the conditions in this Subsection are satisfied and they are not waived by the [Administrator],
8 the registration statement automatically becomes effective as soon as all the conditions are
9 satisfied. If the registrant notifies the [Administrator] of the date when the federal registration
10 statement is expected to become effective, the [Administrator] shall promptly notify the
11 registrant by electronic means, telephone, or telegram whether all the conditions are satisfied
12 and whether the [Administrator] then contemplates the institution of a proceeding under §306;
13 but this notice by the [Administrator] does not preclude the institution of such a proceeding
14 at any time.

15 (e) The [Administrator] by rule or order may waive or modify the application of a
16 requirement of this Section if a provision or an amendment, repeal, or other alteration of the
17 securities registration provisions of the Securities Act of 1933, or the regulations adopted under
18 that Act, render the waiver or modification appropriate to further coordination of State and
19 federal registration.

20 REPORTER'S COMMENT

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

1 1. Sections 303(a)-(d) are similar to the 1956 Act §303 except that the definition of “filed”
2 in §101(g) includes electronic filing, whether through a central registration depository that could be
3 administered similar to the current Central Registration Depository (CRD) or in conjunction with the
4 SEC’s EDGAR System, or otherwise. Such simultaneous or “one stop” filing is consistent with the
5 uniformity of application intended by this Act. See §609. Section 303 also permits required
6 notification to be made by electronic means, which is intended to be coextensive with the electronic
7 means permissible under §101(g).

8 2. Section 303(e) is derived from RUSA §303(h).

9
10 **SECTION 304 [SECURITIES REGISTRATION BY QUALIFICATION]. (a) Any security**
11 **may be registered by qualification under this Section.**

12 **(b) A registration statement under this Section shall contain the following information**
13 **and be accompanied by the following documents in addition to the information specified in**
14 **§305, and the consent to service of process complying with §510:**

15 **(1) with respect to the issuer and any significant subsidiary: its name, address, and form**
16 **of organization; the State or foreign jurisdiction and date of its organization; the general**
17 **character and location of its business; a description of its physical properties and equipment;**
18 **and a statement of the general competitive conditions in the industry or business in which it is**
19 **or will be engaged;**

20 **(2) with respect to each director and officer of the issuer, or person occupying a similar**
21 **status or performing similar functions: her or his name, address, and principal occupation for**
22 **the past five years; the amount of securities of the issuer held by such person as of a specified**
23 **date within 30 days of the filing of the registration statement; the amount of the securities**
24 **covered by the registration statement to which he or she has indicated an intention to**
25 **subscribe; and a description of any material interest in any material transaction with the issuer**
26 **or any significant subsidiary effected within the past three years or proposed to be effected;**

1 **(3) with respect to persons covered by §304(b)(2): the remuneration paid during the past**
2 **year and estimated to be paid during the next year, directly or indirectly by the issuer (together**
3 **with all predecessors, parents, subsidiaries, and affiliates) to all those persons in the aggregate;**

4 **(4) with respect to any person owning of record, or beneficially if known, ten percent or**
5 **more of the outstanding shares of any class of equity security of the issuer: the information**
6 **specified in §304(b)(2) other than her or his occupation;**

7 **(5) with respect to every promoter if the issuer was organized within the past three**
8 **years: the information specified in §304(b)(2), any amount paid to her or him within that**
9 **period or intended to be paid to her or him, and the consideration for any such payment;**

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

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

22 **(8) the kind and amount of securities to be offered; the proposed offering price or the**

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

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

1 to finance the acquisition);

2 (10) a description of any stock options or other security options outstanding, or to be
3 created in connection with the offering, together with the amount of any such options held or
4 to be held by every person required to be named in §§304(b)(2), (4)-(6) or (8), and by any
5 person who holds or will hold ten percent or more in the aggregate of any such options;

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

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

13 (13) a copy of any prospectus, pamphlet, circular, form letter, advertisement, or other
14 sales literature intended as of the effective date to be used in connection with the offering
15 including solicitation of interest document used in compliance with §202(o);

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

20 (15) a signed or conformed copy of an opinion of counsel as to the legality of the security
21 being registered (with an English translation if it is in a foreign language), which shall State
22 whether the security when sold will be validly issued, fully paid, and nonassessable, and, if a

1 debt security, a binding obligation of the issuer;

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

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

13 (18) such additional information as the [Administrator] requires by rule or order. The
14 [Administrator] may waive any of the requirements of §304(b).

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

18 (1) no stop order is in effect and no proceeding is pending under Section
19 306;

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

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

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

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

REPORTER'S COMMENT

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

1. Under §305(e) the Administrator may waive in whole or in part or conditionally any of the requirements of §304(b).

2. Section 304(b)(17) uses the same terminology as is found in the Securities and Exchange Commission's Regulation S-X.

3. Section 304(b)(18) will authorize the Administrator to require that a report by an accountant, engineer, appraiser or other professional person be filed. Section 304(b)(18) would also authorize that securities of designated classes under a trust indenture contain additional specified information.

1 **SECTION 305 [GENERAL SECURITIES REGISTRATION PROVISIONS]. (a) [Registration**
2 **Requirements]** A registration statement may be filed by the issuer, any other person on whose
3 behalf the offering is to be made, or a registered broker-dealer.

4 **(b) [Filing Fee]** Every person filing a registration statement shall pay a filing fee of [____].
5 When a registration statement is withdrawn before the effective date or a preeffective stop
6 order is entered under §306, the [Administrator] shall retain [\$ ____] of the fee.

7 **(c) [Status of Registration Statement]** Every registration statement filed under §§303 or
8 304 shall specify (1) the amount of securities to be offered in this State; (2) the States in which
9 a registration statement or similar document in connection with the offering has been or is to
10 be filed; and (3) any adverse order, judgment, or decree entered in connection with the offering
11 by the regulatory authority in any State or by any court or by the Securities and Exchange
12 Commission.

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

16 **(e) [Waiver of Requirements]** The [Administrator] may waive the requirement for
17 inclusion of any information or document from any registration statement.

18 **(f) [Nonissuer Distribution]** In the case of a nonissuer distribution, information may not
19 be required under §§304 or 305(j), unless it is known to the person filing the registration
20 statement or to the persons on whose behalf the distribution is to be made, or can be furnished
21 by them without unreasonable effort or expense.

22 **(g) [Escrow and Impoundment]** The [Administrator] may by rule or order require as a

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

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

13 (i) [Effective Period] Every registration statement is effective for one year from its
14 effective date, or any longer period during which the security is being offered or distributed in
15 a nonexempted transaction by or for the account of the issuer or other person on whose behalf
16 the offering is being made or by any underwriter or broker-dealer who is still offering part of
17 an unsold allotment or subscription taken as a participant in the distribution, except during the
18 time a stop order is in effect under §306. For the purpose of any nonissuer transaction, all
19 outstanding securities of the same class identified in the registration statement as a registered
20 security are considered to be registered so long as the registration statement is effective. A
21 registration statement may not be withdrawn for one year from its effective date if any
22 securities of the same class are outstanding. A registration statement may be withdrawn

otherwise only in the discretion of the [Administrator].

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

(k) [Posteffective Amendments] (1) A registration statement may be amended after its effective date. The amendment becomes effective when the [Administrator] so orders.

(2) If a posteffective amendment is made to increase the number of securities specified to be offered or sold, the person filing such an amendment shall pay a registration fee of [\$__]. Such a posteffective amendment relates back to the date of the offering of the additional securities being registered, provided that within six months of the date of such sale the amendment is filed and the additional registration fee is paid.

REPORTER'S COMMENT

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

1. Sections 305(a)-(j) are derived from the 1956 Act; §305(k) is derived from 1987 NASAA proposed amendments which, in turn, were derived from RUSA.

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

SECTION 306 [DENIAL, SUSPENSION, AND REVOCATION OF SECURITIES REGISTRATION]. (a) The [Administrator] may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the [Administrator] finds that the order is in the public interest and that:

1 (1) The registration statement as of its effective date or before the effective date in the
2 case of an order denying effectiveness, an amendment under §305(k) as of its effective date, or
3 a report under §305(j) is incomplete in a material respect or contains a statement that, in the
4 light of the circumstances under which it was made, was false or misleading with respect to a
5 material fact;

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

12 (3) the security registered or sought to be registered is the subject of a permanent or
13 temporary injunction of a court of competent jurisdiction or an administrative stop order or
14 similar order entered under any other federal or State law applicable to the offering; but the
15 [Administrator] may not institute a proceeding against an effective registration statement under
16 this paragraph more than one year after the date of the order or injunction relied on, and the
17 [Administrator] may not enter an order under this paragraph on the basis of an order or
18 injunction entered under the securities act of another State unless the order or injunction was
19 based on facts that currently would constitute a ground for a stop order under this Section;

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

22 (5) with respect to a security sought to be registered under §303, there has been a failure

1 to comply with the undertaking required by §303(b)(4);

2 (6) the applicant or registrant has failed to pay the proper filing fee; but the
3 [Administrator] may enter only a stop order under this paragraph and shall void the order if
4 the deficiency is corrected; or

5 [(7) the [Administrator]], has adopted a rule or order that

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

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

12 (iii) the offering is being made on terms that are unfair, unjust, or
13 inequitable].

