

DRAFT

FOR DISCUSSION ONLY

**PROPOSED REVISIONS OF
UNIFORM SECURITIES ACTS**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

SEPTEMBER, 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

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

9 **REPORTER’S COMMENT**

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

11 (b) “Agent” means a person, other than a broker-dealer, who represents a broker-
12 dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer
13 in effecting or attempting to effect purchases or sales of the issuer’s own securities. A person
14 so acting for an issuer with respect to an offering or purchase of the issuer’s own securities or
15 those of the issuer’s parent or any of the issuer’s subsidiaries is not an agent if (i) the person
16 primarily performs, or is intended primarily to perform upon completion of the offering
17 substantial duties for or on behalf of the issuer, the issuer’s parent or any of the issuer’s
18 subsidiaries otherwise than in connection with transactions in the issuer’s own securities and
19 (ii) the person’s compensation is not based, in whole or in part, upon the amount of purchases
20 or sales of the issuer’s own securities. A partner, officer, or director of a broker-dealer or

1 issuer, or a person occupying a similar status or performing similar functions, is an agent only
2 if the person otherwise comes within the definition. No person who represents an issuer shall
3 be deemed to be an agent by reason of effecting transactions in a federal covered security to
4 qualified purchasers pursuant to §18(b)(3) of the Securities Act of 1933 or effecting
5 transactions in a federal covered security pursuant to §18(b)(4)(D) of the Securities Act of 1933
6 if no commission or other remuneration is paid or given directly or indirectly for soliciting any
7 person in this state. Nor shall a person be deemed to be an agent who represents a broker-
8 dealer in this state in effecting transactions limited to those described in §15(h)(2) of the
9 Securities Exchange Act of 1934. The [Administrator] by rule or order may designate any
10 other person not to be an agent.

11 REPORTER'S COMMENT

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

14 1. The 1956 Act §401(b) uses the term “agent” rather than RUSA §101(14)’s term “sales
15 representative.”

16 2. The second sentence of this definition is based on Colorado Securities Act §201(14) and
17 Illinois Securities Act §2.9 to clarify when a person acting for an issuer will not be an agent.

18 3. The substance of the final two sentences appears in NASAA 1997 amendments. Section
19 18(b)(3) will become operational only when the Securities and Exchange Commission (SEC) by rule
20 adopts a definition of “qualified purchaser.”

21 (c) “Broker-dealer” means a person engaged in the business of effecting transactions

1 in securities for the account of others or for the person’s own account. The term does not
2 include:

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

8 REPORTER’S COMMENT

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

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

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

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

1 Exchange Act.

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

12 REPORTER’S COMMENT

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

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

17 2. RUSA §101(3) also excepted from this definition “[a] trust company or other institution
18 that is authorized by federal or state law to exercise fiduciary powers of the type a national bank is
19 permitted to exercise under the authority of the Comptroller of the Currency and is supervised and
20 examined by an official or agency of a state or the United States.” The SEC has not to date opined

as to whether or not such nondepository trust companies are banks under the federal securities laws.

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

REPORTER’S COMMENT

Source of Law: NASAA 1997 Amendment.

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

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

REPORTER’S COMMENT

Source of Law: NASAA 1997 Amendment.

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

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

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

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

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

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

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

1 Amex, NASDAQ National Market System list, or other applicable securities
2 exchange;

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

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

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

11 (A) Sections 4(1) [transactions by persons other than an
12 issuer, underwriter or dealer], and 4(3) [dealers after specified periods
13 of time], but only if the issuer files reports with the Commission under
14 §13 or 15(d) of the Securities Exchange Act;

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

16 (C) Securities Act exemptions in §3(a) with the exception of
17 the charitable exemption in §3(a)(4), the exchange exemption in
18 §3(a)(10), the intrastate exemption in §3(a)(11), and the municipal
19 securities exemption in §3(a)(2), but only with “respect to the offer or
20 sale of such [municipal] security in the state in which the issuer of
21 such security is located”; and

22 (D) Securities issued in compliance with Commission rules

1 under §4(2) [private placement exemption].

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

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

15 **(g) “File, Filed, or Filing” means the receipt of a document or application to the**
16 **[Administrator or designated depository] or designee of the [Administrator] or to the principal**
17 **office of the [Administrator].**

18 REPORTER’S COMMENT

19 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, through a direct modem system such as that used with 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.

1 2. RUSA uses an alternative and broader definition: “Guaranteed means guaranteed as to
2 payment of all or substantially all of principal and interest or dividends,” without defining
3 “substantially all.”

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

6 (i) **a depository institution or international bank;**

7 (ii) **an insurance company;**

8 (iii) **a separate account of an insurance company;**

9 (iv) **an investment company or business development company as defined**
10 **in the Investment Company Act of 1940;**

11 (v) **any broker or dealer registered under §15 of the Securities Exchange**
12 **Act of 1934;**

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

20 (vii) **a plan established and maintained by a state, its political**
21 **subdivisions, or any agency or instrumentality of a state or its political**

1 subdivisions [with total assets in excess of [\$25,000,000]], for the benefit of its
2 employees or its investment decisions are made by a named fiduciary, as defined
3 in the Employee Retirement Income Security Act of 1974, that is either a
4 broker-dealer registered under the Securities Exchange Act of 1934, an
5 investment adviser registered or exempt from registration under the Investment
6 Advisers Act of 1940, a depository institution, or an insurance company;

7 (viii) a trust fund [with total assets in excess of [\$25,000,000]] whose
8 trustee is a depository institution and whose participants are exclusively plans
9 of the types identified in paragraph (v) or (vi) of this Section, regardless of size
10 of assets, except trust funds that include as participants individual retirement
11 accounts, H.R. 10 plans, or similar plans;

12 (ix) an organization described in §501(c)(3) of the Internal Revenue
13 Code, or a corporation, Massachusetts or similar business trust, limited liability
14 company, limited liability partnership, or partnership, not formed for the
15 specific purpose of acquiring the securities offered, [with total assets in excess
16 of [\$25,000,000]];

17 (x) a small business investment company licensed by the Small Business
18 Administration under §301(c) or (d) of the Small Business Investment Act of
19 1958 [with total assets in excess of [\$25,000,000]];

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

[(xii) any investment adviser registered under the Investment Advisers Act of 1940, with investments under management in excess of \$100 million, whether acting for it's 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 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 investor; and

(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. This exemption is limited to juridical, rather than natural, persons.

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

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

(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.

1 REPORTER'S COMMENT

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

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

4 REPORTER'S COMMENT

5 Source of Law: RUSA §401(a)(2).

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

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

10 REPORTER'S COMMENT

11 Source of Law: New.

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

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

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

10 **[(2) a depository institution, its employees, or international bank;]**

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

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

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

(6) a person whose advice, analyses, or reports relate only to securities exempt under §201(a);

(7) a federal covered investment adviser; or

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

REPORTER'S COMMENT

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

1. This provision follows the 1956 Act except (a) it adds §101(n)(7) to incorporate the new concept of a federal covered investment adviser; (b) substitutes in §101(n)(2) the term “depository institution, its employees, or international bank” for the terms “a bank, savings institution, or trust company”; (c) broadens the publication exception in §101(n)(5) following RUSA.

2. When the broadened language in the equivalent to §101(n)(5) was included in RUSA, an Official Code Comment was adopted that read:

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

1 3. The exclusion in §101(n)(5) is intended to reach publishers, employees, or columnists of
2 Internet or electronic media, but only if the Internet or electronic media publication or “website”
3 satisfies the “dissemination is made available to the general public and the content does not consist
4 of rendering advice” requirements.

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

10 5. Section 101(n) expressly refers to financial planners. This reference is not intended to
11 preclude persons who hold some form of formally recognized financially planning or consulting
12 designation from using this designation.

13 QUERY: Is §101(n)(6) too broad?

14 **(o)(1) “Investment adviser representative” of an investment adviser means any partner,**
15 **officer, director of (or an individual occupying a similar status or performing similar functions)**
16 **or any other individual employed by or associated with such an investment adviser, except**
17 **clerical or ministerial personnel, who does any of the following: (A) makes any**
18 **recommendations or otherwise renders advice regarding securities, (B) manages securities**
19 **accounts or portfolios of clients, (C) determines which recommendation or advice regarding**
20 **securities should be given, (D) solicits, offers or negotiates for the sale of or sells investment**
21 **advisory services, or (E) supervises employees who perform any of the foregoing.**

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

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

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

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

REPORTER'S COMMENT

Source of Law: NASAA 1997 Amendment.