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

18 (c) The [Administrator] may summarily revoke, deny, postpone, or suspend the
19 effectiveness of a registration statement pending final determination of an administrative
20 proceeding. Upon the entry of the order, the [Administrator] shall promptly notify each person
21 specified in Subsection (d) that the order has been entered, the reasons for the postponement
22 or suspension, and that within 15 days after the receipt of a written request from the person the

1 matter will be set down for hearing. If no hearing is requested and none is ordered by the
2 [Administrator], the order remains in effect until it is modified or vacated by the
3 [Administrator]. If a hearing is requested or ordered, the [Administrator], after notice of and
4 opportunity for hearing to each person specified in Subsection (d), may modify or vacate the
5 order or extend it until final determination.

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

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

13 REPORTER'S COMMENT

14 Source of Law: RUSA §306.

15 1. The 1956 Act §306 is similar.

16 2. Sections 306(E)-(F) of the 1956 Act address “merit regulation” in a limited sense and are
17 distinguishable from the earlier and broader “fair, just and equitable” standards that still exist in a
18 minority of States. Sections 306(a)(5)-(6) of the 1985 Act are substantively identical, but retain an
19 “unfair, unjust or inequitable” alternative. The range of securities to which merit regulation applies
20 has been partially preempted by NSMIA.

21 Under either version of §306(a)(5) an Administrator would be authorized to adopt rules or
22 guidelines that deny effectiveness to an offering made on a development stage company that has no
23 specific business purpose of plan and has indicated that its business purpose or plan is to engage in a
24 merger or acquisition with an unidentified company, entity, or person. Such “blank check” offerings
25 are subject to federal Securities Act Rule 419.

26 3. Bracketed §306(a)(7) takes a similar approach. Consistent with NSMIA, each of the prior
27 merit regulation standards is retained as long as they are adopted by a published Administrative rule
28 or order. This will serve to provide notice to issuers of the relevant State merit standards. Under

1 §306(a)(7) NASAA Statements of Policy that have been or, in the future, were adopted by a State
2 would provide such notice and would comply with this Section. Similarly other State rules or orders
3 could be adopted to address new types of concerns such as blank checks, now subject to federal
4 Securities Act Rule 419.

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

6 5. As the Official Comment to the 1956 version of the Uniform Securities Act stated with
7 respect to the term “willfully” in §306(a)(2):

8 As the federal courts and the SEC have construed the term “willfully” in §15(b)
9 of the Securities Exchange Act of 1934, 15 U.S.C. §78o(b): all that is required is
10 proof that the person acted intentionally in the sense that he was aware of what he was
11 doing. Proof of evil motive or intent to violate the law, or knowledge that the law was
12 being violated, is not required.

13 This definition has been followed by subsequent courts. See, e.g., *State of Mo. v. Dumke*, 901
14 S.W.2d 100,102 (Mo. Ct. App. 1995). Under this definition proof of *mens rea*, evil motive, intent to
15 violate the law, knowledge that the law was being violated, or knowledge that the defendant knew
16 what he or she was doing was wrong, is not required. “Willfully” would not include negligent or
17 inadvertent conduct.

**[PART D: BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS AND
INVESTMENT ADVISER REPRESENTATIVES, FEDERAL COVERED INVESTMENT
ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES OF FEDERAL
COVERED INVESTMENT ADVISERS]**

**SECTION 401 [BROKER-DEALERS REGISTRATION REQUIREMENT AND
EXEMPTIONS]. (a) Except as provided in §401(b), it is unlawful for any person to transact
business in this State as a broker-dealer, unless such person is registered under this Act as a
broker-dealer.**

**(b) The following broker-dealers are exempt from the registration requirement of
§401(a):**

**(1) Except as provided in §401(c), a broker-dealer without a place of business in this
State if its only transactions effected in this State are with:**

(i) the issuer of the securities involved in the transactions;

**(ii) other broker-dealers registered or not required to be registered under
this [Act];**

(iii) institutional investors;

**(iv) preexisting customers whose principal place of residence are not in
this State provided that the broker-dealer has a place of business in this State
and is registered or not required to be registered under the Securities Act of 1934
and registered under the securities act of the jurisdiction in which the customers
maintain their principal places of residence;**

1 (v) not more than five persons in this State, during the previous 12 month
2 period, in addition to those specified in §§401(b)(1)(i), (ii), and (iii), provided
3 that the broker-dealer is both (I) registered or not required to be registered
4 under the Securities Exchange Act of 1934 and (II) registered under the
5 securities act in the jurisdiction in which the broker-dealer has its principal place
6 of business;

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

8 (2) a broker-dealer registered under the securities law of a State in which the broker-
9 dealer maintains a place of business and

10 (a) the broker-dealer offers and sells in this State to a person who for 30
11 days before the day of the transaction maintained an account with the broker-
12 dealer, and

13 (b) during the period beginning on the date on which such broker-dealer
14 files an application for registration with the State in which the transaction is
15 effected and ending on the earlier of:

16 (i) 60 days after the date on which the application is filed; or

17 (ii) the date on which such state notifies the broker-dealer that it
18 has denied the application for registration or has stayed the pendency of
19 the application for cause; or

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

21 (c) The exemptions provided in §401(b) are not available to a broker-dealer that deals
22 solely in government securities and is not registered under the Securities Exchange Act of 1934

1 unless the broker-dealer is subject to supervision as a dealer in government securities by the
2 Federal Reserve Board.

3 (d) It is unlawful for a broker-dealer, directly or indirectly, to employ or associate with
4 an individual to engage in any activity in this State who is prohibited from association with a
5 broker-dealer by an order of the [Administrator]. Upon request from a broker-dealer and for
6 good cause shown, the [Administrator], by order, may waive the prohibition of this Subsection
7 with respect to an individual suspended or barred.

8 REPORTER'S COMMENT

9 Source of Law: 1956 Act §201; RUSA §§201-202.

10 QUERIES: (1) Should a §401(e) be added to define "place of business," "principal place of
11 business," and possibly "preexisting customer"?

12 (2) Should proposed §401(b)(2) be replaced by a new subsection in §401(b)(1) that reads:

13 pre-existing customers whose principal places of residence were not in this State within
14 the preceding 60 days, provided that the broker-dealer is registered under the securities
15 law of the jurisdiction from which a customer moved into this State and where the
16 customer had maintained a principal place of residence.

17 SECTION 402 [AGENT REGISTRATION REQUIREMENT AND EXEMPTIONS].

18 (a) Except as provided in §402(b), it is unlawful for any individual to transact business
19 in this State as an agent, unless the individual is registered under this Act as an agent.

20 (b) The following agents are exempt from the registration requirement of §402(a):

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

22 (2) an agent acting for an issuer who receives no special compensation for

23 (i) effecting transactions in a security of the issuer exempted by §201;

24 (ii) effecting transactions in the issuer's securities exempted by §202;

25 (iii) solely selling federal covered securities of the issuer;

(3) an agent acting for a broker-dealer registered in the State under §401(a) or exempt under §§401(b) and (c) in the offer and sale of securities for any account whose transactions are conducted by an investment adviser registered in this State or a federal covered investment adviser; or

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

(c) Except as provided in §402(b), it is unlawful for any broker-dealer or issuer to employ or undertake an association with an agent who transacts business in this State on behalf of such broker-dealer or issuer unless the agent is registered under this Act as an agent. The registration of an agent is not effective during any period when the agent is not employed by or associated with a particular broker-dealer registered or exempt under this Act or a particular issuer, which offers its securities in this State.

QUERY: (1) Should an agent be permitted to affiliate with two or more broker-dealers?
(2) Is §402(b)(3) too broad? Section 401(b)(1)(iii) already exempts institutional investors which may include specified investment advisers. Cf. §403(b)(4).

REPORTER'S COMMENT

Source of Law: 1956 Act §201; RUSA §§201-202.

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

SECTION 403 [INVESTMENT ADVISER REGISTRATION REQUIREMENT AND EXEMPTIONS].

(a) Except as provided in §403(b), it is unlawful for any person to transact business in

1 this State as an investment adviser, unless registered under this Act as an investment adviser.

2 (b) The following investment advisers are exempt from the registration requirement of
3 §403(a):

4 (1) an investment adviser without a place of business in this State if its
5 only clients in this State during the preceding 12 month period are not more than
6 five clients who are residents of this State in addition to those specified in
7 §403(b)(2);

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

11 (i) federal covered investment advisers, registered investment
12 advisers, or registered broker-dealers;

13 (ii) institutional investors; or

14 (iii) preexisting clients of the investment adviser who have their
15 principal place of residence outside this State; or

16 (3) any other client the [Administrator], by rule or order, specifies; and

17 (3) any person that is excepted from the definition of investment adviser in §202(a)(11)
18 of the Investment Advisers Act of 1940;

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

20 (c) It is unlawful for an investment adviser, directly or indirectly, to employ or associate

1 with an individual to engage in any activity in this State who is prohibited from association
2 with the investment adviser by an order of the [Administrator]. Upon request from the
3 investment adviser and for good cause shown, the [Administrator], by order, may waive the
4 prohibition of this Subsection with respect to the individual suspended or barred.

5 (d) For purposes of this Section, the term “place of business” and “principal place of
6 business” have the same meanings as in Rule 222-1 of the Investment Advisers Act of 1940.

7 REPORTER’S COMMENT

8 Source of Law: 1956 Act §201; RUSA §§203-204.

9 1. NSMIA establishes a national minimum standard prohibiting a State from regulating
10 investment advisers that do not have a place of business in a State and have had fewer than six clients
11 who are State residents during the preceding 12 month period.

12 **SECTION 404 [INVESTMENT ADVISER REPRESENTATIVE REGISTRATION**
13 **REQUIREMENT AND EXEMPTIONS].**

14 (a) Except as provided in §404(b), it is unlawful for any individual to transact business
15 in this State as an investment adviser representative for an investment adviser unless the
16 investment adviser representative is registered under this Act.

17 (b) The following investment adviser representatives are exempt from the registration
18 requirement of §404(a):

19 (1) an investment adviser representative who is employed by or associated with an
20 investment adviser or federal covered investment adviser that is exempt from registration or
21 notice filing requirements imposed by §405.

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

(c) It is unlawful for any investment adviser to employ or undertake an association with an investment adviser representative unless the investment adviser representative is registered under this Act.

(d) The registration of an investment adviser representative is not effective during any period when the investment adviser representative is not employed by or associated with an investment adviser registered or exempt under this Act.

REPORTER'S COMMENT

Source of Law: New.

QUERY: (1) Should a sole proprietor investment adviser be required to both file as an investment adviser and an investment adviser representative and pay both fees?

(2) Should §404(b)(1) not refer to federal covered investment advisers and this exemption instead be in §406?

SECTION 405 [FEDERAL COVERED INVESTMENT ADVISER NOTICE FILING REQUIREMENTS].

(a) Except with respect to a federal covered investment adviser whose only clients are those described in §403(b), it is unlawful for any federal covered investment adviser to transact business in this State unless the federal covered investment adviser complies with §405(b).

(b)(1) A federal covered investment adviser shall file a notice with the [Administrator], before acting as a nonexempt federal covered investment adviser in this State, by filing such documents as have been filed with the Securities and Exchange Commission as the

1 [Administrator], by rule or order, may require, consent to service of process and a notice fee
2 of [\$____].

3 (2) The notice filing shall be effective commencing upon its receipt by the
4 [Administrator]. The [Administrator] may request a copy of any additional document that has
5 been filed with the Securities and Exchange Commission under the Investment Advisers Act
6 of 1940.

7 REPORTER'S COMMENT

8 Source of Law: New.

9 SECTION 406 [INVESTMENT ADVISER REPRESENTATIVES OF A FEDERAL
10 COVERED INVESTMENT ADVISER].

11 (a) Except as provided in §404(b), it is unlawful for any individual to transact business
12 in this State as an investment adviser representative of a federal covered investment adviser
13 unless the investment adviser representative of the federal covered investment adviser is
14 registered under this Act.

15 (b) The registration of an investment adviser representative of a federal covered
16 investment adviser is not effective during any period when the investment adviser
17 representative is not employed or associated with a federal covered investment adviser that had
18 made or is required to make a notice filing in this State or that is exempt from making such a
19 notice filing.

20 (c) It is unlawful for an investment adviser representative, directly or indirectly, to

conduct business on behalf of a federal covered investment adviser, when the investment adviser representative is prohibited from association with an investment adviser by an order of the [Administrator]. Upon request from the federal covered investment adviser and for good cause shown, the [Administrator], by order, may waive the prohibition of this Subsection with respect to the individual suspended or barred.

REPORTER'S COMMENT

Source of Law: New.

SECTION 407 [REGISTRATION PROCEDURES FOR BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS, AND INVESTMENT ADVISER REPRESENTATIVES].

(a) A broker-dealer, agent, investment adviser, or investment adviser representative shall register by filing with the [Administrator] or a designee an application together with a consent to service of process complying with §510 and paying any reasonable costs charged by the designee for processing such filings. Each application shall contain:

(1) The information required for an application to be filed with a designee and any other information that is material to an understanding of information that is provided to the [Administrator] by the designee; and

(2) whatever information the [Administrator] by rule, requires concerning such matters

as

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

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

1 (C) the qualifications and business history of the applicant; in the case of the broker-
2 dealer or investment adviser, the qualifications and business history of each partner, officer,
3 or director, any person occupying a similar status or performing similar functions, or any
4 person directly or indirectly controlling the broker-dealer or investment adviser;

5 (D) any injunction or administrative order or conviction of any misdemeanor involving
6 securities or commodities or any aspect of the securities or commodities business or a felony of
7 the applicant or any person specified in §403(a)(3);

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

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

11 (G) any other information that the [Administrator] determines is material to the
12 registration.

13 (3) If no denial order is in effect and no proceeding is pending under §409, registration
14 becomes effective at noon of the 45th day after a completed registration is filed. The
15 [Administrator] may by rule or order specify an earlier effective date, and may by order defer
16 the effective date until noon of the 45th day after the filing of any amendment completing the
17 registration.

18 (b) Each registration is effective until midnight of December 31 of the year in which the
19 application for registration was filed. A registration may be automatically renewed each year
20 by filing with the [Administrator] or a designee such documents as the [Administrator], by rule
21 or order, requires and paying any reasonable costs charged by the designee for processing such
22 filings.

1 (c)(1) When an agent begins or terminates employment by or association with a broker-
2 dealer, or begins or terminates those activities that require registration as an agent, the agent
3 or the broker-dealer or issuer shall promptly file a notice with the [Administrator].

4 (2) When an investment adviser representative begins or terminates employment by or
5 association with an investment adviser or federal covered investment adviser or begins or
6 terminates activities which require registration as an investment adviser representative, the
7 investment adviser, the federal covered investment adviser, or investment adviser representative
8 shall promptly file a notice with the [Administrator].

9 (d)(1) When an agent registered under §402 terminates employment by or association
10 with an issuer, or a broker-dealer registered under §401, and within 30 days begins employment
11 by or association with another issuer or broker-dealer registered under §401, the registration
12 of the agent is immediately effective upon payment of the filing fee in §407(e)(2).

13 (2) When an investment adviser representative registered under §404 terminates
14 employment by or association with an investment adviser registered under §403, and within 30
15 days begins employment with another investment adviser registered under §403, the
16 registration of the investment adviser representative shall be immediately effective upon
17 payment of the filing fee in §407(e)(4).

18 (e)(1) Each broker when initially registering shall pay a fee of [\$__] and when renewing
19 shall pay a fee of [\$__]. When an application is denied or withdrawn, the [Administrator] shall
20 retain [\$__] of the fee.

21 (2) Each agent when initially registering shall pay or have paid a fee of [\$__], when
22 renewing shall pay or have paid a fee of [\$__], and when transferring shall pay or have paid a

1 fee of [\$__]. When an application is denied or withdrawn, the [Administrator] shall retain
2 [\$__] of the fee.

3 (3) Every investment adviser when initially registering shall pay a fee of [\$__] and when
4 renewing shall pay a fee of [\$__]. When an application is denied or withdrawn, the
5 [Administrator] shall retain [\$__] of the fee.

6 (4) Each investment adviser representative when initially registering shall pay or have
7 paid a fee of [\$__], when renewing shall pay or have paid a fee of [\$__], and when transferring
8 shall pay or have paid a fee of [\$__]. When an application is denied or withdrawn, the
9 [Administrator] shall retain [\$__] of the fee.

10 (5) Each federal covered investment adviser subject to the notice filing requirement of
11 §405 shall pay an annual notice filing fee of [\$__].

12 (f)(1) A broker-dealer, investment adviser, or federal covered investment adviser may
13 succeed to the registration or notice filing of a registrant or of a federal covered investment
14 adviser who has a current notice filing, by filing with the [Administrator] or a designee an
15 application for registration as required by §§401, 403, or 405 or a notice filing of a successor,
16 whether or not the successor is then in existence for the unexpired portion of the year. There
17 shall be no filing fee.

18 (2) If the resulting entity will be a federal covered investment adviser, it shall comply
19 with the notice filing requirements of §405. Such successor notice filing shall be effective from
20 receipt for the unexpired portion of the current notice filing period. There shall be no filing fee.

21 (g) The [Administrator] may, by rule or order, require a minimum capital for registered
22 broker-dealers, limited by the provisions of §15(h) of the Securities Exchange Act of 1934, and

1 establish minimum financial requirements for investment advisers, limited by the provisions
2 of §222 of the Investment Advisers Act of 1940.