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

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

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

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

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

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

REPORTER'S COMMENT

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

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

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

REPORTER'S COMMENT

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

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

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

REPORTER'S COMMENT

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

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

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

(s) **“Price amendment”** means the amendment to a registration statement filed under

1 the Securities Act of 1933 or, if no amendment is filed, the prospectus or prospectus
2 supplement filed under the Securities Act of 1933, which includes a statement of the offering
3 price, underwriting and selling discounts or commissions, amount of proceeds, conversion
4 rates, call prices, and other matters dependent upon the offering price.

5
6 REPORTER'S COMMENT

7 Source of Law: RUSA §101(11).

8 [(t) "Promoter" means (i) a person who, acting alone or in concert with one or more
9 persons, takes the entrepreneurial initiative in founding or organizing the business or
10 enterprise of an issuer; (ii) an officer or director owning securities of an issuer or a person who
11 owns, beneficially or of record, ten percent or more of a class of securities of the issuer if the
12 officer, director, or person acquires any of those securities in a transaction within three years
13 before the filing by the issuer of a registration statement under this [Act] and the transaction
14 does not possess the indicia of arms length bargaining; and (iii) a member of the immediate
15 family of a person within subparagraph (i) or (ii) if the family member receives securities of
16 the issuer from that person in a transaction within three years before the filing by the issuer
17 of a registration statement under this [Act] and the transaction does not possess the indicia of
18 arms length bargaining.]

19 REPORTER'S COMMENT

20 Source of Law: RUSA §101(12).

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

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

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

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

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

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

1 REPORTER'S COMMENT

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

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

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

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

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

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

17
18 (v) “Securities Act of 1933,” “Securities Exchange Act of 1934,” “Public Utility Holding
19 Company Act of 1935,” “Investment Company Act of 1940,” “Investment Advisers Act of
20 1940,” “Employee Retirement Income Security Act of 1974,” “National Housing Act,”
21 “Commodity Exchange Act,” and “Securities Litigation Uniform Standards Act of 1998” mean
22 the federal statutes of those names, their rules and regulations, as amended. “Securities and

Exchange Commission” means the United States Securities and Exchange Commission.

REPORTER'S COMMENT

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

1. This Subsection is intended 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.

Cf. also *Rochvarg*, *State Adoption of Federal Law – Legislative Abdication or Reasoned Policymaking?*, 36 Admin. L. Rev. 277 (1984) (analyzing constitutional questions that arise when states attempt to adopt future federal laws or regulations); *Oklahoma City v. State et rel. Oklahoma Dep’t of Labor*, 918 P. 2d 26 (Okl. 1995) (distinguishing retrospective incorporation by reference by state of federal regulation from impermissible future incorporation by reference).

(w) “Security” means: a note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral-

1 trust certificate; preorganization certificate or subscription; transferable share; investment
2 contract; voting-trust certificate; certificate of deposit for a security; fractional undivided
3 interest in an oil, gas, or other mineral lease or in payments out of production under a lease,
4 right, or royalty; a put, call, straddle, or option entered into on a national securities exchange
5 relating to foreign currency; a put, call, straddle, or option on a security, certificate of deposit,
6 or group or index of securities, including an interest in or based on the value of any of the
7 foregoing; or, in general, an interest or instrument commonly known as a “security,” or a
8 certificate of interest or participation in, temporary or interim certificate for, receipt for, whole
9 or partial guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

10 The term does not include:

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

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

16 REPORTER’S COMMENT

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

18 1. Section 101(w) adds three provisions from RUSA to the 1956 definition: (a) “a limited
19 partnership interest”; (b) “a put, call, straddle, or option entered into on a national securities exchange
20 relating to foreign currency; a put, call, straddle or option on a security, certificate of deposit, or
21 group or index of securities, including an interest in or based on the value of any of the foregoing”;

1 and (c) the exception for “an interest in a contributory or noncontributory pension or welfare plan
2 subject to the Employee Retirement Income Security Act of 1974.”

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

9 3. Much of the language in §101(w), like the language in the 1956 Act §401(l) and RUSA
10 §101(16), is identical or virtually identical to §2(a)(1) of the Securities Act. State courts interpreting
11 the Uniform Securities Act definition of security have often looked to interpretations of the federal
12 definition of security. See generally 2 L. Loss & J. Seligman, Security Regulation 923-1138.19 (3d
13 ed. rev.1999).

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

16 5. Under federal securities law limited liability companies and limited partnerships have been
17 held to be investment contracts and accordingly “securities” within the meaning of §2(a)(1) of the
18 Securities Act of 1933. See 2 L. Loss & J. Seligman, Securities Regulation 1028-1031 (3d ed. rev.
19 1999). In addition, when consistent with the court decisions interpreting the investment contract
20 concept, see, e.g., SEC v. W.J. Howey Co., 328 U.S. 293 (1946), such instruments as limited
21 liability partnerships or viatical settlements could also be statutory securities. cf. SEC v. Life
22 Partners Inc., 87 F.3d 536 (D.C. Cir. 1996), reh’g denied, 102 F. 3d 587 (D.C. Cir. 1996) (Viatical

1 settlements are investment contracts, but exempt under the federal Securities Act insurance
2 exemption, §3(a)(8)).

3 6. This definition applies whether or not a security is evidenced by a writing.

4 7. A significant minority of states have excluded variable annuities from the definition of
5 security on the grounds that they are both regulated by federal securities and state insurance laws.

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

12 REPORTER’S COMMENT

13 Source of Law: RUSA §101(17).

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

16 (y) **“State” means a State of the United States, the District of Columbia, Puerto**
17 **Rico, the United States Virgin Islands, or any territory or insular possession subject to the**
18 **jurisdiction of the United States.**

19 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 **(z) “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).

1 **[PART B: EXEMPTIONS]**

2 **SECTION 201 [EXEMPT SECURITIES]. The following securities are exempt from §§301,**
3 **302, and 504:**

4 (a) **[United States Governments and Municipals]. Any security (including a revenue**
5 **obligation or a separate security as that term is defined in Rule 131 of the Securities Act of**
6 **1933) issued, insured, or guaranteed by the United States or by any State, or by any political**
7 **subdivision of a State or by any public authority, agency or instrumentality of one or more**
8 **States or political subdivisions of States, or by any person controlled or supervised by and**
9 **acting as an instrumentality of the Government of the United States pursuant to authority**
10 **granted by the Congress of the United States; or any certificate of deposit for any of the**
11 **foregoing.**

12 **REPORTER'S COMMENT**

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

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

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

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

20 2. Neither the exempt security nor the transaction exemptions are meant to be mutually

1 exclusive. A security or transaction may often qualify for two or more of these exemptions.

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

6 REPORTER'S COMMENT

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

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

11 REPORTER'S COMMENT

12 Source of Law: RUSA §401(b)(3).

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

19 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, but only with respect to the registration requirements 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

1 investment companies are “covered securities” under NSMIA and are subject to the notice filing
2 requirements of §302.

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

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

8 REPORTER’S COMMENT

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

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

11 2. Both the 1956 Act and RUSA include references, omitted here, to the Interstate
12 Commerce Commission, whose enabling legislation subsequently was repealed.

13 3. Public utilities covered by this exemption are subject both to the federal Public Utility
14 Holding Company Act and to state utility regulation.

15 **(f) [Certain Options and Rights]. A put or call option contract, warrant or subscription**
16 **right on or with respect to any federal covered security specified in §18(b)(1) of the Securities**
17 **Act of 1933 or by Rule issued under that Subsection or any security listed or approved for**
18 **listing on the (insert names of other appropriate securities markets designated by rule by [the**
19 **Administrator] consistent with §604(b)); or any option on a security or an index of securities**

1 or foreign currencies issued by a clearing agency registered under the Securities Exchange Act
2 of 1934 and listed or traded on a national securities exchange, a facility of a national securities
3 exchange, or a facility of a national securities association registered under the Securities
4 Exchange Act of 1934.