3 (h)(1) The [Administrator] may, by rule or order, require registered broker-dealers and
4 investment advisers who have custody of or discretionary authority over client funds or
5 securities to post a bond or other satisfactory form of security in amounts up to [\$__] as the
6 [Administrator] may prescribe, subject to the limitations of §15 of the Securities Exchange Act
7 of 1934 (for broker-dealers) and §222 of the Investment Advisers Act of 1940 (for investment
8 advisers) and may determine their conditions. No bond or other satisfactory form of security
9 may be required of any registrant whose net capital, or, in the case of an investment adviser
10 whose minimum financial requirements, which may be defined by rule or order exceeds the
11 amounts required by the [Administrator]. Every bond or other satisfactory form of security
12 shall provide for suit by any person who has a cause of action under §509. Every bond or other
13 satisfactory form of security shall provide that no suit may be maintained to enforce any
14 liability on the bond unless brought within the time limitations of §509(e).

15 (2) An agent may not have custody over client funds or securities except under the
16 supervision of a broker-dealer.

17 (3) An investment adviser representative may not have custody over client funds or
18 securities except under the supervision of an investment adviser or federal covered investment
19 adviser.

20 (i) Any person required to pay a fee under this Section may transmit through any
21 designee any fee required by this Section or rules promulgated by the [Administrator].

1 REPORTER'S COMMENT

2 Source of Law: NASAA 1986, 1997, and 2000 Amendments to 1956 Act §202; RUSA
3 205(b).

4 1. Under §407(a)(1), the [Administrator] is authorized to accept such currently standardized
5 forms as Form B-D for broker-dealers; Form U-4 for agents and investment adviser representatives;
6 and Form ADV for investment advisers, which are today filed through such designees as the Central
7 Registration Depository or the Investment Adviser Registration Depository.

8 **SECTION 408 [POSTREGISTRATION PROVISIONS]. (a) Every registered broker-dealer**
9 **and registered investment adviser shall make and keep such accounts, correspondence,**
10 **memoranda, papers, books, and other records as the [Administrator] prescribes, by rule or**
11 **order, except as limited by §15(h) of the Securities Exchange Act of 1934 (in the case of a**
12 **broker-dealer), and §222 of the Investment Advisers Act of 1940 (in the case of an investment**
13 **adviser.**

14 **(b) With respect to registered investment advisers, the [Administrator] may require by**
15 **rule that information be furnished or disseminated to clients or prospective clients in this State**
16 **as necessary or appropriate in the public interest or for the protection of investors and advisory**
17 **clients.**

18 **(c) Every registered broker-dealer and every registered investment adviser shall file such**
19 **financial reports as the [Administrator] may prescribe, by rule or order, except as limited by**
20 **§15(h) of the Securities Exchange Act of 1934 in the case of a broker-dealer or §222(b) of the**
21 **Investment Advisers Act in the case of an investment adviser.**

22 **(d) If the information contained in any document filed with the [Administrator] is or**
23 **becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a**

correcting amendment with the [Administrator].

(e) All records of every registered broker-dealer and every registered investment adviser are subject at any time to such reasonable periodic, special, or other examinations by representatives of the [Administrator], within or without this State as the [Administrator] deems necessary or appropriate in the public interest or for the protection of investors. Such examinations may be made without prior notice. The [Administrator] may impose a reasonable fee for the expense of conducting an examination under this Subsection. For the purpose of avoiding unnecessary duplication of examinations, the [Administrator] may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any self-regulatory organization.

(f) Except as limited by §15(h) of the Securities Exchange Act in the case of broker-dealers, or §222(b) of the Investment Advisers Act in the case of an investment adviser, required records may be maintained in any form of data storage acceptable in Rule 17a-4 under the Securities Exchange Act of 1934 if they are readily accessible to the [Administrator].

REPORTER'S COMMENT

Source of Law: NASAA 1986, 1997; and 2000 Amendments to 1956 Act §203; RUSA 205(b).

SECTION 409 [DENIAL, REVOCATION, SUSPENSION, CANCELLATION, WITHDRAWAL, RESTRICTION, CONDITION, OR LIMITATION OF REGISTRATION].

(a) The [Administrator] may by order deny, revoke, suspend, cancel, restrict, condition or limit

1 any application or registration if the [Administrator] finds (1) that the order is in the public
2 interest and (2) that the applicant or registrant

3 (A) has within the past ten years filed an application for registration which as of its
4 effective date, or as of any date after filing in the case of an order denying effectiveness, was
5 incomplete in any material respect or contained any statement which was, in light of the
6 circumstances under which it was made, false or misleading with respect to any material fact;

7 (B) has within the past ten years willfully violated or willfully failed to comply within the
8 past ten years with any provision of this Act or a predecessor act or any rule or order under this
9 Act or a predecessor act, or any provision of the Securities Act of 1933, the Securities Exchange
10 Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, or the
11 Commodity Exchange Act;

12 (C) has within the past ten years been convicted of any felony or any misdemeanor
13 involving a security, a commodity futures or option contract, or any aspect of the securities,
14 commodities or other business involving investments, franchises, [unfair trade practices,]
15 insurance, banking and finance;

16 (D) is permanently or temporarily enjoined by any court of competent jurisdiction in
17 an action brought by the [Administrator], a State, or federal government agency from
18 engaging in or continuing any conduct or practice involving any aspect of the securities or
19 commodities business, or in any other business where the conduct or practice enjoined involved
20 investments, franchises, [unfair trade practices,] insurance, banking and finance;

21 (E) is the subject of an order entered, after notice and opportunity for hearing, by the
22 securities administrator of any State or by the Securities and Exchange Commission denying,

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

13 (F) is the subject of an adjudication or determination, after notice and opportunity for
14 hearing, by the Securities and Exchange Commission, the Commodities Futures Trading
15 Commission, the Federal Trade Commission or administrator of another State that the person
16 has willfully violated the Securities Act of 1933, the Securities Exchange Act of 1934, the
17 Investment Advisers Act of 1940, the Investment Company Act of 1940, or the Commodities
18 Exchange Act, the securities or commodities law of any other State, or any federal or State law
19 under which any other business involving investment, franchises, [unfair trade practices,]
20 insurance, banking and finance are regulated directly;

21 (G) is insolvent, either in the sense that the person's liabilities exceed the person's assets
22 or in the sense that the person cannot meet the person's obligations as they mature; but the

1 [Administrator] may not enter an order against an applicant or registrant under this paragraph
2 without a finding of insolvency as to the applicant or registrant;

3 (H) is not qualified on the basis of such factors as training, experience, and knowledge
4 of the securities business, except as otherwise provided in §405(b);

5 (I) has within the past ten years failed reasonably to supervise the person's agents or
6 employees if the person is a broker-dealer, or the person's investment adviser representatives
7 or employees if the person is an investment adviser, to ensure their compliance with this Act,
8 if such agents, investment advisers representatives or employees are subject to the person's
9 supervision and have committed a violation of the Act;

10 (J) after notice, failed to pay the proper filing fee within 30 days after being notified by
11 the [Administrator] of a deficiency, but the [Administrator] shall vacate an order under
12 §405(a)(J) when the deficiency is corrected;

13 (K) has within the past ten years, after notice and opportunity, willfully violated the law
14 of a foreign jurisdiction governing or regulating any aspect of the business of securities,
15 commodities, insurance, or banking or has been the subject of an action of a securities regulator
16 of a foreign jurisdiction denying, revoking or suspending the right to engage in the business of
17 securities as a broker-dealer, agent, investment adviser or investment adviser representative,
18 or has been the subject of an action of any securities exchange or securities association
19 operating under the authority of the securities regulator of a foreign jurisdiction suspending
20 or expelling such person from membership in such securities exchange or securities association;

21 (L) is the subject of a Securities and Exchange Commission or State cease and desist
22 order;

1 (M) has within the past ten years engaged in dishonest and unethical practices in the
2 securities or commodities business.

3 (b) The following provisions govern the application of §405(a)(2)(H):

4 (1) The [Administrator] may by rule provide for an examination, including an
5 examination developed or approved by an organization of securities administrators, which
6 examination may be written or oral or both, to be taken by any class of or all applicants. The
7 [Administrator] may by rule or order waive the examination requirement as to a person or class
8 of persons if the [Administrator] determines that the examination is not necessary for the
9 protection of investment adviser clients.

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

12 (3) The [Administrator] shall consider that an agent who will work under the
13 supervision of a registered broker-dealer need not have the same qualifications as a broker-
14 dealer and that an investment adviser representative who will work under the supervision of
15 a registered investment adviser need not have the same qualifications as an investment adviser.

16 (4) The [Administrator] shall consider that an investment adviser is not necessarily
17 qualified solely on the basis of experience as a broker-dealer or agent. When the
18 [Administrator] finds that an applicant for registration as a broker-dealer or agent is not
19 qualified as an investment adviser, the [Administrator] may by order condition the applicant's
20 registration as a broker-dealer or agent upon that person not transacting business in this State
21 as an investment adviser.

22 (c) The [Administrator] may, under §603(b), by order condition, postpone or suspend

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

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

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

1 **If no proceeding is pending or instituted and withdrawal automatically becomes effective, the**
2 **[Administrator] may nevertheless institute a revocation or suspension proceeding under**
3 **§405(a)(2)(B) within one year after withdrawal became effective and enter a revocation or**
4 **suspension order as of the last date on which registration was effective.**

5 **(f) No order may be entered under any part of this Section except the first sentence of**
6 **§405(c) without (1) appropriate prior notice to the applicant or registrant (as well as the**
7 **employer or prospective employer if the applicant or registrant is an agent or investment**
8 **adviser representative), (2) opportunity for hearing, and (3) written findings of fact and**
9 **conclusions of law.**

10 REPORTER'S COMMENT

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

13 1. Under §603 the [Administrator] may seek other remedies against registrants including civil
14 fines, bars or censures.

15 2. Section 409 authorizes the [Administrator] to seek a range of sanctions based on the
16 seriousness of the misconduct.

17 3. The term "foreign" means a jurisdiction outside of the United States, not a different State
18 within the United States.

1 **[PART E: FRAUD AND LIABILITIES]**

2 **SECTION 501 [GENERAL FRAUD PROVISION]. It is unlawful for any person, in connection**
3 **with the offer, sale or purchase of any security, directly or indirectly**

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

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

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

10 **REPORTER'S COMMENT**

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

12 1. Section 501, which was originally §101 in the 1956 Act, was originally substantially the
13 Securities Exchange Act of 1934 Rule 10b-5, which in turn was modeled on §17(a) of the Securities
14 Act of 1933, except that Rule 10b-5 was expanded to cover the purchase as well as the sale of any
15 security. There has been significant later federal and State case development.

16 2. There are no exemptions from §501.

17 3. Because Rule 10b-5 reaches market manipulation, see 8 L. Loss & J. Seligman, Securities
18 Regulation Ch.10.D (3d ed. 1991), this Act does not include the RUSA market manipulation §502,
19 which has no counterpart in the 1956 Act.

20 4. The culpability required to be pled or proved under §501 is addressed in the relevant
21 enforcement context. See, e.g., §508, criminal penalties, where “willfulness” must be proven; §509,
22 civil liabilities, which includes a reasonable care defense.

23 5. There is no private cause of action under §501. See §509(j).

24 **SECTION 502 [FRAUD IN PROVIDING INVESTMENT ADVICE]. It is unlawful for any**
25 **person who receives any consideration from another person primarily for advising the other**

1 person as to the value of securities or their purchase or sale, whether through the issuance of
2 analyses or reports or otherwise

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

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

6 REPORTER'S COMMENT

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

8 1. This Act omits 1956 §102(b) and amendments as unnecessary in light of the Administrator's
9 rulemaking authority in §604.

10 2. Under §203A(b)(2) of the Investment Advisers Act States retain their authority to
11 investigate and bring enforcement actions against a federal covered investment adviser or a person
12 associated with a federal covered investment adviser. Under §502, which applies to any "person", a
13 State could bring an enforcement action against a federal covered investment adviser, including a
14 federal covered investment adviser excluded from the definition of investment adviser in §101(n)(7).

15 3. There is no implied cause of action under §502. See §509(j).

16 **SECTION 503 [BURDEN OF PROOF]. (a) In a civil action or administrative proceeding**
17 **under this [Act], a person claiming status as a covered federal security or federal covered**
18 **investment adviser or an exemption, an exception, or an exclusion from a definition has the**
19 **burden of proving the applicability of the exemption, exception, or exclusion.**

20 **(b) In a criminal proceeding, under this [Act], a person claiming status as a covered**
21 **federal security or federal covered investment adviser or an exemption, an exception, or an**
22 **exclusion from a definition has the burden of going forward with evidence of the claim.**

23 REPORTER'S COMMENT

Source of Law: RUSA §608.

1. 1956 Act §402(d) is similar.

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

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

SECTION 504 [FILING OF SALES AND ADVERTISING LITERATURE]. The [Administrator] may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, in connection with a security or investment advice, other than that applicable to a federal covered security, including clients or prospective clients of an investment adviser registered or required to be registered in this State, other than a federal covered investment adviser, unless the security or transaction is exempted by §§201-202.

REPORTER'S COMMENT

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

1. The prospectuses, pamphlets, circulars, form letters, advertisements, or other sales literature or advertising communication includes material disseminated electronically or available on a web site.

2. The administrator may enjoin the publications circulation or use of any materials that violate §505. See §603.

3. This Section is not intended to apply to federal covered investment advisers.

SECTION 505 [MISLEADING FILINGS]. A person may not make or cause to be made, in a document filed with the [Administrator] or in a proceeding under this [Act], a statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect.

REPORTER'S COMMENT

Source of Law: 1956 Act §404.

SECTION 506 [MISREPRESENTATIONS CONCERNING REGISTRATION OR EXEMPTION]. (a) Neither the fact that an application for registration, a registration statement or a notice filing has been filed under this [Act] nor the fact that a person is registered or has made a notice filing or a security is registered under this [Act] constitutes a finding by the [Administrator] that a document filed under this [Act] is true, complete, and not misleading. Neither of those facts nor the fact that an exemption, exception, or exclusion is available for a security or a transaction means that the [Administrator] has passed upon the merits or qualifications of, or recommended or given approval to, a person, security, or transaction.

(b) A person may not make, or cause to be made, to a purchaser, customer, or client a representation inconsistent with §506(a).

REPORTER'S COMMENT

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

1 **[SECTION 507 [QUALIFIED IMMUNITY]. (a) Every broker-dealer, agent, investment**
2 **adviser or investment adviser representative is required to make truthful and accurate**
3 **statements in any document required by the [Administrator], the Securities and Exchange**
4 **Commission, or any self-regulatory organization.**

5 **(b) No broker-dealer, agent, investment adviser, or investment adviser representative**
6 **shall be liable in any proceeding to another broker-dealer, agent, investment adviser or**
7 **investment adviser representative for any defamation claim relating to an alleged untrue**
8 **statement that is contained in any document required by the [Administrator], the Securities**
9 **and Exchange Commission, or any self-regulatory organization unless it is shown by clear and**
10 **convincing evidence that the defending party knew at the time that the statement was made**
11 **that it was false in any material respect or the defending party acted in reckless disregard of the**
12 **statement's truth or falsity.]**

13 **REPORTER'S COMMENT**

14 **Source of Law: National Association of Securities Dealers, Inc. Proposal Relating to Qualified**
15 **Immunity in Arbitration Proceedings for Statements Made in Forms U-4 and U-5.**

16 **1. The NASD proposal was reprinted in Securities Exchange Release 39,892, 66 SEC Dock.**
17 **2473 (1998). To date it has not been approved by the SEC.**

18 **2. The NASD proposal is limited to arbitration proceedings.**

19 **3. An alternative approach would be a standard providing for absolute immunity.**

20 **SECTION 508 [CRIMINAL PENALTIES]. (a) Any person who willfully violates any provision**
21 **of this Act, or any rule or order under this Act, except §302, the notice filing requirements of**
22 **§405 or who willfully violates §505 knowing the statement made to be false or misleading in any**
23 **material respect, shall upon conviction be fined [not more than [\$X]] or imprisoned not more**

1 than [Y] years, or both]; but no person may be imprisoned for the violation of any rule or order
2 if the person proves that he or she had no knowledge of the rule or order. No indictment or
3 information may be returned under this Act more than [Z years] after the commission of the
4 offense.

5 (b) The [Attorney General or the proper prosecuting attorney] may, with or without a
6 reference from the [Administrator], institute appropriate criminal proceedings under this Act.

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

9 REPORTER’S COMMENT

10 Source of Law: 1956 Act §409.

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

13 2. On the meaning of “willfully”, see Comment 4 under §306.

14 3. The appropriate State prosecutor under §508(c) may decide whether to bring a criminal
15 action under this statute, another statute, or common law.

16 4. This Section does not specify maximum dollar amounts for criminal fines, maximum terms
17 for imprisonment, nor a statute of limitations, but does require that each State include appropriate
18 standards for these matters.

19 **SECTION 509 [CIVIL LIABILITIES].** Except as limited by the Securities Litigation Uniform
20 Standards Act of 1998, (a) any person who

21 (1) sells a security in violation of §§301, 401(a), 402(a), or 506(b), or of any
22 rule or order under §504 which requires the affirmative approval of sales
23 literature before it is used, or (2) purchases or sells a security by means of any
24 untrue statement of a material fact or any omission to state a material fact

1 necessary in order to make the statements made, in the light of the circumstances
2 under which they are made, not misleading (the buyer not knowing of the
3 untruth or omission),
4 and who does not sustain the burden of proof that the person did not know, and in the exercise
5 of reasonable care could not have known, of the untruth or omission, is liable to a person
6 buying or selling the security from her or him, who may sue either at law or in equity to recover
7 the consideration paid for the security, [together with interest at x percent per year] from the
8 date of payment, costs, and reasonable attorneys' fees, less the amount of any income received
9 on the security, upon the tender of the security, and any income received on it, or for damages
10 if he or she no longer owns the security.