5 REPORTER'S COMMENT

6 Source of Law: New; RUSA §401(b)(9).

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

8 A security is a covered security if such security is –

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

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

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

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

1 NASDAQ/NMS.

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

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

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

11 **(g) [Not-for-Profit Organizations]. Any security, whether interest bearing or not, issued**
12 **by a person organized and operated exclusively for religious, educational, benevolent,**
13 **fraternal, charitable, social, athletic, or reformatory purposes or as a chamber of commerce**
14 **and not for pecuniary profit, no part of the net earnings of which inures to the benefit of any**
15 **private stockholder or individual, or any security of a fund that is excluded from the definition**
16 **of an investment company under Section 3(c)(10) of the Investment Company Act of 1940.**
17 **This exemption does not include a note, bond, debenture, or evidence of indebtedness sold to**
18 **persons other than bona fide members of an organization specified in this subsection unless**
19 **the [Administrator] adopts an exemptive rule or order under §203.**

20 REPORTER'S COMMENT

1 Source of Law: Sec. Act §§3(a)(4).

2 1. Section 402(a)(9) of the 1956 Act and §401(b)(10) of RUSA exempt specified not-for-
3 profit securities. Both are modeled on §3(a)(4) of the Securities Act, which was subsequently
4 amended.

5 2. Section 3(a)(4) is not treated as a federal covered security in §18(b)(4)(C), although a
6 separate §3(a)(13) exemption which addresses certain church plan securities in the Securities Act is
7 a federal covered security in §18(b)(4)(C).

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

14 4. This exemption is of particular concern to state securities administrators. Robert M. Lam,
15 Chairman of the Pennsylvania Securities Commission, wrote the Reporter on November 30, 1999:

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

19
20 **(h) [Cooperatives]. A membership or equity interest in, or a retention certificate or like**
21 **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 security sold to persons other bona fide members of the cooperative unless the [Administrator] adopts an exemptive rule or order under §203.

REPORTER'S COMMENT

SOURCE OF LAW: RUSA §401(b)(13)

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

(i) [Employee Benefit Plans]. Any security issued in connection with an employees' stock purchase, savings, option, profit-sharing, pension or similar employees' benefit plan, including any securities (including plan interests and guarantees) issued under a written compensatory benefit plan or compensation contract, established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. Securities issued

1 in connection with such employee benefit plans to former employees, directors, general
2 partners, trustees, officers, consultants and advisors are also exempt, but only if such persons
3 were employed by or providing services to the issuer at the time the securities were offered.
4 The term “employee” includes insurance agents who are exclusive agents of the issuer, its
5 subsidiaries or parents, or who derive more than 50 percent of their annual income from those
6 entities.

7 REPORTER’S COMMENT

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

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

12 2. The final three sentences of this Subsection are derived from Securities Act Rule 701(c).

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

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

1 Act).

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

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

10 REPORTER'S COMMENT

11 Source of Law: RUSA §401(b)(6).

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

15 The new paragraph (b)(6) reflects the extensive development of equipment
16 lease financing through leveraged leases, conditional sales, and other devices.

17 The underlying premise is that if the securities of the person using such a
18 financing device would be exempt under some other paragraph of Section
19 401, the equipment trust certificate or other security issued to acquire the

1 property in question also is exempt.

2 **SECTION 202 [EXEMPT TRANSACTIONS]. The following transactions are exempt from**
3 **§§301, 302, and 504:**

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

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

7 **REPORTER'S COMMENT**

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

9 1. The phrase "isolated" nonissuer transactions has had considerable case law development
10 under state law. Cf. 1 L. Loss & J. Seligman, Securities Regulation 125-129 (3d ed. rev. 1998).

11 2. Limited issuer offerings are addressed in §202(k).

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

17 **(1) The issuer of the security is actually engaged in**

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

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

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

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

18 (a) A description of the business and operations of the
19 issuer,

20 (b) The names of the issuer's executive officers and the
21 names of the issuer's directors, if any, or, in the case of a non-
22 United States issuer, the corporate equivalents of such persons in

1 the issuer's country of domicile,

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

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

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

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

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

21 (iii) The issuer of the security has total assets of at least
22 [\$2,000,000] based on an audited balance sheet as of a date within 18

1 months or, in the case of a reorganization or merger where parties to the
2 reorganization or merger had such audited balance sheet, a pro forma
3 balance sheet.

4
5 REPORTER'S COMMENT

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

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

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

18 2. The NASAA amendment broadens the exemption to add the phrase "or a document filed
19 with the U.S. Securities & Exchange Commission (SEC) which is publicly available through the
20 SEC's Electronic Data Gathering and Retrieval System (EDGAR)." The NASAA amendment also
21 recognizes that non-U.S. issuers can be subject to the manual exemption when there is disclosed the

1 corporate equivalent to the issuer's officers and directors in the issuer's country of domicile.

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

5 **(c) [Foreign Nonissuer Transactions] A nonissuer transaction involving a foreign**
6 **equity security that is a margin security as that term (or any successor term) is defined in rules**
7 **or regulations prescribed by the Board of Governors of the Federal Reserve System.**

8 REPORTER'S COMMENT

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

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

15 REPORTER'S COMMENT

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

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

18 2. To harmonize this Subsection with Securities Act §18(b)(4)(A)-(B), an earlier 90 day

1 reporting period in RUSA §402(2) has been removed.

2 3. The term issuer in this Subsection is intended to include wholly-owned subsidiaries when
3 their parent corporations are reporting companies under §§13 or 15(d) and the subsidiaries are
4 consolidated for financial and other required reports.

5 QUERY: Should this be in the text of the statute?

6 **(e) [Specified Fixed Maturity, Interest or Dividend]. A nonissuer transaction in a**
7 **security that has a fixed maturity or a fixed interest or dividend provision and there has been**
8 **no default during the current fiscal year or within the three next preceding years, or during**
9 **the existence of the issuer, and any predecessors if less than three years, in the payment of**
10 **principal, interest, or dividends on the security and the issuer is actually engaged in business**
11 **and not in the organization stage or in bankruptcy or receivership and is not a blank check,**
12 **blind pool, or shell company whose primary plan of business is to engage in a merger or**
13 **combination of the business with, or an acquisition of, an unidentified person or persons.**

14 REPORTER'S COMMENT

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

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

18 2. The substance of this exemption is identical to the 1956 Act §402(b)(2)(B) and RUSA
19 §402(4), but adds concluding clauses which address blank check and similar offerings, which became
20 major concerns at the state and federal levels during the past two decades.

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

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

REPORTER'S COMMENT

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

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

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

3. This exemption is solely an exemption from the securities registration requirements of §§301, 302, 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).

1 **[(2) ISSUER TRANSACTIONS]**

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

4 **REPORTER'S COMMENT**

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

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

13 **REPORTER'S COMMENT**

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

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

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

1 REPORTER'S COMMENT

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

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

8 **(k) [Institutional Investors]. Any offer or sale made to one or more of the following:**

9 **(1) any institutional investor;**

10 **[(2) any investment adviser registered under the Investment Advisers Act of 1940 acting**
11 **for its own account]; or**

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

13 REPORTER'S COMMENT

14 Source of Law: New

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

16 any offer or sale to a bank, savings institution, trust company, insurance
17 company, investment company as defined in the Investment Company Act of
18 1940, pension or profit-sharing trust, or other financial institution or

1 institutional buyer, or to a broker-dealer, whether the purchaser is acting for
2 itself or in some fiduciary capacity.

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

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

8 **(i) there are no more than 35 purchasers in this State, other than those designated in**
9 **§202(k), during any 12 consecutive months;**

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

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

15 **(iv) either (I) the seller reasonably believes that all the purchasers in this State other**
16 **than those designated in §202(k) are purchasing for investment; or (II) immediately before and**
17 **immediately after the transaction, the issuer reasonably believes that the securities of the issuer**
18 **are held by a total of 50 or fewer beneficial owners, other than those designated in §202(k) and**
19 **the transaction is part of an aggregate offering that does not exceed [\$1,000,000] during any**
20 **12 consecutive months.**

1 REPORTER'S COMMENT

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

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

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

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

21 4. By rule a majority of states have adopted a Uniform Limited Offering Exemption,
22 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, non-transferable warrants, or transferable 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 Securities Act Rule 506, §4(2) private offerings that do not satisfy Rule 506, offerings under Rule 505, and 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]. A transaction involving 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 Securities Act Rule 165; and

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

See §301.