11 (b) Any person who

12 (1) engages in the business of advising others, for compensation, either directly or
13 through publications or writings, as to the value of securities or as to the advisability of
14 investing in, purchasing, or selling securities, or who, for compensation and as a part of a
15 regular business, issues or promulgates analyses or reports concerning securities in violations
16 of sections 403(a), 404(a), 502, or 506(b), or of any rule or order under section 505, or

17 (2) receives directly or indirectly any consideration from another person for advice as
18 to the value of securities or their purchase or sale, whether through the issuance of analyses,
19 reports or otherwise and employs any device, scheme, or artifice to defraud such other person
20 or engages in any act, practice or course of business which operates or would operate as a fraud
21 or deceit on such other person, is liable to that person who may sue either at law or in equity
22 to recover the consideration paid for such advice and any loss due to such advice, together with

1 interest at (x) percent per from the date of payment of the consideration plus costs and
2 reasonable attorney's fees, less the amount of any income received from such advice.

3 (c) Every person who directly or indirectly controls a person liable under §§509(a) and
4 (b), including every partner, officer, or director of such a person, every person occupying a
5 similar status or performing similar functions, every employee of such a person who materially
6 aids and abets conduct giving rise to the liability, and every broker-dealer or agent who
7 materially aids and abets such conduct is liable jointly and severally with and to the same extent
8 as such person, unless he or she sustains the burden of proof that he or she did not know, and
9 in exercise of reasonable care could not have known, of the existence of the facts by reason of
10 which the liability is alleged to exist. There is contribution as in cases of contract among the
11 several persons so liable.

12 (d) Any tender specified in this Section may be made at any time before entry of
13 judgment. Tender requires only written notice of willingness to exchange the security for the
14 amount specified. A purchaser who no longer owns the security may recover damages.
15 Damages are the amount that would be recoverable upon a tender less the value of the security
16 when the purchaser disposed of it, plus interest [at X percent per year] from the date of
17 disposition of the security, costs, and reasonable attorneys' fees determined by the court.

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

20 (f) A person may not obtain relief under §509 unless suit is brought within the earliest
21 of one year after the discovery of the violation, one year after discovery should have been made
22 by the exercise of reasonable care, or no later than three years after the act, omission, or

1 transaction constituting the violation.

2 (g) No purchaser may sue under this Section (1) if the purchaser received a written offer,
3 before suit and at a time when the purchaser owned the security, to refund the consideration
4 paid in cash together with interest [at X percent per year] from the date of payment, less the
5 amount of any income received on the security, and the purchaser failed to accept the offer
6 within 30 days of its receipt, or (2) if the purchaser received such an offer before suit and at a
7 time when the purchaser did not own the security, unless the purchaser rejected the offer in
8 writing within 30 days of its receipt.

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

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

16 (j) The rights and remedies provided by this Act are in addition to any other rights or
17 remedies that may exist at law or in equity, but this Act does not create any cause of action not
18 specified in this Section or §407(g).

19 REPORTER'S COMMENT

20 Source of Law: 1956 Act §410.

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

1 2. The initial clause referencing the Securities Litigation Uniform Standards Act of 1998
2 modifies the entire §509. In 1998 Congress enacted that Act to prevent State private securities class
3 actions lawsuits “from being used to frustrate the objectives of the Private Securities Litigation Reform
4 Act of 1995.” See §2 Findings. At the same time the Act took several steps to preserve State
5 securities enforcement powers and not to interfere with individual federal securities or State derivative
6 claims.

7 **SECTION 510 [JURISDICTION AND SERVICE OF PROCESS].**

8 **[Subject Matter Jurisdiction]**

9 (a) Sections 301, 302, 401(a), 402(a), 403(a), 404(a), 501, 506 and 509 apply to persons
10 who sell or offer to sell a security when (1) an offer to sell is made in this State, or (2) an offer
11 to buy is made and accepted in this State.

12 (b) Sections 401(a), 402(a), 403(a), 404(a), 501, and 506 apply to persons who buy or
13 offer to buy a security when (1) an offer to buy is made in this State, or (2) an offer to sell is
14 made and accepted in this State.

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

19 (d) For the purpose of this Section, an offer to buy or to sell is accepted in this State
20 when acceptance (1) is communicated to the offeror in this State and (2) has not previously
21 been communicated to the offeror, orally or in writing, outside this State; and acceptance is
22 communicated to the offeror in this State, whether or not either party is then present in this
23 State, when the offeree directs it to the offeror in this State reasonably believing the offeror to
24 be in this State and it is received at a place in this State to which it is directed [or at any post

1 office in this State in the case of a mailed acceptance].

2 (e) An offer to sell or to buy is not made in this State when the publisher circulates or
3 there is circulated on his behalf in this State any bona fide newspaper or other publication of
4 general, regular, and paid circulation which is not published in this State, or which is published
5 in this State but has had more than two thirds of its circulation outside this State during the
6 past twelve months, or a radio or television program or other electronic means originating
7 outside this State is received in this State. A radio or television program or other electronic
8 communication is considered as having originated in this State if either the broadcast studio
9 or the originating source of transmission is located in this State, unless:

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

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

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

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

20 (f) Sections 403(a), 404(a), 502, and 506 apply to investment advisers and investment
21 adviser representatives when any act instrumental in effecting prohibited conduct is done in
22 this State, whether or not either party is then present in this State.

1 **[Personal Jurisdiction]**

2 **[A. Consent]**

3 (g) Any consent to service of process required by this [Act] shall be filed with the
4 [Administrator], in the form the [Administrator], by rule, prescribes, an irrevocable consent
5 appointing the [Administrator] the person's agent for service of process in a noncriminal
6 proceeding against the person, a successor, or personal representative, which arises under this
7 [Act] or a rule or order of the [Administrator] under this [Act] after the consent is filed, with
8 the same force and validity as if served personally on the person filing the consent.

9 (h) A person who has filed a consent complying with §510(g) in connection with a
10 previous application for registration or notice filing need not file an additional consent.

11 **[B. Conduct]**

12 (i) If a person, including a nonresident of this State, engages in conduct prohibited or
13 made actionable by this [Act] or a rule or order of the [Administrator] under this [Act] and the
14 person has not filed a consent to service of process under §510(g), then engaging in the conduct
15 constitutes the appointment of the [Administrator] as the person's agent for service of process
16 in a noncriminal proceeding against the person, a successor, or personal representative which
17 grows out of the conduct.

18 **[C. Service of Process]**

19 (j) Service under §510(i) may be made by leaving a copy of the process in the office of
20 the [Administrator], but it is not effective unless:

(1) the plaintiff, who may be the [Administrator], promptly sends notice of the service and a copy of the process by registered or certified mail, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if no consent to service of process has been filed, at the last known address, or takes other steps reasonably calculated to give actual notice; and

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

(k) Service as provided in §510(j) may be used in a proceeding before the [Administrator] or by the [Administrator] in a proceeding in which the [Administrator] is the moving party.

(l) If the process is served under §510(j), the court, or the [Administrator] in a proceeding before the [Administrator], shall order continuances as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

REPORTER'S COMMENT

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

1. The phrase “other electronic means” is coextensive with computer or other information technology permitted by §101(g).

2. The Internet raises new jurisdictional issues, as one commentator theorizes because application of State blue sky laws to securities transactions has traditionally been based on location, i.e., the laws of a given State seek to regulate transactions occurring within the state's boundaries. For example, Section 414(a) of the Uniform Securities Act (USA) provides that its jurisdiction reaches all persons offering or selling securities when "(1) an offer to sell is made in this State, or (2) an offer to buy is made and accepted in this State." The USA further provides that an offer to sell or buy is made "in this State, whether or not either party is then present in this State, when the offer (1) originates

1 from this State or (2) is directed by the offeror to this State and received at the place to which it is
2 directed." Rice, *The Regulatory Response to the New World of Cybersecurities*, 51 Admin. L. Rev.
3 901, 930-931 (1999). It is uncertain whether the existing statutory approach will remain adequate.
4 Id. at 933: "Despite the additional complexities, existing principles can be used to view e-mail over
5 the Internet as similar to traditional postal mail and phone calls in providing a basis for jurisdiction."
6 See also id. at 944-945.

7 3. The ABA Global Cyberspace Jurisdiction Project, 55 Bus. Law. 1801, 1931-1937 (2000),
8 generally emphasized that "there is and should be less focus on the residence of either the seller or
9 purchaser and more focus on the marketplace where the transaction occurs," but specifically
10 recognized that an investor's residence takes on greater significance in public or private offerings of
11 new securities than in secondary trading. Id. at 1931-1932. The Project theorized that in the future
12 artificially intelligent cyber-agents (or Bots) will perform many securities transactions for principals,
13 id. at 1932-1934, but recognized today that "the prevailing trend in jurisdiction over securities
14 transactions has been to focus on the place to which information on securities is directed by the
15 offeror." Id. at 1934.

1 **[PART F: ADMINISTRATION AND JUDICIAL REVIEW]**

2 **SECTION 601 [ADMINISTRATION OF ACT]. (a) This Act shall be administered by the**
3 **[insert name of local administrative agency and any related provisions on method of selection,**
4 **salary, term of office, budget, selection and remuneration of personnel, annual reports to the**
5 **legislature or governor, etc., which are appropriate to the particular State].**

6 **(b) It is unlawful for the [Administrator] or any of the [Administrator's] officers or**
7 **employees to use for personal benefit any information which is filed with or obtained by the**
8 **[Administrator] and which is not made public. No provision of this Act authorizes the**
9 **[Administrator] or any of her or his officers or employees to disclose any such information**
10 **except among themselves, when necessary or appropriate in a proceeding or investigation under**
11 **this Act, or in cooperation with other agencies in accordance with §607(a). No provision of this**
12 **Act either creates or derogates from any privilege which exists at common law or otherwise**
13 **when documentary or other evidence is sought under a subpoena directed to the**
14 **[Administrator] or any of her or his officers or employees.**

15 **REPORTER'S COMMENT**

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

17 **SECTION 602 [INVESTIGATIONS AND SUBPOENAS]. (a) The [Administrator] (1) may**
18 **make such public or private investigations within or outside of this State as the [Administrator]**
19 **deems necessary to determine whether any person has violated or is about to violate any**

1 provision of this Act or any rule or order, or to aid in the enforcement of this Act or in the
2 prescribing of rules and forms hereunder, (2) may require or permit any person to file a
3 statement in writing, under oath or otherwise as the [Administrator] determines, as to all the
4 facts and circumstances concerning the matter to be investigated, and (3) may publish
5 information concerning any violation of this Act or any rule or order.

6 (b) For the purpose of any investigation or proceeding under this Act, the
7 [Administrator] or any designated officer may administer oaths and affirmations, subpoena
8 witnesses, seek compulsion of attendance, take evidence, and require the production of any
9 books, papers, correspondence, memoranda, agreements, or other documents or records,
10 however created, produced, or stored, which the [Administrator] deems relevant or material
11 to the inquiry.

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

18 (d) If a person fails or refuses to file any statement or report or to produce any books,
19 papers, correspondence, memoranda, agreements, or other documents or records, or to obey
20 any subpoena issued by the [Administrator], the [Administrator] may refer the matter to the
21 [Attorney General or the proper attorney], who may apply to [insert name of appropriate
22 court] to enforce compliance. The court may order any or all of the following:

1 **1. Injunctive relief, restricting or prohibiting the offer or sale of securities [or providing**
2 **investment advice].**

3 **2. Revocation or suspension of any registration.**

4 **3. Production of documents or records, including but not limited to books, papers,**
5 **correspondence, memoranda, or agreements.**

6 **4. Such other relief as may be required.**

7 **Such an order shall be effective until the person files the statement or report or produces**
8 **the documents requested, or obeys the subpoena.**

9 **(e) No person is excused from attending and testifying or from producing any document**
10 **or record before the [Administrator], or in obedience to the subpoena of the [Administrator]**
11 **or any designated officer, or in any proceeding instituted by the [Administrator], on the ground**
12 **that the required testimony or evidence (documentary or otherwise) may tend to incriminate**
13 **the person or subject the person to a penalty or forfeiture; but no document, evidence, or other**
14 **information compelled or information derived, directly or indirectly, from such document,**
15 **evidence, or other information, may be used against a person so compelled in a criminal case,**
16 **except that the person testifying is not exempt from prosecution and punishment for perjury**
17 **or contempt committed in testifying.**

18 **(f) The [Administrator] may issue and apply to enforce subpoenas in this State at the**
19 **request of a securities agency or administrator of another State [if the activities constituting an**
20 **alleged violation for which the information is sought would be a violation of this [Act] if the**
21 **activities had occurred in this State].**

1 REPORTER'S COMMENT

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

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

4 The Securities and Exchange Commission, in consultation with State securities
5 commissions (or any agencies or offices performing like functions), shall seek to
6 encourage the adoption of State laws providing for reciprocal enforcement by State
7 securities commissions of subpoenas issued by another State securities commission
8 seeking to compel persons to attend, testify in, or produce documents or records in
9 connection with an action or investigation by a State securities commission of an
10 alleged violation of State securities laws.

11 2. Where appropriate under §602(f), an administrator could move to authorize admission of
12 a requesting state's attorney under existing *pro hac vice* rules.

13 **SECTION 603 [ENFORCEMENT]. (a) Whenever it appears to the [Administrator] that any**
14 **person has engaged or is about to engage in any act or practice constituting a violation of any**
15 **provision of this Act or any rule or order under this Act, the [Administrator] may do one or**
16 **more of the following:**

17 **(1) issue a cease and desist order, with or without a prior hearing against the person or**
18 **persons engaged in the prohibited activities, directing them to cease and desist from further**
19 **illegal activity; or**

20 **(2) bring an action in the [insert the name of appropriate court] to enjoin the acts or**
21 **practices and to enforce compliance with this Act or any rule or order hereunder. Upon a**
22 **proper showing a permanent or temporary injunction, restraining order, asset freeze,**
23 **accounting, writ of attachment, writ of general or specific execution, or writ of mandamus**
24 **shall be granted and a receiver or conservator may be appointed for the defendant or the**
25 **defendant's assets. Upon a proper showing, a court may also order the [Administrator] to take**
26 **charge and control of a party's property, including rents and profits, to collect debts, and to**

1 acquire and dispose of property. In addition, upon a proper showing by the [Administrator]
2 the court may enter an order of rescission, civil penalty up to a maximum of [\$X] for a single
3 violation or of [\$Y] for multiple violations in a single proceeding or a series of related
4 proceedings, a declaratory judgment, restitution or disgorgement directed to any person who
5 has engaged in any act constituting a violation of any provision of this Act or any rule or order
6 issued under this Act and may order the payment of prejudgment and postjudgment interest
7 or other relief the court deems just. The court may not require the [Administrator] to post a
8 bond;

9 (3) censure the person, if the person is a registered broker-dealer, agent, investment
10 adviser, or investment adviser representative; or

11 (4) bar or suspend the person from association with a registered broker-dealer or
12 investment adviser in this State or a person from representing an issuer offering or selling
13 securities in the State or acting as a promoter, officer, director or partner of an issuer offering
14 or selling securities in the State or of a person who controls or is controlled by such issuer; or

15 (b)(1) The [Administrator] may use emergency administrative proceedings in a situation
16 involving an immediate danger to the public investors requiring immediate action. The
17 [Administrator] may take only such action as is necessary to prevent or avoid the immediate
18 danger to the public investors that justifies use of emergency administrative proceedings.

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

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

(4) After issuing an order under this Subsection, the [Administrator] shall proceed as expeditiously as feasible to complete proceedings that would be required [under the State administrative procedure act] if the matter did not involve an immediate danger.

(5) The record of the [Administrator] consists of the documents regarding the matter that were considered, prepared, or obtained by the [Administrator]. The [Administrator] shall maintain these documents as the official record.

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

REPORTER'S COMMENT

Source of Law: 1956 Act §408; NASAA 1987 Proposed Amendments to §408; RUSA §§602-603; Iowa Unif. Sec. Act §502.603 for §603(a)(2).

1. Constitutional due process considerations should be addressed by rulemaking or incorporation of the applicable administrative procedure act provisions of each jurisdiction. Except to the extent otherwise provided in §603(b), it is anticipated that no action under §603(a) would be sought without (1) appropriate notice to any person who is subject to a proceeding and (2) opportunity for hearing.

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

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

The purpose behind the broader range of sanctions is to give the [Administrator] greater flexibility in imposing sanctions. Under the 1956 Act, an Administrator often faced the difficult choice of whether or not to suspend the license of a broker-dealer who had violated the Act, irrespective of the severity of the violation – a very drastic remedy and consequence.

1 This Section now permits the [Administrator] to impose a less drastic sanction, e.g., a civil
2 penalty. In egregious cases, on the other hand, an [Administrator] could, if warranted, impose
3 multiple sanctions.

4 3. Section 603 does not include a statute of limitations. State statutes of limitations applicable
5 to administrative enforcement actions may be applicable here.

6 **SECTION 604 [RULES, FORMS, ORDERS, AND HEARINGS]. (a) The [Administrator] may**
7 **make, amend and rescind such rules, forms and orders as are necessary to carry out the**
8 **provisions of this Act, including rules and forms governing registration statements,**
9 **applications, notice filings, and reports, and defining any terms, whether or not used in this Act,**
10 **when these definitions are not inconsistent with the provisions of this Act.**

11 **(b) No rule, form, or order may be made, amended, or rescinded unless the**
12 **[Administrator] finds that the action is necessary or appropriate in the public interest or for**
13 **the protection of investors and consistent with the purposes fairly intended by the policy and**
14 **provisions of this Act. In prescribing rules and forms the [Administrator] may cooperate under**
15 **§607 with a view to effectuating the policy of this statute to achieve maximum uniformity in the**
16 **form and content of registration statements, applications, and reports.**

17 **(c) Except to the extent limited by §15(h) of the Securities Exchange Act or §222 of the**
18 **Investment Advisers Act of 1940, the [Administrator] may by rule or order prescribe (1) the**
19 **form and content of financial statements required under this Act, (2) the circumstances under**
20 **which consolidated financial statements shall be filed, and (3) whether any required financial**
21 **statements shall be certified by independent certified public accountants. All financial**
22 **statements shall be prepared in accordance with generally accepted accounting principles in the**
23 **United States.**

24 **(d) All rules, forms and orders of the [Administrator] shall be published.**

(e) No provision of this Act imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the [Administrator].