4. RUSA §402(15) also had the requirement that a registration statement be filed under this Act, but not yet be effective. By eliminating this requirement this exemption will reach the offer (but not the sale) of a security that is anticipated to be a federal covered security by dint of listing on the New York Stock Exchange or other exchange specified in §18(b)(1) of the Securities Act or related

1 rules, but the listing and federal covered security status has not yet eventuated. Thus, this deletion
2 does not exempt the sale, but only the offer.

3 **(o) [Offerings When Registered Under this Act and Exempt from the Securities Act of**
4 **1933]. A transaction involving an offer to sell, but not a sale, of a security exempt from**
5 **registration under the Securities Act of 1933 if:**

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

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

10 **REPORTER'S COMMENT**

11 Source of Law: RUSA §402(16).

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

13 **(p) [Control Transactions]. A transaction involving the distribution of the securities**
14 **of an issuer to the security holders of another person in connection with a merger,**
15 **consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer,**
16 **or its parent or subsidiary, and the other person, or its parent or subsidiary, are parties, if:**

17 **(i) the securities to be distributed are registered under the Securities Act of 1933 before**
18 **the consummation of the transaction;**

19 **(ii) the securities to be distributed are not required to be registered under the Securities**

1 **Act of 1933, written notice of the transaction and a copy of the materials, if any, by which**
2 **approval of the transaction will be solicited is filed with the [Administrator] at least ten days**
3 **before the consummation of the transaction; or**

4 **(iii) the securities are exempt from registration under the Securities Act of 1933 under**
5 **Securities Act Rules 801-802.**

6 REPORTER'S COMMENT

7 Source of Law: RUSA §402(17).

8 **SECTION 203 [ADDITIONAL EXEMPTIONS]. The [Administrator], by rule or order, may**
9 **exempt any other security or transaction or class of securities or transactions from §§301, 302**
10 **and 504.**

11 REPORTER'S COMMENT

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

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

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

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

20 4. Under §203 the states would also be authorized to adopt by rule or order new exemptions

1 as circumstances warrant for new technologies such as the Internet. Cf. NASAA Resolution
2 Regarding Securities Offered on Internet, NASAA Rep. ¶7040 (Jan. 7, 1996).

3
4 **SECTION 204 [DENIAL, CONDITION, LIMITATION OR REVOCATION OF**
5 **EXEMPTIONS]. Except to the extent that a security or transaction involves a federal covered**
6 **security, the [Administrator] by order may deny, condition, limit or revoke an exemption**
7 **specified in §§201(g) or 202, with respect to a specific security or transaction. Each such order**
8 **must be entered in accordance with the requirements of §603. An order issued under this**
9 **Section is not retroactive. A person does not violate §§301, 302, or 504 by reason of an offer**
10 **to sell or sale effected after the entry of an order under this Section if the person did not know,**
11 **and in the exercise of reasonable care could not have known, of the order.**

12 **REPORTER'S COMMENT**

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

**[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) it is a federal covered security; (b) the security or transaction is exempted under §§201-203; or (c) it 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, 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) [investment companies] 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) A report of the value of such federal covered securities sold or offered to persons**
3 **located in this state (if such sales data are not included in documents filed with the Securities**
4 **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 issuer to file a copy**
15 **of Form D, including the Appendix, as promulgated by the Securities and Exchange**
16 **Commission and a consent to service of process signed by the issuer no later than 15 days after**
17 **the first sale of such federal covered security in this state, [together with a fee of \$_____].**

18 **(c) The [Administrator] may issue a stop order suspending the offer and sale of a**
19 **federal covered security within this State, except a covered security under §18(b)(1) of the**
20 **Securities Act of 1933, if it finds that there is a failure to submit any notice filing or fee**
21 **required by this Act. The [Administrator] shall vacate the stop order if the deficiency is**
22 **corrected.**

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

3 REPORTER'S COMMENT

4 Source of Law: NASAA 1997 amendment.

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

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

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

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

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

1 (b) A registration statement and accompanying documents shall contain or be
2 accompanied by the following documents in addition to the information specified in §305 and
3 the consent to service of process complying with §510:

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

5 (2) if the [Administrator], by rule or order requires, a copy of the articles of
6 incorporation and bylaws or their substantial equivalents, currently in effect; a copy of any
7 agreement with or among underwriters; a copy of any indenture or other instrument
8 governing the issuance of the security to be registered; and a specimen, copy, or description
9 of the security;

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

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

15 (c) A registration statement under this Section automatically becomes effective at the
16 moment the federal registration statement becomes effective if all the following conditions are
17 satisfied:

18 (1) no stop order is in effect and no proceeding is pending under §405; and

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

21 (d) The registrant shall promptly notify the [Administrator] in writing which may be
22 by electronic means or [telegram] of the date and time when the federal registration statement

1 became effective and the content of the price amendment, if any, and shall promptly file a
2 notice containing the information and documents in the price amendment. Upon failure to
3 receive the required notification with respect to any price amendment, the [Administrator]
4 may enter a stop order, without notice or hearing, retroactively denying effectiveness to the
5 registration statement or suspending its effectiveness until compliance with this Subsection;
6 provided that the [Administrator] promptly notifies the registrant by telephone or electronic
7 means or telegram (and promptly confirms by electronic means, letter, or telegram when the
8 [Administrator] notifies by telephone) of the issuance of the order. If the registrant provides
9 compliance with the requirements of this Subsection as to notice, the stop order is void as of
10 the time of its entry. The [Administrator] may by rule or order waive either or both of the
11 conditions specified in this paragraph. If the federal registration statement becomes effective
12 before all the conditions in this Subsection are satisfied and they are not waived, the
13 registration statement automatically becomes effective as soon as all the conditions are
14 satisfied. If the registrant advises the [Administrator] of the date when the federal registration
15 statement is expected to become effective, the [Administrator] shall promptly advise the
16 registrant by electronic means, telephone, or telegram, at the registrant's expense, whether all
17 the conditions are satisfied and whether the [Administrator] then contemplates the institution
18 of a proceeding under §405; but this advice by the [Administrator] does not preclude the
19 institution of such a proceeding at any time.

20 (e) The [Administrator] by rule or order may waive or modify the application of a
21 requirement of this Section if a provision or an amendment, repeal, or other alteration of the
22 securities registration provisions of the Securities Act of 1933, or the regulations adopted under

that Act, render the waiver or modification appropriate to further coordination of state and federal registration.

REPORTER'S COMMENT

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

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

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

SECTION 304 [SECURITIES REGISTRATION BY QUALIFICATION]. (a) Any security may be registered by qualification.

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

(1) with respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment;

1 and a statement of the general competitive conditions in the industry or business in which it is
2 or will be engaged;

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

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

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

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

20 (6) with respect to any person on whose behalf any part of the offering is to be made
21 in a nonissuer distribution: her or his name and address; the amount of securities of the
22 issuer held by her or him as of the date of the filing of the registration statement; a

1 description of any material interest in any material transaction with the issuer or any
2 significant subsidiary effected within the past three years or proposed to be effected; and a
3 statement of the reasons for making the offering;

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

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

1 distribution of any securities which are to be offered otherwise than through an
2 underwriter;

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

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

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

22 (12) a description of any pending litigation or proceeding to which the issuer is a

1 party and which materially affects its business or assets (including any such litigation or
2 proceeding known to be contemplated by governmental authorities);

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

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

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

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

18 (17) [an audited] balance sheet of the issuer as of a date within four months before
19 the filing of the registration statement; [an audited] profit and loss statement and analysis of
20 surplus for each of the three fiscal years preceding the date of the balance sheet and for any
21 period between the close of the last fiscal year and the date of the balance sheet, or for the
22 period of the issuer's and any predecessors' existence if less than three years; and, if any

1 part of the proceeds of the offering is to be applied to the purchase of any business, the same
2 financial statements which would be required if that business were the registrant; and

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

4 The [Administrator] by rule or order may waive or modify any of the requirements of
5 §304(b).

6 [(c) The [Administrator] may designate one or more employees of the
7 [Administrator] to make an examination of the business and records of the issuer of
8 securities for which a registration statement has been filed under this Section, at the expense
9 of the registrant.]

10 (d) A registration statement under this Section becomes effective when the
11 [Administrator] so orders.

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

1 REPORTER'S COMMENT

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

3 1. RUSA §§304(c)-(d) also requires:

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

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

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

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

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

1 The Official Comment explains:

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

7 2. Under §305(e) the Administrator may waive or modify any of the requirements of §304(b).

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

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

15 **(b) [Filing Fee] Every person filing a registration statement shall pay a filing fee of [____]**
16 **percent of the maximum aggregate offering price at which the registered securities are to be**
17 **offered in this state, but the fee shall in no case be less than [\$____] or more than[\$ ____].**
18 **When a registration statement is withdrawn before the effective date or a preeffective stop**
19 **order is entered under §306, the [Administrator] shall retain [\$ ____] of the fee.**

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

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

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

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

16 (g) [Escrow and Impoundment] The [Administrator] may by rule or order require as a
17 condition of registration by coordination or qualification (1) that any security issued within the
18 past five years or to be issued to a promoter for a consideration substantially different from the
19 public offering price, or to any person for a consideration other than cash, be deposited in
20 escrow; and (2) that the proceeds from the sale of the registered security in this state be
21 impounded until the issuer receives a specified amount from the sale of the security either in
22 this state or elsewhere. The [Administrator] may by rule or order determine the conditions of

1 any escrow or impounding here required, but the [Administrator] may not reject a depository
2 solely because of location in another state.

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

8 (i) [Effective Period] Every registration statement is effective for one year from its
9 effective date, or any longer period during which the security is being offered or distributed in
10 a nonexempted transaction by or for the account of the issuer or other person on whose behalf
11 the offering is being made or by any underwriter or broker-dealer who is still offering part of
12 an unsold allotment or subscription taken as a participant in the distribution, except during the
13 time a stop order is in effect under §306. All outstanding securities of the same class as a
14 registered security are considered to be registered for the purpose of any nonissuer transaction
15 (1) so long as the registration statement is effective and (2) between the 30th day after the entry
16 of any stop order suspending or revoking the effectiveness of the registration statement under
17 §306 (if the registration statement did not relate in whole or in part to a nonissuer distribution)
18 and one year from the effective date of the registration statement. A registration statement may
19 not be withdrawn for one year from its effective date if any securities of the same class are
20 outstanding. A registration statement may be withdrawn otherwise only in the discretion of
21 the [Administrator].

22 (j) [Periodic Reports] So long as a registration statement is effective, the [Administrator]

1 may by rule or order require the person who filed the registration statement to file reports, not
2 more often than quarterly, to keep reasonably current the information contained in the
3 registration statement and to disclose the progress of the offering.

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

14 REPORTER'S COMMENT

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

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

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

20 21 SECTION 306 [DENIAL, SUSPENSION, AND REVOCATION OF SECURITIES]

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

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

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

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

1 **(4) the issuer’s enterprise or method of business includes or would include activities that**
2 **are illegal where performed;**

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

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

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

10 **(7) with respect to a security sought to be registered under §303, there has been a failure**
11 **to comply with the undertaking required by §303(b)(4); or**

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

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

19 **(c) The [Administrator] may summarily revoke, deny, postpone, or suspend the**
20 **effectiveness of a registration statement pending final determination of an administrative**
21 **proceeding. Upon the entry of the order, the [Administrator] shall promptly notify each person**

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

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

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

15 REPORTER'S COMMENT

16 Source of Law: RUSA §306.

17 1. The 1956 Act §306 is similar.

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

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

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

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

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

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

18 “Willfully” would not include negligent or inadvertent conduct.

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

3 **SECTION 401 [REGISTRATION REQUIREMENTS FOR BROKER-DEALERS, AGENTS,**
4 **INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES]. (a)**
5 **[BROKER-DEALERS AND AGENTS] Except as provided in §402, it is unlawful for any**
6 **person to transact business in this state as a broker-dealer, and for any individual to transact**
7 **business in this state as an agent on behalf of a broker-dealer or issuer, unless such person is**
8 **registered under this Act as a broker dealer, and such individual is registered under this Act**
9 **as an agent.**

10 **(b) [AGENTS] Except as provided in §402, it is unlawful for any broker-dealer or issuer**
11 **to employ or undertake an association with an agent who transacts business in this state on**
12 **behalf of such broker-dealer or issuer unless the agent is registered under this Act. The**
13 **registration of an agent is not effective during any period when the agent is not employed by**
14 **or associated with a particular broker-dealer registered or exempt under this Act or a**
15 **particular issuer, an offering of whose securities is being made in this state. When an agent**
16 **begins or terminates employment by or association with a broker-dealer or issuer, or begins or**
17 **terminates those activities that require registration as an agent, the agent and the broker-dealer**
18 **or issuer or the agent shall promptly file a notice with the [Administrator].**

19 **(c)[INVESTMENT ADVISERS] Except as provided in §§402 and 403(c), it is unlawful**
20 **for any person to transact business in this state as an investment adviser, unless registered**
21 **under this Act.**

1 (d)[INVESTMENT ADVISER REPRESENTATIVES] (1) Except as provided in §402,
2 it is unlawful for any person to transact business in this state as an investment adviser
3 representative and for any investment adviser to employ or undertake an association with an
4 investment adviser representative unless the investment adviser representative is registered
5 under this Act. The registration of an investment adviser representative is not effective during
6 any period when the investment adviser representative is not employed by or associated with
7 a particular investment adviser registered or exempt under this Act. When an investment
8 adviser representative begins or terminates employment by or association with an investment
9 adviser, or begins or terminates activities which require registration as an investment adviser
10 representative, the investment adviser, or the investment adviser representative shall promptly
11 file a notice with the [Administrator].

12 (2) Except as provided in §402, the [Administrator] may register any investment adviser
13 representative of a federal covered investment adviser. The registration of such an investment
14 adviser representative is not effective during any period when the investment adviser
15 representative is not employed by or associated with the federal covered investment adviser.
16 When an investment adviser representative begins or terminates employment by or association
17 with a federal covered investment adviser, or begins or terminates activities which make him
18 or her an investment adviser representative, the investment adviser representative shall
19 promptly file a notice with the [Administrator].

20 (3) In this Subsection the place of business of an investment adviser representative has
21 the same meaning as that defined by the United States Securities and Exchange Commission
22 under §203A of the Investment Advisers Act of 1940.

(e) Except with respect to federal covered investment advisers whose only clients are those described in §402(c) of this Act, it is unlawful for such federal covered investment advisers to transact business in this state unless the federal covered investment advisers comply with the provisions of §403(c) of this Act.

(f) A broker-dealer or investment adviser may not directly or indirectly employ, or undertake an association with an individual to engage in any activity in this State contrary to a suspension or bar from association with a broker-dealer or investment adviser imposed against that individual by the [Administrator]. An investment adviser representative may not conduct business on behalf of a federal covered investment adviser contrary to a suspension or bar from association imposed upon the investment adviser representative. Upon request from a broker-dealer, investment adviser or federal covered investment adviser, and for good cause shown, the [Administrator], by order, may waive the prohibition of this Subsection with respect to a person suspended or barred.

(g) Every registration under this Section expires December 31st unless renewed. [Unless the registration is renewed by December 31, then the registration is subject to suspension or termination.]

REPORTER'S COMMENT

Source of Law: 1956 Act §201(a)-(b); 1997 NASAA Amendment (for §§401(c)-(f)); RUSA §203(b) (for §401(f)).