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

REPORTER'S COMMENT

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

1. It is anticipated that the Administrator will make amendments under §604(a) to remain coordinate with relevant federal law and to achieve uniformity among the States.

2. Section 604(c) refers to generally accepted accounting principles in the United States which currently are promulgated by the Financial Accounting Standards Board and the Securities and Exchange Commission.

SECTION 605 [ADMINISTRATIVE FILES AND OPINIONS]. (a) The [Administrator] shall keep a register of all applications for registration of securities, registration statements, notice filings and all applications for broker-dealer, agent, investment adviser and investment adviser representative registration and all notice filings by federal covered investment advisers which are or have ever been effective under this Act and predecessor laws; all written notices of claim of exemption from registration or notice filing requirements; all orders entered under this Act and predecessor laws; and all interpretative opinions or no-action determinations issued under this Act. All records may be maintained in computer or microfilm format or any other form of data storage. The register shall be available for public inspection.

(b) Upon request and at such reasonable charges as he or she prescribes, the

1 [Administrator] shall furnish to any person copies of any entry in the register or any document
2 which is a matter of public record. In any proceeding or prosecution under this Act, any copy
3 so certified is prima facie evidence of the contents of the entry or document certified.

4 (c) The [Administrator] may honor requests from interested persons for interpretative
5 opinions or may issue determinations that the [Administrator] will not institute enforcement
6 proceedings against certain specified persons for engaging in certain specified activities where
7 the determination is consistent with the purposes fairly intended by the policy and provisions
8 of this Act.

9 REPORTER'S COMMENT

10 Source of Law: 1956 Act §413; NASAA Proposed Amendments to §§413(b), (e); RUSA
11 §§101(4), 709.

- 12 1. Section 101(g) of this Act includes a definition of "filed."
13 2. RUSA §706 includes, in addition, a declaratory order procedure.

14 **SECTION 606 [PUBLIC INFORMATION; CONFIDENTIALITY].** (a) Except as provided in
15 subsection (b), information and documents filed with or obtained by the [Administrator],
16 including information contained in or filed with any registration statement, application, notice
17 filing, or report, are public information and are available for public examination under the
18 [freedom of information or open records laws of this State].

19 (b) The following information and documents do not constitute public information under
20 subsection (a):

- 21 (1) information or documents obtained by the [Administrator] in connection with an

1 investigation under §602;

2 (2) information or documents filed with the [Administrator] in connection with a
3 registration statement under §§301-302 or a report under §404 and constituting trade secrets
4 or commercial or financial information that are privileged or confidential;

5 (3) information or documents that (i) are not required to be filed with or provided to the
6 [Administrator] under this Act and (ii) are only provided to the [Administrator] on the
7 condition that such information will not be subject to public examination or disclosure under
8 the [freedom of information or open records laws of this State]. The identity of the person or
9 persons providing to the [Administrator] such documents or information covered by this
10 subsection shall not be subject to disclosure under §606(a).

11 [(4) information or documents obtained by the [Administrator] through a central
12 registration depository (CRD) system which have subsequently been deleted from the CRD or
13 designated as nonpublic or nondisclosable by the CRD system].

14 (c) The [Administrator] may disclose:

15 (1) information obtained in connection with an investigation under §602 subject to the
16 restrictions of subsection §606(b)(2); or

17 (2) information to a securities agency, law enforcement agency, or agency or
18 administrator specified in §607, when applicable law protections exist to preserve the integrity,
19 confidentiality, and security of the information.

20 (d) This [Act] does not create any privilege or diminish any privilege existing at common
21 law, by statute, rule, or otherwise.

1 REPORTER'S COMMENT

2 Source of Law: RUSA §703; SEC Rule §200.80(b)(4) (for §606(b)(2)); Securities Exchange
3 Act §§24(d)-(e) (for §606(c)(2)).
4

5 **SECTION 607 [COOPERATION WITH OTHER AGENCIES]. (a) To encourage uniform**
6 **interpretation and administration of this Act and effective securities regulation and**
7 **enforcement, the [Administrator] may cooperate with the securities agencies or administrators**
8 **of one or more States, Canadian provinces or territories, or another country, the Securities and**
9 **Exchange Commission, the Commodity Futures Trading Commission, the Securities Investor**
10 **Protection Corporation, any self regulatory organization, any national or international**
11 **organization of securities officials or agencies, and any governmental law enforcement or**
12 **regulatory agency.**

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

15 **(1) establishing a central depository for registration and notice filings under this Act and**
16 **for documents or records required or allowed to be maintained under this Act;**

17 **(2) developing common forms;**

18 **(3) making a joint examination or investigation;**

19 **(4) holding a joint administrative hearing;**

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

21 **(6) sharing and exchanging personnel;**

22 **(7) coordinating registration under §301 and §401 with other jurisdictions;**

23 **(8) sharing and exchanging information and documents subject to the restrictions of**

1 [insert applicable State law];

2 (9) formulating, in accordance with the [administrative procedure act] of this State, rules
3 or proposed rules on matters such as statements of policy, guidelines, and interpretative
4 opinions and releases; and

5 (10) formulating common systems and procedures.

6 REPORTER'S COMMENT

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

- 8 1. There is no counterpart provision in the 1956 Act.
9 2. In 1987 NASAA proposed adopting RUSA §704.

10 **SECTION 608 [JUDICIAL REVIEW]. All rules and orders issued under this [Act] are subject**
11 **to judicial review [in accordance with the State Administrative Procedure Act].**

12 REPORTER'S COMMENT

13 Source of Law: RUSA §711(b).

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

18 2. The Official Comment 2 to RUSA §711 states: "The Section does not preclude persons
19 from waiving their rights to an administrative proceeding if, with full knowledge of their rights, they
20 choose to do so."

21 **SECTION 609 [UNIFORMITY OF APPLICATION AND CONSTRUCTION]. This [Act] shall**
22 **be applied and construed to effectuate its general purpose to make uniform the law with respect**
23 **to the subject of this [Act] among States and to coordinate the interpretation and**

administration of this [Act] with the related federal laws and regulations.

REPORTER'S COMMENT

Source of Law: 1956 Act §415, RUSA §803.

1. This Section is intended to be consistent with the goals of the protection of investors and capital formation.

2. The goals of uniformity among the States and coordination with related federal regulation may be enhanced by greater use of such information technology systems as the Central Registration Depository (CRD), or the Securities and Exchange Commission (SEC) Electronic Data Gathering and Retrieval (EDGAR) 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.

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

4. This Act is intended to be revenue neutral in its impact on existing State laws.

5. This Section is intended to be for the guidance of the Administrator and any reviewing court.

1 **[PART G: MISCELLANEOUS]**

2 **SECTION 701 [SHORT TITLE]. This Act may be cited as the Uniform Securities Act (2001).**

3 **SECTION 702 [SEVERABILITY]. If any provision of this [Act] or its application to any**
4 **person or circumstances is held invalid, the invalidity does not affect other provisions or**
5 **applications of this [Act] which can be given effect without the invalid provision or application,**
6 **and to this end the provisions of the [Act] are severable.**

7 **REPORTER'S COMMENT**

8 Source of Law: 1956 Act §417; RUSA §805.

9 **SECTION 703 [REPEAL AND SAVINGS PROVISIONS]. (a) The [identify the existing act**
10 **or acts] is [are] repealed except as saved in this Section.**

11 **(b) Prior law exclusively governs all suits, actions, prosecutions, or proceedings which**
12 **are pending or may be initiated on the basis of facts or circumstances occurring before the**
13 **effective date of this Act, except that no civil suit or action may be maintained to enforce any**
14 **liability under prior law unless brought within any period of limitation which applied when the**
15 **cause of action accrued and in any event within two years after the effective date of this Act.**

16 **(c) All effective registrations under prior law, all administrative orders relating to such**
17 **registrations, and all conditions imposed upon such registrations remain in effect so long as they**
18 **would have remained in effect if this Act had not been passed. They are considered to have**

1 been filed, entered, or imposed under this Act, but are governed by prior law.

2 (d) Prior law applies in respect of any offer or sale made within one year after the
3 effective date of this Act pursuant to an offering begun in good faith before its effective date on
4 the basis of an exemption available under prior law.

5 (e) Judicial review of all administrative orders as to which review proceedings have not
6 been instituted by the effective date of this Act are governed by §608, except that no review
7 proceeding may be instituted unless the petition is filed within any period of limitation which
8 applied to a review proceeding when the order was entered and in any event within 60 days
9 after the effective date of this Act.

10 REPORTER'S COMMENT

11 Source of Law: 1956 Act §418; RUSA §807.

12 **SECTION 704 [EFFECTIVE DATE].** This [Act] takes effect on [insert date, which should be
13 at least 60 days after enactment].

14 REPORTER'S COMMENT

15 Source of Law: 1956 Act §419; RUSA §806.