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

SECTION 402 [EXEMPT BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES]. (a)[BROKER-DEALERS] The following broker-dealers are exempt from the registration requirements of §401:

(1) a broker-dealer without a place of business in this State that is both registered or not required to be registered under the Securities Exchange Act of 1934 and registered under the securities act of the state in which the broker-dealer has its principal place of business, 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) during any 12 consecutive months not more than [five] persons in this State in addition to those specified in the preceding subdivisions of this subparagraph (1); and

(v) any other person the [Administrator], by rule or order, specifies; or

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

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

(b)[AGENTS] The following agents are exempt from the registration requirements of §401:

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

(2) an agent acting for an issuer in effecting transactions in a security exempted by §201;

1 (3) an agent acting for an issuer effecting offers or sales of securities in transactions
2 exempted by §202;

3 (4) an agent acting for an issuer solely selling federal covered securities; and

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

5 (c)[INVESTMENT ADVISERS] The following investment advisers are exempt from the
6 registration requirements of §401:

7 (1) any investment adviser without a place of business in this State that is registered
8 under the securities act of the state in which the investment adviser has its principal place of
9 business, if its only clients in this State are

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

12 (ii) institutional investors;

13 (iii) pre-existing clients of the investment adviser who have their principal places of
14 residence outside this State;

15 (iv) during any 12 consecutive months not more than five clients who are residents of
16 this State in addition to those specified in the preceding subdivisions of this subparagraph (2);

17 or

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

19 (2) any person that is excepted from the definition of investment adviser in §202(a)(11)
20 of the Investment Advisers Act of 1940;

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

22 (4) For purposes of this subsection the term “place of business” has the same meaning

1 as in §222 of the Investment Advisers Act of 1940.

2 (d)[INVESTMENT ADVISER REPRESENTATIVES] The following investment adviser
3 representatives are exempt from the registration requirements of §401:

4 (1) An investment adviser representative that is employed by or that renders investment
5 advice on behalf of an investment adviser or federal covered investment adviser that is exempt
6 from registration or notice filing requirements imposed by Section 401(c) or (e).

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

9 REPORTER'S COMMENT

10 Source of Law: RUSA §§202, 204.

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

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

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

18 **SECTION 403 [REGISTRATION PROCEDURE FOR BROKER-DEALERS,**
19 **AGENTS, INVESTMENT ADVISERS, AND INVESTMENT ADVISER**
20 **REPRESENTATIVES AND NOTICE FILING PROCEDURE FOR FEDERAL COVERED**
21 **INVESTMENT ADVISERS]. (a) A broker-dealer, agent, investment adviser, or investment**
22 **adviser representative may register by filing with the [Administrator] or a designee an**

1 application together with a consent to service of process complying with §510. Each application
2 shall contain whatever information the [Administrator] by rule requires concerning such
3 matters as

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

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

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

10 (4) any injunction or administrative order or conviction of any misdemeanor involving
11 securities or commodities or any aspect of the securities or commodities business or a felony of
12 the applicant or any person specified in §403(a)(3);

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

14 (6) if the applicant is an investment adviser, any information concerning the investment
15 adviser to be furnished or disseminated to any client or prospective client; and

16 (7) any other information that the [Administrator] determines is relevant to the
17 registration.

18 (b) If no denial order is in effect and no proceeding is pending under §405, registration
19 becomes effective at noon of the 45th day after a completed registration is filed. The
20 [Administrator] may by rule or order specify an earlier effective date, and may by order defer
21 the effective date until noon of the 45th day after the filing of any amendment completing the
22 registration. Registration of a broker-dealer automatically constitutes registration of any agent

1 who is a partner, officer, or director, or a person occupying a similar status or performing
2 similar functions. Registration of an investment adviser automatically constitutes registration
3 of any investment adviser representative who is a partner, officer, or director, or a person
4 occupying a similar status or performing similar functions.

5 (c) Except with respect to federal covered investment advisers whose only clients in this
6 State are those described in §402(c)(iii) of this Act, a federal covered investment adviser shall
7 notify the [Administrator], before acting as a nonexempt federal covered investment adviser
8 in this State, by filing such documents as have been filed with the Securities and Exchange
9 Commission as the [Administrator], by rule or order, may require, together with an originally
10 executed consent to service of process, together with a notice fee of \$____.

11 The notice filing shall be effective commencing upon its receipt by the [Administrator]
12 until December 31st of the year in which it is filed, unless renewed. It may be renewed by filing
13 with the [Administrator] a copy of any additional documents that have been filed with the
14 Securities and Exchange Commission under the Investment Advisers Act of 1940 as the
15 [Administrator] may, by rule or order, require together with any renewal fees.

16 (d)(1) Every broker-dealer or agent when registering or renewing its registration shall
17 pay a fee of [\$____];

18 (2) Every investment adviser or an investment adviser representative, when registering
19 or renewing its registration, shall pay a fee of [\$____]. When an application is denied or
20 withdrawn, the [Administrator] shall retain [\$____] of the fee;

21 (3) Every person acting as a nonexempt federal covered investment adviser in this state
22 shall pay an annual notice filing fee [of \$____].

1 (e)(1) A broker-dealer, federal covered investment adviser, or investment adviser may
2 succeed to the registration or notice filing of a registrant or of a federal covered investment
3 adviser who has a current notice filing, by filing an application for registration as required by
4 §403(a) or notice filing of a successor, whether or not the successor is then in existence, for the
5 unexpired portion of the year. There shall be no filing fee.

6 (2) If the resulting entity will be a federal covered investment adviser, it shall comply
7 with the notice filing requirements of this section. Such successor notice filing shall be effective
8 from receipt for the unexpired portion of the current notice filing period. There shall be no
9 filing fee.

10 (f) The [Administrator] may, by rule or order, require a minimum capital for registered
11 broker-dealers, limited by the provisions of §15(h) of the Securities Exchange Act of 1934, and
12 establish minimum financial requirements for investment advisers, limited by the provisions
13 of §222 of the Investment Advisers Act of 1940.

14 (g) The [Administrator] may, by rule or order, require registered broker-dealers, agents,
15 and investment advisers who have custody of or discretionary authority over client funds or
16 securities to post a bond or other satisfactory form of security in amounts up to [\$__] as the
17 [Administrator] may prescribe, subject to the limitations of §15 of the Securities Exchange Act
18 of 1934 (for broker-dealers) and §222 of the Investment Advisers Act of 1940 (for investment
19 advisers) and may determine their conditions. No bond or other satisfactory form of security
20 may be required of any registrant whose net capital, or, in the case of an investment adviser
21 whose minimum financial requirements, which may be defined by rule or order exceeds the
22 amounts required by the [Administrator]. Every bond or other satisfactory form of security

shall provide for suit by any person who has a cause of action under §509. Every bond or other satisfactory form of security shall provide that no suit may be maintained to enforce any liability on the bond unless brought within the time limitations of §509(e).

REPORTER'S COMMENT

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

1. Section 403(b) was originally RUSA §205(b). The Official Comment to that Section explains:

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

2. An Administrator, by rule, may accept notice of a current and complete registration with the Securities and Exchange Commission and a consent to service of process under §510 in satisfaction of the filing requirement in §403(a) for a broker-dealer.

3. Section 607 encourages uniform forms under this Section.

4. Under §403(c) either originally executed documents or copies may be filed with the

1 Administrator.

2
3 **SECTION 404 [POSTREGISTRATION PROVISIONS]. (a) Every registered broker-dealer**
4 **and registered investment adviser shall make and keep such accounts, correspondence,**
5 **memoranda, papers, books, and other records as the [Administrator] prescribes, by rule or**
6 **order, except as limited by §15(h) of the Securities Exchange Act of 1934 (in the case of a**
7 **broker-dealer), and §222 of the Investment Advisers Act of 1940 (in the case of an investment**
8 **adviser). All records so required with respect to an investment adviser shall be preserved for**
9 **such period as the [Administrator] prescribes by rule or order.**

10 (b) With respect to registered investment advisers, the [Administrator] may require by
11 rule that information be furnished or disseminated to clients or prospective clients in this State
12 as necessary or appropriate in the public interest or for the protection of investors and advisory
13 clients. To the extent determined by the [Administrator], information furnished to clients or
14 prospective clients of an investment adviser that would be in compliance with the Investment
15 Advisers Act of 1940 or the rules thereunder may be used in satisfaction of this requirement.

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

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

(e) All records of every registered broker-dealer and every registered investment adviser is 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. 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 national securities exchange or national securities association registered under the Securities Exchange Act of 1934.

(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].

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

REPORTER'S COMMENT

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

1. RUSA §211 is similar to §404(e), but provides:

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

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

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

12 **SECTION 405 [DENIAL, REVOCATION, SUSPENSION, CANCELLATION, AND**
13 **WITHDRAWAL OF REGISTRATION]. (a) The [Administrator] may by order deny, suspend**
14 **or revoke any registration, impose a civil penalty, or bar or censure any registrant, branch**
15 **manager, assistant branch manager, supervisor, principal, or control person from employment**
16 **by or association with a registered broker-dealer, investment adviser, federal covered**
17 **investment adviser, or issuer, or bar or censure any officer, director, partner or person**
18 **occupying a similar status or performing similar functions for a registered broker-dealer or**
19 **investment adviser, from employment by or association with a registered broker-dealer or**
20 **registered investment adviser, or restrict or limit a registrant as to any function or activity of**
21 **the business for which registration under this Act is required in this state, if the [Administrator]**

1 finds (1) that the order is in the public interest and (2) that the applicant registrant within the
2 past ten years

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

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

11 (C) has been convicted of any misdemeanor involving a security or commodity or any
12 aspect of the securities or commodities business or any felony;

13 (D) is permanently or temporarily enjoined by any court of competent jurisdiction from
14 engaging in or continuing any conduct or practice involving any aspect of the securities or
15 commodities business;

16 (E) is the subject of an order entered by the securities administrator of any state or by
17 the Securities and Exchange Commission denying, revoking, or suspending registration as a
18 broker-dealer, agent, investment adviser, or investment adviser representative, or the
19 substantial equivalent of those terms as defined in this Act, or is the subject of an order entered
20 by the [Administrator] of any State or by the Securities and Exchange Commission with a
21 registered broker-dealer or registered investment adviser, or the substantive equivalent of these
22 terms or is the subject of an order of the Securities and Exchange Commission suspending or

1 expelling the registrant from a national securities exchange or national securities association
2 registered under the Securities Exchange Act of 1934, or is the subject of a United States Post
3 Office fraud order; but (i) the [Administrator] may not institute a revocation or suspension
4 proceeding under this paragraph more than one year from the date of the order relied on, and
5 (ii) [the Administrator] may not enter an order under this paragraph on the basis of an order
6 under another state act unless that order was based on facts which would currently constitute
7 a ground for an order under this Subsection;

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

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

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

20 (I) has failed reasonably to supervise the person's agents or employees if the person is
21 a broker-dealer, or the person's investment adviser representatives or employees if the person
22 is an investment adviser, to ensure their compliance with this Act, if such agents, investment

1 advisers representatives or employees are subject to the person's supervision and have
2 committed a violation of the Act;

3 (J) after notice, has failed to pay the proper filing fee within 30 days after being notified
4 by the [Administrator] of a deficiency, but the [Administrator] shall vacate an order under this
5 subsection when the deficiency is corrected;

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

14 (L) is the subject of a Securities and Exchange Commission or state cease and desist
15 order;

16 (M) is found to have engaged in dishonest and unethical practices in the securities or
17 commodities business.

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

19 (1) The [Administrator] may not enter an order against a broker-dealer on the basis of
20 the lack of qualification of any person other than (A) the broker-dealer if the person is an
21 individual or (B) an agent of the broker-dealer.

22 (2) The [Administrator] may not enter an order against any investment adviser on the

1 basis of the lack of qualification of any person other than (A) the investment adviser if the
2 person is an individual or (B) an investment adviser representative.

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

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

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

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

21 (c) The [Administrator] may, by order condition, postpone or suspend registration, or
22 summarily postpone, suspend or bar registration in the case of an agent or investment adviser

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

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

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

1 after the application is filed. If a proceeding is pending or instituted, withdrawal becomes
2 effective at such time and upon such conditions as the [Administrator] by order determines.
3 If no proceeding is pending or instituted and withdrawal automatically becomes effective, the
4 [Administrator] may nevertheless institute a revocation or suspension proceeding under
5 §405(a)(2)(B) within one year after withdrawal became effective and enter a revocation or
6 suspension order as of the last date on which registration was effective.

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

12 REPORTER'S COMMENT

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

15 1. The term "foreign" means a jurisdiction outside of the United States, not a different State
16 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 is substantially the Securities Exchange Act of 1934 Rule 10b-5, which in turn
13 was modeled on §17(a) of the Securities Act of 1933, except that Rule 10b-5 was expanded to cover
14 the purchase as well as the sale of any security. There are no exemptions from §501.

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

18 3. Section 410(h) of the 1956 Act provided unlawful conduct does not result in civil liability
19 except as provided in §410. See, e.g., Held v. Product Mfg. Co., 592 F.2d 1005, 1007 (Or. 1979).
20 This prohibition of civil liability based upon this Section is continued in §509(j). Nonetheless at least

1 two Uniform Securities Act states declined to adopt §410(h) and have implied private remedies under
2 the equivalent to this Section. See, e.g., *Carothers v. Rice*, 633 F.2d 7, 9 (6th Cir. 1980) (Kentucky);
3 *Wade v. Skipper's Inc.*, 915 F.2d 1324, 1329-1332 (9th Cir. 1990) (Washington).

4
5 **SECTION 502 [FRAUD IN PROVIDING INVESTMENT ADVICE]. It is unlawful for any**
6 **person who receives any consideration from another person primarily for advising the other**
7 **person as to the value of securities or their purchase or sale, whether through the issuance of**
8 **analyses or reports or otherwise**

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

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

12 REPORTER'S COMMENT

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

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

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

21 3. The courts have also held that there is no implied cause of action under the Uniform

Securities Act equivalent to §502. See *Cabot Corp. v. Baddour*, 394 Mass. 720 (1985). There is an express cause of action in §509(b) for specified misconduct of investment advisers.

SECTION 503 [BURDEN OF PROOF]. (a) In a civil action or administrative proceeding under this [Act], a person claiming an exemption, an exception, or an exclusion from a definition has the burden of proving the applicability of the exemption, exception, or exclusion.

(b) In a criminal proceeding, under this [Act], a person claiming an exemption, an exception, or an exclusion from a definition has the burden of going forward with evidence of the claim.

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.

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.

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

(b) No broker-dealer, agent, investment adviser, or investment adviser representative shall be liable in any proceeding to another broker-dealer, agent, investment adviser or investment adviser representative for any defamation claim relating to an alleged untrue

1 statement that is contained in any document required by the [Administrator], the Securities
2 and Exchange Commission, or any self-regulatory organization unless it is shown by clear and
3 convincing evidence that the defending party knew at the time that the statement was made
4 that it was false in any material respect or the defending party acted in reckless disregard of the
5 statement's truth or falsity.]

6 REPORTER'S COMMENT

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

9 1. The NASD proposal was reprinted in Securities Exchange Release 39,892, 66 SEC Dock.
10 2473 (1998). To date it has not been approved by the SEC.

11 2. The NASD proposal is limited to arbitration proceedings.

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

13 **SECTION 508 [CRIMINAL PENALTIES]. (a) Any person who willfully violates any provision**
14 **of this Act, or any rule or order under this Act, except §302, the notice filing requirements of**
15 **§403 or 505, or who willfully violates §505 knowing the statement made to be false or misleading**
16 **in any material respect, shall upon conviction be fined[not more than [\$X] or imprisoned not**
17 **more than [Y] years, or both]; but no person may be imprisoned for the violation of any rule**
18 **or order if the person proves that he or she had no knowledge of the rule or order. No**
19 **indictment or information may be returned under this Act more than [Z years] after the**
20 **commission of the offense.**

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

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

REPORTER'S COMMENT

Source of Law: 1956 Act §409.

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

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

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

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

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

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

1 order to make the statements made, in the light of the circumstances under
2 which they are made, not misleading (the buyer not knowing of the untruth or
3 omission),
4 and who does not sustain the burden of proof that he or she did not know, and in the exercise
5 of reasonable care could not have known, of the untruth or omission, is liable to the 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) Every person who directly or indirectly controls a person liable under Subsection (a),
12 including every partner, officer, or director of such a person, every person occupying a similar
13 status or performing similar functions, every employee of such a person who materially aids and
14 abets conduct giving rise to the liability, and every broker-dealer or agent who materially aids
15 and abets such conduct is liable jointly and severally with and to the same extent as such
16 person, unless he or she sustains the burden of proof that he or she did not know, and in
17 exercise of reasonable care could not have known, of the existence of the facts by reason of
18 which the liability is alleged to exist. There is contribution as in cases of contract among the
19 several persons so liable.

20 (c) Any tender specified in this Section may be made at any time before entry of
21 judgment. Tender requires only written notice of willingness to exchange the security for the
22 amount specified. A purchaser who no longer owns the security may recover damages.

1 Damages are the amount that would be recoverable upon a tender less the value of the security
2 when the purchaser disposed of it, plus interest [at X percent per year] from the date of
3 disposition of the security, costs, and reasonable attorneys' fees determined by the court.

4 (d) Every cause of action under this statute survives the death of any person who might
5 have been a plaintiff or defendant.

6 (e) A person may not obtain relief under §509 unless suit is brought within the earliest
7 of one year after the discovery of the violation, one year after discovery should have been made
8 by the exercise of reasonable care, or no later than three years after the act, omission, or
9 transaction constituting the violation.

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

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

21 (h) Any condition, stipulation, or provision binding any person acquiring any security
22 or receiving any investment advice to waive compliance with any provision of this Act or any

1 **rule or order issued under this Act is void.**

2 **(i) The rights and remedies provided by this Act are in addition to any other rights or**
3 **remedies that may exist at law or in equity, but this Act does not create any cause of action not**
4 **specified in this Section or §403(g).**

5 REPORTER’S COMMENT

6 Source of Law: 1956 Act §410.

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

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

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

15 **[Subject Matter Jurisdiction]**

16 **(a) Sections 301, 302, 401(a), 501, 506 and 509 apply to persons who sell or offer to sell**
17 **a security when (1) an offer to sell is made in this State, or (2) an offer to buy is made and**
18 **accepted in this State.**

19 **(b) Sections 401(a), 501, and 506 apply to persons who buy or offer to buy a security**
20 **when (1) an offer to buy is made in this State, or (2) an offer to sell is made and accepted in this**

1 **State.**

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

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

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

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

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

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

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

(f) Sections 401(c), 502, and 506 apply to investment advisers and investment adviser representatives when any act instrumental in effecting prohibited conduct is done in this State, whether or not either party is then present in this State.

[Personal Jurisdiction]

[A. Consent]

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

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

1 [B. Conduct]

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

8 [C. Service of Process]

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

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

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

19 (k) Service as provided in §510(j) may be used in a proceeding before the
20 [Administrator] or by the [Administrator] in a proceeding in which the [Administrator] is the
21 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 from this state or (2) is directed by the offeror to this state and received at the place to which it is directed." Rice, *The Regulatory Response to the New World of Cybersecurities*, 51 Admin. L. Rev. 901, 930-931 (1999). It is uncertain whether the existing statutory approach will remain adequate. *Id.* at 933: "Despite the additional complexities, existing principles can be used to view e-mail over the Internet as similar to traditional postal mail and phone calls in providing a basis for jurisdiction." See also *id.* at 944-945.

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
20 provision of this Act or any rule or order, or to aid in the enforcement of this Act or in the

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

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

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

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

22 1. Injunctive relief, restricting or prohibiting the offer or sale of securities [or providing

1 investment advice].

2 2. Revocation or suspension of any registration.

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

5 4. Such other relief as may be required.

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

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

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

21 REPORTER'S COMMENT

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

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

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

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

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

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

19 (2) **bring an action in the [insert the name of appropriate court] to enjoin the acts or**
20 **practices and to enforce compliance with this Act or any rule or order hereunder. Upon a**

1 proper showing a permanent or temporary injunction, restraining order, asset freeze,
2 accounting, writ of attachment, writ of general or specific execution, or writ of mandamus
3 shall be granted and a receiver or conservator may be appointed for the defendant or the
4 defendant's assets. Upon a proper showing, a court may also order the [Administrator] to take
5 charge and control of a party's property, including rents and profits, to collect debts, and to
6 acquire and dispose of property. In addition, upon a proper showing by the [Administrator]
7 the court may enter an order of rescission, civil penalty up to a maximum of [\$X] for a single
8 violation or of [\$Y] for multiple violations in a single proceeding or a series of related
9 proceedings, a declaratory judgment, restitution or disgorgement directed to any person who
10 has engaged in any act constituting a violation of any provision of this Act or any rule or order
11 issued under this Act and may order the payment of prejudgment and postjudgment interest
12 or other relief the court deems just. The court may not require the [Administrator] to post a
13 bond;

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

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

20 (b)(1) The [Administrator] may use emergency administrative proceedings in a situation
21 involving an immediate danger to the public investors requiring immediate action. The
22 [Administrator] may take only such action as is necessary to prevent or avoid the immediate

danger to the public investors that justifies use of emergency administrative proceedings.

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

1 to the extent otherwise provided in §603(b), it is anticipated that no action under §603(a) would be
2 sought without (1) appropriate notice to any person who is subject to a proceeding and (2)
3 opportunity for hearing.

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

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

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

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

17 **SECTION 604 [RULES, FORMS, ORDERS, AND HEARINGS]. (a) The [Administrator] may**
18 **make, amend and rescind such rules, forms and orders as are necessary to carry out the**
19 **provisions of this Act, including rules and forms governing registration statements,**
20 **applications, notice filings, and reports, and defining any terms, whether or not used in this Act,**

1 **when these definitions are not inconsistent with the provisions of this Act.**

2 **(b) No rule, form, or order may be made, amended, or rescinded unless the**
3 **[Administrator] finds that the action is necessary or appropriate in the public interest or for**
4 **the protection of investors and consistent with the purposes fairly intended by the policy and**
5 **provisions of this Act. In prescribing rules and forms the [Administrator] may cooperate under**
6 **§607 with a view to effectuating the policy of this statute to achieve maximum uniformity in the**
7 **form and content of registration statements, applications, and reports.**

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

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

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

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

21 **REPORTER’S COMMENT**

1 Source of Law: 1956 Act §412; 1987 NASAA Proposed Amendment to §412(a); RUSA
2 §§705, 707.

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

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

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

17 (b) Upon request and at such reasonable charges as he or she prescribes, the
18 [Administrator] shall furnish to any person copies of any entry in the register or any document
19 which is a matter of public record. In any proceeding or prosecution under this Act, any copy
20 so certified is prima facie evidence of the contents of the entry or document certified.

21 (c) The [Administrator] may honor requests from interested persons for interpretative

opinions or may issue determinations that the [Administrator] will not institute enforcement proceedings against certain specified persons for engaging in certain specified activities where the determination is consistent with the purposes fairly intended by the policy and provisions of this Act.

REPORTER'S COMMENT

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

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

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

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

(1) information or documents obtained by the [Administrator] in connection with an investigation under §602;

(2) information or documents filed with the [Administrator] in connection with a registration statement under §§301-302 or a report under §404 and constituting trade secrets

1 or commercial or financial information that are privileged or confidential;

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

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

11 (c) The [Administrator] may disclose:

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

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

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

19 REPORTER'S COMMENT

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

1
2 **SECTION 607 [COOPERATION WITH OTHER AGENCIES]. (a) To encourage uniform**
3 **interpretation and administration of this Act and effective securities regulation and**
4 **enforcement, the [Administrator] may cooperate with the securities agencies or administrators**
5 **of one or more states, Canadian provinces or territories, or another country, the Securities and**
6 **Exchange Commission, the Commodity Futures Trading Commission, the Securities Investor**
7 **Protection Corporation, any self regulatory organization, any national or international**
8 **organization of securities officials or agencies, and any governmental law enforcement or**
9 **regulatory agency.**

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

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

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

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

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

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

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

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

20 **(8) sharing and exchanging information and documents subject to the restrictions of**
21 **[insert applicable state law];**

22 **(9) formulating, in accordance with the [administrative procedure act] of this state, rules**

1 or proposed rules on matters such as statements of policy, guidelines, and interpretative
2 opinions and releases; and

3 (10) formulating common systems and procedures.

4 REPORTER'S COMMENT

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

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

7 2. In 1987 NASAA proposed adopting RUSA §704.

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

10 REPORTER'S COMMENT

11 Source of Law: RUSA §711(b).

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

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

19 **SECTION 609 [UNIFORMITY OF APPLICATION AND CONSTRUCTION]. This [Act] shall**

be applied and construed to effectuate its general purpose to make uniform the law with respect 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.